

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

IN RE APPOINTMENT OF SPECIAL PROSECUTOR

No. 19 MR 00014

The Honorable  
Michael P. Toomin

ORDER

1. On August 23, 2019, in the above-captioned matter, the Court appointed Dan K. Webb to serve as Special Prosecutor ("Appointment Order") relating to *People of the State of Illinois v. Jussie Smollett*, No. 19 CR 0310401. The Appointment Order contained two directives to the Special Prosecutor: (1) "if reasonable grounds exist to further prosecute [Jussie] Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result" ("First Directive"); and (2) "to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled the *People of the State of Illinois v. Jussie Smollett*, No. 19 CR 0310401," and "in the event the investigation establishes reasonable grounds to believe that any other criminal offenses were committed in the course of the Smollett matter, [to] commence the prosecution of any crime as may be suspected" ("Second Directive").

2. With respect to the First Directive, on February 11, 2020, a Special Grand Jury returned a true bill and the OSP filed an indictment against Mr. Smollett charging him with six

counts of disorderly conduct, namely for making false police reports in violation of 720 ILCS 5/26-1(a)(4). See *People of the State of Illinois v. Jussie Smollett*, Case No. 20 CR 03050-01.

3. With respect to the Second Directive, on August 17, 2020, pursuant to the Appointment Order, the Special Prosecutor confidentially provided the Court, in a sealed envelope delivered to the Court's chambers, a report entitled *The Office of the Special Prosecutor's Summary of its Final Conclusions, Supporting Findings and Evidence Relating to the Cook County State's Attorney's Office's and the Chicago Police Department's Involvement in the Initial Smollett Case* (the "OSP's Summary Report"), attached hereto as Exhibit A.

4. Subsequently, the OSP's prosecution of Mr. Smollett in Case No. 20 CR 03050-01 under the First Directive continued before the Honorable Judge James B. Linn. A jury trial commenced on November 29, 2021, and after seven days of testimony and argument, on December 9, 2021, a jury returned a guilty verdict against Mr. Smollett on five of six counts of disorderly conduct in violation of 720 ILCS 5/26-1(a)(4).

5. The trial of Mr. Smollett being complete, the Special Prosecutor has filed a "Motion to Release the Special Prosecutor's Summary Report Containing Grand Jury Material in the Interests of Justice" asking this Court to find that the public release of the OSP's Summary Report, and the grand jury material contained therein, is "in the interests of justice," pursuant to 725 ILCS 5/112-6(c)(3).

6. The Special Prosecutor's Motion asking for the public release of the OSP's Summary Report explained that the request in the Motion is "narrowly tailored to the release of only the OSP's Summary Report."

7. Having considered the Special Prosecutor's Motion, and the reasons set forth therein, the Court finds that the OSP has demonstrated a "particularized need" for public disclosure

of the OSP's Summary Report, consistent with *Board of Education v. Verisario*, 143 Ill. App. 3d 1000 (2nd Dist. 1986), in that the material it seeks to release is needed to avoid a possible injustice in another judicial proceeding, the need for disclosure is greater than the need for continued secrecy, and that its request is structured to cover only material so needed.

8. Having determined that the OSP has demonstrated a particularized need for disclosure, the Court finds that publicly releasing the OSP's Summary Report, entitled *The Office of the Special Prosecutor's Summary of its Final Conclusions, Supporting Findings and Evidence Relating to the Cook County State's Attorney's Office's and the Chicago Police Department's Involvement in the Initial Smollett Case*, and the grand jury material contained therein, is "in the interest of justice" pursuant to 725 ILCS 5/112-6(c)(3).

9. The Court further finds that neither the act of submitting the Summary Report to the Court, nor the public release of the Report, constitutes a waiver of any privilege, exemption, or protection related to the OSP's investigation, the OSP's Summary Report, or the materials and information gathered by the OSP or the Special Grand Jury.

10. **IT IS HEREBY ORDERED** that the Special Prosecutor's Motion to Release the Special Prosecutor's Summary Report Containing Grand Jury Material in the Interests of Justice is granted. This Order is limited to the release of the OSP's Summary Report and the grand jury material contained therein, and not any other grand jury material gathered by or possessed by the OSP.

11. **IT IS HEREBY ORDERED** that the seal placed on the OSP's Summary Report attached hereto as Exhibit A shall be lifted to enable public release.

12. **IT IS HEREBY ORDERED** that the Special Prosecutor is directed to provide the OSP's Summary Report to the Cook County Board of Commissioners, including County Board President Toni Preckwinkle.

**ENTERED**  
**DEC 20 2021**

Presiding Judge Michael P. Toomin-0501

DATE: Dec. 24, 2021

ENTERED:



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



# EXHIBIT A

**THE OFFICE OF THE SPECIAL PROSECUTOR'S  
SUMMARY OF ITS FINAL CONCLUSIONS,  
SUPPORTING FINDINGS AND EVIDENCE RELATING TO  
THE COOK COUNTY STATE'S ATTORNEY'S OFFICE'S  
AND THE CHICAGO POLICE DEPARTMENT'S  
INVOLVEMENT IN THE INITIAL SMOLLETT CASE**

**(SECOND JUDGE TOOMIN DIRECTIVE  
FROM HIS AUGUST 23, 2019 COURT ORDER)**

**Special Prosecutor Dan K. Webb**

**Dated: August 17, 2020**

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                       | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| INTRODUCTION .....                                                                                                                                                                                                                                                                                                    | 1    |
| MAJOR CONCLUSIONS AND FINDINGS OF THIS SUMMARY REPORT .....                                                                                                                                                                                                                                                           | 1    |
| FACTUAL BACKGROUND .....                                                                                                                                                                                                                                                                                              | 3    |
| OVERVIEW OF THE OSP'S INVESTIGATION OF THE CCSAO .....                                                                                                                                                                                                                                                                | 4    |
| Investigative Steps Regarding the Investigation of the CCSAO .....                                                                                                                                                                                                                                                    | 4    |
| Interviews Conducted .....                                                                                                                                                                                                                                                                                            | 5    |
| Documents and Evidence Reviewed .....                                                                                                                                                                                                                                                                                 | 7    |
| DISCUSSION OF THE EVIDENCE THAT SUPPORTS THE FIVE FINAL<br>CONCLUSIONS AND SUPPORTING FINDINGS RELATING TO THE<br>CONDUCT OF THE CCSAO IN THE INITIAL SMOLLETT CASE .....                                                                                                                                             | 7    |
| I. CONCLUSION #1: THE OSP <i>DID</i> DEVELOP EVIDENCE THAT<br>ESTABLISHES SUBSTANTIAL ABUSES OF DISCRETION AND<br>OPERATIONAL FAILURES BY THE CCSAO IN PROSECUTING AND<br>RESOLVING THE INITIAL SMOLLETT CASE .....                                                                                                   | 8    |
| A. FIRST FINDING OF ABUSE OF DISCRETION: The CCSAO's Process<br>and Decision-Making for Resolving the Initial Smollett Case Were a<br>Substantial Abuse of Discretion and Represented a Major Failure of the<br>Operations of the CCSAO .....                                                                         | 8    |
| B. SECOND FINDING OF ABUSE OF DISCRETION: The CCSAO<br>Engaged in a Substantial Abuse of Discretion and Breached Its<br>Obligations of Honesty and Transparency by Making False and/or<br>Misleading Statements to the Public Regarding the Nature and Reason for<br>the Dismissal of the Initial Smollett Case ..... | 16   |
| 1. False and/or Misleading Statement about the Dismissal #1: The<br>CCSAO Mischaracterized the Resolution of the Initial Smollett<br>Case as Similar to Thousands of Other Cases .....                                                                                                                                | 17   |
| i. It Was Not Accurate to Represent that Mr. Smollett's Case<br>Was Similar to the 5,700 Cases Referenced Because He<br>Was Not Referred to a Diversion Program .....                                                                                                                                                 | 18   |

|      |                                                                                                                                                                                                                                                                                                                                                                                                                                    |    |
|------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| ii.  | The Dismissal Press Statement Represented Mr. Smollett's Resolution as Being Similar to Thousands of Other Cases When It Had Not and Could Not Identify Similar Cases.....                                                                                                                                                                                                                                                         | 19 |
| 2.   | False and/or Misleading Statement about the Dismissal #2: The CCSAO Falsely Represented to the Public that \$10,000 Was the Most Mr. Smollett Could Have Been Ordered to Pay in Restitution Under the Law.....                                                                                                                                                                                                                     | 20 |
| 3.   | False and/or Misleading Statement about the Dismissal #3: The CCSAO Falsely Represented to the Public that Mr. Smollett Had No Criminal Background at the Time His Case was Dismissed .....                                                                                                                                                                                                                                        | 21 |
| 4.   | False and/or Misleading Statement about the Dismissal #4: State's Attorney Foxx Pivoted Her Position and Falsely Represented that the CCSAO Dismissed the Case Due to Evidentiary Issues.....                                                                                                                                                                                                                                      | 22 |
| C.   | THIRD FINDING OF ABUSE OF DISCRETION: The CCSAO Engaged in a Substantial Abuse of Discretion and Breached Its Obligations of Honesty and Transparency By Making False and/or Misleading Statements Regarding State's Attorney Foxx's Recusal to the Public .....                                                                                                                                                                   | 24 |
| D.   | FOURTH FINDING OF ABUSE OF DISCRETION: The CCSAO Engaged in a Substantial Abuse of Discretion and Breached its Obligations of Honesty and Transparency When State's Attorney Foxx Made False and/or Misleading Statements to the Public that She Stopped Communicating with Jurnee Smollett, Mr. Smollett's Sister, After State's Attorney Foxx Had Become Aware that Mr. Smollett Had Become a Subject of the Investigation ..... | 26 |
| II.  | CONCLUSION #2: THE OSP <i>DID</i> DEVELOP EVIDENCE THAT MAY RISE TO THE LEVEL OF A VIOLATION OF LEGAL ETHICS BY STATE'S ATTORNEY FOXX AND CCSAO LAWYERS RELATING TO FALSE AND/OR MISLEADING PUBLIC STATEMENTS MADE ABOUT THE PROSECUTION OR RESOLUTION OF THE INITIAL SMOLLETT CASE.....                                                                                                                                           | 28 |
| III. | CONCLUSION #3: WHILE THE OSP <i>DID NOT</i> DEVELOP EVIDENCE SHOWING STATE'S ATTORNEY FOXX WAS INVOLVED IN DECISION-MAKING ON THE INITIAL SMOLLETT CASE AFTER SHE WAS RECUSED, THE OSP <i>DID</i> DEVELOP EVIDENCE THAT SHE WAS PROVIDED WITH FREQUENT UPDATES ABOUT THE INITIAL SMOLLETT CASE AFTER HER RECUSAL.....                                                                                                              | 29 |
| IV.  | CONCLUSION #4: THE OSP <i>DID NOT</i> DEVELOP EVIDENCE THAT WOULD SUPPORT ANY CRIMINAL CHARGES AGAINST STATE'S ATTORNEY FOXX OR ANY INDIVIDUAL WORKING AT THE CCSAO .....                                                                                                                                                                                                                                                          | 32 |

|     |                                                                                                                                                                                 |    |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| V.  | CONCLUSION #5: THE OSP <i>DID NOT</i> DEVELOP EVIDENCE OF IMPROPER INFLUENCE BY ANY OUTSIDE THIRD PARTIES IN THE DECISION-MAKING BY THE CCSAO IN THE INITIAL SMOLLETT CASE..... | 33 |
| A.  | State's Attorney Foxx's Communications with Sherrilyn Ifill.....                                                                                                                | 35 |
| B.  | State's Attorney Foxx's Communications with Tina Tchen.....                                                                                                                     | 36 |
| C.  | State's Attorney Foxx's Communications with Jurnee Smollett.....                                                                                                                | 37 |
| D.  | State's Attorney Foxx's Discussions with Superintendent Eddie Johnson Regarding Referring the Case to the FBI.....                                                              | 40 |
|     | OVERVIEW OF THE OSP'S INVESTIGATION OF THE CPD .....                                                                                                                            | 42 |
|     | Investigative Steps Regarding the Investigation of the CPD.....                                                                                                                 | 42 |
| VI. | DISCUSSION OF THE OSP'S THREE FINAL CONCLUSIONS AND SUPPORTING FINDINGS RELATING TO THE CONDUCT OF CPD IN THE INITIAL SMOLLETT CASE.....                                        | 43 |
| A.  | Criminal Statutes Considered .....                                                                                                                                              | 43 |
| B.  | CPD Policy Concerning Communications with Media .....                                                                                                                           | 44 |
| C.  | Identifying Alleged "Leaks" .....                                                                                                                                               | 45 |
| 1.  | <u>Alleged "Leaks" Identified by Witnesses the OSP Interviewed</u> .....                                                                                                        | 45 |
| 2.  | <u>Alleged False Media Reports Identified by Mr. Smollett During the CPD Investigation</u> .....                                                                                | 47 |
| 3.  | <u>Media Reports Referencing Law Enforcement Investigative Information Attributed to an Anonymous Law Enforcement Source</u> .....                                              | 50 |
| D.  | OSP Unable to Identify the CPD Sources of Media "Leaks" .....                                                                                                                   | 53 |
| E.  | The OSP's Investigation of CPD's Response to Alleged "Leaks" .....                                                                                                              | 54 |
| F.  | The OSP's Discussions Regarding the Individual Who Accessed Investigation Materials Without Authorization .....                                                                 | 57 |
| G.  | Reporters Are Protected from Disclosing Their Sources Under Illinois Law .....                                                                                                  | 57 |
|     | CONCLUSION.....                                                                                                                                                                 | 59 |

## **INTRODUCTION**

Dan K. Webb, Special Prosecutor for Cook County, announced today that the Office of the Special Prosecutor ("OSP") has completed its investigative assignment under Cook County Circuit Court Judge Michael P. Toomin's "Second Directive" to the OSP to determine whether any person or office involved in *People of the State of Illinois v. Jussie Smollett* (No. 19 CR 0310401) ("the Initial Smollett Case") engaged in wrongdoing. In connection with this Second Directive from Judge Toomin, the OSP has investigated the conduct of the Cook County State's Attorney's Office ("CCSAO") and the Chicago Police Department ("CPD"), as well as individuals working in those offices.

The OSP's investigation, which was conducted in conjunction with a Special Grand Jury, began on August 23, 2019, when Judge Toomin appointed Mr. Webb as Special Prosecutor. Judge Toomin directed Mr. Webb to conduct an independent investigation to determine the following: (1) whether Jussie Smollett should be further prosecuted for the alleged false reports he made to CPD officers ("First Directive"), and (2) whether any person or office involved in the Initial Smollett Case engaged in wrongdoing ("Second Directive"). Mr. Webb's appointment as Special Prosecutor followed a decision by Judge Toomin on June 21, 2019 that a Special Prosecutor should be appointed in connection with the Initial Smollett Case in order to "restore the public's confidence in the integrity of our criminal justice system."

In connection with Judge Toomin's First Directive to determine whether Jussie Smollett should be further prosecuted, the OSP ultimately requested, on February 11, 2020, that the Special Grand Jury indict Mr. Smollett, and the grand jury returned a true bill. The OSP then filed a six-count indictment charging Mr. Smollett with making four separate false reports to CPD officers related to his false claims that he was the victim of a hate crime, knowing that he was not the victim of a crime. The further prosecution of Mr. Smollett is ongoing, and will not be concluded until a final disposition of the indictment charges is reached as the result of a jury trial. As of the date of this Report, Mr. Smollett's trial date has not yet been set by the court.

In connection with Judge Toomin's Second Directive to determine whether any person or office involved in the Initial Smollett Case engaged in wrongdoing, the OSP has completed a thorough investigation, which included conducting 53 interviews, issuing more than 50 subpoenas and/or document requests, and collecting more than 120,000 pages of documents (or, more than 26,000 documents), as well as text message data and audio recordings. The OSP has prepared this detailed and comprehensive report, entitled, *The Office of the Special Prosecutor's Summary of its Final Conclusions, Supporting Findings and Evidence Relating to the Cook County State's Attorney's Office's and the Chicago Police Department's Involvement in the Initial Smollett Case* ("Summary Report"), that sets forth the major conclusions and findings from its investigation into the Second Directive, and discusses the evidence that relates to each of those major conclusions and findings.

## **MAJOR CONCLUSIONS AND FINDINGS OF THIS SUMMARY REPORT**

After the CCSAO dismissed the Initial Smollett Case on terms that many believed were very favorable to Mr. Smollett, there was speculation in the media regarding whether something illegal or improper had gone on behind the scenes at the CCSAO to allow Mr. Smollett to achieve

the particular resolution he received. Among other things, there was public speculation that Cook County State's Attorney Kimberly M. Foxx may have been influenced in an improper manner by prominent people who reached out to her to discuss the Initial Smollett Case. Thus, as part of its investigation, the OSP thoroughly investigated and evaluated whether State's Attorney Foxx or anyone working at the CCSAO committed any crime relating to the prosecution or resolution of the Initial Smollett Case. As a result of this investigation, the OSP has concluded that it did not develop evidence that would support any criminal charges against State's Attorney Foxx or any individual working at the CCSAO.

However, as a result of this investigation, the OSP did develop evidence that establishes substantial abuses of discretion and operational failures by the CCSAO in prosecuting and resolving the Initial Smollett Case.

As set forth in this Summary Report, the OSP has reached five (5) final conclusions relating to the conduct of the CCSAO and three (3) final conclusions relating to the conduct of the CPD in the Initial Smollett Case. First, as to the CCSAO, the following are the OSP's five (5) major final conclusions:

(1) The OSP did develop evidence that establishes substantial abuses of discretion and operational failures by the CCSAO in prosecuting and resolving the Initial Smollett Case. Specifically, the OSP concluded:

- The CCSAO's process and decision-making for resolving the Initial Smollett Case were a substantial abuse of discretion and represented a major failure of the operations of the CCSAO;
- The CCSAO engaged in a substantial abuse of discretion and breached its obligations of honesty and transparency by making false and/or misleading statements to the public regarding the nature and reasons for the dismissal of the Initial Smollett Case;
- The CCSAO engaged in a substantial abuse of discretion and breached its obligations of honesty and transparency by making false and/or misleading statements regarding State's Attorney Foxx's recusal to the public; and
- The CCSAO engaged in a substantial abuse of discretion and breached its obligations of honesty and transparency when State's Attorney Foxx made false and/or misleading statements to the public that she stopped communicating with Jurnee Smollett, Mr. Smollett's sister, after State's Attorney Foxx had become aware that Mr. Smollett had become a subject of the investigation.

(2) The OSP did develop evidence that may rise to the level of a violation of legal ethics by State's Attorney Foxx and the CCSAO lawyers relating to false and/or misleading public statements made about the prosecution and resolution of the Initial Smollett Case. Under Illinois Supreme Court Rule 751, the OSP has no authority to make findings determining ethical violations by lawyers. However, the OSP will

comply with applicable reporting obligations as required by the Illinois Rules of Professional Conduct (*see* IRPC Rules 8.3(a) and 8.4(c)). Based on these reporting obligations, once able under Illinois law, the OSP will submit this report to the Illinois Attorney Registration & Disciplinary Commission so that it can do the appropriate review to determine if any ethical violations occurred;

(3) While the OSP did not develop evidence showing State's Attorney Foxx was involved in decision-making on the Initial Smollett Case after she was recused, the OSP did develop evidence that she was provided with frequent updates about the Initial Smollett Case after her recusal;

(4) The OSP did not develop evidence that would support any criminal charges against State's Attorney Foxx or any individual working at the CCSAO; and

(5) The OSP did not develop evidence of improper influence by any outside third parties in the decision-making by the CCSAO in the Initial Smollett Case.

Second, as far as the CPD, the OSP has reached the following three (3) major final conclusions:

(1) The OSP did not develop evidence that would support any criminal charges against any individual working at the CPD;

(2) The OSP did conclude that the majority of CPD media communications during the Smollett CPD investigation were authorized communications in accordance with CPD's written policies; and

(3) The OSP did conclude that there were media reports that contained unauthorized "leaks" of police investigative information by CPD personnel that were in violation of CPD's written policies. However, for reasons set forth in this Summary Report, the OSP was unable to identify the anonymous alleged CPD source(s) of such "leaks."

### **FACTUAL BACKGROUND**

On January 22, 2019, it was reported to CPD that Mr. Smollett received a letter sent to the studio where the show 'Empire' is filmed, containing threatening language and drawings and laced with a small amount of a white powdery substance. The FBI initiated an investigation into the source of the threatening letter. The FBI investigation remains pending.

On January 29, 2019, Mr. Smollett reported to CPD that two unknown assailants wearing masks had attacked him at around 2:00 a.m., near 340 E. North Water Street in Chicago. Mr. Smollett reported that the men attacked him physically, used racial and homophobic slurs, placed a rope fashioned like a noose around his neck, and poured bleach on him. Mr. Smollett also reported that one of the men yelled, "This is MAGA country," an apparent reference to a slogan popularized by President Donald J. Trump.



CPD launched an investigation and the Smollett case quickly garnered global media attention. Abimbola and Olabinjo Osundairo were suspected to be involved in the attack and were taken into custody on February 13, 2019. While in custody, Abimbola and Olabinjo Osundairo eventually revealed to CPD they had participated in a staged hate crime attack that was planned and directed by Mr. Smollett.

While CPD's investigation was ongoing, on February 9, 2019, State's Attorney Foxx decided she would recuse herself from the matter and any subsequent case, and that First Assistant State's Attorney Joseph Magats would serve as "Acting State's Attorney" for the matter.

On February 20, 2019, the CCSAO charged Mr. Smollett, via a complaint, with felony disorderly conduct, namely making a false police report in connection with his plan to report a hate crime that was a hoax. Mr. Smollett was arrested the following day. On February 28, 2019, a grand jury returned a true bill of indictment for disorderly conduct. The CCSAO filed a 16-count indictment against Mr. Smollett on March 7, 2019. On March 14, 2019, Mr. Smollett was arraigned and pleaded not guilty.

Yet on March 26, 2019, 19 days after the indictment was filed, the CCSAO made the decision to resolve the charges under the following circumstances: (1) complete dismissal of the 16-count felony indictment against Mr. Smollett; (2) no requirement that Mr. Smollett plead guilty to any criminal offense under Illinois law; (3) no requirement that Mr. Smollett admit any guilt of his wrongdoing (in fact, following the court proceedings on March 26, 2019, Mr. Smollett publicly stated he was completely innocent); (4) the only punishment for Mr. Smollett was to perform 15 hours of community service that had no relationship to the charged conduct; (5) only 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); and (6) no requirement that Mr. Smollett participate in the CCSAO's Deferred Prosecution Program (Branch 9), which would have required a one-year period of court oversight over Mr. Smollett.

On April 5, 2019, former Judge Sheila O'Brien filed a petition to appoint a special prosecutor relating to the Initial Smollett Case, arguing that State's Attorney Foxx's recusal of herself, and not the entire CCSAO, was improper. After significant briefing and argument on various issues, Judge Toomin granted that motion on June 21, 2019, and then specifically named Mr. Webb as Special Prosecutor on August 23, 2019.

## **OVERVIEW OF THE OSP'S INVESTIGATION OF THE CCSAO**

### **Investigative Steps Regarding the Investigation of the CCSAO**

The OSP partnered with the Cook County Office of the Independent Inspector General ("OIIG") to conduct its investigation into the CCSAO in conjunction with the Special Grand Jury. As part of this extensive investigation, the OSP and OIIG interviewed all relevant witnesses, and collected, reviewed, and analyzed all relevant documentary evidence.

### *Interviews Conducted*

The OSP interviewed 43 people in total in connection with its investigation into the CCSAO.

Specifically, the OSP interviewed 33 current or former members of the CCSAO:

- State's Attorney Kim Foxx<sup>1</sup>
- Two CCSAO decision-makers on the Initial Smollett Case:
  - First Assistant State's Attorney Joseph Magats
  - Chief Criminal Prosecutions Bureau Risa Lanier
- Other CCSAO Executive Staff members
  - Chief Deputy and Chief Ethics Officer April Perry
  - Chief of Staff and Chief Diversity Officer Jennifer Ballard-Croft
  - Deputy Chief of Staff Alyson Miller
  - Director of Policy Marny Zimmer
- Members of the CCSAO Communications Team
  - Director of External Affairs until April 19, 2019 Kiera Ellis
  - Director of External Affairs starting June 2019 Aviva Bowen
  - Chief Communications Officer Tandra Simonton
  - Senior Advisor for Intergovernmental Affairs Robert Foley
- Felony Review Unit Assistant State's Attorneys
  - Head of Felony Review Kimberly Ward
  - Former Deputy Chief Criminal Prosecutions Bureau Diann Sheridan
  - Felony Review Deputy Supervisor Nicholas "Nick" Trutenko
  - First Chair Felony Trial Division Liam "Bill" Reardon
  - Second Chair Felony Trial Division Robert Mack
  - Felony Review Deputy Supervisor Theodore "Ted" Lagerwall
  - Felony Deputy Review Supervisor Laura Ayala-Gonzalez
  - Former Felony Trial Supervisor Enrique Abraham
  - Assistant State's Attorney Meredith Rudolphi
- Grand Jury Unit Assistant State's Attorneys
  - Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 until March 5, 2019, Peter "Guy" Lisuzzo
  - Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 starting March 6, 2019, James "Jim" Murphy
  - Assistant State's Attorney Mary Pat Devereux

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<sup>1</sup> State's Attorney Foxx sat for an all-day voluntary interview with the OSP. State's Attorney Foxx was placed under oath for that interview pursuant to the authority of the Cook County Inspector General.

- Victim Witnesses Assistance Unit Specialist Elizabeth Caratini Buerger
- Supervisor of Criminal Appeals Division Alan Spellberg
- Attorneys from the Civil Actions Bureau
  - Bureau Chief Cathy McNeil Stein
  - Deputy Bureau Chief Amy Crawford
  - Chief of the Advice, Business, and Complex Litigation Division Jessica Scheller
- Chief Data Officer Matthew Saniie
- Alternative Prosecutions Unit Assistant State's Attorney
  - Supervisor Emily Cole
  - Assistant State's Attorney Becky Walters
- Branch Court Supervisor Cathy Hufford
- Former CCSAO First Assistant State's Attorney Eric Sussman

The OSP also interviewed former CPD Superintendent Eddie Johnson in connection with its investigation into the CCSAO.

Additionally, the OSP interviewed the following nine third-parties in connection with its investigation of the CCSAO:

- Christina M. "Tina" Tchen, CEO of TIME'S UP Now (formerly Michelle Obama's Chief of Staff)
- Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.
- Jurnee Smollett, Mr. Smollett's sister
- Several attorneys from Riley Safer Holmes & Cancila LLP who represented Mr. Smollett in the Initial Smollett Case
  - Patricia Brown Holmes
  - Ronald Safer
  - Brian O'Connor Watson
- Alexandra Sims, a consultant for State's Attorney Foxx's reelection campaign
- Darrell Miller, Mr. Smollett's entertainment lawyer at Fox Rothschild
- Kathleen Hill, who was an attorney employed with the City of Chicago in February 2019 and who worked at the CCSAO as Director of Policy, Research, and Development from November 2016 until June 2018

### *Documents and Evidence Reviewed*

In conjunction with the Special Grand Jury's investigation regarding Judge Toomin's Second Directive, the OSP and OIIG issued more than 50 subpoenas and/or document requests and received more than 120,000 pages of documents (or, more than 26,000 documents), as well as text message data and audio recordings. All of the documentary evidence was carefully reviewed and analyzed by the OSP as part of its investigative activities. Specifically:

- The OSP served document requests and a grand jury subpoena that requested very broad categories of relevant emails, policies, text messages, case files, and other relevant documents and communications from the CCSAO itself.
- The OSP served 34 document requests for relevant documents, text messages, and email communications, including from personal devices and accounts, from current and former CCSAO employees as well as State's Attorney Foxx.
- The OSP served 14 document requests and subpoenas for relevant documents, text messages, and email communications, including from personal devices of third parties, including the third-party interviewees noted above and consultants working with State's Attorney Foxx's campaign.
- The OSP obtained call and text records through 25 subpoenas to phone companies.
- Through forensic collections, the OSP obtained all text message data from State's Attorney Foxx's cellphones and First Assistant Magats' cellphones from January 29, 2019 through April 30, 2019.
- The OSP issued subpoenas to financial institutions seeking State's Attorney Foxx's and Friends of Foxx's (her political campaign) financial records for the relevant period.
- The OSP obtained 20 audio recordings of interviews First Assistant Magats and State's Attorney Foxx gave to reporters.

Due to the volume of phone records and the need to pull data from cellphones in a forensically sound manner, the OSP engaged the assistance of the Regional Computer Forensic Lab to assist with data collection and analysis. The OSP also gathered additional information through public records, such as news articles and videos of television interviews given by members of the CCSAO and Superintendent Johnson.

### **DISCUSSION OF THE EVIDENCE THAT SUPPORTS THE FIVE FINAL CONCLUSIONS AND SUPPORTING FINDINGS RELATING TO THE CONDUCT OF THE CCSAO IN THE INITIAL SMOLLETT CASE**

Below is a summary of the OSP's five final conclusions and supporting findings relating to the conduct of the CCSAO, current (and now former) employees of that office, and State's Attorney Foxx. These conclusions and supporting findings reflect the final analysis of the OSP based upon a diligent and careful review of the evidence.

**I. CONCLUSION #1: THE OSP DID DEVELOP EVIDENCE THAT ESTABLISHES SUBSTANTIAL ABUSES OF DISCRETION AND OPERATIONAL FAILURES BY THE CCSAO IN PROSECUTING AND RESOLVING THE INITIAL SMOLLETT CASE**

The OSP developed evidence that establishes four substantial abuses of discretion and failures by the CCSAO in prosecuting and resolving the Initial Smollett Case. Each of these abuses and failures is summarized below.

**A. FIRST FINDING OF ABUSE OF DISCRETION: The CCSAO's Process and Decision-Making for Resolving the Initial Smollett Case Were a Substantial Abuse of Discretion and Represented a Major Failure of the Operations of the CCSAO**

While prosecutors maintain discretion to charge, and thus to resolve, criminal cases, the resolution of the Initial Smollett Case on favorable terms for Mr. Smollett 19 days after the CCSAO filed a 16-count indictment caused significant public speculation regarding whether such an outcome was an appropriate use of discretion and consistent with how the CCSAO handles cases that are not as high-profile.

As noted above, the terms of the dismissal consisted of the following: (1) complete dismissal of the 16-count felony indictment against Mr. Smollett; (2) no requirement that Mr. Smollett plead guilty to any criminal offense under Illinois law; (3) no requirement that Mr. Smollett admit any guilt of his wrongdoing (in fact, following the court proceedings on March 26, 2019, Mr. Smollett publicly stated he was completely innocent); (4) the only punishment for Mr. Smollett was to perform 15 hours of community service that had no relationship to the charged conduct<sup>2</sup>; (5) only 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); and (6) no requirement that Mr. Smollett participate in the CCSAO's Deferred Prosecution Program (Branch 9), which would have required a one-year period of court oversight over Mr. Smollett.

Based on the terms of the dismissal, and because Judge Toomin tasked the OSP with conducting an investigation "to restore the public's confidence in the integrity of our criminal justice system," the OSP carefully and thoroughly investigated and analyzed the CCSAO's decision-making process relating to the resolution of the Initial Smollett Case. After reviewing extensive evidence, including personal and business emails and text messages, and conducting 43 interviews, including of the two CCSAO decision-makers on the case and Mr. Smollett's lawyer who negotiated the resolution, the OSP determined that the CCSAO's process and decision-making for resolving the Initial Smollett Case were a substantial abuse of discretion and

<sup>2</sup> According to a letter provided to the CCSAO by the Rainbow PUSH Coalition, Mr. Smollett spent time volunteering in the PUSH Freedom store "managing sales and encouraging visitors to purchase PUSH gear," providing staff with "suggestions as to how the sales and marketing of the products [ ] could be enhanced and packaged to reach a younger demographic," "reviewing and assessing [ ] television studio and social media production of the weekly broadcast that airs on the IMPACT network, live stream and social media outlets," and meeting with membership staff and the social media director.

represented a major failure of the operations of the CCSAO. Below is a summary of factual findings demonstrating these failings.

*First*, State's Attorney Foxx, in an interview under oath, told the OSP that she was surprised by and disagreed with the terms of the Smollett resolution. Specifically:

- State's Attorney Foxx told the OSP that she was surprised that Mr. Smollett did not plead guilty to any charge.
- State's Attorney Foxx told the OSP that if Mr. Smollett was not going to be required to plead guilty to any crime, in the alternative, she thought he should have had to stand in court and admit facts of wrongdoing—which Mr. Smollett was not required to do.
- State's Attorney Foxx told the OSP that Mr. Smollett's "community service should have been related to the nature of the offense," i.e., filing a false police report. She stated that relevant community service could have consisted of "working with victims of real hate crimes, or dealing with the public in a broader way," and further noted that "Operation PUSH might have been too easy for him."
- State's Attorney Foxx told the OSP she thought Mr. Smollett should have paid more than \$10,000 in restitution, assuming he had the means to do so.
- State's Attorney Foxx explained to the OSP that she got the impression that the case was resolved in the manner it was because "they wanted this guy [Mr. Smollett] out of town." She said the case had brought a "flurry of activity" to the courthouse and "being able to have the case resolved would eliminate throngs of people who were coming to court." Therefore, she got the sense the CCSAO had wanted to move "expeditiously," including "fronting the community service" before the dismissal, rather than having him complete it before a future court date (e.g., six months later), so that Mr. Smollett "could be done and go back home." When asked by the OSP if she agreed that trying to get Mr. Smollett out of town due to press attention might not be the right reason to come up with a disposition, she said that she agreed. She further explained, "I think the kind of negotiating, let's get rid of that guy [Mr. Smollett] at the expense of really what his actions did to the City shortchanged, I think, the accountability that the City deserved."

*Second*, consistent with State's Attorney Foxx's position, almost across the board, lawyers who currently work in or previously worked in the CCSAO's criminal division who were interviewed by the OSP told the OSP they were "surprised" or "shocked" by at least some facet of the dismissal terms. For example:

- Many interviewees, including Alan Spellberg (Supervisor of Criminal Appeals), April Perry (Chief Deputy and Chief Ethics Officer), Enrique Abraham (Former Felony Trial Supervisor), Robert Mack (Second Chair Felony Trial Division), and Nicholas Trutenko (Felony Review Deputy Supervisor), were surprised by the speed of the dismissal. In fact, Mr. Spellberg said that he thought the speed of dismissal was "unusual" and "ridiculous."



- Many interviewees, including Alan Spellberg (Supervisor of Criminal Appeals), April Perry (Chief Deputy and Chief Ethics Officer), Liam Reardon (First Chair Felony Trial Division), Diann Sheridan (Former Deputy Chief of the Criminal Prosecutions Bureau), Peter "Guy" Lisuzzo (Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 until March 5, 2019), Robert Mack (Second Chair Felony Trial Division), and Kimberly Ward (Head of Felony Review), disagreed with the fact Mr. Smollett did not accept responsibility and/or that he did not enter into a formal diversion program. For example, Ms. Sheridan told the OSP that she would have expected Mr. Smollett to "earn the privilege of a [dismissal]" by taking certain steps, including accepting responsibility for his actions.
- Many interviewees, including Peter Lisuzzo (Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 until March 5, 2019), Diann Sheridan (Former Deputy Chief of the Criminal Prosecutions Bureau), Robert Mack (Second Chair Felony Trial Division), and Enrique Abraham (Former Felony Trial Supervisor), indicated that the amount of community service seemed low. For example, Mr. Lisuzzo compared Mr. Smollett's 15 hours of community service to the 50 hours required for a defendant in the first-time offender weapons program, *see* 730 ILCS 5/5-6-3.6(e)(6), or the 30 hours for a deferred drug prosecution, *see* 730 ILCS 5/5-6-3.3(c)(4).
- Many interviewees, including April Perry (Chief Deputy and Chief Ethics Officer), Laura Ayala-Gonzalez (Felony Deputy Review Supervisor), Mary Pat Devereux (Assistant State's Attorney, Grand Jury Unit), Robert Mack (Second Chair Felony Trial Division), James Murphy (Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 starting March 6, 2019), Diann Sheridan (Former Deputy Chief of the Criminal Prosecutions Bureau), Kimberly Ward (Head of Felony Review), Cathy Hufford (Branch Court Supervisor), and Peter Lisuzzo (Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 until March 5, 2019), thought that the fact that Mr. Smollett only paid \$10,000 was low given the amount CPD spent investigating the case and the fact that Mr. Smollett likely has the means to pay full restitution and/or that \$10,000 did not seem consistent with the CCSAO's goal to make victims as whole as possible, when the defendant has the financial means to do so, which they assumed Mr. Smollett likely did.
- Victim Witnesses Assistance Unit Specialist Elizabeth Caratini Buerger also told the OSP she was "stunned and shocked," in particular by how the case was quickly advanced for dismissal. She also said the terms of the dismissal were insulting given Mr. Smollett essentially "mocked" hate crime victims and could have caused damage to the LGBTQ community by falsely reporting a hate crime.
- Nicholas Trutenko, Felony Review Deputy Supervisor, also told the OSP that "everything about [the dismissal] was wrong."
- Peter Lisuzzo, Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 at the time Mr. Smollett was indicted, told the OSP it was an "abnormal disposition" and he had never seen anything like it before.

*Third*, when the CCSAO approved charges against Mr. Smollett on February 20, 2019 and then filed the 16-count indictment on March 7, 2019, the CCSAO decision-makers on the Initial Smollett Case (Mr. Magats and Ms. Lanier) believed the case was strong.<sup>3</sup> Mr. Magats told the OSP that when the CCSAO charged and then indicted Mr. Smollett, he thought the CCSAO had a good, strong case. Mr. Magats also told the OSP that he had asked Ms. Lanier if she had any concerns about charging the case, and she said she did not. Consistent with Mr. Magats' recollection, Ms. Lanier told the OSP that she had thought there was sufficient evidence to meet the CCSAO's burden—legally and ethically—to charge the case. She said that whether the CCSAO could ultimately meet the reasonable doubt standard at trial was part of her thought process when she approved charges, and she had a good-faith belief that the CCSAO could sustain proof at trial. She told the OSP that she was not aware of anyone at the CCSAO who disagreed with that assessment.<sup>4</sup>

*Fourth*, the consensus amongst the current and former CCSAO employees the OSP interviewed was that the CCSAO typically dismisses a case without requiring an admission of guilt or participation in a diversion program<sup>5</sup> (e.g., the Felony Deferred Prosecution Program) only if the circumstances change—primarily if the CCSAO learns of new evidence such that it believes the defendant is innocent or the CCSAO cannot meet its burden.<sup>6</sup> For example, Diann Sheridan, who was Deputy Chief of the Criminal Protections Bureau in early 2019, told the OSP that it is unusual to dismiss a case without a change in the evidence (or else requiring some period of supervision, such as is required by the diversion programs). Peter Lisuzzo, who was Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 when the CCSAO sought a true bill of indictment in the Initial Smollett Case, told the OSP that there would have to be new evidence or information to justify a dismissal like that in the Initial Smollett Case. James Murphy, who took over Mr. Lisuzzo's role in March 2019, similarly told the OSP that a dismissal is usually the result of new information coming to light and that he had "never seen a case fall apart in a month." Alan

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<sup>3</sup> After State's Attorney Foxx recused herself on February 9, 2019, the two decision-makers on the Initial Smollett Case were Mr. Magats, who State's Attorney Foxx designated as "Acting State's Attorney," and Ms. Lanier, the lead prosecutor assigned to the case.

<sup>4</sup> Contrary to the positions Ms. Lanier and Mr. Magats have taken with the OSP and that Mr. Magats took publicly that the case was strong, Alyson Miller, Deputy Chief of Staff, told the OSP that both Mr. Magats and Ms. Lanier told her at some point that there were evidentiary challenges relating to the case and she recalled them indicating these purported "deficiencies" were part of the reason they dismissed the case. Similarly, the Chief Communications Officer, Tandra Simonton, told the OSP that after the dismissal, Ms. Lanier told her that there were evidentiary issues. According to Ms. Simonton, Mr. Magats also told her something to the effect of the "evidence [against Mr. Smollett] was not as solid as it seemed."

<sup>5</sup> The CCSAO has certain formal diversion programs which allow an eligible defendant to avoid a traditional prosecution and even to potentially have the case entirely dismissed if the defendant successfully completes the program's requirements. See <https://www.cookcountystatesattorney.org/resources/diversion-programs>. It should be noted that the OSP recognizes that the interests of justice warrant and even necessitate dismissal in certain cases, including following the completion of a diversion program. Additionally, nothing in this Summary Report should be construed as the OSP evaluating or opining on the CCSAO's efforts under State's Attorney Foxx to increase the use of diversion programs, nor as the OSP taking a position generally on what types of cases should be referred to diversion programs or dismissed.

<sup>6</sup> There are other changed circumstances that could lead the CCSAO to dismiss a case, such as if the CCSAO loses a major motion and evidence would be excluded or if a witness disappears or dies, which are not applicable here.



Spellberg, the Supervisor of the Criminal Appeals Division, also said that for a case to be dismissed in the manner of the Initial Smollett Case, he would have expected there to be a change in the evidence that was "very significant." Additionally, former First Assistant Eric Sussman told the OSP, referencing the concept that a case could be dismissed without a change in the evidence: "I've never seen anything like that."

*Fifth*, there is no indication that the CCSAO or CPD identified any new evidence after Mr. Smollett was indicted and before the CCSAO dismissed the Initial Smollett Case that changed the CCSAO's assessment of the case.

In fact, neither Mr. Magats or Ms. Lanier—who both approved the decision to indict Mr. Smollett—identified to the OSP any new evidence they learned of between the time Mr. Smollett was indicted and the dismissal of the indictment which changed their view that the evidence against Mr. Smollett was strong and the CCSAO could prove his guilt. Specifically:

- Ms. Lanier told the OSP there was nothing specific she learned that had changed her view of the strength of the case between the time of indictment and when she said the CCSAO made its initial resolution offer to Mr. Smollett's counsel at arraignment on March 14, 2019.
- Mr. Magats specifically told the OSP he thought the case was strong. In his interview with the OSP, he also did not identify any new evidence that changed his assessment and did not state that an issue with the strength of the evidence was one of the factors he considered when evaluating potential resolution terms. Consistent with his statements to the OSP, Mr. Magats touted the strength of the case and the CCSAO's ability to prevail at trial during interviews with various press outlets following the dismissal, as detailed below in Section I.B., which discusses specific false representations to the press about the dismissal.

Additionally, no other CCSAO or CPD interviewee identified any new evidence that the CCSAO learned of between the time of the indictment and the dismissal, and numerous interviewees expressed how strong they thought the case was from the information they had received. For example:

- The Deputy Chief of the Criminal Prosecutions Bureau at the time of the Initial Smollett Case, Diann Sheridan, described the Initial Smollett Case as a "strong case," and said no one at the CCSAO ever told her that the case was weak.
- Peter Lisuzzo, Supervisor of Preliminary Hearings, Grand Jury, and Branch 66 at the time the grand jury returned the true bill of indictment, told the OSP: "This was a strong case," and said he had no substantial concerns about the case.
- Mr. Lisuzzo's replacement in March 2019, James Murphy, said the Initial Smollett Case was "one of the strongest cases [he has] ever seen" and said he "would have been happy to try that case [himself]." He also said he had never seen a strong case fall apart within a month, which would have been the circumstances with the Initial Smollett Case.

- Nicholas Trutenko, one of the Felony Review attorneys assisting CPD with the investigation, said “[Mr. Smollett] had no wiggle room. The case against him was air tight.”
- Liam Reardon, the other Felony Review attorney assisting CPD, described it as a “great case” and “solid,” noting that the feeling in the CCSAO when the case was charged was that it was “strong.” Mr. Reardon also remarked to the OSP that even “[a] very inexperienced third chair [ASA] could have put this case on and won.”
- The Head of Felony Review during the Initial Smollett Case, Kimberly Ward, told the OSP that it was a “solid case.”
- A Felony Review Deputy Supervisor during the Initial Smollett Case, Theodore “Ted” Lagerwall, told the OSP he thought it was a strong case and remarked that he thought he “could go into a courtroom and convince a jury” based on the evidence. He also told the OSP he was not aware of anyone within the CCSAO that disagreed with his assessment.
- The attorney who drafted the indictment, Assistant State’s Attorney Mary Pat Devereux, told the OSP she thought that it was a “strong case” and had not heard anyone prior to dismissal express any uncertainties or concerns about the strength of the case.
- Superintendent Johnson told the OSP that he was not aware of any new evidence that was identified between charging and dismissal.

*Sixth*, not only did the two CCSAO decision-makers—Mr. Magats and Ms. Lanier—fail to identify in their interviews with the OSP any change in the evidence, their offered explanations of the process and factors that led to the resolution decision differed in four significant and meaningful ways:

- (1) Who negotiated the terms of the resolution with Mr. Smollett’s lawyers?

Mr. Magats told the OSP that *Ms. Lanier* handled the negotiations of the terms of the resolution (of which he approved). By comparison, Ms. Lanier told the OSP that *Mr. Magats* handled the negotiations of the terms with Mr. Smollett’s counsel. Patricia Brown Holmes, Mr. Smollett’s lawyer who primarily handled negotiating the resolution on Mr. Smollett’s behalf, told the OSP that she had initial discussions with Mr. Magats, who then relayed her to Ms. Lanier, with whom Ms. Holmes negotiated the terms of the resolution.

- (2) When did Mr. Magats and Ms. Lanier begin discussing resolution terms?

Ms. Lanier told the OSP that she and Mr. Magats discussed resolution terms for the *first and only time* at Mr. Smollett’s arraignment hearing on March 14th—at which time the CCSAO first discussed a potential resolution with Mr. Smollett’s counsel. Ms. Lanier further told the OSP she had not determined what she thought would be appropriate terms for a resolution prior to the arraignment hearing. By comparison, Mr. Magats told the OSP that he and Ms. Lanier discussed the terms of the dismissal *prior to* Mr. Smollett’s March 14, 2019 arraignment.

(3) Was Mr. Smollett offered the opportunity to participate in the Felony Deferred Prosecution Program?

Mr. Magats told the OSP that he and Ms. Lanier jointly decided to offer Mr. Smollett the opportunity to enter the Felony Deferred Prosecution Program ("DPP"), that they made such an offer to Mr. Smollett, and that Mr. Smollett rejected that offer. By comparison, Ms. Lanier told the OSP that she and Mr. Magats never discussed potentially offering Mr. Smollett entry into the DPP and never made an offer to Mr. Smollett that he could participate in the DPP. Consistent with Ms. Lanier's memory, Ms. Holmes told the OSP that the CCSAO never offered Mr. Smollett the chance to enter into the DPP.

(4) Were the terms of the resolution of the Initial Smollett Case modeled after the DPP?

Mr. Magats told the OSP that the terms the CCSAO offered to Mr. Smollett (which he ultimately accepted) were modeled after the DPP. To the contrary, Ms. Lanier said that she had not modeled the terms, which she came up with at the arraignment hearing on March 14, 2019, after the DPP.

*Seventh*, contrary to Mr. Magats' claim to the OSP (and his statements to the media in interviews on March 26, 2019) that the terms of Mr. Smollett's resolution were modeled off of and similar to the requirements of the DPP, Mr. Smollett's resolution does not track the requirements of the DPP:<sup>7</sup>

- The standard agreement the CCSAO uses when a defendant enters the DPP explains that DPP diverts "selected non-violent felony defendants ... into an *intensive twelve (12) month preindictment program*" and explains that "[w]hen a defendant successfully completes this *intensive yearlong program*, the State's Attorney's Office will exercise its prosecutorial discretion and dismiss the felony charge," yet Mr. Smollett had his case dismissed without any period of participation in a program, let alone a year of supervision.
- The DPP statute, 730 ILCS 5/5-6-3.3, requires the defendant to pay "full" restitution, yet Mr. Smollett paid only \$10,000, which amounts to less than 10% of the \$130,106.15 in CPD overtime pay that the City alleges it paid solely due to Mr. Smollett's allegedly false statements to the CPD, which arguably would have been the relevant amount of restitution for Mr. Smollett's charged crimes.<sup>8</sup>
- When a defendant must complete community service under the DPP (i.e., if the defendant is not employed), the statute requires a minimum of 30 hours of community service and

<sup>7</sup> In fact, Ms. Perry explained to the OSP that Mr. Magats told her about the terms of the dismissal the day before the dismissal hearing, and that he told her the terms were similar to the DPP statute. Ms. Perry told the OSP she actually walked through a printout of the DPP statute (i.e., the Offender Initiative Statute, 730 ILCS 5/5-6-3.3) with Mr. Magats and asked whether various requirements were part of the agreement with Mr. Smollett. She said that she told Mr. Magats that the resolution terms did not align with the DPP statute.

<sup>8</sup> See *City of Chicago v. Smollett*, No. 19-cv-04547, Dkt. 1-1 (N.D. IL).

the CCSAO's standard agreement requires 96 hours—far above the 15 hours Mr. Smollett completed.

- A defendant under the DPP must meet other requirements for the duration of the program, such as not possessing any controlled substance, including cannabis, or any deadly weapon, including a firearm, neither of which were an obligation imposed on Mr. Smollett.

*Eighth*, contrary to Mr. Magats' claim to the OSP that Mr. Smollett was offered entry into the DPP (an offer which Ms. Lanier and Ms. Holmes both say was not made), the Initial Smollett Case was not even screened for the DPP, unlike virtually every other case that proceeds through bond court in Cook County. Specifically, the CCSAO's Alternative Sentencing Unit, which typically screens cases for diversion programs, such as the DPP, did not screen the case because, pursuant to its standard process, it does not screen a case if it has already been assigned to an Assistant State's Attorney (here, Ms. Lanier). The OSP has not identified any evidence that Mr. Magats or Ms. Lanier screened the case for the DPP, and they did not even consult at any point with the Alternative Prosecutions Unit about whether the case would be eligible for the DPP.

Furthermore, even if the case was screened, it would not have been possible for the CCSAO to offer Mr. Smollett entry into the DPP *after his arraignment* as Mr. Magats claimed in his OSP interview because a referral to the DPP must occur *prior to a formal plea at an arraignment*.<sup>9</sup>

*Ninth*, the CCSAO did not identify any specific cases similar to the Initial Smollett Case that the CCSAO relied upon when resolving the Initial Smollett Case. Specifically, in a formal written document request (which was later served via a formal grand jury subpoena), the OSP requested the following from the CCSAO: "All case files of the [CCSAO] of cases resolved prior to the [Initial Smollett Case] that were so similar to the [Initial Smollett Case] that they were relied on by the [CCSAO] to resolve the [Initial Smollett Case] on the terms presented in court in resolving the [Initial Smollett Case] on March 26, 2019." The CCSAO admitted that it could not identify or produce a single responsive case file. Similarly, during their interviews with the OSP, Mr. Magats and Ms. Lanier both were asked what, if any, similar precedent they had in mind or relied upon when resolving the Initial Smollett Case. Neither identified any specific precedent on which they had relied.

*Tenth*, even putting aside the negotiation process and resolution terms themselves, the CCSAO handled the dismissal in three atypical and non-transparent ways.

- The CCSAO advanced the case from an April 17, 2019 court date to March 26, 2019 *minutes* before conducting the dismissal hearing, without any notice to the media or public, despite knowing there was significant interest in the case, including because the media had filed a petition to have cameras in the courtroom. While prosecutors sometimes advance a case to dismiss it, especially if the defendant is in custody or the prosecutor determines the defendant is innocent, neither such circumstance was present in the Initial Smollett Case. However, Ms. Holmes told the OSP the advancement of the Initial Smollett Case to March

<sup>9</sup> See <https://www.cookcountystatesattorney.org/resources/diversion-programs> (stating that the DPP program is "pre-plea"); see also 730 ILCS 5/5-6-3.3 (stating that the defendant would waive a preliminary hearing before entering into the DPP).

26, 2019 was due to a scheduling issue on her end. State's Attorney Foxx acknowledged to the OSP that advancing the case in the manner it was done "when there was so much interest" "gave the appearance that this was done in secret ... and allowed for the integrity of the results to come into question."

- Ms. Lanier read a statement at the dismissal hearing on March 26, 2019 which she drafted in conjunction with Mr. Smollett's counsel and which did not provide any specific reasons for the dismissal beyond that the CCSAO had "review[ed] the facts and circumstances of the case, including Mr. Smollett's volunteer service to the community and agreement to forfeit his bond to the City of Chicago" and decided dismissal was the "just disposition and appropriate resolution to this case." State's Attorney Foxx said that this statement was atypical and she was "confused" when she learned about it in part because "typically we don't consult with defense attorneys about statements that we're making about facts in a case."
- The CCSAO did not consult with the CPD about the terms of the resolution and intentionally chose not to alert the CPD that the case would be dismissed until minutes before the hearing, despite all of the diligent and hard work the CPD put into investigating the case and the fact that many CCSAO interviewees said they would have considered the CPD a victim of Mr. Smollett's alleged crimes and/or for purposes of restitution.<sup>10</sup> Mr. Magats, Ms. Ellis (Director of External Affairs), and State's Attorney Foxx told the OSP that the CPD was not given advance notice of the dismissal hearing because there were concerns that inaccurate information might have been released publicly, given the issues discussed in Section VI. concerning the alleged "leaks." In fact, State's Attorney Foxx told the OSP she intentionally chose not to even alert then-Superintendent Johnson of the dismissal in advance, explaining to the OSP that while she "had respect for Superintendent Johnson and felt that [they] had a cordial relationship, his leadership over this matter with the leaks,"—and the fact that she was told the rumor about her being related to Mr. Smollett, which according to State's Attorney Foxx stemmed from Superintendent Johnson's office—"did not give [her] the utmost confidence in how he could handle [] the information." She said the CCSAO wanted to "give [CPD] the information in a time where we felt like it would not be compromised."

All of the above actions by the CCSAO demonstrate a substantial abuse of discretion and operational failures in terms of the process and decision-making used to resolve the Initial Smollett Case.

**B. SECOND FINDING OF ABUSE OF DISCRETION: The CCSAO Engaged in a Substantial Abuse of Discretion and Breached Its Obligations of Honesty and Transparency by Making False and/or Misleading Statements to the Public Regarding the Nature and Reason for the Dismissal of the Initial Smollett Case**

<sup>10</sup> Putting aside any legal definitions of what constitutes a "victim" under Illinois law for notification or restitution purposes, Superintendent Johnson told the OSP that he "absolutely" viewed the CPD as a victim of Mr. Smollett's alleged false reports.

The CCSAO must operate in a transparent way so that, among other things, it can be held accountable by the public. However, the CCSAO as an entity, as well as Mr. Magats and State's Attorney Foxx, made statements about the nature and reason for Mr. Smollett's dismissal that were false and/or misleading.

**1. False and/or Misleading Statement about the Dismissal #1: The CCSAO Mischaracterized the Resolution of the Initial Smollett Case as Similar to Thousands of Other Cases**

On March 26, 2019, following the dismissal of the Initial Smollett Case, the CCSAO issued the following press statement (the "Dismissal Press Statement"):

After reviewing all of 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, we believe this outcome is a just disposition and appropriate resolution to this case.

In the last two years, the Cook County State's Attorney's Office has referred more than 5,700 cases for alternative prosecution. This is not a new or unusual practice. An alternative disposition does not mean that there were any problems or infirmities with the case or the evidence. We stand behind the Chicago Police Department's investigation and our decision to approve charges in this case. We did not exonerate Mr. Smollett. 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. This outcome was met under the same criteria that would occur for and is available to any defendant with similar circumstances.

According to Ms. Ellis (Director of External Affairs), Ms. Simonton (Chief Communications Officer), and State's Attorney Foxx, the purpose of the Dismissal Press Statement was to communicate to the public that the resolution of the Initial Smollett Case was not an outlier and was similar to how many other cases had been resolved during State's Attorney Foxx's tenure.<sup>11</sup>

During the afternoon and evening of March 26th (the day of the dismissal), Mr. Magats gave a series of interviews to various press outlets where he stated points similar to those in the Dismissal Press Statement, including characterizing the resolution of the Initial Smollett Case as similar to 5,700 other cases. For example, Mr. Magats told NBC Chicago: "In the last two years we sent over 5,700 cases either into a diversion or some type of alternative prosecution model. It's not something that is unique. It's not first time this has happened. It's happened over 5,700 times in the last two years. And it's available to other defendants who are charged with other similar

<sup>11</sup> The Dismissal Press Statement was initially drafted by members of the CCSAO communications team (i.e., Ms. Simonton and Ms. Ellis). Evidence indicates Mr. Magats reviewed and approved the Dismissal Press Statement. State's Attorney Foxx told the OSP that she did not recall her level of involvement in preparing the Dismissal Press Statement, but said she was at least part of discussions about having the Dismissal Press Statement relay a "theme" of the resolution not being an "outlier for similarly situated cases."



offenses.”<sup>12</sup> Also during his interviews on March 26th, Mr. Magats repeatedly indicated that the resolution was similar to cases resolved via deferred prosecution programs, such as the DPP. For example, he stated to NBC Chicago that the CCSAO “[l]ooked it along lines of what is set out in the deferred prosecution statute ... It was looked at on that type of model.”<sup>13</sup>

State’s Attorney Foxx repeated similar points during interviews she gave to various press outlets on March 27, 2019 (the day after the dismissal). For example, according to audio recordings the OSP obtained, she told one reporter that Mr. Smollett “got the treatment we’ve given to about 5,700 other people over the course of the last two years.” She also told a reporter that Mr. Smollett “was treated no different than the 5,700 other people who participated in similar cases.”

However, the evidence the OSP developed makes it clear that there are fundamental facts which are inconsistent with the CCSAO, Mr. Magats, and State’s Attorney Foxx’s messaging:

- (1) the Initial Smollett Case did not fit the criteria the CCSAO’s Chief Data Officer used to identify the cited 5,700 figure because it was not referred to a diversion program and, thus, it was meaningfully different from how those 5,700 cases were resolved;
- (2) there were not thousands of (or, arguably any) similar cases that the CCSAO resolved in a similar way to the Initial Smollett Case; and
- (3) as discussed above on page 15, the CCSAO did not identify or produce to the OSP a single CCSAO case similar to the Initial Smollett Case that the CCSAO relied on when determining the terms of his resolution.

*i. It Was Not Accurate to Represent that Mr. Smollett’s Case Was Similar to the 5,700 Cases Referenced Because He Was Not Referred to a Diversion Program*

In short, the Initial Smollett Case is different than and does not fit the criteria that was used to identify the 5,700 figure the CCSAO touted as the number of cases resolved similarly to the Initial Smollett Case. In fact, the CCSAO’s Chief Data Officer, Matt Saniie, explained to the OSP that the 5,700 figure reflected only cases the CCSAO had *referred to a diversion program*—cases that were coded differently in the CCSAO’s data portal than the Initial Smollett Case, which was not referred to any program.<sup>14</sup> Stated differently, if Mr. Saniie had run the same search he used to pull the 5,700 cases *after* the Initial Smollett Case was resolved, the Initial Smollett Case would not have been included in the cases identified. Thus, the 5,700 figure did *not* reflect cases resolved

<sup>12</sup> Available at: <https://www.nbcchicago.com/news/local/jussie-smollett-charges-dropped-reaction-507673291.html>.

<sup>13</sup> Available at: <https://www.nbcchicago.com/news/local/jussie-smollett-charges-dropped-reaction-507673291.html>.

<sup>14</sup> It should be noted that the CCSAO’s counsel told the OSP that the CCSAO is not able to re-create this precise list of 5,700 cases because the database is continually being updated with new cases, and as a result, it is unable to re-create what the data set looked like at the time the Chief Data Officer ran the search that produced approximately 5,700 hits.

in the same manner as the Initial Smollett Case; yet, the CCSAO's public messaging portrayed the Initial Smollett Case as being akin to those 5,700 cases.

Notably, there was a realization within the CCSAO that the 5,700 figure did not represent what the CCSAO, Mr. Magats, and State's Attorney Foxx stated to the public and that the public and press did not understand the CCSAO's inconsistent use of terminology relating to "alternative prosecutions," "deferred prosecution," and "diversion" when describing the resolution of the Initial Smollett Case. In fact, evidence indicates there was at least one meeting, which included Mr. Saniie, members of the executive staff, the communications team, and supervisors from the Alternative Prosecutions Unit following the dismissal of the Initial Smollett Case to discuss the fact that the CCSAO was not uniformly using terminology relating to alternative prosecutions and diversion programs, and that the CCSAO needed to make sure it was using those terms accurately and consistently when making public statements. Yet, despite these realizations that the Dismissal Press Statement and statements made by State's Attorney Foxx and Mr. Magats about the resolution were, at a minimum, unclear, the CCSAO did not issue any clarifying or corrective statements.

The fact that the Dismissal Press Statement tried to equate Mr. Smollett's resolution to thousands of cases resolved through diversion programs (when his case was not) is particularly problematic when, as discussed above in Section I.A., the terms of his resolution do not even mirror the requirements of the DPP.

Therefore, the evidence shows that the CCSAO issued a false and misleading statement to the press equating the resolution of the Initial Smollett Case to thousands of cases from which it meaningfully differs—the themes of which were also propagated by Mr. Magats and State's Attorney Foxx in their respective interviews with reporters. The fact that such a significant mischaracterization could be asserted without sufficient vetting, repeated by figureheads of the CCSAO, and then never corrected or clarified—particularly in a case the CCSAO knows has captured the public attention—is unacceptable for an office that must be transparent and maintain public confidence. Simply put, as even Jennifer Ballard-Croft, the CCSAO's Chief of Staff, acknowledged to the OSP, the CCSAO could have asked more questions or done more diligence before making statements to the effect of "we do this all the time."

*ii. The Dismissal Press Statement Represented Mr. Smollett's Resolution as Being Similar to Thousands of Other Cases When It Had Not and Could Not Identify Similar Cases*

As discussed above on page 15, Ms. Lanier and Mr. Magats did not have any specific similar cases in mind when they resolved the Initial Smollett Case. However, after the dismissal, the CCSAO attempted to find anecdotal evidence of similar resolutions to support its public narrative that the resolution of the Initial Smollett Case was not an outlier, but struggled to find any similar cases resolved in a similar manner (let alone thousands as was implied by the Dismissal Press Statement).

Specifically, on the morning of March 27, 2019 (the day after the dismissal), Ms. Lanier sent an email to ASAs who lead different branches or divisions with the following request:



We are looking for examples of cases, felony preferable, where we, in exercising our discretion, have entered into verbal agreements with defense attorneys to dismiss charges against an offender if certain conditions were met, such as the payment of restitution, completion of community service, completion of class, etc., but the defendant was not placed in a formal diversion program.

Please ask your ASAs if they have examples of these types of dispositions and we will work with them further to figure out on what case it was done. Nobody is in trouble, we are just looking for further examples of how we, as prosecutors, use our discretion in a way that restores the victim, but causes minimal harm to the defendant in the long term.

While Ms. Lanier did receive a limited number of responses to her inquiry, the OSP believes the case examples she received are meaningfully different than Mr. Smollett's case (e.g., misdemeanor cases rather than felony cases, defendants who paid full restitution unlike Mr. Smollett, etc.). In fact, State's Attorney Foxx's Chief of Staff, Jennifer Ballard-Croft, told the OSP that Ms. Lanier's anecdotal search for similar cases identified "nothing on point" and said that the CCSAO had not been able to identify any data to support the narrative in the Dismissal Press Statement that the CCSAO resolves cases in the manner of the Initial Smollett Case "all the time." Thus, the CCSAO was not able to identify anything close to the thousands of similar cases to which it implied the Initial Smollett Case was similar.<sup>15</sup>

**2. False and/or Misleading Statement about the Dismissal #2: The CCSAO Falsely Represented to the Public that \$10,000 Was the Most Mr. Smollett Could Have Been Ordered to Pay in Restitution Under the Law**

As part of its efforts to publicly justify the terms on which it resolved the Initial Smollett Case, the CCSAO made false and misleading statements claiming that the most Mr. Smollett could have ever been ordered to pay in restitution was \$10,000 (the amount Mr. Smollett voluntarily released to the City of Chicago in conjunction with his dismissal).

Specifically, both Mr. Magats and State's Attorney Foxx repeatedly stated during interviews with the press on March 26 and 27, 2019, respectively, that the maximum amount of restitution Mr. Smollett could have been ordered to pay if he were convicted after a trial or guilty plea was \$10,000.<sup>16</sup> However, this is false.

<sup>15</sup> Of note, State's Attorney Foxx gave the OSP what she thought was the most "apples to apples" comparison of a "similar" case the CCSAO resolved during her tenure, though it is significantly different than the Initial Smollett Case. According to State's Attorney Foxx, that case involved an incident where a woman, who had mental health challenges, falsely accused a man of stabbing her and was not charged with filing a false police report. Notably, that case is meaningfully different from the Initial Smollett Case in that the alleged perpetrator was not even charged with a crime, unlike Mr. Smollett, who was charged with 16 counts of disorderly conduct stemming from multiple false statements to the CPD.

<sup>16</sup> For example, State's Attorney Foxx told the *Chicago Sun-Times* during an interview on March 27, 2019 that the amount Mr. Smollett was offered to pay in conjunction with his dismissal was the "maximum" amount of restitution allowed. According to an audio recording the OSP obtained, she similarly told Will Lee of the *Chicago Tribune*, "And so in this particular case, even with all of that, he got the maximum allowed under the statute. The restitution

Although there are certain sections of the disorderly conduct statute that contain a restitution cap, there is no such cap for the provision under which Mr. Smollett was charged, 720 ILCS 5/26-1(a)(4). As a result, if Mr. Smollett had been found guilty and sentenced, Mr. Smollett could have been ordered to pay significantly more than \$10,000, such as, perhaps, the \$130,106.15 that the CPD claims it expended to investigate Mr. Smollett's alleged false police report. Furthermore, as discussed above, if Mr. Smollett had entered the DPP, he would have been required to pay "full restitution." Therefore, the contention that Mr. Smollett's voluntary relinquishment of his \$10,000 was the most he could have been required to pay as restitution if the case were resolved through a diversion program or sentencing after a finding of guilt is baseless.

The CCSAO repeatedly asserted this false claim despite the fact that Ms. Lanier made it clear on the day of the dismissal to Ms. Ellis, Ms. Simonton, Mr. Foley, and Mr. Magats that there was no \$10,000 statutory cap for Mr. Smollett's charges. Specifically, in an email on the evening of March 25, 2019 discussing draft language for a statement about the resolution, Ms. Lanier rejected Ms. Ellis' suggestion that the CCSAO should note that "\$10,000 is the maximum amount of restitution allowed under the disorderly conduct statute." Ms. Lanier wrote: "I do not think we should include the statutory language regarding restitution as he was not charged under that subsection (a)(6)." Notably, Mr. Magats responded: "Agreed. If it's not charged in that particular way then we shouldn't mention it."<sup>17</sup>

### **3. False and/or Misleading Statement about the Dismissal #3: The CCSAO Falsely Represented to the Public that Mr. Smollett Had No Criminal Background at the Time His Case was Dismissed**

The CCSAO communications team and State's Attorney Foxx repeatedly indicated publicly that Mr. Smollett had *no* criminal background, though Ms. Lanier specifically stated at Mr. Smollett's bond hearing that Mr. Smollett has a prior misdemeanor conviction out of California from September 22, 2007 for DUI, driving without a license, and giving false information to the police, for which he was placed on 24 months of probation.

For example, according to audio recordings, State's Attorney Foxx also stated during interviews with the press on March 27, 2019 that Smollett had "no background" and that "he didn't have a background."<sup>18</sup> State's Attorney Foxx also published an op-ed in the *Chicago Tribune* on March 29, 2019 in which she analogized Mr. Smollett's case to other cases involving suspects with "no prior criminal record."

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of \$10,000." Similarly, Mr. Magats told Greg Hinz of *Crain's Chicago Business* on March 26, 2019, "If you look at the disorderly conduct statute ... restitution is capped at \$10,000."

<sup>17</sup> Despite this email, Ms. Lanier told the OSP during her interview that, at the time she determined the appropriate terms of the resolution, she thought that \$10,000 was the restitution cap for Mr. Smollett's charges.

<sup>18</sup> State's Attorney Foxx told the OSP she had not been aware of Mr. Smollett's prior criminal history, though said she might have read something on a website after the dismissal referring to him having a prior conviction. She told the OSP she had not read the transcript from Mr. Smollett's bond hearing where Ms. Lanier discussed his background.

Ms. Ellis (Director of External Affairs) emailed a statement to the *Chicago Sun-Times* on March 29, 2019 which said: "Treating Mr. Smollett[t]'s case any differently than a first-time offender without a criminal history because of his status as a public figure is wrong and in direct opposition to the mission, vision, and values of this office." The CCSAO also issued a similar statement in response to a criticism published by the National District Attorney's Association stating: "Treating Mr. Smollett's case any differently than a first-time offense without any history because of the 'consequential effects' of his actions is wrong and in direct opposition to the values of this office."

The fact that the CCSAO represented Mr. Smollett had no criminal background to try to justify to the public the terms of his dismissal is particularly troubling given that Mr. Smollett's prior conviction related, in part, to making a false statement to police, and thus, similar to his alleged conduct (i.e., making a false police report) in the Initial Smollett Case.

**4. False and/or Misleading Statement about the Dismissal #4: State's Attorney Foxx Pivoted Her Position and Falsely Represented that the CCSAO Dismissed the Case Due to Evidentiary Issues**

Consistent with statements given to the press by Mr. Magats on the day of the dismissal, State's Attorney Foxx stated during interviews with reporters on March 27, 2019 that the case was strong, explained that the dismissal was not an indication of any evidentiary infirmity, and asserted that the CCSAO believed it would prevail at trial. Despite this initial stance (which was consistent with the CCSAO's Dismissal Press Statement), State's Attorney Foxx switched her position days later in an op-ed in the *Chicago Tribune* in which she falsely represented that the CCSAO dismissed the case due to evidentiary problems.

Specifically, on the day of the dismissal, Mr. Magats touted the strength of the case and made clear that the dismissal was not indicative of or because of any weakness in the evidence. For example, Mr. Magats told the *Chicago Tribune*: "It's a mistake and it's wrong to read into the decision that there was something wrong or that we learned something about the case that we didn't already know."<sup>19</sup> Mr. Magats similarly told the *Washington Post* that the decision to dismiss the case "should not be considered by anyone as a statement, a signal, a hint, anything, that the case is weak or the case fell apart."<sup>20</sup> Additionally, according to an audio recording, Mr. Magats explained to another reporter: "There is no infirmity in the case. There is no smoking gun or secret evidence that we found or anything like that. There is nothing that changed." Finally, Mr. Magats told a *Chicago Sun-Times* reporter: "The fact that an alternative disposition entered in this case is not and should not be viewed by anyone as some type of admission that there was something wrong with the case or something wrong with the investigation that the Chicago Police Department did."

Consistent with Mr. Magats' position on the day of the dismissal (and his position when he was interviewed by the OSP), State's Attorney Foxx explained in interviews on March 27, 2019

<sup>19</sup> Available at: <https://www.chicagotribune.com/news/breaking/ct-met-jussie-smollett-charges-dropped-20190326-story.html>.

<sup>20</sup> Available at: <https://www.washingtonpost.com/arts-entertainment/2019/03/26/charges-against-empire-actor-jussie-smollett-dropped-his-attorney-says/>.

(the day after the dismissal) that the CCSAO had a strong case and would have prevailed at trial.<sup>21</sup> For example, State's Attorney Foxx told the *Chicago Sun-Times*: "I believe based on the information that was presented before the grand jury, based on what I've seen, the office had a strong case ... that would have convinced a trier of fact."<sup>22</sup> She also told the *Sun-Times*, "you can't even engage in that conversation around an alternative disposition without believing in that person's guilt, or at least your ability to prove that person's guilt." She further told the *Sun-Times* that the request for the \$10,000 was made because "our office believed that we could prove his guilt" and explained that "the notion that this was somehow exonerating or the implication that the prosecutor's office somehow believed in his innocence is very frustrating to the ideal of alternative prosecution." Consistent with these statements, she told Will Lee of the *Chicago Tribune*, "we do believe in fact that we would be able to prove he is guilty of the charges that he was charged with" and "we believe that we had sufficient evidence to make the case to prove his guilt." State's Attorney Foxx similarly told Leah Hope of ABC 7 Chicago: "I cannot ask Mr. Smollett to forfeit his \$10,000 bond if I didn't believe we could meet our ethical burden in this case."<sup>23</sup>

Consistent with State's Attorney Foxx's media talking points, the CCSAO's Dismissal Press Statement also stated that the nature of the resolution did "not mean that there were any problems or infirmities with the case or the evidence."

However, despite all of these statements about the strength of the case, in a matter of days, State's Attorney Foxx's position changed. Specifically, on March 29, 2019, State's Attorney Foxx published an op-ed in the *Chicago Tribune* in which she wrote the following:

So, why isn't Smollett in prison or at least on trial? There are two different answers to this, both equally important.

First, the law. *There were specific aspects of the evidence and testimony presented to the office that would have made securing a conviction against Smollett uncertain.* In determining whether or not to pursue charges, prosecutors are required to balance the severity of the crime against the likelihood of securing a conviction. *For a variety of reasons, including public statements made about the evidence in this case, my office believed the likelihood of securing a conviction was not certain.* (emphasis added).<sup>24</sup>

This pivot in her description of the case from "strong" to "uncertain" is false and misleading. State's Attorney Foxx's statements in the March 29, 2019 *Tribune* op-ed falsely

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<sup>21</sup> This position that the case was strong is also consistent with how others at the CCSAO viewed the case as detailed in Section I.A.

<sup>22</sup> Available at: <https://chicago.suntimes.com/2019/3/27/18349361/kim-foxx-we-would-have-convicted-jussie-smollett-if-case-went-to-trial>.

<sup>23</sup> State's Attorney Foxx told the OSP that when she made these statements on March 27, 2019, she had not "seen anything related to the case," including grand jury transcripts, detective notes, the bond proffer, "or anything," and did not take any steps to educate herself about the case beyond a brief discussion with Mr. Magats.

<sup>24</sup> Available at: <https://www.chicagotribune.com/opinion/commentary/ct-perspec-kim-foxx-jussie-smollett-20190329-story.html>.

portrayed the CCSAO (i.e., her “office”) as having dismissed the case due to specific evidentiary problems when the decision-makers on the case believed (and told the OSP) the exact opposite (i.e., that the case was strong), as detailed above in Section I.A.<sup>25</sup> As a result, State’s Attorney Foxx’s statements in the March 29, 2019 *Tribune* op-ed not only contradicted the statements she, Mr. Magats, and the CCSAO had made on March 26th and March 27th, but they falsely represented what had driven the “office’s” decision to dismiss the case.

C. **THIRD FINDING OF ABUSE OF DISCRETION: The CCSAO Engaged in a Substantial Abuse of Discretion and Breached Its Obligations of Honesty and Transparency By Making False and/or Misleading Statements Regarding State’s Attorney Foxx’s Recusal to the Public**

On February 9, 2019, State’s Attorney Foxx decided to recuse herself from the Initial Smollett Case based on a recommendation from April Perry, her Chief Ethics Officer, who informed her that there was a rumor within CPD that State’s Attorney Foxx was related to or had a relationship with Mr. Smollett or his family. After State’s Attorney Foxx made the decision to recuse herself from Initial Smollett Case, she and the CCSAO came to realize that her recusal was legally defective in a major way—namely, that she could not simply appoint Mr. Magats to be “Acting State’s Attorney” on the case, but instead needed to recuse the entire CCSAO and petition the court to appoint a special prosecutor. Instead of implementing the proper legal course to carry out the recusal once this defect was brought to their attention, the CCSAO and State’s Attorney Foxx made the decision to ignore this major legal defect seemingly because they did not want to admit that they had made such a major mistake of judgment regarding State’s Attorney Foxx’s recusal. The CCSAO and State’s Attorney Foxx then compounded the problem by making a false statement to the media about State’s Attorney Foxx’s knowledge of this major legal defect in carrying out the recusal.

This major legal defect regarding State’s Attorney Foxx’s recusal was called to the attention of Mr. Magats, Ms. Perry, and State’s Attorney Foxx in mid-February 2019 by Assistant State’s Attorney Alan Spellberg, the Supervisor of Criminal Appeals. During the OSP’s investigation, the OSP was advised by many interviewees that Mr. Spellberg had a reputation within the CCSAO for knowing and understanding Illinois law in a thorough manner. In fact, Mr. Spellberg told the OSP he was the “go-to” for many legal questions within the CCSAO.

The evidence the OSP developed shows that State’s Attorney Foxx decided to recuse herself on February 9, 2019 after her Chief Ethics Officer, April Perry, informed her about a rumor within CPD that she [State’s Attorney Foxx] was related to or had a relationship with Mr. Smollett

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<sup>25</sup> Despite the fact that this op-ed, on its face, purports to represent the views of the “office” (which, at the time of the dismissal would not have included State’s Attorney Foxx as a decision-maker as she was recused), State’s Attorney Foxx told the OSP these statements in the op-ed reflected only *her own* assessment of the Initial Smollett Case conducted in the days following the dismissal—not actually the views of others in the CCSAO. In fact, before representing the “office’s” purported views in this op-ed, she did not even vet a draft with the two CCSAO decision-makers on the case (Mr. Magats and Ms. Lanier) or have any discussion with either Ms. Lanier or Mr. Trutenko and Mr. Reardon, the two Felony Review Attorneys who primarily assisted CPD and were closest to the evidence, to understand how they viewed the evidence or strength of the case.



or his family.<sup>26</sup> On February 20, 2019, after State's Attorney Foxx's recusal was reported by the media, Mr. Spellberg had multiple conversations with Ms. Perry, Mr. Magats, and/or Mr. Foley, a Senior Advisor to State's Attorney Foxx who also handles communications, explaining that State's Attorney Foxx's recusal was legally improper.

As part of those discussions, on February 20, 2019, Mr. Spellberg prepared an email memorandum containing legal citations in which he explained that "the ability to recuse from a particular case is very broad, but it triggers the appointment of a special prosecutor by the court, not simply the transfer of authority to another attorney of her choosing." He further explained: "My conclusion from all of these authorities is that while the State's Attorney has the complete discretion to recuse herself from any matter, she cannot simply direct someone (even the First Assistant) to act in her stead." According to Mr. Spellberg, he stressed the significance of State's Attorney Foxx improperly recusing herself by telling Mr. Magats, Ms. Perry, and Mr. Foley, among other things, that, (1) if the CCSAO did not seek to have a special prosecutor appointed to replace State's Attorney Foxx, it could invalidate the entire proceeding, and (2) he did not think it would be possible for charges to be brought while she was recused because charges would be brought under the name and authority of Kim Foxx as the State's Attorney.<sup>27</sup> Notably, Mr. Spellberg's legal analysis and conclusions regarding the impropriety of State's Attorney Foxx's recusal and the legal requirements for recusal under Illinois law align with the analysis by and ultimate conclusions reached by Judge Toomin in his June 21, 2019 order granting the petition to appoint a special prosecutor.

Ms. Perry explained to the OSP that, based on Mr. Spellberg's analysis, during a phone call on February 20, 2019 with Mr. Spellberg, Mr. Magats, and Mr. Foley after they had reviewed Mr. Spellberg's legal analysis in his email, she laid out three potential options: (1) walk back the recusal in the press and not recuse; (2) continue to recuse and seek appointment of a special prosecutor; or (3) "wall off" State's Attorney Foxx from the case and not seek the appointment of a special prosecutor. Ms. Perry told the OSP that Mr. Foley outright rejected the idea of walking back the recusal publicly, though she did not recall him offering a specific reason why. Ms. Perry told the OSP that she recommended that the CCSAO seek appointment of a special prosecutor, and she proceeded to draft a petition seeking to appoint Mr. Magats as the special prosecutor, which she emailed to Mr. Magats for his review. Ms. Perry told the OSP her recommendation was not implemented.

<sup>26</sup> The CCSAO issued statements to the press on February 19 and 20, 2019 that did not mention the fact that this rumor was the specific reason that State's Attorney Foxx initially recused herself—a fact that the CCSAO finally acknowledged in a May 31, 2019 press release which stated that State's Attorney Foxx was "advised to 'recuse' herself ... solely based upon rumors that she was related to Smollett." That May 31, 2019 press release further quotes State's Attorney Foxx as saying: "False rumors circulated that I was related or somehow connected to the Smollett family, so I removed myself from all aspects of the investigation and prosecution and delegated my authority and responsibility to my First Assistant so as to avoid even the perception of a conflict."

<sup>27</sup> Ms. Perry also received an email from Amy Crawford in the CCSAO's Civil Actions Bureau on February 20, 2019 at 11:42 a.m. in which Ms. Crawford raised concerns similar to those voiced by Mr. Spellberg, which had been raised to Ms. Crawford's attention by Jessica Scheller, another attorney in the CCSAO's Civil Actions Bureau. Ms. Crawford and Ms. Perry also spoke on the phone about the concerns raised by Ms. Scheller and Ms. Crawford.

According to both Mr. Magats and State's Attorney Foxx, Mr. Magats informed State's Attorney Foxx that Mr. Spellberg had concluded, based on specific analysis of Illinois law, that her recusal was legally improper. State's Attorney Foxx said that Mr. Magats actually gave her Mr. Spellberg's written analysis, and, at State's Attorney Foxx's request, summarized it for her so she did not have to read Mr. Spellberg's four-page analysis.

State's Attorney Foxx told the OSP that she did not make any effort to talk to Mr. Spellberg—the CCSAO's go-to person on legal issues under Illinois law—or to Ms. Perry, her Chief Ethics Officer, to better understand the law on this important legal issue. Instead, she explained to the OSP that she told Mr. Magats that the CCSAO should just follow the protocols and process that had been done before with her prior recusals. She told the OSP that Mr. Magats agreed.<sup>28</sup>

However, the CCSAO issued false statements to the press, which State's Attorney Foxx helped draft, to cover up the fact that State's Attorney Foxx was aware of the significant conclusion Mr. Spellberg reached, yet ignored it. Specifically, on April 17, 2019, the CCSAO's Chief Communications Officer Tandra Simonton emailed press outlets the following statement: "The State's Attorney was not included in Alan Spellberg's email and was not aware of its existence or content ...." Director of External Affairs Kierra Ellis emailed other reporters a very similar statement the afternoon of April 17th which read: "The State's Attorney was recused at the time of Mr. Spellberg's opinion and thus had been not made aware of the email or its contents ...." According to an email from Alexandra Sims, a political campaign consultant assisting State's Attorney Foxx, this second version was a "suggestion" from State's Attorney Foxx.<sup>29</sup> When shown these public statements stating that she had not been aware of Mr. Spellberg's legal analysis, State's Attorney Foxx admitted to the OSP that they were "not accurate."

**D. FOURTH FINDING OF ABUSE OF DISCRETION: The CCSAO Engaged in a Substantial Abuse of Discretion and Breached its Obligations of Honesty and Transparency When State's Attorney Foxx Made False and/or Misleading Statements to the Public that She Stopped Communicating with Jurnee Smollett, Mr. Smollett's Sister, After State's Attorney Foxx Had Become Aware that Mr. Smollett Had Become a Subject of the Investigation**

As discussed below in Section V.C., State's Attorney Foxx had communications with Mr. Smollett's sister, Jurnee Smollett, including text messages and phone calls, between February 1, 2019 and February 13, 2019. The initial thrust of these conversations was Ms. Smollett expressing to State's Attorney Foxx concerns her family had about the information being released publicly about CPD's investigation of her brother's reported attack. State's Attorney Foxx learned by

<sup>28</sup> Ms. Perry told the OSP that Mr. Magats informed her the CCSAO would not be filing a petition to appoint a special prosecutor approximately 20 minutes after she sent him a draft petition at 4:03 p.m. CST on February 20, 2019. When asked why this decision regarding how to proceed with the recusal and whether it was legally proper seemed to occur in a rushed manner on February 20th, Ms. Perry said that she understood that the CCSAO needed to fix the recusal situation, if it was improper, prior to the CCSAO taking official action—such as bringing charges against Mr. Smollett. In fact, charges were approved that evening at 6:10 p.m. CST.

<sup>29</sup> While State's Attorney Foxx did not specifically recall providing this language to Ms. Sims during her OSP interview, she told the OSP that she must have done so.



February 8, 2019 that Mr. Smollett had become a suspect in CPD's investigation, yet she continued communicating with Ms. Smollett through February 13, 2019, including via five text messages and three phone calls.<sup>30</sup> State's Attorney Foxx then made false statements to the media claiming she ceased all communications with Ms. Smollett as soon as she learned that Mr. Smollett was a suspect in CPD's investigation and no longer merely a victim.

Specifically, State's Attorney Foxx repeatedly told the press that she cut off communication with Ms. Smollett as soon as the case started to switch and Mr. Smollett was no longer merely a victim. For example, in a March 12, 2019 interview with the *Sun-Times*, State's Attorney Foxx said: "In this particular case because I had been having conversations with a member of the family *while Mr. Smollett was a victim*, and as the tenor of the investigation started to change what I did not believe was appropriate was to engage in conversations where potentially she is sharing information from him that can implicate him in a crime ... Again I had conversations with a family member *while he was in fact a victim*. And as he was becoming a suspect, I did not want either for his family, or the public, to believe whatever our charging decision was going to be because we hadn't made a charging decision." (emphasis added). Similarly, on March 27, 2019, State's Attorney Foxx told the *Chicago Sun-Times*, "as the days progressed, as the case continued to gather, as the investigators gathered more information that it was becoming clear that whatever doubts were being raised by Mr. Smollett went from doubts about his credibility as a victim to concerns *about him potentially being a suspect in an actual crime*. And that is when I decided that because of that what I didn't want because a relative might call and say have you heard anything else I'm still concerned about leaks. I didn't want any conversations with that relative *when I knew that there was a potential that the relative would be a suspect*." (emphasis added). State's Attorney Foxx told another reporter during an interview on March 27th: "The *moment that it became clear* he was not [a victim], I did the right thing." State's Attorney Foxx reiterated this same position in a May 31, 2019 press statement, where she stated, "I spoke with Mr. Smollett's family and others *while he was still considered to be the victim* of a hate crime in an effort to streamline the case and alleviate any concerns about the integrity of the investigation." (emphasis added).<sup>31</sup>

The evidence the OSP developed makes it clear that State's Attorney Foxx was aware by February 8, 2019 that Mr. Smollett was a suspect.<sup>32</sup> On Friday, February 8, 2019, the CPD gave a lengthy presentation to two CCSAO attorneys from Felony Review, Nicholas Trutenko and Liam

<sup>30</sup> Notably, these communications also continued *after* State's Attorney Foxx recused herself on February 9, 2019. In fact, phone records show that State's Attorney Foxx and Ms. Smollett had a total of 32 minutes of phone conversations on both February 12th and 13th after State's Attorney Foxx was recused (and after Mr. Smollett was a suspect, as discussed in this section), including a call State's Attorney Foxx initiated on the evening of February 13th without any specific prompting or request from Ms. Smollett.

<sup>31</sup> Kiera Ellis (Director of External Affairs) also made similar statements to reporters. For example, the *Chicago Tribune* quotes her as saying: "When [State's Attorney Foxx] initially engaged in the communications, Mr. Smollett was still believed to be the victim of the crime. . . As the investigation started to change and it became a possibility that he could actually be a suspect, that is when she made the decision (to recuse herself)."

<sup>32</sup> When asked by the OSP if she had moved Mr. Smollett from the "victim category" to "suspect of a potential crime" by February 9th, State's Attorney Foxx said she had. Further, when asked if when she was having discussions with Mr. Smollett on February 13th, she was "speaking to a potential suspect's sister as opposed to a victim's sister," State's Attorney Foxx confirmed that was correct.

Reardon, walking through the significant amount of evidence the CPD had gathered and analyzed. According to Mr. Trutenko, the gist of CPD's presentation was that the CPD believed that Mr. Smollett's report may have been false and the attack may have been a hoax. Following that meeting, Mr. Trutenko and Mr. Reardon called Mr. Magats to provide him with an update of what they had learned. Phone records show that Mr. Magats called State's Attorney Foxx shortly thereafter. State's Attorney Foxx told the OSP that she recalled Mr. Magats telling her at some point prior to February 9th that there was a "wild turn" in the case and that she was aware at that point that Mr. Smollett was being investigated as a suspect.

However, contrary to her representations to the press, State's Attorney Foxx had three phone calls with Ms. Smollett on February 12th and 13th (detailed below in Section V.C.)—multiple days after State's Attorney Foxx was informed that Mr. Smollett was under investigation and not merely a victim.<sup>33</sup>

**II. CONCLUSION #2: THE OSP DID DEVELOP EVIDENCE THAT MAY RISE TO THE LEVEL OF A VIOLATION OF LEGAL ETHICS BY STATE'S ATTORNEY FOXX AND CCSAO LAWYERS RELATING TO FALSE AND/OR MISLEADING PUBLIC STATEMENTS MADE ABOUT THE PROSECUTION OR RESOLUTION OF THE INITIAL SMOLLETT CASE**

Given the breadth of Judge Toomin's Second Directive, and given that the CCSAO employs lawyers who were involved in the CCSAO's prosecution and resolution of the Initial Smollett Case, the OSP investigated whether there was any conduct relating to the Initial Smollett Case that could potentially constitute a violation of the Illinois Rules of Professional Conduct, which set forth the ethical rules governing the conduct of Illinois lawyers.

The OSP assessed the CCSAO's lawyers' conduct for any potential violation of the Illinois Rules of Professional Conduct, including Rule 3.6, which relates to public statements by lawyers involved in an investigation or litigation, Rule 3.8, which sets forth the "Special Responsibilities of a Prosecutor," Rule 4.2, which governs communications with persons represented by counsel (as Mr. Smollett was shortly after he reported being attacked), and Rule 8.4(c), which prohibits, among other things, "conduct involving dishonesty, fraud, deceit, or misrepresentation" by lawyers. Based on evidence developed, the OSP's investigation focused on potential ethical violations under Rule 8.4(c).

As detailed above in Sections I.B., I.C., and I.D., the OSP developed evidence that the CCSAO, State's Attorney Foxx, and/or Mr. Magats made at least six false and/or misleading public statements relating to the nature and reason for the dismissal of the Initial Smollett Case and State's Attorney Foxx's recusal. Some of these public statements were made on more than one occasion. The Illinois Supreme Court has stated that the language in Rule 8.4(c), which prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation," is "broadly construed to include *anything* calculated to deceive, including the suppression of truth and the

<sup>33</sup> Of note, State's Attorney Foxx's last call with Ms. Smollett (which State's Attorney Foxx initiated) was made at 9:05 p.m. CST, *after* Abimbola and Olabinjo Osundairo—who at that point were suspected of being potential co-conspirators with Mr. Smollett—were taken into custody at O'Hare Airport as Detective Case Supplementary Reports indicate they were picked up by CPD at 7:50 p.m. and 7:59 p.m., respectively.

suggestion of falsity.” *In re Edmonds*, 2014 IL 117696, ¶ 53 (2014) (emphasis added). Furthermore, of particular relevance given State’s Attorney Foxx’s role as an elected official, the comments to Rule 8.4 state: “Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers.” As a result, the OSP has concluded that the six false and/or misleading public statements discussed in Sections I.B., I.C., and I.D. could potentially be deemed violations of Rule 8.4(c).

It is important to note that under Illinois law, the OSP has no authority to find that lawyers have violated the Illinois Rules of Professional Conduct or to conduct disciplinary proceedings based on those rules. Under Illinois Supreme Court Rule 751, that determination rests with the Illinois Attorney Registration & Disciplinary Commission (the “ARDC”). The Illinois Rules of Professional Conduct impose a reporting obligation on lawyers under Rule 8.3(a), stating: “A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.” Therefore, while the OSP has no authority to make findings determining ethical violations by lawyers, the OSP will comply with applicable reporting obligations as required by the Illinois Rules of Professional Conduct, and once able under Illinois law, will submit its Summary Report to the ARDC so that the ARDC can conduct the appropriate ethical review to determine if any ethical violations occurred.

However, beyond the false and/or misleading statements discussed in Sections I.B., I.C., and I.D., the OSP did not develop evidence that might rise to the level of a violation of the Illinois Rules of Professional Conduct by any CCSAO lawyer relating to the Prosecution or Resolution of the Initial Smollett Case. The OSP also explicitly asked interviewees who could potentially have information about ethical violations by CCSAO lawyers if they were aware of any actions by anyone at the CCSAO that might violate legal ethics. No one identified conduct, beyond pointing to public statements that might be false and/or misleading, that could constitute a violation of the Illinois Rules of Professional Conduct.

**III. CONCLUSION #3: WHILE THE OSP DID NOT DEVELOP EVIDENCE SHOWING STATE’S ATTORNEY FOXX WAS INVOLVED IN DECISION-MAKING ON THE INITIAL SMOLLETT CASE AFTER SHE WAS RECUSED, THE OSP DID DEVELOP EVIDENCE THAT SHE WAS PROVIDED WITH FREQUENT UPDATES ABOUT THE INITIAL SMOLLETT CASE AFTER HER RECUSAL**

According to Judge Toomin’s June 21, 2019 ruling, State’s Attorney Foxx needed to have filed a petition the court to appoint a special prosecutor when she recused herself, rather than appointing Mr. Magats to serve as “Acting States Attorney” for the matter herself. There is not a clear legal standard for what she could and could not do after she improperly recused herself from the Initial Smollett Case without seeking the appointment of a special prosecutor. The CCSAO also did not have any policy in February 2019 outlining what the parameters of “recusal” were if the State’s Attorney did not seek the appointment of a special prosecutor. State’s Attorney Foxx told the OSP she thought her recusal meant she could not have any role in the decision-making for or otherwise influence how the Initial Smollett Case was handled, though she thought it was fine

for her to receive limited updates so that she could answer questions if asked by the media.<sup>34</sup> Many CCSAO interviewees said they interpreted recusal to mean State's Attorney Foxx could have *no involvement* in the Initial Smollett Case, including receiving substantive updates. In addition, the OSP questions whether State's Attorney Foxx should have made public comments about the resolution of the Initial Smollett Case after the resolution on a case where she was recused. However, as discussed above, there is no clear legal standard for what State's Attorney Foxx could and could not do after she recused herself in a manner that is inconsistent with Illinois law.

While the OSP has not identified evidence showing State's Attorney Foxx had any involvement in any decision-making on the Initial Smollett Case, she was provided with updates and had discussions about events in the case after her recusal on February 9, 2019. For example:

- State's Attorney Foxx had multiple calls with Mr. Magats on February 12th and 13th, 2019, which she told the OSP possibly could have included discussions about the Initial Smollett Case, though she recalled there was an evidentiary issue in the pending case against R. Kelly that prompted most of those calls. State's Attorney Foxx told the OSP it was also possible that calls she had with CCSAO Senior Advisor for Intergovernmental Affairs Robert Foley over that weekend also included discussions about the Initial Smollett Case, but she did not recall.
- State's Attorney Foxx had multiple calls with Superintendent Johnson between February 9th and the dismissal wherein the Initial Smollett Case was discussed.<sup>35</sup> According to State's Attorney Foxx, these calls primarily involved Superintendent Johnson calling and asking for information (and State's Attorney Foxx told the OSP she would refer Superintendent Johnson to Mr. Magats). Superintendent Johnson told the OSP he and State's Attorney Foxx also had calls about information in the press concerning the case. Additionally, according to Superintendent Johnson, during a call on February 13th, State's Attorney Foxx and Superintendent Johnson discussed the investigation, namely the fact that Mr. Smollett was being investigated as a suspect.
- On February 16, 2019, Mr. Foley texted State's Attorney Foxx that Mr. Smollett had hired a particular lawyer who does criminal defense work "so he knows he's in trouble," which could be read as an update on the state of the investigation against Mr. Smollett (who had not yet been charged).

<sup>34</sup> State's Attorney Foxx told the OSP that she believed the fact she was recused meant "not being involved in the decision making in the case. Not direct people on what to do or not to do, or be engaged in the investigation or prosecution." She elaborated that, to her, recusal did not mean she could not get "information for informational purposes only" so that she could answer questions if asked, but it did mean "not directing, counseling, engaging, making recommendations, or giving orders in relation to the prosecution of this case."

<sup>35</sup> According to phone records, the OSP identified 22 calls between State's Attorney Foxx and Superintendent Johnson between February 9, 2019 and March 25, 2019. However, both told the OSP that they spoke during that period about other cases and issues, so these calls are not all related to the Initial Smollett Case. When they did speak about the Initial Smollett Case after her recusal, State's Attorney Foxx recalls Superintendent Johnson asking her questions, rather than providing updates, and she recalled referring him to Mr. Magats.

- On February 18, 2019, State's Attorney Foxx texted Mr. Magats asking him to call her because she had received a call from Superintendent Johnson. State's Attorney Foxx and Mr. Magats then had a phone call.
- On February 20, 2019, Mr. Foley texted State's Attorney Foxx: "FYI Kim: Two brothers are before the grand jury now. Anthony said the brothers['] lawyers are holding a presser after so they are announcing shortly he is no longer being treated as a victim. Detectives are going to formally present tonight and we are going to approve." According to State's Attorney Foxx, Mr. Magats also told her on February 20th that the two primary civilian witnesses, Abimbola and Olabinjo Osundairo, were testifying before the grand jury and charges would likely be approved that day.<sup>36</sup>
- On February 20, 2019, Mr. Foley texted State's Attorney Foxx that Mr. Smollett would be turning himself in the next day.
- On February 27, 2019, State's Attorney Foxx sent Mr. Magats a text with a link to a story about some tweets by one of the civilian witnesses, writing: "I know it's not the most reputable website, but not sure if CPD reported this to us." Mr. Magats responded: "First I've heard of that. We asked them to do a social media search and work up and they said they had someone on it and hadn't come up with anything."<sup>37</sup>
- On March 9, 2019, Mr. Foley had a call with State's Attorney Foxx, following a text where she asked him if he had time for a call, in which, according to Mr. Foley, she expressed her thoughts about the indictment and, in particular, the number of counts.
- According to State's Attorney Foxx, one week before the case was dismissed, Mr. Magats told her that the CCSAO was having resolution discussions and "they were trying to work with counsel on the case to figure out or fashion some type of alternative resolution." She recalled him indicating that the parties might agree on some type of community service as part of a resolution deal. State's Attorney Foxx said that she told Mr. Magats something to the effect of: "Do what I've always said. Treat him like we treat others similarly situated."<sup>38</sup>

State's Attorney Foxx explained to the OSP that she believed all of these communications to be within the bounds of her recusal because she was, at most, in her mind, receiving updates but was not having any influence over how the case was being handled, or she was discussing. In other

<sup>36</sup> State's Attorney Foxx told the OSP she was purely in "listening mode" when she received these updates and she was "just being informed" and "not in any way going to impact what was already happening."

<sup>37</sup> State's Attorney Foxx told the OSP she did not view this exchange as a violation of her recusal because she did not view this exchange as a discussion of the investigation or what evidence CPD had or had not obtained but rather as a heads-up to Magats in case he had not seen the story.

<sup>38</sup> When asked by the OSP, State's Attorney Foxx acknowledged that this comment could be viewed as "feedback" to Mr. Magats on the potential resolution terms, though she said, "I don't know that he was looking for approval or disapproval."



words, she viewed herself as just being in "listening mode," with information flowing only in one direction—to her.

Ms. Perry told the OSP that she heard State's Attorney Foxx and Mr. Magats discussing the Initial Smollett Case in person on potentially three different occasions after State's Attorney Foxx's recusal. Ms. Perry told the OSP she even recalled interrupting their discussion on one occasion to tell State's Attorney Foxx she should not be having such a discussion because she was recused. State's Attorney Foxx denied that she had any in-person substantive discussions with Mr. Magats about the case other than the discussions about potential resolution described above, and did not recall Ms. Perry ever telling her that any discussions he was having were inconsistent with her recusal. Mr. Magats told the OSP that he did not have any discussions with State's Attorney Foxx about decision-making on the Initial Smollett Case.

Additionally, State's Attorney Foxx was adamant in her interview with the OSP that she had no role in the Initial Smollett Case after her recusal, including in investigating the case, deciding to charge the case, deciding what charges to bring, deciding what evidence to put in the grand jury, drafting the bond proffer, negotiating the resolution, determining the terms of the resolution, deciding to dismiss, or deciding to advance the case in order to dismiss it. Consistent with her statements, the OSP did not identify any direct evidence that State's Attorney Foxx influenced how the Initial Smollett Case was prosecuted, the decision to dismiss, or the terms of the dismissal. In fact, when asked, no interviewee was aware of State's Attorney Foxx having any role in any step of the Initial Smollett Case after her recusal.

Given that there is no applicable legal standard governing the type of recusal State's Attorney Foxx implemented, as she was—according to Judge Toomin—required to recuse the entire CCSAO, the OSP cannot reach any final legal conclusion regarding whether she acted consistently with being "recused."

#### **IV. CONCLUSION #4: THE OSP DID NOT DEVELOP EVIDENCE THAT WOULD SUPPORT ANY CRIMINAL CHARGES AGAINST STATE'S ATTORNEY FOXX OR ANY INDIVIDUAL WORKING AT THE CCSAO**

After the dismissal of the Initial Smollett Case to terms favorable to Mr. Smollett, there was speculation in the media regarding whether something illegal or improper had gone on behind the scenes at the CCSAO to allow Mr. Smollett to achieve the particular resolution he received. Among other things, there was speculation that State's Attorney Kim Foxx may have been influenced in an improper manner by prominent people who reached out to her to discuss the Initial Smollett Case, as discussed further below in Section V. As a result, as part of its investigation, the OSP thoroughly investigated and evaluated whether State's Attorney Foxx or anyone working at the CCSAO committed any crime relating to the prosecution or resolution of the Initial Smollett Case.

While the OSP evaluated any and all potentially applicable criminal statutes, the OSP focused its investigation on criminal statutes that might be implicated if anyone involved in the handling or resolution of the Initial Smollett Case had received an improper personal benefit or obstructed how the case was handled. For example, the OSP considered bribery (720 ILCS 5/33-

1), failure to report a bribe (720 ILCS 5/33-2), official misconduct (720 ILCS 5/33-3), obstruction of justice (720 ILCS 5/31-4), and perjury (720 ILCS 5/32-2).

Under the law, a person can only be convicted of a crime if the prosecution proves all the elements of the charged offense beyond a reasonable doubt, including, where applicable, proof of any criminal intent. Further, under applicable ethical standards, the OSP, as a prosecutor, must act in good faith and should never pursue a prosecution for criminal charges that the prosecutor cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.<sup>39</sup> Thus, under these standards, the OSP cannot seek criminal charges against State's Attorney Foxx or any person working at the CCSAO without developing substantial evidence of a crime.

Based on the voluminous documentary evidence gathered and witness interviews conducted, the OSP did not develop evidence that would support any criminal charges against State's Attorney Foxx or any person working at the CCSAO based on bribery, failure to report a bribe, official misconduct, obstruction of justice, perjury, or any other criminal statute.<sup>40</sup> Specifically, the OSP also explicitly asked 37 interviewees who could potentially have information about criminal activity by the CCSAO if they were aware of any actions by anyone at the CCSAO that might constitute criminal conduct. Across the board, everyone asked responded that they were not aware of any potential criminal conduct.

Therefore, based on its thorough investigation and careful analysis of all evidence gathered, the OSP does not have evidence to seek criminal indictments against any person working at the CCSAO.

**V. CONCLUSION #5: THE OSP DID NOT DEVELOP EVIDENCE OF IMPROPER INFLUENCE BY ANY OUTSIDE THIRD PARTIES IN THE DECISION-MAKING BY THE CCSAO IN THE INITIAL SMOLLETT CASE**

State's Attorney Foxx is an elected public official who heads an office tasked with protecting individuals and society, and empowered with the authority to change people's lives through the prosecutions it pursues. Therefore, State's Attorney Foxx—and the CCSAO—must be accountable to the public. Being accountable to the public means State's Attorney Foxx and the CCSAO must also be accessible to the public, including to answer questions and provide information when appropriate to people impacted by the criminal justice system, including victims and victims' families. State's Attorney Foxx and the CCSAO also must be receptive to criticism or concerns raised by constituents or people impacted by the criminal justice system regarding

<sup>39</sup> See, e.g., American Bar Association, "Standards for Criminal Justice: Prosecution and Defense Function" § 3-4.3(a) (4th ed., 2017) ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."); National District Attorneys Association, "National Prosecution Standards" § 4-2.2 (3d ed., 2009) ("A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.").

<sup>40</sup> Of note, even though the OSP concluded that the CCSAO, Mr. Magats, and State's Attorney Foxx made misleading and/or false statements to the public, as detailed in Sections I.B., I.C., and I.D., such conduct does not constitute a violation of any Illinois criminal statute. By comparison, for example, the crime of perjury requires a false statement made "under oath or affirmation," as opposed to in a press release or public interview.



criminal cases in Cook County. Accordingly, it is wholly proper under certain circumstances for the State's Attorney or others at the CCSAO to speak with individuals concerned about how a particular case is being handled or how the CCSAO approaches or resolves cases generally.

Following the dismissal of the Initial Smollett Case, including the CCSAO's public release of emails and text messages in response to Freedom of Information Act requests, there was speculation in the media that conversations State's Attorney Foxx had in the weeks following Mr. Smollett's reported attack improperly influenced or impacted how the CCSAO prosecuted or resolved the Initial Smollett Case. As a result, the OSP investigated whether any such communications resulted in any criminal conduct by State's Attorney Foxx, or any other individual working for the CCSAO, relating to the Initial Smollett Case, including bribery or official misconduct, and whether State's Attorney Foxx had any communications that could be construed as influencing how the CCSAO decided to prosecute or resolve the Initial Smollett Case.

Based on public allegations against State's Attorney Foxx and evidence the OSP developed relating to communications she had about the Initial Smollett Case, the OSP specifically focused its investigation on communications State's Attorney Foxx had with three people:

- Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.
- Christina M. "Tina" Tchen, CEO of TIME'S UP Now (formerly Michelle Obama's Chief of Staff)
- Jurnee Smollett, Mr. Smollett's sister

As detailed below, the OSP did not identify evidence indicating that State's Attorney Foxx's communications with these people influenced or impacted how the Initial Smollett Case was prosecuted or resolved—including the CCSAO's decision to dismiss the case or the terms of the dismissal. In fact, based on the evidence developed by the OSP, State's Attorney Foxx did not have any substantive communications about the Initial Smollett Case with any of these people after Mr. Smollett was charged. However, conversations with these three people did deepen concerns State's Attorney Foxx had regarding information being released to the public, seemingly by CPD, about the ongoing investigation. Thus, communications with these three people spurred her to reach out to CPD Superintendent Eddie Johnson to recommend the case be referred to the FBI—an action that was not improper and did not have any impact on how the case was investigated or ultimately prosecuted.

Furthermore, while the OSP focused on State's Attorney Foxx's communications with the three individuals noted above, the OSP did not identify any other people that had any improper influence over the prosecution or resolution of the Initial Smollett Case. In fact, the OSP explicitly asked interviewees who could potentially have information about any improper influence if they were aware of anyone—outside of CCSAO lawyers and Mr. Smollett's own lawyers—who influenced the decision to dismiss the case or terms of the dismissal, and everyone asked said they were not aware of any such influence.

**A. State's Attorney Foxx's Communications with Sherrilyn Ifill**

As the Director and Counsel for the NAACP Legal Defense Fund, Sherrilyn Ifill works on issues related to voting rights, criminal justice, education, and economic justice as they relate to African-Americans. Consistent with this role, Ms. Ifill raised concerns to State's Attorney Foxx on behalf of Mr. Smollett when CPD and the CCSAO still considered Mr. Smollett a victim of a crime. According to the evidence the OSP developed, she did not intend to influence or in fact influence how the Initial Smollett Case was prosecuted or resolved.

According to Ms. Smollett and emails she produced to the OSP, Ms. Smollett was introduced to Ms. Ifill through Ms. Smollett's entertainment lawyer on January 30, 2019 (the day after Mr. Smollett reported being attacked), and they proceeded to set up a phone call. During that call, Ms. Smollett expressed concerns regarding information the CPD had purportedly released to the public about the ongoing investigation into her brother's reported attack, including information that Ms. Smollett thought cast doubts on Mr. Smollett's report.<sup>41</sup> According to Ms. Smollett and Ms. Ifill, Ms. Smollett did not ask Ms. Ifill to take any action on her or Mr. Smollett's behalf.

Following that call, Ms. Ifill called State's Attorney Foxx and relayed the concern about the CPD's public statements and handling of the investigation.<sup>42</sup> State's Attorney Foxx told the OSP in her interview that she explained to Ms. Ifill neither she nor the CCSAO was responsible for investigating the case as that was the responsibility of the CPD. Ms. Ifill asked for then-CPD Superintendent Eddie Johnson's phone number, which State's Attorney Foxx provided. Neither Ms. Ifill nor State's Attorney Foxx believed they discussed State's Attorney Foxx reaching out to Superintendent Johnson or attempting to refer the matter to the FBI. State's Attorney Foxx said that Ms. Ifill did not ask her to do anything besides connect her with Superintendent Johnson. State's Attorney Foxx was clear in her interview with the OSP that she believed there was "no favor" for which Ms. Ifill was asking her—just that Ms. Ifill had "deep concerns about the amount of information that [was] being shared in the public square." According to Ms. Ifill and State's Attorney Foxx, they did not have any discussions about the Initial Smollett Case beyond this one phone call. The OSP has not identified evidence that Ms. Ifill ever had any discussions or communications with anyone at the CCSAO about the Initial Smollett Case besides State's Attorney Foxx.

Ms. Ifill did proceed to have multiple calls with Superintendent Johnson where she relayed the same concerns she raised with State's Attorney Foxx. Superintendent Johnson said that it was not usual for a victim's advocate to reach out to the CPD, though he did not typically speak to such advocates directly. According to Ms. Ifill and Superintendent Johnson, he was primarily in listening mode on the calls and did not indicate he would take any action as a result of their discussions.

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<sup>41</sup> A summary of the OSP's investigation into the issue is below in Section V.C.

<sup>42</sup> According to State's Attorney Foxx and Ms. Ifill, they have known each other for multiple years, with Ms. Ifill recalling the two meeting at a civil rights conference in 2018 and State's Attorney Foxx recalling that they spoke, and potentially met, even earlier than that. State's Attorney Foxx described her relationship with Ms. Ifill in January 2019 as "professional acquaintances," and said that they did not have frequent communications.

There was nothing improper about Ms. Ifill, as an advocate for a victim, calling State's Attorney Foxx (or Superintendent Johnson) to express concerns about how the investigation into Mr. Smollett's reported attack was being handled. Based on the evidence, the OSP also has concluded that Ms. Ifill did not attempt to and did not in fact influence how the Initial Smollett Case was prosecuted or resolved by the CCSAO.

**B. State's Attorney Foxx's Communications with Tina Tchen**

Based on evidence developed by the OSP, as part of efforts by Tina Tchen to assist as a type of victim's advocate, Ms. Tchen and State's Attorney Foxx had very limited communications regarding the Initial Smollett Case, none of which were intended to or in fact influenced how the case was prosecuted or resolved. Specifically, Ms. Tchen and State's Attorney Foxx merely exchanged a few emails on February 1, 2019 and had a brief phone call that day. During those limited communications, according to both Ms. Tchen and State's Attorney Foxx, Ms. Tchen merely attempted to alert State's Attorney Foxx of concerns Ms. Smollett, a friend of Ms. Tchen's, had raised about whether the CPD was taking Mr. Smollett's allegations that he was attacked seriously as well as concerns about information CPD was releasing about the ongoing investigation, and to connect Ms. Smollett with State's Attorney Foxx.

Ms. Tchen, who has known Ms. Smollett for many years through their respective work with various non-profit organizations, received an email from Ms. Smollett on January 31, 2019 (two days after Mr. Smollett reported being attacked) asking if they could chat. According to Ms. Smollett, she reached out to Ms. Tchen because Ms. Tchen was the only legal contact she had in Chicago. During a call that day, Ms. Smollett relayed the same concerns she had raised to Ms. Ifill regarding information being released publicly about the investigation. Ms. Tchen explained to the OSP that she has experience working as a victim's advocate and said she gave Ms. Smollett the same advice she would give to any victim seeking her help: Mr. Smollett needed a local lawyer to assist him in navigating the local criminal justice system. Ms. Tchen told the OSP that she offered (either voluntarily or after a request from Ms. Smollett) to provide recommendations of local lawyers.

To further assist Ms. Smollett, based on a suggestion by an attorney friend to whom Ms. Tchen had reached out as potential counsel to help Mr. Smollett navigate the justice system as a victim, Ms. Tchen emailed State's Attorney Foxx on the morning of February 1, 2019 asking if they could have a phone call to discuss some "concerns about the investigation" raised by Ms. Smollett. According to phone records, Ms. Tchen and State's Attorney Foxx had a phone call at 7:14 a.m. CST on February 1, 2019, and the call lasted 8 minutes and 4 seconds. Ms. Tchen and State's Attorney Foxx both told the OSP that the thrust of that conversation was Ms. Tchen informing State's Attorney Foxx about the concerns Ms. Smollett had raised to her. According to Ms. Tchen and State's Attorney Foxx, Ms. Tchen never asked State's Attorney Foxx to take any particular action during that call—including to reach out to Superintendent Johnson or try to have the FBI handle the investigation. In fact, State's Attorney Foxx said Ms. Tchen "didn't ask for anything other than if [State's Attorney Foxx] would talk to the family to reassure them that the case was being handled properly." According to Ms. Tchen and State's Attorney Foxx, Ms. Tchen never indicated or insinuated that Ms. Tchen was calling in a favor or seeking special treatment for Mr. Smollett; rather, Ms. Tchen was relaying concerns, which Ms. Tchen told the OSP was the "same advocacy as in any other case."

Later on February 1, 2019, State's Attorney Foxx emailed Ms. Tchen: "Spoke to Superintendent Johnson. I convinced him to [r]each out to FBI to ask that they take over the investigation. He is reaching out now and will get back to me shortly." Ms. Tchen responded: "Thank you. I think jussies [sic] sister Jurnee is going to call you." According to phone records, emails, and the OSP's interviews with Ms. Tchen and State's Attorney Foxx, they did not communicate about the Initial Smollett Case again until March 12, 2019 (after Mr. Smollett had been indicted) when State's Attorney Foxx left Ms. Tchen a voicemail and texted her to alert her that their February 1, 2019 email exchange was being released as part of a Freedom of Information Act production by the CCSAO. In fact, the OSP has not identified evidence that Ms. Tchen and State's Attorney Foxx had any substantive discussions about the investigation or handling of the Initial Smollett Case after February 1, 2019 (weeks before Mr. Smollett was charged). The OSP also has not identified evidence that Ms. Tchen ever had any discussions or communications with anyone within the CCSAO, besides State's Attorney Foxx, about the Initial Smollett Case. When asked whether Ms. Tchen might have influenced how the case was handled or the resolution, State's Attorney Foxx said, "No, not at all."

As a general matter, there is nothing improper about Ms. Tchen, in an attempt to help a victim navigate the justice system and to raise concerns about information being released about the investigation, calling State's Attorney Foxx. Based on the evidence, the OSP has concluded that Ms. Tchen did not attempt to and did not in fact influence how the Initial Smollett Case was prosecuted or resolved by the CCSAO.

#### **C. State's Attorney Foxx's Communications with Jurnee Smollett**

According to phone records, between February 1, 2019 and February 13, 2019, State's Attorney Foxx and Ms. Smollett exchanged 17 text messages and had five phone calls lasting more than 20 seconds.<sup>43</sup> It is wholly proper (and, in fact, required under certain circumstances) for a prosecutor to have certain discussions with a victim or a victim's family. The OSP has not identified evidence that Ms. Smollett attempted to influence how the CCSAO prosecuted Mr. Smollett, and in fact, her discussions with State's Attorney Foxx ended before Mr. Smollett was charged. The OSP also has not identified evidence that any of State's Attorney Foxx's discussions with Ms. Smollett impacted how the CCSAO prosecuted or resolved the Initial Smollett Case, other than the fact that one reason State's Attorney Foxx purportedly recused herself, per State's Attorney Foxx's interview with the OSP and CCSAO press statements, was because of her discussions with Ms. Smollett.

Ms. Smollett and State's Attorney Foxx first spoke on February 1, 2019, when the CPD and CCSAO were treating Mr. Smollett as a victim, following a brief text exchange after Ms. Tchen provided Ms. Smollett with State's Attorney Foxx's contact information.<sup>44</sup> According to

<sup>43</sup> For purposes of the OSP's investigation and review of cell phone data, the OSP assumed that phone calls with a duration of more than 20 seconds contained substantive discussion.

<sup>44</sup> State's Attorney Foxx explained to the OSP that she spoke to Ms. Smollett directly instead of referring Ms. Smollett to the CCSAO's Victim Witness Assistance Unit because Mr. Smollett had not been formally designated a victim since charges had not been brought against anyone at the time Ms. Smollett first reached out to her. State's Attorney Foxx further speculated that, given the fact that information had been released publicly about the investigation, she

Ms. Smollett and State's Attorney Foxx, the focus of their conversation was on Ms. Smollett's frustration and confusion regarding statements the CPD had made publicly about the investigation and her brother. Ms. Smollett recalled State's Attorney Foxx expressing that she shared those frustrations and that State's Attorney Foxx said she planned to try to have the FBI take over the case—an idea that came from State's Attorney Foxx and not any request from Ms. Smollett. According to both Ms. Smollett and State's Attorney Foxx, Ms. Smollett did not ask State's Attorney Foxx to take any action on her or Mr. Smollett's behalf.

After State's Attorney Foxx reached out to then-Superintendent Johnson, as discussed further below in Section V.D., State's Attorney Foxx updated Ms. Smollett via text on February 1, 2019, writing: "Spoke to the superintendent earlier, he made the ask. Trying to work on logistics. I'll keep you posted." Ms. Smollett responded: "Omg this would be a huge victory." State's Attorney Foxx replied, "I make no guarantees, but I'm trying." State's Attorney Foxx then called Ms. Smollett on February 4th to alert her that CPD would continue to handle the case.

State's Attorney Foxx and Ms. Smollett had another call on February 12th at 1:27 p.m. CST for five minutes after Ms. Smollett texted State's Attorney Foxx requesting a call. According to both State's Attorney Foxx and Ms. Smollett, State's Attorney Foxx told Ms. Smollett that the CPD was honing in on two suspects. Ms. Smollett also recalls asking State's Attorney Foxx about what, if any, additional phone records the CPD needed from Mr. Smollett. State's Attorney Foxx recalled telling Ms. Smollett during that call that they could no longer talk because she was recusing herself from the case, though Ms. Smollett told the OSP that State's Attorney Foxx did not tell her about the recusal until the evening of February 13th.<sup>45</sup>

At 11:13 a.m. CST on February 13, 2019, Ms. Smollett texted State's Attorney Foxx, "Hi again. Are you available to talk?" State's Attorney Foxx responded: "Sure." Ms. Smollett then called State's Attorney Foxx and the two spoke for approximately 14 minutes. Ms. Smollett told the OSP that she asked State's Attorney Foxx if media reports indicating that Mr. Smollett may be charged were true. She recalled State's Attorney Foxx saying something to the effect of, "No, not to my knowledge." Ms. Smollett told the OSP she asked Ms. Foxx if she knew anything about the two suspected attackers and that, after State's Attorney Foxx paused, Ms. Smollett asked, "They're White, right?" Ms. Smollett recalled that Ms. Foxx said they were not. Ms. Smollett said they then had a discussion about the skin color and potential nationality of the two suspected attackers.

thought Ms. Smollett might have felt more comfortable talking to her directly. She further explained to the OSP that she thought "[s]ome of the institutional credibility was shaken, and so I think in this particular case, giving the reassurances that -- I hear you, I hear your concerns -- were given by me as opposed to someone in my office."

<sup>45</sup> According to Ms. Smollett, during either their call on February 12th or February 13th, State's Attorney Foxx conveyed to Ms. Smollett that she could only speak to *Ms. Smollett*, and not to *Mr. Smollett* directly. Ms. Smollett recalled State's Attorney Foxx telling her that it would be "unconventional" for her to speak directly to Mr. Smollett and that she should continue only to update Ms. Smollett. State's Attorney Foxx acknowledged to the OSP that, at some point, Ms. Smollett asked her if she would speak to Mr. Smollett, though State's Attorney Foxx did not recall what she told Ms. Smollett—noting, however, that she never did speak to Mr. Smollett despite Ms. Smollett's request. State's Attorney Foxx also acknowledged to the OSP that talking to Mr. Smollett after he became a suspect "would have been incredibly controversial," but said she did not recall when Ms. Smollett asked her to speak to Mr. Smollett directly. Ms. Smollett's recollection that State's Attorney Foxx indicated she could not speak directly to Mr. Smollett is supported by a text message exchange Ms. Smollett had with Mr. Smollett on February 13, 2019 wherein Ms. Smollett stated: "On phone with [State's Attorney Foxx] now ... She can't talk with you ...."



State's Attorney Foxx told the OSP that, contrary to Ms. Smollett's recollection, she did not tell Ms. Smollett any details about the investigation or suspects.<sup>46</sup> Rather, State's Attorney Foxx said that she was primarily in listening mode during this call, allowing Ms. Smollett to express her concerns about her brother as Ms. Smollett was worried "as things were changing." She said that it was "less legal and more like ... counsel. Like, sorry this is happening to ... your family."<sup>47</sup>

According to phone records, State's Attorney Foxx called Ms. Smollett at 9:05 p.m. CST on February 13th, and the two spoke for approximately 13 minutes. Ms. Smollett told the OSP that this conversation was "quite different" than their prior conversations. She said that State's Attorney Foxx told her that they could no longer communicate and that State's Attorney Foxx could not provide her with updates on the investigation as she was recusing herself from the case "out of an abundance of caution." Ms. Smollett told the OSP that she read between the lines and assumed that the "rumors were possibly not rumors," that her worst fears were becoming true and that Ms. Smollett might be charged with a crime. Ms. Smollett said that when she asked if Mr. Smollett was now a suspect, State's Attorney Foxx responded: "Your brother should be fine as long as he stays consistent." Ms. Smollett said that State's Attorney Foxx also told her that the CPD had used high-tech surveillance and tools to find the suspects and told her that they had already been arrested. Ms. Smollett recalled State's Attorney Foxx also telling her that the two suspected attackers had a relationship to or connection with Mr. Smollett. State's Attorney Foxx told the OSP she does not recall having this call with Ms. Smollett on the evening of February 13th. In her interview with the OSP, State's Attorney Foxx also denied making any statement about Mr. Smollett potentially being "fine" if he took any particular action or making any statement of similar advice towards Mr. Smollett, though she does recall telling Ms. Smollett at some point that Mr. Smollett should be "cooperative." Notably, even if the OSP credited Ms. Smollett's recollection, it does not show that either State's Attorney Foxx (the purported giver of information) or the CCSAO was in any way influenced regarding the prosecution or resolution of the Initial Smollett Case by State's Attorney Foxx's discussions with Ms. Smollett.

Ms. Smollett was adamant to the OSP that she did not speak to State's Attorney Foxx to influence how the Initial Smollett Case handled—and in fact, ceased speaking with her before Mr. Smollett had been charged so could not have influenced how the case was resolved. State's Attorney Foxx was similarly adamant in her OSP interview under oath that Ms. Smollett did not influence how the CCSAO prosecuted or resolved the case, though she told the OSP their discussions did further motivate her to reach out to the CPD about referring the case to the FBI. State's Attorney Foxx said that the access and treatment she gave to Mr. Smollett and Ms. Smollett

<sup>46</sup> State's Attorney Foxx told the OSP that, while she did not recall giving Ms. Smollett any substantive information, such as the fact that the attackers were not White, she had been made aware of such substantive details.

<sup>47</sup> While on the phone with State's Attorney Foxx on February 13th, Ms. Smollett texted Mr. Smollett that State's Attorney Foxx was "downloading" information to her. Consistent with the information Ms. Smollett recalls State's Attorney Foxx relaying to her, Mr. Smollett responded: "Ask what the people look like. Please call me and fill me in." Later that day, Ms. Smollett texted Mr. Smollett asking if they should tell Darrell Miller, Mr. Smollett's entertainment lawyer, about her conversation with State's Attorney Foxx. When Mr. Smollett said, "I'm telling now," Ms. Smollett responded: "Stress to him not to tell anyone. I am the only one that should know." This text exchange indicates that, consistent with Ms. Smollett's recollection, what State's Attorney Foxx relayed to Ms. Smollett during their call the morning of February 13th was substantive. Mr. Miller was not able to shed any light as to what State's Attorney Foxx might have told Ms. Smollett on February 13th, as he told the OSP, he does not recall what, if any, specific details or information he learned were relayed to Ms. Smollett by State's Attorney Foxx.



was not the result of their celebrity status or connections, though she acknowledged that it is rare (though not unprecedented) for a victim to be given her contact information directly.

The OSP has not identified evidence that Ms. Smollett had any communications with anyone at the CCSAO besides State's Attorney Foxx.

While the OSP believes that State's Attorney Foxx misrepresented publicly the timing of when she ceased communicating with Ms. Smollett, as discussed above in Section I.D., based on the evidence, the OSP has concluded that Ms. Smollett did not attempt to and did not in fact influence how the Initial Smollett Case was prosecuted or resolved by the CCSAO.

**D. State's Attorney Foxx's Discussions with Superintendent Eddie Johnson Regarding Referring the Case to the FBI**

As discussed above, State's Attorney Foxx's communications with Ms. Smollett, Ms. Tchen, and Ms. Ifill prompted her to take action regarding concerns she already had regarding information she believed was being released publicly by the CPD by encouraging then-CPD Superintendent Eddie Johnson to have the FBI (rather than the CPD) handle the investigation into Mr. Smollett's alleged attack. While such a request may not be typical for cases the CPD is investigating, it is not unheard of for the CCSAO to refer a case to or coordinate with federal law enforcement. State's Attorney Foxx told the OSP she thought it made particular sense for the FBI to take over this investigation given that they had been investigating a threatening letter Mr. Smollett had allegedly received on January 22, 2019. She explained to the OSP that "having the FBI who was already working on this case and the credibility of the FBI and their work to me seems like a way by which we could have this case resolved and eliminate some of the [ ] concerns at that time about that, about the leak." She also noted that the case was receiving national and international press and so wanted to make sure the case was handled appropriately and credibly. She further explained: "It was about the credibility of our institution, particularly how we were investigating an alleged hate crime that I was concerned about." Notably, State's Attorney Foxx told the OSP that her interest in referring the case to the FBI "had nothing to do with their [CPD's] investigative capabilities."

When asked, State's Attorney Foxx also told the OSP that the fact that Mr. Smollett was a celebrity or that she was getting calls from well-known people such as Ms. Tchen, Ms. Smollett, and Ms. Ifill were not what drove her decision to try to refer the case to the FBI. Rather, according to State's Attorney Foxx, those discussions with them merely highlighted the concerns she already held.

State's Attorney Foxx called Superintendent Johnson about referring the Initial Smollett Case to the FBI on February 1, 2019.<sup>48</sup> According to phone records, the two spoke for three minutes and 12 seconds. Superintendent Johnson told State's Attorney Foxx he would consider her request and would reach out to the FBI or the U.S. Attorney's Office. He told the OSP he did this as a professional courtesy to State's Attorney Foxx, though he had already basically made up

<sup>48</sup> Following these discussions, State's Attorney Foxx separately asked Chief Deputy and Chief Ethics Officer April Perry, who previously worked as a federal prosecutor, to reach out to the federal authorities to encourage them to take over the investigation from the CPD.

his mind that the CPD would likely keep the case because the investigation had progressed fairly far at that point and he thought the CPD was capable of handling the investigation. He told the OSP that he reached out to a contact at the FBI who told him that the federal authorities would not take the case unless the CPD specifically asked them to and Superintendent Johnson said he was not making that ask. He said the FBI contact also told him that the FBI would not take the case unless it involved death or serious injury. As a result, the CPD ended up investigating the case itself—and has been lauded for its investigative efforts by many within the CCSAO, both publicly and in interviews with the OSP.

While State's Attorney Foxx had never asked Superintendent Johnson to refer a case to the FBI previously, there is nothing illegal or improper about a State's Attorney seeking to ensure that a case is investigated and handled effectively. Furthermore, as State's Attorney Foxx explained to the OSP, this case was atypical "because there were two parallel investigations around the same person and issue and incident," therefore, she thought "consolidating that investigation and having one point of contact for both the family and Mr. Smollett might make more sense."

Based on the evidence, State's Attorney Foxx's communications with Superintendent Johnson did not have any influence over how the Initial Smollett Case was investigated, as CPD kept the case, nor how it was ultimately prosecuted or resolved by the CCSAO.

\* \* \*

## **OVERVIEW OF THE OSP'S INVESTIGATION OF THE CPD**

### **Investigative Steps Regarding the Investigation of the CPD**

In conjunction with Judge Toomin's second directive to the OSP, to determine whether any person or office involved in the Initial Smollett Case engaged in wrongdoing, the OSP also investigated allegations that CPD personnel improperly disseminated law enforcement sensitive information concerning the original Smollett investigation to media sources while the investigation was ongoing ("leaks"). During the course of the OSP investigation, the OSP specifically distinguished between statements by authorized CPD representatives pursuant to CPD policy, and anonymous, unauthorized statements made by CPD employees to media sources, in violation of CPD policy.

In the course of its investigation, the OSP learned of allegations that anonymous CPD employees improperly "leaked" investigative information about the Smollett investigation to the media. These allegations were raised to CPD by Mr. Smollett and his representatives, and by State's Attorney Foxx, during CPD's original investigation into the alleged attack on Mr. Smollett. After learning of these allegations, the OSP undertook an investigation to determine whether wrongdoing occurred relating to any alleged CPD "leaks" of law enforcement investigative information concerning the original Smollett investigation. (As detailed below, CPD launched its own Internal Affairs investigation into these "leaks" allegations in February 2019—before the appointment of Dan Webb as special prosecutor on August 23, 2019.)

To identify any alleged "leaks" and determine their source, the OSP interviewed former CPD Superintendent Eddie Johnson, former CPD Chief Communications Officer Anthony Guglielmi, Lt. John Folino, Sgt. Marco Tirado, Det. Michael Theis, Det. Michael Vogenthaler, Sgt. Morad Haleem, Det. Ronald Jasica, Det. Robert Graves, Det. Kimberly Murray, and Officer Mohamed Baig. The OSP also interviewed State's Attorney Foxx concerning alleged "leaks."

Additionally, the OSP reviewed CPD's investigative file concerning the original Smollett investigation, the CPD Internal Affairs investigative file documenting CPD's internal investigation into alleged "leaks," and files provided to the OSP by CPD's Office of Communications.

## **VI. DISCUSSION OF THE OSP'S THREE FINAL CONCLUSIONS AND SUPPORTING FINDINGS RELATING TO THE CONDUCT OF CPD IN THE INITIAL SMOLLETT CASE**

Based on investigative steps described above, the following are the three (3) major final conclusions regarding the OSP's investigation of the CPD:

- (1) The OSP did not develop evidence that would support any criminal charges against any employees of the CPD;
- (2) The majority of CPD communications with media outlets during the Smollett CPD investigation were authorized communications in accordance with CPD's written policies; and
- (3) The OSP did conclude that there were media reports that contained unauthorized "leaks" of police investigative information by CPD personnel that were in violation of CPD's written policies. However, for reasons set forth in this Summary Report, the OSP was unable to identify the anonymous alleged CPD source(s) of such "leaks."

### **A. Criminal Statutes Considered**

The OSP generally considered two criminal charges that could potentially apply to improper public dissemination of law enforcement investigative information: (1) official misconduct, and (2) obstructing justice.<sup>49</sup> The definitions of each of these crimes, including their criminal intent (scienter) requirements, follows:

**Official Misconduct:** A public officer or employee violates Illinois' official misconduct statute when he does any of the following in his official capacity: (a) [i]ntentionally or recklessly fails to perform any mandatory duty as required by law; (b) [k]nowingly performs an act which he knows he is forbidden by law to perform; (c) [w]ith intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or (d) [s]olicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law....

**Obstructing Justice:** A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts: (a) destroys, alters, conceals or disguises physical evidence, plants false evidence or furnishes false information; (b) induces a witness having knowledge material to the subject at issue to leave the State or conceal himself; (c) possesses knowledge material to the subject at issue, leaves the State or conceals himself or herself.

As far as the OSP developing evidence to support any criminal charges against any CPD employee for improperly "leaking" information to a media source, the OSP through its investigation identified a single instance where an Illinois police officer was charged with a felony

<sup>49</sup> Official misconduct (720 ILCS 5/33-3); obstructing justice (720 ILCS 5/31-4).

under either of the above two Illinois criminal statutes, or under any other Illinois criminal statutes, for disseminating law enforcement information to an individual or organization not legally authorized to have access to the information.<sup>50</sup>

Indeed, absent exceptional circumstances, it is questionable if either of the above two Illinois criminal statutes could be applied to a police officer who merely "leaks" law enforcement investigative information to a media source. For example, the official misconduct statute makes it a crime to knowingly perform an act that the person knows is forbidden by law. Illinois does not have a statute specifically criminalizing unlawful dissemination of law enforcement sensitive information to media outlets. Therefore, the official misconduct statute may not apply to a police officer who merely "leaks" investigative information to the media. As far as obstructing justice, the State would need to prove that the information "leaked" was actually false, and disseminated with intent to obstruct the defense of any person. As will be discussed in Section VI.C, the vast majority of "leaked" information to media sources are supported by the evidence contained in police reports.

The OSP again notes that, under the law, a person can only be convicted of a crime if the prosecution proves all the elements of the charged offense beyond a reasonable doubt, including, where applicable, proof of any criminal intent. Further, under applicable ethical standards, the OSP, as a prosecutor, must act in good faith and should never pursue a prosecution for criminal charges that the prosecutor cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.<sup>51</sup> Thus, under these standards, the OSP cannot seek criminal charges against any CPD employee without developing substantial evidence of a crime. Based on these legal and ethical standards, the OSP did not develop evidence to support any criminal charges regarding alleged "leaks" to the media by CPD personnel.

#### **B. CPD Policy Concerning Communications with Media**

Under CPD General Order G09-02, "it is the policy of the Chicago Police Department to cooperate impartially with the news media in providing information on crime and police-related matters while simultaneously conforming to the protections guaranteed to individuals under the US Constitution."<sup>52</sup> Under the same Order, certain authorized individuals are permitted to respond to news media inquiries, provided individuals' Constitutional rights are safeguarded.<sup>53</sup>

<sup>50</sup> In that case, the officer was charged with official misconduct following an FBI investigation into the officer's alleged violation of the Illinois Administration Code section 1240.80(d). See <https://www.riverbender.com/articles/details/granite-city-cop-suspended-with-pay-following-charges-of-official-misconduct-17956.cfm>.

<sup>51</sup> See, e.g., American Bar Association, "Standards for Criminal Justice: Prosecution and Defense Function" § 3-4.3(a) (4th ed., 2017) ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."); National District Attorneys Association, "National Prosecution Standards" § 4-2.2 (3d ed. 2009) ("A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.").

<sup>52</sup> CPD General Order G09-02, Section II.A.

<sup>53</sup> *Id.*

Pursuant to this policy, between January 29, 2019, and June 21, 2019, CPD issued more than 25 official public statements (press releases) regarding the status and progress of the Smollett investigation and the case's disposition. Only authorized CPD spokespersons under the policy are permitted to issue these official public police statements. Additionally, authorized personnel, including former CPD Chief Communications Officer Anthony Guglielmi and former CPD Superintendent Johnson, frequently responded to specific media inquiries, which was also proper under CPD policy. The OSP determined that no wrongdoing was committed in issuing these official public statements because each was made pursuant to published CPD policies by authorized CPD personnel. The OSP also concluded that the official public statements CPD made concerning the Smollett investigation were supported by the evidence CPD collected during its investigation.

### **C. Identifying Alleged "Leaks"**

During its investigation, the OSP relied on three sources of information to identify alleged "leaks" that should be investigated: (1) alleged "leaks" identified by witnesses the OSP interviewed, other than Mr. Smollett; (2) media "leaks" alleged by Mr. Smollett in various forums; and (3) media reports referencing law enforcement investigative information attributed to an anonymous CPD source or other law enforcement source. The OSP focused its research on reports from established media outlets.

#### **1. Alleged "Leaks" Identified by Witnesses the OSP Interviewed**

Several CPD representatives involved in the original Smollett police investigation, in interviews with the OSP, identified police investigative information they believed may have been "leaked" to media sources. In addition, State's Attorney Kim Foxx also told the OSP of certain police investigative information she believed was "leaked" to media sources.

The examples of "leaks" identified by witnesses the OSP interviewed included:

- Media reports that Smollett refused to turn over his cell phone records in response to CPD's request.
- Media reports that Smollett refused to turn over his cell phone in response to CPD's request.
- Media reports that Smollett had a broken rib following the attack.
- Media reports that Smollett asked the responding officers to turn off their body-worn cameras when they arrived at his apartment on January 29.

The OSP analyzed each of these alleged "leaks" and reached several conclusions.



- *Media reports that Mr. Smollett refused to turn over his cell phone records in response to CPD's request.*

Witnesses the OSP interviewed identified reports that Mr. Smollett refused to turn over his cell phone records as possible "leaks." The OSP determined CPD's statements on this topic were authorized, and in fact made in accordance with CPD policy. On January 31, 2019, CPD issued an authorized, official statement that stated:

"Both the victim [Smollett] and the manager made independent statements to detectives that they were on the phone with one another during the alleged attack. CPD has no reason to doubt these claims. Detectives however were not able to independently verify the statements as cell phone records were not provided to investigators when asked. Therefore we are not able to confirm this."<sup>54</sup>

However, the OSP's investigation also identified media reports that stated that Mr. Smollett refused to turn over his cell phone records and attributed the statement to anonymous law enforcement sources ("leaks").<sup>55</sup> Therefore, the OSP concluded that this was an improper CPD "leak" of investigative information. The OSP notes that these media reports were published at around the same time that CPD issued the authorized statement above pursuant to CPD policy.

The OSP also determined that the evidence CPD collected during its investigation supported the January 31, 2019 authorized statement by the CPD.

- *Media reports that Smollett refused to turn over his cell phone in response to CPD's request.*

Similarly, a January 31, 2019 NBC News report notes, in a statement attributed directly to Guglielmi, that "police asked Smollett for his cellphone and records ... [but] he refused to share them."<sup>56</sup> The OSP determined this statement by an authorized representative was made in accordance with CPD policy—and therefore is not an unauthorized "leak."

The OSP's investigation did not identify any media reports that stated that Mr. Smollett refused to turn over his cell phone that attributed the statement to an anonymous law enforcement source ("leak").

The OSP also determined that the evidence CPD collected during its investigation supported this authorized statement.

- *Media reports that Mr. Smollett had a broken rib following the attack.*

<sup>54</sup> Available at: <https://www.thewrap.com/jussie-smollett-manager-phone-records-chicago-pd/>.

<sup>55</sup> Available at: <https://news.yahoo.com/empire-actor-refuses-turn-over-162332337.html>.

<sup>56</sup> Available at: <https://www.nbcnews.com/news/us-news/chicago-police-say-empire-actor-jussie-smollett-refuses-hand-over-n965371>.

There were several media reports shortly after the attack that stated that Mr. Smollett suffered a broken or fractured rib during the January 29 alleged attack. Based on the evidence the OSP developed, Mr. Smollett did not report to the police that he suffered a broken rib during the alleged attack. However, the media reports on this topic did not cite to an anonymous police source. Instead, they cited a TMZ.com report. Specifically, a January 29, 2019 story on TMZ.com attributes information about the attack, including the detail that Mr. Smollett "fractured a rib," not to CPD sources, but to "sources directly connected to [Smollett]."<sup>57</sup> The OSP developed no evidence to suggest that reports that Mr. Smollett had a broken rib came from a CPD source.

- *Media reports that Mr. Smollett asked the responding officers to turn off their body-worn cameras when they arrived at his apartment on January 29.*

On January 29, 2019, a CWBChicago article reported that Mr. Smollett "asked Chicago police officers to turn off their body cameras after they arrived to take his report." This media outlet attributed the information to "a CPD source."<sup>58</sup> Therefore, the OSP concluded that this was an improper CPD "leak" of investigative information.

It should be noted that the specific detail that Mr. Smollett requested that responding officers turn off their body-worn cameras was included in the responding officer's Original Incident Report. Under routine procedure when an investigation opens, this document was distributed widely among several divisions within CPD, and would have been viewable by hundreds of CPD personnel.<sup>59</sup>

The OSP also determined that the evidence CPD collected during its investigation supported this report.

## **2. Alleged False Media Reports Identified by Mr. Smollett During the CPD Investigation**

During the original CPD investigation, in connection with the Initial Smollett Case, Mr. Smollett alleged in a variety of forums that media reports contained false information related to the CPD's investigation of the Smollett case. Therefore, the OSP investigated the allegedly false media reports Mr. Smollett identified in: (1) interviews with CPD officers; (2) public statements to media outlets; and (3) a February 2, 2019 concert in which Mr. Smollett performed. In these various forums, Mr. Smollett did not always specifically allege that CPD "leaked" false information, but generally appeared to allege that, because the media reports related to CPD's investigation, the allegedly false reports may have come from CPD. For purposes of its

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<sup>57</sup> Available at: <https://www.t TMZ.com/2019/01/29/empire-star-jussie-smollett-attacked-hospitalized-homophobic-hate-crime/>.

<sup>58</sup> Available at: <https://cwbchicago.com/2019/01/update-tv-star-told-cops-to-turn-off.html>.

<sup>59</sup> CPD released a redacted version of the Original Case Incident Report to the public on February 4, 2019. See <https://abcnews.go.com/Entertainment/newly-revealed-report-offers-chilling-details-alleged-jussie/story?id=60842410>.

investigation, the OSP assumed that Mr. Smollett alleged that each of the false media reports described below were attributed to CPD "leaks."

○ *Media reports that Mr. Smollett had a broken rib following the attack.*

According to police reports, Det. Kimberly Murray interviewed Mr. Smollett on January 29, 2019. During this interview, Mr. Smollett told Det. Murray that a detail about the attack that was reported in the media was incorrect. Specifically, Mr. Smollett told Det. Murray that he did not have a broken rib as was reported in the news, but rather that he was merely sore in the rib area.

As stated above, a January 29, 2019 story on TMZ.com picked up by other media outlets attributes information about the attack, including the detail that Mr. Smollett "fractured a rib," not to CPD sources, but to "sources directly connected to [Smollett]."<sup>60</sup> The OSP developed no evidence to suggest that reports that Mr. Smollett had a broken rib came from a CPD source.

○ *Media reports regarding Mr. Smollett's phone call during the attack.*

According to police reports, Mr. Smollett spoke to Det. Kimberly Murray on January 30, 2019, and identified allegedly false news reports that he was not on the phone during the alleged assault and/or false reports concerning whom Mr. Smollett was speaking to on the phone during the alleged assault.

The OSP searched articles from established media outlets to determine if there were any false reports regarding these allegations that were attributed to anonymous CPD sources ("leaks"). The OSP was unable to identify any such reports. As a result, the OSP concluded there were no CPD "leaks" on this particular issue.

However, CPD did issue an authorized official statement on January 31, 2019, that stated:

"Both the victim and the manager made independent statements to detectives that they were on the phone with one another during the alleged attack. CPD has no reason to doubt these claims. Detectives however were not able to independently verify the statements as cell phone records were not provided to investigators when asked. Therefore we are not able to confirm this."<sup>61</sup>

The OSP determined that no wrongdoing was committed in issuing this authorized official public statement. The OSP also determined that the evidence CPD collected during its investigation supported this statement.

<sup>60</sup> Available at: <https://www.tniz.com/2019/01/29/empire-star-jussie-smollett-attacked-hospitalized-homophobic-hate-crime/>.

<sup>61</sup> Available at: <https://www.thewrap.com/jussie-smollett-manager-phone-records-chicago-pd/>.

○ *Reports that the noose was on Mr. Smollett's neck at Northwestern Hospital.*

According to police reports, Mr. Smollett spoke to Det. Kimberly Murray on January 30, 2019, and identified allegedly false news reports that the noose used in the attack was still on Mr. Smollett's neck when he went to the hospital.

The OSP searched articles from established media outlets to determine if there were any false reports regarding these allegations that were attributed to anonymous CPD sources ("leaks"). The OSP was unable to identify any such reports. As a result, the OSP concluded there were no CPD "leaks" on this particular issue.

○ *Reports that Mr. Smollett was hospitalized for his injuries.*

During a February 2, 2019, concert in Los Angeles in which Mr. Smollett was performing, Mr. Smollett took time to advise the audience of allegedly false media reports, telling the audience, "Just because there's been a lot of stuff said about me that's absolutely not true ... there's just a couple of points I want to make really quick ... I went to the doctor immediately. Frank Gatson drove me, I was not hospitalized...."<sup>62</sup>

The OSP developed no evidence that CPD was the source of any allegedly false media reports on these topics.<sup>63</sup> It should be noted that on January 29, 2019, CPD issued an authorized official statement that included the detail that Mr. Smollett "self-transported to Northwestern Hospital and is in good condition."<sup>64</sup> The OSP determined that the evidence CPD collected during its investigation supported this report. Specifically, CPD collected evidence that Mr. Smollett received treatment for his injuries at Northwestern Hospital.

○ *Reports that Mr. Smollett did not fight back against his attackers.*

During the February 2, 2019, concert in Los Angeles in which Mr. Smollett was performing, Mr. Smollett told the audience, "Just because there's been a lot of stuff said about me that's absolutely not true ... there's just a couple of points I want to make really quick ... And above all, I fought the fuck back."<sup>65</sup>

Mr. Smollett appeared to suggest that there were false media reports that stated during the alleged attack that he did not fight back. The OSP searched stories from established media outlets

<sup>62</sup> Available at: <https://variety.com/2019/music/news/jussie-smollett-concert-troubadour-remarks-attack-1203127025/>.

<sup>63</sup> The OSP also notes that the statement that Mr. Smollett "self-transported to Northwestern Hospital" could arguably be interpreted as misleading, because Mr. Smollett's creative director allegedly drove him to the hospital. However, the evidence CPD collected supports that Mr. Smollett turned down CPD's offer to arrange to have an ambulance transport him to the hospital, instead opting to use his own transportation.

<sup>64</sup> Available at: [https://twitter.com/Phil\\_Lewis\\_/status/1090282533516906496/photo/1](https://twitter.com/Phil_Lewis_/status/1090282533516906496/photo/1).

<sup>65</sup> *Id.*

to determine if there were any false reports regarding these allegations that were attributed to anonymous CPD sources ("leaks"). The OSP was unable to identify any such reports. As a result, the OSP concluded there were no CPD "leaks" on this particular issue.

- *Reports that Mr. Smollett told police that his attackers wore Make America Great Again hats.*

During his February 14, 2019, interview on *Good Morning America*, Mr. Smollett suggested that there were false media reports that he told police that his attackers were wearing Make America Great Again hats.<sup>66</sup>

The OSP searched stories from established media outlets to determine if there were any false reports regarding these allegations that were attributed to anonymous CPD sources. The OSP was unable to identify any such reports. As a result, the OSP concluded there were no CPD "leaks" on this particular issue.

- *Reports that Mr. Smollett was attacked after "a date gone bad."*

During his February 14, 2019, interview on *Good Morning America*, Mr. Smollett suggested that there were false media reports that he was attacked after "a date gone bad."

The OSP searched stories from established media outlets to determine if there were any false reports regarding these allegations that were attributed to anonymous CPD sources ("leaks"). The OSP was unable to identify any such reports. As a result, the OSP concluded there were no CPD "leaks" on this particular issue.

### 3. Media Reports Referencing Law Enforcement Investigative Information Attributed to an Anonymous Law Enforcement Source

As noted above, the OSP determined that the best way to identify improper media "leaks" by CPD personnel regarding the Smollett investigation was to review media reports covering the investigation from the date of the alleged attack until the date of Mr. Smollett's arrest, and to identify those media reports that contained law enforcement investigative information attributed to anonymous CPD or other law enforcement sources.<sup>67</sup> The OSP focused its research on reports from established media outlets.

The OSP's investigative search identified a relatively small number of such media reports from established media outlets. The most frequent media reports that satisfied these criteria were reported by the media outlet CWBChicago.<sup>68</sup> It should be noted that most media reports the OSP

<sup>66</sup> Available at: <https://www.youtube.com/watch?v=pXLx5OY21Bk>. During this interview, Mr. Smollett cited "inaccurate false statements [that] had already been put out there" as a reason he declined to give CPD his phone during the investigation.

<sup>67</sup> For purposes of its investigation, the OSP assumed that media reports truthfully and accurately described their sources.

<sup>68</sup> CWBChicago is a website that focuses on reporting matters related to Chicago law enforcement.

identified using this search methodology did not clearly identify CPD as the anonymous source of the information.

Examples of media reports the OSP identified that included false and/or law enforcement investigative information attributed either to anonymous CPD sources, or sources familiar with the investigation, are described below. It should be noted that this list is not meant to be exhaustive. Rather, the OSP gathered sufficient examples to support the OSP's conclusion that unidentified sources connected with CPD did leak investigative information anonymously to media outlets regarding the Smollett investigation. Here are some examples identified in the OSP's investigation:

- On January 29, 2019, CWBChicago attributed a report to "a source familiar with the investigation" that the rope that was placed around Mr. Smollett's neck was "thin clothesline, straight out of the package."<sup>69</sup> As previously discussed, the same CWBChicago article reported that Mr. Smollett "asked Chicago police officers to turn off their body cameras after they arrived to take his report," attributing the information to "a CPD source."<sup>70</sup> The OSP determined that the evidence CPD collected during its investigation supported these reports.
- On January 30, 2019, a Fox 32 Chicago reporter reported on Twitter, "My sources in Chicago PD are telling me this is looking more and more like a hoax."<sup>71</sup> The reporter eventually deleted the report, and subsequently tweeted, "To be clear. I am not accusing [Mr. Smollett] of lying. I'm saying [CPD and the FBI] have been working round the clock & have found nothing to support it. And given the extremity of his claims and where they allegedly took place it has them skeptical."<sup>72</sup> The OSP determined that the evidence CPD collected during its investigation supported these reports.
- On February 4, 2019, CWBChicago cited a "source close to the investigation" for a report that "the purported threat letter against Smollett that was received days before the alleged attack was mailed from Chicago's southwest suburbs." The OSP determined that the evidence CPD collected during its investigation supported this statement.

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<sup>69</sup> Available at: <https://cwbchicago.com/2019/01/update-tv-star-told-cops-to-turn-off.html>. The OSP notes that this report is similar to an authorized statement Guglielmi gave to the *Chicago Sun-Times* on January 29 in which he described the rope as a "thin, light rope" that "didn't necessarily resemble a noose." See <https://chicago.suntimes.com/platform/amp/2019/1/29/18395230/empire-star-victim-of-racist-homophobic-attack-in-streetsville-police-say>.

<sup>70</sup> Available at: <https://cwbchicago.com/2019/01/update-tv-star-told-cops-to-turn-off.html>.

<sup>71</sup> Available at: <https://thefederalistpapers.org/opinion/chicago-police-say-jussie-smollett-attack-looking-like-hoax>.

<sup>72</sup> Available at: <https://twitter.com/raferweigel/status/1090698639163437056?lang=en>.



- The same article cited “a second source who is familiar with the investigation” for a report that an image of two persons of interest released by CPD actually depicted “two bums.” The source purportedly also said, “Downtown demanded that we put out something, so we issued the photos ... They weren’t happy.”<sup>73</sup> The OSP determined that this report was false.
- On February 14, 2019, a local Chicago ABC7 affiliate reported, “police are investigating whether Smollett and [two suspects] staged the attack allegedly because Smollett was being written off of *Empire*.”<sup>74</sup> This detail was attributed to “multiple sources” but the story noted that the report was unconfirmed by case detectives. The OSP determined that this media report was likely not true based on the evidence CPD collected during its investigation.
- A February 14, 2019, story published by CWBChicago referenced a tip the news outlet received “over a week ago.” The article includes what purports to be a screenshot of a series of text messages from the tipster, stating:

“They’ve identified the two. Black friends of his (facial recognition) who are from Wrigleyville and took Lyft to the scene. Clothesline from Ace Hardware. Mayor wants to release info now, cpd wants two friends to confess first after they have tower dump ... The friends ‘attacked’ JS as planned and then went back to Wrigleyville ... They are the two on video.”<sup>75</sup> (sic).

The same CWBChicago article also notes that the outlet contacted Guglielmi to respond to the tip. Guglielmi stated, “Can’t confirm anything. We have active interviews underway.”

The OSP determined that the CWBChicago report included partially false information. The evidence CPD collected supports reports that two suspects had been identified, were black, and had a prior relationship with Mr. Smollett. The evidence CPD collected did not support reports that Abimbola and Olabinjo Osundairo purchased rope at Ace Hardware or that the suspects were from Wrigleyville.

- On February 14, 2019, the *Chicago Tribune* cited “law enforcement sources” for a report that detectives were questioning two people of interest, including a man who has an acting role on the show *Empire*. The same *Chicago Tribune* article stated that “a law enforcement source” said the two men were brothers in their twenties,

<sup>73</sup> Available at: <https://cwbchicago.com/2019/02/smollett-case-update-threat-letter-was.html>.

<sup>74</sup> Available at: <https://abc7chicago.com/jussie-smollett-attacked-news-chicago/5138497/>.

<sup>75</sup> Available at: <https://cwbchicago.com/2019/02/smollett-two-others-in-active.html>.

and were brought in for questioning from O'Hare International Airport.<sup>76</sup> The OSP determined that the evidence CPD collected during its investigation supported these reports.

- On February 15, 2019, the *Chicago Sun-Times* reported that CPD detectives "allegedly traced the location of the men arrested through ride-hailing and taxi records from the area where Smollett said the attack happened."<sup>77</sup> The article cited "a law enforcement source" for that information. The OSP determined that the evidence CPD collected during its investigation supported these reports.
- On February 15, 2019, a CBS Chicago article cited "two sources with intimate knowledge of the investigation" for a report that "the attack on Smollett was potentially orchestrated by the actor himself, and involved two other men."<sup>78</sup> The OSP determined that the evidence CPD collected during its investigation supported this report.
- On February 16, 2019, CNN reported that "two law enforcement sources with knowledge of the investigation" told the outlet, "Chicago Police believe Jussie Smollett paid two men to orchestrate the assault." The OSP determined that the evidence CPD collected during its investigation supported this report.
- The same CNN report goes on to state that "the sources told CNN that there are records that show the two [suspects] purchased the rope found around Smollett's neck at an Ace Hardware store in Chicago."<sup>79</sup> The OSP determined that this report included partially false information. The evidence CPD collected did not support reports that Abimbola and Olabinjo Osundairo purchased rope at Ace Hardware.
- Citing "two sources with first-hand knowledge of the investigation" on February 19, 2019, CBS Chicago reported that "the two brothers involved in the Jussie Smollett attack told police that Smollett was behind creating a racist letter that was sent to the actor on the set of his show." The OSP determined that this report did not accurately reflect Abimbola and Olabinjo Osundairo's statements to CPD.<sup>80</sup>

#### **D. OSP Unable to Identify the CPD Sources of Media "Leaks"**

<sup>76</sup> Available at: <https://www.chicagotribune.com/news/breaking/ct-met-jussie-smollett-persons-of-interest-20190214-story.html>.

<sup>77</sup> Available at: <https://chicago.suntimes.com/2019/2/15/18377755/man-arrested-in-smollett-attack-convicted-in-2011-stabbing-filed-for-bankruptcy>.

<sup>78</sup> Available at: <https://chicago.cbslocal.com/2019/02/15/suspects-arrested-in-jussie-smollett-case/>.

<sup>79</sup> Available at: <https://www.fox61.com/article/news/local/outreach/awareness-months/police-sources-new-evidence-suggests-jussie-smollett-orchestrated-attack/520-8d76ee1b-eeda-46bc-9b00-467cbb8b86c6>.

<sup>80</sup> Available at: <https://chicago.cbslocal.com/2019/02/19/jessie-smollett-letter-brothers-attack/>.

Based on the examples above, there is sufficient evidence to conclude that one or more anonymous CPD sources "leaked" investigative information to the media about the Smollett investigation without authorization, in violation of CPD policy. However, after a thorough investigation, the OSP was unable to identify the source or sources of these media "leaks."

Several factors rendered the OSP's task in determining the source of anonymous CPD "leaks" particularly difficult.

*First*, to conclusively determine the identity of the source of a "leak" to develop evidence that could be used to prove potential charges beyond a reasonable doubt, the OSP would almost certainly have to prove the identity of the police source by obtaining sworn testimony from news reporters who wrote the articles where the "leaked" information was published. However, reporters are protected from disclosing their sources under the Illinois Reporter's Privilege Statute (discussed in Section VI.F.).

*Second*, some of the "leaks" the OSP identified were included in CPD reports, widely disseminated across CPD divisions under standard CPD procedure, including the Original Incident Report, that hundreds of CPD personnel had access to.

*Third*, many of the "leaks" the OSP identified were not necessarily attributed to CPD sources, but to "law enforcement sources," which could encompass sources from other law enforcement offices, such as the CCSAO or the FBI.

*Fourth*, more than 20 CPD personnel assisted with the Smollett investigation and had access to the confidential investigative files.

*Fifth*, information about the investigation was necessarily shared with individuals and organizations beyond the core investigative team, including State's Attorney Foxx and other members of the CCSAO, the FBI, U.S. Customs and Border Patrol, Mr. Smollett and his representatives, and various witnesses connected to the investigation. As a CPD witness explained to the OSP, as "the circle expanded," so too did the opportunity for "leaks" and misinformation.

*Finally*, nearly every CPD witness interviewed by the OSP cited the difficulty in containing the spread of information, both internally and externally, in what was one of the most high-profile investigations in the history of the Department. For example, Guglielmi told the OSP that the Smollett investigation received global media attention and prompted more media inquiries than any other case in his career with CPD. Superintendent Johnson acknowledged to the OSP that with a department of more than 13,000 employees, controlling information about a very high-profile investigation was nearly impossible.

#### **E. The OSP's Investigation of CPD's Response to Alleged "Leaks"**

Pursuant to Judge Toomin's all-encompassing directive to determine whether any office engaged in wrongdoing, the OSP also investigated whether CPD took proper steps *in response* to the allegations of "leaks" of law enforcement investigative information concerning the Smollett investigation to the media. The OSP developed evidence that showed CPD took several responsible and substantive actions in response to alleged "leaks" and attempted to identify the

sources of any potential "leaks." Therefore, the OSP determined that no wrongdoing was committed by CPD, or any CPD employee, in the Department's response to "leaks" of law enforcement sensitive information about the Smollett investigation.

The OSP interviewed CPD witnesses to determine if they believed CPD leadership and Smollett case detectives seriously addressed the issue of "leaks." Superintendent Johnson and Guglielmi identified several steps CPD took in response to information "leaking" to media sources via anonymous sources. Superintendent Johnson met frequently with his staff to discuss anonymous "leaks." Very early in the investigation, CPD limited access to the electronic investigation files to a select group of individuals on the investigation team. Superintendent Johnson explained that CPD only takes these measures in highly sensitive investigations.

While the investigation was ongoing, Superintendent Johnson also spoke directly with some media outlets and cautioned them to rely on official Department statements rather than anonymous sources. For example, on February 14, 2019, a local Chicago ABC affiliate reported, "police are investigating whether Smollett and [two suspects] staged the attack allegedly because Smollett was being written off of *Empire*."<sup>81</sup> This detail was attributed to "multiple sources" but unconfirmed by case detectives. In response, Superintendent Johnson contacted ABC and informed them on the record that the report was not correct and that reporters should only rely on official CPD sources.

Additionally, in mid-February 2019, CPD initiated an internal investigation into allegations that law enforcement investigative information was being reported in media sources as coming from anonymous police sources. Superintendent Johnson told the OSP he ordered the internal investigation and informed CPD personnel that he would terminate any personnel who were identified as unauthorized sources of information in reports about the Smollett investigation.

Specifically, on February 14, 2019, Sgt. Morad Haleem of the Area Central Detective Division, initiated the internal investigation related to unlawfully disseminating law enforcement sensitive information pertaining to the Smollett investigation. Sgt. Haleem drafted an "initiation report," a standard document that is filed when a supervisor learns of allegations of misconduct. According to the initiation report:

"Various media outlets are reporting facts of [the Smollett] investigation that is not public nor accessible to the public. Sensitive information regarding this high profile investigation is possibly being disseminated by Chicago Police Department personnel not assigned or have any involvement to this investigation. At the request of Area Central Commander Edward Wodnicki<sup>82</sup> ... an investigation is requested to clear allegation or discipline Chicago Police Department personnel for unlawfully disseminating law enforcement sensitive information."

<sup>81</sup> Available at: <https://abc7chicago.com/jussie-smollett-attacked-news-chicago/5138497/>.

<sup>82</sup> Superintendent Johnson explained that his order probably would have been issued to Commander Wodnicki, and that Wodnicki likely assigned the task of initiating the report to his subordinates.

On February 17, 2019, Sgt. Ronald Blas of the Area Central Detective Division filed an "addendum" to the initiation report. The addendum explained further that various media outlets were reporting information "verbatim" from electronically recorded witness interviews, referred to internally at CPD as "ERI."<sup>83</sup> The addendum stated:

"Area Central Detectives are working a high profile investigation. R/Sgt has noticed/learned thru various media outlets who are reporting facts of this investigation verbatim from ERI (Electronic Recording Interview) that is not public nor accessible to the public. Sensitive information regarding this high profile investigation is possibly being disseminated. R/Sgt along with Commander Edward Wodnicki ... conducted a 'Audit Trail Report' on the above ERI videos which showed only personnel assigned to this investigation viewed these videos. A **\*\*CONFIDENTIAL INVESTIGATION\*\*** is requested to clear allegation or discipline Chicago Police Department personnel for unlawfully disseminating law enforcement sensitive information."

Following a standard intake process, on or around February 26, 2019, the investigation was formally assigned to Sgt. Marco A. Tirado, Special Investigations Section, Investigations Division, Bureau of Internal Affairs.<sup>84</sup>

On March 13, 2019, Sgt. Tirado submitted an email search request form to CPD's Information Services Division. Sgt. Tirado requested all CPD emails from January 29, 2019, to March 13, 2019, that hit on various search terms related to the Smollett investigation. Sgt. Tirado sought to identify emails suggesting non-public information had been disseminated—such as emails directly to media outlets or referencing contacts with members of the media. Once he eventually gained access to the requested emails, he conducted targeted reviews of emails of CPD personnel involved in the Smollett investigation. Sgt. Tirado's review of the emails did not reveal the source(s) of any unauthorized "leaks" of law enforcement investigative information to media services or the public.

On February 27, 2020, Sgt. Tirado submitted a Bureau of Technical Services ("B.T.S.") Action Request form, requesting that the Information Services Division provide an "audit trail report" on electronically recorded interviews related to the Smollett investigation. In his request, Sgt. Tirado sought to determine who had accessed particular video files between January 29, 2019, and February 17, 2019.

On March 10, 2020, Information Services provided Sgt. Tirado the requested audit trail report. Sgt. Tirado determined that more than a dozen CPD personnel had accessed particular video files during the relevant time period, and other individuals accessed the files after the relevant period. Following investigation, Sgt. Tirado determined that only one individual viewed

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<sup>83</sup> CPD conducted video recorded interviews of two witnesses, Abimbola and Olabinjo Osundairo, on February 15, 2019, with their counsel present.

<sup>84</sup> Sgt. Tirado is in his 22nd year with CPD, and has been with the Bureau of Internal Affairs for the past seven years. Prior to joining CPD, Tirado earned his undergraduate and law degrees from the University of Illinois at Champaign-Urbana.

the video files who was not authorized to do so. Specifically, on January 31, 2019, Lt. John Folino accessed the body-worn camera footage of one of the responding officers who met and spoke with Mr. Smollett on January 29, 2019. Sgt. Tirado stressed to the OSP that he had no evidence that Lt. Folino disseminated any information—only that he accessed the body-worn camera footage and did not have authorization to do so. In sum, following a thorough investigation, CPD, like the OSP, was not able to identify the source of any unauthorized law enforcement information disseminated to the media about the Smollett investigation.

**F. The OSP's Discussions Regarding the Individual Who Accessed Investigation Materials Without Authorization**

The OSP independently interviewed Lt. Folino regarding allegations that he accessed Smollett investigation materials without authorization and therefore could possibly be a source of unlawfully disseminated law-enforcement investigative information. Lt. Folino appeared voluntarily and cooperated fully with the OSP's investigation. Lt. Folino candidly admitted that on January 31, 2019, he accessed the Smollett incident report and viewed one body-worn camera video from the morning of the incident, and that he was not authorized to do so. However, he denied that he "leaked" any information to media sources, and further denied ever speaking to media sources about the Smollett investigation.

Lt. Folino explained that in addition to his CPD position, he is Director of Security for the Productions Division of a private security company that provided security on the set of the television show *Empire*. Lt. Folino helped coordinate Mr. Smollett's personal security detail on behalf of Fox following the alleged attack on Mr. Smollett. Lt. Folino explained that he accessed the files out of curiosity because of his familiarity with Mr. Smollett and *Empire*, and he thought he might be able to assist with the investigation. Lt. Folino affirmed that after reading the incident report and viewing one body-worn camera video, he had no further involvement in CPD's investigation and did not communicate with the detectives conducting the investigation. It should be noted that several of the examples of "leaks" that the OSP investigated appeared in news reports on January 29 and January 30—before Lt. Folino accessed the electronic files. The OSP did not develop evidence suggesting that Lt. Folino disseminated any information to the media.

**G. Reporters Are Protected from Disclosing Their Sources Under Illinois Law**

As referenced above, the OSP did not pursue the identity of anonymous sources directly from reporters as part of its investigation. Under Illinois law, reporters must disclose their sources only in limited circumstances. Pursuant to the Illinois Reporter's Privilege Statute, reporters have a qualified privilege that protects the anonymity of their sources, whether confidential or non-confidential.<sup>85</sup> The statute provides that a court cannot order disclosure of the source of any information obtained by a reporter, except upon finding that "all other available sources of information have been exhausted" and "disclosure of the information sought is essential to the protection of the public interest involved."<sup>86</sup> A reporter may be divested of the privilege only by

<sup>85</sup> See 735 ILCS 5/8-901.

<sup>86</sup> See 735 ILCS 5/8-901 - 909; *Illinois Reporter's Privilege Compendium*, Reporters Committee for Freedom of the Press, available at: <https://www.rcfp.org/privilege->



the successful completion of a multistep process outlined in the Act.<sup>87</sup> A party seeking to overcome the privilege must identify the specific information sought, its relevancy to the proceedings, "and that a specific public interest would be adversely affected if the factual information sought were not disclosed."<sup>88</sup>

First, the OSP determined that the privilege squarely applies. Illinois law recognizes a qualified privilege of confidentiality for any source of information obtained by a reporter, including the anonymous CPD sources that were the subject of the OSP's investigation.

Next, the OSP recognized and appreciated the "paramount public interest in maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment."<sup>89</sup>

Nevertheless, a reporter's privilege is not absolute. In certain cases, the public's interest in disclosure may outweigh the principles underlying the statute. For example, in *People v. Pawlaczyk*, 189 Ill. 2d 177 (2000), the Illinois Supreme Court ordered reporters to identify their sources to a grand jury on the grounds that disclosure was "essential to the public interest involved." There, the reporters' testimony was relevant to a fact of consequence in perjury proceedings. The Court held that the grand jury proceedings implicated a compelling public interest that outweighed the public's interest in upholding the privilege.

Here, however, the OSP determined that the public's interest in learning the specific identity of anonymous sources does not outweigh the public's interest in safeguarding the First Amendment. Anonymous dissemination of law enforcement investigative information regarding the Smollett investigation violated CPD policy, but did not constitute a crime under these circumstances, such that divesting the privilege would be justified. By way of hypothetical example, if the OSP determined that a media report contained *intentionally false information* attributed to anonymous CPD sources, the OSP may have sought to compel the reporter to reveal her source. However, none of the reports attributed to anonymous CPD sources that the OSP developed justified seeking to divest the reporter's privilege. Under these circumstances, the OSP determined that the "news media's first amendment right to freely gather and disseminate information"<sup>90</sup> plainly outweighed the OSP and public's need for the identity of sources.<sup>91</sup> Thus,

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[compendium/illinois/#:~:text=The%20Illinois%20Reporter's%20Privilege%20Statute,either%20that%20%E2%80%9Cdisclosure%20of%20the.](#)

<sup>87</sup> See 735 ILCS 5/8-903 - 907.

<sup>88</sup> See *People v. Pawlaczyk*, 189 Ill. 2d 177, 188 (2000).

<sup>89</sup> See *People ex rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039, 1043, (1st Dist. 1980), *rev'd on other grounds*, 87 Ill. 2d 167 (1981) (citations omitted).

<sup>90</sup> See *In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act*, 104 Ill. 2d 419, 428-29 (1984).

<sup>91</sup> See, e.g., *People v. McKee*, 2014 IL App (3d) 130696 (identity of reporter's source not relevant to fact of consequence in homicide allegations, and thus divestiture of privilege was not warranted).

the OSP declined to attempt to divest the privilege by pursuing the identity of anonymous sources directly from reporters.

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## **CONCLUSION**

The OSP has worked diligently to complete its investigation into Judge Toomin's Second Directive in a short amount of time as possible. However, as often happens with investigations, there were delays in the production of documents that did slow down the ability of the OSP to conduct witness interviews. However, eventually, the OSP was able to obtain all relevant documents and was able to successfully interview all relevant witnesses in connection with Judge Toomin's Second Directive. In addition, it should be noted that because of the COVID-19 pandemic, there were logistical issues in scheduling some witness interviews through no fault of anyone. However, these events did occur, and they did delay the OSP's ability to complete the investigative work that was required as part of the Second Directive.

It is important to note that all potential witnesses who had any relevant information about the issues being investigated by the OSP regarding the CCSAO and the CPD agreed to cooperate with the OSP and be interviewed in detail about all relevant information. No witness took the Fifth Amendment or refused to provide information.

Mr. Webb wants to thank Patrick Blanchard, Independent Inspector General for Cook County, and his team for serving as an investigative resource to help the OSP carry out Judge Toomin's Second Directive. Mr. Webb also commends Winston & Strawn LLP for allowing the OSP to conduct its robust investigation on a *pro bono* basis, as a service to the public for no compensation. Mr. Webb also thanks the lawyers at Winston who dedicated significant time, and an enormous effort, to this investigation: Michael Claus, Matthew Durkin, DaWanna McCray, Sam Mendenhall, Shannon Murphy, and Sean Wieber.