

Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

)	
)	Master Docket Case No. 19-cv-01717
In re: WATTS COORDINATED)	
PRETRIAL PROCEEDINGS)	Judge Franklin U. Valderrama
)	
)	Magistrate Judge Sheila M. Finnegan
)	

THIS DOCUMENT RELATES TO ALL CASES

**DEFENDANT OFFICERS' RESPONSE TO THE COOK COUNTY STATE'S
ATTORNEY'S OFFICE'S MOTION TO QUASH THE SUBPOENA FOR
DEPOSITIONS OF ERIC SUSSMAN, JOSEPH MAGATS, MARK ROTERT, AND
NANCY ADDUCI**

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DEPOSITIONS OF ERIC SUSSMAN, JOSEPH MAGATS, MARK ROTERT, AND
NANCY ADDUCI**

Defendant Officers, by and through their attorneys, submit this Response to the Cook County State's Attorney's Office's Motion to Quash the Subpoena for Depositions of Eric Sussman, Joseph Magats, Mark Rotert, and Nancy Adduci.

INTRODUCTION

The Cook County State’s Attorney’s Office (“CCSAO”) is trying to conceal its poorly thought-out decisions to vacate convictions and not object to petitions for certificates of innocence (“COI”) under the guise of various privileges. Although publicly holding itself out as a champion of transparency and acknowledging that “[r]eleasing the same information we use *to make decisions* . . . is at the heart of [] transparency,”¹ the CCSAO seeks to prevent disclosure of the facts and questionable decision-making that led to these lawsuits. The CCSAO’s attempt to prevent sworn testimony about its Watts-related investigation is entirely diminished by the public statements, including press conferences with Plaintiffs and their counsel, regarding these cases.

¹ Message from State's Attorney Kim Foxx, *A Commitment to Transparency*, www.cookcountystatesattorney.org/about/commitment-transparency (last visited Aug. 10, 2023).

The CCSAO's assertion of the apex doctrine is baseless because each witness possesses non-privileged (or waived) information that is unavailable from other sources, three of them no longer work at the CCSAO, and the one still employed is not at the apex of the office. The CCSAO's deliberative-process privilege claim to prevent the depositions on any of the identified topics should also be overruled. First, the Defendant Officers identified numerous factual topics that do not implicate deliberative-process. Second, for topics that may be covered by deliberative-process, the CCSAO waived the privilege by its public statements. Third, if this Court does not find waiver, the Defendant Officers have a particularized need for these depositions as the testimony directly relates to the favorable termination element of Plaintiffs' state law malicious prosecution claims. In a group of over 180 lawsuits in which Plaintiffs allege they were framed, wrongfully convicted, and will be asking juries for damages of millions and millions of dollars, the Defendant Officers should be afforded the opportunity to discover why the CCSAO moved to vacate cases, what it relied upon in reaching its decisions, and whether it concluded Plaintiffs were factually innocent. Finally, the CCSAO's invocation of the mental process privilege and work-product doctrine are misplaced and unsupported by the case law.

BACKGROUND

These cases stem from the CCSAO's decisions to vacate criminal convictions and take no position on petitions for certificates of innocence ("COI"). Mr. Sussman was the first assistant State's Attorney from November 2016 through May 2018, but has since left the CCSAO. Mr. Sussman appears to be the ultimate decision-maker of the CCSAO's decision to vacate of number of Plaintiffs' convictions. (Email from Adduci to Sussman, PL Joint 35724, Nov. 14, 2017, attached hereto as Exhibit 1.) Mr. Magats was a deputy supervisor of the criminal prosecutions bureau, then head of the criminal prosecutions bureau, then first assistant State's Attorney before

his retirement in November 2020. Mr. Magats was involved in the review of some of the convictions vacated prior to November 2017 (Email from Valentini to Kirk, PL Joint 35646, Mar. 21, 2016, attached hereto as Exhibit 2), and drafted correspondence to the Chicago Police Department regarding some of the Defendant Officers (the “Magats Letters”). (Correspondence from Magats to Valente, PL Joint 35716 and 50736, attached hereto as Exhibit 3.) Mr. Rotert was the director of the Conviction Integrity Unit (“CIU”) from May 2017 until May 2019. Mr. Rotert assisted in the Watts investigation during this time. (Ex. 1.) Finally, Ms. Adduci is a current Assistant State’s Attorney (“ASA”). ASA Adduci led the investigation into the Watts-related cases during the time Mr. Rotert was the director of the CIU. Thereafter, she was appointed director of the CIU where she has continued to investigate the Watts-related cases.

I. THE CCSAO’S INVESTIGATION

Plaintiff Baker’s conviction stemming from his March 2005 arrest was the first Watts-related case vacated. The ASA assigned to the investigation recommended not to vacate the case. (Memorandum of ASA Stack, at 13-14, Dec. 22, 2015, attached hereto as Exhibit 4.) That ASA analyzed the case under the framework of “whether new evidence exists, especially in light of Watts’ conviction, to support the defense that [certain Defendant Officers] framed Baker at the behest of Watts.” (*Id.* at 13.) The ASA concluded that “no new evidence arising from investigations or elsewhere that the officers who made this arrest are corrupt or that they falsely arrested Baker and framed him.” (*Id.*) The ASA reviewed the exhibits attached to Baker’s filings and noted that the “exhibits fail to implicate or incriminate [Officers] Nichols, Leano, Gonzalez, or [Bolton] or incriminate them as partners in Watts’ corruption.” (*Id.*) Mr. Magats was one of the supervisors who received this recommendation in January 2016. (Email from Valentini to Magats, PL Joint 35645, Jan. 7, 2016, attached hereto as Exhibit 5.) Despite the recommendation, the CCSAO

vacated Mr. Baker's conviction for his March 2005 arrest. (Ex. 2, PL Joint 35646) Two months later, Mr. Magats received information regarding Plaintiff Baker and Glenn's December 2005 arrest. Four days after receiving information about the case, the CCSAO decided not to object to Baker and Glenn's request to have their convictions vacated. (Email from Valentini to Stack, PL Joint 35710, Mar. 21, 2016, attached hereto as Exhibit 6.) Approximately seven years later, State's Attorney Foxx spoke about Baker and Glenn's case when announcing she would not be seeking reelection, stating:

Stand up Clarrissa....Clarissa Glenn lived in the Ida B. Wells public housing projects and was the victim of a corrupt police sergeant, Ronald Watts. Clarrissa Glenn was given a case in which she knew she was innocent and was convicted, and not only her, but her husband. Clarissa Glenn is like me, she's a mother, and the impact that the wrongful conviction of herself and the imprisonment of her husband had on her boys².... And it has never been lost on me that these are not human-interest stories, these are indictments of a system that allows for people to prey on people in public housing, do what they will, and nothing happens. But you want to ask me about Jussie."

(State's Attorney Foxx's Speech, April 25, 2023.)

At around the same time that Baker's convictions were vacated, other current Plaintiffs requested that their convictions likewise be vacated. Mr. Magats appears to have been involved in these decisions. For example, Mr. Magats received information regarding Plaintiff White, Sr.'s case. (Email from Valentini to Magats, PL Joint 35855-56, Nov. 30, 2016, attached hereto as Exhibit 7.)

² State's Attorney Foxx was referring to Baker as Clarissa Glenn's husband. After Baker was released from custody for the conviction underlying his current lawsuit, he was arrested, charged, and convicted of federal narcotics crimes, and sentenced to one year in prison. *See generally United States v. Baker*, 18-cr-216 (N.D. Ill.). During the investigation that led to Baker's federal conviction, law enforcement developed evidence that Baker's son was also participating in narcotics transactions. The CCSAO prosecuted and convicted Baker's son for possession of a controlled substance. (*People v. Baker*, 18-cr-6609, ROP pp. 8-9, Aug. 29, 2018, attached hereto as Exhibit 8; DEA Report, DO Joint 7762-65, attached hereto as Exhibit 9.) Baker lied in his answers to interrogatories in this case when he failed to disclose this illegal narcotics activity. (Baker's Resp. to Mohammed's Int. at ¶ 1, attached hereto as Exhibit 10.)

At some point, it appears that the CCSAO determined that the Watts-related cases would be handled by the CIU, where ASA Adduci and Mr. Rotert were primarily responsible for the investigation. The CIU first investigated 18 convictions and presented its recommendation to Mr. Sussman. (Ex. 1.) The CCSAO subsequently moved to vacate all 18 convictions. The CCSAO made the following public statements regarding these 18 convictions:

- “In these cases, we concluded that unfortunately, the police were not being truthful. We couldn’t have confidence in the integrity of their reports and their testimony. So in good conscience, we could not see these convictions stand.” John Garcia, *Mass exoneration: Convictions of 15 men, tied to tainted CPD officer, overturned*, ABC News, (Nov. 16, 2017), <https://abc7chicago.com/wrongful-conviction-overturned-sgt-ronald-watts-chicago-cop/2656195/> (quoting Mr. Rotert).³
- The conviction integrity unit is looking into dozens of other cases and identified a pattern suggesting “corrupt activity” involving Watts and “members of his crew.” *Id.* (quoting Robert Foley, spokesman for the Cook County State’s Attorney’s Office).
- Rotert noted a troubling trend of defendants complaining early during their prosecution that drugs had been planted on them by Watts and his officers. Aamer Madhani, *Men who allege they were framed by crooked Chicago cop get mass exoneration*, USA Today, (Nov. 16, 2017), <https://www.usatoday.com/story/news/2017/11/16/men-who-allege-they-were-framed-crooked-chicago-cop-get-mass-exoneration/871216001/>.

Once the 18 convictions were vacated, Mr. Sussman directed ASA Adduci to draft a chart of police officers involved in the arrests. (Email from Sussman to McCarthy, PL Joint 35726, Nov. 16, 2017, attached hereto as Exhibit 11.) ASA Adduci completed this task by reviewing the police reports and listing all officers whose names appeared in the police reports. (Email from Adduci to Sussman, PL Joint 35725, Nov. 16, 2017, attached hereto as Exhibit 12.) ASA Adduci’s list was then used by Mr. Magats in drafting the Magats Letters sent to the Chicago Police Department (“CPD”). The Magats Letters informed the CPD that the CCSAO would no longer call certain Defendant Officers as witnesses in criminal matters “due to concerns about their credibility and alleged involvement in the misconduct of Sergeant Watts.” (Ex. 12.) As a result of this decision,

³ The articles cited in this brief are attached hereto as Group Exhibit 13.)

the CPD assigned the officers to administrative duties. (Deposition of Eddie Johnson at 20:18-21:8, Aug. 31, 2022, partially attached hereto as Exhibit 14.)

The CIU continued to review cases and vacate convictions. From the discovery tendered, it appears that Plaintiffs simply submitted police reports about their arrests and affidavits from them stating they were innocent, and the CIU would agree to vacate cases so long as the arrest occurred during the relevant time period, at the right location, and was made by members of the tactical team supervised by Watts. Megan Crepeau, *20 more convictions linked to disgraced ex-CPD sergeant are tossed*, Chicago Tribune, (Feb. 1, 2022) <https://www.chicagotribune.com/news/criminal-justice/ct-ronald-watts-cases-dismissed-kim-foxx-20220201-cmftmcd5yjdgnpq7gof777anoe-story.html>, (State's Attorney Foxx stating that the CCSAO looks at the identity of the police officers, the time period of the arrest, the sufficiency of the evidence or other evidence); *see also* CCSAO's Privilege Log, DEF 2649 (describing chart), attached hereto as Exhibit 15. During this time period, the CCSAO made the following public comments about convictions it moved to vacate:

- “We could not stand behind the integrity of these convictions because of the behavior of Sergeant Watts and his crew. What we know was happening with Sergeant Watts and the way he ran his operation was that there were many men and women who fell victim to his corrupt ways.” Meghan Keneally, *18 men framed by ‘corrupt’ Chicago police sergeant have convictions overturned*, ABC News, (Sept. 24, 2018), <https://abcnews.go.com/US/18-men-framed-corrupt-chicago-police-sergeant-convictions/story>, (quoting States Attorney Foxx).
- “We continue to hear that many of these arrests were purely conjured. They were basically arresting people and framing them or were claiming that they were involved in drug offenses that either didn’t occur or didn’t occur the way that those police officers said.” (Innocence Staff, *18 Exonerated in Chicago’s Second Mass Exoneration*, <https://innocenceproject.org/news/second-mass-exoneration-in-chicago/>, (Sept. 24, 2018) (quoting Mr. Rotert).
- “We found a pattern of misconduct by Watts and other officers in these cases, which caused our office to lose confidence in the initial arrests and validity of these convictions.” Christine Hauser, *‘A Stain on the City’: 63 People’s Convictions Tossed in Chicago Police Scandal*, N.Y. Times, (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/chicago-exonerations-drug-sentences.html> (quoting State’s Attorney Foxx).

- “Watts, we believe, had a proclivity for doing corrupt things when he was arresting groups of people in the projects for drugs,” but there were other times when he was “functioning as a police officer,” such as when he took a report at the scene of a sexual assault or homicide. Jonathan Abel, *Cop Tracing*, 107 Cornell L. Rev. 927, 948 (2002) (quoting Mr. Rotert).

The CIU process appears to have changed in late 2019 when Ms. Adduci took over the unit and requested to interview some of the Defendant Officers, including ones who were identified in the Magats Letters. (Investigative Report, Interview of Young, Dec. 17, 2019, attached hereto as Exhibit 16.) After ASA Adduci completed her interviews with the officers, the CIU did not agree to vacate all the convictions requested by the criminal defendants. Rather, Ms. Adduci began requesting Plaintiffs provide corroborative evidence supporting their version of events. It is unclear if the CIU ever received all the corroborative evidence it requested, but ultimately the CCSAO agreed to vacate these convictions too. For this time period, 2020 until March 24, 2022, the CCSAO made the following public statements about the Watts cases:

- “The seeds of distrust for our criminal justice system run deeply in communities most impacted by violence because of people in power like Sergeant Watts and his cronies who targeted and criminally preyed on these communities....” Matt Masterson, *6 More Men Have Convictions Tossed in Cases Tied to Ex-Chicago Police Sergeant*, WTTW News, (Dec. 15, 2020), <https://news.wttw.com/2020/12/15/6-more-men-have-convictions-tossed-cases-tied-ex-chicago-police-sergeant> (quoting State’s Attorney Foxx).
- “Vacating the convictions of these nine people today who were targeted by Watts provides just a fraction of relief for those who spent time in prison, away from their families.” Phil Rogers, *Chicago Police Scandal Continues as More Cases Thrown Out*, NBC News Chicago, (Feb. 19, 2021), <https://www.nbcchicago.com/news/local/chicago-police-scandal-continues-as-more-cases-are-thrown-out/2442768/> (quoting State’s Attorney Foxx).
- The convictions were vacated based on “the application of Blackstone’s ratio⁴ and in the interest of justice.” (*People v. Harris, Roberts, Giles, Patrick, Jermaine Morris, Newman, Herron, Bonners, and Trinere Johnson*, ROP at 12:6-16, (Feb. 19, 2021), attached hereto as Exhibit 17.)
- “We will not tolerate at the Cook County State’s Attorney’s office convictions that were ill gotten by corrupt law enforcement.” Mark Rivera, *9 more convictions from disgraced Chicago Police Sgt. Ronald Watts vacated*, ABC7 Chicago, (July 25, 2021),

⁴ Blackstone’s ratio is, it is better to let ten guilty persons escape than that one innocent suffer. *United States v. Davis*, 562 F.2d 681, 696 (U.S. App. D.C. 1977) (Bazelon, concur).

<https://abc7chicago.com/ronald-watts-chicago-police-department-cook-county-states-attorney-kim-foxx/10354638/> (quoting State's Attorney Foxx).

Plaintiff's counsel, either unhappy with the speed that the CCSAO was moving to vacate cases or that they had to try to corroborate the criminal defendants' stories, filed petitions for relief from judgment in 2022 for 88 criminal defendants. (*People v. 88 Petitioners*, Pet. for Relief from Judgment, PL Joint 81390, 81481-81482, attached hereto as Exhibit 18.) One of the arguments raised by the criminal defendants was that the State would necessarily lose at an evidentiary hearing and retrial because the Magats Letters prevented it from calling witnesses necessary to meet its burden. (*Id.*) The CCSAO objected to a number of the convictions and filed responses. On March 24, 2022, a news article critical of the CCSAO for objecting to the petitions was published. Chip Mitchell, *State's Attorney Kim Foxx is doubling down on dozens of convictions tied to a corrupt ex-cop*, WBEZ Chicago, <https://www.wbez.org/stories/foxx-doubles-down-on-37-convictions-tied-to-corrupt-cop/5f2db102-b4eb-4f1e-a02e-3a0dc41d218e>, (Mar. 24, 2022). A month later, the CCSAO informed the court that it had reversed course and moved to vacate all the cases it originally objected to. Chip Mitchell, *In Cook County's largest mass exoneration, a judge tosses 44 convictions tied to a corrupt cop*, WBEZ Chicago, <https://www.wbez.org/stories/judge-tosses-44-more-convictions-tied-to-corrupt-chicago-cop/d9ede2d7-2f63-49b5-aa65-d250ec072cc5> (Apr. 22, 2022).

In addition to the public comments directed at specific vacated convictions, the CCSAO has made the following public comments about the Watts-related cases:

- “Our office has been working over the past couple of years as these cases continue to come through to look at the cases on an individualized basis, to identify patterns and practices and things that we can identify that show us that this was part of corrupt behavior.” WBEZ, *Reset*, (Nov. 10, 2021) (statement from State's Attorney Foxx), attached hereto as Exhibit 24.
- “The reality is what happened to these men and women were that they were victimized by not just by Sergeant Watts but by a system that allowed for it to happen.” *Id.*

- “The people whose names were read today are victims....” John Garcia, *Over 100 cases tied to disgraced former CPD Sgt. Ronald Watts vacated*, ABC7 Chicago (Feb. 1, 2022), <https://abc7chicago.com/chicago-police-sgt-ronald-watts-cpd-kim-foxx/11529025/> (quoting State’s Attorney Foxx).
- “The work to give relief to Watts victims is directly related to our public safety today.” Matt Masterson, *Judge Tosses 44 More Cases Tied to Ex-CPD Sgt. Ronald Watts*, WTTW, (Apr. 22, 2022), <https://news.wttw.com/2022/04/22/judge-tosses-44-more-cases-tied-ex-cpd-sgt-ronald-watts>, (quoting State’s Attorney Foxx).
- “[Watts] really carried himself as the top dog in that neighborhood, and people who didn’t comply had cases put on them.” Watts had vendettas against some people. Other times he targeted people just because “he could.” “The righteous anger about this is that (Watts) did inflict all of this harm that we all know that he had done and has eluded the ultimate responsibility – not just for shaking down one informant – but for literally these hundreds of people.” Grace Hauck, *A corrupt Chicago cop destroyed hundreds of lives. Now victims want justice*, USA Today, (Feb. 8, 2023), <https://www.usatoday.com/in-depth/news/nation/2023/02/05/chicago-police-ronald-watts-exoneration-cases/10470598002/>, (Quoting State’s Attorney Foxx).

Plaintiffs have even quoted some of these public statements in their complaints they have filed against the Defendant Officers. *See Roberts v. City of Chicago*, 22-cv-674, dkt. #1, Compl. ¶¶ 7, 92, 94, 97, 98, 100-102, 105, (N.D. Ill. Feb. 7, 2022).

Once convictions are vacated, the criminal defendants file petitions for a COI. The CCSAO did not take a litigation position on any of Plaintiffs’ petitions for a COI. *See e.g., People v. Fischer*, 04-cr-10663, ROP at 2:4-8 (June, 22, 2022) (commenting that State chose not to intervene). With the CCSAO refusing to engage in an adversary proceeding against any Plaintiff, the court has granted all of Plaintiffs’ petitions for a COI, even for those who pled guilty.

II. MEET AND CONFER

Contrary to the CCSAO’s motion,⁵ the Defendant Officers met and conferred with the CCSAO numerous times and in good faith. On February 7, 2023, the Defendant Officers issued

⁵ The CCSAO made misrepresentations in attempting to cast aspersions on Defendant Officers and their counsel. For example, the CCSAO states, “The Defendants have solicited testimony involving privileged matters in some of these cases, even after the Court clearly and expressly ordered them not to do so.” (Dkt. #534 at 3.) The CCSAO cites to the *Fulton* case and Mr. Sussman’s deposition in that matter to support its claim. (*Id.* at fn. 2.) However, as the CCSAO is aware, none of the Defendant Officers were a party in the *Fulton* case and their counsel were not involved in the case or Mr. Sussman’s deposition.

deposition subpoenas for Mr. Sussman, Mr. Magats, Mr. Rotert, and Ms. Adduci. On February 16, 2023, counsel for the Defendant Officers sent links to a sampling of the CCSAO's public statements that demonstrated waiver of the deliberative-process privilege. (Email from Olivier to Henretty, February 16, 2023, attached hereto as Exhibit 19 are the emails documenting the meet-and-confer.) The CCSAO had previously asked that the Defendant Officers consider taking a Rule 30(b)(6) deposition as opposed to deposing all four witnesses. Counsel for the Defendant Officers considered the request and determined that all four depositions were necessary and so informed the CCSAO. (*Id.*) The CCSAO responded and referring to Mr. Sussman, Mr. Magats, and Mr. Rotert argued that it seemed "excessive to take four depositions, *three* of them apex depositions...." (Ex. 19, Email from Henretty to Olivier, Feb. 22, 2023, (emphasis added).) After some back and forth, the Defendant Officers informed the CCSAO that they did not believe the apex doctrine applied to Mr. Sussman, Mr. Magats, and Mr. Rotert because they each have unique, personal knowledge of the Watts cases, and that sitting for a deposition would not impose a hardship on them because they have no official CCSAO duties as they are former employees. (Ex. 19, Email from Olivier to Henretty, Apr. 3, 2023.) Counsel for the Defendant Officers provided the CCSAO with a copy of one of the complaints and pointed to specific allegations in the complaint that quoted Mr. Magats and others at the CCSAO publicly discussing the Watts cases and the reasons why convictions were vacated. (*Id.*) Counsel for the Defendant Officers asked the CCSAO if it believed that the witnesses did not have personal knowledge of the Watts cases and whether the CCSAO agreed that the deliberative-process privilege was waived on any topic based on the public comments. (*Id.*)

The CCSAO did not directly answer these questions. Rather, the CCSAO asked that the Defendant Officers provide a list of deposition topics, like counsel's office did in a separate

reversed-conviction case. (Ex. 19, Email from Henretty to Olivier, April 3, 2023.) Regarding waiver, the CCSAO stated that the public comments went to “sweeping decisions” rather than individual cases. (*Id.*) The CCSAO asked what counsel believed the scope of the waiver was and if it is “everything” then the CCSAO would likely seek a protective order. (*Id.*) Counsel for the Defendant Officers responded the next day stating that although they were not opposed to providing a list of topics, the process did not work out as intended in the prior case as it led to disputes at the depositions about what questions fell under an approved topic. (Ex. 19, Email from Olivier to Henretty, April 4, 2023.) Counsel then stated that it was their position that the CCSAO had waived “everything” for purposes of the deliberative-process privilege. (*Id.*) The Defendant Officers offered to continue to meet-and-confer in order to reach points of agreement with respect to waiver, and again asked what topics the CCSAO agreed that the deliberative-process had been waived. (*Id.*) Once again, the CCSAO did not provide an answer.

On April 28, 2023, counsel for the Defendant Officers provided a list of topics for the four depositions. (Dkt. #534-1.) On May 12, 2023, the Defendant Officers followed-up with the CCSAO on its position regarding the topics as the CCSAO had not responded. (Ex. 19, Email from Olivier to Henretty, May 12, 2023.) On May 18, 2023, the CCSAO responded indicating that it would be meeting internally on the topics and would provide a concrete answer during the next week. (Ex. 19, Email from Henretty to Olivier, May 18, 2023.) On June 12, 2023, after having heard nothing from the CCSAO, the Defendant Officers once again followed-up on the proposed topic list. (Ex. 19, Email from Olivier to Henretty, June 12, 2023.)

On June 13, 2023, counsel for the Defendant Officers and the CCSAO had a meet-and-confer telephone call. The CCSAO stated that every topic on the list was a “non-starter” and that counsel for the CCSAO typically does “better in front of a judge than working with you.” (Ex. 19,

Email from Olivier to Henretty, June 14, 2023.) Following this conversation, the CCSAO moved to quash all four depositions in their entirety.

ARGUMENT

I. THE DEPOSITION SUBPOENAS SHOULD NOT BE QUASHED BASED ON THE APEX DOCTRINE.

The CCSAO's claim now that the apex doctrine bars all four witnesses from being deposed is meritless. Under the apex doctrine, courts may protect senior ranking officials from being deposed if: (1) the official has no unique personal knowledge of the matter in dispute; (2) the information sought can be obtained from other witnesses or discovery methods; or (3) sitting for the deposition would impose a hardship in light of the officer's other duties. *Little v. JB Pritzker for Governor*, 2020 WL 868528, at *1 (N.D. Ill. Feb. 21, 2020).

A. The Apex Doctrine Does Not Prevent the Depositions of Mr. Sussman, Mr. Magats, and Mr. Rotert.

Contrary to the CCSAO's assertion, the apex doctrine does not prevent the Defendant Officers from deposing Mr. Sussman, Mr. Magats, and Mr. Rotert. All three witnesses have unique personal knowledge of the CCSAO's investigation into the Watts cases. Mr. Sussman has unique personal knowledge of at least two broad topics. First, his involvement and decision to vacate the 18 convictions in November 2017, and any other cases he was involved in thereafter. This topic is relevant to Plaintiffs' state law malicious prosecution claim as the reasons why the convictions were vacated goes directly to the favorable termination element of the claim. *Brown v. City of Chicago*, 633 F.Supp.3d 1122, 1169 (N.D. Ill. 2022) (stating to establish element "it is imperative to examine why prosecutors dropped the charges."). Second, Mr. Sussman's decision to direct Ms. Adduci to compile a list of officers involved in the 18 vacated convictions from November 2017, which ultimately led to the Magats Letters. Mr. Sussman's decision is relevant because: (1) it

caused many of the Defendant Officers to be assigned to administrative duties which Plaintiffs may attempt to portray as a form a discipline for having engaged in misconduct; and (2) Mr. Sussman's decision led to the Magats Letters, which in turn may have led the CCSAO to agree to vacate additional convictions where it could not call an officer to deny a criminal defendant's allegations. For these vacated convictions, part of the Defendant Officer's defense is to show that the original decision by Mr. Sussman was faulty and/or was never meant to lead to vacating additional cases.

Similarly, Mr. Magats, whose involvement in these cases are from a time period when he was an ASA, not the First Assistant, has unique personal knowledge regarding two highly relevant topics. (Ex. 2, 5, and 7.) First, his involvement in decisions to vacate convictions for cases prior to the matters being handled by the CIU. Mr. Magats testimony on this topic, like Mr. Sussman's, is relevant to those Plaintiffs' state law malicious prosecution claims. *See Brown*, 633 F.Supp.3d at 1169 (stating to establish element "it is imperative to examine why prosecutors dropped the charges."). To the extent that the convictions were vacated for reasons other than innocence, that testimony rebuts Plaintiffs' damages claim stemming from their theory that they were wrongfully convicted and factually innocent.

Second, Mr. Magats has personal knowledge regarding the Magats Letters. As stated above, the Magats Letters are relevant to damages and the malicious prosecution claims because it may explain why later convictions were vacated and why certain Defendant Officers were assigned to administrative duties. Defendant Officers should be given the opportunity to show that the sweeping conclusions in the Magats Letters were unsupported by the facts known to the CCSAO. For example, prior to the first Magats Letter, the CCSAO had vacated 24 convictions from 20 individuals. In the affidavits submitted to the CCSAO by these individuals in which they

detail their allegations of being framed, none of them identify Officer Bolton as having engaged in any misconduct. (*See* Plaintiff's Aff., attached as Exhibit 20.) Yet, Mr. Magats identified Officer Bolton as an officer the CCSAO would no longer call as a witness. This begs the question, what concerns about Officer Bolton's credibility could Mr. Magats have if no criminal defendant provided information that implicated him in any misconduct.

Unlike Mr. Sussman and Mr. Magats, Mr. Rotert was never the First Assistant State's Attorney and therefore the apex doctrine does not apply to him. This conclusion is supported by the case law relied upon by the CCSAO which all discuss the apex doctrine in the context of subpoenas to a current or former First Assistant. (Dkt. #534 at 4-7.) It is also supported by the CCSAO's position during the meet-and-confer that the current director of the CIU is not an apex witness and the CCSAO not raising the apex doctrine in a separate reversed-conviction case when seeking to quash a deposition subpoena directed at Mr. Rotert. *Brown v. City of Chicago*, 18-cv-7064, CCSAO Mtn. to Quash, dkt. #145 at 2-3. Under the apex doctrine, it is the party seeking to avoid discovery that bears the burden, and the CCSAO has failed to establish that the doctrine applies to Mr. Rotert. *See Dyson, Inc. v. Sharkninja Operating LLC*, 2016 WL 1613489, at *1 (N.D. Ill. Apr. 26, 2016) (stating party seeking to avoid discovery bears the burden of showing good cause exists to prevent the discovery).

Even if Mr. Rotert is considered an apex employee, the doctrine does not prevent his deposition. Mr. Rotert was involved in the CIU's investigation of the convictions that were vacated in November 2017 and subsequent vacated convictions until he left the CCSAO. Mr. Rotert's knowledge of the investigation that led to vacated convictions is relevant to those Plaintiffs' state law malicious prosecution claims and damages, for the same reasons stated above. The CCSAO did not claim the apex doctrine prevented Mr. Rotert from speaking at a press conference with

Plaintiff Gipson and Plaintiffs' counsel in November 2017 or from being interviewed for a legal article in 2020. During these statements, Mr. Rotert disclosed that the CCSAO determined that the police officers were not being truthful and that the CCSAO discovered a pattern of misconduct. (Ex. 13, John Garcia, *Mass exoneration: Convictions of 15 men, tied to tainted CPD officer, overturned*, ABC News, (Nov. 16, 2017), <https://abc7chicago.com/wrongful-conviction-overturned-sgt-ronald-watts-chicago-cop/2656195/>.) The Defendant Officers should be able to ask the obvious follow-up questions, *i.e.*, what is the evidence of untruthfulness and where is the evidence of the pattern of misconduct.

As each witness played a different role in the CCSAO's investigation in the Watts-related cases, this discovery cannot be obtained by other means. The CCSAO claims that whatever information the witnesses "could provide is available from other sources, namely, the Assistant State's Attorney assigned to the case at the time, or a 30(b)(6) deposition." (Dkt. #534 at 4.) By "at the time," the CCSAO was referring to the ASAs who prosecuted the cases originally at the time of the convictions which occurred from approximately 2003-2009, not those involved in the vacating the convictions. The CCSAO's argument is based on a gross misunderstanding of the issues involved in this litigation. The ASA "assigned to the case at the time" of the prosecution that led to the convictions could not provide the same information as these witnesses as they dealt with the criminal convictions of Plaintiffs, approximately ten to fifteen years prior to these witnesses' involvement in vacating cases. While the CCSAO offered a Rule 30(b)(6) witness, that does not advance the CCSAO's argument because these witnesses are "no longer [] CCSAO official[s], so there is no concern here that sitting for a deposition would impose a hardship in light of [the witnesses'] CCSAO duties. *DeLeon-Reyes v. Guevara*, 2021 WL 3109662, *3 (N.D. Ill. 2021) (finding apex doctrine did not bar Mr. Sussman's deposition); *Almodovar v. Guevara*, 18-

cv-2341, Order, dkt. #168 (stating because Mr. Sussman is no longer employed by the CCSAO, deposing him will not impose a hardship). Moreover, because these witnesses have unique personal knowledge each witness would have to be personally consulted (with no guarantee that they would be willing to) for a Rule 30(b)(6) witness to be properly prepared to answer questions about the relevant topics.

The CCSAO argues that “identical attempts in similar cases...to depose First Assistants about similar subject matter has been denied in the past.” (Dkt. #534 at 4-5.) The CCSAO’s assertion is misleading. First, the *Gray* order cited by the CCSAO is a one sentence minute entry stating “The Cook County State’s Attorney’s Office motion to quash subpoena is granted as to the deposition of Joseph Magats but denied as to the deposition of Fabio Valentini.” *Gray v. City of Chicago*, 18-cv-2624, Order, dkt. #184. It says nothing about the apex doctrine or whether Mr. Magats had unique personal knowledge, like the witnesses do in this case. The other cases relied upon by the CCSAO, *Fulton/Coleman v. Foley*, 17-cv-8696/18-cv-998, *Brown v. City of Chicago*, 18-cv-7064, and *Solache/DeLeon-Reyes*, 18-cv-2312/18-cv-1028, all allowed the depositions of former high-ranking members of the CCSAO and do not support the application of the apex doctrine here. (Dkt. #534 at 5.)

While the court in *Solache/DeLeon-Reyes* later granted a motion to quash the subpoena of the current First Assistant State’s Attorney, that case is distinguishable. The court put significant emphasis on the witness being the current First Assistant and that it would be burdensome and distracting on the witness who has significant other duties with uncertainty about the relevant testimony she could provide.⁶ The Defendant Officers are not seeking to depose the current First Assistant State’s Attorney. Thus, the concern that the deposition would interfere with a high-

⁶ As stated in the CCSAO’s motion, the transcript of this proceeding is not publicly available and is still within the 90-day period for redaction requests. (Dkt. #534 at 6 fn.4.)

ranking official's significant other duties is simply not present here. Furthermore, as cited above, courts allowed the depositions of Mr. Sussman in *Solache/DeLeon-Reyes*, *Almovodar*, *Fulton/Coleman*, and both Mr. Sussman and Mr. Rotert in *Brown*.

The CCSAO argues these depositions would be burdensome because “the witnesses would have to be prepared on each of the consolidated cases, the office would have to carefully review each of the files,⁷ and at least two attorneys would need to be present....” The CCSAO’s argument misses its mark. Under the apex doctrine, the burden of the office is not the concern, rather it is the burden on the high-ranking employee in light of their official duties. *Little*, 2020 WL 868528, at *1. As these are former employees, they have no official duties that make a deposition an undue burden. *DeLeon Reyes*, 2021 WL 3109662, at *3.

Finally, the CCSAO claims that “the Defendants in this and myriad other cases are abusing the process in order to affect CCSAO policy and decision-making.” (Dkt. #534 at 7.) Notably absent is any citation that supports the CCSAO’s assertion. The CCSAO has vacated over 180 convictions, has held press conferences with Plaintiffs and their counsel during which it has maligned the Defendant Officers, but when the Defendant Officers subpoena witnesses to develop evidence in defense of a specific element of one of Plaintiffs’ claims, the CCSAO accuses them of abusing the process. Subpoenaing individuals who have unique personal knowledge about the CCSAO’s Watts-related investigation is not an abuse of the process and the CCSAO cites nothing to the contrary.

B. The Apex Doctrine Does Not Bar the Deposition of ASA Adduci.

During the meet-and-confer process, the CCSAO never stated that ASA Adduci was an apex witness, rather it represented that three of the four witness subpoenaed, Mr. Sussman, Mr.

⁷ The CCSAO should have already carefully reviewed each of the files prior to vacating convictions.

Magats, and Mr. Rotert, were apex witnesses. (Ex. 19.) It was only when the CCSAO filed its motion did it claim that ASA Adduci was an apex witness. In fact, the CCSAO's current position is contradicted by how it has viewed Ms. Adduci in other reversed-conviction litigation. *See Fletcher v. Bogucki*, 20-cv-4768 (N.D. Ill) (CCSAO allowed ASA Adduci to testify about the CIU's investigation into the plaintiff's claim of innocence); *Waddy v. Bolton*, 19 L 10035 (Cir. Ct. Cook Cty.) (CCSAO did not object to a subpoena for ASA Adduci's deposition in Watts-related state court case).

The CCSAO's position that the apex doctrine bars ASA Adduci from being deposed is preposterous. First, ASA Adduci was not even the director of the CIU when she started and completed a significant portion of the Watts investigation. Second, like Mr. Rotert, the CCSAO has not met its burden of showing that the Director of the CIU is an apex employee. Finally, even if ASA Adduci is viewed as an apex witness, she clearly has unique personal knowledge of the Watts investigation. ASA Adduci is the only ASA that has investigated the convictions from the time they went into the CIU until the present. ASA Adduci has reviewed materials provided to her by Plaintiff's counsel, has reviewed CCSAO trial files, interviewed police officers, interviewed third-party witnesses, created parameters by which to view and judge cases, made recommendations on cases, and has appeared in Court when convictions were vacated. In one group of cases, ASA Adduci stated on the record that the State did not necessarily agree with the criminal defendant's allegations, but that the convictions were vacated based on "the application of Blackstone's ratio and in the interest of justice." (Ex. 17 at 12:6-16.)

The Defendant Officers seek to discover ASA Adduci's personal knowledge with respect to her involvement in over six years of investigation into Watts-related cases. The Defendant Officers cannot obtain this discovery through other methods. While the deposition would take

ASA Adduci away from her official duties, it would not be an undue hardship considering the scope and breadth of relevant information ASA Adduci possesses. *See Dyson, Inc.*, 2016 WL 1613489, at *1 (apex doctrine protects high-ranking officials where “they have no real information”).

II. The CCSAO’s Objection Based on the Deliberative-Process Privilege Should Be Overruled.

The Defendant Officers provided a list of topics that the witnesses would be questioned about. (Dkt. #534-1.) After having the list for a month and a half, the CCSAO did not agree that a single topic was appropriate. (Ex. 19, Email from Olivier to Henretty, June 14, 2023.) The CCSAO argues that none of the witnesses will be able to provide any information not protected by the deliberative-process privilege. (Dkt. #534 at 4.) The CCSAO’s invocation of the deliberative-process privilege to prevent the depositions in their entirety is an overbroad use of the privilege. First, the factual information that the witnesses possess do not implicate the privilege. Second, for topics which would implicate the privilege, the privilege has been waived based on the CCSAO’s public comments. Third, even if this Court did not find waiver, the Defendant Officers have a particularized need for the information sought.

A. The Deliberative-Process Privilege Does Not Bar Discovery of Factual Information.

The deliberative-process privilege protects the quality of the flow of ideas within a governmental agency. *United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 697 (N.D. Ill. 1985). It shields “communications that are part of the decision-making process of a governmental agency.” *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). The privilege does not extend to factual or objective material, matters that an agency adopts as its position on an issue, or to communications made subsequent to an agency decision. *Holmes v. Hernandez*, 221

F. Supp. 3d 1010, 1016 (N.D. Ill. 2016).

Topics that the Defendant Officers identified that cover factual information include: (a) public statements made by the witnesses; (b) statements made by the witnesses within their respective email correspondence; (c) each witness's involvement in evaluating Watts-related cases; (d) each witness's involvement in determining the criteria upon which the CCSAO used to evaluate cases; (e) each witness's involvement in the recommendation process as to whether a conviction should be vacated; (f) each witness's involvement in the recommendation process regarding petitions for COI; (g) each witness's involvement in the Magats Letters; (h) each witness's knowledge of specific Watts-related cases; (i) each witness's knowledge of the allegations of the current Plaintiffs; (j) Plaintiffs' or their counsels' attempts at influencing and/or influencing public statements made by representatives of the CCSAO; (k) the factual information reviewed or relied upon when reviewing convictions; (l) interviews of witnesses conducted and/or not conducted; (m) the process following the decision to vacate convictions; (n) identification of individuals who were part of the decision-making process for vacating convictions and positions on petitions for COIs; (o) whether there was any determination that certain criminal defendants were or were not factually innocent and if so, who made that determination and what was relied upon; (p) whether criminal referrals were made when false affidavits were submitted to the CCSAO and used in court in support of petitions for COIs; (q) communications with Plaintiff's counsel; (r) the media's and Plaintiffs' counsels' criticisms of the CCSAO and the timing thereafter of decisions to vacate convictions and/or take no position on petitions for COIs; (s) the CIU's policies and procedures when investigating claims of innocence and whether those policies were followed here; (t) whether the CCSAO was aware that certain criminal defendants did not meet the statutory requirements for a COI, and if it was, any actions the CCSAO took; and (u) whether

the CCSAO conducted any additional investigation or review after petitions for COI were filed.

None of these areas of inquiry invade deliberative-process and they are relevant to the defenses at issue in these cases. *See Evans v. City of Chicago*, 231 F.R.D. 302, 318-19 (N.D. Ill. 2005) (deliberative-process privilege does not protect documents that contain purely factual information that does not reveal deliberations (N.D. Ill. 2006) (holding recommendation reflected the agency's final decision and the basis of that decision and was "post-decisional and not protected by deliberative process privilege."); Dkt. #534-2, *Brown v. City of Chicago*, 18-cv-7064, July 28, 2020 Ruling on Mot. to Quash at 13:5-14 (stating if plaintiff intended to use the COI at trial, then the defense was entitled to know something about the process that led the CCSAO to make the determination not to oppose the COI petition).

B. The CCSAO Has Waived the Deliberative-Process Privilege.

The Defendant Officers agree that some of the proposed topics invade deliberative-process. Topics such as ASA Adduci's recommendations on whether convictions should be vacated and petitions for COIs opposed; what led to certain recommendations being overruled; how each case fits within the criteria used by the CCSAO when evaluating cases and why the criteria changed over time; the decision to object to certain petitions to vacate only to reverse course and the reason for the reversal; and the reasons for taking no position on the petitions for COIs. However, the deliberative-process privilege, like other privileges, can be waived. *Hobley v. Chicago Police Commander Burge*, 445 F. Supp. 2d at 990 (N.D. Ill. 2006) at 996. Here, the CCSAO waived the privilege by making multiple public comments revealing its deliberations during its Watts-related investigation. *See In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997) (stating information voluntarily revealed to third parties waives the claim for the deliberative process privilege).

In *Howard v. City of Chicago*, 2006 WL 2331096, *8 (N.D. Ill. Aug. 10, 2006), the

defendants sought to depose the governor about the basis of his decision to pardon the plaintiffs. When announcing the pardons, the governor gave a statement concerning the evidence from the criminal case against each plaintiff. *Id.* The governor later appeared on television and answered questions regarding his pardon decision. *Id.* The court found that by responding publicly about his decision to pardon the plaintiffs, the governor could not claim privilege and refuse to testify on the same topics. *Id.*

Similarly, in *DeLeon-Reyes*, the CCSAO attempted to quash the deposition subpoena of Mr. Sussman. 2021 WL 3109662, at *5. When dismissing the charges against the plaintiff, Mr. Sussman explained on the record that he and other prosecutors believed the plaintiff was guilty, but requested to *nolle prosequi* the criminal charges because the lead detective was found not to have testified truthfully. *Id.* Mr. Sussman's statement revealed pre-decisions and deliberative elements of the CCSAO's decision to dismiss the plaintiff's case. The court therefore found waiver on the topic of the CCSAO's decision to dismiss the case. *Id.*; *see also Hood v. City of Chicago*, 16-cv-1970, dkt. #247 at 7-8 (N.D. Ill. March 19, 2019) (finding governor waived privilege by speaking about commuting plaintiff's sentence in public forums).

In these matters, the CCSAO has waived the deliberative-process privilege in its numerous public comments. Regarding the eighteen convictions vacated in November 2017, the CCSAO stated that "the police were not being truthful" and that the office did not "have confidence in the integrity of their reports and their testimony." (Ex. 13, John Garcia, *Mass exoneration: Convictions of 15 men, tied to tainted CPD officer, overturned*, ABC News, (Nov. 16, 2017), <https://abc7chicago.com/wrongful-conviction-overturned-sgt-ronald-watts-chicago-cop/2656195/>.) The CCSAO explained that it identified a pattern suggesting "corrupt activity." (*Id.*) Mr. Rotert noted a trend that criminal defendants complained during the early stages of their

prosecution that narcotics had been planted. (Ex. 13, Aamer Madhani, *Men who allege they were framed by crooked Chicago cop get mass exoneration*, USA Today, (Nov. 16, 2017), <https://www.usatoday.com/story/news/2017/11/16/men-who-allege-they-were-framed-crooked-chicago-cop-get-mass-exoneration/871216001/>.)

Regarding convictions vacated in September 2018, the CCSAO stated that it could not stand behind the convictions because of the “behavior of Sergeant Watts and his crew.” (Ex. 13, Meghan Keneally, *18 men framed by ‘corrupt’ Chicago police sergeant have convictions overturned*, ABC News, (Sept. 24, 2018), <https://abcnews.go.com/US/18-men-framed-corrupt-chicago-police-sergeant-convictions/story>.) Mr. Rotert explained that the police were arresting people and framing them for crimes that either did not occur or did not occur the way the police officers said. (Ex. 13, Innocence Staff, *18 Exonerated in Chicago’s Second Mass Exoneration*, <https://innocenceproject.org/news/second-mass-exoneration-in-chicago/>.) The CCSAO explained that it learned the way Watts “ran his operation” and that many individuals “fell victim to his corrupt ways.” (Ex. 13, Meghan Keneally, *18 men framed by ‘corrupt’ Chicago police sergeant have convictions overturned*, ABC News, (Sept. 24, 2018), <https://abcnews.go.com/US/18-men-framed-corrupt-chicago-police-sergeant-convictions/story>.)

In discussing convictions vacated in November 2018, the CCSAO harkened back to the so-called “pattern of misconduct” it supposedly found. (Ex. 13, CCSAO Press Release, *Cook County State’s Attorney Foxx Announces Seven Additional Vacated Convictions Tied to Corrupt Former Chicago Police Sergeant*, Nov. 2, 2018.)

For convictions vacated in February 2021, the CCSAO stated that the individuals whose convictions were vacated were “targeted by Watts.” (Ex. 13, Phil Rogers, *Chicago Police Scandal Continues as More Cases Thrown Out*, NBC News Chicago, (Feb. 19, 2021),

<https://www.nbcchicago.com/news/local/chicago-police-scandal-continues-as-more-cases-are-thrown-out/2442768/>.) However, when speaking as an officer of the court, ASA Adduci painted a significantly different picture, stating that the CCSAO moved to vacate the convictions based on “the application of Blackstone’s ratio....” (Ex. 17 at 12:6-16.)

In speaking about all the convictions that had been vacated, State’s Attorney Foxx stated that the CCSAO identified “patterns and practices...that show us that this was part of corrupt behavior.” (Ex. 24, WBEZ, *Reset* Nov. 10, 2021.)

The CCSAO’s public comments waived the deliberative-process privilege regarding the reasoning and basis for vacating the criminal convictions. The Defendant Officers should be allowed to discover the reasoning for vacating the convictions and the evidence the CCSAO relied upon to do so. The Defendant Officers should be allowed to challenge the so-called “pattern” that the CCSAO claims to have discovered in 2017 after reviewing Plaintiffs’ affidavits. In the likely event that no pattern exists or can be shown by the CCSAO, the Defendant Officers are still entitled to discover the reasons why the convictions were vacated. The fact that the publicly stated rationale for vacating cases may not be accurate does not change the waiver analysis.

In addition to the CCSAO waiving the deliberative-process privilege regarding its decision to move to vacate Plaintiffs’ criminal convictions, the CCSAO’s public comments waived the deliberative-process privilege in its entirety, including the reasons why the CCSAO took no position on every Plaintiffs’ petitions for COI. “A public figure making strong public statements may not then skirt questioning on the reason for the official action.” *Hood*, 16-cv-1970, dkt. #247 at 8 (finding governor’s vigorous and critical public comments against prosecutors and judges constituted waiver of deliberative-process).

Here, the CCSAO’s public comments are not only damaging to the Defendant Officers, but

are so strong and critical of them that they constitute waiver of the deliberative-process privilege. State's Attorney Foxx stated that the CCSAO could not stand behind convictions "because of the behavior of Watts and his crew." (Ex. 13, Meghan Kennelly, *18 men framed by 'corrupt' Chicago police sergeant have convictions overturned*, Sept. 24, 2018.) State's Attorney Foxx later stated that "Watts and his cronies...targeted and criminally preyed" on individuals at the Ida B. Wells. (Ex. 13, Matt Masterson, *6 More Men Have Convictions Tossed in Cases Tied to Ex-Chicago Police Sergeant*, Dec. 15, 2020.) In 2021, State's Attorney Foxx stated that convictions were "ill gotten by corrupt law enforcement." (Ex. 13, Mark Rivera, *9 more convictions from disgraced Chicago Police Sgt. Ronald Watts vacated*, July 25, 2021.) State's Attorney Foxx has repeatedly called Plaintiffs "victims" implying that Defendant Officers engaged in misconduct during their arrests. (See Ex. 13, John Garcia, *Over 100 cases tied to disgraced former CPD Sgt. Ronald Watts vacated*, Feb. 1, 2022 (calling certain Plaintiffs victims); Matt Masterson, *Judge Tosses 44 More Cases Tied to Ex-CPD Sgt. Ronald Watts*, Apr. 22, 2022 (same). After years of publicly calling the Defendant Officers liars, criminals, and corrupt officers, the CCSAO should not be allowed to skirt questioning on the reasoning and evidence relied upon for vacating convictions and taking no position on petitions for COI. See *Hood*, 16-cv-1970, dkt. #247 at 8.

Incredibly, to get around its waiver problem, the CCSAO submits a declaration from ASA Scheller in which she avers that although the CCSAO has spoken "very generally about these cases to the press, there was no disclosure of specific factual or legal analysis" for any specific case. (Dkt. #534-3 at ¶7.) As detailed above, nothing could be further from the truth. ASA Scheller's attempt to avoid the CCSAO's public statements by stating it has not discussed "any specific case" is a misunderstanding of the CCSAO's Watts investigation. First, the CCSAO has publicly discussed specific cases, like the Baker and Glenn case. More importantly, for the most part, the

CCSAO did not move to vacate cases and COI petitions were not granted individually, but en masse. For example, when the CCSAO spoke about the police officers not being truthful and having identified a pattern of “corrupt activity” it did not identify a specific case, but was talking about the group of eighteen convictions that had just been vacated. ASA Scheller’s declaration is not only completely rebutted by the CCSAO’s public statements, but her reasoning is not based on how the CCSAO conducted its investigation.

C. The Individual Defendant Have a Particularized Need for the Information Sought.

For any topics that would be covered by the deliberative-process privilege and for which this Court does not find have been waived, the Defendant Officers can overcome the privilege because they have a particularized need for the information these witnesses possess. If the government makes a *prima facie* case that the privilege applies to certain topics the party seeking disclosure may still pierce the privilege by showing a particularized need for the information that outweighs the government’s interest in confidentiality. *Holmes*, 221 F. Supp. 3d at 1016.

Courts analyze the following factors in determining whether a particularized need exists: (1) the relevance of the information to the litigation; (2) the availability of other evidence that would serve the same purpose; (3) the government’s role in the litigation; (4) the seriousness of the litigation and the issues involved; and (5) the degree to which the disclosure would chill future deliberations with government agencies. *Id.* at 1018. These factors all weigh in favor of piercing the deliberative-process privilege.

First, the CCSAO’s deliberations on whether to move to vacate Plaintiffs’ convictions and take no position on their petitions for a COI are certainly relevant. Plaintiffs claim that they are innocent of crimes they say never occurred and have brought malicious prosecution claims, requiring them to prove the prosecution was terminated in their favor, which when charges are

dismissed requires a showing that the dismissal was in a manner indicative of innocence. *Brown v. City of Chicago*, 633 F.Supp.3d 1122, 1169 (N.D. Ill. 2022). The Defendant Officers anticipate that Plaintiffs will argue that the CCSAO's decisions to move to vacate their convictions and take no position on their petitions for a COI suggest that the prosecution terminated in a manner indicative of innocence. To reach that conclusion, the necessary inference is that if the CCSAO believed Plaintiffs were guilty, it would not have moved to vacate the convictions or at least it would have objected to the petitions for a COI. However, the Defendant Officers are entitled to a defense and should be allowed discovery to defend themselves on this issue. Determining why the State decided to move to vacate Plaintiffs' convictions and not object to the petitions for a COI is directly relevant to the favorable termination element of a malicious prosecution claim. *See id.* ("It is imperative to examine why prosecutors dropped the charges."). The CCSAO's motion fails to rebut this crucial point.

Second, the Defendant Officers do not have any other way to determine the prosecution's grounds for vacating convictions other than asking the CCSAO. Here, testimony from these four witnesses is necessary to rebut Plaintiffs' assertion that the criminal proceeding was terminated in a manner indicative of innocence. *See Evans*, 231 F.R.D. at 317 (finding where plaintiff sought to use a pardon to show innocence, the defendants were entitled to obtain information and analysis on which the pardon was based to diminish the weight to be given to the pardon). There could be many reasons other than innocence for why a prosecutor would vacate these convictions, such as Defendant Watts and/or Mohammed's name simply appearing on the police reports or a policy decision not to fight for convictions for which they were associated with. Alternative reasons could assist the Defendant Officers in rebutting Plaintiffs' argument on the "indicative of innocence" element, but the only source of that evidence is the CCSAO. The same would apply to the

CCSAO's decision to take no position on Plaintiffs' petitions for a COI. To rebut the impact of the COIs, the Defendant Officers should be able to discover if the CCSAO's position was based on factors other than innocence, such as resource allocation or indifference because the CCSAO was not exposed to civil liability.

In *Brown*, the Court commented that if the plaintiff planned to argue that the COI established that he was innocent of the underlying crime, then the defendants should be allowed to say that there are reasons "one might get a certificate of innocence that might not relate directly to factual innocence." (Dkt. #534-2 at 8:14-17.) Much like *Brown*, this information can be obtained from only the CCSAO and the Defendant Officers should be allowed to discover the information.

Third, although the County is not named as a party in this litigation, the CCSAO's decisions throughout Plaintiffs' criminal proceedings bear directly on the claims and defenses in these cases. The CCSAO originally convicted all the Plaintiffs. The CCSAO's public integrity unit had an investigation into Watts in 2005, yet it continued prosecutions arising from arrests made by the tactical team. (Deposition of David Navarro, p. 69 (July 18, 2023), partially attached hereto as Exhibit 21. Defendants Watts and Mohammed were arrested in 2012, not for framing citizens, but for theft of government funds. (Dkt. #456-1, p. 16.) After their arrests and convictions, the CCSAO did not begin to investigate or vacate Plaintiffs' convictions. It was not until years later did it move to vacate hundreds criminal convictions after receiving affidavits from criminal defendants stating that they were framed. Simply put, these lawsuits against the Defendant Officers only exist because of the decisions of the CCSAO.

Fourth, the seriousness of the litigation and the issues involved weigh heavily in favor of finding a particularized need. This is not simply one reverse conviction case. Rather, it is a group of over 180 lawsuits stemming from the CCSAO's decision to vacate seemingly every

felony conviction based on arrests made by the Defendant Officers during a given time period. Plaintiffs accused the Defendant Officers in their submissions to the CCSAO and in their allegations in their complaints of engaging in egregious misconduct, including framing them and falsifying police reports, which allegedly led to their convictions. *See Evans*, 231 F.R.D. at 317 (finding particularized need for information because “[a] claim that police officers violated their sworn duty by knowingly seeking the prosecution and conviction of a person whom they knew to be innocent (and did so through multiple constitutional violations) strikes at the heart of the integrity of our criminal justice system. It is among the most serious charges that can be leveled against law enforcement.”)).

Finally, the testimony sought would not chill future deliberations by prosecutors. It has been over seven years since Baker had his convictions vacated and six years since the first mass proceeding vacating convictions. *See Bahena v. City of Chicago*, 2018 WL 2905747, *4 (N.D. Ill. June 11, 2018) (finding four years since dropping criminal case sufficient to not have a chilling effect). The court in *Bahena* found that the particularized need for a memorandum discussing the evidence outweighed the CCSAO’s need for secrecy. In determining this, the court held that production of the memorandum would not chill future deliberations based on the time that had elapsed since the criminal case was dropped. *Id.* The same logic applies here, allowing testimony of these witnesses would not chill future deliberations as Plaintiffs’ criminal proceedings have long been terminated. Although the well of plaintiffs is seemingly close to drying up, to the extent the CCSAO is currently investigating other convictions, the Defendant Officers would agree not to ask ASA Adduci about any current investigation. But in order to defend themselves, the Defendant Officers must be allowed to question the CCSAO about its decisions to vacate Plaintiffs’ convictions and to take no position on their petitions for a COI.

The declaration of ASA Scheller does not indicate how the depositions, if allowed to proceed, would have a chilling effect on future deliberations. Rather, ASA Scheller simply concludes that to “divulge the process...would expose it to outside influence,” which would somehow cause interested persons outside of the CCSAO to “try to manipulate the process itself in order to achieve a favored outcome.” (Dkt. #534-3, ¶ 8.) But the “outside influence” that tries to “manipulate the process” predominately comes from plaintiffs. It is Plaintiffs who have presented false and misleading information in their affidavits submitted to the CCSAO. For example, Plaintiff Willis signed an affidavit stating Officer Nichols was involved in his false arrest, but Officer Nichols was not even a police officer when Willis was arrested.⁸ (Willis Aff. ¶¶ 1, 4, attached hereto as Exhibit 22; Deposition of Douglas Nichols, p. 11-12 (Dec. 19, 2019), partially attached hereto as Exhibit 23.) While ASA Scheller may be concerned about the CCSAO’s processes, in the context of the Watts cases, it does not appear that there is currently a process to manipulate. Rather, it appears based on the CCSAO taking no position on every single Watts-related petition for a COI, that the CCSAO has made a policy decision not to object to these petitions. If that is the case, there is no danger of outside influence. Without any explanation for how the testimony would expose the process to outside influence, ASA Scheller’s declaration should be given no weight. As in *Bahena*, this Court should find that these depositions will not chill future deliberations.

The CCSAO principally relies on *Saunders* to support its argument that the Defendant Officers cannot show particularized need. (Dkt. #534 at pp. 9-10.) *Saunders* is off point. In

⁸ The CCSAO has described Plaintiffs’ counsel as a credible partner who carefully scrutinizes cases before approaching the Office with a case. Melissa Segura, *Josh Tepfer Pioneer Mass Exonerations for Wrongfully Convicted* at 3, Jan. 11, 2023 (attributing statement to State’s Attorney Foxx). Fairness dictates that since the CCSAO has partnered with plaintiff’s counsel in evaluating these claims (regardless of the apparent bias), Defendant Officers should be entitled to discovery on the topics identified in this response.

Saunders, the plaintiffs were seeking evidence of the CCSAO's deliberation during its reinvestigation into the underlying crime by arguing that they had a particularized need for the information. *Saunders v. City of Chicago*, 2015 WL 4765424, *21 (N.D. Ill. Aug. 12, 2015). In making this argument, Plaintiffs relied heavily on *Evans*. *Id.* *Saunders* reasoned that the plaintiffs' reliance on *Evans* was misplaced, because in *Evans*, the defendants, not the plaintiffs, were seeking information relative to the pardon issued by the Governor in order to challenge the pardon's validity. *Id.* *Saunders* found that since the plaintiffs would attempt to introduce their COIs into evidence, the *plaintiffs* could not claim, like the defendants in *Evans*, the need for the CCSAO's deliberations to challenge the COIs. *Id.* Unlike the plaintiffs in *Saunders*, the Defendant Officers *will challenge* the COIs in every way, shape, and form.

III. The Other Privileges Asserted by the CCSAO are Inapplicable.

The CCSAO asserts the "mental processes privilege" and the work-product doctrine to prevent the depositions. (Dkt. #534 at 10-11.) Both claims of privilege are unfounded.

The CCSAO, relying on *Saunders*, argues that the deponents should not be questioned about their internal thoughts and mental impressions as they are protected by the "mental processes privilege." (*Id.* at 10.) As the CCSAO acknowledges, *Saunders* did not use the term mental-processes privilege, and the section of the opinion on which the CCSAO relies is an analysis of the deliberative process privilege. *Saunders*, 2015 WL 4765424, *20. The only other Northern District of Illinois case cited by the CCSAO, *Mendez v. City of Chicago*, 18 CV 5560, 2020 U.S. Dist. LEXIS 47530, at *4 (N.D. Ill. March 19, 2020), is inapplicable as it concerned the judicial deliberative-process privilege, which protects judges from answering questions about their court proceedings or the rationale for their findings. To the extent the mental process privilege exists in this district, courts have found it "inexplicably intertwined" with the deliberative process privilege.

DeLeon-Reyes, 2021 WL 3109662, fn. 5. Where, as here, the claim of privilege is intertwined with the deliberative-process privilege, the analysis is the same. *Id.* Thus, the CCSAO's invocation of the mental process privilege fails for the same reasons its claim of the deliberative-process privilege fails.

The CCSAO also attempts to invoke the work-product doctrine. Besides its citation to *Hickman v. Taylor*, 329 U.S. 495 (1947) for a general proposition about work-product, the CCSAO fails to cite any binding precedent or analogous Northern District of Illinois case. (Dkt. #534 at 11.) That is likely because numerous courts have “expressly found the [work-product] privilege unavailable when a prosecutor in a prior criminal investigation later objects to discovery of her work product by a litigant in a related civil lawsuit.” *Hernandez v. Longini*, 1997 WL 754041, *2 (N.D. Ill. Nov. 13, 1997). Recent decisions from this district have consistently reached the same conclusion. *Walls v. Vasselli*, 2022 WL 1004248, *2-3 (N.D. Ill. Apr. 4, 2022) (concluding “no reason to depart from the majority view that work product protections are not available when a prosecutor in a prior criminal investigation objects to discovery of purported work product by a litigant in a related civil lawsuit to which the prosecutor’s office is not a party”); *Hill v. City of Chicago*, 2015 WL 12844948, *2 (N.D. Ill. May 28, 2015) (stating “the CCSAO, as a non-party, is not entitled to work product protection in this litigation”); *Cook v. City of Chicago*, 2010 WL 331737, *2 (N.D. Ill. Jan. 26, 2010) (stating “a non-party may not assert the work product doctrine to protect its files or documents”); *Evans*, 231 F.R.D. at 310-11 (holding a prosecutor’s materials prepared during the underlying criminal prosecution are not prepared in anticipation of civil litigation); *Ostrowski v. Holem*, 2002 WL 31956039, *3 (N.D. Ill. Jan. 21, 2002) (“work-product privilege unavailable when a prosecutor in a prior criminal investigation later objects to discovery by a litigant in a related and subsequent civil lawsuit.”). Here, the witnesses and the CCSAO are

not parties to this case; therefore, the work-product privilege does not apply.

CONCLUSION

For the reasons stated above, the Defendant Officers request that the CCSAO's motion to quash the deposition subpoena of Mr. Sussman, Mr. Magats, Mr. Rotert, and Ms. Adduci be denied.

Respectfully Submitted,

/s/ Brian J. Stefanich

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CERTIFICATE OF SERVICE

I, Brian J. Stafnich, hereby certify that on **August 28, 2023**, I electronically filed the foregoing, DEFENDANT OFFICERS' RESPONSE TO THE COOK COUNTY STATE'S ATTORNEY'S OFFICE'S MOTION TO QUASH THE SUBPOENA FOR DEPOSITIONS OF ERIC SUSSMAN, JOSEPH MAGATS, MARK ROTERT, AND NANCY ADDUCI with the Clerk of the Court using the ECF system, which simultaneously served copies on all counsel of record via electronic notification.

/s/ Brian S. Stefanich