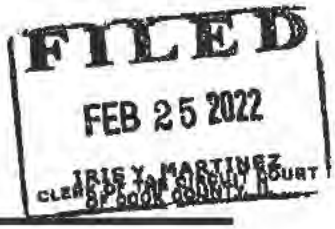
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
vs.	)	**No. 20 CR 03050-01**
	)	
JUSSIE SMOLLETT	)	



DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR MOTION FOR A NEW TRIAL

NOW COMES the Defendant, Jussie Smollett, by and through his attorney, Mark Lewis, after a finding of guilty, before sentencing, and respectfully moves this Honorable Court pursuant to 725 ILCS 5/116-1 to set aside the verdict of guilty in the above-captioned case and enter a verdict of not guilty or grant him a new trial. Counsel makes this motion on behalf of Mr. Smollett without prejudice or waiving the additional discovery of error in the trial record. In support of this motion counsel states as follows:

SECTION I

INCORPORATION OF ALL PRIOR FILED MATTERS PURSUANT TO THIS COURT'S THE DECEMBER 15, 2021 ORDER.

Counsel now hereby incorporates by reference all prior motions, memoranda, and colloquy filed in the instant matter, pursuant to the Court's Order of December 15, 2021.

On February 24, 2020, Defendant filed his Motion to Dismiss Indictment for Violation of Double Jeopardy; This motion was subsequently denied by the Court on or about June 12, 2020; on July 20, 2020, Defendant filed his Motion to Dismiss Indictment and Memorandum of Law in Support; this motion was subsequently denied by the Court on or about September 10, 2020; on August 21, 2020, Defendant filed his Motion for Discovery; on August 25, 2020, Defendant filed

his Memorandum of Points and Authorities; on September 9, 2020, Defendant filed his Motion to Quash and Dismiss Indictment based upon violations of the 5th Amendment; this motion was denied by the Court on or about October 14, 2020; on January 15, 2021, Defendant sent a letter to the Court regarding the OSP's intended list of Motions in Limine that it wished to have granted as well as the single Motion in Limine that the Defendant presented for consideration. The Court denied the Defendant's Motion in Limine on or about January 20, 2021.

On February 24, 2021, Defendant filed his Offers of Proof as to the felony conviction of Olabinjo Osundairo, Offer of Proof Regarding the Trial Testimony of Kimberly Foxx and Risa Lanier (OSP Motion in Limine No. 4), Offer of Proof Regarding the Facts and Circumstances Surrounding Olabinjo Osundairo's Prior Felony Conviction (OSP Motion in Limine No. 12), Offer of Proof Regarding the Trial Testimony of Gloria Schmidt Rodriguez (OSP Motion in Limine No. 20), and Offer of Proof Regarding Interest, Motive, and Bias Stemming from *City v. Smollett* Litigation (OSP Motion in Limine No. 21). These offers of proof were subsequently rejected when their accompanying *motions in limine* were denied.

On March 8, 2021, Defendant filed his Motion in Opposition to Intervenors' Motion to Disqualify Defendant's Counsel. On March 9, 2021, Defense counsel provided a copy of the Conflict Check Agreement between Defendant and lead counsel for the Court's in-camera review pursuant to the Court's request. (Exhibit A). The Defense also turned over this conflict check to the OSP pursuant to this Court's request.

On March 16, 2021, Defendant submitted his Defense Memorandum Regarding Proposed Evidentiary Hearing. On April 30, 2021, Defendant filed his Response and Motion to strike the OSP's Bill of Particulars. The Court denied this motion on or about May 1, 2021.

On June 1, 2021, Defendant filed his Motion to Reconsider. The Court denied this motion on or about July 6, 2021. On July 14, 2021 this Court conducted an evidentiary hearing and subsequently made a ruling that barred lead defense counsel from cross-examining the Osundairo brothers. On August 27, 2021, Defendant filed his Motion to Reconsider Rulings and Findings and Motion to Strike and Unseal. The Court denied both motions on or about September 2, 2021. The Defense now incorporates all orders, colloquy and email colloquy regarding this evidentiary hearing, as part of the record.

On October 6, 2021, Defendant filed his Amended Answer to Discovery. On October 13, 2021, Defendant filed his Motion to Dismiss based on breach of contract by the State of Illinois. The Court denied this motion on or about October 15, 2021. On October 14, 2021, Defendant filed his Motion to Disqualify the OSP. The Court denied this motion on or about October 15, 2021. On October 15, 2021, Defendant filed his Motion to Compel Discovery; the Court denied this motion.

Defendant respectfully requests that all relief previously requested in the above-mentioned filings and all other such pleadings, motions, memoranda, and colloquy filed in the instant matter not listed be granted be reconsidered and granted. Defendant also requests that as a result, this Court vacate the Defendant's conviction or grant him a new trial.

SECTION II

PRE-TRIAL AND TRIAL ERRORS NOT YET ADDRESSED BY THIS COURT

On December 9, 2021 after a jury trial, Defendant Jussie Smollett was found guilty of five counts of Disorderly Conduct (a Class 4 felony), 720 ILCS 5/26-1(a)(4), and not guilty of one count of Disorderly Conduct (a Class 4 felony). 720 ILCS 5/26-1(a)(4).

This Court made numerous trial errors leading up to the trial and during the pendency of the trial. Additionally, the OSP committed trial errors during the pendency of this trial.

Moreover, the State failed to prove the Defendant guilty of the charges against him beyond all reasonable doubt and failed to prove every material allegation of the indictment beyond all reasonable doubt.

As such, the Defendant now respectfully requests that his convictions be vacated or in the alternative, that the Court grant the Defendant a new trial.

1. **This Court violated Mr. Smollett's 6th Amendment rights when it prevented the Defense from actively participating in jury selection during a high-profile case.**

The Court erred by not allowing the Defense to ask questions of potential jurors during the voir dire process or otherwise allowing Defense counsel to inquire directly of the venire to protect and ensure Mr. Smollett's 6th Amendment right to a fair trial. This procedure was particularly prejudicial because this case had garnered widespread pretrial publicity, much of which was blatantly false.

"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.* Questions shall not directly or indirectly concern matters of law or

instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors." Ill. Sup. Ct. R. 431 (2021).

In the instant matter, direct questioning of the venire was sought by the Defense and subsequently denied by the Court in an exchange with defense counsel during an August 26, 2021 status date;

> MR. UCHE: Yes, Judge, yes, yes. But my point is I don't feel comfortable with your Honor asking the jurors questions. *We want to ask the jurors questions ourselves*. I don't think it will be -- I don't think in any way, shape, or form you asking the questions will get down to what we're trying to get down to, which is making sure we pick a jury that is not biased against Mr. Smollett. There is a way –
>
> THE COURT: Okay.
>
> MR. UCHE: Judge, can I finish, please. There is a way we will ask our questions. *There are questions we intend to ask*. There is a style we will ask those questions. And I just -- with the publicity, the false information that has been put out there, I just don't see how your Honor can help us accomplish this.
>
> THE COURT: Okay. Thank you. *I will be doing the questioning*. Lawyers are advocates. God bless you for it. But voir dire is not to be used to promote your case, not to be used to educate or influence the jury or get them in a certain direction. We are not going there. It's not happening. *I'll ask the questions*. But I'll give you -- if you have the questions you want me to ask, tell me what they are and *I will ask them. I will make the inquiries*.[1]

[1] People v. Smollett, tr. p.67, pp. 21-24, p.68, pp. 1-21, August 26, 2021.

After this exchange, the Court requested that the Defense supply the Court with a list of questions to be submitted for the purposes of voir dire.[2] In response, the Defense supplied its suggested voir dire questions to the Court on September 24, 2021. However, the Court failed to inquire of the venire as to the following questions that were included in the Defense's suggested voir dire questions: "Are you or is anyone close to you a member of the mainstream media?", "Do you have any particular feelings one way or another about actors?", "Would the sexual orientation of Mr. Smollett or any witness have any bearing on your ability to reach a fair decision in this case?", and "Do you believe that you would give more or less weight to the testimony of a law enforcement officer as opposed to the average citizen?" (See Defendant's Suggested Voir Dire Questions, September 24, 2021).

Voir dire in criminal cases is governed by Supreme Court Rule 431. People v. Adkins, 239 Ill. 2d 1, 18 (2010). Under this rule, the trial court's discretion is guided by a preference for permitting direct inquiry of prospective jurors by the attorneys if such an opportunity is sought. People v. Garstecki, 234 Ill.2d 430, 445-447 (2009).

Refusal by the Court to allow the defense to supplement voir dire with the Defendant's suggested voir dire questions, or in the alternative, to allow Defense counsel to inquire directly of the venire on these issues was an abuse of discretion, particularly in this case where the jury pool had been tainted with extensive prejudicial pretrial publicity. By refusing to allow the Defense to meaningfully participate in the voir dire process, the Court prejudiced the Defendant's ability to discover those members of the prospective panel with biases and/or

[2] People v. Smollett, tr. p.67, pp. 21-24, p.68, pp. 16-19, August 26, 2021.

questionable impartiality towards the Defendant, infringing upon Mr. Smollett's 6th Amendment right to a fair trial.

Colloquy between the Court and Defense regarding voir dire reveals that the Court abused its discretion in failing to allow direct inquiry of prospective jurors. No consideration was given to the complexity of the instant case including the high-profile and highly-publicity elements, and nature of the charges, in its determination to deny the Defense opportunity to directly question prospective jurors.[3]

To successfully challenge the adequacy of voir dire, it is not necessary for the defendant to show that the jury was, in fact, prejudiced. People v. Strain, 306 Ill.App.3d 328, 335 (1999). Instead, the standard for determining whether the trial court abused its discretion is whether the means employed to test juror impartiality have "created a reasonable assurance that prejudice would be discovered if present." Strain, 306 Ill.App.3d at 335. Trial courts must use discretion so they do not block the reasonable exploration of germane factors that might expose a basis for challenge, whether for cause or peremptory. Strain, 306 Ill.App.3d at 335. The examination must adequately call to the attention of the veniremen those important matters that might lead them to recognize or to display their disqualifying attributes. Strain, 306 Ill.App.3d at 335.

[3] Even though the Court recognized the highly publicized nature and complex issues of this case, the Court failed to deviate from its own process of handling voir dire, stating. "I think we can pick a jury the normal way and treat this case normally." (People v. Smollett, tr. p.73, pp. 16-17, August 26, 2021). The Court implicitly acknowledged, "This is a highly-publicized disorderly conduct case." (People v. Smollett, tr. p.67, pp. 19-20, August 26, 2021). With regard to voir dire, the Court opined, "This is something that we do all the time, and I am sure we can do it in this case, too. And we are not going to treat this case -- I am trying to treat this case more like other cases, not differently than other cases, but more like other cases." (People v. Smollett, tr. p.77, pp. 8-12, August 26, 2021).

In the case at bar, the Court disallowed direct examination of prospective jurors, blocking the conduit to reasonable exploration of factors germane to this matter. These factors included prospective juror bias towards Mr. Smollett's profession as an actor, Mr. Smollett's sexuality, as well as attitudes prejudicial to Mr. Smollett carried by prospective jurors with regard to law enforcement, or media affiliations that might interfere with unbiased deliberation in Mr. Smollett's matter should said jurors be empaneled. The failure of the Court to conduct this examination would have definitively exposed these important matters or otherwise displayed disqualifying attributes possessed by the panel.

Moreover, prior to being empaneled, the Court questioned one prospective juror, Rosemary Mazzola. During the questioning, Mrs. Mazzola informed the Court that numerous members of her family are current and former members of law enforcement.[4]

The Court erred by abusing its discretion in not inquiring further into Rosemary Mazzola's extensive familial ties to law enforcement and blocking further inquiry by Defense counsel on this subject. Not only did the Court fail to inquire further of Mrs. Mazzola, but the Court also cut off Mrs. Mazzolla several times as she was trying to finish her answer. During voir dire, the Court inquired:[5]

Q: I'm Sorry. Please go Ahead.

A: I was going to say I have a daughter.

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[4] Juror Rosemary Mazzola informed the Court that she has multiple members of her immediate family who are affiliated with law enforcement that include her husband who is a retired Chicago Police Officer, her father who is a retired Chicago Police Sergeant, her brother who is also a retired Chicago Police Sergeant, and her daughter who works for the Federal Bureau of Investigation (FBI). (People v. Smollett, tr. p.202, pp. 17-24, p.203, pp. 1-3, 12-16, November 29, 2021).

[5] People v. Smollett, tr. p.204, pp. 9-24, p.205, pp. 1-5, November 29, 2021.

Q: A daughter?

A: I have a daughter. A 45 year old daughter.

Q: What does she do?

A: She works for the government.

Q: And what does she do for the government?

A: She works for the FBI.

Q: She works for the FBI. Anything about that fact that gives you a problem giving either side a fair trial?

A: **No, just - -**

Q: You come from a family of law enforcement.

A: **Correct. I just wanted to- -**

Q: I'm glad you did. Look, the point is you have all this law enforcement background. You're on a jury. Everybody has got an even playing field. If the right verdict is a not guilty verdict, you don't care what the family thinks. You're going to follow your conscience and do the right thing right?

A: You're absolutely right.

The Court erred in denying the Defendant's motion for cause against Mrs. Mazzola based upon her extensive law enforcement ties and the failure of the Court to further investigate the same or allow the Defense to directly inquire.

When the Defense asked the Court to consider a motion for cause as to Mrs. Mazzola, the Court denied the motion, stating, "She answered all the questions right."[6] The Court went on

[6] People v. Smollett, tr. p.215, pp. 20, November 29, 2021.

to state, "Motion for case is respectfully denied. Everything she answered it gave - - she was not hesitant about anything she said. So you can't get cause on her."[7]

The Court abused its discretion, violating Mr. Smollett's 6th Amendment right to a fair trial, by failing to inquire into Rosemary Mazzola's law enforcement ties. As Mrs. Mazzola responded to questions regarding her family's law enforcement affiliation, she attempted to supplement her answers, not once, but twice.[8] But rather than inquire further into the law enforcement issue or allow Mrs. Mazzola to provide complete responses to the Court's questioning, the Court abruptly interrupted Mazzola. The Court elected to quell the potential juror's hesitation and or bias, directing her to respond, not in accordance with the law, but in conformity with her conscience.[9]

The purpose of voir dire is to assure the selection of an impartial jury. People v. Dow, 240 Ill.App.3d 392 (1992). In any event, to be constitutionally compelled, it is not enough that a voir dire question be helpful; rather, the trial court's failure to ask the question must render the defendant's proceedings fundamentally unfair. People v. Terrell, 185 Ill.2d 467 (1998).

The Court erred in denying the Defendant the opportunity to inquire further of Mrs. Mazzola regarding her law enforcement connections, even though defense counsel made a request to do so, and despite the fact that the Court gave its assurance that defense counsel would be allowed to make such further inquiry on the matter.[10] It was possible that one or more of Mrs.

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[7] People v. Smollett, tr. p.216, pp. 13-16, November 29, 2021.

[8] Mrs. Mazzola attempts to add additional texture to her responses of, "No, just- - , and Correct. I just wanted to- - " where on both attempts, she is cut off each time by questions and or comments from the Court. (People v. Smollett, tr. p.204, pp. 18-22, November 29, 2021).

[9] The court states, "You're going to follow your conscience and do the right thing?" Ms. Mazzola responds, "You're absolutely right." (People v. Smollett, tr. p.205, pp. 3-5, November 29, 2021).

[10] Mr. Uche asks on the record to inquire further about Mrs. Mazzola's law enforcement family connections; specifically, whether or not any member of her family worked on the instant case. The Court responds to Mr. Uche,

Mazzola's relatives could have actually worked on the Defendant's case. Additionally, the Court cannot be sure that because of her law enforcement connections, Mrs. Mazzola was completely unbiased.

The Court's failure to inquire of Mrs. Mazzola's law enforcement affiliations and how these affiliations appeared to be displayed as hesitancy (best case scenario) or bias (worst case scenario) have caused fundamental unfairness to Mr. Smollett, impeding him from receiving a fair and impartial trial and amounting to reversible error. The Defense requests that the Court vacate the verdict of guilty and enter a verdict of not guilty notwithstanding the jury verdict, or in the alternative, grant the Defendant a new trial.

2. This Court Erred in Failing to Make Appropriate Rulings During Jury Selection in Regards to Batson Motions.

On November 29, 2021 the above-captioned matter proceeded to jury selection with a total panel of 50 potential jurors, not all of whom had the ability to be present in the courtroom at the same time due to COVID-19 restrictions and protocols in place at the courthouse. Notwithstanding, the Court proceeded to voir dire 16 potential jurors.

The Court determined that seven peremptory challenges would be provided to the defense, and seven peremptory challenges to the prosecution. These challenges would be blind. Each side would write their challenges on a piece of paper, with neither side knowing who the other side was choosing when it was their turn to select. A compromise was put in place that allowed only half of a peremptory strike to be used in the event that both sides happened to select

"Okay. Let me swear in these people in and I will ask her that." (People v. Smollett, tr. p.261, pp. 10-19, November 29, 2021).

the same potential juror for their strike, possibly leaving a slight benefit to the Defendant depending on how the strike process proceeded.

After the voir dire of the 16 potential jurors, the parties retreated to Court chambers to begin the jury selection process. After initial discussions, three potential jurors were stricken for cause and thirteen potential jurors remained for the parties to select from, with the Court offering the first 12 of the 13 for counsels for review.[11] The Office of the Special Prosecutor was provided the juror cards first, to submit their peremptory challenges, subsequently turning them over to the defense to repeat the process before returning to reconvene in chambers.[12] In the first batch of potential jurors given to the parties for review, the OSP used three of its seven peremptory challenges (on Nicholas Boyce, Marian Andranoche, and Darlene Robinson) and the defense used four of seven (on Kelly Dewitt, Ian Fisher, Jeffrey Skly, and Peter Fisher) leaving six people selected at that time to serve on the jury.[13]

Seventeen additional potential jurors were brought for voir dire; afterwards the parties reconvened in chambers again where the next six potential jurors in order were given to the parties for consideration. The Defense used two additional peremptory challenges (Erick Leong, and James Mandarino) leaving only one challenge available for the defense, and the OSP used one challenge (Beverly Dudley), leaving the prosecution three challenges remaining.[14]

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[11] People v. Smollett, tr. p.139, pp. 5-16, November 29, 2021.
[12] People v. Smollett, tr. p.139, pp. 17-22, November 29, 2021.
[13] (People v. Smollett, tr. p.142, pp. 24, p.142-145, pp. 7, November 29, 2021.

[14] (People v. Smollett, tr. p.217, pp. 7-16, November 29, 2021.

Prospective juror, Younes Sayed, was stricken for cause, leaving an additional opening on the jury.

With eight jurors having been selected, counsel for defense made a Batson motion in regards to the peremptory challenges of the OSP indicating that both of the last two challenges made by the OSP were on African American jurors (Darlene Robinson and Beverly Dudley).[15] The Court indicated that a prima facie case had not been made to show racial discrimination and allowed the OSP to make a record rebutting the same.[16] Counsel for the OSP gave what they purported to be "race neutral" reasons which were clearly pretextual in nature, as the issues raised had been previously vetted by the Court during voir dire and on the first convening of jury selection when the OSP attempted originally to have Ms. Robinson stricken for cause (based mostly on their position that she could not be fair because of her similarities to Mr. Smollett). Even so, the Court stood by its initial findings that a prima facie cause had not been made to show racial discrimination and the Batson motion was denied.[17]

The parties continued with the voir dire process to select the remaining four jurors needed to complete the venire whereby the OSP used two more challenges (Mr. Schuler, and Ms. Burnett), and the Defense used their final challenge (Mr. Clovanich). At this time, counsel for the Defense renewed the Batson motion (as Ms. Burnett was African American) and the Court, again, indicated that a prima facie case had not been shown, allowing counsel for the OSP to

[15] (People v. Smollett, tr. p.219, pp. 22-24, p.220, pp. 1-3, November 29, 2021.
[16] (People v. Smollett, tr. p.220, pp. 4-21, November 29, 2021.
[17] People v. Smollett, tr. p.222, pp. 10-15, November 29, 2021.

make a record.[18] The reasons given by the OSP appeared once again to be purely pretextual but the Court indicated no showing of racial discrimination. The Court moved on to select the final members of the jury; whereupon the OSP used their final challenge (on Saul Andrade), and counsel for Defense made a Batson argument on the basis of sexual orientation. The Court again found no prima facie evidence of discrimination and allowed the OSP to make a record at which time they argued highly pretextual reasons for using their challenge; reasons which were merely a cover to intentionally exclude a juror with the same sexual orientation as Mr. Smollett.[19]

Having selected 12 people to sit on the jury, the Court called six additional potential jurors for the purpose of seating alternates. The parties were given additional peremptory challenges, specifically, one per alternate and convened in chambers. The Defense used a challenge on the first alternate (Joseph Zilka) and the option for challenge as to the following potential alternate was offered to the OSP.[20] The OSP used their challenge for the first alternate on Sandra Washington, an African American woman.[21] The Court again did not find that a prima facie case had been made for racial discrimination allowing the OSP to make a record.[22] The final jury was empaneled with only one African American juror (with one additional African American woman (Ms. Dukes-Grant) as an alternate). Having preserved the record by making timely Batson motions during jury selection, Defendant now contends that the record clearly establishes that the prosecution engaged in a systematic pattern of discriminatory challenges, thus, establishing an equal protection violation.

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[18] People v. Smollett, tr. p.224, pp. 2-24, p.225, pp. 1-14, November 29, 2021.
[19] People v. Smollett, tr. p.227, pp. 8-24, p.228, pp. 1-22, November 29, 2021.
[20] People v. Smollett, tr. p.255, pp. 11-16, November 29, 2021.
[21] People v. Smollett, tr. p.257, pp. 7-16, November 29, 2021.
[22] People v. Smollett, tr. p.258, pp. 2-9, November 29, 2021.

As the Court is well aware, the Fourteenth Amendment to the United States Constitution (particularly within the Equal Protection Clause) guarantees the due process of law and equal protections under the law regardless of race, religion (and later extended to include sex, disability, and sexual orientation to certain extents). U.S. Const. Amend XIV, sec. 1. The Equal Protection Clause states, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* U.S. Const. Amend XIV, sec. 1. Such protections and due processes extend to all defendants throughout trials by jury.

Although a defendant has no absolute right to a jury composed in whole or in part of persons of his own race, a pattern of racial discrimination during jury selection has been roundly found to offend and violate the Equal Protection Clause of the United States Constitution. Batson v. Kentucky, 476 U.S. 79 (1985). Racial discrimination in selection of the jury venire violates a defendant's right to equal protection under the Fourteenth Amendment because it denies the defendant the protections that a trial by jury by its very nature is intended to secure. Batson v. Kentucky, 476 U.S. 79, 86 (1985). The foundation of the mechanism of the jury occupying a central position in our justice system safeguards a person accused of a crime against any arbitrary exercise of power by a single prosecutor or a judge. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The citizens ultimately selected to serve on a jury must be "indifferently chosen," to secure the defendant's rights under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Batson v. Kentucky, at 87.

On a broader scale, the harm committed through patterns of racial discrimination against African Americans in jury selection extends far beyond any injury that may be inflicted upon the defendant by such bias but rather to the entire African American community. Specifically, selection procedures and tactics that purposefully or intentionally exclude black persons from juries undermine public confidence in the fairness of the American justice system. Ballard v. United States, 329 U.S. 187, 195 (1946); McCray v. New York, 461 U.S. 961, 968 (1983). Intentional racial discrimination in the criminal justice system, and particularly through jury selection, is perhaps the most harmful form as it becomes "a stimulant to that race prejudice which is an impediment to securing to [black citizens] the equal justice which the law aims to secure to all others." Strauder, 100 U.S., at 308.

Although the prosecution in any given jury trial is ordinarily entitled to exercise their allowable number of peremptory challenges for any reason at all–as long as that reason is related to their view concerning the outcome of the case to be tried–the Equal Protection Clause of the US Constitution expressly forbids the prosecution from using peremptory challenges on potential jurors solely on account of their race or on the basis that black jurors *as a group* would be unable to impartially consider the prosecution's case against a black defendant. United States v. Robinson, 421 F.Supp. 467, 473 (1976), United States v. Newman, 549 F.2d 240 (1977).

To attempt to prevent the intentional and systemic exclusion of black jurors from being empaneled on juries, and specifically in trials with black defendants, the defense may make Batson motions wherein they make a prima facie case of racial discrimination in the use of peremptory challenges. Batson v. Kentucky, 476 U.S. 79 (1985). Motions/challenges under Batson are to proceed in three distinct steps: (1) the defendant must make a *prima facie* showing

that the prosecution struck jurors based on race, (2), the State may offer race-neutral reasons for the challenged strike, and (3) the Defendant may rebut the State's race-neutral reasons as pretextual. People v. Davis, 231 Ill. 2d 349, 360, 362-363 (2008). Only then does the trial court evaluate the facts and arguments to determine if the State engaged in intentional/purposeful race discrimination. *Id.* at 363. What's more, the burden on the Defendant to make out a *prima facie* case of racial discrimination in the prosecution's use of peremptory challenges is "not high." Davis, 231 Ill. 2d at 360.

In evaluating a defendant's prima facie case to show a pattern of racial discrimination, the Courts have been instructed to anyalyze seven factors: (1) same racial identity between the defendant and excluded potential jurors, (2) a pattern of strikes against potential jurors of the alleged racial group, (3) a disproportionate use of peremptory strikes against members of the alleged racial group, (4) the level of representation of the alleged racial group in the venire versus their representation in the jury, (5) the prosecutor's questions and statements during *voir dire* and while exercising their peremptory strikes, (6) a determination of whether the stricken jurors were a heterogenous group sharing race as their only common characteristic, and (7) the race of the defendant, witnesses, and victim. People v. Williams, 173 Ill. 2d 48, 71, (1996).

In the instant case the Court erred by not granting relief per Batson: (1) the Court is to take into consideration the sameness in racial identity between the defendant and excluded potential jurors in the case of Mr. Smollett, the jurors being stricken via pretext of race-neutral peremptory challenges were African American and or Homosexual and Mr. Smollett himself is African American and homosexual. (2) a pattern of strikes against potential jurors of the alleged racial group - It is the defense's position that the OSP engaged in a clear pattern of strikes against

members of the same racial group and sexual orientation when it struck two black jurors in a row, and then a third, as well as when OSP struck a fourth juror on the basis of his sexual orientation. (3) a disproportionate use of peremptory strikes against members of the alleged racial group since the OSP used three of their seven peremptory challenges on African American potential jurors and a fourth the sole homosexual man in the venire; almost 60% of their peremptory challenges were used to exclude jurors who represented appropriate cross sections of Mr. Smollett's community. (4) the level of representation of the alleged racial group in the venire versus their representation in the jury in the 50-person potential jury pool - from the venire brought into the courtroom there appeared to be between 8-10 black potential jurors, (making up 16-20% of the potential juror pool) and yet, the jury selected only had one black person (making up 8% of the empaneled jury). (5) the prosecutor's questions and statements during *voir dire,* and while exercising their peremptory strikes–it is clear from the record that the OSP did everything in their power to keep every African American off the jury that they could and, when challenged by the defense with Batson motions, they proceeded to give highly pretextual reasons to excuse their clearly intentional exclusion of black jurors.[23] (6) a determination of whether the stricken jurors were a heterogenous group sharing race as their only common characteristic. The jurors struck were a wide range of ages (between mid-twenties and all the way up to age 79), made up of different genders, resided in different neighborhoods, and had vastly different occupations, hobbies and activities. It is clear that the only thing the stricken potential jurors had

[23] (People v. Smollett, tr. p.219, pp. 22-24, p.220, pp. 1-21, November 29, 2021). (People v. Smollett, tr. p.224, pp. 2-24, p.225, pp. 1-14, November 29, 2021)., (People v. Smollett, tr. p.227, pp. 8-24, p.228, pp. 1-22, November 29, 2021)., (People v. Smollett, tr. p.258, pp. 2-9, November 29, 2021).

in common was their race; and lastly (7) the race of the defendant, witnesses, and victim. The Defendant and the two OSP star witnesses (the Osundairo brothers) are all black.

Defendant argues that circumstances arose before deliberations began that required the use of an alternate juror; however, the Court's erroneous ruling at the prosecution's prompting, prevented the first alternate juror (an African American woman) from taking the place of the white male juror who had a conflict and was required to leave the courthouse within two hours of the beginning of deliberations.[24] In fact, the Court, over Defense's numerous objections, allowed for the entire jury to leave only an hour into beginning their deliberations and to return the following day, causing a dramatic rift in the flow of the trial and concentration of the jurors to properly deliberate.[25]

A clear and effective remedy would have been to simply place the first alternate in the other juror's place as soon as it became apparent that the white middle-aged juror had become unavailable and unable to properly and duly fulfill his duties as a juror in the case. Instead, the Court dismissed this argument outright and "bent over backwards" to accommodate the sitting juror's "conflict." It became very clear that the reason the OSP fought so hard to agree with the Court on this issue was their realization that the first alternate was an African American woman, whom they did not have sufficient peremptory challenges to remove but unequivocally did not want on the jury.

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[24] A juror told the court that he had a personal commitment requiring him to leave be 5:15pm, with the Court stating, "It turns out that he (the juror) did have a - - a responsibility to go (to) some child's event, a concert, recital, or something. He indicated it was very important to him." "He said, I have to be out of here by 5:15." (People v. Smollett, tr. p.250, pp. 24, p.251, pp. 1-3, 6, December 8, 2021).

[25] Regarding allowing the entire jury to leave, the Court stated, "I thought it was a very minor accommodation that had to be reached, especially in light of how long the trial had taken; and if they need more time, than we're able to give them today, they'll come back tomorrow morning; and they'll finish their deliberations." (People v. Smollett, tr. p.252, p. 7-12, December 8, 2021).

With each and every relevant Batson factor being abundantly present, the Court erred in not finding a prima facie case of pattern discriminatory use of peremptory challenges in jury selection by the OSP, thus erring in not granting relief to the Defendant via Batson. The additional issue of the OSP's maneuvers to prevent the African American alternate from being placed on the jury when a perfectly opportune time arose for such a thing to occur, only added credence to the earlier arguments of the clear pattern of intentional discrimination in place to purposefully prevent Mr. Smollett from receiving a fair trial from a jury of his peers in strict violation of the Equal Protections Clause. As such the Court should grant Mr. Smollett a new trial or in the alternative, set aside the jury's verdict in the interests of justice and to properly protect his rights under the Fourteenth Amendment to the US Constitution.

3. **This Court erred when it refused to Provide Accomplice Instruction to the Jury after the Osundairo brothers had testified that they had been accomplices in planning a fake hate crime with Mr. Smollett.**

During trial, the Court asked the Office of the Special Prosecutor ("OSP") and the defense to submit their proposed jury instructions for the Court's review. In addition to the jury instructions both sides agreed should be given, the defense also requested that the Court provide the jury with Illinois Pattern Jury Instruction, Criminal No. 3.17, entitled "Testimony Of An Accomplice," with regard to the Osundairo brothers' testimony. On December 7, 2021, the defense filed a brief setting forth the case law on this instruction and argued that the failure to give the jury this instruction under the facts of this case would constitute reversible error. Notwithstanding the clear case law supporting the defense position, the Court refused to provide this critical instruction to the jury, as requested by the defense.[26]

[26] People v. Smollett, tr. p.268, pp. 3-7, December 8, 2021.

On December 9, 2021, Mr. Smollett was convicted of five out of six counts of disorderly conduct. Because Mr. Smollett was deprived of a fair trial as a result of the omission of the accomplice witness instruction and because this error was not harmless, his convictions must be vacated and set aside and a new trial must be granted.

A. Giving the Jury Pattern Instruction 3.17 Was Warranted Under the Facts of this Case

Pattern Instruction 3.17 provides:

> When 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. It should be carefully examined in light of the other evidence in the case. I.P.I. Criminal 3.17.

The purpose of the accomplice witness instruction has been explained as follows:

Due to the relationship of the witness and the State, there may be a strong motivation to testify falsely for the accomplice who seeks, hopes or expects lenient treatment by the State in return for favorable testimony. Thus a witness, knowing that his own guilt is detected, may seek to shield himself from punishment by purchasing immunity or leniency by falsely accusing others and procuring their conviction. Even if a promise or expectation of leniency is denied, its existence is always suspected. Therefore a judicial instruction cautioning the jury that the testimony of an accomplice is subject to suspicion has been felt warranted. People v. Riggs, 48 Ill. App. 3d 702, 705, 363 N.E.2d 137, 139 (1977) (internal citations omitted).

In People v. Rivera, 166 Ill.2d 279, 292, 652 N.E.2d 307, 312 (1995)., the supreme court held that an accomplice's testimony should be cautiously

scrutinized regardless of which side he testifies for. As a result, the Committee now recommends that this instruction be given any time an accomplice testifies. *See* Committee Note to I.P.I. Criminal 3.17.

Although the pattern instruction is entitled "Testimony Of An Accomplice," the instruction is not warranted only where a witness is officially charged as an accomplice. Rather, Illinois courts have held that the defendant is entitled to have Instruction 3.17 given to the jury if: (1) 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. *See* People v. Montgomery, 254 Ill.App.3d 782, 790, 626 N.E.2d 1254 (1st Dist.1993); People v. Lewis, 240 Ill.App.3d 463, 467, 609 N.E.2d 673 (1st Dist.1992).

Here, both circumstances requiring giving the accomplice witness jury instruction were present. The Osundairo brothers were initially arrested because the Chicago Police Department (CPD) had not only probable cause but substantial evidence that they were the perpetrators who attacked Mr. Smollett on January 29, 2019. And since then, in statements to the CPD and sworn statements to the grand jury and at trial, the Osundairo brothers admitted to doing everything Mr. Smollett told CPD they did—confront him on the street, yell racial and homophobic slurs at him, punch him, kick him, pour bleach on him, and put a rope around him. If it was not for their own self-serving statements and testimony that they did all of the above acts at Mr. Smollett's behest, they would have been charged with a hate crime, or at least a battery, against Mr. Smollett. Because the Osundairo brothers could have been the persons responsible for the attack on Mr. Smollett, Pattern Instruction 3.17 should have been given to the jury.

Furthermore, *assuming arguendo* that the Osundairo brothers were, in fact, acting at the direction of Mr. Smollett as they alleged at trial, the only reason they were not charged as either co-conspirators or accomplices for their admitted participation in the attack on Mr. Smollett is because of their self-serving statements that they did not know that Mr. Smollett would report the attack to the police. They asked the jury to believe that the elaborate "staged attack" was solely for the media's benefit, taking the absurd position that somehow a heinous crime against a high-profile celebrity which was supposed to be caught on camera would not result in a police investigation. Because the Osundairo brothers admitted being present at the scene of the crime and could have been charged either as principals or under a theory of accountability, Pattern Instruction 3.17 should have been given to the jury.

B. The Court Committed Reversible Error When It Refused to Give Pattern Instruction 3.17 to the Jury, as Requested by the Defense.

The Court's refusal to give this instruction to the jury under the circumstances of this case—where the Osundairo brothers' testimony was the only ***direct*** evidence against Mr. Smollett—deprived Mr. Smollett of a fair trial and constitutes reversible error. It is axiomatic that a defendant is entitled to appropriate jury instructions which present his theories of the case to the jury when and if such theories are supported by the evidence. *People v. Unger*, 66 Ill. 2d 333, 338, 362 N.E.2d 319, 321 (1977).

On this issue, People v. Carreon, 162 Ill. App. 3d 990, 995, 516 N.E.2d 372, 375 (1987). is instructive. There, the appellate court held that the defendant was entitled to an accomplice witness jury instruction, and the trial court's refusal to give such an instruction constituted prejudicial error, requiring a new trial. At trial, the defendant's neighbor at the time of the

incident, who thereafter returned to his native Mexico, Amaya, testified that he was present when the defendant allegedly shot the two victims. *Id.* at 991-92. While investigating the offense, police officers questioned numerous men who were near the scene of the crime. *Id.* at 992. From the information they obtained, they suspected that Amaya must have had some knowledge about the shootings. *Id.* Accordingly, they went to Amaya's apartment, placed him under arrest, and took him to the police station for interrogation. *Id.*

Amaya initially claimed that he did not know anything about the crime; however, when the police showed him the blood-stained money they had found in his wallet at the time of his arrest, Amaya implicated the defendant in the shootings. *Id.* He subsequently testified to the events described above before a grand jury, and was sent to Dallas, Texas, where his rent was paid by the State. *Id.* at 992-93. While awaiting the defendant's trial, the State did not bring Amaya's presence in the United States to the attention of the immigration officials, despite his status here as an illegal alien. *Id.* at 993.

The appellate court held that the trial court erred by refusing to give a cautionary accomplice witness instruction with regard to Amaya's testimony for the following reasons:

> Amaya disclosed that he was with the defendant before, during, and after the shootings. Notwithstanding his profession of innocence based on his alleged fear of the defendant, we believe probable cause existed to indict Amaya for the offenses, particularly when one considers that when he was initially taken into custody for questioning he possessed money linking him to the crime. *Id.* at 995.

The appellate court held that it could not find that the "failure to give the requested instruction constituted harmless error, especially in light of the fact that Amaya's testimony was the only direct evidence implicating Carreon." *Id.* at 996.

Giving the jury Pattern Instruction 3.17 was critical in this case, where the evidence against Mr. Smollett was far from overwhelming. Indeed, the only ***direct*** evidence that the attack was "staged," as the Osundairo brothers claimed, was their own self-serving statements and testimony which resulted in their release from custody uncharged—testimony which should have been cautiously scrutinized by the jury. Furthermore, despite two separate police investigations into the January 29, 2019 attack and after having obtained one entire year's worth of cell phone data for Mr. Smollett and his creative director who called 911 that night—including all of their call history, text messages, voicemails, emails, contacts, pictures, GPS location, and more, as well as a substantial amount of financial and other information—the OSP did not produce any ***independent*** corroboration[27] to support the Osundairo brothers' testimony that the attack on Mr. Smollett was a hoax.

Thus, the Court's refusal to provide Pattern Instruction 3.17 to the jury was not harmless and it constitutes reversible error under Illinois case law. *See, e.g.*, People v. Campbell, 275 Ill. App. 3d 993, 997, 657 N.E.2d 87, 91 (1995). (reversing the defendant's conviction where an accomplice-witness instruction should have been tendered to the court by trial counsel, trial counsel rendered ineffective assistance through his failure to tender the instruction on accomplice witnesses, and "this is not a case where the evidence against defendant was

[27] What the OSP referred to as "corroborating evidence" was one text message where Mr. Smollett asked to speak to Abimbola Osundairo "on the low" and two brief meetings with the Osundairo brothers on January 25 and 27, 2019. However, Mr. Smollett provided a reasonable alternative explanation of the "on the low" text message and subsequent meetings with the Osundairo brothers, which explanation was exculpatory. Thus, without the Osundairo brothers' self-serving explanation of the text message and meetings, there was no independent corroboration of their hoax narrative.

genuinely overwhelming and the lack of a particular instruction was rendered harmless in light of the other instructions, arguments of counsel, and a generally fair trial"); People v. Glasco (1993), 256 Ill.App.3d 714, 717, 195 Ill.Dec. 317, 321, 628 N.E.2d 781, 785 (despite the fact that the accomplice-witness instruction was given, and despite the fact that the evidence linking the defendant to the offenses charged was sufficient for the jury to find him guilty beyond a reasonable doubt, reversible error occurred because the trial court limited defense counsel's closing-argument discussion of the instruction). Defendant respectfully requests that the Court grant a new trial based on its erroneous refusal to include Illinois Pattern Jury Instruction 3.17 in the jury instructions provided to the jury.

4. Denial of Due Process to Defendant's Right to a Public Trial

On November 29, 2021, jury selection began in the instant case. Prior to the jury venire being brought into the courtroom, the Court *sua sponte* barred members of the press and the general public from the venire process citing only the need for all available seats due to COVID 19 courtroom capacity restrictions.[28] As a part of the same verbal order, the Defendant's family also had to leave the courtroom during the venire process. As a result, there were no family members present for the Defendant, no members of the press and no members of the general public in the courtroom during any of the jury selection process.

Throughout the trial and until an overflow room was created after lunch on December 6, 2022, five and half days into the trial and after the prosecution rested their case, members of the general public and oftentimes members of the press were denied entry into the courtroom. In

[28] People v. Smollett, tr. p.5, pp. 17-24, p.6, pp. 1-13, November 30, 2021.

addition, guests of the Defendant who were submitted as a part of his list were denied entry and or removed from the courtroom when they were merely peaceful spectators.

One peaceful spectator, Ambrell Gambrell, also known as Bella BHHAS, was removed from the courtroom on or about Wednesday, December 1, 2021 for exercising her First Amendment right to freedom of speech. Upon information and belief, she spoke to the media regarding her beliefs about the conduct of the Chicago Police while investigating the Defendant. Following the interview and off the record, this Honorable Court questioned defense counsel as to whether or not defense counsel had knowledge of the interview. Once the defense confirmed no knowledge of the events, this Court stated that she would be removed from the trial, citing the "gentleman's agreement" amongst the Parties not to speak to the press.

However, the woman in question had no way to know that speaking to the press about her views on the Chicago Police Department would lead to her being removed from the courtroom for future proceedings. The defense pointed that fact out to this Court, but according to The Chicago Tribune ("Tribune"), Ms. Gambrell was escorted away from the courthouse by two armed deputies. (Annie Sweeney, Megan Crepeau and Jason Meisner, After Chicago activist is barred from courthouse during Smollett trial, judge issues statement saying he didn't intend to ban anyone, (Chicago Tribune, Dec. 5, 2021, Exhibit B attached and incorporated herein.). It was verified by reporters that Ms. Gambrell was indeed removed from the courthouse by Cook County deputies.

The Cook County sheriff's office confirmed in a statement that Linn made a "verbal" order barring "an individual seated in the gallery of his courtroom from the George N. Leighton Criminal Court Building for the remainder of the trial of Jussie Smollett (quotation mark

removed) and that sheriff's deputies had escorted this person out in compliance with the order. *Id.*

Ms. Gambrell was also escorted away from the courthouse by sheriff deputies when she returned the following day on Thursday, December 2, 2021. Id. The Tribune first reported the events on Friday, December 3, 2021 and according to the same article, within an hour after that article was published, this Honorable Court issued a statement through a spokeswoman that stated in relevant part, "To clarify, the Hon. James Linn did not intend to ban anyone from the courtroom, but asked that the person in question not be in the first row,"... "The court is open to the public, subject to COVID-19 precautions that limit the number of people in the courtroom to 57." *Id.* At all times relevant, this Court was well aware of the international publicity surrounding the controversial trial of a high-profile Defendant and that the demand for seats in the courtroom would be sizable. The Court was also very well aware of the COVID-19 restrictions in place and that the Defendant and counsels for each side would have personally invited guests, family members, staff and others who would want or need to attend the trial.

In recognition of that fact, on October 20, 2021, this Court's clerk sent an order to the Parties entitled "Order Regarding Half Capacity Limits in the Courtroom"(Exhibit C incorporated herein). The Order requested headcounts from the Parties due to the courtroom being limited to half capacity pursuant to COVID-19 restrictions. *Id.* In an email dated November 5, 2021, through counsel Heather Widell, the Defendant requested 20 members of his family and other close friends and members of the public be allowed admittance. Defense counsel requested an additional 22 seats for a total of 42 seats (Exhibit D incorporated herein). The Defendant's request was denied by the Court and the Defendant was asked to submit an

updated headcount. On November 8, 2021, more than three weeks before the start of the trial, this Honorable Court's clerk sent an email that contained the "Court's Memorandum Regarding Defense's Modification of Head Count for Trial" which requested a modified headcount for defense counsel and stated in relevant part that of the 57 people allowed in the courtroom, the Defendant would be limited to 4 personal guests per day (despite the fact that the Defendant had five siblings, their spouses, his mother and maternal aunt amongst other family and close friends who all traveled to Chicago to support him during the trial), Additionally, 14 seats were reserved for media at that time and 11 seats previously requested by the Prosecution. (Exhibit E incorporated herein).

Per this Court's position, the Defendant and Defense counsel felt we had no choice other than to limit our request to 17 seats, less than half of the original count, in an email dated November 15, 2021. At all times relevant, there were vacant courtrooms in the courthouse that could have been used as overflow rooms with a live feed set up.[29]

On November 24, 2021, this Court sent the Parties an updated list of 21 journalists, including local and national journalists from CBS, NBC and Fox and 2 sketch artists. (Exhibits F and G incorporated herein). Increasing the number of journalists allowed in the courtroom by seven people also reduced the members of the general public who could attend the trial by that same amount. At no point during the pre-trial orders and communications about COVID-19 restrictions were any alternatives offered to solve the seat limitations within the courtroom,

[29] People v. Smollett, tr. p.5, pp. 17-24, p.6, pp. 1-3, November 30, 2021.

despite the fact that nearly every courtroom in the George N. Leighton courthouse was equipped to conduct court business via Zoom meetings and Youtube live streams:

It is well established that the Sixth Amendment of the United States Constitution (U.S. Const., amend. VI) guarantees the accused the right to a public trial. People v. Evans, 2016 IL App (1st) 142190 citing Presley v. Georgia, 558 U.S. 209, 212-13 (2010). A violation of this right falls into the limited category of "structural errors," which require automatic reversal without the need to show prejudice. People v. Thompson, 238 Ill. 2d 598, 608-09 (2010) (structural error category includes complete denial of counsel, trial before biased judge, racial discrimination in grand jury selection, denial of self-representation, denial of public trial, and defective reasonable doubt instruction). *Id.* at 608. These errors are systemic and, "erode the integrity of the judicial process," and "undermine the fairness of the defendant's trial." *Id.* at 608. An error will be designated structural only if it renders the trial fundamentally unfair or an unreliable means of determining guilt or innocence. *Id.* at 608.

In Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), the United States Supreme Court held that the constitutional guarantees of a free and public trial also applied to the voir dire portion of a jury trial. To reach its decision, the Court relied on the history of public jury selection that dates back to 11th century England and carried over into colonial America as reflected by the United States Constitution. *Id.* at 506-508. Prior to a criminal trial that involved the sexual assault of a teenager, a local newspaper made a motion that the voir dire examination of prospective jurors be open to the press and public. The prosecution opposed the motion on the basis that having press in the room might make jurors uncomfortable and the trial judge agreed. The judge allowed the press and public to attend the

"general" but not the "individual" voir dire process. *Id.* As a result, all but approximately three days of the 6-week voir dire were thus closed to the public and press.

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. *Id.* at 508 quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 569-571.

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Id.* at 510.

During the venire process in the instant matter, the Court cleared the courtroom to make room for the jury pool with the COVID-19 restrictions limiting the capacity of the courtroom to half. While the doors to the courtroom were left open for the press and public to be able to hear the proceedings, the spectators were huddled up together in an attempt to hear and see the trial. (Preyar Aff. 4, Exhibit H incorporated herein). Spectators were unable to maintain social distancing and therefore based on their proximity were more at risk for spreading and or contracting COVID -19 than they would have been in the courtroom. *Id.* at 2. Further, the

affiant states that she was unable to both hear and see at the same time, making it impossible to actually observe the court proceedings *Id.* at 2.

It is no small distinction that Ms. Preyar is both an attorney and a member of the public who was interested in the trial. She was a unique observer that witnessed the Constitutional violations firsthand and had enough knowledge of the court system to address it to the appropriate parties. She also attested to the fact that Ms. Gambrell, among others, was not allowed to view the proceedings. It is a dangerous precedent for this Court to bar attorneys, activists, invited guests of the Defendant, and general members of the public from the courtroom because as pointed out in Press-Enterprise Co., such actions call into question not only the impartiality of the Court, but also the entire court system.

In Presley v. Georgia, 558 U.S. 209 (2010), Eric Pressley was charged with a drug trafficking offense and his uncle came to watch the trial. When the judge noticed the lone spectator, he instructed him to leave the courtroom so that he could have the seats for the jurors. The judge invited him to come back after jury selection, stating that he could not have a relative sitting amongst the jury pool and that he needed all available seats for the venire. *Id.* Pressley was then convicted and appealed based on the public being barred from his venire. The Supreme Court of Georgia upheld the decision, incorrectly stating that the Defendant must introduce his own alternatives to court closure. In reviewing the decision, the United States Supreme Court held that: "The public has a right to be present whether or not any party has asserted the right. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 505 (1984). In Press-Enterprise, neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of

keeping the transcript of the proceedings confidential. *Id.*, at 503–504, The Court, nonetheless, found it was error to close the courtroom. *Id.*, at 513.

Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial. Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members. *Id*, 214-15.

Additionally, Illinois courts, echoing courts around the United States, have made the same findings regarding the right to a public trial starting during the venire process. People v. Smith, 2020 IL App (3d) 160454. The trial court violated the defendant's right to a public trial when, during jury selection, the court ordered spectators, including the defendant's parents, out of the courtroom. There was no record as to why the courtroom had to be closed and the closure was not objected to. The court found plain error and reversed for a new trial.) People v. Taylor, 244 Ill.App.3d (2d Dist. 1993) (Exclusion of defendant's family members from courtroom during voir dire was improper, case was remanded for a new trial without requiring defendant to show any specific prejudice.

In People v. Evans, 2016 IL App (1st) 142190, the appellate court of Illinois found that the trial court erred in removing even one person from the courtroom where the Defendant's step grandmother was asked to leave the courtroom during venire. The trial judge stated he was concerned that she might contaminate the jury pool by making comments during the venire and

that the seats were necessary for the venire since the courtroom had limited seats and that. *Evans* expands previous rulings by setting forth specific conditions that must be met for closing the courtroom to the public and held:

> To justify closing a trial proceeding, we examine: (i) whether there exists an overriding interest that is likely to be prejudiced, (ii) whether the closure is no broader than necessary to protect that interest, (iii) whether the trial court considered 'reasonable alternatives' to closing the proceeding, and (iv) whether the trial court made adequate findings to support the closure." People v. Evans, 2016 IL App (1st) 142190. The Court in Evans also made it clear that neither space limitations nor the potential for jury contamination were "overriding interests" *Id.* at 326.

The trial court's second reason for barring Ms. Peterson was the limited number of seats available in the courtroom. This has even less weight than the worry about jury contamination. Gibbons v. Savage, 555 F.3d at 117. Whether 45 potential jurors can sit in the courtroom at one time is solely a matter of logistics and convenience for courtroom personnel—it has no positive effect on the fairness of the trial. Many courtrooms are undersized for their needs. Presley v. Georgia, 558 U.S. at 210 (2010)., (trial court noted for record that venire consisted of 42 potential jurors and all rows of seats would be filled). But even in a cramped physical space, trial courts can deal with this limitation in ways that do not burden a defendant's constitutional rights. The size of a courtroom, or the number of potential jurors who are summoned to a courtroom, do not constitute an "overriding interest." Evans at 326. Further, the Court delineated specific alternatives that would have solved the space limitations that apply to the instant case and laid bare the fact that the attorneys do not have to suggest alternatives to the Court.

Contrary to the State's suggestion at oral argument, Evans's attorney did not even need to suggest reasonable alternatives. Presley at 214, (trial court must consider alternatives to closure

even when not offered by parties). Given the seriousness of the potential harm, each trial judge must be alert and proactive in managing his or her courtroom to prevent violations of this core constitutional right, regardless of whether the attorneys assist in the process. As the Presley Court noted:

> As a reviewing court, we can conceive reasonable alternatives, many of which are based in common sense. Even in a small courtroom the trial court could have allowed Ms. Peterson to stay by simply calling the potential jurors into the room in smaller groups; asking Ms. Peterson or a potential juror to stand until a seat became available; or instructing the potential jurors and Ms. Peterson not to interact. Presley at 215.

Simply put, the idea that the pandemic creates an exception to the law established in Evans is erroneous. As Evans put forth, the Court is charged with the duty to find solutions that preserve the Defendant's constitutional rights, regardless of whether or not the attorneys ask for alternatives. While the pandemic had a negative impact on the entire court system, *Evans* provided solutions to solve the situation this Court found itself in. At all times relevant, there were many alternatives available that included bringing the venire into the courtroom in small segments while designating a portion of the courtroom for the press and spectators and/or an overflow room with live video and audio feed that was eventually created following complaints from members of the public.

Because the law on the Defendant's right to a public trial throughout the trial process is so historically well-established in the United States and in Illinois, what happened in the instant case is particularly egregious. For example, the present case was a high-profile case involving a famous actor that received international pre-trial publicity and the only solution offered by the Court was to completely deny the Defendant a public trial during portions of the trial and

limiting public access throughout the trial. It is patently unreasonable that the public was denied access to the court proceedings which created daily, serious and incurable Constitutional violations when the issue was known months before trial began. Throughout the extensive communications regarding the COVID-19 space restrictions this Court held prior to trial, there were never any alternatives suggested that would preserve the First Amendment rights of spectators and Sixth Amendment rights of the Defendant.

As it relates to the First Amendment, the United States Supreme Court has held that the public trial right extends beyond the accused and can be invoked under the First Amendment. Presley v. Georgia, 558 U.S. 209, 212 (2010). For instance the Presley Court noted:

> The point is well settled under Press–Enterprise I and Waller. The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. *Id.* at 213.

In other words, the First Amendment rights enjoyed by the public and press, at least as it has been decided pertaining to venire, take a "backseat" to the rights of the accused. Presiding over a high-profile trial in the midst of a pandemic takes foresight and planning to ensure that the Defendant's rights are preserved and balanced against the needs of the public and press. But instead of engaging in that balance, this Court decided during the pre-trial process to limit the members of the public allowed by the Defendant while expanding the press allowed into the courtroom.

The Court in the instant matter first communicated with the parties regarding the space limitations on October 20. 2021. (Exhibit I) When the Defense complied with the stated

directions of the Court and requested 42 seats, 20 of them for the Defendant, this Court responded by limiting the Defendant to 4 guests, despite the fact that even his immediate family exceeds 4 people. (Exhibit J). To add insult to injury, in that November 8, 2021 communication, the press was limited to 14 people. However, this Court *Sua sponte* increased the number of the media by 7 as all parties were informed in this Court's November 24, 2021 email entitled "updated media list" with an attachment that contained the full list of media outlets, which included both national and local reporters for several networks. (Exhibit K).

This was in direct contradiction to Sheppard v. Maxwell, 384 U.S. 333 (1966). For instance, the United States Supreme Court in Sheppard held:

> As we stressed in Estes, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. Sheppard at 358.

Further, in the instant case, which involved copious amounts of pre-trial publicity, fairness to the Defendant required that the press who was in attendance be given strict and specific rules so as not to influence the jury who were not sequestered at any point during trial proceedings. The Sheppard Court opined:

> From the cases here, we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the

> judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. Sheppard at 362-363.

To put it plainly, we do not want the media running out and writing articles that might influence jurors who were not sequestered. *Id.* Which is exactly what happened in the instant case. The jurors returned home every night and had unlimited access to news through print media, television, cell phones, social media and the internet in general and daily articles came out which could have influenced their verdict. And while we are not suggesting that this Court should curtail the media's First Amendment Right of free speech, a reminder admonishment to simply report the news without "extrajudicial comment" was warranted to ensure a fair trial.

We can anticipate the counter argument from the prosecution, which is that the Defendant could have elected to consent to media coverage by requesting to have cameras in the courtroom.

However, in Nixon v. Warner Communications, 435 U.S. 589 (1978), the Supreme Court decided that "there is no constitutional right to have such testimony recorded and broadcast." *Id.* at 610. "Nor does the Sixth Amendment require that the trial — or any part of it — be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Id.* at 610.

Further, under the First Amendment, the press has no superior right to information about a trial than the general public. The First Amendment generally does not grant the press a right superior to that of the general public.

The violation of the Constitutional rights of both the public and the Defendant are plain error without remedy. The prejudice to the Defendant is so great that Courts have no choice but

to reverse and remand since it is a fundamental structural flaw that cannot be cured. As such this Court should grant Mr. Smollett a new trial or in the alternative, set aside the jury's verdict and vacate his conviction.

5. Prosecutorial Misconduct by Sean Wieber and Denial of Disqualification of Sean Wieber.

The Illinois Supreme Court has expressed concern with the problem of prosecutorial misconduct, People v. Moss, 205 Ill. 2d 139 (2001). The Illinois Supreme Court pointed out that a criminal defendant, regardless of guilt or innocence, is entitled to a fair, orderly, and impartial trial. People v. Blue, 189 Ill. 2d. 99, 138 (2000). Furthermore, the Illinois Supreme Court has stated that the court has an "intolerance of pervasive prosecutorial misconduct that deliberately undermines the process by which we determine a defendant's guilt or innocence." People v. Johnson, 208 Ill. 2d 53 (2003). The court in Johnson went on to state that "threats of reversal, and words of condemnation and disapproval, have been less than effective in curbing prosecutorial misconduct." Johnson at 66-67.

Unfortunately, the instant case was tainted with the stain of prosecutorial misconduct. A key witness in this case, Anthony Moore, took the witness stand on December 6, 2021. Mr. Moore was an independent eyewitness who saw the assailants who attacked the Defendant. Mr. Moore did not know, nor had he ever met the Defendant in the past.[30] Mr. Moore under oath stated that he was "pressured and threatened" by Special Prosecutor Sean Wieber to "...pump something out that I didn't see."[31] After definitively pointing Mr. Wieber out in court, a sidebar was held. Defense counsel moved for Mr. Wieber's disqualification from the case due to

[30] People v. Smollett, tr. vol. I, p.89, pp. 7-11, December 6, 2021.
[31] People v. Smollett, tr. vol. I, p.67, pp. 20-24, p.68, pp. 1-21, December 6, 2021.

prosecutorial misconduct. The request was denied.

The circumstances surrounding this misconduct cannot be understated. An independent witness under oath in open court pointed to the prosecutor trying the case and testified that he felt "pressured and threatened" by him to change his story. Mr. Moore testified that he was very clear with the Chicago Police Department on three separate occasions that he saw a white male around 2:00am on January 29, 2019, run past him.[32]

This misconduct was particularly prejudicial because it was attempted to directly undercut the Defense's theory of the case. The evidence in the case established that the Defendant had reported to officers that he believed one of his attackers was white or pale-skinned. Mr. Moore's testimony corroborated the Defendant's testimony. Armed with this information, Mr. Wieber purposefully "pressured and threatened" Mr. Moore to alter his under oath statement that included the witness seeing a black man instead of white man on January 29, 2019, around 2:00 am.[33]

A defendant's fundamental right to present witnesses in his or her own defense is violated if improper influence is exerted on defense witnesses causing them not to testify. People v. King, 154 Ill. 2d 217 (1993). The prosecutor cannot be allowed to intimidate witnesses and transform them "from a willing witness to one who would refuse to testify." United States v. Smith, 478 F.2d 976, 979 (D.C. Cir. 1973).

Prosecutorial intimidation can come in various shapes and forms. In People v. Muschio, the prosecutor threatened to increase the sentence of an important defense witness

[32] People v. Smollett, tr. vol. I, p.60, pp. 10-14, December 6, 2021.
[33] People v. Smollett, tr. vol. I, p.67, pp. 1-13, December 6, 2021.

when said witness decided he did not want to testify for the defense. People v. Muschio, 278 Ill. App. 3d 525 (1st Dist. 1996). In People v. Mancilla, the State intimidated a potential witness who was an undocumented worker from Mexico by threatening the witness with perjury and her immigration status. People v. Mancilla, 250 Ill. App. 3d 353(1st Dist. 1993). In United States v. Smith, the case was reversed because a vital defense witness was intimidated by the prosecutor who had warned the witness that he should consult an independent attorney because his testimony could subject him to prosecution for carrying a dangerous weapon. United States v. Smith, 478 F. 2d at 978 (D.C. Cir. 1973).

The intimidation in this matter is far worse. Sean Wieber kept Mr. Moore in his office for hours to discuss an observation that only took moments.[34] Mr. Moore's interview with Mr. Wieber was not video-recorded.[35] After he was exhausted from lengthy questioning, Mr. Moore was pressured and threatened to change his observation in a written statement to say that he could have been mistaken and that he may have seen a black man on that day.[36] By having Mr. Moore change his statement in writing, Mr. Wieber not only tried to disqualify Mr. Moore as a favorable defense witness, but he also tried to obtain false, incriminating evidence against Mr. Smollett. This flagrant misconduct constitutes reversible error. Additionally, Mr. Moore's credibility was negatively impacted since the jury heard testimony that he had informed Mr. Weiber, albeit under duress, that the man who ran past him was not black as he had testified to in court.

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[34] People v. Smollett, tr. vol. I, p.67, pp. 10-14, December 6, 2021.
[35] People v. Smollett, tr. vol. I, p.65, pp. 18-22, December 6, 2021.
[36] People v. Smollett, tr. vol. I, p.66, pp. 17-24, p.67, pp. 1-24, December 6, 2021.

Once Mr. Wieber was identified by Mr. Moore in the courtroom, Mr. Weiber became a witness in the case and should have been disqualified as an attorney in this matter. After Mr. Moore testified that he felt "pressured and threatened" by Wieber, further inquiry into this serious issue was necessary; including the right to interview, and possibly call as a witness any person that was present during Mr. Moore's interview, specifically Mr. Wieber.

Once new information arises in a matter, a representing attorney can then become a witness and must then be disqualified. People v. Rivera, 2013 IL 112467 (2013). In Rivera, the Defendant filed a written pretrial motion to suppress statements. Prior to that hearing, the State moved to disqualify the defendant's counsel who was listed as a witness in the defendant's motion to suppress. The trial court granted the motion finding that written motion to suppress rendered Defendant's attorney a material witness. This is similar to the instant case.

Once this information was gleaned in open court, Mr. Wieber became a material witness in the case. In addition, pursuant to Rule 3.7 of the Illinois Rules of Professional Conduct, Mr. Wieber had a professional obligation to withdraw. "If the lawyer knows or reasonably should know that the lawyer may be called as a witness on behalf of the client." Ill. R. Prof. Conduct R. 3.7(2022). A special prosecutor is not excluded from the rules of Professional Conduct. The Defendant in this matter had the absolute right to inquire further into prosecutorial misconduct of Mr. Wieber.

Finally, the advocate-witness rule precludes an attorney from acting as an advocate and a witness in the same case. People v. Gully, 243 Ill. App. 3d 853(5th Dist. 1993). When the defendant in a criminal case subpoenas the prosecutor, the trial court should conduct a hearing to determine whether it will permit those subpoenas to stand. People v. Palacio, 240 Ill. App. 3d

1078 (4th Dist. 1993). In the instant case, the Court should have, at a minimum, given the Defendant a recess to contemplate subpoenaing Mr. Wieber, thereafter holding a hearing if necessary. Instead, the Defense's oral motion on the issue was immediately denied. Where such egregious prosecutorial misconduct occurred, Mr. Wieber should have been disqualified and subject to be called as a witness by the Defendant.

It is noteworthy that at no time did the prosecution seek to deny Mr. Moore's accusation that he had been pressured and threatened.

As such this Court should grant Mr. Smollett a new trial or in the alternative, set aside the jury's verdict and vacate his conviction.

6. The Court Erred in Denying Defendant's Motion for Directed Finding of Not Guilty.

In the early evening hours of December 2, 2021 the OSP rested their case in chief and counsel for the Defense made a motion for Directed Finding of Not Guilty.[37] While the Court indicated that it would not care to hear arguments on the matter, the Court did allow argument at counsel's request to make a record.[38] Counsel argued that even given the evidence in the light most favorable to the non-moving party (the OSP), there was not sufficient evidence to sustain the charges against Mr. Smollett particularly specifying that the prosecution's own evidence tended to show that Mr. Smollett was in fact struck and kicked by at least one of the Osundairo brothers and that there was no evidence at that juncture in the trial that Mr. Smollett in fact consented to receiving a battery, and as such, any battery he in fact received would have been properly reported and thereby not subject to conviction on a charge of disorderly conduct.[39] As to

[37] People v. Smollett, tr. p.113, pp. 18-24, December 2, 2021.

[38] People v. Smollett, tr. p.114, pp. 1-4, December 2, 2021.

[39] People v. Smollett, tr. p.114, pp. 5-24, December 2, 2021.

the charges regarding improper reporting of hate crimes, again, counsel argued that even given the evidence in the light most favorable to the prosecution, there was not sufficient evidence to show that the acts Mr. Smollett reported did not in fact occur, rather to the contrary, the Osundairo brothers' own testimony indicated several instances where each of them took part in an actual attack; not that they faked one or that one never happened at all, thereby voiding the charge that Mr. Smollett reported an attack and hate crime that he knew to be false when he reported it.[40] The Court, without refuting any of counsel's arguments or offering bases for its ruling, indicated that there were "ample, ample facts to go before the jury" denying the Motion for Directed Finding.[41]

Section 115-4(k) of the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/115-4(k) (West 2018) provides: "When, at the close of the State's evidence or at the close of all of the evidence, the evidence is insufficient to support a finding or verdict of guilty the court may, and on motion of the defendant *shall,* make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge the defendant."

A motion for a directed verdict in a criminal trial tests the constitutional sufficiency of the evidence presented. People v. Connolly, 322 Ill. App. 3d 905, 915 (2001).The trier of fact's ultimate verdict, which involves making credibility determinations and weighing the evidence presented, determining whether evidence is constitutionally sufficient is entirely different and requires a different standard of argument. Connolly, 322 Ill. App. 3d at 915. A motion for a directed verdict asserts that as a matter of law the evidence presented is insufficient to support a

[40] People v. Smollett, tr. p.116, pp. 23-24, December 2, 2021.
[41] People v. Smollett, tr. p.118, pp. 8-12, December 2, 2021. In fact the evidence showed that Mr. Smollett never actually called the police. See, People v. Smollett, tr. p.43, pp. 1-24; p. 44, pp 1-4, November 30, 2021

finding or verdict of guilty. *Id.* In moving for a directed verdict, the defendant admits the truth of the facts stated in the State's evidence for purposes of the motion. The trial judge does not pass upon the weight of the evidence or the credibility of the witnesses in testing the sufficiency of the evidence to withstand a motion for a directed verdict. *Id* at 1228. In other words, a motion for a directed verdict of not guilty asks whether the State's evidence could support a verdict of guilty beyond a reasonable doubt, not whether the evidence does in fact support that verdict. If the State's evidence does not meet the minimum constitutional sufficiency stated in Jackson v. Virginia, 443 U.S. 307, (1979), there is no need for a finder of fact to consider that evidence. *Connolly*, 322 Ill. App. 3d at 915.

The evidence is to be reviewed as presented in the light most favorable to the prosecution and the Court must determine at that juncture whether any reasonable trier of fact could fairly conclude the defendant was guilty beyond a reasonable doubt. Connolly, 322 Ill. App. 3d at 918. The beyond a reasonable doubt standard does not change, only the light in which the evidence presented is to be viewed. That being the case, even with the evidence given in the light most favorable to the OSP, being that everything their witnesses said should be taken as true, there were still several faults in their case which would lead any reasonable trier of fact to have reasonable doubt on multiple fronts and thus, and just as many grounds for acquittal.

The OSP provided no independent corroborating evidence to prove the elements of their case, relying instead solely on the entirely self-serving statements of a convicted felon and his drug dealer brother, whose testimony was compelled by the Chicago Police Department and given in order to avoid the pain of prosecution. The evidence offered by the State did not introduce any evidence to corroborate the account of the incident provided by Olabinjo and

Abimbola Osundairo regarding the conduct of the defendant. The Court should now set aside the verdict of the jury to remedy the failure of the Court in granting Defendant's Motion for Directed Finding when it was timely made and argued by the Defense at the time the prosecution rested their case.

7. The Verdict of the Jury Was Contrary to the Manifest Weight of the Evidence

After a day and a half of uninterrupted deliberations, the jury reached a verdict finding Mr. Smollett guilty of five out of the six counts charged against him.[42] The foreperson (Ana Padilla), read aloud the verbatim verdict forms.[43] As to Count 6 of the Indictment, the jury found Mr. Smollett "not guilty." Based on the drafting of the charges, the facts and evidence presented throughout the trial, the arguments made in Defendant's Motion for Directed Finding during trial and argued above (Section II), as well as the fact that the jury found Mr. Smollett not guilty of one of the six nearly identical charges, it is clear that the findings of guilty are contrary to the manifest weight of the evidence. The evidence presented by the prosecution was insufficient and inconsistent so that no reasonable trier of fact could have found Mr. Smollett guilty beyond a reasonable doubt and thus there is evidence that the jury verdict was contrary to the manifest weight of the evidence.

While the Court, in making a determination as to whether or not to overturn the verdict of the jury or grant a new trial, may not simply reweigh the evidence and substitute its judgment for that of the jury, there is still an avenue by which the Court can make such a determination. Snelson v. Kamm, 204 Ill. 2d 1, 35 (2003). Overturning a jury's verdict is permissible when the

[42] People v. Smollett, tr. p.32, pp. 15-24, p.34, pp. 1-16, December 9, 2021.
[43] People v. Smollett, tr. p.32, pp. 15-24, p.34, pp. 1-16, December 9, 2021.

verdict is contrary to the manifest weight of the evidence adduced. Snelson, 204 Ill. 2d at 35. "A verdict is found to be contrary to the manifest weight of the evidence where the opposite conclusion is *clearly* evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." Snelson, 204 Ill. 2d at 35.

Specifically, in the findings of guilty in the above-captioned matter, the jury had to find (and somehow did find) the prosecution had presented proof beyond a reasonable doubt that 1) on January 29, 2019 Mr. Smollett knowingly reported to Officer Baig that a hate crime had been committed and when he did so had no reasonable grounds to believe a hate crime had been committed; 2) on January 29, 2019 Mr. Smollett knowingly reported to Officer Baig that he had received a battery and when he did so had no reasonable grounds to believe that a battery had occurred; 3) on January 29, 2019 Mr. Smollett knowingly reported to Officer Murray that a hate crime had been committed and when he did so had no reasonable grounds to believe a hate crime had been committed; 4) on January 29, 2019 around 5:55a Mr. Smollett knowingly reported to Officer Murray that he had received a battery and when he did so had no reasonable grounds to believe that he had received a battery; and 5) on January 29, 2019 around 7:15p Mr. Smollett knowingly reported to Officer Murray that a hate crime had been committed and when he did so had no reasonable grounds to believe a hate crime had been committed.

In order for all of those findings to be sustained, the jurors would have to believe beyond a reasonable doubt that Mr. Smollett consented to receiving a battery and that an attack that presented as a hate crime did not occur at all. In order to believe either of those things, the jurors would have had to completely ignore all of the bias, motive, interest and severe inconsistencies of the of the Osundairo brothers' testimony and completely disregard the defense case-in-chief,

which brought up not only issues of potential prosecutorial misconduct *vis-a-vis* witness tampering but also with further inconsistencies and lies in regards to the Osundairo brothers testimony and version of the events.

As such this Court should grant Mr. Smollett a new trial or in the alternative, set aside the jury's verdict and vacate his conviction.

8. Impermissible Questions Concerning the Defendant's Post-Arrest Silence

The rule regarding impermissible comment on a defendant's post-arrest silence has been articulated in the United States Supreme Court case of Doyle v. Ohio, 426 U.S. 610 (1976). There, the Supreme Court held that a defendant's silence after being informed of his right to remain silent is "insolubly ambiguous" and in light of the implied assurance given in the Miranda warnings that silence will carry no penalty, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Doyle at 617-618. Generally, remarks a prosecutor makes regarding a defendant's post-arrest silence are improper when used to create an inference of guilt." People v. Edwards, 309 Ill. App. 3d 447, 454 (4th Dist. 1999).

The Office of the Special Prosecutor violated Doyle during two distinct lines of questioning in the instant matter. The first instance came on November 30, 2021, during the direct examination of Detective Michael Theis by Samuel Mendenhall. The questioning was as follows:

> Q: Did you ever become aware that Mr. Smollett acknowledged that the brothers did nothing wrong?
>
> A: No.

Q: Did he ever make a statement that they did nothing wrong and never would?

A: No.

Q: To this day, has he ever come clean about this hate crime that you are aware of?

A: Not that I'm aware of.[44]

Mr. Mendenhall launched into this line of questioning after asking about a 2:54pm text message sent on February 14, 2019.[45] During this line of questioning, Mr. Mendenhall did not indicate whether or not the Defendant was a suspect when this text message was generated or whether the Defendant received *Miranda* warnings before or after this text was sent.

A defendant's post-arrest silence after being *Mirandized* may not be used to impeach his trial testimony. Doyle v. Ohio, 426 U.S. 610 (1976). This prohibition does not apply when a defendant makes a voluntary statement to the police and relates a version that is inconsistent with his trial testimony. Anderson v. Charles, 447 U.S. 404, 408 (1980). The State may remark on a defendant's post-arrest silence when his in-court testimony is inconsistent with the statement previously given to the police. People v. Frieberg, 147 Ill. 2d 326 (1992). In making this determination, the court considers whether the defendant's post-arrest statements go beyond mere denial of knowledge and are manifestly inconsistent with exculpatory trial testimony. *Id.* at 356. Where a defendant omits significant details in his initial version that are inconsistent with his trial testimony, the State may use the inconsistency to test the defendant's theory of defense. *People v. Mischke*, 278 Ill. App. 3d 252 (1995).

[44] People v. Smollett, tr. vol. I, p.174, pp. 5-13, November 30, 2021.
[45] People v. Smollett, tr. vol. I, p.173, pp. 1-13, November 30, 2021.

Mr. Mendenhall's questioning fails this initial test. None of the Defendant's voluntary statements in the instant case are inconsistent or different from his trial testimony. The testimony of the Defendant and Abimbola and Olabinjo Osundario are similar overall with the primary difference being whether the Osundairo brothers' actions were done at the behest of Mr. Smollett. The questions by Mr. Mendenhall are not nuanced enough to make this distinction. Mr. Mendenhall's line of questioning led the jury to infer that the Defendant was guilty because he never stated that the Osundario brothers did "nothing wrong." The true intent of Mr. Mendenhall's questioning became clear with the last question to the witness, when he asked: "To this day, has he ever come clean about this hate crime that you are aware of?"[46] To be sure, this question is all encompassing and seems to include any time, whether the Defendant was a suspect, pre, or post *Miranda.* This impermissible questioning directly violates the Defendant's rights under the Due Process Clause of the 14th Amendment to the U.S. Constitution by permitting the prosecutor to impeach the Defendant's exculpatory testimony told for the first time at trial and by cross-examining another witness on the fact that the Defendant failed to relay these facts to police at the time of his arrest, after Miranda warnings were given. Doyle v. Ohio, 426 U.S. 610 at 620 (1976). As no exceptions apply in the instant case, these questions violate *Doyle*.

The Illinois Supreme Court has held that it would be fundamentally unfair for a prosecutor to question a defendant about his failure to make a statement after being advised of his right to remain silent. People v. Green, 74 Ill.2d 444 (1979). Illinois goes a step further in

[46] People v. Smollett, tr. vol. I, p.174, pp. 11-12, November 30, 2021.

that "under Illinois evidentiary law, it is impermissible to impeach a defendant with his or her post-arrest silence, regardless of whether the silence occurred before or after the defendant was given Miranda warnings." People v. Clark, 335 Ill. App. 3d 758 (3rd Dist. 2002). Evidence of the defendant's post-arrest silence is considered neither material nor relevant to proving or disproving the charged offense. People v. Sanchez, 392 Ill. App. 3d 1096 (3rd Dist. 2009). The admission of such evidence is reversible error. *Id.* at 1096-97. The Illinois analysis is exemplified in People v. Miles where Clara Miles, the Defendant, asserted self-defense in her charge of murder. In order to rebut this defense, the State went into the following line of questioning of Officer Boska who transported the Defendant to the police station:[47]

> Q: At any time did the defendant say anything to you that you can recall in the car?
>
> A: No.
>
> Q: Did the defendant ever tell you she had been beaten or struck? Did she mention a belt to you at any time?
>
> Mr. Ellis: Your Honor, I object to leading the witness.
>
> The Court: Overruled. He may answer.
>
> The Witness: No, she didn't mention anything like that.
>
> Q: Did she ever—did she mention a belt to you?
>
> A: No, she did not.
>
> Q: Did she ever inform you that she had been struck by any other individual in her apartment shortly before you arrived?

[47] *People v. Miles*, 82 Ill. App. 3d 922 (1st Dist. 1980).

A: No.

Q: Did the defendant mention anything to you about being struck, beaten or harmed by another individual at 4807 West Washington?

Mr. Ellis: Your Honor, I object to repeating the same question over and over again.

The Court: He may answer.

The Witness: No.

The court in *Miles* stated, "In Doyle, the Supreme Court determined that a defendant was denied due process when a State prosecutor sought to impeach the defendant's exculpatory testimony, told for the first time at trial, by cross examining him about his failure to give the statement at the time of his arrest after receiving *Miranda* warnings." *Id.* The court in *Miles* continued by saying, "the court held that *Miranda* gives implicit assurance that silence will not be used against the defendant and the post-arrest silence is insolubly ambiguous." *Id.* Yet even more significant the Illinois Supreme court has held that the Doyle rule applies even where there is no evidence that the Defendant was previously given *Miranda* warnings. People v. Beller, 74 Ill. 2d 514 (1979).

The court in Miles held that the questioning of Officer Boska about the Defendant's total silence after he read her the *Miranda* warnings was improper. People v. Miles, 82 Ill. App. 3d 922 (1st Dist. 1980). In another example in Illinois, a defendant alleged that the State's repeated questions concerning his failure to offer an exculpatory version of events to the police when he was initially questioned violated Doyle. People v. Gagliani, 210 Ill. App. 3d 617 (1991). When the police initially questioned him, the defendant denied knowing anything about the

crimes or how his fingerprints came to be found in the decedent's home. *Id.* at 621. At trial, the defendant testified that he was acquainted with the decedent and admitted having consensual sex with her in her home on three prior occasions. *Id.* at 623. The State repeatedly questioned the defendant about his failure to provide the exculpatory version he testified to when the police asked him. The trial court sustained defense counsel's objections to such questions. *Id.* at 625-26. The defendant failed to preserve the claimed error in his post trial motion. *Id.*

The appellate court found that the plain error rule applied where the evidence was closely balanced. *Id.* at 626. The court agreed with the defendant that the State's cross-examination was improper and violated Doyle. *Id.* The prosecutor's questions improperly "suggested that [the] defendant's trial testimony was fabricated because he could have told the police officers the same story during the investigation but did not." *Id.* Where defendant's credibility was integral to his defense of consent, the improper cross-examination provided the jurors an impermissible basis for believing that defendant's trial testimony was fabricated. *Id.* at 627. Similarly in our case the credibility of the Defendant was paramount. The instant case is one where the Defendant was charged with lying to the police; hence credibility is of the utmost importance in this matter and thus makes the Doyle violation that much more egregious.

The second line of questioning came from Special Prosecutor Dan Webb during his direct of Abimbola Osundario on December 1, 2021:[48]

> Q: Sir, on February 14th, when Mr. Smollett told you he knows 1,000 percent that you and your brother did nothing wrong and never would, and he goes on to state I am making a statement so everybody else knows, after Mr. Smollett sent you that text

[48] People v. Smollett, tr. PM, p.181, pp. 4-18, December 1, 2021.

message, did Mr. Smollett ever make a statement to the public where he admitted that the hate crime was a hoax?

A: No.

Mr. Allen: Objection, your Honor.

The Court: Objection sustained. Disregard the question and answer.

Mr. Allen: Your Honor, I'm going to ask for a sidebar.

The Court: Not necessary, objection sustained. The jury will disregard that.

Mr. Webb asked whether Mr. Smollet *ever* made a statement to the public where he admitted that the hate crime was a hoax.[49] The word *ever* shows that Mr. Webb was talking about any time before or after the February 14, 2019 text message. It is not necessary to belabor the previous discussion on Doyle. Clearly, this line of questioning violates the Defendant's Due Process rights by casting doubt on the Defendant's absolute right to remain silent and improperly trying to shift the burden of proof to the Defendant. Doyle v. Ohio, 426 U.S. 610 at 620 (1976).

This line of questioning violates the law in Illinois that goes a step further in that "under Illinois evidentiary law, it is impermissible to impeach a defendant with his or her post-arrest silence, regardless of whether the silence occurred before or after the defendant was given Miranda warnings." People v. Clark, 335 Ill. App. 3d 758 (3rd Dist. 2002). Evidence of the defendant's post-arrest silence is considered neither material nor relevant to proving or disproving the charged offense. People v. Sanchez, 392 Ill. App. 3d 1096(3rd District 2009). The

[49] People v. Smollett, tr. PM, p.181, pp. 9-10, December 1, 2021.

admission of such evidence is reversible error. *Id.* at 1096-97. This line of questioning unfairly puts the Defendant's credibility into question. The cumulative effect of the line of questioning by Mr. Mendenhall and Mr. Webb was highly prejudicial and devastating to the credibility of Mr. Smollett. Sustaining an objection and giving instructions to the jury did not cure this reversible error. The jury had already heard that the Defendant was allegedly not telling police the truth in exercising his constitutional rights. This cannot stand and the guilty verdict should be reversed due to this reversible error.

As such this Court should grant Mr. Smollett a new trial or in the alternative, set aside the jury's verdict and vacate his conviction.

9. The Office of Special Prosecutor violated Mr. Smollett's due process and right to a fair trial when it improperly shifted the burden during closing arguments by informing the jury that defense counsel produced no evidence of a missing video.

Illinois appellate courts have held that a prosecutor shifts the burden of proof by suggesting to the jury that the defendant was obligated to present evidence in a trial. People v. Giangrande, 101 Ill. App. 3d 397(1st Dist. 1981). In fact, in *Giangrande*, the prosecutor's comment to a jury asking, "where's the evidence" was found to be improper and prejudicial because it may well have improperly suggested to the jury that the Defendant had a burden to introduce evidence. Id at 402.

Like the prosecutors in Giangrande, the prosecutor in the present case improperly shifted the burden of proof. For example, the prosecutor in rebuttal suggested to the jury that Mr. Smollett had the burden of producing video evidence. To be sure, during rebuttal closing arguments in the present case, the following occurred:

> Mendenhall: Next, they told you there was missing video. No video was missing. Mr. Uche gave you no evidence of any video that was missing.

Mr. Uche: Judge, objection.

THE COURT: All right. The lawyers have argued their inferences from the evidence and -- and Mr. Uche argued certain inferences. Now, he can argue his inference, as well. Overruled. Please, finish your argument, please.[50]

The comment that "Mr. Uche gave you no evidence of any video that was missing" is equivalent to asking "where's the evidence" as was the case in Giangrande.

This prosecutor's statement to the jury violated Mr. Smollett's right to a fair trial and due process right. As a result, Mr. Smollett is requesting that this Court set the jury's verdicts of guilty or in the alternative grant a new trial.

10. The verdicts against Mr. Smollett were legally inconsistent.

The Indictment against Mr. Smollett charged him with six counts of disorderly conduct based on Mr. Smollett's recounting of the same incident to several officers at different times. The counts charge that Mr. Smollett reported the following:

Count 1 – that he was the victim of a hate crime to Officer Muhammad Baig

Count 2 – that he was the victim of a battery to Officer Muhammad Baig

Count 3 – that he was the victim of a hate crime to Detective Kimberly Murray

Count 4 – report that he was the victim of a battery to Detective Kimberly Murray

Count 5 – report that he was the victim of a battery to Detective Kimberly Murray

Count 6 – report that he was the victim of an aggravated battery to Detective Robert Graves

Although the various counts allege the filing of a false police report of three technically different crimes (i.e., a hate crime, a battery and an aggravated battery), the allegations and trial

[50] People v. Smollett, tr. p.212-213, December 8, 2021.

testimony demonstrate that each of these counts was based on Mr. Smollett recounting to officers ***the identical narrative***; specifically that he was attacked at approximately 2:00 a.m. on January 29, 2019 by two men (one of whom he saw was wearing a ski mask) and that these men yelled racial and homophobic slurs at him, poured a liquid on him which turned out to be bleach, and put a rope around his neck.

On December 9, 2021, the jury returned guilty verdicts on the first five counts against Mr. Smollett; the jury found Mr. Smollett "not guilty" of Count 6.

Mr. Smollett's convictions should be vacated and set aside because the verdicts of conviction and acquittal against him are legally inconsistent. Verdicts finding the defendant guilty of one crime and not guilty of another crime, "where both crimes arise out of the same set of facts, are legally inconsistent when they necessarily involve the conclusion that the same essential element or elements of each crime were found both to exist and not to exist." People v. Murray, 34 Ill.App.3d 521, 531, 340 N.E.2d 186 (1975).

Here, the jury made inconsistent findings of fact when it convicted Mr. Smollett of Counts 1 through 5 but acquitted him of Count 6. The disorderly conduct, namely filing a false police report, charged in Counts 1 through 5 of the Indictment rests upon the same factual description of the crime as that charged in Count 6, which the jury resolved in Mr. Smollett's favor when it acquitted him on this count.

To sustain the charge alleged in Count 6 of the Indictment, the State had to prove beyond a reasonable doubt that Mr. Smollett's attackers committed a battery and that in doing so, they wore "a hood, robe, or mask to conceal [their] identity." 720 ILCS 5/12-3.05(f)(2). Although Count 6 requires an added element that the perpetrator of the battery on him was wearing a hood

or mask, a review of the record demonstrates that Mr. Smollett consistently reported the fact that the one attacker who he was able to see was wearing a ski mask.[51] In fact, Detective Murray (who is the officer to whom Mr. Smollett reported that he was the victim of a hate crime and battery on January 29, 2019, as alleged in Counts 3, 4, and 5 of the Indictment) specifically testified that Mr. Smollett reported to her that "the attacker was wearing a ski mask with an open eye area."[52] She further explained that she "had asked Mr. Smollett if the attacker had a mask on, how did he know the race of the attacker, and Mr. Smollett had told [her] that the open eye area allowed him to see the skin around the attacker's eyes and the bridge of the attacker's nose."[53] Thus, Mr. Smollett's same report of the attack could not have been false in one instance and not false in another. Murray, 34 Ill.App.3d at 531.

Because acquitting Mr. Smollett of Count 6 while convicting him on Counts 1 through 5 are legally inconsistent, the verdicts finding Mr. Smollett guilty must be vacated and set aside and a new trial should be granted in the above-entitled matter.

11. This trial court erred when it violated Mr. Smollett's Sixth and Fourteenth Amendment Rights by restricting relevant questioning during Defense cross-examination of prosecution witnesses, making uninvited, inappropriate, and prejudicial commentary of defense strategy and evidence during defense cross-examination of prosecution witnesses, as well as expressing verbal and non-verbal aversion towards defense counsels throughout the trial; all of which occurred in front of the jury.

The United States Supreme Court has long since outlined its policy consideration for safeguarding due process when that Court announced:

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[51] (People v. Smollett, tr. vol. 2, p.79, pp. 16-23, December 6, 2021) (People v. Smollett, tr. p.87, pp. 16-20, December 1,2021) (People v. Smollett, tr. p.94, pp. 10-12, December 1,2021) (People v. Smollett, tr. p.108, pp. 22-24, December 1,2021).

[52] People v. Smollett, tr. p.32, pp. 5-6, December 1,2021

[53] People v. Smollett, tr. p.32, pp. 14-18, December 1,2021

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. *Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (emphasis added).

Likewise, Illinois courts have essentially restated the Sheppard principle in rulings rejecting improper influence by trial judges. *See*, People v. Edwards, 2021 IL App (1st) 200192.

For instance, in Edwards, the First District outlined a two-prong test when determining if a trial court had made inappropriate comments that biased the jury against the Defendant. *Id. at* ¶ 59. To be sure, the Edwards Court, noted that "our supreme court has made clear that a hostile attitude toward defense counsel, an inference that defense counsel's presentation is unimportant, or a suggestion that defense counsel is attempting to present a case in an improper manner may be prejudicial and erroneous." *Id.*

However, irrespective of the prejudicial or erroneous nature of a judge's hostile attitude, the Edwards Court recognized a second requirement when that court noted, "where it appears that the comments do not constitute a material factor in the conviction, or that prejudice to the defendant is not the probable result, the verdict will not be disturbed." *Id.*

Further, the policy consideration for this two-prong test was announced in Edwards, when that Court stated:

> A trial judge has a duty to see that all persons are provided a fair trial. Accordingly, a trial judge "must refrain from interjecting opinions, comments or insinuations reflecting bias toward or against any party. Jurors are ever watchful of the attitude of the trial judge and his influence upon them is necessarily and properly of great weight, thus his lightest word or intimation is received with deference and may prove controlling. *Id.* at ¶ 57.

As a means of promoting this policy consideration, the Edwards Court suggested that comments made to counsel during trial should always be made outside the presence of the jury, and during a sidebar. *Id.*

Beyond these policy considerations, the Edwards Court provided a framework under which courts in Illinois evaluate the second requirement of the two-prong test espoused in its holding. According to the Edwards Court, Illinois courts must "consider the evidence, the context in which the comments were made, and the circumstances surrounding the trial" when evaluating the effect a trial judge's comments might have had on a jury. *Id.*

For instance, in Edwards, the First District criticized the trial judge for losing patience with defense counsel during cross-examination of a clinical psychologist in a petition to civilly commit the Defendant as a sexually violent person under the Illinois SVP Act. *Id.* at ¶ 3-23.

Specifically, the Court noted that the trial court's *sua sponte* interjections as well as asking defense counsel to "move on" amongst other similar statements during defense counsel cross-examination of the State's expert for failing to investigate medical diagnosis, suggested to the jury that the defense attorney's line of questioning was not worthwhile. *Id.* at ¶ 58.

However, during an elevation as to the impact of this error on the jury, the Edwards Court found that the error was not a *material factor* in the adverse outcome against the Defendant because the Defendant was represented by "able attorneys who vigorously cross-examined both of the State's experts, and even where the court made unnecessary comments, counsel was still permitted to explore nearly every line of inquiry sought." *Id.* at ¶ 60. *See also,* People v. Lopez, 2012 ILL App (1st) 101395. (Rejecting defendant's claim of breach of jury impartiality and

finding that trial judge's statements were not improper and were held in sidebar outside the presence of the jury).

Analysis

The Court in the instant matter displayed hostile attitude and infused prejudicial commentary throughout the trial, in full presence of the jury. In this regard, the hostile attitude and prejudicial commentary from this Court was similar to and even worse than the *sua sponte* commentary found to have been improper in Edwards.

Indeed, unlike Lopez, where the trial court made use of the sidebars suggested in Edwards, the Court in the case at bar refused to make use of sidebars during improper commentary and even rejected requests for side bars from the Defense attorneys.

Unlike Edwards, this Court's conduct cannot be excused because the hostility exhibited by this Court directly and explicitly attacked the entire theory of the case offered by the Defense. Thus, this Court's hostility not only constituted a *material factor* in the conviction of Mr. Smollett, but it also constituted *prejudice* towards Mr. Smollett.

When considering the evidence, the context in which the comments were made, and the circumstances surrounding the trial, as called for by the Edwards evaluating framework, it is apparent that this Court's prejudicial actions were both a *material factor* in the conviction but also *prejudiced* Mr. Smollett.

A. The Edwards Framework: The circumstances surrounding the trial

As a starting point, this court can take judicial notice of the carnival atmosphere surrounding Mr. Smollett's trial. To be clear, Mr. Smollett's trial was wrought with extensive

sensational media coverage from local, national, and international press alike.[54] Even before the verdict was out, most Americans who had not seen the evidence in the courtroom, were convinced that Jussie had committed the crime.[55] To make matters worse, Mr. Smollett, prior to the start of trial or arraignment on second charges had caught the ire of the President Donald Trump, the sitting United States president at the time.[56] In fact, prior to and during the trial Mr. Smollett had become a lightning rod for the political divisions plaguing the country currently.[57]

Perhaps, even more damaging was the following pronouncement of guilt from a sitting Cook County Judge before a second round of charges had been brought against Mr. Smollett and a year before a jury reviewed the evidence:

> The instant petition has its genesis in a story unique to the annals 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 television intrigue*.[58]

The above referenced statement was made not only before an investigation had commenced, or a jury impaneled, but was made by a judge in the number one constitutional

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[54]https://sports.yahoo.com/smollett-leaves-court-media-frenzy-223106130.html
[55] https://thehill.com/blogs/in-the-know/in-the-know/585067-most-think-smollett-staged-fake-hate-crime-poll
[56] https://www.cnn.com/2019/03/28/politics/donald-trump-jussie-smollett-doj-fbi/index.html
[57] https://variety.com/2019/tv/news/jussie-smollett-possible-hoax-deepens-political-divide-1203145283/
[58] (Judge Michael P. Toomin, IN RE: Appointment of Special Prosecutor (Jussie Smollett), No. 19MR00014 (Circuit Court of Cook County, Illinois, Criminal Division, June 21, 2019) (slip op. at 2). (Emphasis added).

republic that exports the Rule of Law to developing nations around the world. Additionally, this statement, along with the Order was reported on extensively in mass media.[59]

As a result, Mr. Smollett was found guilty before trial, not just in the media, or by the public but by a judicial officer whose opinion was published in the mass media for public consumption.

This negative publicity is the starting point Mr. Smollett began with under the first consideration of the Edwards Framework.

B. Hostile and prejudicial commentary; The Edwards Framework: The evidence and the context in which the comments were made.

Beyond the negative media publicity surrounding the trial, *the evidence and the context in which the prejudicial statements were made* demonstrate that the Court's comments prejudiced Mr. Smollett and were a material factor in Mr. Smollett's conviction. Below are some of the commentary that was made by the court in the presence of the jury:

Prejudicial commentary and erroneous hearsay ruling

During the cross-examination of Detective Theis, the Defense sought to establish that the detective had not thoroughly investigated the case and had thus rushed to judgment. The Defense did this by questioning the detective on whether he had investigated if Bola, one of the brothers, had attacked anyone on the empire set for being gay.[60] Specifically, the detective was questioned on whether he interviewed a man called Alex McDaniel's, whom the detective had learned from a witness, was attacked by Bola on the Empire Set. *Id.* Additionally, beyond the

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[59] https://www.chicagotribune.com/news/criminal-justice/ct-jussie-smollett-special-prosecutor-ruling-20190622-qzz75rrr5zh7znqcseqyojnbam-story.html

[60] People v. Smollett, tr. p.220, pp. 22-24, p.221, pp. 1, November 30, 2021.

rush to judgement point, the defense goal was to highlight a possible homophobic motive for the brother's attack on Mr. Smollett thus, calling into question the prosecution's hoax theory. *Id.*

However, during questioning, the prosecution made hearsay objections. For instance, the following line of questioning resulted:[61]

> Q: When you found out that Bola was working on the Empire set, did you call anyone at Empire, the studio, to found out anything about Bola, if he had had any homophobic incidents being that you were investigating a hate crime at that time?
>
> A. We did have detectives go talk to the studio.
>
> Q. Have you heard of a person called Alex McDaniels?
>
> A. I believe he's one of persons at the studio that we interviewed.
>
> Q. After your investigation of Mr. McDaniels, you learned that Bola had attacked him for being gay?
>
> MR. MENDENHALL: Objection, Your Honor. Hearsay.
>
> THE COURT: The objection will be sustained. The jury will disregard that question and answer. You've got to rephrase these things, please. That's hearsay. The jury will disregard that. Find another question, please. Move on.
>
> MR. UCHE: No pending statement, but I'll move on, Judge.

It is noteworthy that this hearsay objection was obviously not hearsay, because as Defense counsel pointed out, "there was no pending statement." To be sure, Ill. R. Evid. 801 defines a statement as an "oral or written assertion or (2) a nonverbal conduct of a person, if it is intended by the person as an assertion." Ill. R. Evid. 801 also defines hearsay as a "statement,

[61] People v. Smollett, tr. p.221, pp. 1-21, November 30, 2021.

other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Nowhere in this line of questioning does Defense counsel attempt to solicit a statement from the detective. But beyond, this obvious error, this Court then made uninvited commentary in the presence of the jury that cast defense counsel as being incompetent and wasting time when this court noted: "You've got to rephrase these things, please. That's hearsay. The jury will disregard that. Find another question, please. *Move on.*"

As a result, the court's erroneous hearsay ruling along with the prejudicial commentary had a negative impact on the Defense theories of the Chicago Police rushing to judgment and the homophobic motive of at least one of Osundairo brothers.

Even more prejudicial was the court's continued commentary on the matter as Defense counsel continued cross-examination:[62]

> Q. My question to you again is: After your investigation of the Empire set, you learned that Bola had attacked someone for being gay; am I correct?
>
> MR. MENDENHALL: Same objection, Your Honor.
>
> THE WITNESS: I learned that somebody said that happened.
>
> THE COURT: The source of the information is crucial and if it's not established, then it's worthless.
>
> MR. UCHE: Judge, I will move on. It's okay.

[62] People v. Smollett, tr. p.223, pp. 20-24, p.224, pp. 1-4, November 30, 2021.

This continued hearsay objection and subsequent ruling was erroneous. Even worse, this Court made more uninvited prejudicial commentary when it stated: "The source of the information is crucial and if it's not established, then it's worthless."

This statement was problematic as it essentially cued the jury to disregard the Defense theory which focused on police rush to judgment and a motive for the attack on Mr. Smollett. The danger posed by this Court's commentary is further highlighted by what followed next:[63]

MR. UCHE: Judge, I will move on. It's okay.

BY MR. UCHE:

Q. Did you ever try to get ahold of Mr. Alex McDaniels who had been attacked for being gay on the 9 Empire set by Bola? 10 MR. MENDENHALL: Objection, Your Honor.

THE COURT: Sustained as to the form of the question because that's a fact not in evidence.

MR. UCHE: Okay. That's fine.

BY MR. UCHE:

Q. Did you ever have a conversation yourself -- as the lead detective in this case did you ever have a conversation with Alex McDaniels one on one?

A. No, I did not.

Q. Ah. But you knew about him, right?

A. Yes.

Q. Ah. And you were investigating a crime that was a hate crime; am I correct?

[63] People v. Smollett, tr. p.224, pp. 5-23, November 30, 2021.

A. Correct.

The above-referenced colloquy demonstrates that the police officer admitted that he failed to interview Alex McDaniels and thus, this would have demonstrated a lack of proper investigation on the part of the detectives. But this point would have been lost on the jury because of this Court's preceding uninvited commentary including declaring such a line of questioning as "worthless."

Prejudicial commentary about defense attorney/rushing defense counsel:

During defense re-cross-examination of Detective Theis, the Defense sought to show that the detective had ordered fingerprint testing of a gun found in the Osundairo's home. The point of this questioning was to refute the detectives claim that he believed the gun's found in the Osundairo home to be owned by Abimbola who had a FOID card and not Olabinjo who did not have a FOID, and was a convicted felon. During this section of re-cross-examination the following exchange occurred:[64]

BY MR. UCHE:

Q You ordered fingerprints on that gun because you didn't believe it was Bola's gun; am I correct?

MR. MENDENHALL: Objection.

THE COURT: **He can say why he did it. He said why he did this multiple times. You're asking him for the fourth time** –

MR. UCHE: This is a redirect question –

THE COURT: Excuse me. Without your **editorializing and trying to add** –

[64] People v. Smollett, tr. vol. 2, p.63, pp. 7-24, p.64, pp. 1-3, November 30, 2021.

MR. UCHE: Excuse me?

THE COURT: Please, please, just -- you're just trying to be a good lawyer, but the question is wrong, and he will answer the question why he had the gun fingerprinted. You asked him before and he can answer, **but don't add the other information.**

MR. UCHE: Thank you, Judge. There was a redirect question, and the question was asked –

THE COURT: Don't argue with me, please. Just ask –

MR. UCHE: Your Honor, I am –

THE COURT: Don't argue with me.

MR. UCHE: Judge, I'm making a record.

THE COURT: Don't argue with the Court. Just ask the question, please. **I want to finish this witness.** Please. Thank you.[65]

The Court's added commentary was highly prejudicial. Additionally, the Court's commentary accusing defense counsel of "editorializing" and "adding" was erroneous since the question posed was a cross-examination question that called for an agreement, or a denial from the witness. Again, the Court's comments implied that Defense counsel was misleading the jury. This Court committed further error when it noted, "Just ask the question, please. I want to finish this witness. Please. Thank you." Such comments, no doubt left the jury with the impression that the Defense was wasting the jury's time.

[65] People v. Smollett, tr. vol.2, p. 63-64, November 30, 2021.

Additionally, the Court's declaration that "he can say why he did it. He said why he did this multiple times. You're asking him for the fourth time," was also flawed. Not just because it implied defense counsel was wasting the jury's time, but because the prosecution had asked questions about the fingerprints during re-direct examination. Additionally, during cross examination, the Court rushed Defense counsel to finish cross-examination while promising the Defense more time and scope during re-cross-examination:[66]

MR. UCHE: I think I'm at the end. Can I have five minutes to verify that with my team?

THE COURT: I want to go into redirect examination.

MR. UCHE: Can I get –

THE COURT: I'll give you more scope on your recross.

MR. UCHE: Do you want me to sit down?

THE COURT: Do you have any redirect? MR. MENDENHALL: Yes, I do.

THE COURT: Let's go. I'll give you more scope if you need it.

MR. UCHE: As long as you give me more scope. That's okay.

It is also noteworthy that the Court rushed Defense counsel on numerous occasions during the trial.[67]

Prejudicial commentary that sought to explain the detective's actions.

[66] People v. Smollett, tr. vol. 2, p.47, pp. 1-13, November 30, 2021.
[67] (People v. Smollett, tr. vol. 2, p.66, pp. 1-22, November 30, 2021) (People v. Smollett, tr. vol.1, p.220, pp. 1, November 30, 2021).

During re-cross examination the Defense aimed to highlight for the jury that the detective had failed to charge the Osundairo brothers with cocaine that police found in their home. This failure would have exposed a credibility issue for the detectives and would have added to the Defense theory that the police rushed to judgment. However, during questioning this Court committed error not only by implying that the Defense examination was not focused and by offering an explanation for the detective's lack of arrest. The following exchange occurred:[68]

> Q Defense 12. There were inventory sheets about everything that was taken in the house, am I correct, created?
>
> A Yes.
>
> Q And on one inventory sheet, it described the items as suspect heroin; am I correct?
>
> A. That's correct.
>
> Q You reviewed that?
>
> A Yes.
>
> Q Not much was said about the amount. In the State of Illinois, our laws don't care how much amount of heroin you have –
>
> MR. MENDENHALL: Objection.
>
> THE COURT: I'll be telling the jury about the law that applies to this case.
>
> MR. UCHE: For the heroin?

[68] People v. Smollett, tr. vol. 2, p.60, pp. 21-24-p.62, pp. 1-11, November 30, 2021

THE COURT: I'll be telling the jury about the law that applies to this case when that time comes. I don't want the lawyers to be asking witnesses about the law, ask questions of fact.

MR. UCHE: I'll rephrase it.

THE COURT: I'll instruct the jury about the law, not the witnesses.

MR. UCHE: All right.

BY MR. UCHE:

Q: **As a trained police officer, as a trained detective, when a person has cocaine, you don't care what amount of cocaine they have, you arrest them if they have cocaine, correct?**

MR. MENDENHALL: **Objection, your Honor.**

THE COURT: **That objection is sustained. Every situation is different for a variety of reasons.**

MR. UCHE: For cocaine and heroin?

THE COURT: You can try different questions. **Don't assume every case and every police officer, that's not fair. Ask a different question.**

By making the statement, "don't assume every case and every police officer, that's not fair. Ask a different question," this Court was essentially injecting its own opinion as to the detective's actions. However, this was an explanation the detective could have given himself during further examination by the prosecution. This Court's improper statement also implied that the Defense was being unfair to the police officer with that line of question. Thus, putting the detective in a sympathetic light with the jury.

Additionally, the Court also chided the Defense in front of the jury as being "far-afield" when this Court noted in the following exchange:[69]

> BY MR. UCHE:
>
> Q Have you arrested people for cocaine before, Detective?
>
> A Yes.
>
> Q Because -- were you doing narcotics? Because you said you've never done narcotics.
>
> A When I was a police officer.
>
> Q Did you ever go into a trap house as a police officer, not as a detective?
>
> MR. MENDENHALL: Objection.
>
> THE COURT: We're far afield. Sustained to this line of questioning.
>
> BY MR. UCHE:
>
> Q Have you ever arrested anyone for having heroin?
>
> MR. MENDENHALL: Objection.
>
> THE COURT: Sustained. Sustained. Let's talk about this case.
>
> MR. UCHE: Judge, this is about this case.
>
> THE COURT: I understand the point you're trying to make, and you can argue that point. I get it; the jury gets it. We're getting a little far here.[70]

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[69] People v. Smollett, tr. vol. 2, p.62-64, pp. 1-21, November 30, 2021

[70] People v. Smollett, tr. vol.2, p.62-64, November 30, 2021.

This line of questioning was not "far-afield" because it directly sought to question the detective on his failure to arrest the Osundairo brothers for the cocaine in their home. Moreover, by insisting "the jury gets it," the Court has improperly intervened in the jury's role as the trier of fact.

Even during the prosecution's re-direct examination, the Court sought to rope the Defense into an improper question that was asked by the prosecution. For instance:[71]

> Q Detective Theis, during your investigation, did you discover any motive why two men would attack someone who just gave them $3500 the day before?
>
> MR. UCHE: Objection, speculation.
>
> THE COURT: Sustained. Sustained. These are matters for argument. The witnesses will be here, they'll be examined and cross-examined. Sustained. You're getting a little far afield, both sides.

Uninvited prejudicial commentary

During cross examination of Detective Theis, the Defense sought to demonstrate to the jury that the detectives rushed to judgment in their investigation due to sexual orientation bias against Mr. Smollett, who is openly gay.[72] Specifically, the Defense focused on a video tape interrogation were Detective Theis's partner is heard making homophobic remarks. The following exchange occurred as the defense attempted to show the jury this bias:[73]

> Q. Who was it that used the term did you beat up Jussie's pretty face? Which one of you said it? Do you remember that?
>
> A. I don't remember either of us saying it that way.
>
> Q. I'm going to show you what is being marked Defense Exhibit 5.

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[71] People v. Smollett, tr. vol. 2, p.54, pp. 8-15, November 30, 2021.

[72] People v. Smollett, tr. p.228-231, November 30, 2021.

[73] People v. Smollett, tr. p.228-231, November 30, 2021.

BY MR. UCHE:

Q. That's you and Ola and Bola; am I correct?

A. Correct. I am the one on the right in the gray shirt.

MR. MENDENHALL: Your Honor, we're going to object to relevance.

THE COURT: I'm not finding it particularly prejudicial.

Go ahead. Let's go. Let's go. Come on.

BY MR. UCHE:

Q. Did you hear that?

A. I did.

Q. Who was that?

A. That's my partner.

Q. What's his name?

A. Michael Vogenthaler.

Q. Okay. Do you think that was appropriate, what he just said?

THE COURT: All right. Look, objection sustained.

They're in the interrogation room.

MR. UCHE: Homophobic. I'm confused as to what the objection –

THE COURT: No, no, no. Objection sustained. Ask something else. Move on.

BY MR. UCHE:

Q. Did Vogenthaler refer to Jussie's face as pretty face?

MR. MENDENHALL: Same objection, Your Honor.

THE COURT: He can answer did he say that. So what? Did he say it?

MR. UCHE: So what?

THE COURT: Go ahead. He can answer.

MR. UCHE: That's offensive. That's offensive.

THE COURT: He can answer.

MR. UCHE: That's offensive, Judge. I mean, my client –

THE COURT: Look, look, Mr. Uche –

MR. UCHE: I'm sorry. That's offensive. I'm sorry. I need a break. That's too much.

THE COURT: All right. We're going to continue your cross-examination.

MR. UCHE: Judge, I apologize.

THE COURT: I'm trying to tell you that the question needs to be rephrased.

MR. UCHE: Judge, that's inappropriate. I'm so sorry.

THE COURT: Do you have any other questions?

MR. UCHE: Judge, I might -- I might -- I've got to talk to my team for a possible motion based on that. I just need to have a second.

THE COURT: Take a second. 3 MR. UCHE: Thank you.

THE COURT: I'm going to have the jury go back to the jury room momentarily. Don't talk to about the case.[74]

This Court's comments in the above-referenced colloquy certainly prejudiced Mr. Smollett. By commenting "So what?" when referencing a detective's obvious homophobic remark, this Court announced that at the very least it did not care about homophobic comments towards gay men. More importantly, such a comment invited the jury not to take seriously the obvious bias exhibited by the detectives against Mr. Smollett's sexual orientation. Finally, this Court indicated to the jury that the Defense was asking time-wasting questions when it remarked: "lets go, lets go, come on," and "ask something else. Move on."[75] The Court attempted to cure this error with a later instruction, however, such an attempt was ineffective not just due to the generalized nature of the instruction but because the damage had already been done.[76]

Uninvited prejudicial commentary that negatively impacted defense theory of the case.

Throughout the trial, the defense sought to inform the jury that the attack on Mr. Smollett was not a hoax but a real attack from the Osundairo brothers driven by homophobia against Mr. Smollett, an openly gay man.[77] (Emphasis and colons added).

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[74] People v. Smollett, tr. vol.1, p.228-231, November 30, 2021.

[75] People v. Smollett, tr. vol. 2, p.5-7, November 30, 2021., (Suggesting to the Defense to save cross-examination of homophobic tweets for Olabinjo Osundairo as opposed to the detective who investigated the tweets).

[76] People v. Smollett, tr. vol. 2, p.4, pp. 1-22, November 30, 2021.

[77] People v. Smollett, tr. vol.2, p.36, pp. 4-9, November 30, 2021.

However, during cross-examination of Ola Osundairo, this Court hampered the Defense goal of confronting Ola about homophobic text messages he had authored. For instance, the following colloquy ensued:[78]

> Q. Did you share with Mr. Smollett when he asked you if he could trust you if you had those types of feelings towards people who you just suspected of being gay?
>
> A. If a woman did the same thing to me, I would have called her those same things.
>
> Q. Oh, you would have called a woman a fruity ass?
>
> THE COURT: Alright. Alright. We are getting a little far field here. Focus your cross, please.
>
> MS. WALKER: Your Honor, could we have a side-bar, please?
>
> THE COURT: No.
>
> MS. WALKER: Please?
>
> THE COURT: No. No. No. Get back to your cross-examination, please.
>
> MS. WALKER: Judge –
>
> THE COURT: We are on trial. You are not getting a side-bar. You don't need a side-bar let's go. You don't need a side-bar. Let's go. **These are all very collateral matters.**
>
> MS. WALKER: Judge, I object for the record.
>
> THE COURT: Noted. Noted. But we are not going to argue it right now. We are in front of the jury. We are on trial. Please continue your cross-examination.
>
> MS. WALKER: Which is why I asked for a side-bar respectfully, Your Honor.
>
> THE COURT: Please continue your cross-examination.
>
> MS. WALKER: Judge, I need a moment to confer with my team, please.
>
> THE COURT: Okay. MS. WALKER: Thank you. Your Honor, I am again after conferring with my team requesting a side-bar because there are some things that are extremely important to this case that we need to put on the record.

[78] People v. Smollett, tr. p.32, pp. 13-24, p.33-34, pp. 1-7, December 2, 2021.

THE COURT: We will have a side-bar.[79]

Not only did the Court declare legitimate questions into the homophonic motive of Olabinjo Osundairo as unfocused, but the Court repeatedly denied requests for a side bar and made the prejudicial comments without any objection from the prosecution. Perhaps worse, was the Court's declaration in front of the jury that legitimate inquiry into homophobic motive of Olabinjo involved "very collateral matters."

Additionally, the Court erred when it denied a subsequent oral motion from the Defense for a mistrial.[80] The hostile conduct of the Court violated Mr. Smollett's Sixth Amendment Right to an impartial jury and a fair trial as well as the Defendant's Fourteenth Amendment Right to due process and a fair trial. As a result, Mr. Smollett requests a new trial.

Conclusion

This prosecutor's statement to the jury violated Mr. Smollett's right to a fair trial and due process right. As a result, Mr. Smollett is requesting a new trial.

As a result, Mr. Smollett is requesting that this Court set the jury's verdicts of guilty or in the alternative grant a new trial.

12. This trial court erred when it violated Mr. Smollett's 6th Amendment Right to confront witnesses against him by restricting relevant questioning during Defense cross-examination of prosecution witnesses.

The Illinois First District has found that "while the cross-examination of a witness which is designed to explain, modify or discredit anything to which the witness has testified on direct

---

[79] People v. Smollett, tr. p.32-34, December 2, 2021.
[80] People v. Smollett, tr. p.34, pp. 15-19, p.36, pp. 14, p.37, pp. 22-23, December 2, 2021.

examination is a matter of right, the trial court retains the ability to limit its scope, and its decision to do so will not be disturbed unless it constitutes an abuse of discretion resulting in manifest prejudice to defendant." People v. Mercado, 244 Ill. App. 3d 1040, 1050 (1st Dist. 1993).

In Mercado, the trial judge restricted the defense attorneys questioning of a prosecution witness on how he injected heroin and to display his needle scarred arm in open court. *Id.* at 1051. The Defendant argued that the trial court's restriction infringed on his right to confront and attack the credibility of the prosecution witness. *Id.* The Mercado Court disagreed by noting that the defense had more than sufficiently attacked the credibility of the prosecution witness when they cross-examined heroin drug past, heroin drug treatment and heroin addiction. *Id.*

It is noteworthy that in reaching its decision, the Mercado Court drew a distinction between its case and the Illinois Supreme Court's decision in People v. Strother, 53 Ill. 2d 95 (1972); a case where the defense was restricted from attacking the credibility of a witness by questioning a prosecution witness about their drug use only days before trial.

The present case is inapposite to Mercado since the restrictions from the trial court was not restrictive of superfluous questioning but rather, restrictive on the very cornerstone and heartbeat of Mr. Smollett's defense.

As discussed in the preceding topic, the Court prevented the defense from cross-examining the detective and Olabinjo Osundairo on homophobic topics that were relevant to the Defense's theory of the case. This inability to cross-examine regarding a central component of the Defense theory violated Mr. Smollett's Sixth Amendment Right to a fair trial,

and as a result, Mr. Smollett requests that this court set aside the jury's verdicts or in the alternative grant him a new trial.

13. Improper Exhibits Allowed Into Jury Deliberations

On December 8, 2021, the instant case was given to the jury for deliberations. During extensive conferences between the Parties about what exhibits should be submitted to the jury, this Court made decisions to allow the jury to view several exhibits over the Defendant's objection.[81] The prosecution used a small portion of an interview given by the Defendant to Robin Roberts to impeach the Defendant on a singular issue of identification that was limited to a few minutes of the exhibit. The Court initially ruled that only the portion of the exhibit that was used for impeachment could be published to the jury during deliberations; later the Court sua sponte reconsidered the decision to allow the entire exhibit to be provided to the the jury during deliberations, over the Defendant's strenuous objection.[82]

The Court erred by sending the entire Good Morning America Robin Roberts interview when the tape had been used only for impeachment and by allowing demonstrative evidence to go to the jury room during jury deliberations.

---

[81] The jury requested a copy of Officer Baig's police report and a transcript of his testimony. The Court communicated the jury's request to the parties, stating, "Here's the new notes from the jury. Is there a copy of the written report of Officer Baig, and can we have a copy of the transcript for Officer Baig's testimony. So to me, these are easy answers. They cannot get the written report of Officer Baig because that's the police report not admissible in evidence. The transcript, they're asking for it, if we have it, I'm glad to give it to them." (People v. Smollett, tr. p.3, pp. 14-21, December 9, 2021).

[82] With regard to providing the Robin Roberts interview to the jury, the Court stated, "Okay. Noted. I will note that this is an exhibit in -- in great part created by the defendant himself talking about everything about the case himself voluntarily, but the jury can decide what they want to think about it. I have no problem with its admissibility, and I think I was perhaps being too cautious yesterday when I was trying to divide up what was published to the jury as opposed to what was received into evidence as to -- as the basis and grounds for what could be published to the jury now. So your objection again is timely made, you made it last night, you made it before they got it, and it's respectfully overruled." (People v. Smollett, tr. p.11, pp. 4-16, December 9, 2021).

The decision whether to allow jurors to take exhibits into the jury room is left to the sound discretion of the trial court. People v. Hunley, 313 Ill. App. 3d 16, 37-38, (2000). We will not reverse that decision unless there is an abuse of discretion to the prejudice of the defendant. Hunley, 313 Ill. App. 3d at 37-38.

However, Illinois Courts have looked at several factors regarding exhibits that were published for limited purposes before the jury. In People v. Waikong, 2020 IL App (1st) 180203 (2020). The trial judge refused to send back the entire tape of the Defendant's interview when the entire tape was properly admitted into evidence, but only a small portion was actually published to the jury at trial. In reaching its decision, the Appellate Court evaluated the reasons that the judge denied the request and held:

> We find no abuse of discretion in the trial court's determination that the defendant's entire recorded statement would not be sent to the jury room for use during deliberations. As we interpret the trial court's comments, its basis for declining to send defendant's entire video statement to the jury room was that (1) the video was four hours long, (2) only a very short portion of it was actually published to the jury during the trial, and (3) it was admitted only for impeachment and not as substantive evidence. Thus, even though the video was admitted into evidence, the trial court properly declined to send the entire video to the jury room, where the jury would have received it without guidance from the court or attorneys about how it could properly be used or interpreted as part of the jury's deliberations." *Id.* at 22-23.

The tape in Waikong was a police interrogation while the Defendant was in police custody that he could reasonably anticipate could be used against him in a court of law. In the instant case, the interview in question was given when the Defendant was a mere citizen and not suspected of any crime. He also was not under oath at the time of the interview. And most notably, the Defendant had no ability to address the entire interview on redirect.

The tape consisted of prior consistent statements and therefore not admissible during the Defendant's direct examination. The Defendant was only able to clarify and explain the portions of the video that were actively published to the jury during trial. The first time the jury saw the entire tape, a tape they did not request, was when it arrived in the jury room, independent of other exhibits, with no explanation from this Court or any context from the Defense. It stands to reason that the way the exhibit was published created an inherent danger that the jury would place undue influence on this exhibit which arrived out of "nowhere" without any explanation or context.

However, a court commits error by allowing an exhibit not admitted into evidence to be viewed by the jury. People v. Taylor, 166 Ill. 2d 414, 438 (1995). Additionally, an exhibit admitted into evidence only for impeachment purposes cannot be taken to the jury room. People v. Carr, 53 Ill. App. 3d 492, 499 (1977). It is error for a trial court to allow a witness' entire statement to go to the jury room when only a portion of the statement was presented at trial. Nelson v. Northwestern Elevated R.R. Co., 170 Ill. App. 119, 124-25 (1912). However, reversal is required only if extraneous material allowed in the jury room is prejudicial to the defendant. Carr, 53 Ill. App. 3d at 497; People v. Dixon, 2019 Ill. App. 3d 170245, 8 (Ill. App. Ct. 2019).

The evidence that was improperly admitted contained the entirety, instead of a portion of an impeaching statement, in contradiction to Illinois law. If the jury looked at the demonstrable evidence as fact, then the danger existed that the jury took an aid meant to merely offer illustration of a single issue, and was provided prejudicial information without the opportunity for the Defendant to refute or otherwise test the veracity of the evidence through cross examination. We submit that given the evidence presented in the instant case, the improperly

published exhibit may have been the "crushing blow" that led to the guilty verdict, a verdict that because of this reversible error cannot stand.

As a result, Mr. Smollett requests that this court set aside the jury's verdicts or in the alternative grant him a new trial.

CONCLUSION

WHEREFORE, the Defendant prays that for the various reasons urged before and during trial, the reasons set forth above, and every error that appears in the official transcript of proceedings, that this Honorable Court vacate the verdict of guilty and enter a verdict of not guilty notwithstanding the jury verdict, or in the alternative, grant the Defendant a new trial.

Respectfully Submitted,

By: */s/ Mark Lewis*
Attorney for Jussie Smollett

Exhibit A

CONFLICT CHECK

Attorney Nenye E. Uche of Uche P.C. has conducted a search of Uche P.C.'s legal files to determine if any conflicts exist that would make it impossible for Attorney Nenye E. Uche or Attorney Shay T. Allen to represent you in this matter.

A conflict occurs when an attorney is asked to represent a party against a former or present client. Attorneys are prohibited from providing services where a conflict exists unless all affected parties give permission in writing.

While no conflict currently exists, Attorney Uche does feel it necessary and prudent to share the following:

In 2019, Attorney Uche and Attorney Allen were contacted by a family member of Abimbola and Olabinjo Osundairo, (hereinafter, "brothers") requesting that Attorney Uche and Attorney Allen represent the brothers in the same matter for which you are seeking Attorney Uche's services. Neither Attorney Uche or Attorney Allen met with or were hired by the brothers. Please be advised that Attorney Uche and Attorney Allen did not end up representing or meeting with the brothers because they were already represented by an Attorney.

If a conflict arises in the future, Attorney Uche may not be able to continue to represent you with respect to this matter unless he obtains the appropriate waivers. At this time, Attorney Uche does not see any conflicts with regard to handling the representation of your matter. If Attorney Uche discovers any such conflicts during the course of his representation, he will bring such conflicts to your attention immediately.

Acknowledged and agreed:

JUSSIE SMOLLETT _____ Client

Date: February 19, 2021

Exhibit A-1

Gmail

M Lewis <1150mcl@gmail.com>

Fwd: People v. Smollett

3 messages

nenye uche <nenye.uche@uchelitigation.com> Mon, Jul 12, 2021 at 10:48 AM
To: Law Offices of Mark Lewis <mark@lewisandthelaw.com>

---------- Forwarded message ---------
From: **Shahina Khan (Chief Judge's Office)** <Shahinaf.Khan@cookcountyil.gov>
Date: Mon, Jul 12, 2021 at 9:29 AM
Subject: RE: People v. Smollett
To: Mendenhall, Samuel <SMendenh@winston.com>, Wieber, Sean <SWieber@winston.com>, Gloria Rodriguez <gloria@gloriaslaw.com>, Webb, Dan <DWebb@winston.com>, Durkin, Matt <MDurkin@winston.com>, nenye uche <nenye.uche@uchelitigation.com>, tina@geragos.com <tina@geragos.com>, sallen@attorneyshaytallen.com <sallen@attorneyshaytallen.com>, Heather Widell <heather@thelawofficehaw.com>, Tamara Walker <twalker@defendchicago.com>, Ricky Granderson <rgrandersonlaw@gmail.com>
CC: Zipporah Freeman (Chief Judge's Office) <Zipporah.Freeman@cookcountyil.gov>, Brian Goodrich (Chief Judge's Office) <Brian.Goodrich@cookcountyil.gov>

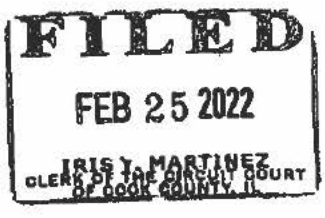
All -

Please find below an important message from Honorable Judge James B. Linn:

"Disclosure to the OSP

The Court finds the enclosed Conflict Check letter it previously received in camera between Attorney Nenye Uche and Jussie Smollett may have relevance to the evidentiary hearing scheduled for July 14, 2021. Accordingly, the Court is making the enclosed available to the OSP for review. "

Sincerely,
Shahina Khan
Staff Attorney
773-674-3705



--
Nenye E. Uche Esq.
Attorney & President
UCHE P.C.
314 N. Loomis St.
Suite G2
Chicago IL 60607

P: (312) 380-5341
F: (312) 376-8751
Toll Free: 888.251.4428
W: https://uchelitigation.com/nenye-e-uche/

Attorney & Former Prosecutor

As a trial lawyer and former Chicago prosecutor, Attorney Uche aggressively uses his legal expertise in protecting his clients rights in the areas of criminal law, personal injury, medical malpractice and civil rights.

Exhibit B

After Chicago activist is barred from courthouse during Smollett trial, judge issues statement saying he didn't intend to ban anyone.

By ANNIE SWEENEY, MEGAN CREPEAU, JASON MEISNER
CHICAGO TRIBUNE |

DEC 05, 2021 AT 5:41 PM

A Chicago activist and writer was barred from the George N. Leighton Criminal Courthouse for two days during the Jussie Smollett trial last week. The judge issued a statement late Friday evening within an hour of a Tribune report that activist and rap artist Bella BAHHS (Black Ancestors Here Healing Society) had been told Tuesday she was not allowed inside the courtroom or the courthouse.

Cook County Judge James Linn contacted the newspaper through a spokeswoman and clarified his position in an email.

"To clarify, the Hon. James Linn did not intend to ban anyone from the courtroom, but asked that the person in question not be in the first row," the emailed statement read. "The court is open to the public, subject to COVID-19 precautions that limit the number of people in the courtroom to 57."

BAHHS told the Tribune last week that she was asked to leave the courtroom shortly after she gave an interview to reporters in the lobby of the building.

BAHHS sat in the front row of Linn's courtroom with the Smollett family Tuesday during morning testimony and then was asked at the lunch break by

Smollett's media representative if she would be willing to speak to reporters in the lobby of the courthouse.
She agreed and then returned for afternoon testimony. Later that afternoon she was told by the media representative that the judge wanted her to leave the courtroom. BAHHS said she was escorted out of the courthouse. When she returned Thursday to attend the trial again, she was again escorted out of the building.

The Cook County sheriff's office confirmed in a statement that Linn made a "verbal" order barring "an individual seated in the gallery of his courtroom from the George N. Leighton Criminal Court Building for the remainder of the trial of Jussie Smollett" and that sheriff's deputies had escorted this person out in compliance with the order.

BAHHS said she felt physically threatened and violated by her removal because the guards were armed.

The barring of BAHHS from the courtroom came after Linn had issued a verbal directive to attorneys to not speak with the media. The order was never detailed in writing.

BAHHS said she did not speak to Smollett's defense attorneys about her statements to the media beforehand. She told the media representative what she intended to say.

When asked by the Tribune about the statements, BAHHS said she told reporters that while she did not know Smollett to be someone who would falsify a story, she did know "CPD to be that type of department though." Within hours, she was told she could not be in the courtroom. BAHHS told the Tribune at that time that she believed it was because of her opinions.

"I think he did not want me in that courtroom because of my political views," she said.

BAHHS, who was born Ambrell Gambrell, grew up in the Austin neighborhood and is a rapper, artist and writer who has interviewed Cook County State's Attorney Kim Foxx and Mayor Lori Lightfoot for the TRiiBE, a digital media platform that covers the Black experience in Chicago.

She is a founder of the Sister Survivor Network, an organization that focuses on the impact of incarceration on Black women and girls, and is an abolitionist activist who is pushing to replace the criminal justice system with non-law-enforcement resources that address the root causes of crime.

Linn was contacted midafternoon Friday by the Tribune with questions about both the order and the fact BAHHS had been removed from the courtroom. He did not respond with the statement until just before 9 p.m.
Linn, however, had addressed his concerns about the media on the day BAHHS was removed after special prosecutor Dan Webb alerted him to some "press issues."

Linn first responded that the lawyers had agreed they were not going to make comments or statements to the press.

"It's not a gag order; it's just an agreement between the lawyers," he said.
Linn went on to say he was aware of "statements made in the lobby" and then mentioned "a self-described activist."

Linn also said, "Nobody is going to infect this trial."

BAHHS, reached late Friday night, said she did not believe it was a miscommunication and pointed out that Linn never addressed her directly about any of it. She said attributing what happened to a miscommunication also absolves "anyone from being held accountable."

"My right to access a public space as a voting and taxpaying member of the public was violated," she said.

BAHHS, before Linn issued his statement, said her removal was particularly concerning because it threatens to limit and prejudice the public's understanding of court proceedings.

"It's about who gets to bear witness to these public trials," she said.

 Exhibit I

Gmail M Lewis <1150mcl@gmail.com>

Order Regarding Limited Space in the Courtroom 10/20/21

2 messages

Marisa Tisbo (Chief Judge's Office) <Marisa.Tisbo@cookcountyil.gov> Wed, Oct 20, 2021 at 3:21 PM
To: Tamara Walker <twalker@defendchicago.com>, Law Offices of Mark Lewis <mark@lewisandthelaw.com>, "Wieber, Sean" <SWieber@winston.com>, "Webb, Dan" <DWebb@winston.com>, "Mendenhall, Samuel" <SMendenh@winston.com>, "Durkin, Matt" <MDurkin@winston.com>, Heather Widell <heather@thelawofficehaw.com>, Ricky Granderson <rgrandersonlaw@gmail.com>, Tina Glandian <tina@geragos.com>, nenye uche <nenye.uche@gmail.com>, Shay Allen <sallen@attorneyshaytallen.com>
Cc: "Zipporah Freeman (Chief Judge's Office)" <Zipporah.Freeman@cookcountyil.gov>

Good afternoon,

Below is an order from Judge Linn regarding capacity limits in the courtroom during trial.

Best,

Marisa Tisbo

--
People v. Jussie Smollett
20 CR 03050-01
October 20, 2021

Order Regarding Half Capacity Limits in the Courtroom

The Court wants to remind all parties that due to Covid-19, the George N. Leighton Criminal Courthouse is still operating with capacity limitations in courtrooms. Specifically, each courtroom is only allowed to be filled to half capacity. The Court requests each party to inform the Court of the number of seats they would like to reserve in advance for their legal teams, personal visitors, etc. Also, in light of the no camera order, the Court would like to reserve some seating for working mainstream press, which is why the Court requests a general head count from each party.

Judge James B. Linn

--

Marisa Tisbo
Staff Attorney, Office of the Chief Judge
Circuit Court of Cook County
Criminal Division
2600 S. California
Chicago, IL 60608
(773) 674-7294
marisa.tisbo@cookcountyil.gov

Exhibit C

From: "Marisa Tisbo (Chief Judge's Office)" <Marisa.Tisbo@cookcountyil.gov>
Date: October 20, 2021 at 2:21:35 PM CDT
To: Tamara Walker <twalker@defendchicago.com>, Law Offices of Mark Lewis <mark@lewisandthelaw.com>, "Wieber, Sean" <SWieber@winston.com>, "Webb, Dan" <DWebb@winston.com>, "Mendenhall, Samuel" <SMendenh@winston.com>, "Durkin, Matt" <MDurkin@winston.com>, Heather Widell <heather@thelawofficehaw.com>, Ricky Granderson <rgrandersonlaw@gmail.com>, Tina Glandian <tina@geragos.com>, nenye uche <nenye.uche@gmail.com>, Shay Allen <sallen@attorneyshaytallen.com>
Cc: "Zipporah Freeman (Chief Judge's Office)" <Zipporah.Freeman@cookcountyil.gov>
Subject: Order Regarding Limited Space in the Courtroom 10/20/21

Good afternoon,

Below is an order from Judge Linn regarding capacity limits in the courtroom during trial.

Best,

Marisa Tisbo

People v. Jussie Smollett
20 CR 03050-01
October 20, 2021

Order Regarding Half Capacity Limits in the Courtroom

The Court wants to remind all parties that due to Covid-19, the George N. Leighton Criminal Courthouse is still operating with capacity limitations in courtrooms. Specifically, each courtroom is only allowed to be filled to half capacity. The Court requests each party to inform the Court of the number of seats they would like to reserve in advance for their legal teams, personal visitors, etc. Also, in light of the no camera order, the Court would like to reserve some seating for working mainstream press, which is why the Court requests a general head count from each party.

Judge James B. Linn

Marisa Tisbo
Staff Attorney, Office of the Chief Judge
Circuit Court of Cook County
Criminal Division
2600 S. California
Chicago, IL 60608
(773) 674-7294
marisa.tisbo@cookcountyil.gov

Exhibit E

From: Marisa Tisbo (Chief Judge's Office) Marisa.Tisbo@cookcountyil.gov
Subject: Order Regarding Defense's Modification of Head Count for Trial 11/8/21
Date: November 8, 2021 at 11:55 AM
To: Tamara Walker twalker@defendchicago.com, Law Offices of Mark Lewis mark@lewisandthelaw.com, Wieber, Sean SWieber@winston.com, Webb, Dan DWebb@winston.com, Mendenhall, Samuel SMendenh@winston.com, Durkin, Matt MDurkin@winston.com, Heather Widell heather@thelawofficehaw.com, Ricky Granderson rgrandersonlaw@gmail.com, Tina Glandian tina@geragos.com, nenye uche nenye.uche@gmail.com, Shay Allen sallen@attorneyshayallen.com
Cc: Zipporah Freeman (Chief Judge's Office) Zipporah.Freeman@cookcountyil.gov

Good morning all,

Below please see an order from Judge Linn regarding the submitted head counts for trial and requested modifications.

Best,
Marisa Tisbo

People vs. Jussie Smollett
20-CR-0305001

Court's Memorandum Regarding Defense's Modification of Head Count for Trial

To All Attorneys of Record:

The Court has received the head counts for trial from both the defense and OSP. The Court again would like to emphasize and remind both sides that due to Covid-19 protocol and required social distancing, courtrooms in the George N. Leighton Criminal Courthouse are only allowed to be filled to half capacity. ***Therefore, the defense's request for 42 seats needs to be modified and reduced.***

Under the current health and safety protocols, capacity in Judge Linn's courtroom is limited to 57 persons total. This number includes attorneys and all court personnel. As of now, 14 seats have been reserved for mainstream media, along with the 11 seats previously requested by the OSP. The Court would also like to remind both parties that seats need to be kept open for the general public to view the trial. Thus, the Court is asking the defense to modify their current number of 42 seats, regardless of whether those persons will not all be present at the same time or on the same days. **Additionally, the Court would like to inform the defense that due to these capacity limits and to allow room for the parties and court personnel, media, and the general public, Mr. Smollett is only allowed 4 personal guests at trial per day.**

The Court requests that the defense send a second, modified head count by the end of this week, **no later than Friday, November 12, 2021.**

Judge James B. Linn

Marisa Tisbo
Staff Attorney, Office of the Chief Judge
Circuit Court of Cook County
Criminal Division
2600 S. California
Chicago, IL 60608
(773) 674-7294
marisa.tisbo@cookcountyil.gov

Gmail

M Lewis <1150mcl@gmail.com>

Exhibit J

Order Regarding Defense's Modification of Head Count for Trial 11/8/21

2 messages

Marisa Tisbo (Chief Judge's Office) <Marisa.Tisbo@cookcountyil.gov> Mon, Nov 8, 2021 at 12:55 PM
To: Tamara Walker <twalker@defendchicago.com>, Law Offices of Mark Lewis <mark@lewisandthelaw.com>, "Wieber, Sean" <SWieber@winston.com>, "Webb, Dan" <DWebb@winston.com>, "Mendenhall, Samuel" <SMendenh@winston.com>, "Durkin, Matt" <MDurkin@winston.com>, Heather Widell <heather@thelawofficehaw.com>, Ricky Granderson <rgrandersonlaw@gmail.com>, Tina Glandian <tina@geragos.com>, nenye uche <nenye.uche@gmail.com>, Shay Allen <sallen@attorneyshaytallen.com>
Cc: "Zipporah Freeman (Chief Judge's Office)" <Zipporah.Freeman@cookcountyil.gov>

Good morning all,

Below please see an order from Judge Linn regarding the submitted head counts for trial and requested modifications.

Best,
Marisa Tisbo

FILED
FEB 25 2022
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

People vs. Jussie Smollett
20-CR-0305001

Court's Memorandum Regarding Defense's Modification of Head Count for Trial

To All Attorneys of Record:

The Court has received the head counts for trial from both the defense and OSP. The Court again would like to emphasize and remind both sides that due to Covid-19 protocol and required social distancing, courtrooms in the George N. Leighton Criminal Courthouse are only allowed to be filled to half capacity. ***Therefore, the defense's request for 42 seats needs to be modified and reduced.***

Under the current health and safety protocols, capacity in Judge Linn's courtroom is limited to 57 persons total. This number includes attorneys and all court personnel. As of now, 14 seats have been reserved for mainstream media, along with the 11 seats previously requested by the OSP. The Court would also like to remind both parties that seats need to be kept open for the general public to view the trial. Thus, the Court is asking the defense to modify their current number of 42 seats, regardless of whether those persons will not all be present at the same time or on the same days. **Additionally, the Court would like to inform the defense that due to these capacity limits and to allow room for the parties and court personnel, media, and the general public, Mr. Smollett is only allowed 4 personal guests at trial per day.**

The Court requests that the defense send a second, modified head count by the end of this week, **no later than Friday, November 12, 2021.**

Judge James B. Linn

Exhibit F

From: Marisa Tisbo (Judiciary - Law Clerks) Marisa.Tisbo@cookcountyil.gov
Subject: People v. Smollett — Updated Media List
Date: November 24, 2021 at 3:16 PM
To: Tamara Walker twalker@defendchicago.com, Law Offices of Mark Lewis mark@lewisandthelaw.com, Webb, Dan DWebb@winston.com, Wieber, Sean SWieber@winston.com, Mendenhall, Samuel SMendenh@winston.com, Durkin, Matt MDurkin@winston.com, Heather Widell heather@thelawofficehaw.com, Ricky Granderson rgrandersonlaw@gmail.com, Tina Glandian tina@geragos.com, nenye uche nenye.uche@gmail.com, Shay Allen sallen@attorneyshayallen.com
Cc: Zipporah Freeman (Judiciary - Law Clerks) Zipporah.Freeman@cookcountyil.gov

Good afternoon all,

Attached please see an updated list of media outlets and their representatives that will be granted media access and credentials at trial.

Best,
Marisa Tisbo

Marisa Tisbo
Staff Attorney, Office of the Chief Judge
Circuit Court of Cook County
Criminal Division
2600 S. California
Chicago, IL 60608
(773) 674-7294
marisa.tisbo@cookcountyil.gov

Reporter list Smolle...1.docx

Exhibit D

From: Heather Widell heather@thelawofficehaw.com
Subject: Re: Order Regarding Reminder for Head Count at Trial 11/3/21
Date: November 5, 2021 at 4:09 PM
To: Marisa Tisbo (Chief Judge's Office) Marisa.Tisbo@cookcountyil.gov
Cc: Tamara Walker twalker@defendchicago.com, Law Offices of Mark Lewis mark@lewisandthelaw.com, Ricky Granderson rgrandersonlaw@gmail.com, Tina Glandian tina@geragos.com, nenye uche nenye.uche@gmail.com, Shay Allen sallen@allorneyshayallen.com, Zipporah Freeman (Chief Judge's Office) Zipporah.Freeman@cookcountyil.gov

Good afternoon all,

The seven defense attorneys (Mr. Uche, Ms. Glandian, Mr. Allen, Mr. Lewis, Ms. Walker, Mr. Granderson, and Ms. Widell) expect to have a total of 14 guests/personnel in addition to themselves.

Mr. Smollett has indicated a list of 20 people who he expects to be present at different points throughout the trial.

Total headcount including attorneys and Mr. Smollett = 42 *(with 20 of those likely not all being present at once).*

Please let us know if you have any questions or concerns in regards to this headcount.

Enjoy your weekend.

Heather A. Widell, *Esq.*

Attorney at Law - The Law Offices of Heather A. Widell

1507 E. 53rd Street, Suite 2W, Chicago, Illinois 60615

Phone (773) 955-0400 | Fax (773) 955-1951 |

Alternate Phone: (847) 780-6876 |

On Wed, Nov 3, 2021 at 8:51 AM Marisa Tisbo (Chief Judge's Office) <Marisa.Tisbo@cookcountyil.gov> wrote:

> Good morning,
>
> Please see below an order from Judge Linn regarding the Court's previously requested head count for trial.
>
> Best,
> Marisa Tisbo
>
> ---
>
> *People vs. Jussie Smollett*
> 20-CR-0305001
>
> **Court's Memorandum Regarding Reminder for Trial Head Count**
>
> To All Attorneys of Record:
>
> The Court wants to again remind the parties that due to Covid-19, the George N. Leighton Criminal Courthouse is still operating with capacity limitations in courtrooms. Specifically, each courtroom is only allowed to be filled to half capacity.
>
> On October 20, 2021, the Court requested that both sides send the Court a general head count of how many seats would be required for trial in light of these capacity limitations. While the Court has already received a response from the OSP detailing their estimated head count for trial, it has not yet received a response from the defense. **This order serves as a reminder to the defense to send to the Court its requested number of seats by the end of this week – no later than Friday, November 5, 2021.**
>
> Judge James B. Linn

Exhibit G

From: Marisa Tisbo (Judiciary - Law Clerks) Marisa.Tisbo@cookcountyil.gov
Subject: People v. Smollett -- Updated Media List
Date: November 24, 2021 at 3:16 PM
To: Tamara Walker twalker@defendchicago.com, Law Offices of Mark Lewis mark@lewisandlhslaw.com, Webb, Dan DWebb@winston.com, Wieber, Sean SWieber@winston.com, Mendenhall, Samuel SMendenh@winston.com, Durkin, Matt MDurkin@winston.com, Heather Widell heather@thelawofficehaw.com, Ricky Granderson rgrandersonlaw@gmail.com, Tina Glandian tina@geragos.com, nenye uche nenye.uche@gmail.com, Shay Allen sallen@attorneyshayallen.com
Cc: Zipporah Freeman (Judiciary - Law Clerks) Zipporah.Freeman@cookcountyil.gov

Good afternoon all,

Attached please see an updated list of media outlets and their representatives that will be granted media access and credentials at trial.

Best,
Marisa Tisbo

Marisa Tisbo
Staff Attorney, Office of the Chief Judge
Circuit Court of Cook County
Criminal Division
2600 S. California
Chicago, IL 60608
(773) 674-7294
marisa.tisbo@cookcountyil.gov

Reporter list Smolle...1.docx

Exhibit K

Gmail

M Lewis <1150mcl@gmail.com>

People v. Smollett — Updated Media List

1 message

Marisa Tisbo (Judiciary - Law Clerks) <Marisa.Tisbo@cookcountyil.gov> Wed, Nov 24, 2021 at 4:16 PM
To: Tamara Walker <twalker@defendchicago.com>, Law Offices of Mark Lewis <mark@lewisandthelaw.com>, "Webb, Dan" <DWebb@winston.com>, "Wieber, Sean" <SWieber@winston.com>, "Mendenhall, Samuel" <SMendenh@winston.com>, "Durkin, Matt" <MDurkin@winston.com>, Heather Widell <heather@thelawofficehaw.com>, Ricky Granderson <rgrandersonlaw@gmail.com>, Tina Glandian <tina@geragos.com>, nenye uche <nenye.uche@gmail.com>, Shay Allen <sallen@attorneyshaytallen.com>
Cc: "Zipporah Freeman (Judiciary - Law Clerks)" <Zipporah.Freeman@cookcountyil.gov>

Good afternoon all,

Attached please see an updated list of media outlets and their representatives that will be granted media access and credentials at trial.

Best,
Marisa Tisbo

Marisa Tisbo
Staff Attorney, Office of the Chief Judge
Circuit Court of Cook County
Criminal Division
2600 S. California
Chicago, IL 60608
(773) 674-7294
marisa.tisbo@cookcountyil.gov

Reporter list Smollett trial updated 11.18.21.docx
15K

1. CHICAGO TRIBUNE
Megan Crepeau or Jason Meisner

2. NEW YORK TIMES
Robert Chiarito

3. CHICAGO SUN-TIMES
Matt Hendrickson

4. WSJ
Ben Kesling

5. ASSOCIATED PRESS
Don Babwin, but if he can't do it for some reason, it will be Sarah Burnett or Michael Tarm

6. WBBM
No reporter named yet (contact Julie Mann)

7. CNN
No reporter named yet (contact Bill Kirkos)

8. WTTW
Matt Masterson

9. FOX-32
Dane Placko and Sally Schulze (they would alternate depending on schedule)

10. WLS-TV, ABC 7 Chicago
Reporter not determined yet due to scheduling. Jeff Marchese is the contact.

11. WMAQ NBC-Chicago
No set reporter yet. Possibly Charlie Wojciechowski, Christian Farr, Phil Rogers and/or Chris Hush.

12. WGN
Mike Lowe

13. CBS-2 CHICAGO
Charlie De Mar

14. WBEZ
Patrick Smith

15. CHERYL COOK – freelance sketch artist for NBC, WGN and CBS

16. NATIONAL REVIEW
Luther Abel

17. NBC UNIVERSAL
Samira Puskar

18. USA TODAY

19. COURTHOUSE NEWS SERVICE

20. FOX NEWS NATIONAL
Matt Finn

21. WLS COURTROOM ARTIST
L.D. Chukman

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT OF APRIL D. PREYAR

I, April D. Preyar, a resident of the city of Chicago, County of Cook, State of Illinois being duly sworn under oath, do attest and affirm as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I have been so licensed for 22 years.
2. On November 29 – December 9, 2021, I was a spectator at the felony trial of Jussie Smollett in room 700 of the Leighton Criminal Court Building.
3. On multiple occasions throughout the trial, I, along with other members of the public including Mark Clements (a Burge torture survivor), Ambrell Gambrell, Fania Davis and others were not allowed to view the court proceedings.
4. Upon my arrival on the afternoon of Monday, November 29, 2021, I was told by sheriff's deputies and a sergeant that due to COVID19 protocol, there was a limit of 57 people allowed into the courtroom each day and there would be no overflow room. The 57 people were to be comprised of: the defendant, 12 jurors, 2 alternatives, 7 defense attorneys, the judge, the clerk, the court reporter, 2 Sheriff's Deputies, 21 members of the media, 10 members of the defendant's family, and 7 people (attorneys and staff) on the prosecution team.
5. On Monday, November 29, 2021, no members of the public were allowed to observe voir dire.
6. On that same evening, 21 members of the media were initially allowed into the courtroom to observe opening statements. Three members of the public –Mark Clements,

another individual and I were allowed in the courtroom. After approximately 10 minutes, Sheriff's Deputies told Mr. Clements and I, along with the media representatives, to leave the courtroom. We were told we could observe through the side door of the courtroom. From this vantage point, many of us were huddled together. Due to the close proximity, I felt at risk to contract COVID--19. I was able to either see or hear, depending on where I stood. I was never effectively able to do both. There was no overflow room.

7. On Tuesday, November 30, 2021, I arrived between 8:15 and 8:20 am. I was allowed into the courtroom. There were well over 65 people in the courtroom. There was no overflow room.
8. On Wednesday, December 1, 2021, I again arrived between 8:15 and 8:20 am. I was again allowed into the courtroom. There were well over 75 people in the room. There was no overflow room.
9. On Thursday December 2, 2021, I again arrived between 8:15 – 8:30 in the morning, I was allowed into the courtroom. Initially, there were well over 75 people in the room, including multiple packed benches.
10. On the afternoon of Thursday, December 2, 2021, Court recessed for lunch until 2pm. When I returned to court at 2:30, I found a line of 8 people waiting to get into the courtroom. The Sheriff's Deputies told us that "the COVID19 numbers changed" over lunch. I waited for 3 hours to no avail. I watched multiple people leave the room but was still not allowed in. Aside from courtroom personnel and parties, only members of the media were allowed into the courtroom for the rest of the day.
11. On Friday, December 3, 2021, the trial recessed for the entire day.

12. On Monday, December 6, 2021, I once again arrived at 8:15 am. I arrived before the attorneys on both sides, the clerk, the judge, yet I still was not allowed into the courtroom.
13. On Monday, December 6, 2021 at 9:58 a.m., I called Chief Judge Timothy Evans' office to complain about the public being barred from the courtroom. I was transferred to Mary Wisniewski. I explained the situation to her. She told me to send her an email.
14. On that same day at 10:37 am, I emailed Mary Wisniewski.
15. On that same day at 10:39 am, I called Chief Judge Erika Reddick's office to also lodge a complaint about the public being barred from the trial.
16. On that same day at 11:11 am, Judge Reddick called me directly. She said she was unaware of the issue until I called and wished to resolve it.
17. While I spoke with Judge Reddick, the sheriff's deputies immediately began opening the front and side doors of the courtroom to allow the public access.
18. Judge Reddick told me that if there were any other problems to call her back.
19. On that same day at 11:23 am, I called Judge Reddick's office again. I informed her administrative assistant that the problem was not resolved. If I stood at the front door of the courtroom, I could see and not hear. If I stood at the side door, I could hear and not see.
20. On that same day at 1:15 pm, Judge Reddick called and said an overflow room would be set up after during the lunch break.
21. To date, Judge Timothy Evans has never responded to me. I emailed Mary Wisniewski on December 9, 2021, to inform her that Judge Reddick resolved the issue when the office did not.

22. From the afternoon of Monday, December 6 until the conclusion of the trial on December 9, 2021, I was able to view the trial on a large television screen in the overflow room along with members of the media, other attorneys, members of the public and members of the defendant's family.

23. Prior to the opening of the overflow room, I witnessed members of the media, members of the public and members of the defendant's family being turned away at the courtroom door.

24. Prior to the opening of the overflow room, I witnessed an arbitrary application of the so-called COVID-19 restrictions over the course of several days.

April D. Preyar, Affiant

Subscribed and sworn to before me

This 17th day of February, 2022.

SARAH GRIFFITH
Official Seal
Notary Public - State of Illinois
My Commission Expires Sep 18, 2022

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

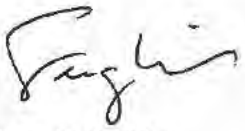
[7] The Post-Trial Motion also references unidentified demonstrative exhibits and trial transcripts that went back to the jury room, but the crux of this alleged error focuses on the *Good Morning America* tape.

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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AFFIDAVIT OF MICHAEL D. FREEMAN Med.Dr., Ph.D., MScFMS, MPH, MFFLM

NOW COMES, Dr. Michael D. Freeman, who after being duly sworn, deposes and states under oath as follows:

1. I have been asked to provide an analysis regarding whether incarcerating Mr. Jussie Smollett in an Illinois jail or prison poses a potentially deadly risk to his health from an epidemiological and medical perspective.

2. It is my opinion that the incarceration of Mr. Smollett, in jail or prison, poses a substantially increased risk to his health.

3. The **COVID-19 pandemic**, also known as the **coronavirus pandemic**, is an ongoing global pandemic of coronavirus disease 2019 (COVID-19) caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

4. As of 6 March 2022, the pandemic had caused more than 445 million cases and approximately 6 million deaths worldwide, making it the deadliest pandemic in recent history.

5. Prisons and jails all around the United States of America, including Illinois, have been particularly hit with the Covid pandemic at every wave of the pandemic.

6. Incarceration in a jail or prison setting poses a heightened danger to Mr. Smollett's health when taking his current health status, including compromised immunity, into account.

7. My qualifications to render the opinions described herein are as follows:

8. I am a doctor of medicine and an epidemiologist, and my field of expertise is forensic medicine and forensic epidemiology. I hold a doctor of medicine degree (Med.Dr.) from Umeå University (Sweden), a (Ph.D.) in epidemiology in epidemiology from Oregon State University, a master of forensic medical sciences (MScFMS) from the University of Verona and the Academy of Forensic Medical Sciences (UK), and a master of public health (MPH) in epidemiology and biostatistics, also from Oregon State University, *inter alia*. I have completed a 2-year postdoctoral fellowship in forensic pathology at Umeå University in Sweden, and am a member of the Faculty of Forensic and Legal Medicine (FFLM) of the Royal College of Physicians (UK), equivalent to board certification in forensic medicine. I am a fellow of the American College of Epidemiology (ACE) and the American Academy of Forensic Sciences (AAFS). I am a US Fulbright fellow, having held a 3-year

appointment as a Fulbright Specialist in the field of Forensic Medicine with the U.S. Department of State (2017-20).

9. I serve as a tenured Associate Professor of Forensic Medicine and Epidemiology at Maastricht University (NL), and a Clinical Professor of Psychiatry at Oregon Health and Science University (OHSU) School of Medicine. I have taught at these institutions for the past 24 years in forensic medicine and epidemiology. I currently serve or have served as an associate editor or editorial board member of 13 peer reviewed scientific journals, and have published approximately 220 scientific papers, abstracts, book chapters and books on topics largely related to scientific methods of causal evaluation. I have provided testimony in more than 400 civil and criminal trials in state and Federal court throughout the United States, Canada, Australia, and Europe. Please see my CV for further details.

FURTHER AFFIANT SAYETH NOT.

Michael D. Freeman Med.Dr., Ph.D., MScFMS, MPH, MFFLM

Sworn to and subscribed before me
this 7th day of MARCH, 2022.

Kathleen M. Smith
NOTARY PUBLIC

OFFICIAL STAMP
KATHLEEN MARIE SMITH
NOTARY PUBLIC-OREGON
COMMISSION NO. 1017092
MY COMMISSION EXPIRES OCTOBER 06, 2025

My Commission Expires: 10.06.2025