Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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

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

Charging the above named defendant with:

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

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

EVENTS AND ORDERS OF THE COURT:

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

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

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3/11/2019 APPEARANCE FILED

3/11/2019 NOTICE OF MOTION/FILING

3/12/2019 DEFENDANT ON BOND

MARTIN, LEROY K, JR.

3/12/2019 APPEARANCE FILED

MARTIN, LEROY K, JR.

3/12/2019 OTHER

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

MARTIN, LEROY K, JR.

3/12/2019 CONTINUANCE BY AGREEMENT

MARTIN, LEROY K, JR.

3/14/2019 CASE ASSIGNED

MARTIN, LEROY K, JR.

3/14/2019 DEFENDANT ON BOND

WATKINS, STEVEN G

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

JACK B. PRIOR

WATKINS, STEVEN G

3/14/2019 DEFENDANT ARRAIGNED

WATKINS, STEVEN G

3/14/2019 PLEA OF NOT GUILTY

WATKINS, STEVEN G

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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

3/14/2019 ADMONISH AS TO TRIAL IN ABSENT

WATKINS, STEVEN G

3/14/2019 MOTION FOR DISCOVERY

WATKINS, STEVEN G

3/14/2019 DISCOVERY ANSWER FILED

WATKINS, STEVEN G

3/14/2019 CASE MANAGEMENT ORDER ENTERED

WATKINS, STEVEN G

3/14/2019 STATE DISCOVERY DEADLINE SET

WATKINS, STEVEN G

3/14/2019 DEFENDANT PRETRIAL MOTION DISCOVERY DEADLINE SET

WATKINS, STEVEN G

3/14/2019 FINAL PRETRIAL CONFERENCE DATE SET

WATKINS, STEVEN G

3/14/2019 TARGET DISPOSITION DATE SET

WATKINS, STEVEN G

3/14/2019 PERMISSION TO LEAVE JURISDICTION

SEE COURT ORDER

WATKINS, STEVEN G

3/14/2019 PRE-TRIAL SERVICE MONITORING PROGRAM

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

WATKINS, STEVEN G

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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

3/14/2019 OTHER

G/J TRANS. TENDERED TO BOTH PARTIES

WATKINS, STEVEN G

3/14/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

3/14/2019 REQUEST EXTERNAL MEDIA COVERAGE - FILED

3/14/2019 HEARING DATE ASSIGNED

3/25/2019 ORDER ENTERED

SETTING HEARING ON REQUEST FOR EXTENDED MEDIA COVERAGE

WATKINS, STEVEN G

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

D1375606 CITY OF CHICAGO

3/26/2019 DEFENDANT ON BOND

WATKINS, STEVEN G

3/26/2019 CASE ADVANCED

WATKINS, STEVEN G

3/26/2019 OTHER

STRIKE DATES 4/2 & 4/17

WATKINS, STEVEN G

3/26/2019 NOLLE PROSEQUI

WATKINS, STEVEN G

3/26/2019 OTHER

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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

BOND D 1375606 TO CITY OF CHICAGO

WATKINS, STEVEN G

3/26/2019 CHANGE PRIORITY STATUS

WATKINS, STEVEN G

3/28/2019 OTHER

PETITION WITHDRAWN

MARTIN, LEROY K, JR.

4/1/2019 NOTICE OF MOTION/FILING

4/2/2019 DEFENDANT NOT IN COURT

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

WATKINS, STEVEN G

4/2/2019 DEFENDANT NOT IN COURT

FOR THE MEDIA NATALIE SPEARS & JACQUE GIANNI

WATKINS, STEVEN G

4/2/2019 DEFENDANT NOT IN COURT

ASA: CATHY MCNEIL STEIN & JESSIA SCHELLER

WATKINS, STEVEN G

4/2/2019 DEFENDANT NOT IN COURT

FOR D. SMOLLETT BRIAN WATSON

WATKINS, STEVEN G

4/2/2019 MOTION FILED

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

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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

WATKINS, STEVEN G

4/2/2019 MOTION FILED

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

WATKINS, STEVEN G

4/2/2019 MOTION FILED

STATES HEARING

WATKINS, STEVEN G

4/2/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

5/9/2019 DEFENDANT NOT IN COURT

WATKINS, STEVEN G

5/9/2019 MOTION FILED

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

WATKINS, STEVEN G

5/9/2019 MOTION FILED

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

WATKINS, STEVEN G

5/9/2019 MOTION FILED

THE SEALING ORDER AND STATUS ON COOK COUNTY STATE ATTY MTN

WATKINS, STEVEN G

5/9/2019 MOTION FILED

TO MODIFY SEAL ORDER

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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

WATKINS, STEVEN G

5/9/2019 WITNESSES ORDERED TO APPEAR

FOR ARGUMENTS

WATKINS, STEVEN G

5/9/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

5/16/2019 DEFENDANT NOT IN COURT

WATKINS, STEVEN G

5/16/2019 MOTION FILED

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

WATKINS, STEVEN G

5/16/2019 MOTION FILED

TO VACATING THE SEALING ORDER.

WATKINS, STEVEN G

5/16/2019 MOTION FILED

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

WATKINS, STEVEN G

5/16/2019 WITNESSES ORDERED TO APPEAR

FOR RULING

WATKINS, STEVEN G

5/16/2019 CONTINUANCE BY AGREEMENT

WATKINS, STEVEN G

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

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CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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

5/23/2019 DEFENDANT NOT IN COURT

WATKINS, STEVEN G

5/23/2019 MOTION FILED

ATTY FOR INTERVENORS , ATTY. FOR STATE. MEDIA INTERVENORS

WATKINS, STEVEN G

5/23/2019 MOTION FILED

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

WATKINS, STEVEN G

5/23/2019 MOTION FILED

ORDER GRANTED SEE 10 PAGE COURT ORDER.

WATKINS, STEVEN G

5/23/2019 MOTION FILED

STATES MOTION TO MODIFY SEALING ORDER IS MOOT.

WATKINS, STEVEN G

5/23/2019 CHANGE PRIORITY STATUS

WATKINS, STEVEN G

5/23/2019 VACATE ORDER

ORDER OF MARCH 26, 2019

HEARINGS

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

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER: 19CR0310401

SMOLLETT, JUSSIE

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

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

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

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

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

PLEAS, DISPOSITIONS AND SENTENCES:

Plea:

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

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

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

Disposition:

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

Sentence (Credit):

Clerk of the Circuit Court of Cook County

PEOPLE OF THE STATE OF ILLINOIS

VS **NUMBER: 19CR0310401**

SMOLLETT, JUSSIE

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

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

Date: 3/4/2020

Dorothy Brown

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

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

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

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

DEFENDANT'S POSITION STATEMENT REGARDING SENTENCING

The Defense, on behalf of Mr. Jussie Smollett, by and through one of his attorneys, Nenye E. Uche, states its sentencing recommendation and position prior to the March 10, 2022, sentencing hearing.

1. **The City's request is excessive when compared to other Disorderly Conduct charges.**

At the outset, the Defense acknowledges that Mr. Smollett has been convicted of Class 4 felony charges. Nevertheless, Mr. Smollett's low level, non-violent offense has received outsized and extraordinary national and international publicity, the type which is usually reserved for murder, terrorism, and other serious or violent crimes.

Mr. Smollett's low-level and non-violent offense has become so big that the City of Chicago has now taken the extraordinary step of writing a victim impact statement. But that is not all. After the City agreed to accept Mr. Smollett's $10,000 bail bond property in 2019 as payment in full, in connection with the dismissal of the charges against him, and after the court sanctioned the punishment and dismissed

the charges against Mr. Smollett, the City has now reneged on its agreement and asks this Court to require Mr. Smollett to pay restitution in the amount of $130,106.00 to cover expenses related to the police investigation of his convicted offense. (City of Chicago—Victim Impact Statement p. 3). Perhaps more alarming is the City's justification for its request: Mr. Smollett's crime caused police to *waste time and money*. (City of Chicago—Victim Impact Statement p. 3).

As an initial matter, the amount of time and money spent on the investigation in this case was not a foreseeable, ordinary consequence of filing a police report (even a "false" one). Indeed, the filing of a police report, in and of itself, does not necessitate a sprawling investigation, nor does it, as a practical matter, usually result in an investigation as extensive as the one the CPD chose to undertake in this case; rather, the filing of a police report enables the police and prosecutors to decide *whether and how* to investigate a particular report, and it was the City and/or the CPD in this case, and not Mr. Smollett, who decided to devote an enormous amount of resources to investigating Mr. Smollett's report that he had been attacked (despite the fact that he was not severely injured or robbed; nor did he request any special treatment or attention).

Moreover, the City's justification for seeking an exorbitant restitution amount because of the time and money spent investigating this matter is flawed because the disorderly conduct statute makes no provision for any such aggravation. *See* 720 ILCS 5/26-1. Instead, the City's outrage that substantial police resources were wasted has already been accounted for and is the entire basis for the creation of this

low-level Class 4 disorderly conduct charge. Moreover, police will always be compensated by salary for doing what they are supposed to do: investigate all reported crimes.

Also, unlike most crimes that have enhancement ladders based on certain aggravating factors,[1] it is noteworthy that the Illinois legislature specifically declined to impose any such enhancement ladders for *waste of resources* within the disorderly conduct laws.[2] Specifically, there is no enhancement ladder based on the amount of money or hours wasted as the result of a false police report. Instead, all false reports, regardless of the amount of time or money spent investigating the report, are lumped together under the same low-level Class 4 felony designation.

This should not come as a surprise. Because unlike the offense of murder, armed robbery, assault, and other progeny of more serious or violent offenses, the offense of disorderly conduct is inherently a mere public nuisance. Thus, complaints and outcries over wasted money and time are tangential issues that obfuscate the legislature's intent in creating the disorderly conduct laws.

In any event, the publicity and fallout from this case have significantly harmed Mr. Smollett's entertainment career and any income stream from this source has been discontinued, all while he has incurred substantial legal fees defending against two

---

[1] Illinois criminal statutes have numerous enhancement ladders. For instance, speeding laws contain provisions which enhance a petty speeding ticket to a misdemeanor, depending on the miles per hour over the posted speed limit. *See*, 625 ILCS 5/11-601.5. *See also*, 720 ILCS 5/18-2 (armed robbery statute containing enhancements).

[2] The only enhancement ladder under the disorderly conduct laws is for false reports of terrorism type acts. In such instances, the false reporting rises to the level of a Class 3 felony. *See*, 720 ILCS 5/26-1 (B).

separate criminal indictments and a civil case by the City. As a result, Mr. Smollett cannot pay the requested $130,106.00 restitution amount unless he is allowed to do so over a period of time, while he is out of custody and trying to regain his livelihood.

2. **This Court should adopt Mr. Smollett's previous punitive sanctions as his sentence in this case since a second round of punitive sanctions would violate Mr. Smollett's Fifth Amendment and Eighth Amendment Rights.**

Mr. Smollett faces the unenviable distinction of being punished twice for the exact same offense. To be sure, in 2019, a criminal court in Cook County ratified punitive sanctions taken against Mr. Smollett as part of a contractual agreement between the State of Illinois, through its agent, the Cook County State's Attorney's Office, and Mr. Smollett. As part of the agreement, Mr. Smollett was effectively fined when he was divested of his $10,000 bail bond– an amount that was paid to the City of Chicago and an amount that has never been returned to him.[3] Additionally, Mr. Smollett was required to perform community service, a punitive step that he cannot undo.

Three years later, Mr. Smollett faces a second round of possible punitive sanctions. But given that Mr. Smollett has already been punished once for this offense, a second round of punitive sanctions against Mr. Smollett for the same offense will no doubt run afoul of the Fifth and Eighth Amendments to the United States Constitution.

[3] At no point has the first set of sanctions been deemed to have been illegal by any court, nor has it been deemed to have been procured illegally by any of the parties. Furthermore, this money was not returned to Mr. Smollett once the prior proceedings were voided and a new indictment was filed.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits double punishment. *People v. Henry*, 204 Ill.2d 267, 282 (2003). Because there was no rational, nonpunitive reason for the previous $10,000 bond forfeiture in this case, it constitutes "punishment" for the offense at issue, and any further punishment for the same offense would violate the Double Jeopardy Clause of the Fifth Amendment.

The prospect of being sanctioned twice for the same offense also violates the heart and the spirit of the Eighth Amendment Clause which prohibits "cruel and unusual" punishment.

In the spirit of the contractual obligations of the 2019 agreement and to avoid a double sanction and thus, running afoul of the Eighth Amendment, this Court should impose second chance probation. Diversions from prosecutions involving sanctions are common practice in Illinois, especially as it pertains to charges of disorderly conduct. And Mr. Smollett qualifies for second chance probation because he has no violent record which would disqualify him from second chance probation and his offense of disorderly conduct is one of the offenses explicitly listed as qualifying within the second chance probation statute. *See, e.g.*, 720 ILCS 5/5.-6-3.4 (a-1). This gives Mr. Smollett the opportunity to comply with any other court orders while also giving him the chance–as the 2019 agreement did–to avoid a felony record.

Thus, to avoid violating Mr. Smollett's constitutional rights under the Fifth and Eighth Amendments, the Defense respectfully requests that this Court adopt the

2019 $10,000 fine imposed and the community service performed, and sentence Mr. Smollett to second chance probation.

3. **The Defense is respectfully requesting that Mr. Smollett be sentenced to a term of second chance probation due to his lack of felony criminal background or criminal convictions and his documented contribution to society.**

After findings of guilt by a jury in the above-captioned matter, a pre-sentence investigation was ordered. It is noteworthy that after a review of Mr. Smollett's background, his family history, work history, personal history and interviewing of his contacts, the Cook County Adult Probation Department determined that Mr. Smollett is of a "low risk level." (Attachment 1—Adult Probation Department Report).

Specifically, the probation department found that Mr. Smollett scored a 7 when using the "Ohio Risk Assessment System" framework. *Id.* Importantly, under this system, offenders are given ratings based on assigned investigative scores. *Id.* (Attachment 2—Risk Categories Sheet). To be certain, the categories sheet in use in Cook County states:

Scores:	Rating:
0-14	Low
15-23:	Moderate
24-33:	High
34+:	Very High. *Id.*

It should not be ignored that Mr. Smollett got an assigned investigative score of a 7 which is in the lowest range possible. *Id.* Under this framework, the recommendation for a low-risk male is "minimum supervision or non-reporting supervision." *Id.*

The Defense urges this Court to also consider the fact that there is little to no chance of recidivism on the part of Mr. Smollett. Numerous letters of support have documented his extraordinary and prolific dedication to community service. And this dedication was certainly not lip-service, as Mr. Smollett has demonstrated his dedication and passion for helping others since his childhood, both before and after he attained commercial success as an actor. Additionally, this Court heard extensive unimpeached testimony from Pamela Sharp, which detailed Jussie's numerous contributions to charity including giving large amounts of his earnings to charities.

Apart from his charity contributions and dedication to the community, Mr. Smollett comes from a well-grounded family. Mr. Smollett does not come from the stereotypical celebrity family who has lost touch with society. At every stage of the trial, Mr. Smollett's close-knit family was in attendance. And since this matter first began in early 2019, Mr. Smollett has complied with all court orders and appeared for every single hearing at which his attendance was required.

Moreover, as Mr. Smollett testified, his siblings have contributed to various charities across the United States and are employed in various industries ranging from education, consulting, culinary, advanced technology, data services and entertainment.

Finally, Mr. Smollett was not convicted of a violent offense. Rather, his conviction for a non-violent, public nuisance charge does not warrant jail or prison time since the risk to public safety is non-existent and there are a number of creative ways to ensure rehabilitation without the imposition of incarceration.

It is against this backdrop that the Defense respectfully requests that Mr. Smollett be given second chance probation for all the foregoing reasons already discussed. His family background, lack of a past felony record, the non-violent nature of this case, as well as his dedication to helping others, demonstrate that Mr. Smollett has a strong foundation that will prevent him from being back in front of this Court or any other court.

4. Sentencing Mr. Smollett to jail or prison is a step backward in the wrong direction from the policy perspective of ending racially biased sentences.

It is no longer a controversial issue, and is indeed fact, that black men in particular (and minorities in general) are sentenced harshly for non-violent offenses and sentenced more harshly for all offenses when compared to their white counterparts.

Across the United States, scholars and politicians alike have recognized that racial bias against black men seems to have permeated all levels of the criminal justice system.[4] This issue is so serious that in an era of aggressive partisanship and political tribalism, the chorus for a solution to this racial bias is uniquely bipartisan.

In the last decade, both the Obama and Trump administrations have sought to tackle the vast myriad of issues that have stemmed from racial bias in the criminal justice system. For instance, the Obama administration's focus on criminal justice

[4] *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Evidence Brief, Elizabeth Hinton *et al.*, May, 2018, https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf

reform included executive actions that sought to reduce prison populations.[5] Perhaps, one of the driving forces for this was the former president's recognition that "with just 5% of the world's population, the United States incarcerates 25% of the world's prisoners."[6]

For its part, the Trump administration successfully passed into law the First Step Act, an Act aimed at reforming federal prisons and sentencing laws in order to reduce incarcerations.[7]

Reform has also taken hold in Illinois. For instance, Governor Bruce Rauner's Administration enacted reforms aimed at reducing the incarceration rates of persons convicted of Class 4 felonies in Illinois.[8]

As of today, the march for incarceration reduction continues and sentencing Mr. Smollett, an African American man, to prison or jail for a non-violent Class 4 felony sets this march backwards and perpetuates racial animosity towards black men in the criminal justice system. Mr. Smollett is not accused of a false report of terrorism related acts, nor is he accused of murder or any violent offense whatsoever. Instead, Mr. Smollett has been accused of that class of felonies that can be categorized as a public nuisance; nothing more, nothing less.

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[5] *Four Ways the Obama Administration Has Advanced Criminal Justice Reform*, Grainne Dunne, Brennan Center for Justice, May 19, 2016, https://www.brennancenter.org/our-work/analysis-opinion/four-ways-obama-administration-has-advanced-criminal-justice-reform.

[6] Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811 (2017).

[7] *The First Step Act of 2018: An Overview*, Congressional Research Service, March 4, 2019, https://sgp.fas.org/crs/misc/R45558.pdf

[8] Reforming Illinois' nonviolent Class 4 felony statutes, Lauren Krisai, Reason Foundation Director of Criminal Justice Reform, Spring 2016, https://files.illinoispolicy.org/wp-content/uploads/2016/05/Sentencing-reform-and-Executivesummary.pdf

When compared to similar crimes around the United States, any call for incarceration only highlights the racial bias in the criminal justice system or that Mr. Smollett is being singled out for disparate treatment. From time immemorial, false accusations against black men have persisted.[9] More recently, with the rise of mass media technology and telecommunications, documentation of false reports against black men and minorities have increased ten-fold.[10]

The irony should be clear. Most of the false reporting against black men go unprosecuted, under-prosecuted or dropped entirely, without fanfare.[11]

It is noteworthy that *this* Court has historically followed the positive trend of reform and decarceration on Class 4 felonies. The cases below help to highlight this:

1. Benjamin Kinsey (21CR0059101) Amended from Class 2 Narcotics to a Class 4 PCS for 24 months probation;

2. Jonathan Smith (21CR0969301) Amended from Agg. UUW Class 4 to a Class A Attempt UUW for 2 days;

3. Yvonne Hayes (21CR0535701) Amended from Class 4 Damage to Govt. Property to Class A Criminal Damage to Property for TCS/TAS;

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[9] *From Emmett Till to Pervis Payne—Black Men in America Are Still Killed for Crimes They Didn't Commit*, Innocence Project, Daniele Selby, 07/25/20, https://innocenceproject.org/emmett-till-birthday-pervis-payne-innocent-black-men-slavery-racism/. *See also, Black men — not white guys — face false allegations and a presumption of guilt*, The Washington Post, Petula Dvorak, October 08, 2018, https://www.washingtonpost.com/local/black-men--not-white-guys--face-false-allegations-and-a-presumption-of-guilt/2018/10/08/a397fb44-cb06-11e8-a3e6-44daa3d35ede_story.html

[10] *From 'BBQ Becky' to 'Golfcart Gail,' list of unnecessary 911 calls made on blacks continues to grow*, ABC News, Bill Hutchinson, October 19, 2018, https://abcnews.go.com/US/bbq-becky-golfcart-gail-list-unnecessary-911-calls/story?id=58584961

[11] *Public outrage, legislation, follow calls to police about black men*, The Washington Post, Maria Sacchetti *et al.*, May 27, 2020, https://www.washingtonpost.com/national/public-outrage-legislation-follow-white-womans-call-to-police-about-black-man-in-central-park/2020/05/27/94b219a6-a049-11ea-9590-1858a893bd59_story.html*See also, Charge dropped against woman who made false claim to cops about Black man in Central Park*, U.S. News, Peter Szekely, https://www.reuters.com/article/us-global-race-usa-new-york/charge-dropped-against-woman-who-made-false-claim-to-cops-about-black-man-in-central-park-idUSKBN2AG1Y7

4. Kelvin West (15CR1293101) Class 4 6-303 (previously convicted of SIX 6-303s from prior DUI) for 18 months probation;

5. Kerry Perkins (16CR0951902) Finding of guilty on lesser included Class 4 PCS for 2 years probation; Concurrent with Case No. 16CR0987001 finding of guilty on lesser included Class 4 PCS for 2 years probation;

6. Timothy Wright (19CR0867901) Class 4 6-303 (previously convicted of one 6-303 from prior DUI) for 18 months probation;

7. Christopher Friedle (19CR0139401) Class 4 Domestic Battery/Prior for 2 years probation;

Lastly, the Defense is not asking this Court to treat Mr. Smollett's convictions causally, rather, the Defense is asking this Court to treat the offense for what it is: a public nuisance, for which incarceration is not only appallingly unjustified, but also, symptomatic of the racial bias against black men within the criminal justice system.

Perhaps the outrageousness of sending Mr. Smollett to jail or prison for this particular low-level Class 4 felony was best captured during a Chicago Sun Times interview of one of Mr. Smollett's jurors when that juror stated: "We didn't know what the penalty would be. Are we sending this guy to jail?" she said. The juror said she hopes Smollett will get probation."[12]

5. Any incarceration poses a safety risk to Mr. Smollett due to his prominent status and the negative backlash he has faced publicly.

[12] *Jussie Smollett juror: Split decision was 'favor' to actor after debate over final count*, Chicago SunTimes, Matthew Hendrickson, December 10, 2021, https://chicago.suntimes.com/2021/12/10/22828351/jussie-smollett-juror-interview-hate-crime-hoax?_amp=true

The high publicity this case received is a clear indication of Mr. Smollett's high profile. Individuals of Mr. Smollett's high profile will undoubtedly be designated special needs, and as a result, assigned to administrative segregation or protective custody, both euphemisms for solitary confinement.[13] This is also necessary especially as Mr. Smollett has received enormous negative backlash that has unfortunately turned into racial and sexual orientation abuse as multipole internet discussion forums can demonstrate.

The psychological trauma and physical risk to those assigned to solitary confinement should be apparent and obvious.[14] The mental toll of seclusion from not just the outside world but from other inmates will cause irreparable harm to Mr. Smollett; a harm not justified by a conviction for a low-level non-violent offense. In fact, the imminent harm that solitary confinement poses has triggered calls for its ban across the United States.[15]

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[13] *Solitary Confinement*, MacArthur Justice Center, https://www.macarthurjustice.org/issue/advocating-for-the-rights-of-the-incarcerated/solitary-confinement/#:~:text=Solitary%20confinement%20has%20many%20euphemisms,management%20unit%2C%20secure%20housing%20unit

[14] *What are the effects of solitary confinement on health*? MedicalNewsToday, Jayne Leonard, August 6, 2020, https://www.medicalnewstoday.com/articles/solitary-confinement-effects. *See also, The hidden damage of solitary confinement*, Knowable Magazine, Ramin Skibba, 06.22.2018, https://knowablemagazine.org/article/society/2018/hidden-damage-solitary-confinement

[15] *A Blue Print For Ending Solitary Confinement by the Federal Government*, ACLU & the Federal Anti-Solitary Taskforce (FAST), https://www.aclu.org/sites/default/files/field_document/the_federal_anti-solitary_taskforce_proposal_1.pdf. *See also, New York Will End Long-Term Solitary Confinement in Prisons and Jails, The New York Times*, Troy Closson, Published April 1. 2021Updated April 24, 2021, https://www.nytimes.com/2021/04/01/nyregion/solitary-confinement-restricted.html

Additionally, solitary confinement is not a guarantee of safety. Indeed, prisoners in solitary confinement are not immune from unexplained and suspicious deaths.[16]

Beyond the safety issues, the financial cost and expense of protecting Mr. Smollett in custody will be enormous and unnecessary and ultimately defeats the purpose of the outrage surrounding the resources wasted during the police investigation of his case.

6. Any incarceration poses a health risk to Mr. Smollett due to the Covid pandemic crisis within the prison and jail systems.

The Covid pandemic was particularly damaging to the prison population around the United States and in Illinois.[17] Another wave of infections or new strains could hit at any moment. The problem was so bad that during this global pandemic, numerous experts called for the decarceration and early release of non-violent offenders in Illinois.[18] To make matters worse, prison staff and inmates are unfortunately often the last to receive medical treatment and booster vaccinations.[19] Importantly, Mr. Smollett has been deemed at high health risk of grave illness should

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[16] *Private pathologist questions whether Jeffrey Epstein died by suicide; medical examiner stands by conclusion*, USA Today, Kristine Phillips & Kevin Johnson, October 30, 2019, https://www.usatoday.com/story/news/politics/2019/10/30/pathologist-questions-whether-jeffrey-epstein-died-suicide/4096618002/

[17] *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, Brennan Center for Justice, March 27, 2020, updated, January 7, 2022, https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic

[18] Op Ed: *To slow the spread of COVID-19, Illinois must decarcerate*, Chicago Tribune, Erika Tyagi et al., September 20, 2021, https://www.chicagotribune.com/opinion/commentary/ct-opinion-slow-covid-19-illinois-decarcerate-prisons-20210920-ruf2yvaif5ethgj6wtde3fauz4-story.html

[19] *Most Illinois prison staff haven't gotten Covid-19 boosters*, InjusticeWatch, Adam M. Rhodes (The Chicago Reader), January 7, 2022, https://www.injusticewatch.org/news/prisons-and-jails/2022/illinois-prison-staff-covid-19-boosters/

he be exposed to Covid infection while in jail or prison. (Attachment 3—Dr. Michael D. Freeman Medical Opinion Affidavit & Accompanying CV).

7. Public policy disfavors any retributive sentence based on public outrage or the unpopularity of Mr. Smollett.

It cannot be disputed that Mr. Smollett has suffered extraordinary negative backlash because of this case. This negative backlash has been justified by anger and outrage over the perceived *time and expense wasted* by the CPD. This has been the focus, not just of the outsized public discourse, but in fact, the driving theme of the prosecution's case during the trial and no doubt it will be the main theme during sentencing.

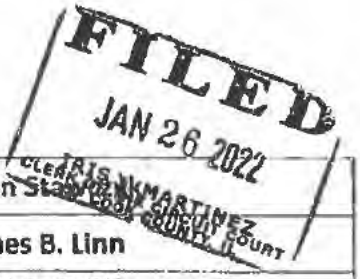
But as previously discussed, *time and expense wasted* are not factors to be considered under the Illinois disorderly conduct statutes. They are not and have never been aggravating factors under Illinois' disorderly conduct laws. Instead, such arguments are political in nature, designed to stoke public outrage and resentment towards Mr. Smollett.

The Rule of Law must trump any arguments that are not based in actual law or delineated statutory aggravation. Instead, within the framework of the Rule of Law, this Court should consider that this low-level non-violent Class 4 felony is not in the same class of felonies that involve public safety, violence, assaults, or terrorism.

Respectfully submitted,

/s/ Nenye E. Uche
Nenye E. Uche
One of the Attorneys for Defendant

CIRCUIT COURT OF COOK COUNTY
ADULT PROBATION DEPARTMENT
PRE-SENTENCE
INVESTIGATIVE REPORT



DATE ORDERED:	12/9/21	ASSIGNED OFFICER:	Jason Stawczyk
DATE DUE:	1/27/22	JUDGE:	James B. Linn
DEFENDANT:	Jussie Smollett	LOCATION:	2650 S. California Ave. Chicago, Illinois 60608
A/K/A:	See Arrest History	ASST. STATE ATTY:	As Assigned
CLIENT'S ADDRESS	[redacted]	DEFENSE ATTY:	Nenye Liche
TELEPHONE:	[redacted]	INVESTIGATING P.O.	Jason Stawczyk
VERIFICATION:	N/A	I.R. #:	2397168
DATE OF BIRTH:	6/21/82	C.B. #:	019771648
PLACE OF BIRTH:	Santa Rosa, California	S.I.D. #:	IL37521501
SEX/RACE:	Male/Black	F.B.I. #:	679854TC5
HGT/WGT:	5'11"/175 LBS	D.L. #:	N/A
EYES/HAIR:	Brown/Black	DNA CONFIRMATION DATE:	N/A
U.S. CITIZEN	Yes		
DATE ENTERED U.S.A.	N/A		
ALIEN REGISTRATION #:	N/A		

CASE NUMBER	ARREST DATE	CHARGE	DISPOSITION	DISPOSITION DATE
20CR0305001	2/21/19	False Report of Offense (Counts 1-5)	Verdict of Guilty Presentence Investigation Ordered	12/9/21

CUSTODY STATUS: Mr. Smollett is presently on Bond.

BACKGROUND

PRIOR CRIMINAL INVOLVEMENT (CHECK ALL THAT APPLY)

JUVENILE		ADULT			
☐	PROBATION	☒	MISDEMEANOR	☒	PROBATION
☐	INCARCERATION	☐	FELONY	☐	INCARCERATION
				☐	PAROLE

INCOME:	Supported by Savings and Acting Residual Payments	SOURCE:	Residual Income From Television Series – Empire - Verified by Mr. Smollett on January 4, 2022
EDUCATION, HIGHEST LEVEL: 12th Grade			
MILITARY:	No	BRANCH:	N/A
DISCHARGE:	N/A		
CURRENT MARITAL STATUS:	Single	NUMBER OF CHILDREN:	0
SUPPORT PAYMENTS:	N/A		
SUBSTANCE USE:	ALCOHOL PROBLEM/USE:	Yes	
	DRUG PROBLEM/USE:	Yes	

PSYCHOLOGICAL INFORMATION:	Yes	
PHYSIOLOGICAL INFORMATION:	Yes	
GANG INVOLVEMENT:	No	

OTHER PERTINENT INFORMATION:

-The information contained in this investigation has been reported by the defendant and has not been verified unless otherwise noted.

-On December 29, 2021, Mr. Smollett was asked to provide a phone number of a close relative, so the information he gave for his Presentence Investigation interview could be confirmed. Mr. Smollett provided a phone number to his sister, Janine Smollett. On January 19, 2022, this Investigating Officer spoke to Janine Smollett, and she was able to confirm Mr. Smollett's information.

HISTORY OF CONVICTIONS:

JUVENILE

CASE NUMBER	ARREST DATE	CHARGE	DISPOSITION	DISPOSITION DATE
		No Prior Juvenile Adjudications of Delinquency Discovered		

ADULT

CASE NUMBER	ARREST DATE	CHARGE	DISPOSITION	DISPOSITION DATE
7VY03633 (Los Angeles, California)	7/19/07	Count 2 – DUI Alcohol/.08 Percent (23152 (B)) Count 4 – Drive W/O License (12500 (A)) -Count 5 – Give False Information To Peace Officer (31 VC))	-Sentenced to 36 Months Summary Probation (Count 2), Serve 48 Hours Los Angeles County Jail, and Pay Fees and Fines -Sentenced to 24 Months Summary Probation (Counts 4 and 5), Complete Community Service, and Pay Fees and Fines	9/14/07

OFFICIAL VERSION OF THE OFFENSE:

The defendant, Jussie Smollett, was arrested by the Chicago Police Department on February 21, 2019 on the charge of Disorderly Conduct – False Report of Offense.

On February 11, 2020, the defendant was indicted and charged with False Report of Offense (6 Counts) under case number 20CR0305001. On December 9, 2021, the defendant appeared before the Honorable James B. Linn and was found guilty of False Report of Offense (Counts 1-5). A Presentence Investigation was ordered and returnable on January 27, 2022.

DEFENDANT'S VERSION OF THE OFFENSE:

Mr. Smollett was advised by his attorney to not comment on the specifics of the offense.

CO-DEFENDANT STATEMENT:

N/A

SOCIAL HISTORY:

The defendant, Jussie Smollett reported he was born on June 21, 1982 in Santa Rosa, California to the union of Joel Smollett Sr. and Janet Smollett. Mr. Smollett indicated he was raised in Los Angeles, California "mainly in Woodland Hills." The defendant explained he was raised by both parents for most of his childhood. Mr. Smollett added his parents separated when he was 15 years old. He was asked to describe his childhood, and he answered, "I had a really good childhood. There were some issues with my father due to my sexuality, but I had a good upbringing." Mr. Smollett denied there was any abuse or neglect when he was growing up with his family. He denied ever trying to run away from home as a child. The defendant discussed the Department of Children and Family Services never intervened with his family for any reasons.

Mr. Smollett stated his father, Joel Smollett Sr., passed away in 2015. The defendant added his father had "battled cancer." Mr. Smollett disclosed towards the end of his father's life, they were "really close." The defendant added "There were some issues before, but I talked to him often and visited him in California." The defendant reported his mother, Janet Smollett, is 69 years old, resides in Woodland Hills, California, is retired, and presently has some health issues. Mr. Smollett was asked to describe his relationship with his mother, and he answered, She is "my everything." The defendant noted he is in contact with his mother every day.

Mr. Smollett discussed he has 5 siblings that were also born to the union of his parents, and their names are Joel Smollett Jr., age 44, Janine Smollett, age 41, Jurnee Smollett, age 35, Jake Smollett, age 31, and Jocqui Smollett, age 28. The defendant indicated he is "extremely close" with his siblings. Mr. Smollett explained that none of his siblings have ever been arrested, and none have ever had any type of substance abuse issues.

On January 19, 2022, this investigating Officer spoke to the defendant's sister, Janine Smollett, and she confirmed that their father, Joel Smollett Sr., passed away on January 7, 2015. She noted there were "some issues with her father and Jussie, but toward the end of their father's life, they became closer." She discussed after their parents separated, Jussie was raised mostly by their mother, Janet Smollett. Janine Smollett verified there was never any abuse or neglect in their family, and she added, "My parents were very attentive. They were not neglectful." Janine Smollett verified there are a total of 6 siblings.

EDUCATION/EMPLOYMENT/FINANCIAL SITUATION:

Mr. Smollett indicated he graduated 8th grade in 1997 from Oak Meadow, which is an independent study program through Oak Meadow Home Schooling. The defendant explained he attended his freshman year at Calabasas High School located in Calabasas, California. Mr. Smollett added during the 10th grade, he was home schooled through Oak Meadow Home Schooling. The defendant discussed he then enrolled in Paramus Catholic High School located in Paramus, New Jersey for his 11th grade. For his 12th grade, Mr. Smollett indicated he attended Malibu High School located in Malibu, California, and then transferred back to Paramus Catholic High School for the last semester of his 12th grade. Mr. Smollett stated he graduated from Paramus Catholic High School in 2000. Mr. Smollett made attempts to obtain verification

of completing Paramus Catholic High School, but was not successful. On January 20, 2022, he provided to this Investigating Office an email showing he requested verification that he graduated from Paramus Catholic High School. On January 19, 2022, Mr. Smollett provided to this Investigating Officer a transcript from the Santa Monica-Malibu Unified School District verifying he completed a total of 215 high school credits. The defendant explained he had transferred high schools due his parents separating and moving. Mr. Smollett described being a "good student" and was "strong in English and history." The defendant noted he had between a 3.4 and a 3.8 Grade Point Average when he was a student. The defendant was asked to describe his relationship with his teachers and fellow classmates, and he responded, "I liked my teachers. My teachers liked me. Some of my classmates are still my friends." The defendant noted he belonged to the Young Black Scholars and the Poetry Club when he had attended school. Mr. Smollett denied ever having any problems in school; he was never suspended or expelled from any schools. The defendant denied ever being diagnosed with a learning disability and placed in special education classes. Mr. Smollett explained he previously took some non-credit classes through Pierce College located in Los Angeles, California. The defendant was asked to discuss any future educational plans that he may have, and he answered, "I think about attending school often but no official plans right now."

Mr. Smollett informed this Investigating Officer, at the time of his arrest, he was employed as an actor working on the television show, Empire. The defendant explained he began acting at the age of 4 ½ years old until the age of 13. Mr. Smollett indicated he was "not in show business" from the age of 14 to 28 years old. The defendant added he had worked several jobs during these years including being a clown at children's parties, retail at Macy's and Banana Republic, an administrative assistant and fund raiser for Artists For a New South Africa, and a fund raiser for Bennett College. Mr. Smollett discussed he was an actor on the television show Empire for 5 years from 2014 to 2019. Presently, Mr. Smollett reported he is self-employed working on building his producing, directing, and acting company called Super Massive Movie. The defendant noted he currently works 80-100 per week on his business Super Massive Movie. Mr. Smollett indicated his business partner is Tom Wilson, and he gets along with him. The defendant added he has never had any issues with co-workers or bosses at past jobs. Mr. Smollett disclosed the only time he has ever been fired or terminated from past employment was his last acting job with the television show Empire. The defendant was asked to discuss his future employment plans, and he answered, "I want to continue writing, producing, and directing. I'm still an artist, and I want to continue in this field. I've always wanted to transition into directing."

The defendant disclosed to this Investigating Officer he does not have any income from his business Super Massive Movie at this time; he is presently being supported by his quarterly residual payments from past work and savings only. Mr. Smollett, on January 4, 2022, provided to this Investigating Officer a quarterly residual income statement and check from Disney Worldwide Services Inc. which is the paying agent for Twentieth Century Fox Film Corporation dated September 28, 2021 for his work on the television show Empire. The defendant explained he is not behind on any bills or debts at this time but is still paying his lawyer's fees. Mr. Smollett was asked to discuss his financial status as far as meeting his monthly needs and if he is making financial ends meet, and he responded, "Financially, I'm not in a good place, but I've worked hard for a long time. It's a difficult time." Next, he was asked if he worries about his finances and meeting his basic needs, and he answered, "Yes, on the surface, but I'm not attached to money. I know it is going to be okay, but I'm not sure when."

On January 19, 2022, this Investigating Officer spoke to the defendant's sister, Janine Smollett, and she confirmed that her family had moved from California to New Jersey during Mr. Smollett's Senior year. She stated that her brother transferred from Malibu High School to Paramus Catholic High School. Janine Smollett stated that Mr. Smollett never had any problems as a student; he was never suspended or expelled when he attended school. She verified that Mr. Smollett had graduated from Paramus Catholic

High School. Janine Smollett confirmed that Mr. Smollett began acting at the age of 4 ½ years and continued acting until he was 13 years old. She added, "He took a break from acting and returned to acting after the age of 28." Janine Smollett indicated that her brother, Jussie Smollett has started his own production, directing, and writing company called Super Massive Movie.

FAMILY AND SOCIAL SUPPORT:

The defendant reported he has never been married, and he does not have any children. Mr. Smollett stated "no comment" when he was asked if he is in a relationship at this time. The defendant described being "very close" with his entire family. Mr. Smollett explained that his family resides in Los Angeles, California, and he is in contact with his family when he visits Los Angeles. The defendant added he is in contact with his family "often" by Zoom and telephone. Mr. Smollett was asked to discuss how his family members feel about him getting in trouble with the law, and he answered, "They know me, and they know I did not do this. They know I am a man of integrity." Next, he was asked if getting in trouble with the law has changed his relationship with his family, and he responded, "No, not at all." Mr. Smollett indicated that none of his family members have ever been involved with the law. The defendant expressed he is presently receiving "very strong" emotional and personal support from his family members and close friends, and he is "very satisfied" with the level of support he is receiving from them.

Janine Smollett, Mr. Smollett's sister, verified on January 19, 2022 that Mr. Smollett does not have any children. She reported that they are a "close family." She confirmed that nobody in their family has a criminal record.

HOUSING/NEIGHBORHOOD PROBLEMS:

Mr. Smollett discussed he currently resides by himself at [redacted] and he has been residing at this address since August 2019. The defendant provided to this investigating Officer a Spectrum cable bill dated November 20, 2021 for residency verification. The defendant was asked to discuss the neighborhood that he resides in, and he stated, "It's a good up-and-coming neighborhood in Harlem near Yankee Stadium." Next, he was questioned to discuss the kinds of crimes happening in his neighborhood, and he responded, "I never witness any crimes." Mr. Smollett indicated he resides next to a police station, and he feels safe residing in his neighborhood. The defendant was questioned if he intends to continue to reside at [redacted] and he answered, "Not sure if I will continue to live there when my lease is up. Everything is up in the air right now."

Janine Smollett indicated that her brother presently resides by himself at [redacted]

PEER ASSOCIATIONS:

Mr. Smollett denied ever belonging to a street gang. The defendant indicated he has a total of 4 close friends, and none of his close friends have ever been in trouble with the law. Mr. Smollett discussed that his close friends currently reside in Los Angeles, California, so he is in "close contact" with them on FaceTime and the telephone. According to Mr. Smollett, when he and his close friends get together in person, they will cook, eat, play conga drums, and play music together. The defendant was questioned if he has contact with any pro-criminal associates or acquaintances, and he answered, "maybe, but I'm not sure."

The defendant explained that when he is not spending time with his close friends, he will spend time with his family members, and when they get together, they will cook all day, eat, listen to music, or drive to the beach. Mr. Smollett stated his personal interests and hobbies include writing songs, reading, watching old films, or listening to records. The defendant indicated he is involved with charity work with Flint Kids (Flint Michigan), helps raise money for A.C.L.U., and is on the board with the Black Aids

Institute.

Janine Smollett discussed that her brother does not "knowingly" have contact with pro-criminal friends, associates, or acquaintances. She stated "He is very friendly and nice to people. He doesn't knowingly spend time with people that have gotten in trouble."

HEALTH HISTORY:

Mr. Smollett described being in "pretty good" physical health. The defendant disclosed he is under the care of a physician, is taking prescribed medicine, but did not comment on his current health situation or which prescribed medicine(s) he is taking. The defendant denied ever suffering from a serious illness or injury. He also denied ever being shot or stabbed. Mr. Smollett acknowledged he suffers from a communicable disease; however, he wished not to disclose any additional information regarding this matter.

Janine Smollett informed this Investigating Officer on January 19, 2022 that her brother is in "good" physical health.

PSYCHOLOGICAL:

The defendant disclosed he does meet with a mental health professional, and he added, "I actively see someone, but I have not met with them in a couple weeks." Mr. Smollett revealed he has been diagnosed with having anxiety, has been prescribed Xanax, but does not take this psychotropic medication. The defendant did not indicate ever being incarcerated in the Cook County Department of Corrections Division 8 Residential Treatment Unit for mental health reasons, and he denied ever being court ordered to complete a Behavior Clinical Examination. Mr. Smollett expressed he is experiencing excessive stress at this time, and he is presently managing his anxiety. The defendant was asked if he would cooperate with any mental health treatment if so ordered by the court, and he responded, "Yes, I would comply."

Janine Smollett on January 19, 2022 was asked to describe her brother's current mental health, and she stated, "I have been pushing him to get therapy. This has been a lot for him. He also speaks with a pastor. I pray with him and so does his pastor. I'm concerned for his mental health."

SUBSTANCE USE:

Alcohol:

Mr. Smollett denied ever having a problem with alcohol. The defendant disclosed he began to consume alcohol on a regular basis at the age of 23 years old. Mr. Smollett indicated he "rarely" drinks alcohol, but when he does consume alcohol, he will have "some wine or a cocktail at dinner with friends." According to Mr. Smollett, he last consumed alcohol (a glass of wine) on December 24, 2021 (this P.S.I. interview completed on December 29, 2021). The defendant explained he has once gone "almost a year" without consuming alcohol. The defendant denied his alcohol use has ever caused any problems with his family or employment; however, Mr. Smollett disclosed alcohol has caused problems with the law in that he was arrested for a D.U.I. in California and received probation. The defendant added as a condition of his D.U.I. probation, he was court ordered to complete substance abuse treatment.

Drugs:

The defendant disclosed he "dabbled in cocaine" from the ages of 23 to 36 years old. Mr. Smollett added he tried Molly (Ecstasy/MDMA) once when he was 31 or 32 years old. The defendant indicated he began using marijuana at the age of 22 years old, and he last used marijuana this year at 39 years old. Mr. Smollett explained that his drug use has never caused any problems with his family; however, the defendant revealed his drug use has caused problems with the law and employment. Mr. Smollett added, "Legal issues got in the way of job with Empire." The defendant explained the substance abuse

counseling he had received while in California treated his alcohol and cocaine use. According to Mr. Smollett, he successfully completed this substance abuse treatment program. Mr. Smollett was asked if alcohol or drugs are a problem at this time, and if he is willing to consider going to a substance abuse treatment program, and he answered, "Yes, the last 3 years I've been asking to go to rehab for substance use. Yes, I would cooperate."

On January 19, 2022, Janine Smollett, the defendant's sister stated that Mr. Smollett does not have any issues with alcohol. She added, "He was never a consistent drinker. He never struggled with alcohol." Janine Smollett did confirm he received a D.U.I. when he was 23 years old, and he had successfully completed his D.U.I. treatment program. In regard to drugs, Janine Smollett commented that Mr. Smollett had problems with drugs from his mid-20's until he was 32 years old. She reported, "He used drugs on and off. The new show Empire and their father's death happened at the same time. There was a lot of pressure on him at that time." Janine Smollett verified that her brother wants to admit himself into substance abuse treatment.

ATTITUDES AND BEHAVIORAL PATTERNS:

Mr. Smollett was asked to discuss how he feels about what happened regarding his arrest and this current court matter, and the defendant was advised not to speak on the specifics of this case. Next, he was asked to state his opinion of crime in general, and he answered, "I'm horrified by where the world is now by the amount of crime we are seeing. It's pretty bad. It's awful." Next, he was asked to discuss his opinion of people who are victims of crimes, and he answered, "I feel like they should be believed." When Mr. Smollett was asked how he thinks the victim(s) of his case feels about what he had done, he declined to comment, wished to follow his attorney's instructions, and not speak on the specifics of this case. The defendant expressed he generally has "deep concern for others." Mr. Smollett was questioned if he ever feels that he has lost control over events in his life, and he responded "sometimes." The defendant added, "Certain things I lack control with choices, certain things were not my choice." Mr. Smollett explained under no circumstances, it is "never okay" to tell lies. The defendant was asked if he considers himself to be a risk taker, and he stated, "It depends on what we are talking about. I have taken some risks, some good and some bad." Mr. Smollett was questioned if it was a risk when he had committed his offense, and he declined to comment, wished to follow his attorney's instructions, and not speak on the specifics of this case. The defendant described himself as someone who always avoids fights or physical confrontations, and he added, "I was raised to never start a fight, but I will defend myself."

MILITARY:

The defendant has never served in the United States Armed Forces.

SUMMARY:

The defendant, Jussie Smollett, reported he was born on June 21, 1982 in Chicago, Illinois to the union of Joel Smollett Sr. and Janet Smollett. Mr. Smollett indicated he was raised by both parents and resided in the Woodland Hills, California for most of his childhood. The defendant noted his parents separated when he was 15 years old. Mr. Smollett denied any type of abuse or neglect by his parents or family members when he was a child growing up in his family. The defendant explained his father passed away in 2015, and Mr. Smollett noted he and his father became "really close" during the last 4 years of his father's life. Mr. Smollett discussed his mother, Janet Smollett, currently resides in Woodland Hills, California, and he is in contact with his mother every day. The defendant indicated he has 5 siblings also born to the union of his parents, and he has "extremely close" relationships with his siblings. Mr. Smollett reported he has never been married, and he does not have any children. The defendant declined to comment if he is in a relationship at this time. Mr. Smollett stated he attended 4 different high schools

due to his parents separating and moving, and he had graduated from Paramus Catholic High School located in Paramus, New Jersey. Mr. Smollett provided a high school transcript to this Investigating Officer on January 19, 2022 from the Santa Monica-Malibu Unified School District verifying he obtained a total of 215 high school credits. The defendant explained he started acting at the age of 4 ½ years old until 13 years old. Mr. Smollett noted he worked various jobs from the age of 14 until 28 years old. The defendant added he began working on the television show Empire in 2014 and was terminated from this television show in 2019. Mr. Smollett indicated he is presently supported by savings and quarterly residual payments from past television work. On January 4, 2022, Mr. Smollett provided to this Investigating Officer a quarterly residual check dated September 28, 2021, which was payment for his work on the television show, Empire. The defendant explained he resides by himself since August 2019 at [redacted] He had provided to this Investigating Officer Spectrum cable bill for residency verification. The defendant described being in "pretty good" physical health. Mr. Smollett disclosed he has been diagnosed with anxiety, and he meets with a mental health professional to treat his anxiety. The defendant indicated he "rarely" drinks alcohol, and he last consumed alcohol on December 24, 2021 (this P.S.I. interview was completed on December 29, 2021). Mr. Smollett reported he previously was arrested for a D.U.I. in California, and he received a probation sentence for this D.U.I. arrest. The defendant informed this Investigating Officer that he "dabbled" in cocaine from 23 to 36 years old, tried Molly (Ecstasy/MDMA) once when he was 31 or 32 years old, began using marijuana at the age of 22 years old, and last used marijuana this year. The defendant noted he was ordered to complete substance abuse counseling as a condition of his D.U.I. probation in California. Mr. Smollett denied ever belonging to a street gang. The defendant discussed he has a total of 4 close friends, and none of his friends have ever been involved with the law. A review of the defendant's criminal history has revealed 1 prior misdemeanor probation sentence in California in case number 7VY03633.

TARGETED INTERVENTIONS AND SUPERVISION STRATEGIES/AVAILABLE RESOURCES:

On January 19, 2022, this Investigating Officer completed the Ohio Risk Assessment System: Community Supervision Tool (ORAS-CST), and he scored a 7, which is a Low risk level.

SOURCE OF INFORMATION:

- ☒ Chicago Arrest History
- ☒ Federal Arrest History
- ☒ LEADS Reports
- ☒ Circuit Court of Cook County Clerks
- ☒ Interview with Defendant on December 29, 2021.
- ☒ Other: An interview with the defendant's sister, Janine Smollett, on January 19, 2021.
- ☒ Other: Income Verification
- ☒ Other: Residence Verification
- ☒ Other: High School Transcript From Santa Monica – Maliu Unified School District

Probation Officer
Jason Stawczyk

PLAINTIFF'S EXHIBIT 2

Attachment 2

Risk Categories for MALES		Categories for FEMALES	
Scores	**Rating**	**Scores**	**Rating**
0-14	**Low**	**0-14**	**Low**
15-23	**Moderate**	**15-21**	**Low/Moderate**
24-33	**High**	**22-28**	**Moderate**
34+	**Very High**	**29+**	**High**

Professional Override: YES NO

Reason for Override (note: overrides should not be based solely on offense):

Final Level Males: LOW MODERATE HIGH VERY HIGH

Final Level Females: LOW LOW/MODERATE MODERATE HIGH

Recommendations:

LOW	Minimum supervision or non-reporting supervision
MODERATE	Regular supervision; programming should be provided for moderate and high need domains
HIGH	Enhanced supervision or residential placement; programming should be provided for moderate and high need domains
VERY HIGH	*For males:* Residential placement preferred or enhanced supervision at highest level; programming should be provided for moderate and high need domains *For females:* Enhanced supervision or residential placement; programming should be provided for moderate and high need domains

Other Areas of Concern. Check all that Apply:

_____Low Intelligence*
_____Physical Handicap
_____Reading and Writing Limitations*
_____Mental Health Issues*
_____No Desire to Change/Participate in Programs*
_____Transportation
_____Child Care
_____Language
_____Ethnicity
_____Cultural Barriers
_____History of Abuse/Neglect
_____Interpersonal Anxiety
_____Other _____

*If these items are checked it is strongly recommended that further assessment be conducted to determine level or severity.

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, to a reasonable degree of medical and scientific certainty, 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 generally had a higher rate of Covid infections, in comparison to the general population, during every wave of the pandemic. This trend is likely to continue in the future for some time.

6. Incarceration in a jail or prison setting poses a heightened danger to Mr. Smollett's health.

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 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, including risk and cause of infectious disease. 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

CURRICULUM VITAE

MICHAEL D. FREEMAN

February 2022

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Tel 971.255.1008 Fax 971.255.1046
e-mail: forensictrauma@gmail.com, m.freeman@maastrichtuniversity.nl
website: www.forensictrauma.com, https://www.maastrichtuniversity.nl/m.freeman

EDUCATION:
Doctor of Medicine (MedDr)
Faculty of Medicine, Umeå University, Umeå, Sweden

Doctor of Philosophy (PhD) Public Health/ Epidemiology
Oregon State University, Corvallis, Oregon

Master of Science in Forensic Medical Science (MScFMS)
Academy of Forensic Medical Sciences, London, England
University of Verona, Verona, Italy

Master of Public Health (MPH), Epidemiology/ Biostatistics
Oregon State University, Corvallis, Oregon

Doctor of Chiropractic (DC)
University of Western States, Portland, Oregon

Bachelor of Science (BS) General Science
University of Oregon, Eugene, Oregon

FORENSIC MEDICINE QUALIFICATIONS:
Member, Faculty of Forensic and Legal Medicine (MFFLM)
Royal College of Physicians, London, United Kingdom, 2021 to present

Diploma of Legal Medicine (DLM)
Faculty of Forensic and Legal Medicine
Royal College of Physicians, London, United Kingdom, 2019 to present

FELLOWSHIPS:
Fulbright Specialist Roster
Bureau of Educational and Cultural Affairs and World Learning,
United States Department of State, 2017-2020 tenure

Postdoctoral Fellowship
Forensic Pathology
Section of Forensic Medicine, Department of Community Medicine and Rehabilitation,
Umeå University, Umeå, Sweden, 2014-2015

ACADEMIC POSITIONS:

Regular Faculty Appointments

Associate Professor of Forensic Medicine and Epidemiology – 2018 (permanent tenured appointment)
Department of Epidemiology
CAPHRI Research Institute for Public Health and Primary care
Faculty of Health, Medicine, and Life Sciences
Maastricht University Medical Centre+
Maastricht, The Netherlands

Associate Professor of Forensic Medicine – 2015 to 2018
Department of Cell Biology and Complex Genetics
CAPHRI Research Institute for Public Health and Primary care
Faculty of Health, Medicine, and Life Sciences
Maastricht University Medical Centre+
Maastricht, The Netherlands

Clinical and Affiliate Appointments

Joint Clinical Professor, Psychiatry and Public Health & Preventive Medicine – 2016 to present
Department of Psychiatry
School of Medicine, Oregon Health & Science University
Portland, Oregon

Affiliate Professor of Epidemiology – 2010 to 2015
Department of Public Health and Preventive Medicine
School of Medicine, Oregon Health & Science University
Portland, Oregon

Affiliate Professor of Psychiatry – 2011 to present
Department of Psychiatry
School of Medicine, Oregon Health & Science University
Portland, Oregon

Clinical/Affiliate Associate Professor – 2005-10
Department of Public Health and Preventive Medicine
School of Medicine, Oregon Health & Science University
Portland, Oregon

Clinical Assistant Professor – 1997-2005
Department of Public Health and Preventive Medicine
School of Medicine, Oregon Health & Science University
Portland, Oregon

Visiting Professorships

Visiting Professor of Medical Science – August 2020-April 2021
Faculty of Medicine, University of Indonesia
Jakarta, Indonesia

Adjunct Appointments

Adjunct Professor of Forensic Epidemiology and Traumatology – 2012-17
Department of Forensic Medicine
Faculty of Health Sciences, Aarhus University
Aarhus, Denmark

Adjunct/Honorary Associate Professor of Epidemiology and Traumatology – 2012-17
Department of Forensic Medicine
Faculty of Health Sciences, Aarhus University
Aarhus, Denmark

Adjunct Associate Professor of Forensic Medicine and Epidemiology – 2005-12
Institute of Forensic Medicine
Faculty of Health Sciences, Aarhus University
Aarhus, Denmark

Adjunct Professor – 2015-16.
University of Western States
Portland, Oregon

EDITORIAL ACTIVITIES:

Lead Guest Editor, Special Issue on Forensic Epidemiology:
International Journal of Environmental Research and Public Health, 2020

Co-Editor in Chief:
Journal of Whiplash-Related Disorders 1999-2006

Associate Editor:
BMC Musculoskeletal Disorders, 2019-present
The Spine Journal 2007-present
PM&R, official scientific journal of the American Academy of Physical Medicine and Rehabilitation, 2008-present
Scandinavian Journal of Forensic Medicine, 2012-present
J of Forensic Biomechanics, 2010-present
OA Epidemiology, 2014

Editorial Board Member:
International Journal of Environmental Research and Public Health, 2019 to present
Forensic Science International Reports, 2019 to present
Orthopedics, 2019 to present
Top 10 Reviewer 2019, *Orthopedics*
The Spine Journal, 2004 to present
International Research Journal of Medicine and Medical Sciences, 2015
Egyptian Journal of Forensic Sciences, 2010 to present
Journal of Case Reports in Practice 2014 to present
Austin Journal of Public Health & Epidemiology 2014-2016
Edorium Journal of Public Health, 2014

Advisory Board Member:
Challenges 2020-present

Editorial Committee Member:
Spineline 2004-2009

Peer reviewer:
Journal of Vascular and Interventional Radiology
BMC Musculoskeletal Disorders
BMC Public Health
BMC Research Notes
Annals of Epidemiology (outstanding reviewer status 2015)
Orthopedics
Spine
The Spine Journal
Lancet
Mayo Clinic Proceedings
Annals of Biomechanical Engineering
Journal of the American Board of Family Medicine
Journal of Forensic and Legal Medicine
Acta Neurologica Scandanavica
Medical Science Monitor
Pain Research & Management
Journal of Back and Musculoskeletal Rehabilitation
American Society for Testing and Materials (ASTM)
Biosecurity & Bioterrorism
Annals of Medical and Health Sciences Research
Neurorehabilitation and Neural Repair
International Research Journal of Medicine and Medical Sciences

Jurimetrics
Law, Probability, and Risk
International Journal of Molecular Sciences
Journal of Rehabilitation Medicine
Arthritis
BMC Pediatrics
Journal of Back and Musculoskeletal Rehabilitation
Diagnostic and Interventional Radiology
Healthcare
Expert Review of Medical Devices
BMC Cancer

COURSES TAUGHT:

PHPM 574 Forensic & Trauma Epidemiology
Department of Public Health and Preventive Medicine
Oregon Health & Science University School of Medicine
Portland, Oregon 2006-2013

Principles of Forensic Medicine and Forensic Epidemiology
Forensic Psychiatry Fellowship
Department of Psychiatry
Oregon Health & Science University School of Medicine
Portland, Oregon – 2011 to present

PHPM 503 Thesis Advising
Department of Public Health and Preventive Medicine
Oregon Health & Science University School of Medicine
Portland, Oregon 2005-present

PHPM 507 Injury and Trauma Epidemiology
Department of Public Health and Preventive Medicine
Oregon Health & Science University School of Medicine
Portland, Oregon 1999 – 2005

Forensic Epidemiology and Bioterrorism
Charles County Department of Public Health
College of Southern Maryland, Waldorf, Maryland 2014

ACTIVITIES and HONORS:

Chair, Research subcommittee, Faculty of Forensic and Legal Medicine, London, UK, 2021-present

Vice Chair, American Academy of Forensic Sciences Standards Board Medicolegal Death Investigation Consensus Body – 2016-present

Member, Academic committee, Faculty of Forensic and Legal Medicine, London, UK, 2021-present

Member, Academic advisory board, Academy of Forensic Medical Sciences, UK. 2021- present.

Appointed member, Office of Chief Medical Examiner death in custody audit design team, Maryland Attorney General, Baltimore, MD, 2021.

Affiliate Member, Faculty of Forensic and Legal Medicine, Royal College of Physicians, London, UK, 2016-2021

Faculty, course designer and keynote speaker, "*When Science Meets Law: Forensic Epidemiology in Medicolegal Practice.*" Summer school course, Radboud Medical Center, Nijmegen, Netherlands, August 13-17, 2018.

Fulbright fellowship, US Department of State, *Forensic Epidemiology in Forensic Medicine*, March 2018, Maastricht, Netherlands.

Senatorial letter of commendation, Louisiana Senate (Sen. Jon Milkovich), January 25, 2017.

Keynote speaker, Gran Sesión de Epidemiología Forense. November 18, 2016 Universidad Libre, Seccional Cali, Colombia.

Member, American Academy of Forensic Sciences Standards Board Medicolegal Death Investigation Consensus Body – 2016 to present

Affiliate Medical Examiner, Allegheny County, Pennsylvania, 2014 to present

Member, Scientific Advisory Board, International Conference on Forensic Inference and Statistics. August 2014, Leiden, The Netherlands
Reviewer, National Aeronautical Space Administration (NASA) 2011
Past president, International Cellular Medicine Society, 2009 to 2012
Founding member, International Cellular Medicine Society, 2009
Member, Research Planning Committee, North American Spine Society 2007-2009
Member, Complementary Medicine Committee, North American Spine Society 2007-2009
Special Deputy Sheriff (Forensics), Vehicular Homicide Investigator, Clackamas County, Oregon, 2007-2009
Member, Crash Reconstruction and Forensic Technology (CRAFT) multidisciplinary law enforcement fatal crash investigation team, Clackamas County, Oregon, 2002-2013
Consultant Forensic Trauma Epidemiologist to the Medical Examiner Division of the Oregon Department of State Police – Occupant Kinematics, 1999-2006
Deputy Medical Examiner, Marion County, Oregon. 2000-2005
Moderator, Engineering sciences section, American Academy of Forensic Sciences 62nd Annual Meeting, Seattle, WA 2010
Co-Chair, International Whiplash Trauma Congress V, Lund, Sweden. 2011
Co-Chair, International Whiplash Trauma Congress IV, Miami, FL. October 2007.
Co-Chair, International Whiplash Trauma Congress III, Portland, OR. June 2006.
Co-Chair, International Whiplash Trauma Congress II, Breckenridge, CO. February 2005.
Co-Chair, International Whiplash Trauma Congress I, Denver, CO. October, 2003
Co-Chair, Forensic Section, International Traffic Medicine Association. Budapest, Hungary. September, 2003
Member, Blue Ribbon Panel Congressional Task Force on roller coaster-induced brain injury. Funded by a grant from the National Institute of Child Health and Human Development 2002-2003
President, Spinal Injury Foundation. Denver, CO 2002-2009
Member, Marion-Polk County C.R.A.S.H. Team - Occupant Kinematics Consultant 1999-2004
Scientific Chair, North American Whiplash Trauma Congress. Victoria, British Columbia 1999

BOARD CERTIFICATION AND ORGANIZATIONS:

Faculty of Forensic & Legal Medicine, Royal College of Physicians, London, UK
- Member 2021 - present
- Affiliate Member 2018 - 2021

American Academy of Forensic Sciences, Pathology/ Biology section
- Fellow 2016 - present
- Member 2008 - 2016

Academy of Forensic Medical Sciences, UK
- Fellow 2021-present

American College of Epidemiology
- Fellow 2019 - present
- Member 2007 – 2019

Royal College of Physicians, London UK
- Associate member 2021 - present

ACTAR Accredited Crash Reconstructionist, Accreditation Commission for Traffic Accident Reconstruction, Accreditation #1581 (December 2005 through December 2024)
Crash Data Retrieval Technician I & II
Certification in basic and advanced crash reconstruction - Northwestern University
Diplomate, American Academy of Pain Management
Member, Fulbright Association
Member, American College of Epidemiology (2007-2019)
Member, Association for the Advancement of Automotive Medicine
Member, Sigma Xi Scientific Honor Society
Member, Society of Automotive Engineers
Past member, International Traffic Medicine Association

Fellow, International College of Chiropractic
Inactive member, North American Spine Society
Past member, Forensic Accident Reconstructionists of Oregon

GRANTS:

2020-present Unrestricted grant, private donor. Evaluation of upper cervical CSF flow alterations in retired NFL players with chronic head injury. $250,000.

2017-2020 Fulbright scholarship, Fulbright Specialist program, Bureau of Educational and Cultural Affairs and World Learning, United States Department of State.

2015 National Science Foundation Industry/University Cooperative Research Centers Program, NSF 13-594 Planning Grant: I/UCRC for Advanced Research in Forensic Science, National Center for Research on Forensic Epidemiology. Principal Investigator.

2011-2013 World Health Organization – research grant for Rwandan study of relationship between genocide and suicide and homicide victimization and offending. $50,000. Project No: AFRWA 1005685, Award No: 53975.

2010-2015 Centers for Disease Control (Administered by National University of Rwanda and OHSU) SPH/CDC $200,000 over 4 years.

2002-2003 National Institute of Child Health and Human Development – Blue Ribbon Task Force on Roller Coaster Associated Brain Injury. $75,000.

DISSERTATION SUPERVISION/MENTORING:

Ellen Strömmer BA BS MPH – PhD candidate, CAPHRI School for Public Health and Primary Care, Maastricht University Medical Center (2018 to present)

David Brunarski MSc, DC - PhD candidate, CAPHRI School for Public Health and Primary Care, Maastricht University Medical Center (2019 to present)

Wendy Leith MS MPH – PhD candidate, CAPHRI School for Public Health and Primary Care, Maastricht University Medical Center (2018 to present)

Paul Nolet MPH, MSc, DC – PhD candidate, CAPHRI School for Public Health and Primary Care, Maastricht University Medical Center (2017 to present)

Huijie Wang B.Med., M.Med. – PhD candidate, CAPHRI School for Public Health and Primary Care, Maastricht University Medical Center (2017-2018)

Dritan Bijko MD MSc – PhD candidate, CAPHRI School for Public Health and Primary Care, Maastricht University Medical Center (2017)

Putri Dianita MD – PhD candidate, CAPHRI School for Public Health and Primary Care, Maastricht University Medical Center (2015 to present)

Frank Franklin Ph.D., J.D. (2013), Earle Mack School of Law, Drexel University

Bonnie Colville-Ebeling MD – PhD candidate (2012-15) University of Copenhagen, Faculty of Health Sciences, Department of Forensic Medicine

Dimitrios Papadakis BSc, MRes, Dr.rer.nat. (2012-present) independent mentoring

Wendy Leith MS – MPH (2015) Department of Public Health & Preventive Medicine, Oregon Health & Science University School of Medicine

Konrad Dobbertin – MPH (2011) Department of Public Health & Preventive Medicine, Oregon Health & Science University School of Medicine

Apostolo Alexandridis – MPH (2011) - Department of Public Health & Preventive Medicine, Oregon Health & Science University School of Medicine

Wilson Rubanzana MD – PhD (2016) National University of Rwanda, School of Public Health, Kigali, Rwanda

Catherine Maddux-Gonzalez – MPH (2009) – Department of Public Health & Preventive Medicine, Oregon Health & Science University School of Medicine

Laura Criddle MS, RN – PhD (2008) Oregon Health & Science University School of Medicine, School of Nursing

Peter Harmer PhD – MPH (2006) Department of Public Health & Preventive Medicine, Oregon Health & Science University School of Medicine

PUBLICATIONS:

Peer-reviewed journal articles

1. Katz E, Katz S, Poldin J, **Freeman MD.** Non-surgical management of upper cervical instability via improved cervical lordosis: a case series. *BMC Musculoskel Dis* (in review).
2. **Freeman MD.** Principles and methods for evidence-based quantification of the effect of seatbelt non-use in crash-related litigation. *Int J Environ Res Public Health* 2021:18,9455. https://doi.org/10.3390/18189455.
3. Dianita Ika Melia P, Zeeger MP, Herkutanto H, **Freeman MD.** Medicolegal causation investigation of bacterial endocarditis associated with an oral surgery practice using the INFERENCE approach. *Int J Environ Res Public Health* 2021:18,7530. https://doi.org/10.3390/ijerph18147530.
4. Nolet PS, Nordhoff L Kristman KL, Croft AC, Zeegers MP, **Freeman MD.** Is acceleration a valid proxy for injury risk in minimal damage traffic crashes? A comparative review of volunteer, ADL and real-world studies. *Int J Environ Res Public Health* 2021;18:2901; https://doi.org/10.3390/ijerph18062901.
5. Dianita Ika Melia P, Zeeger MP, Herkutanto H, **Freeman MD.** Development of the INFERENCE (**IN**tegration of **F**orensic **E**pidemiology and the **R**igorous **E**valuatio**N** of **C**ausation **E**lements) approach to causal inference in forensic medicine. *Int J Environ Res Public Health* 2020;17:8353; doi:10.3390/ijerph17228353.
6. Strömmer EMF, Leith WM, Zeegers MP, **Freeman MD.** The role of restraint in fatal excited delirium: a research synthesis and analysis of the literature. *For Sci Med Path* 2020: doi.org/10.1007/s12024-020-00291-8.
7. **Freeman MD.** Forensic epidemiologic analysis of the cause of an unexpected teen suicide following ingestion of mis-dispensed isosorbide mononitrate. *For Sci Int Rep* 2020: doi.org/10.1016/j.fsir.2020.100093
8. Tønner G, **Freeman MD,** Rubenstein S. De waarde van chiropractie bij lagerugklachten. *Huisarts Wet* [Dutch Journal of General Practice Medicine] 2020:10.1007/s12445-020-0964-3.
9. Dianita Ika Melia P, Herkutanto H, Atmadja DS, Cordner S, Eriksson A, Kubat B, Kumar A, Payne-James J, Rubanzana W, Uhrenholt L, **Freeman MD,** Zeeger MP. The PERFORM-P (Principles of Evidence-based Reporting in FORensic Medicine-Pathology version) Guideline. *Forensic Sci Int Volume* 2021: 10.1016/j.forsciint.2021.110962.
10. Dianita Ika Melia P, **Freeman MD,** Herkutanto H, Zeeger MP. A review of causal inference in forensic medicine. *For Sci Med Path* 2020:doi.org/10.1007/s12024-020-00220-9.
11. **Freeman MD,** Katz EA, Rosa SL, Gatterman BD, Strömmer EMF, Leith WM. Diagnostic accuracy of videofluoroscopy for symptomatic cervical spine injury following whiplash trauma. *Int J Environ Res Public Health* 2020;17:1693 ; doi:10.3390/ijerph17051693
12. Centeno C, Cartier C, Stemper I, Dodson E, **Freeman MD**, Azuike U, Williams C, Hyzy M, Silva O, Steinmetz N. The treatment of bone marrow lesions associated with advanced knee osteoarthritis: comparing intra-osseous and intra-articular injections with bone marrow concentrate and platelet-rich plasma. *Pain Physician* 2021;24(3):E279-88
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23. **Freeman MD.** Applied forensic epidemiology: the evaluation of individual causation in wrongful death cases using relative risk. *Scand J Forens Med* (2012;18(1):25.

24. Uhrenholt L, Webb A, Pedersen M, Christensen HW, **Freeman MD.** Does whiplash trauma result in somatic injury. *Scand J Forens Med* (2012;18(1):121

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26. Uhrenholt L, **Freeman M**, Jurik AG, Jensen LL, Gregersen MEG, Boel LWT et al. Evidence of somatic injury in rear-impact collisions - esophagus injuries. 2011. Poster session presented at Årsmøde i Dansk Selskab for Retsmedicin og Dansk Selskab for Ulykkes- og Skadeforebyggelse [The Danish Traffic Medicine Society of the Danish Society for Forensic Medicine] November 3-5, 2011] Grenå, Denmark.

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35. **Freeman MD**. The Error Odds method of objectively assessing bioengineering based claims of causation; a Bayesian approach to test validity quantification (Special joint session of Jurisprudence and Engineering Sciences) *Proceedings of 62nd Annual Meeting of the American Academy of Forensic Sciences* Feb 2010, Seattle, Washington.

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37. **Freeman MD,** Rosa S, Harshfield D, Smith F, Bennett RM, Centeno CJ, Kornel E, Nystrom A, Heffez D, Kohles SS. A case-control study of cerebellar tonsillar ectopia and cervical spine trauma. *European Congress of Radiology,* March 4-8, 2010, Vienna, Austria.

38. Uhrenholt L, **Freeman MD.** The Role of Microscopic Post-Mortem Study in Explaining Traffic-Crash Related Neck Injury; A Review. *Proceedings of 62nd Annual Meeting of the American Academy of Forensic Sciences.* Feb 2010, Seattle, Washington.

39. **Freeman MD,** Uhrenholt L, Newgard C. The effect of restraint use on skull vault fractures in rollover crashes. *Proceedings of 62nd Annual Meeting of the American Academy of Forensic Sciences* Feb 2010, Seattle, Washington.

40. **Freeman MD,** Uhrenholt L, Newgard C. Head injuries in lower speed collinear collisions; an analysis of the National Automotive Sampling System database. *Proceedings of 62nd Annual Meeting of the American Academy of Forensic Sciences* Feb 2010, Seattle, Washington.

41. **Freeman MD,** Rosa S, Harshfield D, Smith F, Bennett RM, Centeno CJ, Kornel E, Nystrom A, Heffez D, Kohles SS. A case-control study of cerebellar tonsillar ectopia and cervical spine trauma. *XXI Congress of the International Academy of Legal Medicine* May 2009 Lisbon, Portugal

42. **Freeman MD.** The Error Odds assessment of accuracy for tests in forensic medicine; a simple application of Bayes' Law. *XXI Congress of the International Academy of Legal Medicine* May 2009 Lisbon, Portugal

43. Uhrenholt L, Schumacher B, **Freeman MD.** A cross-sectional study of road traffic fatalities and vehicular homicide investigation practices in Denmark for 2000-2004. *Proceedings of 61st Annual Meeting of the American Academy of Forensic Sciences.* Feb 2009, Denver, Colorado.

44. **Freeman MD,** Centeno CJ. Etiologic and demographic characteristics of traffic crash-related disc injuries. *Spine J* doi:10.1016/j.spinee.2008.06.373.

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46. **Freeman MD.** Probability and pathological findings in suicide versus homicidal hanging deaths; a case study. *Proceedings of 16th Nordic Conference on Forensic Medicine* June 15-17, 2006, Turku, Finland 2006:15-6.

47. **Freeman MD.** Injury Pattern Analysis as a means of driver determination in a vehicular homicide investigation. *Proceedings of 16th Nordic Conference on Forensic Medicine* Turku, Finland June 15-17 2006:38-9.

48. **Freeman MD.** Injury Pattern Analysis in Fatal Traffic Crash Investigation. *Proceedings of 57th Annual Meeting of American Academy of Forensic Sciences* New Orleans, Louisiana. February 24, 2005.

49. **Freeman MD,** Croft AC, Centeno C. Fatal head injury cases in a rural Oregon county. *Proceedings of the 19th World Congress of the International Traffic Medicine Association* Budapest, Hungary, September 14-17, 2003.

50. Croft AC, Haneline MT, **Freeman MD.** Differential Occupant Kinematics and Forces Between Frontal and Rear Automobile Impacts at Low Speed: Evidence for a Differential Injury Risk, *International Research Council on the Biomechanics of Impact (IRCOBI)* Munich, Germany September 18-20, 2002:365-6.

51. Sparr L, **Freeman MD.** The Uses and Abuses of Psychiatric IMEs: An Ethical Dilemma? *American Psychiatric Association Annual Meeting* San Francisco, California May 2003.

52. Croft AC, Haneline MT, **Freeman MD.** Low speed frontal crashes and low speed rear crashes: is there a differential risk for injury? *Proceedings of the 46th Association for the Advancement of Automotive Medicine (AAAM) Annual Scientific Conference* Tempe, Arizona, September 29-October 2, 2002:79-91.

53. Croft AC, Lord S, **Freeman MD.** Whiplash Injury: Mechanisms of Injury, Pathophysiology, and Treatment *10th World Congress on Pain, International Association for the Study of Pain* San Diego, August 17-22, 2002:482.

54. **Freeman MD**, Centeno C, Croft AC, Nicodemus CN: Significant spinal injury resulting from low-level accelerations: a comparison with whiplash. *International Congress on Whiplash-Associated Disorders* Berne, Switzerland, March 9-10, 2001.

55. Croft AC, Haneline MT, **Freeman MD.** Differential occupant kinematics and head linear acceleration between frontal and rear automobile impacts at low speed: evidence for a differential injury risk. *International Congress on Whiplash-Associated Disorders* Berne, Switzerland, March 9-10, 2001.

56. Croft AC, Haneline MT, **Freeman MD.** Automobile crash reconstruction in low speed rear impact crashes utilizing a momentum, energy, and restitution (MER) method. *International Congress on Whiplash-Associated Disorders* Berne, Switzerland, March 9-10, 2001.

57. Centeno C, **Freeman MD**, Croft AC. A comparison of the functional profile of an international cohort of whiplash injured patients and non-patients: an internet study. *International Congress on Whiplash-Associated Disorders* Berne, Switzerland, March 9-10, 2001.

58. **Freeman MD**, Sapir D, Boutselis A, Gorup J, Tuckman G, Croft AC, Centeno C, Phillips A. Whiplash injury and occult vertebral fracture: a case series of bone SPECT imaging of patients with persisting spine pain following a motor vehicle crash. *Cervical Spine Research Society 29th Annual Meeting* Monterey, CA, Nov 29-Dec 1, 2001.

59. Johansson BH, **Freeman MD.** The prevalence of symptomatic cervical disc herniation in the Swedish population with asymptomatic degenerative disc disease (a cross-sectional study). *International Congress on Whiplash Associated Disorders* March, 2001. Berne, Switzerland.

60. **Freeman MD**, Centeno C, Croft AC, Nicodemus C. Significant spinal injuries resulting from low-level accelerations: a case series of roller coaster injuries. *Proceedings of Cervical Spine Research Society 28th Annual Meeting,* November 30-December 2, 2000:110-1.

61. Croft AC, **Freeman MD.** An evaluation of the neck injury criterion; recommendations for future consideration. *Association for the Advancement of Automotive Medicine*, San Antonio, TX October, 2000.

62. **Freeman MD**, Croft AC, Rossignol AM. The prevalence of whiplash-associated chronic cervical pain among a random sample of patients with chronic spine pain. *Proceedings of 27th Annual Cervical Spine Research Society Annual Meeting.* Seattle, WA December 13-15, 1999.

63. **Freeman MD**, Croft AC, Rossignol AM. Late whiplash risk factor analysis of a random sample of patients with chronic spine pain. *World Whiplash Associated Disorders Congress*, February 8-10, 1999, Vancouver, British Columbia

Scientific Commentary/Editorials/Letters

1. **Freeman MD**, Strömmer EMF. Letter to the Editor re: Dror and Kukucka, Linear Sequential Unmasking–*Expanded* (LSU-*E*): A general approach for improving decision making as well as minimizing noise and bias. *For Sci Int Syn* 2021 https://doi.org/10.1016/j.fsisyn.2021.100195

2. Nystrom NA, **Freeman MD.** Authors' Response. *Pain Med* 2018;19(4):816-7.

3. Uhrenholt L, Webb A, **Freeman MD.** Letter to the Editor regarding "Do X-ray-occult fractures play a role in chronic pain following a whiplash injury?" *Eur Spine J* DOI 10.1007/s00586-014-3362-3.

4. **Freeman MD.** Clinical Practice Guidelines versus Systematic Reviews; which serves as the best basis for evidence-based spine medicine? Invited commentary. *Spine J* 2010 Jun;10(6):512-3.

5. **Freeman MD,** Centeno CJ, Katz E. MR imaging of whiplash injury in the upper cervical spine; controversy or confounding? *Spine J* 2009 Sep;9(9):789-90. Epub 2009 Jun 17

6. Centeno CJ, **Freeman M.** Re: Are smooth pursuit eye movements altered in chronic whiplash-associated disorders? A cross-sectional study. *Clin Rehabil* 2008 Apr;22(4):377-8.

7. Centeno CJ, **Freeman MD.** Editorial Submission on Kongsted, A., et al., Are smooth pursuit eye movements altered in chronic whiplash associated disorders? A cross-sectional study. *Clin Rehabil* 2007;21(11):1038-49.

8. **Freeman MD.** Crash Test Dummy? *New Scientist* June 23, 2007:22-3.

9. **Freeman MD,** Centeno CJ, Merskey H, Teasell R, Rossignol AM. Greater injury leads to more treatment for whiplash: no surprises here. *Arch Int Med* 2006;166(11):1238-9.

10. Centeno C, **Freeman MD.** Alberta rodeo riders do not develop late whiplash. *J Rheumatol* 2007 Feb;34(2):451-2.

11. **Freeman MD,** Centeno C. Alar, Transverse and Apical Ligament Strain due to Head-Turned Rear Impact. *Spine* 2006;31(17):2030.

12. **Freeman MD.** Cervical disc herniation following motor vehicle crash trauma. Invited commentary. *Spine J* 2005 Nov-Dec;5(6):644.

13. **Freeman MD,** Centeno C. Whiplash and Peer Review *JWRD* 2003;2(2):1-3.

14. **Freeman MD,** Centeno C. Whiplash and Secondary Gain *JWRD* 2003;2(1):1-4.

15. **Freeman MD,** Centeno C. "Placebo" Collisions and Whiplash *JWRD* 2002;1(2):1-8.

16. **Freeman MD.** Biomechanics of minor automobile accidents. *J South Orthop Assoc* 2001 Summer;10(2):95-6.

17. **Freeman MD.** Are demolition derby drivers a valid proxy for the population at risk for whiplash injury? *Arch Neurol* 2001 Apr;58(4):680-1.

18. **Freeman MD,** Rossignol AM. Effect of eliminating compensation for pain and suffering on the outcome of insurance claims. *NEJM* 2000 Oct 12;343 (15):1118-9.

19. **Freeman MD.** Letter to the editor. *Cranio* 1999;17(3):160-1.

20. Croft AC, **Freeman MD.** Commentary on "Pain after whiplash: a prospective controlled inception cohort study." *The Back Letter* 1999;14(4):43-5.

21. **Freeman MD,** Croft AC. Late Whiplash Syndrome, 3rd reply. *Lancet* 1996 Jul 13;348(9020):125.

NATIONAL PRACTICE STANDARDS:

American National Standards Institute (ANSI)/ American Standards Board (ASB) Standard 125-2021: Organizational and Foundational Standard for Medicolegal Death Investigation (Committee vice chair and co-author).

MEDIA:

Mannix, A. (2022 February 12) Minneapolis Police Department still teaching controversial 'excited delirium' syndrome — despite claiming it had stopped. Minneapolis Star Tribune.

Wiggins, O. (2022 January 2) Review of cases under former Maryland medical examiner expected to get underway this year. Washington Post.

Dewan, S. (2021 October 2). Subduing suspects face down isn't fatal, research has said. Now the research is on trial. *The New York Times.*

Semoffsky, E. (2021 September 2020) 'Excited delirium' denounced long before controversial Antioch in-custody death. FOX 2 KTVU.

Porter, C and Lopez, O. (2021 July 13). Haitians hope president's funeral is a moment of unity. *The New York Times.*

Porter, C and Lopez O. (2021 July 12). Haitian officials say U.S.-based suspect in president's killing was seeking power. *The New York Times.*

Laughland, O. (2021 April 11). 'Excited delirium': the controversial defense that could be used in the Chauvin trail. *The Guardian.*

Karnowski, S. (2021 April 19). EXPLAINER: Why 'excited delirium' came up at Chauvin trail? *The Associated Press.*

Lyden, T. (2020 November 15). Excited Delirium dilemma: Explanation or excuse for in-custody deaths? FOX 9 KMSP.

Cushing, T. (2020 August 25). Law enforcement training: People saying 'I can't breathe' are just suffering from 'Excited Delirium.' *TechDirt.*

Koerth M. (2020 June 8). The two autopsies of George Floyd aren't as different as they seem. *FiveThirtyEight.*

SCIENTIFIC PRESENTATIONS:

1. Freeman MD. Introduction to Forensic Epidemiology. Core course lecture, Diploma of Forensic Medical Sciences curriculum, Academy of Forensic Medical Sciences, London. November 12, 2021.
2. Freeman MD. Introduction to Forensic Epidemiology: An evidence-based approach to causal analysis in forensic medicine. Faculty of Forensic and Legal Medicine, Royal College of Physicians, London. October 13, 2021.
3. Freeman MD. Forensic Epidemiology: The use of population-based data and methods in the evaluation of specific causation in a medicolegal setting. American College of Epidemiology, Plenary lecture. September 10, 2021.
4. Freeman MD. The role of epidemiology in evidence-based investigation of injury and death. 1st International Forensic Science e-Conference. National Forensic Sciences University, India. July 10-11, 2021.
5. Freeman MD. Medico-legal causation in auto litigation. International Orthopedic Foundation. January 30, 2021.

6. Freeman MD. Medico-legal investigation of suicide. Lecture at Mental Illness Research Education Clinical, Centers of Excellence NW (MIRECC CoE), Veteran's Affairs Medical Center, Portland Oregon. December 16, 2020.

7. Freeman MD. The role of epidemiology in evidence-based forensic medical investigation of death and injury. Faculty of Medicine, Universitas Indonesia. December 15, 2020.

8. Freeman MD. Does Excited Delirium cause death, or does death cause Excited Delirium? A systematic review and statistical analysis of the world literature. Presented at *Deaths in Custody 3: Judicial Considerations.* Department of Pathology and Laboratory Medicine, of the Faculty of Medicine, in conjunction with the Office of the Chief Medical Examiner, Washington DC, September 27, 2020.

9. Freeman MD. Medico-legal investigation of suicide. Grand Rounds in Psychiatry, Department of Psychiatry, Oregon Health & Science University School of Medicine. March 24, 2020.

10. Freeman MD. Forensic investigation of unexplained death. University of Business, Technology, and Science (UBT), October 9, 2018: Pristina, Kosovo.

11. Freeman MD. Causation analysis in medical negligence. Radboud Summer School. Radboud Medical Center, August 14, 2018: Nijmegen, Netherlands.

12. Freeman MD. Injury causation analysis. Radboud Summer School. Radboud Medical Center, August 14, 2018: Nijmegen, Netherlands.

13. Freeman MD. Criminal applications of Forensic Epidemiology. Radboud Summer School. Radboud Medical Center, August 14, 2018: Nijmegen, Netherlands.

14. Freeman MD. Introduction to Forensic Epidemiology. Radboud Summer School. Radboud Medical Center, August 13, 2018: Nijmegen, Netherlands.

15. Freeman MD. Ballistic analysis of an attempted murder using a porcine model. *Proceedings of 70th Annual Meeting of the American Academy of Forensic Sciences* 2018 Feb 19-23: Seattle, WA.

16. Freeman MD. Evidence-based practice in Forensic Medicine; Principles of Forensic Epidemiology. Radboud Medical Center, October 9, 2017: Nijmegen, Netherlands.

17. Freeman MD. Incidence and risk factors for neonatal falls US Hospitals, 2003-2012. *Health Science Research,* Doernbecher Childrens' Hospital, Oregon Health & Science University, March 13, 2017, Portland, Oregon.

18. Freeman MD. Incidence and risk factors for neonatal falls US Hospitals, 2003-2012. *Research in Progress,* Department of Internal Medicine, Oregon Health & Science University School of Medicine, January 31, 2017, Portland, Oregon.

19. Freeman MD. Evidence-based practice in Forensic Medicine. Invited presentation to the Dutch National Forensic Institute (NFI). December 6, 2016 Maastricht University, Maastricht, Netherlands.

20. Freeman MD. Forensic Epidemiology: Principals & Practice Part 2: Investigation of specific causation. Gran Sesión de Epidemiología Forense. November 18, 2016 Universidad Libre, Cali, Colombia.

21. Freeman MD. Forensic Epidemiology: Principals & Practice Part 1: Investigation of specific causation. Gran Sesión de Epidemiología Forense. November 18, 2016 Universidad Libre, Cali, Colombia.

22. Freeman MD. Fatal crash investigation. World Reconstruction Exposition (WREX 2016). May 2-6, 2016. Orlando, Florida.

23. Freeman MD. Trends in police use-of-force related hospitalizations; an analysis of Nationwide Inpatient Sample data for 1998-2012. *Research in Progress,* Department of

Internal Medicine, Oregon Health & Science University School of Medicine, November 10, 2015, Portland, Oregon.

24. Freeman MD. Concussion risk associated with head impact; an analysis of pooled data from helmeted sports. *12th Annual Conference of the North American Brain Injury Society*, April 29-May 1, 2015 San Antonio, Texas

25. Freeman MD. The role of risk in assessing cause in forensic investigation of injury and death. *American Medical Response biennial EMS training*. April 17, 2015, Mt. Hood, Oregon.

26. Freeman MD. Development of a pediatric fatal head trauma registry. *Research in Progress*, Department of Internal Medicine, Oregon Health & Science University School of Medicine, April 7, 2015, Portland, Oregon.

27. Freeman MD. Fatal crash investigation: methods and case presentations. Washington County CART Team training lecture. Tualatin Police Department, Tualatin, Oregon. March 4, 2015.

28. Freeman MD. An analysis of the causal relationship between maternal/ prenatal cocaine use and stillbirth: results of a national hospital database study. *67th Annual Meeting of the American Academy of Forensic Sciences* 2015 Feb 16-21: Orlando, FL

29. Freeman MD. Biomechanical, Mechanical, and Epidemiologic Characteristics of Low Speed Rear Impact Collisions. *67th Annual Meeting of the American Academy of Forensic Sciences* 2015 Feb 16-21: Orlando, FL.

30. Freeman MD. Sexual abuse in the Boy Scouts: a preliminary analysis of Boy Scout ineligible volunteer files from 1945 to 2004. *Research in Progress*, Department of Sociology, Portland State University. December 18, 2014.

31. Freeman MD. Understanding chronic pain after whiplash trauma. *Lund University Hospital, Department of Rehabilitation Medicine.* December 11, 2014, Lund, Sweden.

32. Freeman MD. Forensic Applications of Epidemiology in Criminal and Civil Settings. *Richard Doll Building, Nuffield College, Oxford University.* December 10, 2014, Oxford, UK.

33. Freeman MD. The Efficacy of tPA in Preventing Long Term Poor Outcome After Ischemic Stroke: A Reanalysis of NINDS Data. *Research in Progress*, Department of Internal Medicine, Oregon Health & Science University School of Medicine, November 25, 2014, Portland, Oregon.

34. Freeman MD. Forensic Epidemiology and Bioterrorism. Full day course for public health and law enforcement. A joint training for public health, law enforcement, and emergency services. Sponsored by Charles County Department of Public Health and funded through a grant from the Centers for Disease Control and Prevention, Public Health Preparedness Cooperative Agreement. College of Southern Maryland. June 10, 2014. Waldorf, Maryland.

35. Freeman MD. Maternal cocaine exposure and still-birth risk. *Research in Progress*, Department of Internal Medicine, Oregon Health & Science University School of Medicine, May 20, 2014, Portland, Oregon.

36. Freeman MD. Forensic Applications of Epidemiology in Civil and Criminal Litigation. *9th International Conference on Forensic Inference and Statistics* August 19-22, 2014

37. Freeman MD. Investigation of a disputed mechanism of diffuse axonal injury following a low speed frontal crash. *65th Annual Meeting of the American Academy of Forensic Sciences*, Feb 21, 2014, Seattle, Washington.

38. Freeman MD. Public defense of dissertation for Doctor of Medicine degree, "The role of forensic epidemiology in evidence based forensic medical practice." *Section of Forensic Medicine, Department of Community Medicine and Rehabilitation, Faculty of Medicine, Umeå University*. November 6, 2013, Umeå, Sweden.

39. Freeman MD. Case studies in applied forensic epidemiology. Invited lecture, *University of Maastricht, Department of Complex Genetics and Epidemiology,* Maastricht, The Netherlands. October 31, 2013.

40. Freeman MD. The relationship between Chiari malformation, trauma, and chronic pain. *Karolinska Institute,* September 27, 2012, Stockholm, Sweden.

41. Freeman MD. Serious head and neck injury as a predictor of occupant position in fatal rollover crashes. *18th Nordic Conference on Forensic Medicine,* June 13-16, 2012 Aarhus Denmark.

42. Freeman M. Self-defense or attempted murder? A combined ballistic and traffic crash reconstruction of a Texas shooting. *18th Nordic Conference on Forensic Medicine,* June 13-16, 2012 Aarhus Denmark.

43. Freeman MD. Applied forensic epidemiology: the evaluation of individual causation in wrongful death cases using relative risk. *18th Nordic Conference on Forensic Medicine,* June 13-16, 2012 Aarhus Denmark.

44. Freeman MD. Forensic Epidemiologic Investigation of Traffic Crash-Related Homicide. *Årsmøde i Dansk Selskab for Retsmedicin og Dansk Selskab for Ulykkes- og Skadeforebyggelse* [The Danish Traffic Medicine Society of the Danish Society for Forensic Medicine] November 3-5, 2011] Grenå, Denmark.

45. Freeman MD. Traffic Crash Injuries 1960 to the present; how far we've come. Keynote address, *Årsmøde i Dansk Selskab for Retsmedicin og Dansk Selskab for Ulykkes- og Skadeforebyggelse* [The Danish Traffic Medicine Society of the Danish Society for Forensic Medicine] November 3-5, 2011] Grenå, Denmark.

46. Freeman MD. Is there a place for forensic biomechanics in evaluation of Probability of Causation? *8th International Conference on Forensic Inference and Statistics (ICFIS),* July 19-21, 2011; University of Washington, Seattle, Washington.

47. Freeman MD. Case studies in forensic epidemiology. *8th International Conference on Forensic Inference and Statistics (ICFIS),* July 19-21, 2011; University of Washington, Seattle, Washington.

48. Freeman MD. The Error Odds method of objectively assessing bioengineering based claims of causation; a Bayesian approach to test validity quantification. Invited lecture; joint session of Jurisprudence and Engineering Sciences. *62nd Annual Meeting of the American Academy of Forensic Sciences* Feb 25, 2010, Seattle, Washington.

49. Freeman MD, Uhrenholt L, Newgard C. The effect of restraint use on skull vault fractures in rollover crashes. Engineering Sciences section, *62nd Annual Meeting of the American Academy of Forensic Sciences* Feb 26, 2010 Seattle, Washington.

50. Freeman MD, Uhrenholt L, Newgard C. Head injuries in lower speed collinear collisions; an analysis of the National Automotive Sampling System database. Engineering Sciences section, *62nd Annual Meeting of the American Academy of Forensic Sciences* Feb 26, 2010 Seattle, Washington.

51. Freeman MD. The Error Odds assessment of accuracy for tests in forensic medicine; a simple application of Bayes' Law. Invited presentation; *XXI Congress of the International Academy of Legal Medicine* May 2009, Lisbon, Portugal

52. Freeman MD. Forensic Epidemiology and Traumatic Brain Injury. Invited presentation; *VII World Congress on Brain Injury, International Brain Injury Association* April 2008 Lisbon, Portugal.

53. Freeman MD, Hand M. Bayesian analysis of predictive characteristics in suicidal versus homicidal hanging deaths: A case study in forensic epidemiology. *59th Annual Meeting of the American Academy of Forensic Sciences* February 19-24, 2007, San Antonio, Texas.

54. Freeman MD. Probability and pathologic findings in suicidal versus homicidal hanging deaths; a case study *16th Nordic Conference on Forensic Medicine* June 15, 2006, Turku, Finland.

55. Freeman MD. Injury Pattern Analysis as a means of driver determination in a vehicular homicide investigation *16th Nordic Conference on Forensic Medicine* June 16, 2006, Turku, Finland.

56. Freeman MD. Probability and pathologic findings in suicidal versus homicidal hangings; a case study. Grand Rounds *Institute of Forensic Medicine, Aarhus University, Aarhus, Denmark*. October 27, 2005.

57. Freeman MD. Road Traffic Crashes- mechanisms, injuries and analysis. Invited lecture (Keynote address) *Danish Society for Automotive Medicine* Aarhus, Denmark. October 27, 2005.

58. Freeman MD. The Defense Medical Evaluation: Issues, Ethics and Pitfalls. *2nd Annual International Whiplash Trauma Congress* Breckenridge, Colorado. February 26, 2005.

59. Freeman MD. Injury Pattern Analysis in Fatal Traffic Crash Investigation *American Academy of Forensic Sciences' 57th Annual Meeting* New Orleans, Louisiana. February 24, 2005.

60. Freeman MD. Independent Medical Evaluations and secondary gain. Grand Rounds, *Department of Psychiatry, Oregon Health & Science University School of Medicine* November 2, 2004.

61. Freeman MD. The epidemiology of crash-related trauma. Invited lecture. Grand Rounds *Peace Health Hospital* Longview, Washington. March 30, 2004.

62. Freeman MD. Injury pattern analysis: the practical application to the investigation of crash related death. Grand Rounds Department of Pathology, *Oregon Health Sciences University* Portland, Oregon. January 21, 2004.

63. Freeman MD. Literature critique, Whiplash Updates. Invited lecture. *British Columbia Chiropractic Association* Vancouver, British Columbia, Canada. October 23, 2003.

64. Freeman MD. Catastrophic crash cases and probability. Invited lecture. *Paris American Legal Institute* Florence, Italy. September 22, 2003.

65. Freeman MD. Injury pattern analysis as a means of driver identification in a vehicular homicide; a case study. *International Traffic Medicine Association Annual Meeting*. Budapest, Hungary. September 17, 2003.

66. Freeman MD. Fatal head injury crashes in a rural Oregon county, 1990-1999. *International Traffic Medicine Association Annual Meeting*. Budapest, Hungary. September 16, 2003.

67. Freeman MD. Crash reconstruction and forensic science. Invited lecture. *CRASH 2003* Spine Research Institute of San Diego. San Diego, California. August 22, 2003.

68. Freeman MD, Sparr L. The uses and abuses of psychiatric IMEs: an ethical dilemma. *American Psychiatric Association Annual Meeting*. San Francisco, California. May 21, 2003.

69. Freeman MD. Crash-related trauma. Invited lecture. THRI Neuroscience meeting. *Texas Back Institute* St. Mary's Hospital. Plano, Texas. February 28, 2003.

70. Freeman MD. Whiplash injury and occult spinal fracture. *International Association for the Study of Pain* 10th World Congress on pain. San Diego, California. August 20, 2002.

71. Freeman MD. Crash Reconstruction and forensic science. *CRASH 2002* Spine Research Institute of San Diego. San Diego, California. August 8, 2002.

72. Freeman MD. Epidemiologic and medical aspects of whiplash injury. *Swedish Orthopedic Society* Stockholm, Sweden. May 17, 2002.

73. Freeman MD. Epidemiologic considerations of whiplash injuries. Invited lecture. *European Chiropractic Union Annual Congress* Oslo, Norway. May 9, 2002.

74. Freeman MD. The role of cervical manipulation in neck pain. Invited lecture. *Cervical Spine Research Society 29th Annual Meeting* Instructional Course, Monterey, CA, Nov 29-Dec 1, 2001

75. Freeman MD. Whiplash injury and occult vertebral fracture: a case series of bone SPECT imaging of patients with persisting spine pain following a motor vehicle crash. *Cervical Spine Research Society 29th Annual Meeting* Monterey, CA, Nov 29-Dec 1, 2001

76. Freeman MD. Interpreting the medical literature with a focus on bias and confounding/Minimal Damage Crash Reconstruction. Invited lecture. *CRASH 2001* Spine Research Institute of San Diego. San Diego, CA. August 2001.

77. Freeman MD. Injury Pattern Analysis and Forensic Trauma Epidemiology in vehicular homicide investigation. *Washington State Patrol* Lacy, WA, June 20, 2001

78. Freeman MD. Case studies in multidisciplinary spine care. *Chiropractic Association of Oregon* Portland OR, April 28, 2001

79. Freeman MD. Injury Pattern Analysis and Forensic Trauma Epidemiology in vehicular homicide investigation. *Washington State Patrol* Vancouver, WA, February 13, 2001

80. Freeman MD. The role of cervical manipulation in neck pain. Invited lecture. *Cervical Spine Research Society 28th Annual Meeting* Instructional Course. Charleston, South Carolina, December 1, 2000

81. Freeman MD. Significant spinal injuries resulting from low-level accelerations: a case series of roller coaster injuries. *Cervical Spine Research Society 28th Annual Meeting* Charleston, South Carolina, December 1, 2000

82. Freeman MD. Injury Pattern Analysis and Forensic Trauma Epidemiology in vehicular homicide investigation. *Medical Examiner Division, Oregon State Police*. Salem, OR. November 28, 2000

83. Freeman MD. Minimal damage motor vehicle crash reconstruction. Invited lecture. Spine Research Institute of San Diego. *CRASH 2000* Spine Research Institute of San Diego. San Diego CA. August 11-13, 2000

84. Freeman MD. Analysis of the whiplash literature with emphasis on research out of Quebec and Saskatchewan. *Saskatchewan Medical Group and Coalition Against No-Fault*. Saskatoon, Saskatchewan. September 2000.

85. Freeman MD. Forensic applications of crash reconstruction. Invited lecture. *CRASH 2000* Spine Research Institute of San Diego.. San Diego, CA. August 11, 2000.

86. Freeman MD. Injury Pattern Analysis and Forensic Trauma Epidemiology; practical application in the forensic setting. Washington County CART Team training lecture, on behalf of *Medical Examiner Division, Oregon State Police*. Lake Oswego, Oregon. July 13, 2000.

87. Freeman MD. The epidemiology of acute and chronic whiplash injury in the U.S. Invited lecture. *HWS-Distorsion (Schleudetrauma) & Leichte Traumatische, Hirnverletzung. Invaliditat und Berufliche Reintegration*. Basel, Switzerland. June 29-30, 2000.

88. Freeman MD. Whiplash injury risk factors. Invited lecture. *Whiplash 2000*. Bath, England. May 18, 2000.

89. Freeman MD. How many whiplash injuries could there be? Invited lecture. *Whiplash 2000* Bath, England. May 17, 2000.

90. Freeman MD. Whiplash injury and occupant kinematics; the results of human volunteer crash testing. Invited lecture. *Society for Road Traffic Injuries (LFT)*. Oslo, Norway. April 3, 2000.

91. Freeman MD. Epidemiology of Whiplash Injuries. Invited lecture. *Swedish Orthopedic Society* Stockholm, Sweden. March 31, 2000.

92. Freeman MD. Methodologic pitfalls in epidemiological and clinical research, with examples from whiplash research. Invited lecture. *Arvetsinstitut (Institute for Musculoskeletal Medicine Research) Umeå University,* Umeå, Sweden. March 30, 2000.

93. Freeman MD. The prevalence of whiplash-associated chronic cervical pain among a random sample of patients with chronic spine pain. *Cervical Spine Research Society 27th Annual Meeting* Seattle, WA December 13-15, 1999.

94. Freeman MD. High speed videography of occupant movement during human volunteer crash testing; searching for an injury threshold. *North American Whiplash Trauma Congress* November 12, 1999.

95. Freeman MD. Scientific Chair Address. *North American Whiplash Trauma Congress* November 12, 1999.

96. The science of whiplash injuries: common mistakes in the reconstruction of low speed crashes. Invited lecture. *Forensic Accident Reconstructionists of Oregon* Eugene, Oregon, April 1, 1999.

97. Freeman MD. Late whiplash risk factor analysis of a random sample of patients with chronic spine pain. *Whiplash Associated Disorders World Congress* Vancouver, B.C. February 9, 1999.

98. Freeman MD. The epidemiology of whiplash injuries; critiquing the literature. Grand rounds, *Department of Public Health and Preventive Medicine, Oregon Health Sciences University* Portland, Oregon. December 17, 1998.

99. Freeman MD. The scientific appraisal of motor vehicle crash-related injuries. Invited lecture. *Managing the Cost of Auto Injuries*. Orlando, FL. December 8, 1998.

100. Freeman MD. Risk factors for chronic pain following acute whiplash injury. Invited lecture. *Managing the Cost of Auto Injuries* Orlando, FL. December 7, 1998.

101. Freeman MD. The epidemiology of whiplash injuries. Current Issues in Public Health, *Department of Public Health and Preventive Medicine, Oregon Health Sciences University* Portland, Oregon. October 7, 1998

102. Freeman MD. The epidemiology of whiplash - Is there a reliable threshold for whiplash injury? Invited lecture. *HWS-Distortion (Schleudetrauma) & Leichte Traumatische Medico-Legal Congress*. Basel, Switzerland, June 26, 1998.

103. Freeman MD. The Epidemiology of Late Whiplash. Invited lecture. *HWS-Distortion (Schleudetrauma) & Leichte Traumatische Medico-Legal Congress.* Basel, Switzerland, June 25, 1998.

104. Freeman MD. Methodologic error in the whiplash literature. Invited lecture. *Whiplash '96* Brussels, Belgium, November 15-16, 1996

105. Freeman MD. Conservative therapy for spinal disorders *St. Francis Hospital*, San Francisco, CA. September 1994

106. Freeman MD. The history of chiropractic. Invited lecture. *White Plains Hospital*, White Plains, NY. December 1993

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

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

DEFENDANT'S MOTION TO RECONSIDER SENTENCE

NOW COMES the Defendant, JUSSIE SMOLLETT, by and through his attorneys, The Law Offices of Heather A. Widell et al, and pursuant to Illinois Supreme Court Rule 604(d) and all other applicable statutes and local court rules moves this Honorable Court to reconsider sentence imposed and in support thereof states as follows:

1. On December 9, 2021 Mr. Smollett was found guilty by a jury of five counts of Disorderly Conduct - to wit: filing a false police report.

2. On March 10, 2022 the matter appeared before the Court for Post-Trial Motions and Sentencing wherein the motions were denied and the Court sentenced Mr. Smollett to a term of 30 (mos/yrs) probation (felony probation) w/ the first 150 days to be spent in the cook county department of corrections.

3. The sentence ordering restitution of $ 120,106 is in error since neither the City nor the Chicago Police Department ("CPD") could be considered a "victim" within the meaning of the restitution statute. *See, e.g., People v. Chaney,* 188 Ill. App.3d 334, 544 N.E.2d 90 (1989); *People v.Winchell,* 140 Ill. App.3d 244, 488 N.E.2d 620 (1986); *People v.Gaytan,* 186 Ill. App.3d 919, 542 N.E.2d 1163 (1989); *People v. Evans,* 122 Ill. App.3d 733, 461 N.E.2d 634 (1984); *People v. Lawrence,* 206 Ill. App.3d 622, 565 N.E.2d 322 (1990); *People v. McGrath,* 182 Ill. App.3d 389, 538 N.E.2d 855 (1989). The rationale is that where public money is expended in pursuit of solving crimes, the expenditure is part of the investigatory agency's normal operating costs and the agency is not considered a "victim" for purposes of restitution. *Chaney,* 188 Ill. App.3d at 335, 544 N.E.2d at 91.

4. The sentence against Mr. Smollett violates his Fifth and Eighth Amendment right as discussed in the Defense position statement.

5. In light of the lengthy mitigation presented to the Court during the sentencing hearing, the fact that Mr. Smollett has already received punitive action in 2019 for his conduct and Mr. Smollett's overall lack of felony or violent criminal background, Defendant maintains that the sentence imposed in this case is excessive and moves the Court to

impose a lesser more appropriate sentence in the form of a term of only probation and not any jail or prison.

\WHEREFORE, for all the reasons stated above, Defendant, JUSSIE SMOLLETT, respectfully moves this Honorable Court to reconsider the sentence imposed and to impose a lesser and more appropriate sentence.

Respectfully submitted,

Attorney for Defendant

The Law Offices of Heather A. Widell
1507 E. 53rd Street Suite 2W
Chicago, Illinois 60615
Ph: (773) 955-0400
Fax: (773) 955-1951
Attorney #37568

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

or

A Municipal Corporation

v.

JUSSIE SMOLLETT

Defendant

☒ Criminal Division

☐ Municipal District No. _____

Br/Rm 700

Case No. 20 CR 03050-01

Statute Citation: 720 ILCS 5/26-1(a)(4)

AOIC Code: _____

IR No. 2397468 SID No. _____

CB No. 19771648

SENTENCING ORDER

☐ SOCIAL SERVICE ☒ ADULT PROBATION

☐ SUPERVISION ☐ CONDITIONAL DISCHARGE ☐ STANDARD PROBATION

IT IS HEREBY ORDERED that

the Defendant is sentenced to a term of 30 ○ Years ☒ Months ○ Days

☐ Scheduled Termination Date: _____

☐ Misdemeanor ☒ Felony ☐ Standard Probation

☐ Adult Probation Drug Court ☐ Adult Probation Mental Health Court ☐ Adult Probation Veterans Court

☐ Adult Probation ACT Court ☐ Adult Probation Mental Health Unit

☐ Adult Probation Sex Offender Program (additional requirements - see additional order)

☐ Other _____

☐ Special Probation includes the following statutory requirements:

- ☐ 720 ILCS 550/10 (550 Probation Cannabis Control Act) 24 months' probation, no less than 30 hours community service, minimum of 3 periodic drug tests
- ☐ 720 ILCS 570/410 (410 Probation Controlled Substances Act) 24 months' probation, no less than 30 hours community service, minimum of 3 periodic drug tests
- ☐ 720 ILCS 646/70 (Methamphetamine Control & Community Protection Act) 24 months' probation, no less than 30 hours community service, minimum of 3 periodic drug tests
- ☐ 730 ILCS 5/5-6-3.6 (1st Time Weapon Offender) 18-24 months' probation, minimum of 50 hours community service, both school and employment, periodic drug testing
- ☐ 730 ILCS 5/5-6-3.4 (Second Chance) no less than 24 months' probation, minimum of 30 hours community service, high school diploma/GED and employment, minimum of 3 periodic drug tests
- ☐ 720 ILCS 5/12C-15 (Child Endangerment Probation) no less than 2 years' probation, cooperate with all requirements and recommendations with the Department of Children and Family Services (DCFS).

☐ Reporting (All DUI orders are reporting) ☒ Non-Reporting

☐ Limited Reporting (Monitor community service or restitution only)

It is further ordered Defendant shall comply with the conditions specified below:

STANDARD CONDITIONS

☑ If reporting is ordered, the Defendant shall report immediately to the Social Service or Adult Probation Department as indicated in the above Sentencing Order and pay that department such sum as determined by the department in accordance with the standard probation fee guide. Said fee not to exceed $50.00 per month.

☑ Pay all fines, costs, fees, assessments, reimbursements and restitutions (if applicable, additional order required.).

- ☑ Not violate the criminal statutes of any jurisdiction.
- ☑ Refrain from possessing a firearm or any other dangerous weapons.
- ☑ Notify monitoring agency of change of address.
- ☑ Not leave the State of Illinois without consent of the court or monitoring Agency.
- ☑ Comply with reporting and treatment requirements as determined by the Adult Probation or Social Service Department's assessment. Any treatment requirements not specified elsewhere on this order that would cause a financial hardship shall be reviewed by the court after being imposed.

DRUG/ALCOHOL/DUI RELATED CONDITIONS

- ☐ Complete drug/alcohol evaluation and treatment recommendations.
- ☐ Submit to random drug testing as determined by the monitoring agency or treatment provider.
- ☐ Zero Tolerance for Drugs/Alcohol.
- ☐ Remote Alcohol Monitoring.
- ☐ Transdermal Alcohol Monitoring.
- ☐ Breath Alcohol Ignition Interlock Device.
- ☐ Complete Traffic Safety School.
- ☐ Complete TASC Program.
- ☐ DUI Offenders Classified Level A Monitoring, report immediately to Central States Institute of Addictions and commence the following treatment intervention program within sixty (60) days of this order:
  ☐ Minimum ☐ Moderate ☐ Significant
- ☐ DUI Offenders Classified Level B or C Monitoring, report immediately to:
  ☐ Social Service Department ☐ Adult Probation Department and complete a drug/alcohol evaluation within thirty (30) days, fully comply with the intervention plan and commence the following treatment intervention program within sixty (60) days of this order:
  ☐ Minimum ☐ Moderate ☐ Significant ☐ High
- ☐ Attend a Victim Impact Panel.
- ☐ File proof of financial responsibility with the Secretary of State.
- ☐ Surrender Driver's License to Clerk of the Court.
- ☐ Pay all Driver's License reinstatement fees.

SPECIAL CONDITIONS

- ☐ Home Confinement through Adult Probation until _____ (Additional Order Required).
- ☐ GPS device through Adult Probation until _____ at $10 per day (Additional Order Required).
- ☐ Submit to searches by Adult Probation of person and residence when there is reasonable suspicion to require it (high risk probationers only).
- ☐ Obtain a GED.
- ☐ Perform _____ hours of community service as directed by the ☐ Social Service or ☐ Adult Probation Department Community Service Program.
- ☐ Perform _____ days of Sheriff's Work Alternative Program (S.W.A.P.) (773) 674-0716.
  ☐ Weekends Allowed
- ☐ Avoid contact with: _____
- ☐ Complete mental health evaluation and treatment recommendations.
- ☐ Register as a Violent Offender Against Youth.
- ☐ Register as an Animal Abuser with the Cook County Sheriff.
- ☒ DNA Indexing.
- ☐ Complete Anger Management Counseling and any other recommendations per assessment, which may include an evaluation and/or treatment for alcohol and drug abuse, mental health, parenting or sexual abuse.

DOMESTIC VIOLENCE

- ☐ Comply with all lawful court orders including an Order of Protection.
- ☐ Complete Domestic Violence Counseling and any other recommendations per assessment, which may include an evaluation and/or treatment for alcohol and drug abuse, mental health, parenting or sexual abuse.

Sentencing Order (03/09/20) CCCR 0090 C

SEX OFFENDER

- ☑ Additional conditions required - see additional order.
- ☐ Complete evaluation and treatment recommendations for sex offenders.
- ☐ Register as a sex offender.
- ☐ STD/HIV Testing.

Stephen J. Kane
Deputy corporation Counsel
City of Chgo Dept. of Law
121 N. LaSalle Street 600
Chgo IL 60602

RESTITUTION

☒ Make restitution to: Stephen J. Kane

City of Chicago Department of Law in the amount of $ 120,106, payable through the Social Service Department or Adult Probation Department at the rate of $ _____,

per _____ with final payment due on or before ~~60 days prior to termination date~~ March 10, 2024

☐ **OTHER** _____

☒ **ADDITIONAL ORDERS**

- First 150 days in Cook County Jail
- Given permission to travel out of state

☐ Next Court Date: _____

I acknowledge receipt of this Order and agree to abide by the specified conditions. I agree to accept notices by regular mail at the address provided to the monitoring agency and to answer questions asked by the Court related to my behavior. I understand that a failure to comply with the conditions of this Order, or refusal to participate, or withdrawal or discharge from a required program, plan, or testing will be considered a violation of this Order and will be reported to the Court; and may result in a re-sentencing imposing the maximum penalty as provided for the offense.

Jessie Smollett JA

(Defendant's Name) (Defendant's Signature)

Defendant DOB: 6/21/82

Address: 220 W. 148th St., Apt. 2C City: New York

State: NY Zip: 10039

Telephone: 310-993-1649 Email: jussie.smollett@gmail.com

Prepared by: Office of the Special Prosecutor

ENTERED
Judge James B. Linn #1544
MAR 10 2022
CLERK OF THE CIRCUIT COURT

ENTERED:

Dated: _____

James B. Linn 1544

Judge Judge's No.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

v.

Jussle Smollett

Defendant

Case No. 20 CR 03050-01

CRIMINAL AND TRAFFIC ASSESSMENT ORDER

The Defendant has appeared before this Court and ☐ pled guilty ☒ was found guilty of the following offenses:

Disorderly conduct 720 ILCS 5/26-1(a)(4)

In addition to any other sentences imposed in the case, the Defendant is ordered to pay the following fines, fees : assessments:

1. Fines

☒ Public Act 100-0987 (effective July 1, 2019) established a minimum fine of $25 for a minor traffic offens and $75 for any other offense, unless otherwise provided by law. If applicable, Defendant has been admonished of his/her right to elect whether he/she will be sentenced under the law in effect at the time the offense or at the time of sentencing.

a.	Offense:	Disorderly Conduct 720 ILCS 5/26-1(a)(4)	$ 25,000.00
b.	Offense:		$
c.	Offense:		$
		Total Fine Amount:	$ 25,000.00

2. Criminal Assessments (check the highest class offense only)

a. ☐	Schedule 1. Generic Felony (705 ILCS 135/15-5) $549	$
b. ☐	Schedule 2. Felony DUI (705 ILCS 135/15-10) $1,709	$
c. ☐	Schedule 3. Felony Drug Offense (705 ILCS 135/15-15) $2,215	$
d. ☐	Schedule 4. Felony Sex Offense (705 ILCS 135/15-20) $1,314	$
e. ☐	Schedule 5. Generic Misdemeanor (705 ILCS 135/15-25) $439	$
f. ☐	Schedule 6. Misdemeanor DUI (705 ILCS 135/15-30) $1,381	$
g. ☐	Schedule 7. Misdemeanor Drug Offense (705 ILCS 135/15-35) $905	$
h. ☐	Schedule 8. Misdemeanor Sex Offense (705 ILCS 135/15-40) $1,184	$

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

v.

Jussie Smollett

Defendant

Case No. 20 CR 03050-01

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h. ☐	Schedule 8. Misdemeanor Sex Offense (705 ILCS 135/15-40) $1,184	$

i. ☐	Schedule 9. Major Traffic Offense ((705 ILCS 135/15-45) $325 + (Cook County Code § 18-47(A)) $37) $362	$
j. ☐	Schedule 10. MinorTraffic Offense ((705 ILCS 135/15-50) $226 + (Cook County Code § 18-47 (A)) $28) $254	$
k. ☐	Schedule 10.5. Truck Weight / Load Offense (705 ILCS 135/15-52) $260	$
l. ☐	Schedule 11. Conservation Offense (705 ILCS 135/15-55) $195	$
m. ☐	Schedule 12. Disposition Under Supreme Court Rule 529 (705 ILCS 135/15-60) $164	$
n. ☐	Schedule 13. Non-Traffic Violation (705 ILCS 135/15-65) $100	$
	Total Criminal Assessment Amount	$

3. Conditional Assessments (check all that apply)

a. ☒	2011 Arson/residential arson/aggravated arson (705 ILCS 135/15-70(1)) $500 for each conviction	$
b. ☐	3015 Child pornography 705 ILCS 135/15-70(2)) $500 for each conviction	$
c. ☐	3004/6001 Crime lab drug analysis (705 ILCS 135/15-70(3)) $100	$
d. ☐	6013 DNA analysis (705 ILCS 135/15-70(4)) $250	$
e. ☐	6002/3005 DUI analysis (705 ILCS 135/15-70(5)) $150	$
f. ☐	2021 Drug-related offense, possession/delivery (705 ILCS 13/115-70(6)) Street value	$
g. ☐	2022 Methamphetamine-related offense, possession/manufacture/delivery (705 ILCS 135/15 70(7) Street Value	$
h. ☐	2019 Order of protection violation/criminal code (705 ILCS 135/15-70(8)) $200 for each conviction	$
i. ☐	6007 Order of protection violation (705 ILCS 135/15-70(9)) $25 for each conviction	$
j. ☐	2031 State's Attorney petty or business offense (705 ILCS 135/15-70(10)(A)) $4	$
k. ☐	2032 State's Attorney conservation or traffic offense (705 ILCS 135/15-70(10)(B)) $2	$
l. ☐	6051 Speeding in a construction zone (705 ILCS 135/15-70(11)) $250	$
m. ☐	6017 Supervision disposition under Vehicle Code (705 ILCS 135/15-70(12)) $0.50	$
n. ☐	6008 Conviction(s) for DV against family member (705 ILCS 135/15-70(13)) $200 for each sentenced violation	$

o. ☐	3009 EMS response reimbursement, vehicle/snowmobile/boat violation (705 ILCS 135/15-70(14)) Maximum amount is $1,000	$
p. ☐	3020 EMS response reimbursement, controlled substances (705 ILCS 135/15-70(15)) Maximum amount is $1,000	$
q. ☐	3016 EMS response reimbursement, reckless driving/aggravated reckless driving speed in excess 26 mph (705 ILCS 135/15-70(16)) Maximum amount is $1,000)	$
r. ☐	6052 Prostitution violations that result in an imposition of a fine (705 ILCS 135/15-70(17)) Minimum amount is $350	$
s. ☐	6003 Weapons violation (705 ILCS 135/15-70(18) $100 for each conviction)	$
t. ☐	Scott's Law Fund (625 ILCS 5/11-907(c)) First violation $250 - $10,000; Subsequent violation $750 - $10,000	$
u. ☐	6022 Roadside Memorial Fund (730 ILCS 5/5-9-1.22) $50	$
	Total Conditional Assessment Amount	$

4. Other Assessment

a. ☐	Service Provider Fee(s) payable to the entity that provided the service. *** Not eligible for credit for time served, substitution of community service or waiver (705 ILCS 135/5-15). Applies to Traffic Safety School, etc.**	$
	Total Other Assessment Amount	$

5. Credit

a. ☒	Credit for time served 150 days X $5 day credit	$ 750.00
	Total Credits Amount	$ 750.00

6. Offsets of Assessments

a. ☐		Community Service (1 hour -= $4.00 subtracted from criminal assessment)	$
b. ☐		Waiver of Court Assessment granted. *** Does not apply to fines or IVC**	$
	i. ☐	Full waiver granted, 100% waived	$
	ii. ☐	Partial waiver granted, ○ 25% ○ 50% ○ 75% waived	$
		Total Offset Amount	$

The Court orders:

By this date, March 10, 2022, Defendant shall pay the circuit court of this county:

1.	Total Fines	$ 25,000.
2.	Total Criminal Assessments	$
3.	Total Conditional Assessments	$
4.	Total Other Assessments	$
5.	Total Credits	$ 750.
6.	Bond Deduct	$
7.	Total Offsets	$
	Total Amount Due	$ 24,250.

ENTERED:

Dated:

Judge

1544

Judge's No.

I am the Defendant and I have read and understand thi
Criminal and Traffic Assessment Order.

Signature of Defendant

ENTERED
Judge James R. Linn #1544
MAR 10 2022
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
v.
JUSSIE SMOLLETT
Defendant

Case No. 20CR0305001
Date of Birth 06/21/1982
Date of Arrest
IR Number SID Number

ORDER OF COMMITMENT AND SENTENCE TO COOK COUNTY DEPARTMENT OF CORRECTIONS

The Defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Cook County Department of Corrections as follows:

Count	Statutory Citation	Offense	Months	Days	Class	Consecutive	Concurrent
1	720 ILCS 5/26-1(a)(4)	FALSE REPORT OF OFFENSE		150	4		X
2	720 ILCS 5/26-1(a)(4)	FALSE REPORT OF OFFENSE		150	4		X
3	720 ILCS 5/26-1(a)(4)	FALSE REPORT OF OFFENSE		150	4		X
4	720 ILCS 5/26-1(a)(4)	FALSE REPORT OF OFFENSE		150	4		X
5	720 ILCS 5/26-1(a)(4)	FALSE REPORT OF OFFENSE		150	4		X

ENTERED
Judge James B. Linn 1544
MAR 10 2022
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
COOK COUNTY, IL

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of _____ days as of the date of this order.

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____

AND consecutive to the sentence imposed under case number(s) _____

IT IS FURTHER ORDERED THAT BOND REVOKED – MITT TO ISSUE – ALL COUNTS TO RUN CONCURRENT

IT IS FURTHER ORDERED that the Clerk of the Court provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the Defendant into custody and deliver him/her to the Cook County Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

DATED: March 10, 2022 ENTER: 3/10/2022

CERTIFIED BY _____ S. Sims

Judge Linn, James B 1544
Judge's No.

VERIFIED BY _____

ENTERED
3/10/2022
Iris Y Martinez
Clerk of the Circuit Court
Cook County, IL
DEPUTY CLERK S. Sims

IRIS Y MARTINEZ CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Printed: 3/10/2022 7:16 PM

GROUP EXHIBIT 3

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

FILED
2020 FEB 24 AM 11:23

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

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

NOW COMES Defendant Jussie Smollett, by and through his attorneys, Geragos & Geragos, APC and The Quinlan Law Firm, and respectfully moves this Court for an order dismissing the indictment in this case for violation of Mr. Smollett's right against double jeopardy. The Defendant's Fifth Amendment right to be protected from being put twice into jeopardy was violated by the return of a new indictment in case number 20 CR 03050-01 alleging the same violations over the same time period as the violations previously alleged against Mr. Smollett in case number 19 CR 3104 (filed on March 7, 2019 and dismissed on March 26, 2019) because Mr. Smollett was punished in the prior criminal proceedings by the imposition of a criminal penalty. In support of this Motion, Mr. Smollett provides the following memorandum of facts and law.

INTRODUCTION

The serial prosecution of Mr. Smollett is fundamentally unfair and a denial of Mr. Smollett's right to due process and to be free from being twice put into jeopardy.

The indictment in case number 20 CR 03050-01 alleges six counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended. The indictment arises out of allegations related to the January 29, 2019 attack on Mr. Smollett, which was previously the subject of a 16-count indictment against him in the Circuit Court of Cook County, case number 19 CR 3104 (filed on March 7, 2019 and dismissed on March 26, 2019). There can be no dispute that the instant indictment arises from the identical alleged violations that gave rise to the prior indictment.

When the charges against Mr. Smollett were dismissed on March 26, 2019, the bond he had posted in the amount of $10,000.00 was forfeited, per the agreement of the parties. One of the fundamental rights the Double Jeopardy Clause protects is the right to be free from multiple punishment for the same offense. Because Mr. Smollett was punished in a prior criminal prosecution by the imposition of a criminal penalty, namely forfeiture of the $10,000.00 bond, this proceeding is barred as a second attempt to punish Mr. Smollett criminally and the indictment must be dismissed for violation of his right against Double Jeopardy.

FACTUAL BACKGROUND

The criminal prosecution giving rise to this Motion arises from a racist and homophobic attack on Jussie Smollett on January 29, 2019 by two masked men. Although Mr. Smollett was initially treated as the victim of a hate crime, the Chicago Police Department later accused Mr. Smollett of staging the hate crime and filing a false police report. On March 7, 2019, a felony indictment was filed against Mr. Smollett in the Circuit Court of Cook County, case number 19 CR 3104, alleging 16 counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended.

On March 26, 2019, the State's Attorney's Office moved to *nolle pros* all 16 counts. Assistant State's Attorney Risa Lanier told the court: "After reviewing the facts and circumstances of the case, including Mr. Smollett's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, the State's motion in regards to the indictment is to nolle pros. We believe this outcome is a just disposition and appropriate resolution to this case." Exhibit 1, 3/26/2019 Transcript at 3. She added: "I do have an order directing the Clerk of the Circuit Court to release Bond No. 1375606, payable to the City of Chicago, to be sent directly to the City of Chicago, Department of Law." *Id.*

The Honorable Steven G. Watkins granted the motion and dismissed the case against Mr. Smollett. The $10,000.00 bond Mr. Smollett had posted was forfeited, as

agreed by the parties. Judge Watkins also ordered the records in the matter sealed. The Smollett case had drawn national attention and the sudden dismissal of all charges without a proper explanation by the State's Attorney's Office caused public confusion.

On April 5, 2019, Sheila M. O'Brien, in *pro se*,[1] filed a Petition to Appoint a Special Prosecutor to preside over all further proceedings in the matter of the *People of the State of Illinois v. Jussie Smollett* (hereafter "Petition").

On April 11, 2019, the City of Chicago filed a civil complaint in the Circuit Court of Cook County, Illinois, Law Division,[2] styled *City of Chicago v. Smollett*, No. 2019L003898, in which the City is seeking $130,106.15 in overtime pay as well as civil penalties, treble damages, and attorneys' fees and costs under the Municipal Code of Chicago for investigating the alleged false statements made by Mr. Smollett to the City. Notably, the total amount alleged in damages is not offset by the $10,000.00 forfeited by Mr. Smollett in the criminal proceedings.

On June 21, 2019, Judge Toomin, to whom the Petition to Appoint a Special Prosecutor had been transferred by Judge Martin, issued a written order granting the appointment of a special prosecutor "to conduct an independent investigation of any person or office involved in all aspects of the case entitled the People of the State of Illinois

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

[2] On July 3, 2019, Mr. Smollett removed this case to federal court.

v. Jussie Smollett, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected." Exhibit 2, Order at 21.

On August 23, 2019, over Mr. Smollett's objection, Judge Toomin appointed Dan K. Webb as the special prosecutor to preside over further proceedings in this matter. On February 11, 2020, pursuant to an investigation led by Mr. Webb, a special grand jury indicted Mr. Smollett of six counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended. The charges arise from the same January 29, 2019 attack on Mr. Smollett, which was previously the subject of the 16-count indictment against him in the Circuit Court of Cook County, case number 19 CR 3104 (filed on March 7, 2019 and dismissed on March 26, 2019).

In the Information Release issued on February 20, 2020 regarding the indictment, Mr. Webb acknowledged that Mr. Smollett had been punished during the prior criminal proceeding. He noted that on March 26, 2019:

> the CCSAO made the decision to resolve the charges under the following circumstances: 1) complete dismissal of the 16-count felony indictment; ***2) only punishment for Mr. Smollett was to perform 15 hours of community***

> ***service; 3) requiring Mr. Smollett to forfeit his $10,000 bond as restitution to the City of Chicago*** (a figure amounting to less than 10% of the $130,106.15 in police overtime pay that the City alleges it paid solely due to Mr. Smollett's false statements to police); 4) not requiring that Mr. Smollett admit any guilt of his wrongdoing (in fact, following the court proceedings on March 26, Mr. Smollett publically stated that he was completely innocent); and 5) not requiring that Smollett participate in the CCSAO Deferred Prosecution Program (Branch 9), which he was eligible to participate in, and which would require a one-year period of court oversight of Mr. Smollett.

Exhibit 3, Information Release at 2 (emphasis added).

ARGUMENT

A. The Double Jeopardy Clause Prohibits Double Punishment.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that no person shall "be subjected for the same offence to be twice put in jeopardy of life or limb." *People v. Henry*, 204 Ill.2d 267, 282, 789 N.E.2d 274, 283 (2003); *Lockhart v. Nelson*, 488 U.S. 33, 38; 109 S. Ct. 285 (1988). Although its text mentions only harms to "life or limb," it is well settled that the Amendment also covers monetary penalties. *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 769 (1994). Similar protection is provided by the Illinois Constitution (Ill. Const. 1970, art. I, § 10) and by Illinois statute (720 ILCS 5/3-4(a) (West 2012)). The United States Supreme Court has explained that "[t]he right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should

continue to be highly valued. If such great constitutional protections are given a narrow grudging application they are deprived of much of their significance." *Green v. United States*. 355 U.S. 184, 198, 78 S. Ct. 221,229(1957).

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *People v. Henry*, 204 Ill. 2d 267, 283 (2003). The third of these protections -- the one at issue here -- has deep roots in our history and jurisprudence.

As the United States Supreme Court has recognized, "[a]s early as 1641, the Colony of Massachusetts in its 'Body of Liberties' stated: 'No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.'" *United States v. Halper*, 490 U.S. 435, 440 (1989) (quoting American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed.1910)). The High Court has also noted that "[i]n drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: 'No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.'" *Id.* (quoting 1 Annals of Cong. 434 (1789-1791) (J. Gales ed. 1834)). Consistent with these principles, the Supreme Court observed over a century ago: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall. 163, 85 U. S. 168 (1874).

B. The $10,000 Bond Forfeiture in this Case Was Punishment for Purposes of Double Jeopardy.

Since there can be no dispute that the instant proceeding and the prior criminal proceeding concern the same conduct, the only question is whether the $10,000.00 bond forfeiture constitutes "punishment" for purposes of the Double Jeopardy Clause. The answer is an unequivocal yes.

As explained below, since the bond forfeiture in this case could not constitute victim restitution, it amounted to a fine, which is one of the enumerated forms of punishment for violation of the disorderly conduct statute. Moreover, there was no rational, nonpunitive reason for the bond forfeiture in this case and an expressed intent to punish can be shown from the circumstances. Because Mr. Smollett was punished in a prior criminal prosecution by the imposition of a criminal penalty, this proceeding is barred as a second attempt to punish Mr. Smollett criminally. *See Helvering v. Mitchell*, 303 U. S. 391, 399 (1938) (the Double Jeopardy Clause "prohibits . . . attempting a second time to punish criminally, for the same offense").

1. Disorderly conduct convictions include monetary fines in the amount forfeited by Mr. Smollett.

The instant indictment against Mr. Smollett alleges six counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-

1(a)(4) of the Illinois Compiled Statutes Act of 1992, as amended (the exact same crime alleged in the previous indictment against Mr. Smollett).

A violation of the disorderely conduct statute at issue is a Class 4 felony. *See* 720 ILCS 5/26-1(b). The sentence for a Class 4 felony is "a determinate sentence of not less than one year and not more than 3 years." 730 ILCS 5/5-4.5-45(a). In addition, fines may be imposed as provided in Section 5-4.5-50(b). *See* 730 ILCS 5/5-4.5-45(e). Section 5-4.5-50(b) provides that unless otherwise specified by law, the minimum fine for all felonies is $75 and a fine may not exceed, for each offense, $25,000 or the amount specified in the offense, whichever is greater. *See* 730 ILCS 5/5-4.5-50(b).

The disorderly conduct statute also specifically provides for certain fines as punishment for violation of the statute. For instance, for a Class 3 felony, the statute specifically requires a fine in an amount between $3,000 and $10,000. *See* 720 ILCS 5/26-1(b). And any person convicted of disorderly conduct under paragraph (6)(a) must be ordered to reimburse the public agency for the reasonable costs of the emergency response by the public agency up to $10,000. *See* 720 ILCS 5/26-1(e).

2. Bond forfeitures are expressly authorized for the payment of fines.

Bond forfeiture can be involuntary or voluntary. In most instances, bond is forfeited involuntarily when a person fails to appear at court or to otherwise comply with bail conditions. *See* 725 ILCS 5/110-7(a) & (g). In other instances, bond may be forfeited voluntarily in order to cover certain expenses. The statute explicitly states that "the bail

may be used to pay costs, attorney's fees, ***fines***, or other purposes authorized by the court." 725 ILCS 5/110-7(a) (emphasis added); *see also* 730 ILCS 5/5-5-6(e) ("The court may require the defendant to apply the balance of the cash bond, after payment of court costs, and ***any fine that may be imposed*** to the payment of restitution.") (emphasis added).

3. The bond forfeiture in this case could not constitute victim restitution.

Under the circumstances of this case where the bond was voluntarily forfeited as a condition of the dismissal of charges (as opposed to an involuntary bond forfeiture which results when the accused fails to comply with bail conditions),[3] the forfeited money can only constitute a fine or victim restitution. But as explained below, neither the City of Chicago nor the Chicago Police Department can be considered a "victim" within the meaning of the restitution statute (730 ILCS 5/5-5-6); therefore, the bond forfeiture can only constitute a fine.

Illinois courts have repeatedly held that a police department or government agency is not considered a "victim" within the meaning of the restitution statute. *See, e.g., People v. Chaney*, 188 Ill. App.3d 334, 544 N.E.2d 90 (3d Dist. 1989); *People v. Winchell*, 140 Ill. App.3d 244, 488 N.E.2d 620 (5th Dist. 1986); *People v. Gaytan*, 186 Ill. App.3d 919, 542 N.E.2d 1163 (2d Dist. 1989); *People v. Evans*, 122 Ill. App.3d 733, 461 N.E.2d 634 (3d Dist.

[3] This is in contrast to a bond forfeiture ***judgment*** which, under section 110-7(g) of the Code of Criminal Procedure, is a civil judgment. *See People v. Bruce*, 75 Ill. App. 3d 1042, 1044 (1979). Upon entry of a bond forfeiture judgment, the obligation of the defendant becomes a debt of record as a civil liability. *See People v. Arron*, 15 Ill. App. 3d 645, 648 (1973).

1984); *People v. Lawrence*, 206 Ill. App.3d 622, 565 N.E.2d 322 (5th Dist. 1990); *People v. McGrath*, 182 Ill. App.3d 389, 538 N.E.2d 855 (2d Dist. 1989). The rationale is that where public money is expended in pursuit of solving crimes, the expenditure is part of the investigatory agency's normal operating costs and the agency is not considered a "victim" for purposes of restitution. *Chaney*, 188 Ill. App.3d at 335, 544 N.E.2d at 91.

In *People v. Evans*, after defendant was found guilty of unlawful delivery of a controlled substance (LSD), he was sentenced to a term of two years' imprisonment and ordered to make restitution in the amount of $180 from his bond. 122 Ill. App.3d at 734. On appeal, the Court of Appeal held that the trial court's restitution of $180 to the Multi-County Drug Enforcement Group (MEG) was in error and vacated that portion of the judgment. *Id.* at 740. The court explained:

> While certainly we would be remiss were we to hold that unlawful delivery of a controlled substance is a victimless crime, we would be blinking reality were we not to acknowledge that many, if not most, offenders are brought to justice through the efforts of undercover agents making buys with public monies. We will not, however, strain the commonly accepted understanding of the word "victim" so as to include the public drug enforcement agency, MEG, in the case before us. Where public monies are expended in the pursuit of solving crimes, the expenditure is part of the investigating agency's normal operating costs. The governmental entity conducting an investigation is not therefore considered a "victim" to the extent that public monies are so expended.

Id.

In *People v. Derengoski*, 247 Ill. App. 3d 751, 752-53 (Ill. App. Ct. 1993), 73 defendants were convicted of criminal trespass to real property and 4 defendants were

convicted of resisting a peace officer. As part of their sentence, each defendant was ordered to pay $68.50 in restitution to the Champaign County police department, which represented the proportionate share of the additional costs the police department incurred in policing the protest and arresting the protestors. At the various sentencing hearings, evidence was introduced that the Department incurred substantial costs in controlling the demonstration totaling $5,000.92 ($3,293.97 in overtime salary for police officers, $221.39 for a SWAT team, $1,032 for summoning the fire department, $168 to feed the police officers, and $85.56 in overtime for a clerk to subsequently calculate the expenses incurred by the Department). *Id.* at 754.

On appeal, all defendants challenged the restitution order contending that the Champaign County police department was not a "victim" within the meaning of the restitution statute. *Id.* at 753. In reversing the restitution orders, the Court of Appeal explained:

> These expenses were incurred solely as a result of the police department's ongoing, normal duty to maintain public order. To the extent the public may be entitled to a "remedy," the court is entitled to consider imposing a fine upon a defendant, an authorized disposition for these offenses. (Ill. Rev. Stat. 1991, ch. 38, pars. 1005-9-1(a)(2), (a)(3).)

Id. at 755.

Because the forfeited money in this case could not constitute victim restitution, it was necessarily a fine.

4. There was no rational, nonpunitive reason for the bond forfeiture, and an expressed intent to punish can be shown.

Assuming *arguendo* that the bond forfeiture were to somehow be interpreted as a civil penalty (which it clearly was not), it would still constitute "punishment" under the circumstances of this case.

In *United States v. Halper*, 490 U.S. 435 (1989), the United States Supreme Court considered under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause. The Court first noted that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and, for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. *Id.* at 448. To that end, the Court explained that "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id. See also Austin v. United States*, 509 U.S. 602, 610 (1993) ("a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.")

(quoting *Halper*, 490 U.S. at 448) (internal quotation marks omitted); *Bell v. Wolfish*, 441 U.S. 520, 538-39, 560-61 (1979) (holding that a challenged sanction constitutes punishment if an expressed intent to punish can be shown or if there is no rational, nonpunitive reason for it).

Here, there was no rational, nonpunitive reason for the $10,000.00 bond forfeiture other than to serve as punishment. Upon the dismissal of the case, the bail bond would normally be returned to the accused, less bail bond costs not to exceed $100.00.[4] *See* 725 ILCS 5/110-7(f). However, despite Mr. Smollett's full compliance with all bail conditions, the forfeiture of his bond was required as a condition of the dismissal of charges against him. Therefore, the bond forfeiture was intended to serve retributive or deterrent purposes.

Putting aside the fact that neither the City of Chicago nor the Chicago Police Department could be considered a "victim" within the meaning of the restitution statute, any suggestion that the bond forfeiture was remedial must also fail because the City claims that it has incurred far more than that amount, namely $130,106.15 in overtime pay, investigating the attack on Mr. Smollett (so the $10,000.00 was not intended to make the City whole).[5] Moreover, in the City of Chicago's civil lawsuit against Mr. Smollett to

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[4] Because the population in Cook County exceeds 3,000,000, the amount retained by the clerk as bail bond costs could not exceed $100. *See* 725 ILCS 5/110-7(f).

[5] It should also be noted that prior to the dismissal of the charges, the State failed to introduce one scintilla of evidence as to the alleged overtime pay the City of Chicago incurred to investigate the police report in question.

recoup these costs, the total amount alleged in damages is not offset by the $10,000.00 forfeited by Mr. Smollett in the criminal proceedings. Thus, the bond forfeiture was punitive not remedial.

Furthermore, the State's Attorney's statements after the dismissal of charges, namely that the State's Attorney's Office still believed Mr. Smollett was guilty, can be interpreted as an expressed intent that the State's Attorney's Office intended to punish Mr. Smollett by requiring a fine in the form of bond forfeiture to dismiss the charges. *See* Matt Masterson & Eddie Arruza, *Kim Foxx Backs Dismissal of Charges in Jussie Smollett Case*, **WTTW** (Mar. 27, 2019), *available at* https://news.wttw.com/2019/03/27/kim-foxx-backs-dismissal-charges-jussie-smollett-case (Kim Foxx stating: "We can't offer someone (the chance) to forfeit their bond in exchange for dropping their charges if we don't think that they're guilty."). This is consistent with the State's Attorney's public statements that similar crimes are often punished by the imposition of community service and/or fines. *See id.* (Foxx said "the result of this case was in line with other low-level felony charges like the ones Smollett faced"); *see also id.* ("The state's attorney's office says it regularly disposes of low-level felony cases with this type of 'alternative prosecution' – pointing to more than 5,700 such cases in the last two years alone."

Finally, the fact that Mr. Smollett was not convicted of any crimes in the prior criminal proceeding does not affect the analysis. In a case decided 140 years ago, the United States Supreme Court explained that

> [t]he term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. ***He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense.*** To hold otherwise would be to sacrifice a great principle to the mere form of procedure and to render settlements with the government delusive and useless. ***Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect.***

United States v. Chouteau, 102 U.S. 603, 611 (1880) (emphases added).

WHEREFORE, Defendant, Jussie Smollett, by his attorneys, Geragos & Geragos, APC and The Quinlan Law Firm, requests that the indictment be dismissed and all further proceedings in this matter vacated.

Dated: February 24, 2020

Respectfully submitted,

/s/ Tina Glandian

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The undersigned attorney certifies on February 24, 2020, these papers were served to the following attorneys of record:

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

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

SUR-REPLY TO MOTION TO DISMISS INDICTMENT FOR ALLEGED VIOLATION OF DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY

Mr. Smollett's ***34-page*** Reply brief is an unsuccessful attempt to distract the Court's attention away from the fundamental threshold issue in any double jeopardy analysis (and the dispositive issue here)—***whether jeopardy attached in the first proceeding***—while also raising new arguments for the first time,[1] mischaracterizing the OSP's Response brief,[2] and misrepresenting facts and law.[3]

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[1] For example, Mr. Smollett contends that the OSP should be "equitably estopped" from prosecuting Mr. Smollett because the CCSAO—an entity of the State of Illinois like the OSP—previously negotiated an agreement to dismiss the charges in return for Mr. Smollett forfeiting his bond. *See* Reply at 4, 31–32. This "estoppel" argument is not only wrong, as discussed further on pages 9–10 below, but it was never raised in Mr. Smollett's Motion to Dismiss, and the Court should strike any such arguments that have been improperly presented for the first time in Mr. Smollett's Reply.

[2] For example, Mr. Smollett incorrectly cites the OSP's Response for two statements by Joseph Magats and Risa Lanier in February 2019 during the resolution of the first proceedings. *See* Reply at 19–20. Neither of these statements were quoted or cited in the OSP's Response brief.

[3] For example, citing to the OSP's February 11, 2020 Information Release, Mr. Smollett claims "the OSP has not found any evidence that Mr. Smollett, or anyone on his behalf, engaged in any wrongdoing related to resolving the prior charges against him." Nothing in the Information Release supports this inaccurate statement. Mr. Smollett also incorrectly states that the "New Charges are essentially a subset of the Prior Charge" (Reply at 6), when it is clear on the face of the new indictment, and as the OSP explained in its

Even putting aside the fatal flaw of wholly failing to address in his initial motion the issue of jeopardy attaching (which necessitates dismissal of his motion), Mr. Smollett ***still*** has not shown either (1) that jeopardy attached in his prior case or (2) that, somehow, contrary to established law, jeopardy did not need to attach. Rather, Mr. Smollett contends, based on case law from other states about defendants who either ***entered into or completed*** actual diversion programs, that jeopardy attached when he "effectively" completed the Felony Deferred Prosecution Program. Reply at 7, 18–25. But this argument is a non-starter, as there is no dispute that Mr. Smollett did not enter into the Felony Deferred Prosecution Program (nor do his actions—a voluntary forfeiture of $10,000 and 15 hours of community service without any period of court supervision—meet the statutory requirements of the Felony Deferred Prosecution Program).

Alternatively, Mr. Smollett asks the Court to disregard fundamental principles of sentencing (not to mention statutory definitions relating to sentences and dispositions), to conclude that his voluntary relinquishment of his $10,000 bond "amounts" to a fine, and thus, a "punishment."

Moreover, in an attempt to avoid the legal requirement that jeopardy attach (since it did not in his prior case), he asks the court to make findings untethered to the law. He asks the Court to conclude that the State's *nolle prosequi* before jeopardy attached means the OSP is barred from prosecuting him—which it does not. He even asks the Court to adopt his subjective belief that his negotiated *nolle prosequi* meant that he had obtained finality—which it does not. And, he invites this Court to hold, contrary to established law, that jeopardy attached in the absence of the case progressing through established stage gates—which it did not.

In short, this Court's analysis should begin and ends with one fundamental principle: ***Mr.***

Response, that the New Charges also allege that Mr. Smollett made a false report on February 14, 2019 when the Prior Charges only alleged false reports made on January 29, 2019.

Smollett had not been put in jeopardy when the charges were dismissed; therefore, every other argument raised in retort is moot, and this Court must deny Mr. Smollett's motion to dismiss.

I. Even in a "Multiple Punishments" Double Jeopardy Challenge, Jeopardy Must Attach in the First Instance.

Mr. Smollett contends that the double jeopardy analysis is somehow different when a challenge is brought under a "multiple punishments" theory. *See* Reply at 10 (explaining that the OSP's citations to Illinois double jeopardy authority are "inapposite" because they did not involve a "multiple punishments" challenge). However, Mr. Smollett offers no other authority to rebut bedrock Illinois Supreme Court and U.S. Supreme Court law that ***"[t]he starting point in <u>any</u> double jeopardy analysis, of course, is determining whether or not jeopardy had attached."*** *People v. Bellmyer*, 199 Ill. 2d 529, 538 (2002) (quoting *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 534 (1979)) (emphasis added); *see also Serfass v. United States*, 420 U.S. 377, 388 (1975) (stating that the U.S. Supreme Court has "consistently adhered to the view that jeopardy does not attach, and ***the constitutional prohibition can have no application***, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge.").[4] (emphasis added) (internal quotation marks omitted).

Indeed, the Illinois Supreme Court has repeatedly stated that "[t]he protections against double jeopardy are triggered ***only after the accused has been subjected to the hazards of trial and possible conviction.***" *Bellmyer*, 199 Ill. 2d at 537 (emphasis added); *People v. Daniels*, 187 Ill. 2d 301, 309–10 (1999) (same). This holding derives directly from *Serfass* which stated that "[b]oth the history of the Double Jeopardy Clause and its terms demonstrate that ***it does not come***

[4] Mr. Smollett claims that "*Serfass* did not hold that jeopardy must have attached in the prior proceeding in order for double jeopardy to bar further prosecution based on multiple punishment." Reply at 11. This is plainly wrong, as *Serfass* clearly holds that double jeopardy has "no application" unless jeopardy attaches. *Serfass*, 420 U.S. at 388.

into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused." *Serfass*, 420 U.S. at 391 (emphasis added) (internal quotation marks omitted); *see also People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 51 ("The guarantee against double jeopardy is not implicated before that point in the proceedings when jeopardy attaches.").

Further, Mr. Smollett tries—and fails—to rebut the notion that jeopardy attaching is a prerequisite even under a "multiple punishment" double jeopardy challenge by incorrectly trying to distinguish case law the OSP cited. *See* Reply at 10–11 (criticizing the OSP's reliance on *People v. Delatorre*, 279 Ill. App. 3d 1014 (2d. Dist. 1996) as "dicta and not supported by any authority whatsoever."). But, *Delatorre* explicitly supported its holding by relying on "the general proposition in *Serfass* that there can be no double jeopardy without a former jeopardy." *Delatorre*, 279 Ill. App. 3d at 1019. In fact, this fundamental proposition has been repeatedly recognized by both Illinois and federal courts in "multiple punishment" double jeopardy challenges. *See, e.g.*, *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994) (finding that jeopardy did not attach in parallel civil forfeiture proceeding where defendant did not appear, and stating "[y]ou can't have double jeopardy without a former jeopardy."); *People v. Kim*, 284 Ill. App. 3d 637, 638–40 (2d. Dist. 1996) (finding that jeopardy did not attach when defendant was issued a civil tax assessment and demand for payment, and stating "[i]t is obvious that there can be no double jeopardy without a former jeopardy."). Moreover, *Delatorre*'s holding has been adopted by other Illinois courts in "multiple punishment" challenges. *See, e.g.*, *People v. Portuguez*, 282 Ill. App. 3d 98, 101 (3d. Dist. 1996) ("We find the decision in *Delatorre* to be well-reasoned. We adopt its analysis and follow its holding.").

Accordingly, there can be no serious dispute that jeopardy must have attached in a prior

proceeding "***in <u>any</u> double jeopardy analysis***"—including the present case. *Bellmyer*, 199 Ill. 2d at 538 (emphasis added).[5]

II. Jeopardy Did Not Attach Here Because Mr. Smollett Was Never Punished or Fined, and He Admittedly Did Not Enter Into or Complete Any Sort of Deferred Prosecution or Diversion Program.

Tellingly, Mr. Smollett did not offer ***any basis*** for jeopardy attaching in his initial motion, and his Reply brief attempts to: (1) disregard the fundamental principle that punishment requires more than mere acquiescence by a defendant, (2) cobble together a novel theory adopted by courts in other states which, even if adopted by this Court, is not supported by the facts of his own case, and (3) ignore the fact that he received exactly what he bargained for—a *nolle prosequi*.

A. Mr. Smollett's Case Did Not Proceed Far Enough for Jeopardy to Attach.

The law is crystal clear—and Mr. Smollett does not dispute—that jeopardy attaches: "(1) at a jury trial when the jury is empaneled and sworn; (2) at a bench trial when the first witness is sworn and the court begins to hear evidence; and (3) at a guilty plea hearing 'when the guilty plea is accepted by the trial court.'" *People v. Cabrera*, 402 Ill. App. 3d 440, 447 (1st 2010) (quoting *Bellmyer*, 199 Ill. 2d at 538). As noted above, it is also undisputed that Mr. Smollett's case did not pass through any of these stage gates. Rather, it was dismissed via a motion for *nolle prosequi* a mere 12 days after Mr. Smollett was arraigned, and well before a jury was empaneled or any witness was sworn. Thus, under the traditional and well-established jurisprudence regarding double jeopardy, jeopardy did not attach.

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[5] Mr. Smollett also repeatedly states that the double jeopardy analysis "should not be applied in a rigid, mechanical nature." Reply at 2, 4, 12, 32 (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). But, as the U.S. Supreme Court recently clarified in an appeal from Illinois, the "rigid, mechanical" rule that *Somerville* referred to was "***not whether jeopardy had attached***, but whether the manner in which it terminated (by mistrial) barred the defendant's retrial." *Martinez v. Illinois*, 572 U.S. 833, 840 (2014) (per curiam) (emphasis added).

B. Mr. Smollett Was Not Punished in His Prior Case.

While seeming to concede that jeopardy attaching is a prerequisite to any double jeopardy analysis, Smollett argues—without citing any legal basis—that jeopardy can attach if a defendant is "punished," contending (1) that his voluntary bond forfeiture "amounts" to a fine, and thus a "punishment" (Reply at 16), and (2) that he was "punished" because he "effectively" completed the Felony Deferred Prosecution Program. Reply at 3–4, 7.

As to the bond forfeiture, Mr. Smollett offers no legal citation for his position that a voluntary forfeiture of bond can constitute or ever has constituted "punishment."[6] Mr. Smollett also tries to distance himself from the voluntary nature of his forfeiture by claiming that it was "in fact, imposed by the court" because Judge Watkins granted the agreed motion to direct the ***Clerk*** to ***release*** the bond to the City of Chicago. Reply at 26. In other words, the court did not order ***Mr. Smollett*** to do anything—it merely directed the ***clerk*** what to do with the funds Mr. Smollett ***chose*** to relinquish. *See* Response, Ex. 3 at 3 ("Motion, State, to release D-Bond 1375606 to the City of Chicago will be granted."); Response, Ex. 4 ("IT IS HEREBY ORDERED that the Clerk of the Circuit Court of Cook County shall release Bond No. D1375606 **payable to the City of Chicago** . . . ."). As a result, Mr. Smollett's bond forfeiture was ***not*** a part of a "sentence" ordered by the Court. *See* 730 ILCS 5/5-1-19 ("'Sentence' is the disposition imposed by the court on a convicted defendant."); 730 ILCS 5/5-4.5-15(a) (listing the types of "dispositions").

Furthermore, contrary to Mr. Smollett's contention, the OSP did not argue or suggest that a "conviction" is a prerequisite to the imposition of a fine. Reply at 17–18. Instead, the OSP stated

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[6] Mr. Smollett contends that the OSP's emphasis on the voluntary nature of his forfeiture is misplaced because plea agreements must be entered into voluntarily. Reply at 14-15. However, a plea of guilty—which must be entered voluntarily—is followed by a ***court-ordered*** disposition or sentence, which does not have to abide by any plea agreement by the State and the defendant, and is ***not*** voluntary. Reply at 14–15. Thus, Mr. Smollett's ***voluntary*** decision to forfeit his bond, which was not ordered by any court, undermines any notion that it was somehow an imposed legal punishment.

that, under Illinois statutes, a "fine" is one of many specifically-delineated "appropriate dispositions" for a felony, and that Mr. Smollett was "not given a sentence of ***any*** disposition," thus precluding the possibility that a fine was Mr. Smollett's disposition. *See* OSP's Response at 8–9 (citing 730 ILCS 5/5-4.5-15(a) (listing the types of "dispositions")).[7] Therefore, contrary to Mr. Smollett's contention that the Certified Statement of Conviction/Disposition—which only shows that the initial 16 charges were dismissed *nolle prosequi*—is "irrelevant" (Reply at 16), his lack of ***any*** sentence and disposition (including a "fine") is of the utmost relevance, and a clear representation of his lack of punishment.[8]

As to his contention that he was punished because he "effectively" entered into a diversion program, it is undisputed that Mr. Smollett did not, in fact, enter into any such program. *See* Reply at 9 (emphasis added) ("***Had Mr. Smollett been enrolled in the program***, his case would have been dismissed by now.").[9] Indeed, if Mr. Smollett were to have entered into the Felony Deferred Prosecution Program, his case would have been transferred to Branch 9 of the Cook County Circuit Court (which it was not), he would have entered into a written agreement with the State setting

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[7] Mr. Smollett also ignores the important statutory requirement that a "fine" cannot be the "sole disposition for a felony" and "may be imposed only in conjunction with another disposition." 730 ILCS 5/5-4.5-15(b). Because there was no other "disposition" entered, the $10,000 forfeiture cannot have been a "fine."

[8] Notably, Mr. Smollett urges the Court to ignore the "label" and examine the "purpose or effect" of the sanction to determine whether it operates as a criminal punishment. Reply at 16 (citing *Hudson v. United States*, 522 U.S. 93, 99–101 (1997) and *United States v. Ward*, 448 U.S. 242, 249 (1980)). But, both *Hudson* and *Ward* analyzed whether a "statutory scheme was so punitive either in purpose or effect" to turn a civil penalty into a criminal punishment. *Ward*, 448 U.S. at 248–49; *Hudson*, 522 U.S. at 99. This "purpose or effect" test applied when analyzing a civil statutory scheme is simply inapplicable in the present criminal context.

[9] In fact, any opportunity Mr. Smollett had to enter into the Felony Deferred Prosecution Program ended when he entered a plea of Not Guilty on March 14, 2019 because it is a "pre-plea" program. *See Cook County State's Attorney, Felony Diversion Programs* (last checked on June 5, 2020), available at https://www.cookcountystatesattorney.org/resources/felony-diversion-programs. He cannot now claim that he "effectively" completed the Felony Deferred Prosecution Program by entering into an agreement that occurred at a time when entering into that Program was not possible.

forth requirements he must meet (which he did not), and a court would have "enter[ed] an order specifying that the proceedings be suspended while [Mr. Smollett] is participating in a Program of not less 12 months" (which did not occur). 730 ILCS 5/5-6-3.3(b); *see also See Cook County State's Attorney, Felony Diversion Programs* (last accessed on June 5, 2020), available at https://www.cookcountystatesattorney.org/resources/felony-diversion-programs; General Administrative Order: 11-03 "Cook County State's Attorney's Deferred Prosecution Program." Instead, Mr. Smollett's case was dismissed on March 26, 2019—not 12 months later "[u]pon fulfillment of the terms and conditions of the Program." 730 ILCS 5/5-6-3.3(f).

Even if the Court were inclined to accept Mr. Smollett's suggestion to "take notice that [he] has now ***effectively*** completed this program" 12 months later, despite having spent that year without being under court supervision (Reply at 7, emphasis added),[10] Mr. Smollett ***still has not completed*** at least one of the defined "conditions" of the program—namely, he did not "make full restitution to the victim." 730 ILCS 5/5-6-3.3(c)(3).[11] The $10,000 Mr. Smollett relinquished cannot constitute "full" restitution given that, according to the City's ongoing civil suit to recover

[10] Mr. Smollett cites a handful of out-of-state cases that generally stand for the proposition that jeopardy can attach following the successful completion of a diversion program. *See* Reply at 20–24 (citing *State v. Urvan*, 4 Ohio App. 3d 151 (1982), *Com. v. McSorley*, 335 Pa. Super. 522 (1984), and *State v. Maisey*, 215 W. Va. 582 (2004)). Besides having no jurisdictional value in this Court, these cases have no application here because all of them involved *actual* entrance or completion of a court-ordered or invited diversion program—not "effective" completion of a program.

[11] Mr. Smollett contends that Illinois courts have "repeatedly held that a police department or government agency is not considered a 'victim' within the meaning of the restitution statute." Reply at 9, n. 2 (citing cases from 1990 or earlier). However, more recent cases have clarified that several prior "opinions contain language that could be read out of context" as to whether a police department could be a "victim" entitled to restitution. *See People v. Danenberger*, 364 Ill. App. 3d 936, 944 (2d Dist. 2006) ("[W]e do not hold that a law enforcement agency can *never* be a victim entitled to restitution …the real rationale of these opinions is that a law enforcement agency ought not be compensated for the public money that it spends in performing its basic function of investigating and solving crimes."). Accordingly, "there is no *per se* rule prohibiting a law enforcement agency from receiving restitution." *People v. Ford*, 2016 IL App (3d) 130650, ¶ 29 (affirming restitution to police department to repair damaged police vehicle).

its costs in investigating Mr. Smollett's case, the City expended $130,106.15.[12] Additionally, the statutory requirement for a defendant ordered to do community service under the Felony Deferred Prosecution Program is 30 hours, while Mr. Smollett merely completed 15 hours before his case was *nolle'd*. Thus, Mr. Smollett did nothing, besides perhaps not getting arrested for a year, that would be "tantamount" to completing the requirements of Felony Deferred Prosecution Program as he claims. Reply at 18. Stated differently, he did not in actuality—or even effectively—complete the Felony Deferred Prosecution Program, thereby making the non-precedential out-of-state cases he cites irrelevant.

In sum, because Mr. Smollett's bond forfeiture was not a fine and Mr. Smollett never entered into or completed the Felony Deferred Prosecution Program, or any semblance of that program, Mr. Smollett was never previously put in jeopardy or punished.

C. The *Nolle Prosequi* Does Not Bar Re-Prosecution

As the OSP explained in its Response, a *nolle prosequi* does not inherently bar re-prosecution. More specifically, because the *nolle prosequi* was entered in this case before any attachment event occurred, it does not bar re-prosecution of Mr. Smollett by the OSP. *Daniels*, 187 Ill. 2d at 312 (1999) ("If the allowance of a motion to nol-pros is entered before jeopardy attaches, the *nolle prosequi* does not operate as an acquittal, and a subsequent prosecution for the

[12] The OSP made reference to two pleadings from the ongoing civil case in its Response brief. *See* Response at 4, 11 (citing *City of Chicago v. Smollett*, 19 cv. 04547, Dkt. 47, 78). In response to those references, the Court asked to receive copies of the cited pleadings if both sides were amenable to the Court's request. The OSP informed the Court that it would provide the requested pleadings. But Mr. Smollett's counsel objected to the Court's "consideration" of the pleadings altogether. Then, despite this objection, Mr. Smollett's Reply brief referenced those same pleadings (Reply at 6), and then even cited, quoted and attached in total the district court's order stemming from those pleadings to wrongly argue that "judicial estoppel" prevented the OSP from claiming Mr. Smollett's bond forfeiture was voluntary. Reply at 15–16. In attempting to resolve this issue, the OSP has subsequently reached out to Mr. Smollett's counsel multiple times to see whether they would withdraw their objection in light of their own repeated references to the civil pleadings and order in the Reply brief—but Mr. Smollett's counsel has not responded. Regardless, Mr. Smollett's Reply brief undermines any objection to the Court's review and consideration of the aforementioned civil pleadings, and as such, the Court should proceed with reviewing these public filings.

same offense could legally proceed."); *c.f., People v. Milka*, 211 Ill. 2d 150, 176 (2004) (recognizing that a *nolle prosequi* after jeopardy attaches bars prosecution on subsequent charges).

Furthermore, a prosecutor's decision to *nolle* a case does not mean that the prosecutor will not or cannot decide later to prosecute that defendant for those, or similar, charges in a new proceeding—such action (absent the attachment of jeopardy) is within the prosecutor's discretion.[13] Stated differently, a *nolle prosequi* is not a final disposition. *People v. Norris*, 214 Ill. 2d 92, 104 (2005). However, contrary to this established principle, Mr. Smollett now tries to assert—for the first time—that, in addition to his double jeopardy arguments, the OSP is somehow "equitably estopped" from prosecuting him because he believed that he had obtained "finality" through his agreement with the State. Reply at 4–5, 32. But, Mr. Smollett never bargained for—and the State never agreed to—finality. Rather, he bargained for, and received, a *nolle prosequi*—a resolution that, under the law (absent jeopardy having attached), leaves the door open for a defendant to be re-prosecuted. Thus, Mr. Smollett received the benefit of his negotiated bargain and cannot now—either under the protections of the Double Jeopardy Clause or his new theory of equitable estoppel—avoid prosecution.

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

Finally, Mr. Smollett challenges Judge Toomin's ability to declare that the prior proceedings are void because Mr. Smollett asserts that (1) he did not challenge the CCSAO's initial prosecution, and (2) he contends that "Dan. K. Webb was not properly appointed a special prosecutor and thus lacked legal authority to bring these charges." Reply at 29, n. 8. However, such arguments are irrelevant because Judge Toomin's ruling remains fully intact and "good law."

[13] Of note, there also is not a time limitation (other than the statute of limitations) for when a prosecutor could re-prosecute.

despite Mr. Smollett's failed (and untimely) effort to challenge it.[14] Thus, in addition to the reasons set forth in the sections above, because Judge Toomin (correctly) found that the prior proceedings were void, Mr. Smollett's current charges were brought on a clean slate. As a result, and as a matter of law, there cannot be a double jeopardy violation.

[14] Mr. Smollett chose not to appeal either of Judge Toomin's rulings on June 21, 2019 and August 23, 2019 relating to the appointment of the Special Prosecutor and Mr. Webb's appointment as Special Prosecutor—including the denial of his motion to intervene—though he attempted, unsuccessfully, to unwind the appointment and dismiss the present charges by petitioning to the Illinois Supreme Court. *See* Smollett v. Toomin, No. 125790, Illinois Supreme Court, March 6, 2019 Order Denying Emergency Motion by Movant Jussie Smollett for a Supervisory Order (available at https://courts.illinois.gov/SupremeCourt/SpecialMatters/2020/125790-1.pdf); Smollett v. Toomin, No. 125790, Illinois Supreme Court, March 6, 2019 Order Denying Emergency Motion to Stay Proceedings in the Circuit Court of Cook County, Case. No. 20 CR 3050 (available at https://courts.illinois.gov/SupremeCourt/SpecialMatters/2020/125790-2.pdf).

CONCLUSION

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

Dated: June 5, 2020

Respectfully Submitted,

/s/ Dan K. Webb

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

People of the State of Illinois,

Jussie Smollett,

Defendant.

No. 20 CR 03050-01

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

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

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: March 24, 2020

Respectfully Submitted,

/s/ Dan K. Webb

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

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

NOTICE OF FILING

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

/s/ Sean G. Wieber
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PROOF OF SERVICE

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

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

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

DEFENDANT'S MOTION TO DISQUALIFY
THE OFFICE OF THE SPECIAL PROSECUTOR

NOW COMES Defendant, JUSSIE SMOLLETT, by and through one of his attorneys, The Law Office of Heather A. Widell, and pursuant to 55 ILCS 5/3-9008 and all other relevant statutes and case law, respectfully requests this Honorable Court disqualify the Office of the Special Prosecutor ("OSP") as counsel in the above-entitled cause against Mr. Smollett and in support thereof states as follows:

INTRODUCTION

As this Court is well aware, Illinois has statutes that govern the appointment of attorneys and special prosecutors to perform certain duties in particular cases when the necessity arises. The onus is on the petitioner requesting the appointment of a special prosecutor to show the precise nature of the necessity that conforms with the applicable statute.

In the case at bar, after hearing a baseless petition from a random concerned citizen (*i.e.* uninvolved party), Judge Toomin appointed Dan Webb - and by extension the entire law firm of Winston & Strawn, LLP - as the special prosecutor/OSP in the above-captioned case in the stead of the Office of the Cook County State's Attorney. This appointment occurred only after the

Office of the Cook County State's Attorney, through their agent, made an agreement with Mr. Smollett as to his previously-indicted matter and ultimately dismissed Mr. Smollett's case.

As such, the Defense now makes an additional motion in relation to the appointment of a special prosecutor, seeking for this Court to disqualify the OSP as counsel in the above-captioned cause.

ARGUMENT

1. **No valid basis existed under which to appoint a special prosecutor.**

The legislative intent of the applicable statute is shown clearly by the letter of the law. 55 ILCS 5/3-9008 was never intended to be a workaround for anytime a private prosecutor wants to second-guess the judgment of a duly elected public official. Rather, the statute is in place for very limited and very specific situations with regards to inabilities of a State's Attorney to proceed in certain matters. The subsections that delineate the only circumstances in which appointing a special prosecutor would be appropriate are as follows:

> Sec. 3-9008. Appointment of attorney to perform duties.
>
> (a-5) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties.... If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-10) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding... If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.

> (a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

The statute is clear on its face and requires no interpretation to discern that only three discreet circumstances allow for the appointment of a special prosecutor: when the State's Attorney (1) is unable to fulfill her prosecutorial duties, (2) has an actual conflict of interest in the matter, or (3) has recused herself. None of those circumstances are present in this case. Prior to the petition for the appointment of a special prosecutor being filed, the Office of the Cook County State's Attorney had already entered into an agreement with the Defendant, Mr. Smollett, and accordingly was granted leave by the trial court (Judge Watkins) to dismiss the case against the Defendant as the terms of the agreement had been completed.

In a recent decision from a case out of Winnebago County, the Court held that after a case had been dismissed (because of no colorable claims being raised in the petition), there was no longer occasion for there to be a conflict of interest or other inability to prosecute and thus, the trial court abused its discretion in appointing a special prosecutor. *Haney v. Winnebago Cty. Bd.*, 2020 IL App (2d) 190845, 2020 Ill. App. LEXIS 691 (Ill. App. Ct. 2d Dist. 2020). In that case, the trial court originally denied the State's Attorney's motion to dismiss, which left open the possibility for the State's Attorney to potentially have a conflict of interest in prosecuting the matter or an inability to continue to prosecute a pending matter. Once that case was dismissed, however (as the appellate Court held it should have been in the first place), there no longer remained even the potential for a conflict of interest or inability to prosecute and thus the necessity for the appointment of a special prosecutor was null and void.

The case currently before the Court is more egregious, as the trial Court actually ***granted*** the States Attorney's motion to dismiss the previously charged indictment, and thus there could be neither a conflict of interest in prosecuting a dismissed matter, nor an inability to perform prosecutorial duties in a dismissed matter. As such, there was unequivocally no basis for the appointment of a special prosecutor and Judge Toomin therefore abused his discretion in appointing a special prosecutor in a matter that had already been handled and dismissed by the State's Attorney.

It is also important to note that an appointment, even a legitimate one, of a special prosecutor still does not render the OSP a State's Attorney, even for the duration of the appointment. *Aiken v. County of Will*, 321 Ill. App. 171, 52 N.E.2d 607, at 67 (1943). As such, especially absent any actual conflict of interest or inability of the State's Attorney to fulfill her prosecutorial duties, it is highly inappropriate for a special prosecutor to be appointed solely to substitute their judgment as it relates to prosecutorial matters in the stead of a qualified and duly elected public official.

To be clear, no section of 55 ILCS 5/3-9008 purports to create any office, or provide that such an appointee under this section shall become a new State's Attorney any time the actions or policies of the sitting State's Attorney are being questioned; rather, this section merely provides that under the specific circumstances delineated in the statute, the court may appoint some competent attorney to prosecute or defend such cause or proceeding, and that such powers and authority is limited to the particular cause or proceeding. *Aiken v. County of Will* at 67 (1943).

In this case, it appears that the special prosecutor was only appointed because of a concern from an uninterested private citizen as to how the sitting elected State's Attorney

handled a criminal matter, not because any actual conflict existed, nor because of any reason given that the State's Attorney was unable to fulfill her prosecutorial duties in a matter that was properly prosecuted, negotiated, and subsequently dismissed by the trial judge.

2. **Sheila O'Brien lacked standing to petition the Court for an appointment of a special prosecutor.**

As shown above in sections (a-5), (a-10), and (a-15) of the statute listing the valid bases for petition to appoint a special prosecutor, the language is also very clear as to *who* is allowed to make such a petition in the first place. The language, as it stands, is unambiguous and provides that only the Court, the State's Attorney herself, or an "interested party" may petition the Court for the appointment of a special prosecutor. Subsections (a-5) and (a-10) begin: "The court on its own motion, or an *interested person* in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney..." (emphasis added). Similarly, subsection (a-15) provides that "the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate". The language above is the exhaustive list as to the only persons who have standing to file a petition with the Court to appoint a special prosecutor; such list is limited to the Judge, the State's Attorney herself, or an "interested party."

Black's Law Dictionary defines an "interested party" as:

> [t]he persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding.

While Ms. O'Brien (per her own petition) was formerly a member of the bench, at the time she filed the petition for appointment of a special prosecutor, she was neither the sitting trial judge involved in the proceedings against Mr. Smollett nor did she in any way have any direct interest in the prosecution or defense of the legal proceeding against Mr. Smollett.

Paragraph 9 of Ms. O'Brien's own petition indicates that she has no agenda in the matter; and the rest of the petition failed to state how, in fact, she was an "interested party" per the language of the statute and the common legal definition of the term. If being a mere taxpayer with concerns about any random criminal matter created the basis for a valid petition, the statutory language would have stated such.

As neither the trial court (Judge Watkins) nor any other interested party petitioned the court for the appointment of a special prosecutor, (and since the State's Attorney by her own admission did not recuse herself), we are left without any valid petitioners to this cause and thus the appointment of a special prosecutor *based upon a petitioner who lacked standing* is void.

3. **Judge Toomin abused his discretion in appointing a private attorney as a special prosecutor.**

Subsection (a-20) of 55 ILCS 5/3-9008 addresses the steps necessary in order to appoint a private attorney rather than public agency to be the special prosecutor in a given case; the requirements are clear and provide as follows:

> Sec. 3-9008. Appointment of attorney to perform duties.
>
> (a-20) Prior to appointing a private attorney under this Section, the court shall contact public agencies, including, but not limited to, the Office of Attorney General, Office of the State's Attorneys Appellate Prosecutor, or local State's Attorney's Offices throughout the State, to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and shall appoint a public agency if they are able and willing to accept the appointment. An attorney so appointed shall have the same power and authority in relation to the

cause or proceeding as the State's Attorney would have if present and attending to the cause or proceedings.

To date, Mr. Smollett's defense team in the re-indicted matter currently pending before the Court has yet to see any proof that any of the public agencies listed in the statute above were properly contacted. We only have Judge Toomin's word to go on from his ruling on the petition to appoint a special prosecutor, wherein he indicated that he contacted over a hundred (100) local public officials/agencies and heard back from only thirty (30).

The issue here, aside from the fact that there is no evidence as to any public agencies actually being contacted as required by statute prior to Judge Toomin appointing a private attorney, is that by Judge Toomin's own admission ***at least two (and possibly a third) public agency was willing to take on the appointment***; however, without any explanation, Judge Toomin unilaterally decided that none of these three public agencies were "able" to do so, despite their representations to the contrary.

The statute is very clear that the Court "*shall* appoint a public agency if they are able and willing to accept the appointment." 55 ILCS 5/3-9008 (a-20) (emphasis added in italics). Only if after all public prosecuting agencies have been exhausted and all are unable and unwilling to accept the appointment can the court then appoint a private attorney as the special prosecution in a case. As multiple agencies purportedly indicated their willingness and ability to accept the appointment, Judge Toomin abused his discretion by appointing the last resort of a private attorney.

WHEREFORE, for all the reasons stated above, Defendant, JUSSIE SMOLLETT, respectfully requests that this Honorable Court grant Defendant's Motion and thereby disqualify the OSP (and by extension its agents including Dan Webb, Sean Weiber, Samuel Mendenhall, and Matt Durkin) as counsel in the above-entitled matter.

Respectfully submitted,

Heather Widell
Attorney for Defendant

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

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

MOTION TO DISMISS INDICTMENT

NOW COMES Defendant, JUSSIE SMOLLETT, by and through one of his attorneys, Nenye E. Uche of Uche P.C., and respectfully requests this Honorable Court dismiss the indictments and charges against the Defendant Jussie Smollett, and in support thereof states as follows:

RELEVANT PROCEDURAL HISTORY

On March 7, 2019, a grand jury indicted the Defendant on 16 counts of disorderly conduct based upon the allegation that he filed a false police report, a class 4 felony, on January 29, 2019. (*Order, People v. Smollett, 19CR3104, May 23, 2019*). On March 26, 2019, the State moved to Nolle Pros Defendant's matter in exchange for the City of Chicago directly receiving the proceeds of Mr. Smollett's $10,000 bond and Mr. Smollett completing community service. *(People v. Smollett, tr. P. 2, pp. 21-24, P. 3, pp. 1-3, March 26, 2019)*. "After reviewing the facts and circumstances of the case, including Mr. Smollett's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, the State's motion in regards to the indictment is to nolle pros. We believe this outcome is a just disposition and

appropriate resolution to this case." *Id.* Thereafter, the Court granted the State's Motion and released the monetary bond under bond number: 137506, to Natalie Frank with the City of Chicago Law Department. *(People v. Smollett, tr. P. 3, pp. 17-18, March 26, 2019).*

Introduction

In the original criminal proceedings against Mr. Smollett, an immunity-type non-prosecution agreement was entered into between the State's Attorney's Office, an agent of the People of the State of Illinois, and Mr. Smollett. This immunity-type agreement was not just agreed upon by the parties, but also executed and enforced. As explained below, in each and every one of the cases cited where a prosecutor has attempted to avoid the enforcement of an immunity-type agreement, the courts have ultimately enforced the agreement between the State and the defendant. This case presents an even more troubling scenario. Here, a special prosecutor is attempting to void an immunity-type agreement that has already been executed and enforced. In other words, the Office of the Special Prosecutor ("OSP") is attempting to move the proverbial goal post after the proverbial goal has already been scored.

ARGUMENT

1. **The agreement entered and executed between Mr. Smollett and the Cook County State's Attorney's Office is binding on the OSP since both the OSP and the Cook County State's Attorney's Office are acting as agents of the State of Illinois.**

In the State of Illinois, the State's Attorneys are agents and representatives of the People of the State of Illinois. *See* 55 ILCS 5/3-9005 (a)(1); *see also United States ex rel. Burton v. Mote*, 2003 WL 23019174, *19 (N.D.Ill. Dec. 22, 2003) (noting that

Illinois State's Attorneys represent the executive branch of the State of Illinois). The idea that a State's Attorney's office in Illinois does not act as an agent of the State of Illinois has been deemed "ludicrous and wholly without merit." *Id.* at *19; *see also People v. Starks*, 106 Ill. 2d 441, 448-49 (1985) (observing that the State's Attorney is a representative of the People and that "the bargaining relationship between the State, **by its agent, the prosecutor**, and a defendant charged with a crime is now universally recognized") (emphasis added).

In the present case, the Cook County State's Attorney's Office entered and executed an agreement with Mr. Smollett that Mr. Smollett would not be prosecuted in connection with the January 29, 2019 attack on him. The Cook County State's Attorney's Office entered such an agreement on behalf of the People of the State of Illinois and no one else. But this should not come as a surprise. In the dismissed indictment filed against Mr. Smollett, the caption read: "The People of the State of Illinois v. Jussie Smollett."

The instant indictment filed by the OSP reads the same way: "The People of the State of Illinois v. Jussie Smollett." This should also not come as a surprise, as the OSP is specifically acting on behalf of the People of the State of Illinois.[1] *See,* (55 ILCS 5/3-9008).

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[1] This agency argument would fail if this had been a federal prosecution since the federal government would argue that they are prosecuting on behalf of the federal government and are not bound by agreements made on behalf of the State of Illinois.

Also, it should be noted that the Illinois statute governing the appointment of a special prosecutor calls for one to be appointed only after attempts at securing a local prosecutor within the state have been exhausted. (55 ILCS 5/3-9008) (a-20). Under the statute, the appointment of a private attorney as special prosecutor is a last resort. *Id.* Yet, at this time, this defense team is yet to see a record of

As a fundamental tenet of agency,[2] the act of an agent is attributable to the principal. Thus, the agreement formed and executed between the Cook County State's Attorney's Office and Mr. Smollett is binding on the State of Illinois, and cannot be undone or ignored by changing the agent—in this case, by bringing in a special prosecutor to prosecute Mr. Smollett.

2. **The current indictment against Mr. Smollett should be dismissed as a violation of 724 ILCS 5/114-1(3) because the State of Illinois and Mr. Smollett entered into and enforced a binding non-prosecution immunity agreement.**

The Relevant Statute

724 ILCS 5/114-1 of the code of criminal procedure reads in relevant part:

> Upon the written motion of the defendant made prior to trial before or after a plea has been entered the court may dismiss the indictment, information, or complaint upon any of the following grounds:
>
> > **(3)** The defendant has received immunity from prosecution for the offense charged.

The type of agreement

Pursuant to 724 ILCS 5/114-1 (3), the current indictment against Mr. Smollett should be dismissed because the People of the State of Illinois, through its agent, the Cook County State's Attorney's Office, entered into a non-prosecution immunity agreement with Mr. Smollett ***which was executed and enforced.***

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each and every local prosecuting agency in this state that was contacted to secure the position of special prosecutor as required by the statute.

[2] It is an ironclad legal principle that the principal is always responsible for the actions of its agent (e.g., the doctrine of *respondeat superior* and the principle of vicarious liability). *See also* RESTATEMENT (SECOND) OF TORTS, § 429, and RESTATEMENT (SECOND) OF AGENCY, § 267.

Indeed, Illinois courts have consistently dismissed indictments that violate 724 ILCS 5/114-1, including section 3 of that code. *See, e.g., People v. Smith*, 233 Ill. App. 3d 342, 350 (2d Dist. 1992) (where the court affirmed a trial court's dismissal of an indictment based on a cooperating witness agreement which the court found was a grant of immunity under 724 ILCS 5/114-1 (3)). In fact, the Illinois appellate courts have expressly held that "the instances in which the State is prohibited from bringing a new indictment involve a defendant's constitutional right to be free from multiple prosecutions for the same crime, a constitutional and statutory right to a speedy trial, or a **contractual right to immunity**." *People v. Hunter*, 298 Ill. App. 3d 126, 131 (2d Dist. 1998) (emphasis added).

Immunities, generally

In law, an Immunity has commonly been defined as any "exemption from a duty, liability or service of process." *See Black's Law Dictionary* (2d Ed). Within the context of criminal law, *informal* immunity (also known as *pocket* immunity) is defined as "an immunity that results from the prosecutor's decision not to prosecute." *Id.*

Illinois courts, mirroring courts around the United States, analyze informal immunity agreements under basic principles of contract law. *See, e.g., People v. Stapinski*, 2015 IL 118278 ¶ 47; *see also United States v. McFarlane*, 309 F.3d 510, 514 (8th Cir. 2002).

Elements of a contract

In Illinois, an offer, acceptance, and consideration form the "basic ingredients" of any contract. *Carey v. Richards Bldg. Supply Co.*, 367 Ill. App. 3d 724, 726 (2d Dist. 2006).

In defining the meaning of consideration, the Illinois Supreme Court has noted that "consideration is a basic element for the existence of a contract. Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977).

Contracts can be formed orally or in writing. *See, e.g., Stapinski*, 2015 IL 118278 ¶ 25 (where the Illinois Supreme Court enforced an oral cooperation immunity agreement).

In the present case, there should be no doubt that the People of the State of Illinois entered into a contractual immunity agreement with Mr. Smollett. According to the offered terms of the contractual oral immunity agreement, Mr. Smollett had to forfeit his monetary bond and satisfy prosecutors as to his performance of community service. Mr. Smollett accepted this agreement and performed what was required of him per the terms of the "contract." The State of Illinois, through its agent, the Cook County State's Attorney's office, also performed its part of the agreement when it dismissed the case against Mr. Smollett after he specifically performed the terms of the agreement.

The consideration for this agreement is clear. The State of Illinois benefited from collecting Mr. Smollett's monetary bond and Mr. Smollett was to benefit from the dismissal of the indictment and promised non-prosecution of him.

3. **The indictment against Mr. Smollett should be dismissed as a due process violation because the State of Illinois and Mr. Smollett entered and executed a valid immunity agreement and as a result, Mr. Smollett now has a "right not to be hauled into court" on the same charges.**

It has long been established that agreements between the prosecution and the defense will be enforced in the State of Illinois. *People v. Starks*, 106 Ill. 2d 441 (1985). *See also United States v. Lyons*, 670 F.2d 77 (7th Cir. 1982) (noting that "any agreement made by the government must be scrupulously performed and kept"). For instance, in *Starks*, the prosecution promised the defendant that armed robbery charges would be dismissed if the defendant submitted to a polygraph examination and if the results came back negative. *Id* at 444. The defendant passed the polygraph test and the prosecution reneged. *Id.* A jury trial was held, and the defendant was convicted. *Id.*

In remanding the case back for an evidentiary hearing on the issue of the agreement, the *Starks* Court noted, "In the case at bar, the agreement allegedly rested upon the State's promise to dismiss the charge against Starks. If there was an agreement as alleged, and if Starks fulfilled his part of it, then the State must fulfill its part." *Id.* at 452.

The *Starks* Court's ruling was based on three main public policy tenants. First, the *Starks* Court noted that:

> The prosecution must honor the terms of agreements it makes with defendants. To dispute the validity of this precept would surely result in the total nullification of the bargaining system between the prosecution and the defense. Therefore, this court believes that if the prosecution did make an agreement with the defendant, it must abide by its agreement in this case. *Id.* at 449.

Second, the *Starks* Court noted that:

> We believe that in the case at bar if the State made an agreement with the defendant, it is bound to abide by that agreement. Whatever the situation might be in an ideal world, the fact is that agreements between the prosecution and the defense are an important component of this country's criminal justice system. If a defendant cannot place his faith in the State's promise, this important component is destroyed." *Id.* at 452.

Finally, the *Starks* Court noted, "the State has the *right* to 'choose its procedures and weapons of prosecution'; however, the State also has the *duty* to abide by an agreement it makes with a defendant. *Id.*

The only exception to the *Starks* rule involves cases dealing with plea agreements. In such cases, Illinois courts have found that specific enforcement of the terms of such agreements is not required since the Defendant has the option of proceeding to trial. *See, e.g., People v. Navarroli*, 121 Ill. 2d 516, (1988) (involving a plea agreement for the reduction of charges), and *People v. Boyt*, 109 Ill.2d 403 (1985) (involving a plea agreement for a lesser sentence).

To be clear, the exceptions in *Navarroli* and *Boyt* exist because our courts have made a distinction between plea agreements and immunity-type agreements. *People v. Smith*, 233 Ill. App. 3d 342 (2d Dist. 1992). For example, in *Smith*, a case involving the enforcement of a cooperation-immunity agreement, the Illinois appellate court noted that:

> A cooperation-immunity agreement differs from a plea agreement in that the detrimental reliance for a plea agreement is the defendant's waiver of the right to a trial, whereas with an agreement not to prosecute, parties agree that the defendant's cooperation is sufficient consideration for the government's promise of immunity... As a result, the due process implications are different. In the plea agreement scenario, if the defendant has not yet pled guilty, he may still proceed to trial. Here, however, it is the violation of **"the right not to be hauled into court at all [which] operated to deny [defendant] due process of law**. *Id.* at 349-50. (Emphasis added). *See also People v. Stapinski*, 2015 IL 118278 ¶ 53-55. (Binding the prosecution to a cooperating immunity agreement even though it was entered between the defendant and police officers).

Though the *Starks* case did not involve the traditional cooperation-immunity agreement like in *Smith*, the court in *Smith* was still clear in emphasizing that its facts resembled the *Starks* case and not the *Navarroli* and *Boyt* cases, thus further distinguishing cases involving plea agreements from cases that involved non-prosecution type agreements like *Starks*. *Smith*, 233 Ill. App. 3d at 350.

Even beyond *Starks* and *Smith*, the Illinois Supreme Court, in *People v. Stapinski*, highlighted further concerns and implications of not enforcing cooperation-type immunity agreements between the prosecution and defendants. The Court noted:

> Due process is implicated "whenever the State engages in conduct towards its citizens deemed oppressive, arbitrary or unreasonable." Further, since the essence of due process is "fundamental fairness," due process essentially requires "fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." (Internal quotation marks omitted.) To violate substantive due process, the government's conduct must shock the conscience and violate the decencies of civilized conduct.'"2015 IL 118278 ¶ 51.

Mr. Smollett's present case fits squarely within the *Starks* case and is certainly in the same family as the *Smith* and *Stapinski* cases. Here, like in *Starks*

and its progeny, the prosecution and the defense entered into a non-prosecution immunity-type agreement. As part of the agreement, Mr. Smollett gave up his right to his bond money and he satisfied the Cook County prosecutors as to his performance of community service. The agreement was executed, and the State of Illinois dismissed the charges against Mr. Smollett through its agent, the Cook County State's Attorney's Office. Thus, as was the case in *Smith*, Mr. Smollett's due process rights are being violated as a result of the instant indictment against him, since the agreement with the State of Illinois assured him of "the right not to be hauled into court at all."

Moreover, the case at bar presents a much more egregious scenario than that in *Starks*. Unlike *Starks* or any of the cases cited thus far, the contract here was already duly enforced when the case was dismissed. The current prosecuting agency has done more than renege on its agreement; rather, after prior enforcement, it is now attempting to dial back the hands of time. To make matters worse, this attempt at dialing back what was already enforced is being carried out by non-elected special prosecutors.

4. **The indictment against Mr. Smollett should be dismissed because from a public policy perspective, the current prosecution sets the wrong precedent and will have a negative impact on the Illinois criminal justice system.**

> *This was a pledge of public faith -- a promise made by state officials -- and one that should not be lightly disregarded. Starks, 106 Ill. 2d at 451.*

From *Starks* to *Smith* to *Stapinski,* the Illinois Courts' main motivating factor in enforcing agreements between prosecutors and defendants has been to promote an

honor system within the criminal justice system and to prevent abuse by the executive branch of state government through its prosecutors.

Here, the need to promote an honor system and to prevent executive branch abuse is even more pronounced. It is telling that the precedential authority is non-existent as it pertains to a scenario, like the current one, where an agreement has been executed and a criminal case dismissed as a result, and yet, a special prosecutor has been appointed to resurrect an indictment of the previously dismissed case. In this state, such a thing has never been done and it should be soundly rejected here.

Perhaps, even more offensive than the *Starks*, *Smith* and *Stapinski* cases is the fact that Mr. Smollett has done things he would not have done if the State's agreement had not been in place. He has completed community service and he has forfeited his bond money which was substantial. To be clear, Mr. Smollett would not have done these things if not for his reliance on the promises of the State. By reindicting him, Mr. Smollett has essentially been duped.

The chilling effects of allowing this prosecution to proceed should be obvious. The floodgates of special prosecutions will be let loose every time public sentiment or state officials are not aligned or pleased with the handling of a case by an elected State's Attorney, who has exercised executive discretion in a prosecution. Moreover, it flies in the face of democratic principles that an elected State's Attorney is being second-guessed for her executive discretionary decisions by a privately appointed attorney who does not answer to the electorate.

A deal is a deal, and the State of Illinois is not exempt from that ancient

principle. What makes this country's democracy strong can be directly linked to a bold judiciary that acts as a proper check on executive branch excessiveness.

The temptation might well exist to push this case forward to trial because it has already come this far. However, such a temptation should be avoided because such reasoning is flawed, illogical and dangerous. An abuse of executive power should not be condoned because it has already begun; rather, it should be curbed, no matter how late, to stop further harm to the defendant and also to the taxpayers—the very People of the State of Illinois which the OSP represents.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Defendant, Mr. Jussie Smollett, respectfully asks the Court to grant this motion and dismiss the charges and indictments against him in the present case.

Respectfully submitted,

/s/ Nenye E. Uche

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

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

DEFENDANT'S MOTION TO DISQUALIFY
THE OFFICE OF THE SPECIAL PROSECUTOR

NOW COMES Defendant, JUSSIE SMOLLETT, by and through one of his attorneys, The Law Office of Heather A. Widell, and pursuant to 55 ILCS 5/3-9008 and all other relevant statutes and case law, respectfully requests this Honorable Court disqualify the Office of the Special Prosecutor ("OSP") as counsel in the above-entitled cause against Mr. Smollett and in support thereof states as follows:

INTRODUCTION

As this Court is well aware, Illinois has statutes that govern the appointment of attorneys and special prosecutors to perform certain duties in particular cases when the necessity arises. The onus is on the petitioner requesting the appointment of a special prosecutor to show the precise nature of the necessity that conforms with the applicable statute.

In the case at bar, after hearing a baseless petition from a random concerned citizen (*i.e.* uninvolved party), Judge Toomin appointed Dan Webb - and by extension the entire law firm of Winston & Strawn, LLP - as the special prosecutor/OSP in the above-captioned case in the stead of the Office of the Cook County State's Attorney. This appointment occurred only after the

Office of the Cook County State's Attorney, through their agent, made an agreement with Mr. Smollett as to his previously-indicted matter and ultimately dismissed Mr. Smollett's case.

As such, the Defense now makes an additional motion in relation to the appointment of a special prosecutor, seeking for this Court to disqualify the OSP as counsel in the above-captioned cause.

ARGUMENT

1. No valid basis existed under which to appoint a special prosecutor.

The legislative intent of the applicable statute is shown clearly by the letter of the law. 55 ILCS 5/3-9008 was never intended to be a workaround for anytime a private prosecutor wants to second-guess the judgment of a duly elected public official. Rather, the statute is in place for very limited and very specific situations with regards to inabilities of a State's Attorney to proceed in certain matters. The subsections that delineate the only circumstances in which appointing a special prosecutor would be appropriate are as follows:

> Sec. 3-9008. Appointment of attorney to perform duties.
>
> (a-5) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties.... If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-10) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding... If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.

> (a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

The statute is clear on its face and requires no interpretation to discern that only three discreet circumstances allow for the appointment of a special prosecutor: when the State's Attorney (1) is unable to fulfill her prosecutorial duties, (2) has an actual conflict of interest in the matter, or (3) has recused herself. None of those circumstances are present in this case. Prior to the petition for the appointment of a special prosecutor being filed, the Office of the Cook County State's Attorney had already entered into an agreement with the Defendant, Mr. Smollett, and accordingly was granted leave by the trial court (Judge Watkins) to dismiss the case against the Defendant as the terms of the agreement had been completed.

In a recent decision from a case out of Winnebago County, the Court held that after a case had been dismissed (because of no colorable claims being raised in the petition), there was no longer occasion for there to be a conflict of interest or other inability to prosecute and thus, the trial court abused its discretion in appointing a special prosecutor. *Haney v. Winnebago Cty. Bd.*, 2020 IL App (2d) 190845, 2020 Ill. App. LEXIS 691 (Ill. App. Ct. 2d Dist. 2020). In that case, the trial court originally denied the State's Attorney's motion to dismiss, which left open the possibility for the State's Attorney to potentially have a conflict of interest in prosecuting the matter or an inability to continue to prosecute a pending matter. Once that case was dismissed, however (as the appellate Court held it should have been in the first place), there no longer remained even the potential for a conflict of interest or inability to prosecute and thus the necessity for the appointment of a special prosecutor was null and void.

The case currently before the Court is more egregious, as the trial Court actually ***granted*** the States Attorney's motion to dismiss the previously charged indictment, and thus there could be neither a conflict of interest in prosecuting a dismissed matter, nor an inability to perform prosecutorial duties in a dismissed matter. As such, there was unequivocally no basis for the appointment of a special prosecutor and Judge Toomin therefore abused his discretion in appointing a special prosecutor in a matter that had already been handled and dismissed by the State's Attorney.

It is also important to note that an appointment, even a legitimate one, of a special prosecutor still does not render the OSP a State's Attorney, even for the duration of the appointment. *Aiken v. County of Will*, 321 Ill. App. 171, 52 N.E.2d 607, at 67 (1943). As such, especially absent any actual conflict of interest or inability of the State's Attorney to fulfill her prosecutorial duties, it is highly inappropriate for a special prosecutor to be appointed solely to substitute their judgment as it relates to prosecutorial matters in the stead of a qualified and duly elected public official.

To be clear, no section of 55 ILCS 5/3-9008 purports to create any office, or provide that such an appointee under this section shall become a new State's Attorney any time the actions or policies of the sitting State's Attorney are being questioned; rather, this section merely provides that under the specific circumstances delineated in the statute, the court may appoint some competent attorney to prosecute or defend such cause or proceeding, and that such powers and authority is limited to the particular cause or proceeding. *Aiken v. County of Will* at 67 (1943).

In this case, it appears that the special prosecutor was only appointed because of a concern from an uninterested private citizen as to how the sitting elected State's Attorney

handled a criminal matter, not because any actual conflict existed, nor because of any reason given that the State's Attorney was unable to fulfill her prosecutorial duties in a matter that was properly prosecuted, negotiated, and subsequently dismissed by the trial judge.

2. **Sheila O'Brien lacked standing to petition the Court for an appointment of a special prosecutor.**

As shown above in sections (a-5), (a-10), and (a-15) of the statute listing the valid bases for petition to appoint a special prosecutor, the language is also very clear as to *who* is allowed to make such a petition in the first place. The language, as it stands, is unambiguous and provides that only the Court, the State's Attorney herself, or an "interested party" may petition the Court for the appointment of a special prosecutor. Subsections (a-5) and (a-10) begin: "The court on its own motion, or an *interested person* in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney..." (emphasis added). Similarly, subsection (a-15) provides that "the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate". The language above is the exhaustive list as to the only persons who have standing to file a petition with the Court to appoint a special prosecutor; such list is limited to the Judge, the State's Attorney herself, or an "interested party."

Black's Law Dictionary defines an "interested party" as:

> [t]he persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding.

While Ms. O'Brien (per her own petition) was formerly a member of the bench, at the time she filed the petition for appointment of a special prosecutor, she was neither the sitting trial judge involved in the proceedings against Mr. Smollett nor did she in any way have any direct interest in the prosecution or defense of the legal proceeding against Mr. Smollett.

Paragraph 9 of Ms. O'Brien's own petition indicates that she has no agenda in the matter; and the rest of the petition failed to state how, in fact, she was an "interested party" per the language of the statute and the common legal definition of the term. If being a mere taxpayer with concerns about any random criminal matter created the basis for a valid petition, the statutory language would have stated such.

As neither the trial court (Judge Watkins) nor any other interested party petitioned the court for the appointment of a special prosecutor, (and since the State's Attorney by her own admission did not recuse herself), we are left without any valid petitioners to this cause and thus the appointment of a special prosecutor *based upon a petitioner who lacked standing* is void.

3. **Judge Toomin abused his discretion in appointing a private attorney as a special prosecutor.**

Subsection (a-20) of 55 ILCS 5/3-9008 addresses the steps necessary in order to appoint a private attorney rather than public agency to be the special prosecutor in a given case; the requirements are clear and provide as follows:

> Sec. 3-9008. Appointment of attorney to perform duties.
>
> (a-20) Prior to appointing a private attorney under this Section, the court shall contact public agencies, including, but not limited to, the Office of Attorney General, Office of the State's Attorneys Appellate Prosecutor, or local State's Attorney's Offices throughout the State, to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and shall appoint a public agency if they are able and willing to accept the appointment. An attorney so appointed shall have the same power and authority in relation to the

cause or proceeding as the State's Attorney would have if present and attending to the cause or proceedings.

To date, Mr. Smollett's defense team in the re-indicted matter currently pending before the Court has yet to see any proof that any of the public agencies listed in the statute above were properly contacted. We only have Judge Toomin's word to go on from his ruling on the petition to appoint a special prosecutor, wherein he indicated that he contacted over a hundred (100) local public officials/agencies and heard back from only thirty (30).

The issue here, aside from the fact that there is no evidence as to any public agencies actually being contacted as required by statute prior to Judge Toomin appointing a private attorney, is that by Judge Toomin's own admission ***at least two (and possibly a third) public agency was willing to take on the appointment***; however, without any explanation, Judge Toomin unilaterally decided that none of these three public agencies were "able" to do so, despite their representations to the contrary.

The statute is very clear that the Court "*shall* appoint a public agency if they are able and willing to accept the appointment." 55 ILCS 5/3-9008 (a-20) (emphasis added in italics). Only if after all public prosecuting agencies have been exhausted and all are unable and unwilling to accept the appointment can the court then appoint a private attorney as the special prosecution in a case. As multiple agencies purportedly indicated their willingness and ability to accept the appointment, Judge Toomin abused his discretion by appointing the last resort of a private attorney.

WHEREFORE, for all the reasons stated above, Defendant, JUSSIE SMOLLETT, respectfully requests that this Honorable Court grant Defendant's Motion and thereby disqualify the OSP (and by extension its agents including Dan Webb, Sean Weiber, Samuel Mendenhall, and Matt Durkin) as counsel in the above-entitled matter.

Respectfully submitted,

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Attorney for Defendant

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

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

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR ALLEGED VIOLATION OF HIS FIFTH AMENDMENT DUE PROCESS RIGHTS

Nearly eight months since the February 11, 2020 felony disorderly conduct charges were filed, Mr. Smollett now brings his ***third attempt*** to dismiss the indictment based on purported legal errors before the Special Grand Jury (the "Motion"). Specifically, and as discussed below, Mr. Smollett sets forth two failed theories for dismissal based on the Office of the Special Prosecutor's (OSP) presentation of evidence to the Special Grand Jury that are based on incorrect characterizations of both the record and the applicable law. Therefore, Mr. Smollett's latest (and hopefully final) attempt to dismiss charges must meet the same fate as his first two failed attempts and must be denied.

First, Mr. Smollett contends that the OSP failed to comply with a provision in the grand jury statute, 725 ILCS 5/112-4(b), which requires that the prosecutor advise a grand jury of its right to subpoena and question persons, and to obtain and examine documents. Yet, this assumption is completely wrong—the OSP did, in fact, inform the Special Grand Jury of its rights

under 5/112-4(b) ***on numerous occasions*** when the Special Grand Jury was in session. *See* Exhibit A, Affidavit of Deputy Special Prosecutor A. Matthew Durkin. Indeed, even though it was under no obligation to do so, the OSP also documented the fact that the Special Grand Jury was informed of its rights under 5/112-4(b) on the day of the impaneling of the Special Grand Jury and the day a True Bill was returned through two affidavits.

Moreover, Mr. Smollett fails to mention in his Motion that ***even if*** the OSP had violated Section 5/112-4(b)—which it did not—Illinois courts have found that such a technical violation of the statute ***is not grounds for dismissing the indictment.*** *See People v. Haag*, 80 Ill. App. 3d 135, 139 (2nd Dist. 1979) ("While section 112-4(b) of the Code imposes a duty upon the State's Attorney to advise the Grand Jury in this regard it does not authorize dismissal of an indictment or provide any other penalty or sanction for his failure to do so."). Therefore, Mr. Smollett's argument based on the requirements of Section 5/112-4(b) is not only factually baseless, but also legally wrong.

Second, Mr. Smollett argues that the February 11, 2020 indictment was based on "illegal and incompetent evidence" (Motion at 1)—namely, the testimony from the prior grand jury proceedings in the initial Smollett prosecution (Case No. 19 CR 3104) (the "Initial Smollett Matter") of Abimbola Osundairo and Olabinjo Osundairo (the "Osundairo Brothers")—and that allegedly as a result, "the evidence before the grand jury was clearly insufficient to support the indictment against Mr. Smollett." Motion at 3. This argument is based on two faulty premises: (1) that Judge Toomin's June 21, 2019 opinion made the Osundairo Brothers' testimony null and void, and (2) an assumption about the sufficiency of the evidence the OSP presented to the Special Grand Jury. Contrary to Mr. Smollett's contention that the proceedings or sworn testimony before the grand jury relating to the Initial Smollett Matter were null and void, Judge Toomin found that

the ***resulting disposition***, i.e., the March 26, 2019 *nolle pros*, was null and void, and that conduct stemming from the authority of the ***State's Attorney*** was improper after Cook County State's Attorney Kimberly Foxx recused herself from the Initial Smollett Case. *See* Def.'s Ex. B at 20. Importantly, a grand jury operates separate and apart from the Cook County State's Attorney's Office and its authority is not derived from or tethered to any authority vested in the State's Attorney because, by statute, it is an entity ***sworn in by a court and presided over by the foreperson***. Therefore, any unauthorized actions taken by the Cook County State's Attorney in the Initial Smollett Matter are distinct from the actions of the properly convened grand jury itself, and do not wholly void the sworn testimony and proceedings that occurred before that grand jury.

Furthermore, even if the Osundairo Brothers' grand jury testimony from the Initial Smollett Matter were considered null and void based on Judge Toomin's ruling—which it should not be—Illinois law prohibits challenges to the sufficiency of the grand jury evidence so long as ***some evidence*** relative to the charge is presented. *See People v. DiVincenzo*, 183 Ill. 2d 239, 255 (1998) *abrogated on other grounds by People v. McDonald*, 2016 IL 118882 ("A defendant ***may not seek to challenge the sufficiency of the evidence*** considered by a grand jury if some evidence was presented.") (emphasis added); *see also* 725 ILCS 5/114-I(a)(9) (permitting dismissal of an indictment only when it "is ***based solely*** upon the testimony of an incompetent witness") (emphasis added). Even if Mr. Smollett could legally challenge the competency of the Osundairo Brothers' testimony (which he cannot under Illinois law), as set forth in Mr. Smollett's own Motion (pp. 6–10), the Special Grand Jury that returned the True Bill in February 2020 was presented with a significant amount of evidence aside from the Osundairo Brothers' testimony, over four sessions totaling approximately 18 hours, including (1) live testimonial evidence from Chicago Police

Department Detective Michael Theis; (2) sworn written statements from five different witnesses; and (3) over 65 document and video exhibits.

As a result, Mr. Smollett's due process rights were neither violated during the grand jury proceedings, nor was incompetent or insufficient evidence presented to the Special Grand Jury. Accordingly, the Court must deny Mr. Smollett's ***third*** motion to dismiss the indictment.

ARGUMENT

As the Illinois Supreme Court has repeatedly stated, "[c]hallenges to grand jury proceedings are ***limited***," and a defendant generally "may not challenge the validity of an indictment returned by a legally constituted grand jury." *People v. Wright*, 2017 IL 119561, ¶ 61 (emphasis added) (quoting *DiVincenzo*, 183 Ill. 2d at 255). Importantly, a "defendant ***may not challenge the sufficiency of the evidence*** considered by a grand jury if some evidence was presented." *DiVincenzo*, 183 Ill. 2d at 255 (emphasis added); *People v. Reimer*, 2012 IL App (1st) 101253, ¶ 26 (same); *see also People v. Torres*, 245 Ill. App. 3d 297, 300 (2nd Dist. 1993) ("An indictment returned by a legally constituted grand jury is ***presumed valid and is sufficient to justify trial of the charges on the merits***.") (emphasis added).

A defendant seeking to dismiss an indictment based on alleged prosecutorial misconduct must demonstrate that the prosecutor's purported actions "rise to the level of a deprivation of due process or a miscarriage of justice." *Wright*, 2017 IL 119561 at ¶ 61. However, a trial court's inherent authority to dismiss an indictment because of due process violations "should be used with great restraint and only when a violation is clearly established." *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 95. "[A] due process violation consisting of prosecutorial misconduct before a grand jury is actually and substantially prejudicial only if without it the grand jury would not have

indicted the defendant." *People v. Cross*, 2019 IL App (1st) 162108, ¶ 55 (quoting *People v. Oliver*, 368 Ill. App. 3d 690, 696–97 (2nd Dist. 2006)).

Mr. Smollett asks this Court to dismiss the February 2020 indictment based on either speculated prosecutorial misconduct that did not occur, or based on supposed invalid evidence that has not been voided (and that was merely one piece of the significant amount of evidence presented to the Special Grand Jury). These arguments, as detailed below, are both factually and legally flawed, and even if true (which they are not) do not even come close to clearing the high legal standard established by Illinois law for dismissing an indictment.

I. The OSP Informed the Special Grand Jury of Its Rights Under 725 ILCS 5/112-4(b), and Mr. Smollett Was Not Denied Due Process.

Much of Mr. Smollett's Motion operates under the entirely ***false assumption*** that the OSP failed to advise the Special Grand Jury of certain rights it has under 725 ILCS 5/112-4(b). That section of the Grand Jury Statute states as follows:

> The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney. ***Prior to the commencement of its duties and, again, before the consideration of each matter or charge before the Grand Jury, the State's Attorney shall inform the Grand Jury of these rights.***

725 ILCS 5/112-4(b) (emphasis added). Contrary to Mr. Smollett's mere assumption, and as set forth in the Declaration of Deputy Special Prosecutor Durkin, attached hereto as Exhibit A, the OSP informed the Special Grand Jury of its rights under 5/112-4(b) on ***numerous occasions*** when the Special Grand Jury was in session. In fact, the Special Grand Jury was informed or reminded of its investigative powers at ***each*** of the four sessions held leading up to the return of the True Bill. Exhibit A at ¶¶ 5–7.

Specifically, on October 9, 2019 (the day Special Grand Jury was empaneled by Judge Toomin), the OSP specifically walked the Special Grand Jury through the grand jury process, explained that the OSP would serve as an advisor to the Special Grand Jury, and explained the Special Grand Jury had investigative powers, including its rights under 5/112-4(b) to subpoena and question witnesses, and obtain documents and transcripts. *Id.* at ¶ 3. Notably, the OSP documented through affidavits (long before Mr. Smollett filed—or even outwardly mentioned the concept of filing—the present Motion) that it met its statutory obligation. *Id.*

During the next two Special Grand Jury sessions—on October 29, 2019 and November 19, 2019—the OSP reminded the grand jurors of their subpoena power rights, consistent with the powers of a grand jury under Section 5/112-4(b). *Id.* at ¶ 6.

Finally, on February 11, 2020, prior to the Special Grand Jury returning a True Bill, the OSP ***again*** informed the grand jurors of their rights under Section 5/112-4(b). *Id.* at ¶ 7. As it did after the October 9, 2019 session, the OSP again documented through a contemporaneous affidavit that it had fulfilled its statutory obligation under Section 5/112-4(b). *Id.*

Accordingly, and without question, the OSP fulfilled its obligations under Section 5/112-4(b), and thus, did not take any action or inaction that could possibly resemble prosecutorial misconduct rising to the level of a due process violation.

Furthermore—although not cited by Mr. Smollett—***even if*** the OSP had not fulfilled its obligations under Section 5/112-4(b) (which, as explained above, it did), Illinois courts have stated that such a failure on its own ***would not be grounds for dismissal of the indictment***. *See People v. Haag*, 80 Ill. App. 3d 135, 139 (2nd Dist. 1979) ("While section 112-4(b) of the Code imposes a duty upon the State's Attorney to advise the Grand Jury in this regard it does not authorize dismissal of an indictment or provide any other penalty or sanction for his failure to do so.");

People v. Fassler, 153 Ill. 2d 49, 57 (1992) (citing *Haag* with approval and summarizing its holding with respect to 5/112-4(b)).

Thus, not only is Mr. Smollett's factual assumption about the OSP's conduct incorrect, but his legal argument as to the proper sanction for a Section 5/112-4(b) violation (which did not even occur here) is plainly wrong, too. Accordingly, dismissal of the indictment based on Section 5/112-4(b) is entirely baseless and unwarranted.

II. The Indictment Was Not Based on "Illegal," "Incompetent," "Invalid," or "Insufficient" Evidence.

Mr. Smollett describes the Osundairo Brothers' sworn grand jury testimony from the Initial Smollett Matter as both "illegal and incompetent" (Motion at 1) and "invalid" (Motion at 3), and states that without the Osundairo Brothers' testimony, the evidence before the Special Grand Jury "was clearly insufficient to support the indictment against Mr. Smollett." Motion at 3. These mischaracterizations and arguments are meritless because: (1) Judge Toomin never voided the entirety of the grand jury's proceedings relating to the Initial Smollett Matter; (2) the Osundairo Brothers gave sworn testimony after being placed under oath by a properly empaneled grand jury; and (3) the OSP presented the Special Grand Jury with significant evidence beyond merely the Osundairo Brothers' testimony.

A. Judge Toomin did not find that the sworn testimony of the Osundairo Brothers was void or invalid.

Mr. Smollett's Motion also operates under the incorrect legal assumption that Judge Toomin held, as part of his June 21, 2019 order (*see* Def.'s Ex. B), that "the grand jury proceeding in which the Osundairo Brothers testified is null and void and of no legal effect." Motion at 5. This, too, is plainly wrong.

In concluding the June 21, 2019 order, Judge Toomin found that the ***disposition*** from the Initial Smollett Matter—the March 26, 2019 *nolle pros*—was null and void:

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

Def.'s Ex. B at 20 (emphasis added). Nowhere in Judge Toomin's order does it state that the sworn testimony and proceedings before the grand jury in the Initial Smollett Matter were null and void.

Indeed, the analogous cases with "similar factual scenarios" cited by Judge Toomin in his June 21, 2019 order are cases where the courts explicitly held, like Judge Toomin held here, that the unauthorized actions of a State's Attorney voided the ***final disposition or judgment***. *See People v. Ward*, 326 Ill. App. 3d 897, 902 (5th Dist. 2002) ("If a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, ***the prosecution is void*** and the cause should be remanded so that it can be brought by a proper prosecutor.") (emphasis added); *People v. Dunson*, 316 Ill. App. 3d 760, 770 (2nd Dist. 2000) ("We hold that the participation in the trial by a prosecuting assistant State's Attorney who was not licensed to practice law under the laws of Illinois requires ***that the trial be deemed null and void ab initio and that the resulting final judgment is also void.***") (emphasis added). None of the cases relied on by Judge Toomin suggest that a voided prosecution or disposition results in the sworn testimony and the proceedings before a grand jury being deemed null and void, and, tellingly, Mr. Smollett cites no such authority.

While Judge Toomin's June 21, 2019 order did state that "[t]here was no State's Attorney when [Mr.] Smollett's case was presented to the grand jury" (Def's Ex. B at 20), this does not

mean that the grand jury itself was improperly impaneled or that the sworn testimony of the Osundairo Brothers is invalid. In fact, Mr. Smollett does not even contend (nor could he) that the grand jury at issue was improperly impaneled, or that the Osundairo Brothers were improperly sworn in by the grand jury's foreperson.

Furthermore, Judge Toomin's conclusions regarding the authority of the State's Attorney and actions by her Office do not apply to the grand jury itself—an entity which, by law, is separate and apart from the State's Attorney's Office, which, in turn, merely "serves as advisor to the grand jury." *DiVincenzo*, 183 Ill. 2d at 254. Indeed, the grand jury's authority and power is derived from an Illinois statute (725 ILCS 5/112-4)—not any authority vested in the State's Attorney. In fact, the grand jury is "impaneled, sworn and instructed as to its duties ***by the court***"—not the State's Attorney. 725 ILCS 5/112-2(b) (emphasis added). Additionally, during the proceedings before the grand jury, "***[t]he foreman***"—not the State's Attorney—who is sworn in by ***the court***—not the State's Attorney—"shall preside over all hearings and swear all witnesses." 725 ILCS 112-2(b); 725 ILCS 5/112-4(c) (emphases added). Accordingly, State's Attorney Kimberly Foxx's improper recusal did not invalidate the propriety of the grand jury itself or any sworn testimony that a witness gave before the properly impaneled grand jury in the Initial Smollett Matter.

Importantly, Mr. Smollett does not cite to any case suggesting that ***sworn testimony*** from a prior grand jury proceeding may not be used in a subsequent grand jury proceeding, even if the disposition or judgment in the prior case was voided.[1] Based on the OSP's diligent search of the case law, no such case law exist.

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[1] During the June 26, 2020 status hearing, the Court also referenced "115-10 evidence" in a dialogue with Mr. Smollett's counsel about the basis for this Motion (June 26, 2020 Hr. Tr. at 55–57), which is a reference to 725 ILCS 5/115-10.1 covering the admissibility of prior inconsistent statements. As the Court knows, a prior inconsistent statement which "was made under oath" in an another proceeding, including a grand jury

Rather, Mr. Smollett cites to *People v. Curoe*, 97 Ill. App. 3d 258 (1st Dist. 1981) to argue that the indictment must be dismissed "because it is based on invalid testimony from a void proceeding."[2] Motion at 13. However, as noted in the Motion's parenthetical explaining *Curoe*, the appellate court in that case found that the trial court should have dismissed the indictment due to the prosecutor's ***unsworn summary*** of testimony from four witnesses in another grand jury proceeding. *Id.* at 266–71. As such, *Curoe* is inapplicable, as the Osundairo Brothers' testimony was sworn and under oath before a properly empaneled grand jury, and then their testimony was read verbatim in its entirety to the Special Grand Jury.[3] *See* Def's Under Seal Ex. C & D.

Moreover, and as noted in *Curoe*, "the practice of a prosecutor or other law enforcement official reading verbatim the transcripts of sworn testimony presented to an earlier grand jury" has been approved by courts in Illinois. *Curoe*, 97 Ill. App. 3d at 270 ("Several Illinois cases have upheld criminal convictions where the indictments were based solely upon the sworn testimony of the prosecutor reading the transcripts of proceedings before another grand jury."); *see also People v. Bragg*, 126 Ill. App. 3d 826, 832 (1st Dist. 1984) ("It is well established that ... the reading of the evidence presented before the prior grand jury does not prejudice the accused."). Thus, the

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proceeding, is not inadmissible hearsay. 725 ILCS 5/115-10.1(c)(1); *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 85 (noting that grand jury testimony is admissible under section 5/115-10.1 if it is inconsistent with trial testimony). The Court aptly noted that "you need to persuade me that [the Osundairo Brothers' testimony] wasn't under oath, otherwise it may not be available for the prosecutor to use if the criteria for what we call 115-10 evidence is out there. So I want you to look at that." June 26, 2020 Hr. Tr. at 55. Notably, Mr. Smollett's Motion does not address this issue despite the Court's request, or offer any reasoning or case law suggesting that sworn and under- oath testimony from a grand jury proceeding would be inadmissible.

[2] Mr. Smollett also cites to *Ducey v. Peterson*, 258 Ill. 321 (1913) to support this contention, but that case has no applicability (nor is its application explained by Mr. Smollett), as it involved a dispute over the validity of a deed for land.

[3] In addition to reading the Osundairo Brothers' grand jury transcripts, the Special Grand Jury was provided written copies of the transcripts to read along while listening.

fact that the Osundairo Brothers' sworn testimony was presented to the Special Grand Jury via a reading of the transcript (namely, grand jurors reading written copies of the transcripts of that testimony and listening to a witness read the transcripts aloud) is of no import.

As a result, Judge Toomin's order simply cannot be read, either explicitly or implicitly, to mean that the ***sworn*** testimony of the Osundairo Brothers before a properly impaneled grand jury in the Initial Smollett Matter is null and void.

B. Mr. Smollett cannot challenge the sufficiency of the evidence before the Special Grand Jury, but even if he could, the indictment is supported by more than sufficient evidence.

Mr. Smollett audaciously proclaims that "[w]hen the invalid testimony by the Osundairo Brothers is disregarded, the evidence before the grand jury was clearly insufficient to support the indictment against Mr. Smollett." Motion at 3. In support of this self-serving "sufficiency of the evidence challenge," Mr. Smollett argues that "none of the live witnesses or the sworn statements which were read into evidence were based on any personal knowledge about the attack," and that it "cannot be disputed that the cumulative testimony of the Osundairo Brothers ... was critical and necessary to the finding of probable cause by the grand jury." Motion at 10–11. But, even assuming that the Osundairo Brothers' testimony is invalid (which, as explained above, it is not), Mr. Smollett cannot make a sufficiency of the evidence challenge under Illinois law because an overwhelming amount of additional evidence was presented to the Special Grand Jury to establish probable cause that felony disorderly conduct had occurred to support the True Bill returned on February 11, 2020.

As Mr. Smollett correctly notes, the grand jury's role is only to "determine[] whether ***probable cause*** exists that an individual has committed a crime, thus warranting a trial." Motion at 10 (citing *DiVincenzo*, 183 Ill. 2d at 254 (emphasis added)); *see also United States v. Williams*,

504 U.S. 36, 51 (1992) ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge."). "Probable cause, *i.e.*, sufficient evidence to justify the reasonable belief that the defendant has committed or is committing a crime, does not demand any showing that such a belief be correct or more likely true than false." *People v. Jones*, 215 Ill. 2d 261, 277 (2005) (internal quotation marks omitted). Because the grand jury does not determine guilt or innocence, "grand jury proceedings are not intended to approximate a trial on the merits," *Fassler*, 153 Ill. 2d at 59. As such, "[i]t is the prosecutor's duty to present to the grand jury information that tends to establish probable cause that the accused has committed a crime." *Id.* at 60.

Because the grand jury's role is limited to determining whether probable cause exists, a "defendant ***may not challenge the sufficiency of the evidence*** considered by a grand jury if some evidence was presented." *DiVincenzo*, 183 Ill. 2d at 255 (emphasis added); *Reimer*, 2012 IL App (1st) 101253, ¶ 26 (same); *see also Torres*, 245 Ill. App. 3d at 300 ("An indictment returned by a legally constituted grand jury is ***presumed valid and is sufficient to justify trial of the charges on the merits***.") (emphasis added). Thus, a valid indictment "***is not subject to challenge*** on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *Fassler*, 153 Ill. 2d at 60 (emphasis added) (quoting *United States v. Calandra*, 414 U.S. 338, 345 (1974)); *see also People v. Sampson*, 406 Ill. App. 3d 1054, 1060 (3rd Dist. 2011) ("Indictments returned by a legally constituted grand jury are unassailable on the grounds that the indictment was based on inadequate or incompetent testimony.").

As noted in Mr. Smollett's Motion (pp. 6–10), the Special Grand Jury did hear a significant amount of evidence aside from the Osundairo Brothers' testimony over the course of four sessions totaling approximately 18 hours, including two full-day sessions. This other evidence included

(1) live testimony evidence from Detective Michael Theis; (2) sworn written statements from five different witnesses; and (3) over 65 document and video exhibits, including hours of video compilations. The Special Grand Jury was also given access to the entire CPD investigative file and all materials the OSP received in response to applicable grand jury subpoenas, which constituted over 25,000 pages of documents for its review. Thus, even assuming the Osundairo Brothers' testimony from the prior grand jury session is invalid (which it is not), Mr. Smollett cannot challenge the sufficiency of the evidence presented to the Special Grand Jury under Illinois law because much more than "some evidence was presented." *DiVincenzo*, 183 Ill. 2d at 255; *Reimer*, 2012 IL App (1st) 101253, ¶ 26; *see also* 725 ILCS 5/114-1(a)(9) (permitting dismissal of an indictment only when it "is ***based solely*** upon the testimony of an incompetent witness") (emphasis added).

Moreover, even if Mr. Smollett could overcome the outcome-determinative hurdles to his argument (i.e., that the Osundairo Brothers' testimony is not invalid, and that he cannot challenge the sufficiency of the evidence before Special Grand Jury), it cannot be seriously disputed that the Special Grand Jury received ample evidence—well beyond the Osundairo Brothers' testimony—to establish probable cause that Mr. Smollett committed felony disorderly conduct in the filing of false police reports.

Accordingly, the Court cannot and should not dismiss the indictment based on the sufficiency of the evidence before the Special Grand Jury.

CONCLUSION

For the foregoing reasons, the Office of the Special Prosecutor respectfully requests that this Court deny Mr. Smollett's Motion to Quash and Dismiss Indictment for Alleged Violation of Defendant's Fifth Amendment Due Process Rights.

Dated: October 1, 2020

Respectfully submitted,

/s/ Dan K. Webb
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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

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

DEFENDANT'S MOTION TO DISQUALIFY
THE OFFICE OF THE SPECIAL PROSECUTOR

NOW COMES Defendant, JUSSIE SMOLLETT, by and through one of his attorneys, The Law Office of Heather A. Widell, and pursuant to 55 ILCS 5/3-9008 and all other relevant statutes and case law, respectfully requests this Honorable Court disqualify the Office of the Special Prosecutor ("OSP") as counsel in the above-entitled cause against Mr. Smollett and in support thereof states as follows:

INTRODUCTION

As this Court is well aware, Illinois has statutes that govern the appointment of attorneys and special prosecutors to perform certain duties in particular cases when the necessity arises. The onus is on the petitioner requesting the appointment of a special prosecutor to show the precise nature of the necessity that conforms with the applicable statute.

In the case at bar, after hearing a baseless petition from a random concerned citizen (*i.e.* uninvolved party), Judge Toomin appointed Dan Webb - and by extension the entire law firm of Winston & Strawn, LLP - as the special prosecutor/OSP in the above-captioned case in the stead of the Office of the Cook County State's Attorney. This appointment occurred only after the

Office of the Cook County State's Attorney, through their agent, made an agreement with Mr. Smollett as to his previously-indicted matter and ultimately dismissed Mr. Smollett's case.

As such, the Defense now makes an additional motion in relation to the appointment of a special prosecutor, seeking for this Court to disqualify the OSP as counsel in the above-captioned cause.

ARGUMENT

1. **No valid basis existed under which to appoint a special prosecutor.**

The legislative intent of the applicable statute is shown clearly by the letter of the law. 55 ILCS 5/3-9008 was never intended to be a workaround for anytime a private prosecutor wants to second-guess the judgment of a duly elected public official. Rather, the statute is in place for very limited and very specific situations with regards to inabilities of a State's Attorney to proceed in certain matters. The subsections that delineate the only circumstances in which appointing a special prosecutor would be appropriate are as follows:

> Sec. 3-9008. Appointment of attorney to perform duties.
>
> (a-5) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties.... If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-10) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding... If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.

> (a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

The statute is clear on its face and requires no interpretation to discern that only three discreet circumstances allow for the appointment of a special prosecutor: when the State's Attorney (1) is unable to fulfill her prosecutorial duties, (2) has an actual conflict of interest in the matter, or (3) has recused herself. None of those circumstances are present in this case. Prior to the petition for the appointment of a special prosecutor being filed, the Office of the Cook County State's Attorney had already entered into an agreement with the Defendant, Mr. Smollett, and accordingly was granted leave by the trial court (Judge Watkins) to dismiss the case against the Defendant as the terms of the agreement had been completed.

In a recent decision from a case out of Winnebago County, the Court held that after a case had been dismissed (because of no colorable claims being raised in the petition), there was no longer occasion for there to be a conflict of interest or other inability to prosecute and thus, the trial court abused its discretion in appointing a special prosecutor. *Haney v. Winnebago Cty. Bd.*, 2020 IL App (2d) 190845, 2020 Ill. App. LEXIS 691 (Ill. App. Ct. 2d Dist. 2020). In that case, the trial court originally denied the State's Attorney's motion to dismiss, which left open the possibility for the State's Attorney to potentially have a conflict of interest in prosecuting the matter or an inability to continue to prosecute a pending matter. Once that case was dismissed, however (as the appellate Court held it should have been in the first place), there no longer remained even the potential for a conflict of interest or inability to prosecute and thus the necessity for the appointment of a special prosecutor was null and void.

The case currently before the Court is more egregious, as the trial Court actually ***granted*** the States Attorney's motion to dismiss the previously charged indictment, and thus there could be neither a conflict of interest in prosecuting a dismissed matter, nor an inability to perform prosecutorial duties in a dismissed matter. As such, there was unequivocally no basis for the appointment of a special prosecutor and Judge Toomin therefore abused his discretion in appointing a special prosecutor in a matter that had already been handled and dismissed by the State's Attorney.

It is also important to note that an appointment, even a legitimate one, of a special prosecutor still does not render the OSP a State's Attorney, even for the duration of the appointment. *Aiken v. County of Will*, 321 Ill. App. 171, 52 N.E.2d 607, at 67 (1943). As such, especially absent any actual conflict of interest or inability of the State's Attorney to fulfill her prosecutorial duties, it is highly inappropriate for a special prosecutor to be appointed solely to substitute their judgment as it relates to prosecutorial matters in the stead of a qualified and duly elected public official.

To be clear, no section of 55 ILCS 5/3-9008 purports to create any office, or provide that such an appointee under this section shall become a new State's Attorney any time the actions or policies of the sitting State's Attorney are being questioned; rather, this section merely provides that under the specific circumstances delineated in the statute, the court may appoint some competent attorney to prosecute or defend such cause or proceeding, and that such powers and authority is limited to the particular cause or proceeding. *Aiken v. County of Will* at 67 (1943).

In this case, it appears that the special prosecutor was only appointed because of a concern from an uninterested private citizen as to how the sitting elected State's Attorney

handled a criminal matter, not because any actual conflict existed, nor because of any reason given that the State's Attorney was unable to fulfill her prosecutorial duties in a matter that was properly prosecuted, negotiated, and subsequently dismissed by the trial judge.

2. **Sheila O'Brien lacked standing to petition the Court for an appointment of a special prosecutor.**

As shown above in sections (a-5), (a-10), and (a-15) of the statute listing the valid bases for petition to appoint a special prosecutor, the language is also very clear as to *who* is allowed to make such a petition in the first place. The language, as it stands, is unambiguous and provides that only the Court, the State's Attorney herself, or an "interested party" may petition the Court for the appointment of a special prosecutor. Subsections (a-5) and (a-10) begin: "The court on its own motion, or an *interested person* in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney..." (emphasis added). Similarly, subsection (a-15) provides that "the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate". The language above is the exhaustive list as to the only persons who have standing to file a petition with the Court to appoint a special prosecutor; such list is limited to the Judge, the State's Attorney herself, or an "interested party."

Black's Law Dictionary defines an "interested party" as:

> [t]he persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding.

While Ms. O'Brien (per her own petition) was formerly a member of the bench, at the time she filed the petition for appointment of a special prosecutor, she was neither the sitting trial judge involved in the proceedings against Mr. Smollett nor did she in any way have any direct interest in the prosecution or defense of the legal proceeding against Mr. Smollett.

Paragraph 9 of Ms. O'Brien's own petition indicates that she has no agenda in the matter; and the rest of the petition failed to state how, in fact, she was an "interested party" per the language of the statute and the common legal definition of the term. If being a mere taxpayer with concerns about any random criminal matter created the basis for a valid petition, the statutory language would have stated such.

As neither the trial court (Judge Watkins) nor any other interested party petitioned the court for the appointment of a special prosecutor, (and since the State's Attorney by her own admission did not recuse herself), we are left without any valid petitioners to this cause and thus the appointment of a special prosecutor *based upon a petitioner who lacked standing* is void.

3. **Judge Toomin abused his discretion in appointing a private attorney as a special prosecutor.**

Subsection (a-20) of 55 ILCS 5/3-9008 addresses the steps necessary in order to appoint a private attorney rather than public agency to be the special prosecutor in a given case; the requirements are clear and provide as follows:

> Sec. 3-9008. Appointment of attorney to perform duties.
>
> (a-20) Prior to appointing a private attorney under this Section, the court shall contact public agencies, including, but not limited to, the Office of Attorney General, Office of the State's Attorneys Appellate Prosecutor, or local State's Attorney's Offices throughout the State, to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and shall appoint a public agency if they are able and willing to accept the appointment. An attorney so appointed shall have the same power and authority in relation to the

cause or proceeding as the State's Attorney would have if present and attending to the cause or proceedings.

To date, Mr. Smollett's defense team in the re-indicted matter currently pending before the Court has yet to see any proof that any of the public agencies listed in the statute above were properly contacted. We only have Judge Toomin's word to go on from his ruling on the petition to appoint a special prosecutor, wherein he indicated that he contacted over a hundred (100) local public officials/agencies and heard back from only thirty (30).

The issue here, aside from the fact that there is no evidence as to any public agencies actually being contacted as required by statute prior to Judge Toomin appointing a private attorney, is that by Judge Toomin's own admission ***at least two (and possibly a third) public agency was willing to take on the appointment***; however, without any explanation, Judge Toomin unilaterally decided that none of these three public agencies were "able" to do so, despite their representations to the contrary.

The statute is very clear that the Court "*shall* appoint a public agency if they are able and willing to accept the appointment." 55 ILCS 5/3-9008 (a-20) (emphasis added in italics). Only if after all public prosecuting agencies have been exhausted and all are unable and unwilling to accept the appointment can the court then appoint a private attorney as the special prosecution in a case. As multiple agencies purportedly indicated their willingness and ability to accept the appointment, Judge Toomin abused his discretion by appointing the last resort of a private attorney.

WHEREFORE, for all the reasons stated above, Defendant, JUSSIE SMOLLETT, respectfully requests that this Honorable Court grant Defendant's Motion and thereby disqualify the OSP (and by extension its agents including Dan Webb, Sean Weiber, Samuel Mendenhall, and Matt Durkin) as counsel in the above-entitled matter.

Respectfully submitted,

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