No. 130431

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, First District, No. 1-22-0322
Plaintiff-Appellee,	)	
	)	There on Appeal from the Circuit Court of Cook County, Criminal Division, No. 20 CR 03050-01
v.	)	
	)	Honorable Judge James B. Linn Presiding.
JUSSIE SMOLLETT,	)	
Defendant-Appellant.	)	

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

The Appellant was convicted of five (5) counts of disorderly conduct following a jury trial in the Circuit Court of Cook County, Illinois. (C1420); (C1714-1721). He was sentenced on March 10, 2022, to a term of 30 months felony probation, with the first 150 days to be served as a term of imprisonment in the Cook County Department of Corrections, for multiple counts of the offense of Disorderly Conduct (*vis a vis* filing a false police report). (C652-C658, C1709). A notice of appeal was timely filed on March 10, 2022. (C1710-C1711; C1722-C1723; C1714-1721). On appeal, the Appellate Court of the First District affirmed the Appellant's conviction on all grounds. No issue is raised challenging the charging instrument.

ISSUES PRESENTED

1. Whether a non-prosecution agreement can be enforced within the context of *nolle prosequi*, where the defendant has detrimentally relied upon the non-prosecution agreement by fully performing his part of the agreement to the benefit of the State and where, even within a *nolle prosequi* context, prosecutors never had the unfettered ability to re-prosecute, upon a showing of fundamental unfairness and bad faith.

2. Whether the Appellant's bail bond forfeiture and performance of community service in his first prosecution constitutes punishment, thereby rendering his subsequent prosecution and additional punishment for the same alleged offenses a violation of the Double Jeopardy Clause, which prohibits multiple punishments for the same offense.

3. Whether Illinois Supreme Court Rule 412 was violated when the Appellant was denied access to OSP's hours-long interviews of prosecution star witnesses who provided the only evidence linking the Appellant with the hoax that formed the basis of his Disorderly Conduct charges.

4. Whether the trial court's sentencing remarks informing the Appellant that the Appellant's case was a heater case and "the heater has to be addressed," amongst other remarks, is proof that the trial court was influenced by improper aggravating factors when it sentenced the Appellant, a first-time Class 4 felony offender, to probation including a 150-day jail term and $25,000.00 fines.

5. Whether a restitution order for overtime payments is valid when the City of Chicago and its police department are not considered "victims" per the restitution statute and Illinois precedent and where the receipts for overtime payments are fraught with issues of proof.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 604(a). This Court granted the Appellant's petition for leave to appeal on March 27, 2024.

STATEMENT OF FACTS

On March 8, 2019, a grand jury returned a 16-count felony Disorderly Conduct indictment of the Appellant. On March 26, 2019, the State, through its agent the Cook County State's Attorney's Office ("CCSAO") disposed of the matter by way of a *nolle posequi*, stating:

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

People v. Smollett, 2023 IL App (1st) 220322, ¶ 4. (Internal quotation marks omitted and emphasis in bold added).

The dismissal of the Appellant's charges after his complete performance was the result of a collaborative effort and agreement reached between the State and the Appellant. *Smollett*, 2023 IL App (1st) 220322, ¶¶ 156-58 (Lyle, J., dissenting). Additionally, the impact of this agreement was meant to track the Deferred Prosecution Program. *Id*. at ¶ 165.

On February 11, 2020, a new true bill of indictment was filed against Appellant, by the Office of Special Prosecutor ("OSP"), charging the Appellant with six (6) counts of Disorderly Conduct. (C 652-658). During the pre-trial phase, the Appellant filed a Motion to Dismiss Charges on the theory of breach of contract. (CI 324-336). The trial court denied this motion. (C 1343, R 897-916).

Additionally, on or about October 5, 2019, the OSP held an hours-long investigative interview with the Osundairo brothers, the key witnesses against the Appellant, to learn critical facts that would dictate whether the OSP would seek a new indictment against the Appellant, and if so, to aid in their prosecution. (R 242-251). The defense made a request for the disclosure of OSP's notes which the trial court denied as work-product privilege, without conducting an in-camera review. (R 242-251); (SUP 2 C 513-523). After that denial, the defense made another motion to compel OSP to release its notes to the trial court for an in-camera review, which the trial court denied. (CI 337-345); (R 900-901).

On November 29, 2021, the parties appeared before the court for a jury trial and completed jury selection. (R 922-1179). After an 11-day jury trial, including jury deliberations, the Appellant was found guilty of five (5) out of the six (6) charged counts of Disorderly Conduct. (R 1180-3328); (C 1420, R 3313-3318).

On February 25, 2022, the defense filed a Post-Trial Motion for Judgment Notwithstanding the Verdict and for New Trial. (C 19; C 1578-1660). The matter proceeded to hearing on post-trial motions on March 10, 2022. (R 3355-3561). The trial court denied the Appellant's Motion for Judgment Notwithstanding the Verdict and for New Trial and the matter proceeded to sentencing. (R 3355-3402, R3402-3434). A presentence investigation report was presented, and the parties offered evidence and argued in aggravation and mitigation. (CI 84-92; R 3435; C 1685-1693; R 3435-3439, CI93-CI104/R3439-R3490). Afterwards, the trial court sentenced the Appellant to thirty (30) months of felony probation with the first 150 days of the sentence to be served in the custody of the Cook County Jail, as well as the maximum fines of $25,000.00 and restitution in the amount of $120,106.00. (C 1712; C1714; R 3557). Counsel for the Appellant filed a Motion to Reconsider Sentence following the sentencing which was denied. (SUP C 2221-SUP C 2222; SUP C 1613- SUP C 1614; R 3559). A notice of appeal was timely filed on March 10, 2022. (R 3559-3560, C 1721-1723). The Appellant was taken into custody to begin the imposed sentence on that same day.

On March 11, 2022, the Appellant appealed to the First District Appellate Court, filing an emergency motion to stay his jail sentence and/or grant bail pending appeal. On March 16, 2022, the Appellant was released from custody after the First District stayed his sentence, reasoning that the court would be "unable to dispose of the instant appeal before the defendant would have served his entire sentence of incarceration." On December 01, 2023, the Appellate Court affirmed Appellant's conviction in a 2-1 decision. *People v. Smollett*, 2023 IL App (1st) 220322. (Hereinafter, "Majority Opinion"). A petition for rehearing was timely filed on December 21, 2023. The petition for rehearing was denied

by the First District in a 2-1 decision on January 02, 2024. This matter now comes before this Court after a Petition for Leave to Appeal was allowed on March 27, 2024.

ARGUMENT

I.

A NON-PROSECUTION AGREEMENT EXISTED AND SHOULD BE ENFORCED BECAUSE UPON DISMISSAL OF THE APPELLANT'S FIRST PROSECUTION VIA A NOLLE PROSEQUI, THE COOK COUNTY PROSECUTOR INFORMED THE TRIAL COURT THAT SHE BELIEVED THE OUTCOME WAS "A JUST DISPOSITION AND APPROPRIATE RESOLUTION TO THIS CASE," BECAUSE THE APPELLANT HAD PERFORMED COMMUNITY SERVICE AND AGREED TO, AND IN FACT, FORFEITED HIS BAIL BOND.

A. Standard of Review

This Court should review this issue *de novo*, as the trial court never analyzed facts pertaining to this issue. *See*, *People v. Stapinski*, 2015 IL 118278, ¶ 35.

B. Legal Analysis

The State of Illinois' re-prosecution of the Appellant was in breach of a non-prosecution agreement they had entered into and even disclosed on the record, because in reliance on the State's promise to dismiss charges, the Appellant fully performed his part of the agreement by completing community service and forfeiting his bail bond to the State.

1. American and Illinois courts apply contractual principles to enforce prosecutorial agreements where the defendant has detrimentally relied on the agreement.

> Our government is the potent, the omnipresent, teacher. For good or ill, it teaches the whole people by its example. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

When a sovereign cannot be trusted to fulfill its contractual obligations and promises, then the breakdown of the plea-bargaining system is inevitable. It is for this

reason that this Supreme Court, our appellate courts, and indeed Supreme Courts and appellate courts around the United States, have uniformly enforced contractual obligations spanning diverse pre-trial contexts involving scenarios in which defendants have specifically performed their contractual obligations to the State's benefit.

The Majority Opinion in this matter stands isolated in its reasoning as it is the only appellate court, thus far, in Illinois and in the United States, that has gone the opposite direction in its refusal to enforce a pre-trial agreement where the defendant has specifically performed his obligations to the benefit of the State.

For instance, in *Santobello v. New York*, 404 U.S. 257 (1971), the United States Supreme Court was faced with a scenario in which a defendant plead guilty to a lesser offense after the prosecutor had agreed to refrain from making a sentencing recommendation. *Santobello*, 404 U.S. at 258. However, at a later stage in proceedings, a new prosecutor reneged on the agreement and made a recommendation for the maximum sentence during sentencing. *Id*. at 259. The defendant was sentenced to the maximum sentence and appealed. *Id.* at 260.

On review, the *Santobello* Court reversed and remanded. *Id*. at 263. The *Santobello* Court reasoned that, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. This holding in *Santobello,* wherein prosecutors are held to promises that induce the defendant's action, is not restricted to plea agreements. Indeed, the United States Supreme Court was driven to protect the entire plea-bargaining system as it aptly confirmed, "the disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential

component of the administration of justice. Properly administered, it is to be encouraged." *Id*. at 260. *See also*, *People v. Bogolowski*, 317 Ill. 460, 468 (1925).

The *Santobello* Court's reasoning has also been extended to cooperation-immunity agreements. *United States v. Carter*, 454 F.2d 426, 428-29 (4th Cir. 1972). For example, in *Carter*, the defendant claimed that federal prosecutors in the District of Columbia had promised the defendant immunity from prosecution "anywhere else" and as it pertained to stolen checks if he cooperated in the apprehension of others. *Carter*, 454 F.2d at 426-27. The defendant fully performed his end of the bargain, leading to the apprehension and conviction of others. *Id*. However, the Government reneged, and the defendant was charged in a case involving stolen checks in Virginia. *Id*. The defendant filed a motion to dismiss which was denied without an evidentiary hearing, and after which, the defendant was prosecuted and convicted. *Id*.

In reversing the defendant's conviction and remanding for an evidentiary hearing, the Fourth Circuit concluded, "if the promise was made to defendant as alleged and defendant relied upon it in incriminating himself and others, the government should be held to abide by its terms." *Id*. at 427-28. The driving force behind the *Carter* Court's decision was the same as the *Santobello* Court's, as the Fourth District laid bare when it stated, "there is more at stake than just the liberty of this defendant. At stake is the honor of the government (sic) public confidence in the fair administration of justice, and the efficient administration of justice…" *Id*. at 428.

Around the United States, federal and state reviewing courts have extended the *Santobello* and *Carter* decisions, as well as their policy concerns, to all prosecutorial promises including non-prosecution agreements. *See e.g*., *State v. Bond*, 139 Wis. 2d 179,

188 (Ct. App. 1987) (holding that "once a defendant has relied upon a prosecutorial promise in any way and the state does not fulfill its promise, the promise is to be held enforceable against the state"); *United States v. Castaneda*, 162 F.3d 832, 836-37 (5th Cir. 1998) (finding that non-prosecution agreements are contractual in nature and cannot be rescinded except upon a showing, by a preponderance of evidence, that the defendant materially breached the terms of the agreement).

This Court is in tandem with the above-mentioned cases. For instance, this Court has held that "the prosecution must honor the terms of agreements it makes with defendants" especially if the defendant has "fulfilled his part of it." *People v. Starks*, 106 Ill. 2d 441, 449-52 (1985) (hereinafter, *Starks* '85).

In *Starks* '85, the defendant claimed that the prosecution had promised him armed robbery charges would be dismissed if he submitted to and passed a polygraph examination. *Starks*, 106 Ill. 2d at 444 (*Starks* '85). The defendant passed the polygraph and prosecutors reneged on the agreement. *Id*. A jury trial was held, and the defendant was convicted. *Id*. During post-trial motions, the defendant attempted to be heard on the merits of the issue of the agreement but was denied by the trial court. *Id*. at 444-46. In affirming the trial court on appeal, the Second District Appellate Court found that the record was not clear on the existence of an agreement. *Id*. at 446-47. On review, this Court in *Starks* '85 applied contractual principles in reviewing the agreement. *Id.* at 451. The *Starks* '85 Court rejected the State's argument that the alleged agreement lacked consideration and thus was a "gift-type" bargain. *Id*. Instead, the *Starks* '85 Court noted that consideration existed in the agreement because by taking the polygraph, "the defendant surrendered his fifth amendment privilege against self-incrimination" and thus, submitted to the risk of exposing

guilt. *Id*. at 452. As a result, the *Starks* '85 Court reversed Starks conviction and remanded for an evidentiary hearing to determine the terms of the alleged agreement since those terms were not clear from the record. *Id*. at 453. The *Starks* '85 Court reasoned that if the terms of the agreement had promised dismissal after Starks full performance, then such an agreement was contractually enforceable. *Id*. at 452-53

The *Starks* '85 Court's decision echoed the contractual principle that every agreement has an implied duty of good faith and fair dealing which the *Starks* '85 Court implicitly noted was significant in preventing the nullification of the essential plea-bargaining system within the criminal justice system. *Id*. at 449-52. As the *Starks* '85 Court noted:

> The prosecution must honor the terms of agreements it makes with defendants. To dispute the validity of this precept would surely result in the total nullification of the bargaining system between the prosecution and the defense…whatever the situation might be in an ideal world, the fact is that agreements between the prosecution and the defense are an important component of this country's criminal justice system. If a defendant cannot place his faith in the State's promise, this important component is destroyed. In the case at bar, the agreement allegedly rested upon the State's promise to dismiss the charge against Starks. If there was an agreement as alleged, and if Starks fulfilled his part of it, then the State must fulfill its part.

Id. (Internal quotation marks and citations omitted).

This strong policy concern against *total nullification* of the plea-bargaining system took on a major role in the *Starks* '85 decision, as reflected in three main areas of its holding. First, the Court in *Starks* '85 made clear that its holding broadly applied to all prosecutorial agreements fulfilled by the defendants. *Id*. *See also*, *Id*. at 454 (Ward, J., dissenting). This fact shouldn't be surprising since in *Starks* '85, the policy goal was to ensure the protection of the *entire* plea-bargaining system.

Second, the *Starks* '85 Court found that a non-prosecution agreement was enforceable even when raised during post-trial motions. *Id*. at 445-46. This too shouldn't be surprising, since as the *Starks* '85 Court demonstrates, ensuring an honor based plea-bargaining system overrides any technical maneuvers that the State might use to avoid compliance with its contractual or promissory obligations. *See also*, *Carter*, 454 F.2d at 428 (rejecting technical "formalisms" as a means of avoiding prosecutorial compliance with prosecutorial agreements to the detriment of "public confidence in the fair administration of justice").

Third, the *Starks* '85 Court found that Starks submission to a polygraph test provided sufficient consideration even though polygraph tests are inadmissible at trial. *Starks*, 106 Ill. 2d. at 451-53 (*Starks* '85). The *Starks* '85 Court justified this by pointing out that a failed polygraph might revitalize a faltering investigation, dimmish the confidence of the defendant on cross-examination, or worse, come to the judge's attention thereby compelling the defendant to elect trial by jury. *Id.* at 451-52. However, the more compelling, albeit implicit justification, is that the *Starks* '85 Court's policy of promoting honor and preventing nullification in the plea-bargaining system made no room for judicial approval of prosecutorial breach of agreements using technicalities.

Aside from the above-mentioned policy influence permeating the *Starks* '85 decision, it is also noteworthy that even though the *Starks* '85 case never disclosed the manner in which that case had been dismissed[1], the *Starks* '85 Court demonstrated that a non-prosecution agreement is enforceable within a *nolle prosequi* context because the

[1] The lack of clarity on the method of dismissal promised to Starks is most likely because there was no evidentiary hearing at the trial level as to the exact terms of the agreement. *Starks*, 106 Ill. 2d at 447-53 (*Starks* '85).

Starks '85 decision was significantly reliant on out-of-state cases involving the enforcement of non-prosecution agreements within the context of a *nolle prosequi*. *See*, *Id*. at 449-52. This is critical as it demonstrates that if contractual principles are to be applied when analyzing non-prosecution agreements, the mechanical way ("formalities") in which prosecutors dismiss charges is not the focus. Rather, the focus is on the true intent of the parties, *vis a vis,* if the State has bargained away its right to bring back charges. *See*, *Matthews v. Chicago Transit Auth*., 2016 IL 117638, ¶ 77 (an Illinois court's primary goal is to ascertain and give effect to the intention of the parties at the time the contract was formed).

2. Illinois and other state appellate courts have applied contractual principles to enforce non-prosecution agreements within the context of a *nolle prosequi*.

In reaching its opinion, the Majority Opinion in this matter reasoned that:

> Presumably relying on principles of contract law, the dissent asserts that "the rights of the State in a *unilateral nolle*" can be "bargain[ed] away" when "making a *bilateral agreement*." (Emphases added.) However, no Illinois court has ever applied principles of contract law in interpreting the scope of a *nolle prosequi* disposition in a criminal case.

Smollett, 2023 IL App (1st) 220322 at ¶ 32.

But this reasoning is patently incorrect. For instance, even though the facts in *Starks* '85 never detailed what type of "dismissal" Starks was promised, in a later decision, the Second District clarified that Starks had been promised a dismissal via a *nolle prosequi*. *People v. Starks*, 146 Ill. App. 3d 843, 844 (2d Dist. 1986) (hereinafter, *Starks* '86). To be clear, the Supreme Court in *Starks* '85 remanded the case to the trial court to conduct an evidentiary hearing to determine if an agreement was made. *Starks*, 106 Ill. 2d. at 453 (*Starks* '85). An evidentiary hearing was held, after which, the trial court found in favor of

Starks and dismissed the case. *Starks*, 146 Ill. App. 3d at 845-46 (*Starks* '86). The State then appealed, and the Second District noted:

> The State appeals from the dismissal of a charge of armed robbery (Ill. Rev. Stat. 1981, ch. 38, par. 18 -- 2) against defendant, Ronnie Starks. **The trial court found the State had failed to fulfill its promise to nol-pros the charge if defendant passed a polygraph examination**, and the State contends the court's finding is against the manifest weight of the evidence.

Id. at 844; 845. (Internal citation marks omitted, emphasis in bold and underline added).[2]

Notably, in finding that the trial court had not committed error in its evidentiary hearing, the *Starks* '86 Court observed that, "the existence of an oral agreement, as well as its terms and conditions, is a question of fact to be determined by the trier of fact." *Id.* at 847. Also, in rejecting the State's argument that it shouldn't be bound by its agreement, the *Starks* '86 Court emphasized that Illinois had "drawn a distinction between those situations where the defendant abides by the bargain and those cases where the defendant does not." *Id*. at 847. Accordingly, the *Starks* '86 Court found that because Starks had fulfilled his part of the agreement, "the State will, in such cases, be required to fulfill its part of the bargain." *Id*. at 848.

The *Starks* '86 case should come as no surprise for two reasons. First, no prosecutor in Illinois has ever had the unfettered ability to re-prosecute a case after a *nolle prosequi*. Prosecutors must meet a threshold, wherein, the "state may re-prosecute the defendant

[2] Remarkably, in their PLA Answer, the OSP never presented any rebuttal to *Starks* '86. Instead, the OSP argued that the Defendant did not raise *Starks* '86 in their First District appellate brief and thus, forfeited its use. *See*, *OSP PLA Answer* at 5-6. But this argument is baffling. The OSP should know the difference between including additional case authority to support an issue and raising an additional issue to support an appeal. The former is true here. From the inception of this appeal, the Defendant has raised the issue that a non-prosecution agreement exists and should be enforced even within the context of a *nolle prosequi*. The *Starks* '86 case supports this issue. Thus, the issue was preserved.

subject to other relevant statutory or *constitutional defenses*, absent *fundamental unfairness, bad faith, or harassment*." (Hereinafter, "Fairness Protections"). *Smollett*, 2023 IL App (1st) 220322 at ¶ 45, (*quoting*, *People v. Hughes*, 2012 IL 112817, ¶ 23). Here, the State does not meet the Fairness Protections threshold because its breach of the non-prosecution agreement is surely *fundamentally unfair* and in *bad faith*, especially after assuring the trial court, "we believe this outcome is a just disposition and appropriate resolution to this case." *Id*. at ¶ 4.

Second, enforcing the real intent of the parties in the present case in no way undermines the principle that prosecutors can refile charges after a *nolle prosequi*. Certainly, the power to refile charges is activated when charges have been dismissed unilaterally, and not when prosecutors have intended to, and indeed, bargained away their right to bring back charges *via* bilateral non-prosecution agreements. *Id*. at ¶ 153 (J. Lyle, dissenting) (*citing*, *State v. Kallberg*, 326 Conn. 1, 160 A.3d 1034, 1042 (Conn. 2017)). To put it another way, a non-prosecution agreement is built around the State's promise to never prosecute a case after dismissal. Therefore, if there is a non-prosecution agreement in place, the manner in which the case is dismissed becomes a mere mechanical formality and will not be fatal to the formation of a non-prosecution agreement.[3] Accordingly, any analysis

[3] This point is made again in *People v. Bogolowski*, 317 Ill. 460, 467-68 (1925), where this Court observed—while enforcing a pre-trial cooperation plea agreement—that a *nolle prosequi* was a method in which a cooperation immunity agreement could be perfected. Specifically, the *Bogolowski* Court noted, "in this State the method has been, in accordance with the practice stated in Bishop's New Criminal Procedure, (vol. 2, secs. 1161, 1166,) either for the State's attorney to enter a ***nolle prosequi*** and call the defendant thus discharged as a witness, or to require him to plead guilty and examine him as a witness, after which, if his testimony shows a full and truthful disclosure of the facts, his plea may be set aside and a *nolle prosequi* or some other form of discharge may be entered." *Id*. (emphasis added).

should be focused on determining if the true intent of the parties was to form a non-prosecution agreement. *See*, *Matthews*, 2016 IL 117638 at ¶ 77.

This point is made clearer by this Court's application of contractual principles in enforcing a non-prosecution agreement within the context of a motion to strike with leave to reinstate. *People v. Johnson*, 372 Ill. 18, 26 (1939). This is significant, because the *Fairness Protections* threshold found within the context of a *nolle prosequi*, does not exist within the context of a motion to strike with leave to reinstate, (or Motion State-Stricken off Leave, colloquially referred to as a "MS-SOL"). By its very nature, when a prosecutor dismisses charges *via* a MS-SOL, the prosecution is effectively announcing to the trial court and the defendant that charges could be refiled within a set period. Thus, the *Johnson* case demonstrates, yet again, that if contractual principles are to be applied in analyzing non-prosecution agreements, the mechanical way ("formalities") in which prosecutors dismiss charges is not the focus, rather, the focus is on the true intent of the parties *vis a vis* if the State has bargained away its right to bring back charges.

3. The record clearly established that a non-prosecution agreement was entered into between the Appellant and the State of Illinois and executed and fully performed by the Appellant to the full benefit of the State.

Apart from ignoring the relevant precedent as stated above, the Majority Opinion erroneously declared:

> The record does not establish that Smollett entered into a nonprosecution agreement with the CCSAO, in which the CCSAO agreed to forgo further prosecution of him in exchange for his performance of community service and the forfeiture of his bond.

Smollett, 2023 IL App (1st) 220322 at ¶ 28. (Internal quotation marks omitted).

The Majority Opinion's declaration is perplexing because they never looked for a contractual agreement nor performed a contractual analysis in their opinion. They said so.

See, *Id.* at ¶ 32 (criticizing Justice Lyle's application of contractual principles in her dissent). If the Majority Opinion had applied contractual principles, the evidence of a non-prosecution agreement would have been easily gleaned from the record. For example, right there, in the transcript of dismissal of the first indictment, a seasoned Cook County Assistant State's Attorney (hereinafter "Prosecutor") stated:

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

Id. at ¶ 4. (Internal quotation marks omitted and emphasis in bold added).

The Prosecutor's use of the word "agreement" in relation to the Appellant forfeiting his bail bond clearly demonstrates that there was an agreement between the State and Appellant. This must be true since the Appellant could not legally form a contractual *agreement* with himself. By its very nature, an agreement is bilateral or multilateral; it is never unilateral with one's self.

The consideration for the agreement is also equally clear—the Appellant forfeited something of value ($10,000.00 bail bond) which benefited the State to his detriment. Even without the forfeiture of his bail bond, the Appellant's cooperation alone, in restricting his freedom and performing community service, is sufficient consideration.[4]

Furthermore, any questions as to the terms of this "agreement" were answered by the Prosecutor when she stated, "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**

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

disposition and appropriate resolution to this case."[5] *Id*. And as the dissent noted, the phrases *just disposition* and *appropriate resolution* "denote a finality that would not exist if the State merely sought to refile the charge." *Id*. at ¶ 173 (J. Lyle, dissenting). Significantly too, the Prosecutor's mention of the phrases "just disposition*"* and "appropriate resolution*"* came right **after** her use of the phrase "*nolle pros*." This is important because it demonstrates the Prosecutor's belief that *finality* was the effect of her dismissal.

Nor can we ignore that the Prosecutor's in-court statement was drafted in collaboration with the Appellant's attorneys and that the Cook County State's Attorney's Office agrees and concedes that the intent of the parties was to form an agreement that tracked a deferred prosecution. *Id*. at ¶¶ 156-59; 165-66 (J. Lyle, dissenting).

Any other interpretation of the seasoned Prosecutor's words would lead to absurd results since in no obvious scenario can it be reasoned that the Appellant walked into a courtroom, entered into an agreement with himself to give up his bail bond for temporary relief from prosecution (even though he was out on bail), and coincidentally, at the moment he was making this charitable donation of his bail bond, the Prosecutor dismissed his case. *See, e.g*., *Nutrasweet Co. v. American Nat'l Bank & Trust Co*., 262 Ill. App. 3d 688, 695 (1st Dist. 1994) (finding that during contract construction, the "interpretation which makes a rational and probable agreement must be preferred"[6]).

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[5] This "just disposition and appropriate resolution" statement is conspicuously absent from any analysis in the Majority Opinion. One might conclude its absence is not unrelated to the fact that it negates the erroneous conclusion that a non-prosecution agreement was not clear from the record.

[6] At this junction, it should be noted that if indeed Cook County prosecutors did not intend to bargain for a non-prosecution agreement, then the OSP should not have troubled itself, because presumably, the Cook County prosecutors would have initiated a second

At the very least, and assuming arguendo, the Majority Opinion is correct that a non-prosecution agreement could not have been formed since there was a *nolle prosequi*, then the Prosecutor stating, "**we believe this outcome is a just disposition and appropriate resolution to this case,**" is inconsistent with the *nolle prosequi* and creates an ambiguity as to the terms of the agreement. Nonetheless, such ambiguities should be resolved in favor of the Appellant. *People v. Weilmuenster*, 283 Ill. App. 3d 613, 625 (2d Dist. 1996). *See also*, *United States v. Vergara*, 791 F. Supp. 1095, 1100 (N.D.W.Va. 1992) (finding that in the "absence of an agreement, clearly understood by all of the parties, carefully memorialized, and fully disclosed to the Court, the government must bear the disadvantage of ambiguity or omission").

It should also be noted, the use of the phrase, "just disposition and appropriate resolution" after the phrase "nolle pros," makes it clear that the *nolle prosequi* was at most a scrivener's error since prosecutors are not required to use such phrases after a dismissal. But the Prosecutor did so here to indicate the finality of the matter. Thus, the true intent of the parties should be enforced. *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 391 (4th Dist. 1992).

Additionally, the fact that the State of Illinois *via* the OSP, later gave in to public outcry over the disposition of the initial prosecution has no bearing on the enforceability of the non-prosecution agreement. As one appellate court aptly noted, "the awesome power, vested by the people in the State's Attorney, should not be employed for the purpose

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prosecution. But the OSP interfered with an elected prosecutor's executive discretionary authority because they disagreed with the *nonprosecution agreement resolution*. (C 1478-1480; C 892); (C 727).

of applying balm to a wounded ego or to the fulfillment of a personal vendetta." *State v. Thompson*, 48 Md. App. 219, 222-23, 426 A.2d 14, 16 (1981).

The Maryland Appellate Court's declaration against personal vendettas as justification for prosecution is relevant here. The OSP has openly admitted that there was no misconduct, undue influence, or crime committed in the formation of the non-prosecution agreement in the present case but admits that it disagrees with the punishment the Appellant in this case received from an elected prosecutor who exercised well-established discretionary powers. (C 1478-1480; C 892); (C 727) (where the OSP, in its prepared written Information Release to announce the second indictment of Appellant, stated that it "disagrees with how the CCSAO resolved the Smollett case").

Finally, this non-prosecution agreement reached by the Cook County State's Attorney's Office also binds the Office of Special Prosecutor. For instance, courts have recognized that in Illinois, State's Attorneys are agents and representatives of the State of Illinois. *See*, 55 ILCS 5/3-9005 (a)(1); *See also*, *United States ex rel. Burton v. Mote, No. 01C9744*, 2003 U.S. Dist. LEXIS 23117 at *19 (N.D. Ill. Dec. 22, 2003), (noting that Illinois State's Attorneys represent the executive branch of the State of Illinois). The idea that a State's Attorney's Office in Illinois does not act as an agent of the State of Illinois has been deemed "ludicrous and wholly without merit." *Id. See also*, *Starks*, 106 Ill. 2d at 448-49 (1985) (*Starks* '85) (noting that the State's Attorney is a representative of the People and that, "the bargaining relationship between the State, by its agent, the prosecutor, and a defendant charged with a crime is now universally recognized").

In the present case, the Cook County State's Attorney's Office entered and executed the agreement with the Appellant. In doing so, the Cook County State's Attorney's Office

did so on behalf of its principal, the State of Illinois, and no one else. Likewise, the OSP was appointed to act on behalf of the State of Illinois during its investigation and eventual prosecution of the Appellant. *See*, (C 369), (order appointing Dan K. Webb as the special prosecutor and noting that, "the Special Prosecutor shall be vested with the same powers and authority of the elected State's Attorney of Cook County, limited only by the subject matter of this investigation"). In fact, the caption of the OSP's indictment papers against the Appellant reads: "State of Illinois v. Jussie Smollett." (C 652). This caption also reflects the fact that the OSP represents the State of Illinois, and no one else. Also, as a fundamental tenet of agency, the act of an agent is attributable to the principal.[7] Thus, the non-prosecution agreement formed and executed between the Cook County State's Attorney's Office and Appellant is binding on the State of Illinois and cannot be undone or ignored by changing the agent—in this case, by bringing in the OSP to re-prosecute the Appellant.

4. Non-prosecution agreements that are structurally or procedurally flawed should be enforced if a defendant's reliance has constitutional implications.

Beyond the public policy of protecting the plea-bargaining process, this Court has enforced unauthorized promises when fundamental fairness is implicated. *Stapinski*, 2015 IL 118278 at ¶ 55. In such situations, the fundamental fairness rationale of enforcing such agreements is justified where the defendant's reliance on the agreement has constitutional consequences. *Id.* at ¶ 55.

At the crux of the *Stapinski* holding was the Illinois Supreme Court's firm rejection of the State's argument that it was not bound by an agreement between a police officer and

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

the defendant, since the State's Attorney's office never approved the agreement. *Id*. at ¶¶ 53- 55. The *Stapinski* Court could not have been clearer when it held that, "whether the cooperation agreement was valid in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on Due Process grounds if a defendant's reliance on the promise has constitutional consequences." *Id*. at ¶ 55. As a result, the *Stapinski* Court found that the defendant in that case incriminated himself when he relied upon the non-prosecution cooperation agreement. *Id*. Thus, the breach of the agreement by the prosecution was a prejudicial violation of the defendant's Due Process rights. *Id*.[8]

Importantly, the *Stapinski* Court's reasoning rejects any notion that its holding is limited to cooperation agreements. Specifically, the Court noted that:

> Generally, fundamental fairness requires that promises made **during plea bargaining and analogous contexts** be respected. Where the government has entered into an agreement with a prospective defendant and the defendant has acted to his detriment or prejudice in reliance upon the agreement, as a matter of fair conduct, the government ought to be required to honor such an agreement.

Id. at ¶ 48. (Emphasis added). *See also, U.S. v. Lyons*, 670 F.2d 77, 80 (7th Cir. 1982) ("any agreement made by the government must be scrupulously performed and kept").

In the aforementioned quote, the *Stapinski* Court's reasoning is all encompassing and focused on a call to generally enforce prosecutorial agreements that have been

[8] This apparent agency principle has also been applied within the context of Illinois Supreme Court Rule 402(f). For instance, the Illinois Supreme Court in *People v. Friedman*, 79 Ill. 2d 341, 351-52 (1980), held that, "the fact that the party to whom this statement was made did not have the actual authority to enter negotiation is not, standing by itself, sufficient to render the statement admissible. Defendant could have reasonably assumed that Kaiser was an appropriate party to whom he could convey his offer to bargain."

detrimentally relied upon by a defendant. This should come as no surprise since the *Stapinski* Court based the foundation of its fundamental fairness rationale on the holding in *Starks* '85; a case not involving the typical cooperation agreement seen in *Stapinski*. *See, Stapinski*, 2015 IL 118278 at ¶ 38-49.

The *Stapinski* rule should still apply here, even if the *nolle prosequi* created a procedural flaw in the non-prosecution agreement. It will be wholly unfair for the State to gain an improper advantage over a defendant by giving misleading assurances to extract reliance from a defendant at his constitutional expense.

Also, in the case at bar, even if we were to assume, that somehow, the Cook County State's Attorney's Office, did not have authorization to enter into an agreement, the Prosecutor's promises and representations made on the record are no different than that of the unauthorized promises made by police to the defendant in *Stapinski*. Like the agreement in *Stapinski*, the agreement here should be enforced on due process grounds because the Appellant 's reliance on the promise has constitutional consequences.

For example, the impact of the State's actions on Appellant's Fourteenth Amendment substantive due process right is as apparent as it was in *Stapinski*. Under the Fourteenth Amendment due process analysis, there is nothing fair or honorable about the State pulling a fast one and pocketing the Appellant's bail bond and/or restricting his freedom in the performance community service, all to his detriment and the State's benefit, while blatantly failing to meet its end of the bargain.

Also, there are even more constitutional violations in this case than in *Stapinski*, as the State's breach of the non-prosecution agreement with this Appellant violates not only his substantive due process rights but also his procedural due process rights. For example,

the State cannot deprive the Appellant of his bail bond without due process of law, as explicitly guaranteed by the Due Process Clause of the Fourteenth Amendment. *See*, U.S. Const. Amend. XIV ("nor shall any state deprive any person of life, liberty, or property without due process of law"). However, the State did just that. By re-prosecuting the Appellant in direct contravention of its non-prosecution agreement pursuant to which the Appellant had agreed to forfeit his $10,000.00 bail bond, the State has effectively denied the Appellant proper notice and an impartial hearing as to the propriety of that forfeiture. Additionally, it should not be forgotten that this constitutional violation is ongoing since the State continues to enjoy the benefit of its breach *via* conversion of the Appellant's bail bond, all in violation of the Fourteenth Amendment of the United States Constitution.

Nor should it be forgotten, the *Stapinski* Court's finding that due process is not just designed to protect an individual's personal rights, but also to protect an individual's property rights from arbitrary and capricious governmental action. *Stapinski*, 2015 IL 118278 at ¶ 50. Thus, the State's breach of the agreement after taking the Appellant's bail bond violates the Appellant's substantive and procedural due process rights. In fact, this is precisely the scenario the First District Court denounced in *People v. Marion* when it warned that, "to allow the government to receive the benefit of its bargain without providing the reciprocal benefit contracted for by the defendant would…offend all notions of fairness…which are protected by constitutional due process." 2015 IL App (1st) 131011, ¶ 38. Thus, fundamental fairness requires the State and its appointed agents to fulfill their end of the bargain. *See*, 22 C.J.S. Crim. L.: *Substantive Principles* § 110 (2019 update) ("fairness or equity may require the enforcement of an immunity agreement, even though it is procedurally flawed").

Furthermore, even if one were to believe that a non-prosecution agreement does not exist, the effect of such a belief is that the prosecutor came to court, acting on behalf of the sovereign, and converted a citizen's bail bond, without compensation and *via* deception. Such a scenario is manifestly and *fundamentally unfair* and in *bad faith*. As such, within the *nolle prosequi* context, the State cannot not meet the *Fairness Protections* threshold that would justify re-prosecution.

5. This Court should mandate an evidentiary hearing if it has doubts as to the terms of the agreement.

The Majority Opinion erroneously declared that "the record in this case is silent regarding any nonprosecution agreement between the CCSAO and Smollett." *Smollett*, 2023 IL App (1st) 220322 at ¶ 37; *see also*, *Id*. at ¶ 37. But such a finding, without a complete evidentiary hearing, is erroneous. *See*, *Starks*, 106 Ill. 2d at 453 (*Starks* '85); s*ee also*, *Id.* at ¶ 168 (J. Lyle, dissenting). This is true since, "the existence of an oral agreement, as well as its terms and conditions, is a question of fact to be determined by the trier of fact." *Starks*, 146 Ill. App. 3d at 847 (*Starks* '86).

Notably, the Majority Opinion makes the same mistake the Second District made in *People v. Starks*, 122 Ill. App. 3d 228, 239 (2d Dist. 1983) (hereinafter, *Starks* '83), where that Court declared: "[T]he record here is not complete enough to allow the conclusion that there was, in fact, an agreement or if there was what its terms were." Of course, this declaration was later rejected by the Illinois Supreme Court in *Starks* '85, wherein the Illinois Supreme Court, *sua sponte*, remanded and ordered an evidentiary hearing. *Starks*, 106 Ill. 2d at 447-48 (*Starks* '85), (also observing that the trial court "had refused to consider the pretrial agreement regarding the polygraph examination and refused to allow counsel to make any record pertaining to the agreement"); *Starks,*146 Ill. App. 3d

at 845 (*Starks* '86); *see also*, *People v. Marion*, 2012 IL App (1st) 082465-U ¶ 8-18 and *People v. Marion,* 2015 IL App (1st) 131011, ¶¶ 1-3, (where Justice Neville, formerly sitting in the First District and authoring a unanimous opinion, reversed and remanded *Marion* for completion of evidentiary hearings, not once, but twice).

The *Starks* '85 Court mandated an evidentiary hearing for two reasons. First, the *Starks* '85 Court noted that the prosecutors did not deny the existence of an agreement. *Starks*, 106 Ill. 2d at 447 (*Starks* '85). Nevertheless, the *Starks* '85 Court noted that the record was, "unclear as to the exact terms of the agreement." *Id*. at 451. Second, in *Starks* '85, the defendant's allegations of an agreement were seen as reliable enough to trigger an evidentiary hearing because his statements had been made under oath. *Id*. at 448.

Here, like *Starks* '85, there is reliable evidence of an agreement to trigger an evidentiary hearing. For instance, the Cook County State's Attorney's Office does not deny the existence of an agreement and its terms. One of them stated this much on the record when she noted this Appellant's "**agreement** to forfeit his bond…" *Smollett*, 2023 IL App (1st) 220322 at ¶ 4. (Emphasis in bold added). Also, the Prosecutor's declaration, on the record, describing an agreement prior to dismissal, was made in her capacity as an officer of the court and an administrator of justice who is ethically bound to be truthful to the court. Such statements carry the same effect as an oath since an attorney can be disciplined for unethical conduct. In fact, the Prosecutor's statements to the court are even more reliable than relying alone on the potentially self-serving statements of a defendant as was done in *Starks* '85, even if under oath.

Also significant is the investigative report from OSP which disclosed that Cook County prosecutors had intended for the "terms of the dismissal" to track a deferred prosecution. *Id*. at ¶¶ 156-59; 165-66 (J. Lyle, dissenting).

Notwithstanding these points, the OSP objects to an evidentiary hearing because the Appellant brought it up, for the first time, in his Petition for Rehearing and thus, according to the OSP, waived "any argument that he was entitled to an evidentiary hearing to determine whether there was a non-prosecution agreement." *See*, *OSP PLA Answer* at 6. (Internal quotes omitted). But the OSP's argument misses the entire point of *Starks* '85. Again, in *Starks* '85, this Court noted that the record was unclear as to the terms of the agreement and mandated an evidentiary hearing to clear up the issue. The evidentiary hearing in *Starks* '85 was mandated *sua sponte* and not at the request of the defendant since the *Starks* '85 Court had criticized the defendant's argument for *presuming* "that an agreement existed." *Starks*, 106 Ill. 2d at 447 (*Starks* '85).

In the present case, the Appellant in his Petition for Rehearing, raised the issue of an evidentiary hearing because the Majority Opinion expressed doubts as to the existence of an agreement.[9] *Smollett*, 2023 IL App (1st) 220322 at ¶ 28. Thus, as mandated by *Starks* '85, when there is some reliable evidence of an agreement—as was the case here—and if a reviewing court has doubt as to the terms, then there should be an evidentiary hearing. *Id*. at ¶ 168 (J. Lyle, dissenting). Besides, the record is clear that the Appellant filed a

[9] Remarkably, not even the OSP has ever made such an argument. The OSP does not dispute an agreement was formed, they only argue that the terms centered upon relief from temporary prosecution as opposed to a complete non-prosecution. *Smollett*, 2023 IL App (1st) 220322, ¶ 159 (J. Lyle, dissenting).

motion to dismiss *but this motion was denied without being heard on the merits*.[10] R. 912-914. *See also*, *Smollett*, 2023 IL App (1st) 220322 at ¶ 168 (J. Lyle, dissenting).

At this juncture, it should be noted that the continued irony of this case is that both the Appellant and the Cook County prosecutors do not dispute the terms of the agreement. Only the OSP does, even though they were not in the room when it happened.

6. The Majority Opinion rejects nearly a century of Illinois public policy which promotes good faith and fair dealing in our plea-bargaining system and in so doing, restricts the discretionary and independent powers of prosecutors.

In her dissent, Justice Lyle raised public policy concerns as to the implication of allowing the State to breach a fully performed agreement. *Smollett*, 2023 IL App (1st) 220322 at ¶¶ 170-75. (J. Lyle, dissenting). Certainly, Justice Lyle's public policy concerns are not outliers. This Court has found that, "if the administrative and prosecuting agencies of the People fail to keep their legitimate agreements, public policy and the great ends of justice require the court to prevent such breaches of faith." *Johnson*, 372 Ill. 18, 26 (1939). As has been explained above, this public policy is in place to prevent "the total nullification of the bargaining system between the prosecution and the defense." *Starks*, 106 Ill. 2d at 449 (*Starks* '85).

The negative impact of the Majority Opinion on our plea-bargaining system is clear and present. For example, on a daily basis, criminal misdemeanor and felony charges around Illinois are dismissed via a *nolle prosequi* (or sometimes, as is specific to Cook County misdemeanors, *stricken off docket, with leave to reinstate*), after an *informal* agreement for the defendant to complete *independent* community service has been fully

[10] Had the Appellant's motion been heard on the merits, it would have given the OSP an opportunity to deny the four corners of Appellant's motion which would have triggered an evidentiary hearing.

performed. Those cases, save for any statute of limitations, are at risk with the Majority Opinion. And as Justice Lyle, in her dissent, found, even formal deferred prosecution programs won't be spared because of the Majority Opinion when she observed:

> The OSP reports indicated that the Cook County State's Attorney's Office, in the 2 years prior to Smollett's disposition, had referred over 5000 individuals into the DPP. I have noted that the guidance from the administrative order is for the State to nol-pros the case after completion of the program. This opinion has the effect of scaring every defendant who entered the DPP and completed it successfully, that the State can reinstate charges against them as long as it does not run afoul of the statute of limitations.

Smollett, 2023 IL App (1st) 220322 at ¶ 107. (J. Lyle, dissenting). (Internal quotation marks omitted).

Beyond the Majority Opinions' negative impact on deferred prosecutions, there will be a negative impact on non-prosecution agreements within plea agreements. Take for instance a case in which a defendant is arrested and charged with Driving Under the Influence of Alcohol ("DUI") and during the pendency of the DUI, the defendant is arrested and charged with a separate event of Driving on a Suspended License ("6-303"). In order to resolve both matters, a prosecutor, with the defendant's agreement, consolidates both cases and makes a global offer wherein the defendant will plead guilty to the DUI in exchange for a *nolle prosequi* on the separate 6-303 case. In this context–which is a common occurrence in most traffic rooms across this State–a prosecutor could attempt to re-prosecute a defendant on the *nolle'd* charges using the Majority Opinion as justification.

Furthermore, the Majority Decision runs afoul of well-established discretionary and independent powers of elected prosecutors. *Starks*, 106 Ill. 2d at 449 (*Starks* '85); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (noting that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). In sum,

prosecutors should enjoy wide latitude in enforcing criminal laws, including choosing whom to prosecute and whom to immunize from prosecution "without hinderance or interference from any source." *Commonwealth ex rel. Specter v. Bauer*, 437 Pa. 37, 43 (1970).

In her dissenting opinion, Justice Lyle also pointed out that, "prosecutors have as their preeminent goal not victory, but justice" and anything beyond that goal is a breach of "both their ethical code and public trust." *Smollett*, 2023 IL App (1st) 220322 at ¶ 175, (*quoting*, *People v. Weilmuenster*, 283 Ill. App. 3d 613, 626 (2d Dist. 1996)). This same public policy point was also recognized by the Pennsylvania Supreme Court in a recent opinion which enforced an immunity-based prosecution agreement. That Court noted the obligation of a prosecutor "is 'not merely to convict,' but rather to 'seek justice within the bounds of the law'…as prosecutors are vested with such tremendous discretion and authority, our law has long recognized the special weight that must be accorded to their assurances." *Commonwealth v. Cosby*, 252 A.3d 1092, 1131-32 (Pa 2021).

If the Majority Opinion is allowed to stand, the opposite will be true in Illinois, and chaotic results will likewise occur, as future citizen activists (or even newly elected prosecutorial administrations) dissatisfied or offended by an already executed and performed bargain, will roam from county to county in Illinois, causing gridlock, as they seek to overturn such bargains whilst waving the Majority Opinion in hand as justification.

Conclusion

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the judgements of the appellate and circuit court and remand to the trial court with

instructions to vacate the Appellant's conviction and render a judgment of dismissal. Alternatively, this Court should reverse and remand with instructions to conduct an evidentiary hearing on the issue of the non-prosecution agreement, if this Court finds that the existence of the non-prosecution agreement is not clear from the record.

II.
THE SECOND INDICTMENT AND ADDITIONAL PUNISHMENT OF THE APPELLANT VIOLATED HIS DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENTS BECAUSE THE APPELLANT WAS PREVIOUSLY PUNISHED FOR THE SAME OFFENSES BY HIS PERFORMANCE OF COMMUNITY SERVICE AND FORFEITURE OF HIS BAIL BOND TO THE CITY OF CHICAGO.

A. Standard of Review

Illinois appellate courts apply an abuse of discretion standard when reviewing a trial court's decision on a motion to dismiss charges on double jeopardy grounds. *People v. Taylor*, 2013 IL App (2d) 110577, ¶ 22. However, "where no factual determinations are involved in the trial court's decision, a purely legal question is presented" and Illinois courts will review the trial court's decision *de novo*. *Id.*

In the present case, the review should be *de novo*, since there is no factual dispute that the Appellant performed community service and forfeited his bail bond in the first prosecution, as evidenced by the Prosecutor's on-the-record remarks during the hearing on the dismissal. (SUP C 1458-1459; R 4-5).

B. Legal Analysis

In the present case, the Appellant's bail bond forfeiture and performance of community service during his first prosecution constituted punishment and thus, his second

prosecution and punishment for the same offenses violated the Double Jeopardy protection against multiple punishments for the same offense.

1. For purposes of analyzing the punishment prong of the Double Jeopardy Clause, jeopardy attaches when criminal punishment is imposed.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." *People v. Henry*, 204 Ill. 2d 267, 282 (2003); *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988). Although the text of the Double Jeopardy Clause only mentions "life or limb," it is well settled that this Amendment also covers monetary penalties. *Dep't of Revenue of Mont. v. Kirth Ranch*, 511 U.S. 767, 769 (1994).

The Double Jeopardy Clause protects defendants from (1) a retrial for the same offense after an acquittal, (2) retrial after a conviction, and (3) multiple punishments for the same offense. *Smollett*, 2023 IL App (1st) 220322 at ¶ 42.

As it pertains to the multiple punishment prong—the one at issue here—the Majority Opinion rejected the Appellant's contention that he was put in double jeopardy with a second prosecution because he was already punished during his first prosecution by performing community service and forfeiting his bail bond. The Majority Opinion noted:

> In a jury trial, jeopardy attaches when the jury is impaneled and sworn…In a bench trial, jeopardy attaches upon the first witness being sworn in and the trial court beginning to hear evidence…And, in the context of a guilty plea, jeopardy attaches when the court accepts the defendant's guilty plea. In the instant case…No jury had been impaneled, no witness had been sworn in, no evidence had been introduced, and Smollett had not pled guilty. Because none of these actions occurred, jeopardy did not attach to Smollett's first criminal prosecution.

Id. at ¶¶ 43-44.

However, this bright-line rule relied upon by the Majority Opinion is not the applicable standard when analyzing the attachment of jeopardy as it pertains to the multiple punishment prong. To be clear, the U.S. Supreme Court has only applied the Majority Opinion's bright-line rule when analyzing the other prongs of the Double Jeopardy Clause. *Crist v. Bretz*, 437 U.S. 28, 36 (1978). Conversely, any analysis of the punishment prong begins and ends by determining whether the Government's initial imposed sanction on a defendant "serves the goals of punishment." (Hereinafter, "*Punishment Analysis*"). *United States v. Halper*, 490 U.S. 435, 448 (1989) (abrogated on other grounds by *Hudson v. United States*, 522 U.S. 93 (1997)). In short, as it pertains to the punishment prong, criminal punishment subjects "the defendant to 'jeopardy' within the constitutional meaning." *See*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943). The cases below demonstrate the application of this *Punishment Analysis*.

In *United States v. Chouteau*, 102 U.S. 603 (1881), the U.S. Supreme Court examined whether a distiller, who had reached a compromise monetary settlement with the Government in exchange for dismissal of his criminal indictments for tax fraud, could face civil action for the same conduct which had formed the basis of the criminal proceeding. *Chouteau*, 102 U.S. at 609-10. The *Chouteau* Court sided with the distiller and held that punishment pursuant to a compromise agreement, even in the absence of a conviction or judgment, bars a second punishment for the same offense. *Id*. at 611. The *Chouteau* Court viewed the compromise settlement as a form of punishment since the Government expressed satisfaction with it by ending a criminal indictment. *Id*.

Additionally, the argument that a civil proceeding could not implicate the punishment prong of the Double Jeopardy Clause was rejected by the *Chouteau* Court

when it noted, "the term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *Id*. Accordingly, the *Chouteau* Court found that the settlement paid by the distiller in the criminal case was a form of punishment and thus barred any further penalties in any proceedings, including civil. *Id.* In reaching this conclusion, the *Chouteau* Court also noted, "to hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless." *Id.*

This *Punishment Analysis* used in *Chouteau* was again emphasized in *Halper*. 490 U.S. at 447-48. For instance, in *Halper*, the defendant was convicted under a false claim criminal statute for submitting sixty-five (65) fraudulent Medicare reimbursement claims. *Id*. at 437. As a result of Halper's fraud, the Government suffered $585.00 in actual overpayment damages. *Id*. Halper was sentenced to prison and fined $5,000.00. *Id.* After his conviction, the Government then brought a civil action against the defendant in *Halper* based on the same facts as the underlying criminal case. *Id.* at 438. Using the incorporated facts from his criminal conviction, the civil court granted summary judgment against the *Halper* defendant. *Id*. Under the civil statute, Halper was liable for a judgment of $2,000.00 per violation and an amount two (2) times the actual damages sustained by the United State Government. *Id.* In total, Halper was liable for $130,000.00 in penalties, accounting for his sixty-five (65) violations. *Id*. Nevertheless, the District Court in *Halper* declined to enforce the full statutory penalties because it viewed such penalties as violative of the punishment prong of the Double Jeopardy Clause since the civil fines were "entirely unrelated" to the actual damages suffered by the Government. *Id*. The Government appealed. *Id*.

On direct appeal to the United States Supreme Court, the Government in *Halper* argued that the punishment clause could only be implicated in criminal proceedings. *Id.* at 446-47. Thus, the United States Supreme Court in *Halper* tackled the question of whether a civil penalty could implicate the punishment prong of the Double Jeopardy Clause. *Id.* at 446. In rejecting the Government's position, and affirming that a civil penalty could implicate the punishment prong, the *Halper* Court noted:

> The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. **The labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law**. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. **Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment**.

Id. at 447-48. (Emphasis in bold added).

The *Chouteau* and *Halper* cases illustrate two important points. First, at the time of the *Halper* decision, the U.S. Supreme Court was well aware of the bright-line rule espoused by the Majority Opinion, in fact, they formulated that rule. *Crist,* 437 U.S. at 36; *Serfass v. United States*, 420 U.S. 377, 388 (1975). Yet they never applied it to the multiple punishment prong when determining if jeopardy was attached. Its application was meant for the first two-prongs only.

Second, prior to *Chouteau* and *Halper*, the punishment prong of the Double Jeopardy Clause was historically viewed as only applicable in criminal proceedings. *Chouteau* and *Halper* dismissed this flawed conclusion, and in doing so, both opinions demonstrate that bright-line formalities – such as the name of the proceeding, or whether a

jury has been impaneled, or whether the first witness has sworn – are not relevant to the punishment prong of the Double Jeopardy Clause. Rather, as the *Halper* Court reminded, determining whether a "sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Halper*, 490 U.S. at 448.

Moreover, the *Punishment Analysis* espoused in *Chouteau* and *Halper* has been consistently applied in other United States Supreme Court cases. *See*, *Bell v. Wolfish,* 441 U.S. 520, 538-39, 560-61 (1979) (holding that a challenged sanction constitutes punishment if an expressed intent to punish can be shown or if there is no rational, nonpunitive reason for it); s*ee also Austin v. United States*, 509 U.S. 602, 610 (1993).

Likewise, out-of-state Supreme and appellate court cases have applied the *Punishment Analysis* espoused in *Chouteau* and *Halper* when dealing with issues similar to the present case.

For instance, the Court of Appeals of Ohio was confronted with this issue in *State v. Urvan*, 4 Ohio App. 3d 151 (Ohio Ct. App. 1982). There, the defendant was charged with receiving stolen property; after successfully completing a pretrial diversion program, the charges were *nolle-prossed*. *Urvan*, 4 Ohio App. 3d at 154. The defendant was thereafter charged with grand theft in a different county related to the same events as the prior charge of receiving stolen goods. *Id.* After his motion to dismiss on the grounds of double jeopardy was denied, the defendant appealed. *Id*.

In reversing the judgment on appeal, the *Urvan* Court explained:

> If pretrial diversion programs are to be effective, the state must live up to its agreements. It cannot avoid its obligation by splitting responsibilities between its agencies and pretending that it acts disparately. What it knew and did in Medina County through its agent it knew in legal contemplation

> in Cuyahoga County and was bound in both places by applicable federal and state constitutional principles.

Id. at 157. The *Urvan* Court added that "[n]egligence or oversight on the part of Cuyahoga County does not legalize the consequences." *Id*. at 156.

The *Urvan* Court also noted that completing the terms of a pretrial diversion program amounts to criminal punishment. *Id*. at 157. As the Court explained, "[i]t may seem a novel idea to some, but it is not far-fetched to conclude that success in a diversion program is the constructive equivalent of serving a sentence for the crime charged." *Id*. Thus, the Court held that further prosecution of the defendant was barred because it would "violate [] the spirit and the letter of constitutional Double Jeopardy policy." *Id.* at 158. *See also, State v. Monk,* 64 Ohio Misc. 2d 1, 8 (Ohio Com. Pleas 1994) (Finding that the multiple punishment prong of the Double Jeopardy Clause was implicated and prosecutors were barred from re-prosecuting a defendant who had completed the terms of a pretrial diversionary agreement); *City of Cleveland v. Kilbane,* 2000 Ohio App. LEXIS 923 (Ohio Ct. App. 2000) (unpublished opinion) (although prosecutors argued that the trial court erred when it placed the defendant in the pretrial diversion program over their objections and entered a *nolle*, the court of appeals could not address this issue, holding that, since Kilbane had completed the requirements of diversion and the case was dismissed, "[t]his court can no longer afford any relief to the prosecution [because d]ouble jeopardy prohibits further prosecution").

An appellate court in Pennsylvania confronted a similar issue in *Commonwealth v. McSorley*, 335 Pa. Super. 522 (Pa. Super. Ct. 1984). There, a diversionary program for DUI drivers inadvertently sent the defendant an application which required him to attend driving school and to pay a $50.00 fee for the program. *McSorley*, 335 Pa. Super. at 524-

25. The defendant completed the program successfully. *Id*. After successfully completing the program, prosecutors moved to prosecute the defendant, arguing that he was not eligible for the program. *Id*.

Although the *McSorley* Court found that the first letter directing the defendant to attend the driving classes appeared to be an administrative error, and that the procedures outlined in the code of criminal procedure were not followed, the Court still found that the defendant detrimentally relied on the letter and that he was justified in doing so. *Id*. at 526; 530. As the Court explained, the "inadvertence" occurred within the District Attorney's Office and "[w]hat the district attorney's office knew and did with its right hand (sending the notification that appellant could reasonably have interpreted as evidencing his acceptance into ARD), it cannot take away with its left hand (by claiming that appellant was ineligible)." *Id.* Thus, the *McSorley* Court held that the defendant was implicitly accepted into ARD and that the Commonwealth was restrained from further prosecuting him based on double jeopardy. *Id.*

The Supreme Court of Appeals of West Virginia also confronted a similar issue in *State v. Maisey*, 600 S.E. 2d 294 (W. Va. 2004), where an 18-year-old defendant had been charged with carrying a concealed and deadly weapon. *Maisey*, 600 S.E. 2d at 295-97. The trial court issued a pretrial diversion order that required the defendant to complete fifty (50) hours of community service, to not violate any laws, and to not have any unexcused absences from school. *Id*. After several months passed, the prosecutor mailed a letter to the defendant's counsel claiming that the defendant had failed to comply with the pretrial diversion order because he had not provided proof of his community service. *Id*. As a result, the prosecutor then filed a motion to terminate the pretrial diversion order and reinstate the

criminal complaint and warrant. *Id*. The Court subsequently held a bench trial and found the defendant guilty, fining him $100.00 plus costs and fees, and sentencing him to thirty (30) days in jail, with only five (5) days to be served and the other twenty-five (25) days suspended in exchange for completion of fifty (50) hours of community service. *Id*.

After the defendant's motion to dismiss the case on the ground that he had already been punished was denied, he appealed his conviction and sentence to the Supreme Court of Appeals of West Virginia. *Id.* at 297. The defendant argued that the lower court subjected him to multiple punishments by sentencing him to jail time, a fine, and additional community service after he already completed the community service required by the pretrial diversion order. *Id.* In reversing the judgment, the appellate court explained:

> We agree that when a person charged with a criminal offense successfully complies with the terms of a pretrial diversion **agreement**, the State may not prosecute the defendant for that criminal offense, or for the underlying conduct, in the absence of an agreement that the defendant will plead guilty or nolo contendere to a related offense.

Id. (Emphasis in bold added).

These out-of-state Supreme and appellate cases are instructive because their rulings applied the *Punishment Analysis*. It is clear, the decisions in those cases were influenced by the fact that the defendant's activities rose to the level of punishment. Nonetheless, the Majority Opinion erroneously rejects the opinion of the out-of-state cases because they are not binding. *Smollett*, 2023 IL App (1st) 220322 at ¶ 43. However, where there is no Illinois law on an issue, our appellate courts look to other jurisdictions for persuasive authority. *Allstate Insurance Co. v. Lane*, 345 Ill. App. 3d 547, 552, (2003). Furthermore, the Majority Opinion erroneously attempts to distinguish these foreign state cases because they involved formal deferred prosecution programs. *Smollett*, 2023 IL App (1st) 220322 at ¶

44. But, again, those cases were focused on whether the activities the defendants performed as part of their agreements rose to the level of punishment, and not some non-existent punishment formality clause.[11] Put another way, it is improbable that these out-of-state courts would have ruled in favor of a defendant who simply enrolled in a formal diversionary program without actually engaging in conduct that would give rise to punishment.[12] Thus, consistent with *Halper*, the emphasis of the out-of-state cases is on the *sanction* not the *formality*.

2. The record clearly established that the forfeiture of the Appellant's bail bond and his performance of community service rose to the level of punishment.

There should be no doubt that the sanction imposed on the Appellant was punishment. Again, right there, in the transcripts, the Cook County Prosecutor removed all doubt when she announced:

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

Smollett, 2023 IL App (1st) 220322 at ¶ 4. (Internal quotation marks omitted and emphasis in bold added).

The intention to punish the Appellant here is clear with the Prosecutor's use of the word *forfeit*; a word historically associated with punishment in both civil and criminal

[11] American criminal law jurisprudence has long since recognized prosecutorial grants of *informal* immunity to defendants. *See, e.g., United States v. Skalsky*, 857 F.2d 172, 175 (3d Cir. 1988); 22 C.J.S. *Crim. L.: Substantive Principles* § 107 (2019 update) (finding that courts recognize informal agreements).

[12] The Majority Opinion's focus on formality as it pertains to the out-of-state cases would render those cases ineffective since the obvious loophole for a prosecutor to avoid attaching jeopardy would be to sanction a defendant *via* an *informal* deferred prosecution agreement.

settings. *See, e.g., Austin*, 509 U.S. at 622 (1993) (defining forfeiture as "payment to a sovereign as punishment for some offense"); *see also*, *Black's Law Dictionary* (11th ed 2019) (defining forfeiture as "a punishment annexed by law to some illegal act"). This is especially true since the U.S. Supreme Court has held that fines, penalties, and ***forfeitures*** have punitive purposes within the context of analyzing the punishment prong of the Double Jeopardy Clause. *Dep't of Revenue of Mont. v. Ranch*, 511 U.S. 767, 779-80 (1994) (extending the *Halper Punishment Analysis* to find that a Montana statute that taxed the contraband of convicted drug dealers violated the multiple punishment prong because the statute's punitive nature outweighed its remedial purposes).

Furthermore, there is no rational, nonpunitive reason for the $10,000.00 bail bond forfeiture – which closely resembles the statutory fine amount for felony offenses[13] – other than to serve as punishment. This point is emphasized by the fact that the OSP sought a separate restitution amount during sentencing in the second prosecution of the Appellant.[14]

Also, like the bond forfeiture, there was no rational, nonpunitive reason to require the Appellant to perform community service, which is an authorized form of criminal punishment in Illinois. *See e.g.*, 730 ILCS 5/5-6-3(a)(6).

Additionally, the Majority Opinion rejected the application of the out-of-state precedent because in its view, those cases involved formal diversionary programs unlike the present case. *Smollett*, 2023 IL App (1st) 220322 at ¶ 44. However, putting aside the

[13] A violation of the disorderly conduct statute with which Appellant was charged is a Class 4 felony. *See,* 720 ILCS 5/26-l(b). Unless otherwise specified by law, the minimum fine for all felonies in Illinois is $75.00, and a fine may not exceed, for each offense, $25,000.00 or the amount specified in the offense, whichever is greater. *See*, 730 ILCS 5/5-4.5-50(b).
[14] Moreover, the City of Chicago has a pending federal civil case against the Appellant to recoup its claimed restitution. *See*, *City of Chicago v. Smollett*, No. 19-cv-04547 (N.D. Ill.).

fact that the Majority Opinion missed the point of these cases, such an assessment, ironically, only further proves that this Appellant's sanction was indeed a form of punishment. For example, the State's action of entering a courtroom and seizing the Appellant's bail bond without a formalized program or an agreement and without his violation of his bail conditions is both retributive and punitive.

Finally, it should not go unnoticed that the OSP never hid its intention of having another go at this Appellant because they were dissatisfied with his punishment. The OSP said it, when it complained that the "***only punishment*** for Mr. Smollett was to perform 15 hours of community service . . . [and] requiring Mr. Smollett forfeit his $10,000 . . ." (C727) (emphasis added) (where also, the OSP, in its prepared written Information Release to announce the second indictment of the Appellant, stated that it "disagrees with how the CCSAO resolved the Smollett case"). This expressed dissatisfaction with a previous punishment and the resulting subsequent prosecution is a brazen violation of the Appellant's rights as it openly flouts the Double Jeopardy Clause hoping, no doubt, that any negative sentiment towards this Appellant would excuse this Double Jeopardy violation. Fortunately, the Double Jeopardy Clause is historically mature, it is not concerned with negative sentiments, rather, it is concerned with protecting "against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding" *See*, *Halper*, 490 U.S. at 451.

Conclusion

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the judgements of the appellate and circuit court and remand to the trial court with instructions to vacate the Appellant's conviction and render a judgment of dismissal.

III.

THE DENIAL OF THE APPELLANT'S ILLINOIS SUPREME COURT RULE 412 MOTION TO COMPEL THE OSP TO DISCLOSE TO THE COURT, FOR IN-CAMERA REVIEW, NOTES GENERATED FROM HOURS-LONG INTERVIEWS WITH THE OSUNDAIRO BROTHERS WAS REVERSIBLE ERROR BECAUSE THE OSUNDAIRO BROTHERS WERE CENTRAL WITNESSES SINCE THEIR TESTIMONY WAS THE ONLY EVIDENCE LINKING THE APPELLANT TO THE HOAX WHICH FORMED THE BASIS OF HIS DISORDERLY CONDUCT CHARGES.

A. Standard of Review

Discovery violations are generally reviewed under an abuse of discretion standard. *People v. Taylor*, 409 Ill. App. 3d 881, 908 (1st Dist. 2011). However, the Appellant argues that the trial court erred and applied the wrong legal standard when it failed to conduct an in-camera review of the OSP's notes pursuant to the Illinois Supreme Court's mandate in *People v. Szabo*, 94 Ill. 2d 327 (1983). As a result, the defendant is requesting that this Court review this issue *de novo*.

B. Legal Analysis

The Appellant's conviction should be reversed because he was denied access to hours-long interviews with the Osundairo brothers, even though the Osundairo brothers' testimony was the only evidence linking the Appellant to a hoax that formed the basis for his Disorderly Conduct charges.

The Illinois Supreme Court has repeatedly defined and interpreted the prosecution's obligation under Supreme Court Rule 412 and has held that a prosecutor's notes of witness statements are discoverable subject to the prosecutor's right to have work product excised therefrom. *See*, *Szabo*, 94 Ill. 2d at 346-47 (1983); *see also*, *People v. Bassett,* 56 Ill. 2d 285, 291 (1974) (in the event the prosecutor claims that validly protected work product is

also contained in the witness's statement, the trial judge can review the material *in camera* for the limited purpose of excising the work-product material); *People v. Manley,* 19 Ill.App.3d 365 (1974) (where the prosecutor claims that the memoranda does not contain substantially verbatim reports of witness; statements, an *in camera* examination is necessary).

In *Szabo*, this Court was faced with a scenario where the prosecutor's notes of witness interviews had been destroyed. Unable to determine if denial of the notes to the defense was prejudicial since the contents of the notes were destroyed, the *Szabo* Court first determined whether the notes involved a witness that was central to the prosecutor's case and thus, potentially important for any defense cross examination. *Szabo,* 94 Ill. 2d at 347. Upon this finding, the Court reversed and remanded with instructions for the trial court to conduct an *in camera* inspection. *Id*. at 350.

The Majority Opinion agrees that the trial court erred in refusing to conduct an *in-camera* inspection of the OSP's notes from its interviews with the Osundairo brothers. *Smollett*, 2023 IL App (1st) 220322 at ¶ 65. However, the Majority Opinion distinguished *Szabo* and concluded that the error here was harmless because the Osundairos' testimony was not the only evidence tending to establish the Petitioner's guilt. *Id.* at ¶ 65-66. In reaching this conclusion, the Majority Opinion relied on *People v. Young*, 128 Ill. 2d 1, 44-45 (1989), where this Court declined to reverse prosecutorial nondisclosure when it noted that the interview with a prosecutorial witness "was not the only evidence tending to establish" the defendant's guilt and "the denial of the opportunity to use the interview notes in cross-examining [the witness] [did not] [affect] the reliability of the fact-finding process at trial."

The present case is similar to *Szabo* and not to *Young*. Here, as was the case in *Szabo*, the central witnesses on which the OSP's entire case rested were the Osundairo brothers. Although there was ample other evidence tending to show that the Osundairo brothers attacked the Appellant, the ***only*** evidence that the attack was a "hoax" done at the Appellant's behest was the Osundairo brothers' self-serving testimony. Thus, if during their hours-long interviews with the OSP, the Osundairo brothers changed their statements multiple times and gave contrary or inconsistent accounts of what they claimed occurred (and the OSP took note of these statements), that would constitute exculpatory, or at the very least, impeachment evidence that the defense should have received for use at trial. Given that the Osundairo brothers' credibility and veracity was the crux of the OSP's case against the Appellant (and without whom there would be no prosecution against the Appellant), it was ***prejudicial error*** for the trial court to refuse to conduct an *in-camera* inspection of the OSP's notes and/or recordings to determine what is discoverable versus actual work product as called for under Supreme Court Rule 412.

The Majority's Opinion sets a dangerous precedent for criminal prosecutions. If prosecutors can take witness statements and then make a blanket claim that the entirety of the notes constitutes work product, then Rule 412 and the Illinois Supreme Court rulings cited above are rendered meaningless.

Conclusion

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the judgements of the appellate and circuit court and remand to the trial court with instructions to grant him a new trial.

IV.

THE SENTENCE IMPOSED ON THE APPELLANT, A FIRST TIME OFFENDER CONVICTED OF A CLASS 4 FELONY, WAS EXCESSIVE BECAUSE THE TRIAL COURT'S SENTENCING REMARKS TO THE APPELLANT THAT HIS CASE WAS A *HEATER CASE* AND "THE HEATER HAS TO BE ADDRESSED," PROVES THAT APPELLANT'S 150-DAY JAIL TERM AND $25,000 FINES WERE INFLUENCED BY IMPROPER AGGRAVATING FACTORS.

A. Standard of Review

In reviewing whether a trial court's sentence is excessive or improper, Illinois appellate courts use an abuse of discretion standard. *People v. Brown*, 2015 IL App (1st) 130048, ¶ 41-42 (2015).

Although a sentencing judge is given great discretion in determining a sentence, that discretion is neither "totally unbridled" nor absolute. *Id.* at ¶¶ 41-42. A reviewing court has the power to reduce any imposed sentence if the reviewing court determines that the sentence was an abuse of the trial court's discretion. *Id.*; *see also People v. Daly*, 2014 IL App (4th) 140624, at 26 (2014). Even a sentence that falls within the statutory framework can be deemed to be excessive if it appears to be at great variance "with the spirit and purpose of the law or if it is manifestly disproportionate to the nature of the offense." *Brown*, 2015 IL App (1st) 130048 at ¶ 42.

B. Legal Analysis

The Majority Opinion should be reversed because it affirms the trial court's abuse of discretion in sentencing the Appellant. Despite the Appellant's overwhelming mitigation, the trial court informed the Appellant that he was considering improper aggravating factors for his sentencing.

Nevertheless, the Majority Opinion rejected the Appellant's argument that his sentence was excessive. *Smollett*, 2023 IL App (1st) 220322 at ¶ 137. The Majority Opinion reasoned that a trial court is presumed to have considered all presented mitigation unless such presumption is rebutted by "an affirmative showing that the court did not consider the relevant factors." *Id*. In support of this conclusion, the Majority Opinion relied on the rule reiterated by the First District in *People v. Canet*, 218 Ill. App. 3d 855*,* 864 (1st Dist. 1991). However, the facts in *Canet* show that the Appellant here has made an affirmative showing rebutting the presumption that his sentencing was proper.

For example, in *Canet*, the defendant argued that the trial court had considered improper aggravating factors in reaching its sentencing decision. *Canet*, 218 Ill. App. 3d at 864. Specifically, the defendant drew the *Canet* Court's attention to the prosecutor's remarks that called for a tough sentence because "we are losing the war on drugs today." *Id*. In rejecting this argument, the *Canet* Court found that the trial court in its sentencing remarks "did not rely upon and incorporate the prosecutor's comments." *Id.*

The *Canet* ruling is illustrative because it shows us that if the trial court had incorporated the prosecutor's remarks, then the defendant in *Canet* would have been able to rebut the presumption of sentencing propriety. In the present case, the trial court's comments were more improper than the prosecutor's comments in *Canet*.

For instance, here, the trial court made it clear that improper aggravating factors will be the most important in determining this Appellant's sentence. For instance, the trial court stated:

> What you did is you created what we call around here a heater. What's a heater? A heater is a case that when it's reported to the public the public conscious is shocked, shocked to such an extreme that the public is demanding that the police solve this crime here right now, right here, right

> now. **Everything else has to take second place. The heater has to be addressed**. You created a heater.

(R 3552) (emphasis in bold added).

In essence, the driving consideration behind this Appellant's sentencing was the significant public exposure he had attracted by his case.[15] Such a consideration is inappropriate since there is no sentencing enhancement for *heater* cases.

But there were more inappropriate considerations as the trial court's sentencing remarks demonstrated that Appellant's sentencing took on a personal retributive tone and was based on speculative information which can't be considered under *Brown*. 2015 IL App (1st) 130048 at ¶ 44. (R 3524-3557). For example, during sentencing, the trial court remarked that this Appellant was a hypocrite on social justice issues who wanted to throw a national pity party. (R 3534). Additionally, the trial court accused this Appellant of being selfish, arrogant, and narcissistic and accused him of using up policing resources "for your own benefit and that's a problem here." (R 3536); (R 3551-3552).[16] Further, the trial court accused this Appellant of removing "some scabs off some healing wounds" of America's past of social injustice. (R 3536). Lastly, the trial court accused the Appellant of having caused "some damage to real victims of hate crime" and caused "great stress throughout the city." (R 3539) (R 3538); (R 3548).

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[15] The term *heater case* is colloquial criminal courtroom verbiage used to describe cases attracting significant public attention or cases that have the potential to attract significant public attention. These cases have the tendency to be treated differently compared to other cases similarly situated.

[16] As the defense had argued, the fact that police spent resources on investigating a false report is not an enhancement of the disorderly conduct false 911 charge. Any wasted resource factor has been accounted for in the legislation of the statute itself. In fact, the only enhancement that exists are for crimes involving terrorism related false reports. *See*, 720 ILCS 5/26-1(B); (SUP C 1722-1723); (R 3510).

These statements, particularly holding the Appellant responsible for removing "scabs off" America's "healing wounds" on social justice, establish that the Appellant was sentenced based on considerations that had nothing to do with his conviction for a non-violent, Class 4 offenses.

If the trial court's improper aggravating factors are put aside, then Appellant's jail sentence and fines are excessive when proper mitigating factors are considered. For example, the Appellant received a pre-sentence report from the adult probation department which ranked him as a low risk (CI 92); (CI 84-92). And as the defense argued, a low-risk ranking calls for "minimum supervision or non-reporting supervision." (SUP C 1744); (SUP C 1726). Thus, the adult probation department did not view the Appellant as a candidate for incarceration. Additionally, the Appellant submitted substantial letters from civic leaders and organizations as well as testimony in mitigation on behalf of the Appellant regarding his character and significant public service. (CI 93-CI 104; R3439-R3490). Also, the Appellant presented an affidavit from an epidemiologist declaring the health risk a custodial setting will pose to the Appellant within the context of the current COVID 19 epidemic. (SUP C 1721 - SUP C 1773); (SUP C 1745-1773). Beyond this health risk, a custodial setting posed a great danger to the Appellant due to his unpopularity. This risk was obvious to the trial court because it ordered that the 150-day jail term be served in protective custody. (SUP C 1774). Apart from the obvious cost to taxpayers, protective custody causes physical and mental isolation, and is also no guarantee of the Appellant's physical safety. (SUP C 1731-1733).

Finally, the Appellant's fine was excessive because the trial court gave him the maximum fines even though the Appellant had already forfeited his $10,000.00 bail bond to the State during his initial prosecution. *Smollett*, 2023 IL App (1st) 220322 at ¶ 4.

Conclusion

For the foregoing reasons, the Appellant respectfully requests this Court reverse the judgments of the appellate and circuit court and reduce the Appellant's sentence by removing the 150-day jail and the $25,000.00 in fines.

V.

THE RESTITUTION ORDER SHOULD BE REMOVED WHERE THE CRIME THE APPELLANT WAS CONVICTED OF DOES NOT ALLOW RESTITUTION AS THE CITY OF CHICAGO AND ITS POLICE DEPARTMENT CANNOT BE CONSIDERED "VICTIMS" PER THE TERMS OF THE RESTITUTION STATUTE AND ILLINOIS PRECEDENT AND WHERE THE OVERTIME PAYMENT RECEIPTS ARE FRAUGHT WITH ISSUES OF PROOF.

A. Standard of Review

In reviewing whether a trial court's sentence is excessive or improper, Illinois appellate courts use an abuse of discretion standard. *Brown*, 2015 IL App (1st) 130048 at ¶ 41-42.

B. Legal Analysis

In Illinois, when imposing restitution upon a defendant as a portion of a sentence, the trial court is bound by the terms of the statutory language set forth in chapter 5, section 5-5-6 of the Illinois compiled statutes. 730 ILCS 5/5-5-6. To be clear, the statute makes no allowances for sums to be paid for punitive purposes or for expenses that would have occurred with or without the defendant being the cause. *Id*. More importantly, Illinois courts have repeatedly held that a police department or other government agency is not considered a "victim" within the meaning of the restitution statute. *See e.g.*, *People v.*

Evans, 122 Ill. App. 3d 733 (3d Dist. 1984); *People v. Derengoski*, 247 Ill. App. 3d 751, 752-53 (1993). Thus, the trial court erred when it imposed $120,106.00 restitution on Appellant for the overtime expenses incurred by the Chicago police department during his investigation. (SUP C 1777); (C 1712); (C 1685-1693); (R3435-3439).

Moreover, the OSP's receipts justifying such restitution were fraught with issues. For example, the first three pages of the receipts submitted by OSP are devoid of any dates, times, or description of work done to corroborate regular or overtime hours. (C 1689-1691). Pages four and five have dates but lack any description of work done. (C 1692-1693). Second, nearly all the officers listed in the receipts as working on the case are nowhere in any of the evidence or records presented during pretrial discovery or at trial. (C 1689-1693). Third, in the receipts that do have dates listed, only two entries occurred on or before the Appellant was arrested on February 15, 2019. (C 1692-1693). The remaining hours worked occurred on dates after the Appellant's arrest and when he had been officially charged with Disorderly Conduct. (C 1692-1693). Accordingly, the only conceivable overtime should have occurred when officers were looking for the Appellant's attackers prior to him being charged. Lastly, as an example of the deficiencies with the receipts, Officer Kimberly Murray testified at trial that she only worked on the Appellant's case for two (2) days, the 29th and 30th of January 2019. (R 1667-1669). On the page of receipts that lists Officer Murray, she is listed as having accrued 50.75 hours of overtime and 17 hours of regular time. (C 1690). Given the two-day (48-hour) time-period Officer Murray admitted to being involved with the case, accruing 67 hours of work is simply not possible.

As to these issues with the receipts of the restitution, the Majority Opinion found the Appellant never objected to such alleged discrepancies at the sentencing hearing or in

his post-trial motion to reconsider his sentence, and thus he has forfeited this argument on appeal. *Smollett*, 2023 IL App (1st) 220322, ¶ 145. However, this is not the case. During sentencing, the Appellant pointed out to the sentencing judge that there were issues with the restitution receipts. (R. 3508).

Finally, the Majority Opinion found that overtime payments to the officers effectively made the City of Chicago a "victim" for the purposes of restitution. *Id*. at ¶ 141. However, the issues raised as to the validity of these receipts create doubt that most of the overtime payments were legitimate.[17]

Conclusion

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the judgements of the appellate and circuit court and respectfully requests that this Court vacate the $120,106.00 restitution order.

Respectfully submitted,

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[17] As has been stated before, the City of Chicago has a pending federal civil case against the Appellant to recoup its claimed restitution. *City of Chicago v. Smollett*, No. 19-cv-04547 (N.D. Ill.). The proper venue for determining the legitimacy of restitution due to overtime payments will be in this federal case since *via* litigation involving written discovery and depositions, the parties' respective claims on this issue will be better scrutinized.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a), is 50 pages.

/s/ Nnanenyem E. Uche
Nnanenyem E. Uche

CERTIFICATE OF FILING & SERVICE

I certify that on May 1, 2024, I electronically filed the foregoing Brief and Appendix of Defendant-Appellant with the Clerk of the Supreme Court of Illinois via an approved Electronic Filing Service Provider, OdysseyeFileIL, which will send copies of the same to all counsel of record listed below at the email addresses indicated.

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

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APPENDIX TO THE BRIEF

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2023 IL App (1st) 220322
No. 1-22-0322
Opinion filed December 1, 2023
Fifth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 20 CR 3050
	)	
JUSSIE SMOLLETT,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge presiding.

JUSTICE NAVARRO delivered the judgment of the court, with opinion.
Justice Coghlan concurred in the judgment and opinion.
Justice Lyle dissented, with opinion.

OPINION

¶ 1 A grand jury returned an indictment against defendant Jussie Smollett on 16 counts of felony disorderly conduct stemming from his false reporting to Chicago police officers that he had been the victim of a racist and homophobic attack near downtown Chicago. Thereafter, the Cook County State's Attorney's Office (CCSAO) nol-prossed the case against him. However, after the appointment of a special prosecutor, a special grand jury reindicted Smollett on six counts of felony disorderly conduct based on similar allegations. Following a jury trial, Smollett was found guilty of 5 counts of felony disorderly conduct and sentenced to 30 months' probation, with the first 150

days of probation to be served in jail. Smollett was also ordered to pay a $25,000 fine and $120,106 in restitution to the City of Chicago. On appeal, Smollett challenges virtually every aspect of the second prosecution that resulted in his convictions and sentence. For the following reasons, we affirm Smollett's convictions and sentence.

¶ 2 I. BACKGROUND

¶ 3 In February 2019, the CCSAO filed a criminal complaint against Smollett for felony disorderly conduct. Smollett turned himself in to the Chicago police the next day and posted a $10,000 bond. Thereafter, a grand jury returned a true bill of indictment against him for felony disorderly conduct, and the CCSAO filed a 16-count indictment against him. The indictment alleged that Smollett falsely reported to Chicago police that he had been physically attacked by two men shouting racist and homophobic slurs. Smollett pled not guilty.

¶ 4 On March 26, 2019, the State advanced Smollett's scheduled status hearing and presented an oral motion to nol-pros the charges against him. In court, an assistant state's attorney stated:

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

The trial court granted the motion and ordered the clerk of the circuit court of Cook County to release Smollett's bond to the City of Chicago.

¶ 5 In April 2019, a retired appellate court justice filed a *pro se* petition to appoint a special prosecutor to "investigate and prosecute the People of the State of Illinois v. Jussie Smollett." The petition was docketed as a new case and subsequently assigned to be heard by Judge Michael P.

Toomin. On June 21, 2019, over the objection of the CCSAO, Judge Toomin ordered that "a special prosecutor be appointed to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled People of the State of Illinois v. Jussie Smollett, No. 19 CR 03104[-]01, and if reasonable grounds exist to prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result." Judge Toomin further found that "the unprecedented irregularities identified in this case warrant[ ] appointment of an independent counsel to restore the public's confidence in the integrity of our criminal justice system."

¶ 6 The following month, Smollett filed several motions before Judge Toomin, including a motion for reconsideration of the appointment order and a motion to intervene *instanter*. In denying Smollett's motion to intervene, Judge Toomin clarified that "the order of June 21[, 2019] *** only enables a Special Prosecutor to conduct an independent investigation and re-prosecution is not ordered, but may occur only if additional considerations are met, *i.e.*, reasonable grounds exist to re-prosecute Mr. Smollett, and it's in the interest of justice." Judge Toomin also emphasized that the June 21, 2019, appointment order "was not an interim order." Smollett did not appeal the June 21, 2019, order.

¶ 7 On August 23, 2019, Judge Toomin appointed Dan K. Webb as "Special Prosecutor *** 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 0304[-]01, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate the result." Smollett did not appeal the August 23, 2019, order.

¶ 8 In February 2020, a special grand jury indicted Smollett on six counts of felony disorderly conduct for falsely reporting that he had been the victim of a racial and homophobic attack. Later that month, Smollett was arraigned and pled not guilty. On that same date, Smollett filed an emergency motion for a supervisory order in the Illinois Supreme Court asking the court to vacate the orders appointing Webb as special prosecutor. The following month, the Illinois Supreme Court denied Smollett's emergency motion.

¶ 9 Smollett then filed several motions in the trial court seeking the dismissal of the second indictment on various grounds, including the alleged violation of double jeopardy principles, challenging the validity of the special prosecutor's appointment, and asserting a violation of an "agreement" with the CCSAO to dismiss his original case, all of which were subsequently denied. Olabinjo "Ola" Osundairo and Abimbola "Bola" Osundairo, the two brothers alleged to have assisted Smollett in staging the attack, moved to intervene and disqualify Smollett's lead defense attorney, Nenye Uche (attorney Uche), from representing Smollett because he had previously consulted with them regarding the facts of this case. Following an evidentiary hearing, the trial court ruled that attorney Uche could "appear as counsel for Smollett," but other members of the defense team would be required to cross-examine the Osundairo family members at trial. Smollett also moved to obtain notes from a meeting the Office of the Special Prosecutor (OSP) had with the Osundairo brothers, but the court denied that motion.

¶ 10 The evidence introduced at trial established that, in the early morning hours of January 29, 2019, Chicago police officer Muhammad Baig responded to Smollett's high-rise condominium near downtown Chicago to investigate a report from Smollett's "creative manager" that Smollett had been the victim of a crime. Smollett reported to Officer Baig that two unknown individuals yelling racial and homophobic slurs had physically attacked him. While receiving medical

treatment at Northwestern Memorial Hospital, Smollett repeated the same allegations to Detectives Kimberly Murray and Robert Graves. The police later identified two suspects matching Smollett's description of the alleged offenders from security video footage showing two suspects exiting an Uber, entering a taxicab, and arriving near the crime scene moments before the alleged attack occurred. Uber records confirmed that Ola had ordered the Uber observed in the video. After being arrested on February 13, 2019, the Osundairo brothers admitted staging an attack against Smollett at his request. When Detectives Murray and Graves reinterviewed Smollett the next day, he reiterated the same allegations previously reported to the police.

¶ 11 At trial, the Osundairo brothers both testified that they participated in a staged hate crime orchestrated by Smollett. Bola testified that Smollett staged the attack because he was unhappy that his television studio was not taking hate mail he had previously received seriously. Other evidence introduced at trial included messages between the Osundairo brothers and Smollett, cell phone GPS data, video evidence, receipts for the items used in the staged attack, and a $3500 check from Smollett made out to Bola.

¶ 12 Smollett testified in his own defense that he was attacked by two offenders on January 29, 2019. He denied that he had paid the Osundairo brothers to help him stage a fake hate crime. Other witnesses called by Smollett included his former manager, Brandon Moore, who had been on the phone with Smollett at the time the alleged attack occurred, and Dr. Robert Turelli, a Northwestern Memorial Hospital physician who treated Smollett for head injuries after the alleged attack.

¶ 13 The jury found Smollett guilty of five counts of felony disorderly conduct. After a sentencing hearing, the trial court sentenced him to 30 months' probation, with the first 150 days of his sentence to be served in the Cook County Jail. He was also ordered to pay a $25,000 fine and $120,106 in restitution to the City of Chicago.

¶ 14 II. ANALYSIS

¶ 15 A. Appointment of the Special Prosecutor

¶ 16 Smollett contends that (1) statutory authority was lacking for the appointment of a special prosecutor, (2) the appointment order was vague and overbroad, (3) the appointment was not statutorily allowed, and (4) the circuit court erred in denying defense counsel's motion for a substitution of judge. The OSP responds that this court lacks jurisdiction over these issues because they did not arise in the case currently on appeal.

¶ 17 The petition seeking appointment of a special prosecutor was filed on April 5, 2019. The case number assigned to that case was 19 MR ("Miscellaneous Remedies") 00014. On June 21, 2019, Judge Toomin granted the petition to appoint a special prosecutor. Smollett did not appeal that order.

¶ 18 On July 19, 2019, Smollett moved to intervene in case number 19 MR 00014 *instanter*, arguing that pursuant to section 2-408 of the Code of Civil Procedure (735 ILCS 5/2-408 (West 2018)), he was a nonparty directly affected by the proceedings. He also moved for reconsideration of the June 21, 2019, order appointing a special prosecutor and for a substitution of judge. In denying Smollett's motion to intervene on July 31, 2019, Judge Toomin stated that the June 21, 2019, appointment order "was not an interim order." Smollett's other motions were also denied. Smollett did not appeal those orders.

¶ 19 On August 23, 2019, Judge Toomin appointed Webb as the special prosecutor and ordered him to conduct an independent investigation of actions of any person or office involved in the original case (19 CR 03104-01). Judge Toomin also ordered Webb to further prosecute Smollett if there were reasonable grounds. Smollett did not appeal that order.

¶ 20 On February 11, 2020, the special grand jury returned an indictment against Smollett charging him with six counts of felony disorderly conduct. See *People v. Smollett*, No. 20 CR 3050. On February 24, 2020, Smollett was arraigned and pled not guilty. That same day, Smollett filed an emergency motion in the Illinois Supreme Court in case number 19 MR 00014, seeking a supervisory order to vacate the June 21, 2019, order appointing a special prosecutor and the August 23, 2019, order appointing Webb as the special prosecutor. The Illinois Supreme Court denied Smollett's emergency motion.

¶ 21 In July 2020, Smollett filed a motion to dismiss the second indictment alleging the invalid appointment of the special prosecutor. In denying Smollett's motion, the trial court noted that the "case filed in 2019 was a totally different case number, a totally different proceeding ***. I don't see any possible way that I would have authority at this level to revisit Judge Toomin's ruling. *** So it's denied on that ground."

¶ 22 Similarly, this court has no authority to review the orders issued in case number 19 MR 00014. Because an appeal is a continuation of the circuit court proceeding, the "notice of appeal cannot vest jurisdiction in this court over an order entered in a different proceeding." *Lee v. Pavkovic*, 119 Ill. App. 3d 439, 444 (1983) (cannot review order that was "not part of the judgment appealed from, but instead was entered in another case"). "Unless there is a properly filed notice of appeal, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss it." *People v. Smith*, 228 Ill. 2d 95, 104 (2008). A "notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal." *Id.*

¶ 23 Smollett failed to file a timely notice of appeal from either the June 21, 2019, or the August 23, 2019, orders entered by Judge Toomin in case number 19 MR 00014. See Ill. S. Ct. R. 606(b) (eff. Mar. 12, 2021) (a notice of appeal must be filed with the clerk of the trial court within 30 days

after the entry of the final judgment appealed from). As "the filing of the notice of appeal is jurisdictional" (Ill. S. Ct. R. 606(a) (eff. Mar. 12, 2021)), this court lacks jurisdiction to review orders entered in case number 19 MR 00014 in this appeal, which involves case number 20 CR 3050.

¶ 24 Smollett's argument that he was unable to appeal the orders entered in case number 19 MR 00014 because he was not a party to that case is without merit. Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) "has been construed to allow even a nonparty to appeal" so long as the nonparty has a "direct, immediate, and substantial interest in the subject matter, which would be prejudiced by the judgment or benefitted by its reversal." (Internal quotation marks omitted.) See *In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 230 (2009). Pursuant to Rule 301, Smollett qualified as a nonparty who could have appealed. Instead, he waited nearly six months after the final order was issued in case number 19 MR 00014, and after he had been reindicted, to contest these orders. For the reasons stated here, we do not have jurisdiction to review these orders.

¶ 25 B. Due Process Right and Alleged Nonprosecution Agreement

¶ 26 On October 14, 2021, Smollett filed another motion to dismiss the indictment, alleging that the State breached an "immunity type non-prosecution agreement" by reindicting him, in violation of "his 'right not to be hauled into court' on the same charges." Generally, we review the trial court's ruling on a motion to dismiss charges under an abuse of discretion standard. *People v. Stapinski*, 2015 IL 118278, ¶ 35. However, where the issues are purely legal questions, our standard of review is *de novo*. *Id.* In this case, Smollett is alleging a denial of due process and claims that denial was sufficiently prejudicial to require the dismissal of the charges against him. These are questions of law, which we review *de novo*. *Id.*

¶ 27 Smollett argues that he performed his part of the alleged nonprosecution agreement with the CCSAO by performing community service and forfeiting his $10,000 bond. He asserts that the "record is clear, that Cook County prosecutors had an *intention* and indeed an *agreement* to bargain away the State's ability to re-prosecute [him] in exchange for [his] $10,000 bail bond and [his] performance of community service." (Emphasis in original.) We disagree.

¶ 28 The record does not establish that Smollett entered into a nonprosecution agreement with the CCSAO, in which the CCSAO agreed to forgo further prosecution of him in exchange for his performance of community service and the forfeiture of his bond. On the contrary, the record clearly shows that on March 26, 2019, the CCSAO stated in court that it had reviewed Smollett's "volunteer service in the community and agreement to forfeit his bond to the City of Chicago" in making "the State's motion *** to *nolle pros* [*sic*]." (Emphasis added.). At oral argument, Smollett agreed that the only indication in the record of the "agreement" between him and the CCSAO is the transcript of the March 26, 2019, court proceeding.

¶ 29 Under well-established Illinois law, "[a] *nolle prosequi* is not a final disposition of the case, and will not bar another prosecution for the same offense." (Internal quotation marks omitted.) *People v. Milka*, 211 Ill. 2d 150, 172 (2004). "The decision to nol-pros a charge lies within the discretion of the prosecutor, and a trial court may not deny the motion under normal circumstances." *People v. Murray*, 306 Ill. App. 3d 280, 282 (1999). A *nolle prosequi* "is not an acquittal, but it is like a nonsuit or discontinuance in a civil suit, and leaves the matter in the same condition in which it was before the commencement of the prosecution." (Internal quotation marks omitted.) *Milka*, 211 Ill. 2d at 172. If a *nolle prosequi* "is entered before jeopardy attaches, the State may reprosecute the defendant subject to other relevant statutory or constitutional defenses" absent fundamental unfairness, bad faith or harassment. *People v. Hughes*, 2012 IL 112817, ¶ 23

(citing *People v. Norris*, 214 Ill. 2d 92, 104 (2005)). "Once a charge is nol-prossed, the proceedings are terminated with respect to the particular charge, and the defendant is free to go 'without entering into a recognizance to appear at any other time.' " (Internal quotation marks omitted.) *Id.* (quoting *Norris*, 214 Ill. 2d at 104).

¶ 30 Here, the State's *nolle prosequi* of the indictment was not a final disposition of the case, and as will be discussed below, jeopardy did not attach. Therefore, the State was not barred from reprosecuting Smollett. After the *nolle prosequi* was entered, Smollett was free to go without entering into a recognizance to appear at any other time, which is the bargain Smollett made. There is no ambiguity as to what occurred between Smollett and the CCSAO, and contrary to the dissent's position, further proceedings are not necessary to add clarity.

¶ 31 As thoroughly explained by the OSP:

> "Throughout this action, Smollett has offered numerous, different—and oftentimes, conflicting—framings of the purported 'agreement' that was struck with the CCSAO on March 26, 2019. For example, in the trial court, Smollett called the disposition reached on March 26, 2019 an 'informal agreement' [citation], 'analogous to a negotiated plea agreement' [citation], a 'negotiated agreement' [citation], 'effectively' pretrial diversion [citation], a 'contractual immunity agreement' [citation], and an 'immunity-type agreement.' [Citation.] In this appeal, Smollett has tossed aside these previous descriptions and landed on 'non-prosecution agreement.' [Citation.] But the record supports only one conclusion—Smollett bargained for and received a *nolle prosequi*, which legally cannot bar the prosecution of Smollett in this case."

¶ 32 Presumably relying on principles of contract law, the dissent asserts that "the rights of the State in a *unilateral nolle*" can be "bargain[ed] away" when "making a *bilateral agreement.*"

(Emphases added.) However, no Illinois court has ever applied principles of contract law in interpreting the scope of a *nolle prosequi* disposition in a criminal case.

¶ 33 Unlike in the instant case, in *People v. Smith*, 233 Ill. App. 3d 342, 347 (1992), the prosecutor advised the trial court that there would be an "outright dismissal" if the defendant met her expectations of a "cooperation-immunity" agreement. The defendant fulfilled her obligations under the agreement, and the State voluntarily dismissed charges based on the defendant's cooperation. *Id.* at 345-47, 349. When the State reindicted the defendant more than a year later, the trial court dismissed the new indictment, finding that, "by moving to dismiss the charges, the prosecutor acknowledged the receipt of the benefit from [the] defendant's performance." *Id.* at 345-46. The court expressly held that the "prosecutor's use of the phrase 'outright dismissal' indicated that the prosecutor intended the dismissal to be an acquittal, not a *nolle prosequi*." *Id.* at 346. Under those circumstances, the trial court found that reindicting the defendant violated due process. *Id.* at 346-47. On appeal, the reviewing court agreed, noting that, "[o]nce the State elected to dismiss the charges, *the dismissal was to be absolute*" and "[i]f a *nolle prosequi* had been intended, it is likely that the charges would have been nol-prossed" at the hearing. (Emphasis added.) *Id.* at 348.

¶ 34 In *Stapinski*, 2015 IL 118278, ¶¶ 16, 25, the defendant entered into a cooperation agreement with a police officer in which he agreed to cooperate in the arrest of two individuals in exchange for not being charged with possession of a controlled substance. When the defendant was later indicted for this offense, the trial court found that his due process rights had been violated because he had fulfilled his part of the bargain and had incriminated himself based on the promises made to him. *Id.* ¶¶ 25, 55. Our supreme court agreed, finding that the "defendant's substantive

due process rights were violated when the State breached" his agreement with the police officer. *Id.* ¶ 52.

¶ 35 Unlike in *Stapinski*, Smollett did not enter into a "cooperation agreement" with the CCSAO. See *id.* ¶ 46 (explaining that "[c]ooperation agreements are neither plea agreements nor a grant of immunity. [Citation.] They arise when the State agrees to limit a prosecution in some manner in consideration for the defendant's cooperation."). In addition, the terms of the *Stapinksi* cooperation agreement provided that, if the defendant cooperated in the arrests of two individuals, he would not be charged. *Id.* ¶ 25. In contrast, Smollett had already been indicted prior to the CCSAO's motion to nol-pros the charges pending against him, and the record does not contain any evidence that the CCSAO agreed Smollett would not be further prosecuted in exchange for forfeiting his bond and performing community service.

¶ 36 In *People v. Starks*, 106 Ill. 2d 441, 443-44 (1985), after being found guilty of armed robbery, the defendant alleged that the state's attorney's office had agreed before trial to dismiss the charge if he passed a polygraph examination. The defendant alleged he submitted to and passed the test based on that representation. *Id.* at 444. Our supreme court found that, "[i]f there was an agreement as alleged, and if [the defendant] fulfilled his part of it, then the State must fulfill its part" and, "[b]y submitting himself to the polygraph examination, the defendant surrendered his fifth amendment privilege against self-incrimination." *Id.* at 451-52.

¶ 37 Unlike in *Starks*, where the defendant testified at the posttrial hearing that the prosecution told him that if he took and passed a polygraph examination, the charge would be dismissed, the record in this case is silent regarding any nonprosecution agreement between the CCSAO and Smollett. No questions are left by the State's actions on that date. As previously discussed, the

only disposition requested by the CCSAO at the March 26, 2019, hearing was to "nolle pros" the indictment, which does not impart finality.

¶ 38 Similarly, in *People v. Marion*, 2015 IL App (1st) 131011, ¶¶ 31, 34, 38-39, a police officer offered not to arrest the defendant for narcotics possession in exchange for his cooperation in helping to find and produce handguns, which the defendant accepted and then fulfilled his part of the bargain. We found that the defendant proved that there was "an enforceable agreement" and that the "police had actual authority to promise not to arrest [the defendant] in exchange for his cooperation." *Id.* ¶ 39.

> " '[T]o allow the government to receive the benefit of its bargain without providing the reciprocal benefit contracted for by the defendant would do more than violate the private contractual rights of the parties—it would offend all notions of fairness in the related criminal proceedings, which are protected by constitutional due process.' " *Id.* ¶ 38 (quoting *Commonwealth v. Sluss*, 419 S.E.2d 263, 265 (Va. Ct. App. 1992)).

In contrast, the record in the instant case establishes that on March 26, 2019, the CCSAO only agreed to nol-pros the charges against Smollett.

¶ 39 Accordingly, Smollett has failed to establish a due process violation based on the alleged existence of a nonprosecution agreement.

¶ 40 C. Double Jeopardy

¶ 41 Smollett also contends that the trial court erred in denying his motion to dismiss the second indictment based on the violation of his right against double jeopardy. Generally, we review the trial court's ruling on a motion to dismiss based on double jeopardy grounds for an abuse of discretion. *People v. Jimenez*, 2020 IL App (1st) 182164, ¶ 10. However, where, as here, there are

no disputed factual issues, our review is *de novo*. *People v. Staple*, 2016 IL App (4th) 160061, ¶ 12.

¶ 42 The double jeopardy clause of the fifth amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend. V. The Illinois Constitution also prohibits double jeopardy. See Ill. Const. 1970, art. I, § 10. Illinois courts interpret our double jeopardy clause identically to the federal counterpart. *People v. Kimble*, 2019 IL 122830, ¶ 28. The double jeopardy clause provides three discrete shields: "barring retrial for the same offense after an acquittal, retrial after a conviction, and multiple punishments for the same offense." *Id.*

¶ 43 The threshold inquiry is whether jeopardy had previously attached. *People v. Bellmyer*, 199 Ill. 2d 529, 537-38 (2002); see *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 534 (1979) (observing that "[t]he starting point in any double jeopardy analysis, of course, is determining whether or not jeopardy had attached"). "The protections against double jeopardy are triggered only after an individual has been subjected to the hazards of trial and possible conviction." *People v. Shields*, 76 Ill. 2d 543, 546 (1979). In a jury trial, jeopardy attaches when the jury is impaneled and sworn. *Bellmyer*, 199 Ill. 2d at 538. In a bench trial, jeopardy attaches upon the first witness being sworn in and the trial court beginning to hear evidence. *Id.* And, in the context of a guilty plea, jeopardy attaches when the court accepts the defendant's guilty plea. *Id.*

¶ 44 In the instant case, 12 days after Smollett's first arraignment, the State nol-prossed his case. No jury had been impaneled, no witness had been sworn in, no evidence had been introduced, and Smollett had not pled guilty. Because none of these actions occurred, jeopardy did not attach to Smollett's first criminal prosecution. See *id.* Smollett erroneously argues that jeopardy attached when Judge Steven Watkins accepted the negotiated disposition between him and the CCSAO in

the original case, involving his performance of community service and forfeiture of his $10,000 bond. Smollett relies on several decisions from other states to support his argument that the negotiated disposition was tantamount to an alternative or deferred prosecution or a pretrial diversion program. In addition to the fact that decisions from foreign jurisdictions are not binding on this court (see *People v. Wright*, 2013 IL App (1st) 103232, ¶ 66), the record does not show that Smollett ever enrolled in or completed an alternative or deferred prosecution or a pretrial diversion program, as such programs require strict formalities, none of which were present here. See 730 ILCS 5/5-6-3.3 (West 2018) (describing the requirements for the Offender Initiative Program, a program eligible for defendants charged with nonviolent crimes, including disorderly conduct); Cook County Cir. Ct. G.A.O. 11-03 (Feb. 17, 2011) (describing the requirements for the Cook County State's Attorney's Deferred Prosecution Program); Cook County Cir. Ct. G.A.O. 11-06 (Feb. 28, 2011) (same).

¶ 45 Jeopardy protects the integrity of the finality of judgments. See *United States v. Scott*, 437 U.S. 82, 92 (1978). The CCSAO's *nolle prosequi* of the first case against Smollett did not represent a final judgment because, as previously discussed, a *nolle prosequi* "is not a final disposition of the case, and will not bar another prosecution for the same offense" as "[i]t is not an acquittal." (Internal quotation marks omitted.) *Milka*, 211 Ill. 2d at 172. Also as previously discussed, if a *nolle prosequi* "is entered before jeopardy attaches, the State may reprosecute the defendant subject to other relevant statutory or constitutional defenses" and absent fundamental unfairness, bad faith, or harassment. *Hughes*, 2012 IL 112817, ¶ 23.

¶ 46 Given the absence of a nonprosecution agreement with the CCSAO, reprosecuting Smollett was not fundamentally unfair. Because the charges against Smollett were nol-prossed before jeopardy had attached in the first criminal proceeding, the subsequent prosecution did not violate

his right against double jeopardy. Smollett's reliance on *United States v. Chouteau*, 102 U.S. 603, 610 (1880), in which the defendant's penalty was " 'in full satisfaction, compromise, and settlement' " of the indictment, is misplaced. In the instant case, the forfeiture of Smollett's $10,000 bond to the City of Chicago was not in full satisfaction of the costs the city incurred in investigating his reporting of a crime, which the City of Chicago alleges exceeded $100,000.

¶ 47 Smollett also argues that his convictions violated the spirit of the double jeopardy clause and should be reversed on public policy grounds. Smollett repeatedly cites *Illinois v. Somerville*, 410 U.S. 458 (1973), for the proposition that the application of double jeopardy principles should not be done in a rigid, mechanical manner. In *Somerville*, 410 U.S. at 459-60, after the defendant was indicted and a jury was impaneled, the State realized the indictment was fatally deficient and, under the law at the time, could not be cured. After the State informed the trial court of this flaw, the court granted the State's motion for a mistrial. *Id.* at 460. Thereafter, the defendant was indicted for a second time, and the second indictment corrected the flaw of the first indictment. *Id.* A jury found the defendant guilty, and ultimately, the issue of double jeopardy reached the United States Supreme Court. *Id.* at 460-61. In analyzing whether the trial court's declaration of a mistrial barred the State from retrying the defendant with a valid indictment, the Court made multiple references to eschewing rigid and mechanical rules in a double jeopardy analysis. *Id.* at 462, 467.

¶ 48 More recently, in *Martinez v. Illinois*, 572 U.S. 833, 839-40 (2014), the Court reiterated that there are clear, bright-line rules as to *when* jeopardy attaches. In fact, the court rejected any argument that *Somerville* stood for the proposition that whether jeopardy had attached was subject to flexibility. *Id.* at 840. The Court observed that, in *Somerville*, it "declined to apply 'rigid, mechanical' reasoning in answering a very different question: not whether jeopardy had attached, but whether the manner in which it terminated (by mistrial) barred the defendant's retrial." *Id.*

(quoting *Somerville*, 410 U.S. at 467). *Martinez* demonstrates that Smollett's use of public policy arguments cannot change the bright-line rule that jeopardy never attached to his first criminal proceeding. Consequently, the trial court properly denied Smollett's motion to dismiss based on double jeopardy grounds.

¶ 49 D. Conflict of Lead Defense Counsel

¶ 50 The Osundairo brothers filed a motion to disqualify attorney Uche from representing Smollett in this case based on a conflict of interest. They asserted that on February 19, 2019, and February 20, 2019, attorney Uche "held two distinct [telephone] consultations with [them]." They also alleged that attorney Uche had discussed the facts of this case with their mother, Ola Adeola Osundairo.

¶ 51 Attorney Uche advised the trial court that the affidavits attached to the motion to disqualify were not accurate and that he "did not talk to the brothers on the phone," had "never met the brothers in my life," and did "not know what they sound like." At attorney Uche's request, the court held an *ex parte* meeting with attorney Gloria Rodriguez, the attorney for the Osundairo brothers, regarding the information they allegedly discussed with attorney Uche.

¶ 52 The OSP filed its bill of particulars, in which it asserted that attorney Uche "had at least four distinct conversations" with Ola about the case over the phone, with Bola being present for at least two of those conversations.

¶ 53 The court held an *in camera* evidentiary hearing on the motion to disqualify attorney Uche from representing Smollett. Ola, Bola, and Ms. Osundairo were the only witnesses who testified at the evidentiary hearing.

¶ 54 The court entered a written order finding that "[t]he totality of the evidence shows clearly and convincingly that at different points, [attorney Uche] talked to both brothers and their mother" and that the topics discussed included immunity, the $3500 check, the search warrant, items seized during execution of the search warrant, the laws about hate crimes, and handling of the intense media demands. The court stated that it "firmly believe[d] that the interest of Mr. Smollett to have the lawyer of his choice when his liberty is at stake outweigh[ed] any other valid and good faith concerns of the OSP and the Osundairo family witnesses" and it "also believe[d] that it ha[d] a firm obligation to protect the integrity of the trial and the legitimate concerns of the Osundairo family witnesses." Although the court did not disqualify attorney Uche from representing Smollett, the court held that attorney Uche would not be allowed to cross-examine the Osundairo family members at trial. The court explained that "[attorney Uche] may appear as Counsel for Mr. Smollett with the following limitations *** Some other member(s) of the highly qualified defense attorneys shall cross examine the Osundairo family witnesses should this matter be ultimately adjudicated by way of trial."

¶ 55 "[T]here is a presumption in favor of defendant's counsel of choice." *People v. Buckhanan*, 2017 IL App (1st) 131097, ¶ 26. There is a two-part test that governs challenges to a defendant's counsel of choice. *Id.* ¶ 27. The court must first determine if there is a conflict or serious potential for conflict. *People v. Ortega*, 209 Ill. 2d 354, 361, 365 (2004). If the court finds a conflict, it then must "consider the interests threatened by the conflict or potential conflict." *Id.* at 361. To determine whether the interests threatened by the conflict or potential conflict are weighty enough to overcome the presumption, the court may consider and weigh four factors, including

> "(1) the defendant's interest in having the undivided loyalty of counsel; (2) the State's right to a fair trial in which defense counsel acts ethically and does not use confidential

information to attack a State's witness; (3) the appearance of impropriety should the jury learn of the conflict; (4) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction." *Id.* at 361-62.

¶ 56 This is not an exhaustive list, as "[a] court should seek to fairly consider all the interests that are affected by a conflict in a given case." *Id.* at 362. Further, "where appropriate, the court should consider whether there are alternatives to disqualification that would remove the conflict while still protecting defendant's right to counsel." *Buckhanan*, 2017 IL App (1st) 131097, ¶ 27. "We review the trial court's decision to disqualify counsel for an abuse of discretion ***." *Id.* "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." (Internal quotation marks omitted.) *People v. King*, 2020 IL 123926, ¶ 35.

¶ 57 Based on the evidence introduced at the hearing, the court reasonably concluded that "in light of the topics discussed and the circumstances in which they were discussed," the threshold criteria for an attorney-client relationship had been met. See Ill. R. Prof'l Conduct (2010) R. 1.18(a) (eff. Jan. 1, 2016) ("A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."). Because the court reasonably concluded that the threshold criteria for an attorney-client relationship had been met, a serious potential for conflict existed. See *In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 31 (" 'An attorney/client relationship can be created at the initial interview between the prospective client and the attorney, and it is possible that confidential information passed during the interview sufficient to disqualify the attorney from representing the opposing party in related litigation.' " (quoting *Nuccio v. Chicago Commodities, Inc.*, 257 Ill. App. 3d 437, 440 (1993), citing *Herbes v. Graham*, 180 Ill. App. 3d 692 (1989))); see also Ill. R. Prof'l Conduct (2010) R.

1.18(b) (eff. Jan. 1, 2016) ("Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.").

¶ 58 The court ultimately concluded that the remedy of disqualification was available but decided to consider "other approaches *** to better achieve the interests of justice." The court decided that attorney Uche could continue to represent Smollett, but other members of the defense team would be required to cross-examine the Osundairo family members. Although attorney Uche was not allowed to cross-examine the Osundairo family witnesses, he was not prevented from being present during the cross-examinations, preparing questions for the cross-examinations, or from discussing their testimony or attacking their credibility during opening or closing arguments. The trial court's resolution fairly balanced the interests of the State's right to a fair trial and Smollett's right to the counsel of his choice. The court's ruling on the motion to disqualify was not fanciful, arbitrary, or unreasonable such that no reasonable person would agree with it. We find no abuse of discretion.

¶ 59 E. Rule 412 Discovery Violation

¶ 60 Before trial, Smollett filed a motion for discovery under Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001). At the hearing on the motion, Smollett requested that the OSP disclose notes made during an October 5, 2019, meeting with the Osundairo brothers. He argued that the Osundairo brothers "met for hours with representatives" of the OSP and the defense did not have "notes as to what was discussed and their statements at that time which is highly relevant." In response, the OSP argued that it did not generate any reports from the meeting and only had attorney notes consisting of "internal opinions, theories, conclusions of the State, purely work product as opposed to formal memoranda that either the investigator put together or our office and

all of those have been tendered." The court denied Smollett's motion to compel discovery of the OSP notes, finding that the notes were the attorneys' work product.

¶ 61 The defense requested the court to conduct an *in camera* inspection of the OSP notes from the October 5, 2019, meeting with the Osundairo brothers, which the court also denied.

¶ 62 Under Rule 412(a)(i), upon written motion of defense counsel, the State must disclose to defense counsel the following material and information within its possession and control:

> "(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel[.]" Ill. S. Ct. R. 412(a)(i) (eff. Mar. 1, 2001).

"[T]he purpose of the discovery rules is to protect the accused against surprise, unfairness, and inadequate preparation." *People v. Heard*, 187 Ill. 2d 36, 63 (1999). "Although compliance with the discovery rules is mandatory, the failure to comply with these rules does not require reversal absent a showing of prejudice." *Id.* It is the defendant's burden to show surprise or prejudice. *People v. Taylor*, 409 Ill. App. 3d 881, 908 (2011).

¶ 63 At the hearing on the first motion to compel discovery of the OSP's notes, the OSP informed the court that the notes from the meeting were attorney notes and "clearly work product," noting that they were "internal opinions, theories, conclusions of the State." The court, without examining the notes *in camera*, denied the motion based on the notes being protected work

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product. Although the State is not required to disclose privileged work product (*People v. Szabo*, 94 Ill. 2d 327, 344 (1983)), the court, not the prosecutor, must make the determination regarding whether memoranda summarizing a witness's oral statements contains privileged material. See *People v. Young*, 128 Ill. 2d 1, 41 (1989) (concluding that the trial court erred when it relied on the assistant state's attorney's "representations that the notes did not contain verbatim statements," noting that the "determination whether memoranda contain verbatim or substantially verbatim reports summarizing a witness' oral statements is to be made by the court, not the prosecutor"); see also *Szabo*, 94 Ill. 2d at 345 ("When the State resists disclosure, asserting that the statement or a portion thereof is irrelevant, or contains privileged material, or is not substantially verbatim, the court must examine the statement *in camera* and determine whether it is or is not properly producible; if necessary excise irrelevant or privileged matter; and turn over to the defendant whatever portion of the statement can fairly be said to be the witness' own words.").

¶ 64 In *Young*, the supreme court found that the trial court erred when it did not conduct an *in camera* review of the assistant state's attorney's notes from interviews with the State's witness, but found that the defendant was not prejudiced by the State's nondisclosure of the interview notes and that the error was harmless beyond a reasonable doubt. *Young*, 128 Ill. 2d at 44-45. The court concluded that the denial of an *in camera* inspection did not deprive the defendant the opportunity to effectively cross-examine the witness, thereby denying him the right of confrontation under the sixth and fourteenth amendments of the United States Constitution. *Id.* at 42. The court noted that the witness's testimony "was not the only evidence tending to establish" the defendant's guilt and "the denial of the opportunity to use the interview notes in cross-examining [the witness] [did not] affect[ ] the reliability of the fact-finding process at trial." *Id.* at 44-45.

¶ 65 In the instant case, although the trial court erred in denying Smollett's motion to compel discovery of the OSP notes from the October 5, 2019, meeting with the Osundairo brothers without conducting an *in camera* review of the notes, the error was harmless beyond a reasonable doubt. See *id.* at 41-44. In addition to testimony and police reports, there was substantial evidence that corroborated the Osundairo brothers' testimony and tended to establish Smollett's guilt, including video evidence, cell phone GPS data, and text messages. Therefore, "we cannot say that there is a reasonable doubt that the defendant would not have been convicted if the [trial] court had conducted an *in camera* inspection of the [interview] notes." *Id.* at 45. Under these circumstances, "[a]ny error in this regard was thus harmless beyond a reasonable doubt." *Id.*

¶ 66 In *Szabo*, upon which Smollett relies, the testimony at issue was the "only evidence tending to establish that [the defendant] premeditated" the murders. See *id.* at 44-45 (distinguishing *Szabo*, noting that the alleged accomplice in *Szabo* was the only occurrence witness and the accomplice's testimony "concerning Szabo's lead role in planning and carrying out the crimes was the only evidence tending to establish that Szabo premediated the murders"). In the present case, as discussed herein, the Osundairo brothers' testimony was corroborated by substantial evidence that established that Smollett was guilty of disorderly conduct for falsely reporting to the police that he was the victim of a violent attack. We find that Smollett has failed to establish that he was prejudiced by the OSP's nondisclosure of the notes.

¶ 67 F. Public Access to Trial

¶ 68 Defendant next contends that the trial court violated his constitutional right to a public trial by the imposition of COVID-19 restrictions during jury selection. In October 2021, a month before Smollett's scheduled trial date, the trial court e-mailed the parties informing them that, while criminal courts in Cook County were still operating, they were operating with 50% capacity limits.

This meant that only 57 people would be allowed in the courtroom during Smollett's trial. The court informed the media that all of the seats in the courtroom were being reserved for prospective jurors. However, the court agreed to "keep the doors open on both sides" of the courtroom for the media "to listen and observe."

¶ 69 Under the sixth amendment of the United States Constitution, a criminal defendant is guaranteed the right to a public trial. U.S. Const., amend. VI; *People v. Radford*, 2020 IL 123975, ¶ 25. The Illinois Constitution guarantees the same. Ill. Const. 1970, art. I, § 8. This protection requires the trial court to take all reasonable measures to ensure public attendance at a criminal trial. *Radford*, 2020 IL 123975, ¶ 25. The right to a public trial protects both the defendant and the public. *Id.* For the defendant, a public trial allows the public to observe that he is fairly adjudicated, ensures the trier of fact recognizes the importance of the matter, ensures that the trial judge and the prosecutor responsibly carry out their duties, encourages witnesses to testify, and discourages witnesses from lying. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). For the community at large, a public trial "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984). The right to a public trial extends beyond the trial itself to include jury selection. *Radford*, 2020 IL 123975, ¶ 25.

¶ 70 We initially note that Smollett failed to contemporaneously object to the trial court's decision to reserve the seats inside the courtroom for prospective jurors only. Based on Smollett's failure to object, he has failed to preserve this claim of error for review. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). When a defendant forfeits a claim of error, we will only consider if the error was a plain error. *Id.* The plain-error doctrine "bypasses normal

forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *Id.* at 613. The doctrine applies when a clear or obvious error has occurred and either (1) "the evidence [was] so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) the "error [was] so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Belknap*, 2014 IL 117094, ¶ 48. The first step in a plain-error analysis is to determine if a clear or obvious error occurred. *People v. Jackson*, 2022 IL 127256, ¶ 21.

¶ 71 "[C]ourtroom closure is to be avoided, but *** there are some circumstances when it is justified." *Weaver v. Massachusetts*, 582 U.S. 286, 297 (2017). When Smollett's trial began, COVID-19 restrictions in effect resulted in only 57 people being allowed in the courtroom. Allowing 50 prospective jurors, court staff, and the parties' attorneys strained this capacity limit and raised obvious public health concerns. Under this backdrop, the court properly determined that allowing members of the media, and implicitly other members of the public, to be present in the courtroom was problematic. The court's decision to keep the doors of the courtroom open during jury selection allowed people in the hallway, including members of the public and the media, to observe the proceedings inside the courtroom. This accommodation reasonably balanced the public's right to observe jury selection and Smollett's right to a public trial with the logistical needs of conducting a trial under COVID-19 restrictions. Consequently, Smollett cannot demonstrate that the trial court clearly or obviously erred, and therefore, he has not established plain error. See *People v. Bannister*, 232 Ill. 2d 52, 79 (2008) (asserting that, absent "error, there can be no plain error"). Accordingly, Smollett's constitutional right to receive a public trial was not violated by the COVID-19 restrictions imposed by the court.

¶ 72 Smollett also posits that the trial court improperly excluded a civilian referred to as Bella BAHHS from the courtroom during his trial. Even assuming *arguendo* that one individual was excluded from Smollett's trial, his constitutional right to a public trial was not violated, as it proceeded in front of his family and friends as well as members of the media, who "served as the eyes and ears of the public." *Radford*, 2020 IL 123975, ¶ 41; see *People v. Falaster*, 173 Ill. 2d 220, 228 (1996) (where the trial court removed several spectators who "were not members of the defendant's immediate family and thus did not have a direct interest in the outcome of the case" from the courtroom while a 14-year-old sexual assault victim testified, "none of the evils of closed trials [were] implicated" because the trial court "did not impose any restrictions on the media, which were still allowed full and uninhibited access to the proceedings").

¶ 73 G. Rule 431 and *Voir Dire*

¶ 74 Smollett next contends that the trial court violated Illinois Supreme Court Rule 431 (eff. July 1, 2012) by not allowing defense counsel to directly question prospective jurors during *voir dire*. Prior to trial, the court stated that it had a "normal way of picking" jurors and would "do all of the talking during *voir dire*." However, the court also stated that it would "invite input from the lawyers" on specific questions to ask, emphasizing that the degree of "pretrial publicity" warranted such consideration. In response, Smollett submitted more than 50 questions on topics such as the potential juror's consumption of media, his or her awareness of Smollett as well as questions about race, sexual orientation, hate crimes, the false reporting of crimes, and COVID-19. The record reflects that the majority of Smollett's proposed questions were incorporated into the court's *voir dire* questioning.

¶ 75 The defendant has a constitutional right to a trial before an impartial jury, and *voir dire* is a procedure that helps protect that right. *People v. Encalado*, 2018 IL 122059, ¶ 24. The primary

purpose of *voir dire* is to ensure the selection of a fair and impartial jury. *Id.* Questioning potential jurors is designed to identify whether any potential jurors have a bias or harbor an opinion that would affect their fair determination of the issues presented at trial. *Id.* The trial court "is primarily responsible for initiating and conducting *voir dire.*" *People v. Rinehart*, 2012 IL 111719, ¶ 16. To this end, the court controls "[t]he manner, extent, and scope of *voir dire* examination." *Encalado*, 2018 IL 122059, ¶ 25.

¶ 76 Admittedly, the trial court must "permit the parties to supplement its examination 'by such direct inquiry as the court deems proper,' " under Illinois Supreme Court Rule 431 (eff. July 1, 2012). *Rinehart*, 2012 IL 111719, ¶ 16 (quoting Ill. S. Ct. R. 431 (eff. May 1, 2007)). Although Illinois Supreme Court Rule 431(a) (eff. July 1, 2012) uses the word "shall," the court is not required to permit the parties to supplement its examination by their own direct inquiry of the potential jurors. *People v. Garstecki*, 234 Ill. 2d 430, 442-44 (2009). Rather, the court must consider the factors listed in Rule 431(a)—the length of the court's examination of potential jurors, the complexity of the case, and the type of charges the defendant is facing—"and then determine, based on those factors, whatever direct questioning by the attorneys would be appropriate." *Id.* at 444. While the court maintains discretion in determining whether to allow the parties to supplement its examination by direct inquiry, its "discretion is guided by a preference for permitting direct inquiry of prospective jurors by the attorneys if such an opportunity is sought." *People v. Adkins*, 239 Ill. 2d 1, 18 (2010). Trial courts may not "simply dispense with attorney questioning whenever they want." *Garstecki*, 234 Ill. 2d at 444. Although rare, there are circumstances where it is appropriate for the court to reject a party's request to have his attorney directly question potential jurors. *Id.*

¶ 77 In balancing a party's right to supplement the trial court's examination with its own direct inquiry, the court must also ensure that *voir dire* questioning does not act as "a means of indoctrinating a jury, or impaneling a jury with a particular predisposition." *People v. Bowel*, 111 Ill. 2d 58, 64 (1986). To this end, "[s]pecific questions tailored to the facts of the case and intended to serve as 'preliminary final argument' " are usually not allowed. *Rinehart*, 2012 IL 111719, ¶ 17 (quoting *People v. Mapp*, 283 Ill. App. 3d 979, 989-90 (1996)). We review the court's conduct during *voir dire* for an abuse of discretion. *Id.* ¶ 16. This only "occurs when the conduct of the trial court thwarts the purpose of *voir dire* examination—namely, the selection of a jury free from bias or prejudice." *Id.* A trial court does not abuse its discretion during *voir dire* if the procedure employed "create[d] 'a reasonable assurance that any prejudice or bias would be discovered.' " *Id.* (quoting *People v. Dow*, 240 Ill. App. 3d 392, 397 (1992)).

¶ 78 In *People v. Gonzalez*, 2011 IL App (2d) 100380, ¶¶ 4-6, the trial court did not allow any of the parties' attorneys to question potential jurors and prevented the attorneys from asking any follow-up questions. On appeal, this court observed that "nothing in the record indicates that the court considered the factors in Rule 431(a) before denying the attorneys the opportunity to question the venire directly." *Id.* ¶ 24. We noted that, "before *voir dire* ever began, the court determined that it would not allow any direct questioning, and later it simply stated that there would be no direct supplemental questioning because this was a 'new regime.' " *Id.* Because the court "decided that it would dispense with all direct attorney questioning without consideration of Rule 431(a)," the court failed to comply with the rule. *Id.*

¶ 79 In the instant case, unlike in *Gonzalez*, the trial court openly invited input from the parties throughout *voir dire*. The court recognized that, while the case generated significant pretrial publicity, the disorderly conduct charges were not complex. See Ill. S. Ct. R. 431(a) (eff. July 1,

2012) (providing that the trial court must consider "the complexity of the case" as well as "the nature of the charges"). And while the court never explicitly discussed "the length of examination by the court" (see *id.*), such consideration was implicit based on the court's invitation to the parties to submit questions they wanted the court to ask prospective jurors and its understanding that Smollett wanted several of his own questions asked. Moreover, the court's acknowledgment of the significant pretrial publicity in the case implied that its examination of potential jurors would be more extensive than normal. In addition, the record confirms that the trial court conducted a lengthy and comprehensive *voir dire*, which incorporated many of Smollett's proposed questions.

¶ 80 Still, Smollett argues that the trial court relied on a factor not listed in Rule 431(a), that defense counsel might attempt to influence the jurors with his questions. While Rule 431(a) lists only three factors the court must consider, the court's contemplation of the effect of defense counsel's questioning on potential jurors was not unreasonable because the court has a responsibility to ensure that *voir dire* does not act as "a means of indoctrinating a jury, or impaneling a jury with a particular predisposition." *Bowel*, 111 Ill. 2d at 64.

¶ 81 The trial court's *voir dire* demonstrated a steadfast effort to ferret out any potential jurors who harbored biases or prejudices against Smollett. The court questioned the jurors about their media consumption and their membership in any clubs or organizations involving police issues, civil rights, and LGBTQ rights, and it asked whether they watched the television show *Empire*, the television show Smollett was on. Additionally, the court asked potential jurors if they had performed any research about the case previously and asked follow-up questions where necessary to ensure jury impartiality. For example, when one potential juror said she had researched the case, the court asked about the nature of her research. The potential juror responded that her daughter worked near the location of the alleged crime, causing the potential juror to perform research

because she "was very concerned." When pressed regarding whether she could put aside any feelings she had toward either party due to her research and her daughter, she wavered and ultimately said she was unsure. In a later discussion with the parties, the court *sua sponte* suggested striking this juror for cause, and by agreement of the parties, she was discharged. The court's procedures and questions created a reasonable assurance that any prejudice or bias of a potential juror would be discovered. See *People v. Applewhite*, 2016 IL App (4th) 140558, ¶¶ 81-82 (in an aggravated criminal sexual abuse case, where during *voir dire* the trial court barred defense counsel from individually questioning potential jurors about their own personal sexual abuse issues and instead determined that it would be the sole inquirer, the appellate court found the procedure was conducted with the primary purpose "to exclude prospective jurors who are unwilling or unable to be impartial arbiters" and therefore implemented in accordance with Rule 431(a)). Although the court did not ask every *voir dire* question proposed by Smollett, the court is not required to do so. See *In re Commitment of Edwards*, 2021 IL App (1st) 200192, ¶¶ 45, 55. Viewing the record in its entirety, the trial court complied with the requirements of Rule 431(a) and did not abuse its discretion by performing all of the questioning during *voir dire*.

¶ 82 H. *Batson* Motions

¶ 83 Smollett next contends that the trial court erred in denying his motions alleging that the OSP used its peremptory challenges in a discriminatory manner during jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically, Smollett challenges the exclusion of four African-American prospective jurors and one prospective juror who, Smollett's defense believed, identified as gay.

¶ 84 The equal protection clause of the fourteenth amendment of the United States Constitution prohibits the State from using race in exercising a peremptory challenge during jury selection. U.S.

Const., amend. XIV; *Batson*, 476 U.S. at 84, 89. As enunciated in *Batson*, there is a three-step process for determining whether the State improperly exercised a peremptory challenge on the basis of race. *People v. Davis*, 231 Ill. 2d 349, 360 (2008) (citing *Batson*, 476 U.S. at 96). First, the defendant must establish a *prima facie* showing that the State exercised a peremptory challenge on the basis of race. *Id.* Second, if the defendant makes a *prima facie* showing, the State must present a race-neutral reason for striking the juror in question, which the defendant can rebut as pretextual. *Id.* at 362-63. Third, the trial court is required to determine whether the defendant has demonstrated intentional discrimination. *Id.* at 363.

¶ 85 In the instant case, although the trial court invited the OSP to proffer race-neutral reasons for exercising its peremptory challenges, the court never found that Smollett made a *prima facie* showing that the OSP exercised a peremptory challenge on the basis of race. At the first stage, the defendant's burden is not great, and he can make the *prima facie* showing by merely presenting "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005); see *Davis*, 231 Ill. 2d at 360. There are several relevant factors the court may consider when determining if the defendant has made a *prima facie* showing:

> "(1) the racial identity between the party exercising the peremptory challenge and the excluded venirepersons; (2) a pattern of strikes against African-Americans on the venire; (3) a disproportionate use of peremptory challenges against African-Americans; (4) the level of African-American representation in the venire compared to the jury; (5) the prosecutor's questions and statements of the challenging party during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a

heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witnesses." *Davis*, 231 Ill. 2d at 362.

¶ 86 In determining whether the defendant made a *prima facie* showing, the trial "court must consider 'the totality of the relevant facts' and 'all relevant circumstances' surrounding the peremptory strike to see if they give rise to a discriminatory purpose." *Id.* at 360 (quoting *Batson*, 476 U.S. at 93-94, 96-97). At the first stage of a *Batson* analysis, we will not overturn the court's conclusion unless it was against the manifest weight of the evidence (*People v. Williams*, 173 Ill. 2d 48, 71 (1996)), which occurs when the opposite conclusion is plainly evident or where the finding itself was arbitrary, unreasonable, or not based upon the evidence. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). "Ordinarily, the party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against that party." *Davis*, 231 Ill. 2d at 365. The exception to this general rule occurs when the trial court *sua sponte* raises a *Batson* claim (*id.*), which is not the case here.

¶ 87 At the outset, as discussed, when the trial court entertained Smollett's *Batson* motions, it directed the OSP to proffer race-neutral reasons for exercising its peremptory challenges on prospective jurors Derline R., Bevely D., Mildred B., and Sandra W., even though it never found that Smollett made a *prima facie* showing. Although the court, in its own words, was "being cautious" and apparently attempting to present a more comprehensive record by allowing the OSP to proffer race-neutral reasons, its procedure had the effect of collapsing the first and second stages of a *Batson* analysis, which our supreme court has warned against. See *People v. Rivera*, 221 Ill. 2d 481, 500-01 (2006); *People v. Wiley*, 156 Ill. 2d 464, 475 (1993). Despite this, the court's ultimate conclusions that Smollett failed to establish a *prima facie* showing were not against the manifest weight of the evidence.

¶ 88 Smollett's *Batson* motions concerning Derline R., Bevely D., Mildred B., and Sandra W. failed to establish a *prima facie* showing of discrimination because he provided no argument other than noting they were all African-American. While the race of the excluded venirepersons as compared to the defendant is certainly a relevant factor in determining whether a defendant has made a *prima facie* case, it is but one of several factors. See *Davis*, 231 Ill. 2d at 362. In order to make a *prima facie* showing, it was incumbent upon Smollett to present "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170. Although the burden is not great, there is still a burden. See *id.* Merely raising a *Batson* motion based on the OSP exercising a peremptory challenge on a prospective juror who is African-American without any additional argument is insufficient to carry that initial burden. "[A]s a general rule, the mere number of [African-American] venire members peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *People v. Garrett*, 139 Ill. 2d 189, 203 (1990).

¶ 89 For instance, in *Heard*, 187 Ill. 2d at 52, a defendant contended that the State violated *Batson* when it exercised five peremptory challenges on African-American venirepersons. The defendant's argument in favor of a *Batson* violation "rest[ed] solely on the basis that the prosecution used peremptory challenges to exclude five [African-American] venirepersons." *Id.* at 56. After observing the well-established principle that a defendant cannot make a *prima facie* showing by simply pointing to the number of African-American venirepersons peremptorily challenged, our supreme court asserted that, "[b]ecause [the] defendant has not provided any other information to support his claim of discriminatory jury selection, he has failed to establish a *prima facie* case of discrimination in the jury selection." *Id.* Smollett's argument to the trial court was the same and thus was insufficient to establish a *prima facie* showing. See *People v. Allen*,

401 Ill. App. 3d 840, 848-49 (2010) (finding the defendant failed to make a *prima facie* showing of racial discrimination because his *Batson* motion only alleged that the State exercised peremptory challenges of African-American men from the jury, as the motion was "bare-bones," "did not contain any specific facts to support the allegation of discrimination," and thus failed to "produce evidence sufficient to permit the trial court to draw an inference that discrimination had occurred").

¶ 90 Nevertheless, Smollett posits that the trial court erred in analyzing his *Batson* motions by failing to consider the relevant factors listed in *Davis*, which he now argues are in his favor, to determine whether he made a *prima facie* showing. By making this argument, Smollett attempts to shift the burden to make the *prima facie* showing from himself to the court. It was his burden to present evidence and argument based on the various factors when bringing his *Batson* motions before the court, and he cannot satisfy that burden by making those arguments now, for the first time, on appeal. See *People v. Sanders*, 2015 IL App (4th) 130881, ¶¶ 33-34 (rejecting a defendant's claim that the trial court should have guided the parties through the *Batson* analysis and asked questions based upon the various factors because the defendant "had the burden of establishing a *prima facie* case of purposeful discrimination before the trial court—not on appeal").

¶ 91 At no point did the trial court deny him an opportunity to expand on his *Batson* motions and make an argument on the record based on the relevant factors. Smollett simply raised his *Batson* motions and never attempted to develop a comprehensive argument supporting them. He cannot now claim that the court failed to consider factors he never argued in the first instance. See *id.* ¶ 41 (finding the trial court did not err by failing to "*sua sponte* address other [*Davis*] factors, which [the defendant] claims were potentially in his favor" because "the trial court is not tasked with establishing defendant's *prima facie* case for him"). By not buttressing his *Batson* motions

with supporting argument based upon the relevant factors, Smollett failed to establish a *prima facie* showing of racial discrimination by the OSP when exercising its peremptory challenges.

¶ 92 Smollett further highlights that the impaneled jury contained only one African-American juror, a contention he also raised in his posttrial motion. However, during the actual jury selection, in particular when making his *Batson* motion concerning alternate juror Sandra W. after the 12-member jury had been selected, Smollett never stated for the record the composition of the impaneled jury. See *People v. Turner*, 110 Ill. App. 3d 519, 522 (1982) ("It is clear that the accused has the burden of properly preserving the trial proceedings [citation], and neither statements in [the] defendant's appellate brief [citation] nor assertions in a post-trial motion [citation] can substitute for a proper report of proceedings [citation]."). Equally as important, Smollett never made an argument to the trial court about the composition of the jury and the lack of African-American representation. To reiterate, Smollett had the burden to make a *prima facie* case to the trial court during jury selection, not to us on appeal. See *Sanders*, 2015 IL App (4th) 130881, ¶¶ 33-34, 41. Consequently, the court's conclusions that Smollett failed to make a *prima facie* showing of racial discrimination were not against the manifest weight of the evidence, and the court properly denied Smollett's *Batson* motions concerning Derline R., Bevely D., Mildred B., and Sandra W.

¶ 93 Lastly, Smollett argues that OSP acted unlawfully when exercising a peremptory challenge on prospective juror Saul A., whom Smollett's defense believed identified as gay. Section 2(b) of the Jury Act provides that, "[e]xcept as otherwise specifically provided by statute, no person who is qualified and able to serve as a juror may be excluded from jury service in any court of this State on the basis of *** sexual orientation." 705 ILCS 305/2(b) (West 2020). Section 2(b) of the Jury Act refers to the Illinois Human Rights Act (775 ILCS 5/1-101 (West 2020)) for the definition of

"sexual orientation" (705 ILCS 305/2(b) (West 2020)), which defines it as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth." 775 ILCS 5/1-103(O-1) (West 2018). Our legislature added "sexual orientation" as a protected class under section 2(b) of the Jury Act through Public Act 101-327. See Pub. Act 101-327 (eff. Jan. 1, 2020) (amending 705 ILCS 305/2(b)). And it intended the amendment to codify *Batson* to protect sexual orientation. See 101st Ill. Gen. Assem., House Proceedings, May 22, 2019, at 16 (statements of Representatives Thapedi and Didech). Therefore, it is unlawful to exclude a potential juror on the basis of sexual orientation.

¶ 94 However, similar to Smollett's *Batson* claims concerning race, he failed to make a *prima facie* case of discrimination based on sexual orientation where all he did was highlight that Saul A. identified as gay yet failed to present any additional evidence to permit the court to draw an inference that discrimination occurred. See *Johnson*, 545 U.S. at 170. Consequently, the trial court's conclusion that Smollett failed to make a *prima facie* showing of sexual-orientation discrimination was not against the manifest weight of the evidence, and the court properly denied Smollett's *Batson* motion concerning Saul A.

¶ 95 I. Trial Court's Commentary During Cross-Examination

¶ 96 Smollett next contends that, during his cross-examination of Detective Michael Theis, the Chicago police's lead investigator of his case, and Ola Osundairo, the trial court made improper comments in the presence of the jury that violated his right to due process.

¶ 97 At trial, Detective Theis detailed the Chicago Police Department's investigation of Smollett's allegations. Although originally considered to be a crime victim, the subsequent investigation established that Smollett had staged a fake hate crime. Smollett's theory of defense

was that the police never took his allegations seriously and prematurely concluded that he had falsely reported a crime.

¶ 98 During cross-examination, Detective Theis testified that he could not recall whether he or his partner, Detective Michael Vogenthaler, ever asked Bola Osundairo whether the perpetrator "beat up [Smollett's] pretty face." When defense counsel played a video from Bola's interrogation for purposes of impeachment, the OSP objected based on relevance. In response, the trial court instructed defense counsel to: "Go ahead. Let's go. Let's go. Come on." Defense counsel proceeded to ask Detective Theis if Detective Vogenthaler's question was "appropriate." The court *sua sponte* sustained the OSP's prior objection and instructed defense counsel to ask another question. Defense counsel again asked about Detective Vogenthaler referring to Smollett's "pretty face," and the OSP again objected based on relevance. In denying the OSP's relevance objection, the court stated: "He can answer did [Detective Vogenthaler] say that. So what? Did [Detective Vogenthaler] say it?" Defense counsel replied: "I'm sorry. That's offensive. I'm sorry. I need a break. That's too much." After a short recess, the jury was admonished that trials were "contested matters" and occasionally professionals involved can "get testy." The jury was instructed not to "consider that one way or another, not the comments by lawyers, not the comments by the Court." The court added: "The rulings are the rulings, the evidence is the evidence, and I don't want you to concern yourself with the fact that some voices were raised and there was a little bit of consternation that was shown." According to Smollett, the court's remark "[s]o what?" improperly dismissed his attempt to establish homophobia as a central theory of the case.

¶ 99 Defense counsel also asked Detective Theis a series of questions based on the discovery of suspected narcotics during the execution of a search warrant on the Osundairo family residence. In sustaining the OSP's objection to one of these questions, the trial court asserted that "[e]very

situation is different for a variety of reasons." When defense counsel responded even "for cocaine and heroin?", the court stated: "You can try different questions. Don't assume every case and every police officer, that's not fair. Ask a different question." According to Smollett, the court's response to the OSP's objection had the effect of condoning Detective Theis's investigative decisions.

¶ 100 During another exchange with defense counsel, the trial court instructed counsel to continue his cross-examination "[w]ithout *** editorializing and trying to add—," and defense counsel interjected, "[e]xcuse me?" The court continued that defense counsel was "just trying to be a good lawyer, but the question is wrong, and he will answer the question why he had the gun fingerprinted. You asked him before and he can answer but don't add the other information." After further back and forth, defense counsel stated he was just trying to "mak[e] a record," and the court asked counsel not to argue, adding: "Just ask the question, please. I want to finish this witness. Please. Thank you."

¶ 101 During defense counsel's cross-examination of Ola, the trial court interjected that defense counsel was getting "a little far [a]field" and instructed her to "[f]ocus [her] cross[-examination]." Defense counsel subsequently asked for a sidebar, which the court denied, directing her to continue her cross-examination and noting she was asking about "very collateral matters." Ultimately, a sidebar was convened, and Smollett moved for a mistrial, which was denied. Before cross-examination resumed, the court again admonished the jury that "words come out like focus or collateral" during conversations with the parties' attorneys and instructed the jury to not consider any of those comments. Additionally, the court reminded the jury that its decision on Smollett's guilt must be based solely on the evidence and the law. According to Smollett, these comments were particularly prejudicial because the court used the word "collateral" and informed defense counsel that she was not focused. Finally, Smollett challenges the court's efforts to expedite cross-

examination. For example, in sustaining an objection, the court stated: "You've got to rephrase these things, please. That's hearsay. The jury will disregard that. Find another question, please. Move on." At another point, the court told defense counsel "[l]et's go" and "[c]ome on" during various parts of cross-examination.

¶ 102 "Every defendant, regardless of the nature of the proof against him or her, is entitled to a trial that is free from improper and prejudicial comments on the part of the trial judge." *People v. Heidorn*, 114 Ill. App. 3d 933, 936 (1983). While the court has broad discretion in presiding over a trial, it must refrain from commenting on, or insinuating, its opinion of the case in front of the jury. *Id.* "A hostile attitude toward defense counsel, an inference that defense counsel's presentation is unimportant, or a suggestion that defense counsel is attempting to present a case in an improper manner may be prejudicial and erroneous." *People v. Harris*, 123 Ill. 2d 113, 137 (1988). This is of critical importance during a jury trial because the court's influence over the jury is great. *Heidorn*, 114 Ill. App. 3d at 937. However, such comments are not reversible error unless they "constituted a material factor in the conviction or were such that an effect on the jury's verdict was the probable result." *Harris*, 123 Ill. 2d at 137.

¶ 103 Even assuming *arguendo* the trial court's remarks were improper, the extensive curative instructions given to the jury obviated any potential prejudice from these comments. See *id.* at 139 (concluding that the trial court's allegedly improper comments during trial were not prejudicial to the defendant where "the jury was instructed that the court's rulings and remarks were not meant to indicate any opinion either on the facts or on what the verdict should be"). Additionally, "a trial judge retains wide latitude to impose reasonable limits on such cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance." *People v. Kliner*, 185 Ill. 2d 81, 134 (1998). Telling defense

counsel to focus and move away from collateral issues during the cross-examination of Ola served to inform defense counsel that she was wading into areas of minimal relevance for the issues at trial and to continue her cross-examination on more relevant issues. See *id.*; see also *Harris*, 123 Ill. 2d at 138-39 (finding the trial court's comments "amounted to no more than an attempt to move the already lengthy cross-examination along," which "during the course of vigorously defended protracted criminal litigation are common and oftentimes necessary"). Although the record suggests that the court may have become impatient with defense counsel at various points during cross-examination, the "showing of impatience, in itself, does not evidence bias against defendant or his case." *People v. Moore*, 2023 IL App (1st) 211421, ¶ 126.

¶ 104 As to Smollett's argument that the trial court improperly defended Detective Theis's investigative decisions and baselessly accused defense counsel of editorializing during recross-examination of Detective Theis, the record shows that these were isolated comments made in the course of a nearly two-week trial, during which Smollett was allowed to extensively cross-examine the witnesses. As such, the comments did not constitute a material factor in Smollett's conviction. See *Harris*, 123 Ill. 2d at 137.

¶ 105 J. IPI Criminal No. 3.17

¶ 106 Smollett's next contention on appeal is that the trial court abused its discretion when it failed to give Illinois Pattern Jury Instructions, Criminal, No. 3.17 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.17) on accomplice testimony. An accomplice instruction applies when a witness is an accomplice and testifies for the prosecution, implicating the defendant. *People v. Ticey*, 2021 IL App (1st) 181002, ¶ 63 (citing *People v. Buffington*, 51 Ill. App. 3d 899, 901-02 (1977) (strong motivation for accomplice to testify falsely because of expectation of lenient treatment by the State in return for favorable testimony)). IPI Criminal No. 3.17 states: "When a

witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution." "The test for determining whether a witness is an accomplice for the purposes of the accomplice witness instruction is whether the witness could have been indicted for the offense in question either as a principal or under a theory of accountability." *People v. Lewis*, 240 Ill. App. 3d 463, 466-67 (1992). Generally, the trial court has discretion to determine jury instructions. See *Ticey*, 2021 IL App (1st) 181002, ¶ 62.

¶ 107 Here, Smollett was charged with knowingly reporting to a police officer that he had been a victim of a hate crime, battery, and aggravated battery and that he knew at the time of the reporting that there were no reasonable grounds for believing such offenses had been committed. Accordingly, the test for whether to give an accomplice jury instruction in this case was whether the Osundairo brothers could have been indicted for knowingly transmitting to police that a hate crime, battery, and aggravated battery had been committed knowing that there were no reasonable grounds for believing those offenses had been committed. While the Osundairo brothers readily admitted to planning and carrying out the fake attack on Smollett, there was no evidence introduced at trial that they were involved in making false reports to the police.

¶ 108 Significantly, "one is not an accomplice merely because he ' "has guilty knowledge *** or who was even an admitted participant in a related but distinct offense." ' " *People v. Strickland*, 2019 IL App (1st) 161098, ¶ 51 (quoting *People v. Robinson*, 59 Ill. 2d 184, 191 (1974), quoting *People v. Hrdlicka*, 344 Ill. 211, 222 (1931)). Both Osundairo brothers testified at trial that they would not have gone along with the hoax if they had known that Smollett was going to file a false police report. Based on the record before us, it cannot be said that the trial court's failure to give the jury an accomplice instruction was arbitrary, fanciful, or unreasonable to the degree that no

reasonable person would agree with it. See *King*, 2020 IL 123926, ¶ 35 (an abuse of discretion "occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it" (internal quotation marks omitted)).

¶ 109 K. Prosecutorial Misconduct

¶ 110 Smollett's next contention on appeal is that his rights to a fair trial and due process were violated when the OSP committed several acts of prosecutorial misconduct.

¶ 111 1. Witness Pressure

¶ 112 Defense witness Anthony Moore testified that he saw a white male leaving the scene on the night of the crime. Moore also testified that on January 9, 2020, he told the special prosecutor that he saw a white male on the night in question. The OSP typed up a statement for him to sign, which he read and initialed. Defense counsel then elicited that Moore "felt pressured and threatened to say something that [he] didn't see." When defense counsel asked whether Moore saw "the person in court who pressured and threatened him" and asked Moore to point that person out, Moore pointed to special prosecutor Sean Wieber. At this point, the trial court called for a sidebar.

¶ 113 Defendant argues that the fair trial implications are "obvious" and states that Moore's credibility was "negatively impacted in front of the jury due to having inconsistent statements." Since the defense called Moore to the stand presumably knowing that he was going to testify inconsistently with his sworn statement because of pressure exerted upon him by Wieber, it is disingenuous for defendant to claim he was prejudiced by a situation he created.

¶ 114 Defense counsel then made an oral motion to disqualify the OSP based on Moore's testimony, which the court denied. Smollett contends, citing generally *People v. Rivera*, 2013 IL 112467, that the trial court should have granted the oral motion to disqualify "since the prosecutor

had essentially turned into a witness." Smollett does not explain how the OSP had turned into a witness or which portions of *Rivera* are relevant to the case at bar. We reiterate that "[a] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research." (Internal quotation marks omitted.) *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 205. The failure to cite authority or articulate an argument will result in forfeiture of that argument on appeal. *Id.* Forfeiture aside, we find Smollett's argument to be without merit.

¶ 115 In *Rivera*, 2013 IL 112467, ¶ 4, the defendant filed a written pretrial motion to suppress certain statements made to a police officer and an assistant state's attorney after he was in custody but before any charges had been filed against him. Prior to the suppression hearing, the State moved to disqualify the defendant's counsel, who was listed as a witness in the defendant's motion to suppress, arguing that defense counsel was prohibited from both representing the defendant and acting as a witness in the same proceeding. *Id.* The trial court granted the motion, finding that the written motion to suppress rendered the defendant's counsel a material witness. *Id.* On appeal, the defendant argued that the trial court's decision to disqualify his counsel violated his constitutional right to counsel of choice. *Id.* ¶ 33. Our supreme court found that, where counsel acted both as an advocate and a witness during pending litigation, defense counsel was required to withdraw from his representation of the defendant and the trial court did not abuse its discretion in disqualifying defense counsel. *Id.* ¶ 40.

¶ 116 Here, unlike in *Rivera*, defense counsel moved to disqualify the OSP after a witness he called accused the OSP of pressuring the witness prior to trial. The OSP was not called to testify and was not listed as a witness at trial. Disqualification is a drastic remedy, and courts must be vigilant in ensuring that motions to disqualify are not misused as tactical weapons for the purpose

of harassment or delay. *In re Estate of Wright*, 377 Ill. App. 3d 800, 804 (2007). We find that the trial court did not abuse its discretion in rejecting defense counsel's oral motion to disqualify the OSP. *People v. Downey*, 351 Ill. App. 3d 1008, 1011 (2004) (a trial court's decision on a motion to disqualify an attorney will not be disturbed absent an abuse of discretion).

¶ 117 2. Closing Argument

¶ 118 Smollett also contends the OSP improperly shifted the burden of proof from the OSP to Smollett during its rebuttal argument. The OSP maintains that the comment was made in response to defense counsel's closing argument. Prosecutors generally have a wide latitude in closing arguments and may comment on the evidence and any reasonable inferences arising from the evidence, even if the inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). We consider statements in the context of the closing arguments as a whole instead of examining the contested phrases in a vacuum. *Id.*

¶ 119 Defense counsel stated during closing argument, "There's a lot of missing data. You don't have the whole video. You don't know who they're talking to, and I'm going to get to that." In rebuttal, the OSP responded, "Next, they told you there was missing video. *** [Attorney Uche] gave you no evidence of any video that was missing."

¶ 120 It is well established that the State always has the burden of proving, beyond a reasonable doubt, the elements of the crime, and the State may not attempt to shift the burden of proof to the defendant. *People v. Robinson*, 391 Ill. App. 3d 822, 841 (2009). However, if defense counsel provokes a response in closing argument, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial. *Id.*

¶ 121 Here, defense counsel argued in closing that there was "a lot of missing data" from the videos of the Osundairo brothers that were played for the jury. Accordingly, the disputed comment in the OSP's rebuttal argument that no evidence was presented to support this allegation of missing data is properly viewed as a response to defense counsel's argument. Moreover, a conviction will only be reversed where the prosecution's comments were so inflammatory or so flagrant that they denied the defendant a fair trial. *People v. Euell*, 2012 IL App (2d) 101130, ¶ 22. Here, the remark about evidence of the missing video was an isolated statement that did not create reversible error. See *People v. Runge*, 234 Ill. 2d 68, 142 (2009) (remarks have lesser impact on a jury when they are brief and isolated); *People v. Luna*, 2013 IL App (1st) 072253, ¶ 140 (where comments were brief and of little import in the context of State's lengthy closing argument, they did not amount to reversible error).

¶ 122 3. Smollett's Postarrest Silence

¶ 123 Smollett's final prosecutorial misconduct argument is that the OSP impermissibly impeached Smollett with his postarrest silence in two instances, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). First, during direct examination of the OSP's witness, Detective Theis, the OSP asked if Smollett ever made statements saying the Osundairo brothers did nothing wrong. Defense counsel did not object to this line of questioning. See *People v. Sebby*, 2017 IL 119445, ¶ 48 ("To preserve a purported error for consideration by a reviewing court, a defendant must object to the error at trial ***."). The second instance was when the OSP asked Bola if Smollett "ever made a statement to the public where he admitted that the hate crime was a hoax." Smollett argues that this question implicated his postarrest silence by highlighting his failure to tell police officers the same story during the investigation, in violation of *Doyle*.

¶ 124 In *Doyle*, the Supreme Court held that it was a violation of the due process clause of the fourteenth amendment (U.S. Const., amend. XIV) for the State to use a defendant's postarrest, post-*Miranda* silence for impeachment purposes. *Doyle*, 426 U.S. at 619. Illinois has expanded that rule by including pre-*Miranda* silence, finding that, "under Illinois evidentiary law, it is impermissible to impeach a defendant with his or her post-arrest silence, regardless of whether the silence occurred before or after the defendant was given *Miranda* warnings." *People v. Clark*, 335 Ill. App. 3d 758, 763 (2002).

¶ 125 At trial, a screenshot of a text message sent by Smollett to Bola on February 14, 2019, before Smollett's arrest, was entered into evidence. It stated in part: "I know 1000% you and your brother did nothing wrong and never would. I am making a statement so everyone else knows." When the OSP asked if Smollett ever made "any statement to the public where he admitted that the hate crime was a hoax," the trial court sustained defense counsel's objection and instructed the jury to "[d]isregard the question and answer." A trial judge's prompt action in sustaining an objection will be sufficient to cure any error in a question or answer before the jury. *People v. Redd*, 173 Ill. 2d 1, 29 (1996); see *People v. Edgecombe*, 317 Ill. App. 3d 615, 622 (2000). Here, the trial judge cured any prejudicial impact the comment may have had on the jury by sustaining defense counsel's objection and ordering the comment stricken. *Redd*, 173 Ill. 2d at 29; *People v. Speight*, 153 Ill. 2d 365, 376 (1992) ("[T]he trial judge's admonishment to the jury to disregard the prosecutor's improper statement cured the error.").

¶ 126 L. *Good Morning America* Interview

¶ 127 Smollett's next contention is that the trial court abused its discretion in allowing the entirety of an interview he had with Robin Roberts on the television show *Good Morning America* (*GMA*) to go back to the jury during deliberation where the jury only saw a portion of the interview at trial

for impeachment purposes. The OSP responds that the *GMA* interview had been admitted into evidence and published to the jury as substantive evidence during the OSP's case-in-chief and therefore the court properly allowed the entirety of the interview into jury deliberations.

¶ 128 As an initial matter, we note that Smollett does not cite the pages in the record where the *GMA* interview was allegedly used for impeachment purposes. Illinois Supreme Court Rule 341(h)(7) (eff. Oct. 1, 2020) requires that the appellant's brief include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Failure to include record citations when the argument requires an examination of the record results in forfeiture of the issue on appeal. *People v. Loera*, 250 Ill. App. 3d 31, 54 (1993). Forfeiture aside, we find that the court properly allowed the video of the *GMA* interview to be taken to the jury room. It is well established that whether evidentiary items "should be taken to the jury room rests within the discretion of the trial judge, whose decision will not be disturbed unless there was an abuse of discretion to the prejudice of the defendant." (Internal quotation marks omitted.) *People v. Hollahan*, 2020 IL 125091, ¶ 11.

¶ 129 In *People v. Montes*, 2013 IL App (2d) 111132, the defendant argued that the trial court should not have allowed an audio recording, which had been admitted as substantive evidence, to go back to the jury. *Id.* ¶ 68. The jury had only heard portions of the audio recording during the trial. *Id.* The appellate court acknowledged that "a recording may, in the court's discretion, be employed in the jury room." *Id.* It found that, where the trial court properly admitted the recording as substantive evidence and the jury heard portions of the recording at the trial, there was no abuse of discretion in permitting the entire recording to go to the jury room. *Id.*

¶ 130 Like *Montes*, the trial court here did not abuse his discretion in allowing the *GMA* interview, which had been properly admitted as substantive evidence, to be taken into the jury

room. See *id.* Smollett has not shown the court's ruling was arbitrary, fanciful, or unreasonable or that no reasonable person would have taken the same view adopted by the court. See *King*, 2020 IL 123926, ¶ 35. Accordingly, we find that the trial court did not abuse its discretion in allowing the entire *GMA* interview to be taken into jury deliberations.

¶ 131 M. Sentence

¶ 132 1. Excessive Sentence

¶ 133 Smollett next contends that the trial court abused its discretion in imposing excessive sentencing terms, given the nature of the offenses charged and the "overwhelming mitigation presented in the sentencing hearing."

¶ 134 Smollett was convicted of disorderly conduct (720 ILCS 5/26-1(a)(4) (West 2020)), a Class 4 felony. For a Class 4 felony, the trial court can sentence a defendant to a term of imprisonment that "shall be a determinate sentence of not less than one year and not more than 3 years." 730 ILCS 5/5-4.5-45(a) (West 2020). The court can also sentence a defendant to periodic imprisonment, which "shall be for a definite term of up to 18 months." *Id.* § 5-4.5-45(b). If the court sentences the defendant to probation, the period of probation "shall not exceed 30 months" (*id.* § 5-4.5-45(d)), and the court shall specify the conditions of probation as set forth in section 5-6-3. See *id.* §§ 5-4.5-45(d), 5-6-3. Section 5-6-3(e) states that "the court shall not require as a condition of the sentence of probation or conditional discharge that the offender be committed to a period of imprisonment in excess of 6 months." *Id.* § 5-6-3(e). Fines and restitution may also be imposed for a Class 4 felony. See *id.* § 5-4.5-45(e), (f).

¶ 135 Here, the trial court imposed a sentence of 30 months' probation, with the first 150 days to be served in the custody of the Cook County Jail, and a fine of $25,000. See *id.* § 5-4.5-50(b). The

sentence was within the statutory sentencing range and, thus, presumed to be proper. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36 ("[w]e presume that sentences within the statutory mandated guidelines are proper"). Nevertheless, Smollett argues that the condition of his probation requiring him to spend the first 150 days in jail was excessive because he was convicted of a nonviolent felony, he received a presentence report from the adult probation department that ranked him as low risk, he was not recidivist, there was a health risk in a custodial setting due to COVID-19, and a custodial setting posed a threat to Smollett due to his "unpopularity." He also posits that his 150-day jail condition was "unnecessary since the trial judge had imposed the maximum fine of $25,000."

¶ 136 Initially, we note that a fine does not render jail time unnecessary, as the statute specifically allows for both. See 730 ILCS 5/5-4.5-50(b) (West 2020) ("A fine may be imposed in addition to a sentence of *** probation, periodic imprisonment, or imprisonment."). Additionally, we presume the trial court considered all the mitigation evidence that was presented. See *People v. Burnette*, 325 Ill. App. 3d 792, 808 (2001). To rebut this presumption, a defendant must make an affirmative showing that the court did not consider the relevant factors. *People v. Canet*, 218 Ill. App. 3d 855, 864 (1991).

¶ 137 Aside from naming the mitigating factors he presumably thinks should have negated the probation condition of 150 days in jail, Smollett fails to make any affirmative showing that the trial court failed to give proper weight to mitigating evidence offered at his sentencing hearing. As noted above, a Class 4 felony is punishable by a term of imprisonment of one to three years or a term of periodic imprisonment of up to 18 months, neither of which the trial judge imposed here. See 730 ILCS 5/5-4.5-45(a), (b) (West 2020). Although the court had the authority to impose up to 6 months (180 days) in jail, Smollett was ordered to serve the first 150 days of his probation in

jail. See *id.* § 5-6-3(e). We find nothing in the record to indicate that the trial court abused its discretion in fashioning Smollett's sentence.

¶ 138 2. Restitution

¶ 139 Smollett also argues that the trial court erred in ordering restitution to be paid to the City of Chicago because Smollett's conviction of disorderly conduct "does not allow municipalities or public agencies to be viewed as victims under the restitution statute." The City of Chicago filed an *amicus curiae* brief on the issue. The OSP and the City both respond that Illinois law allows for a police department to be a "victim" under the applicable statute. We agree.

¶ 140 The restitution statute, which is contained in section 5-5-6 of the Unified Code of Corrections, authorizes courts to order restitution when a person has "received any injury to his or her person or damage to his or her real or personal property as a result of the criminal act of the defendant." *Id.* § 5-5-6. The statute provides: "[T]he court shall assess the actual out-of-pocket expenses, losses, damages, and injuries *** proximately caused by the same criminal conduct of the defendant." *Id.* § 5-5-6(b). A "victim" under the restitution statute is someone who has suffered property damage, personal injury, or financial loss. *People v. Danenberger*, 364 Ill. App. 3d 936, 943 (2006). When, as here, the issue is whether a restitution order is authorized by statute, it is a question of law that we review *de novo*. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 35.

¶ 141 While several cases in Illinois have held that a police department or government agency is not considered a "victim" within the meaning of the restitution statute,[1] "there is no *per se* rule

[1]Several cases in Illinois have held that a police department or government agency is not considered a "victim" within the meaning of the restitution statute. See, *e.g.*, *People v. Derengoski*, 247 Ill. App. 3d 751, 754 (1993); *People v. Lawrence*, 206 Ill. App. 3d 622 (1990); *People v. Chaney*, 188 Ill. App. 3d 334 (1989); *People v. Gayton*, 186 Ill. App. 3d 919 (1989); *People v. McGrath*, 182 Ill. App. 3d 389 (1989); *People v. Winchell*, 140 Ill. App. 3d 244 (1986); *People v. Evans*, 122 Ill. App. 3d 733 (1984).

prohibiting a law enforcement agency from receiving restitution." *People v. Ford*, 2016 IL App (3d) 130650, ¶ 29; *Danenberger*, 364 Ill. App. 3d at 944 ("we do not hold that a law enforcement agency can *never* be a victim entitled to restitution" (emphasis in original)). In *Danenberger*, 364 Ill. App. 3d at 941-42, the court vacated an order of restitution to the police department for investigation of a crime of disorderly conduct because the "defendant's offense did not proximately cause the department any out-of-pocket expenses, losses, damages, or injuries." Because the police department only sought restitution for the hours that officers and other employees spent on the job investigating the nonexistent crime, its losses were not compensable under the restitution statute. *Id.* at 942. The court stated, "[t]he money that the officers were paid for the hours that they spent investigating defendant's claim was money that they would have been paid anyway. There is no evidence that anyone who investigated defendant's report was paid anything beyond his or her normal compensation for working on defendant's case." (Emphasis omitted.) *Id.*

¶ 142 Here, the testimony at trial revealed that there were 24 to 26 detectives working on the investigation, totaling more than 3000 hours of work, and reviewing 1500 hours of video footage. At the sentencing hearing, a victim impact statement from the City of Chicago attested that the Chicago Police Department spent 1837 overtime hours investigating the false reports, costing the City $130,106. The OSP submitted an accounting of overtime expenses that the City incurred as a result of Smollett's false report. Unlike in *Danenberger*, the restitution in this case did not reimburse the City for its normal cost of investigating a crime but rather for its overtime expenses. Because the City suffered out-of-pocket expenses as a result of Smollett's conduct, it was entitled to restitution. *Id.*; *Ford*, 2016 IL App (3d) 130650, ¶ 30.

¶ 143 Having found that the City was entitled to restitution, we now turn to Smollett's argument that the trial court abused its discretion in ordering him to pay $120,106 to the City because the receipts justifying such restitution were "fraught with issues." A trial court's determination on restitution will not be reversed absent an abuse of discretion. *Ford*, 2016 IL App (3d) 130650, ¶ 26. When setting a restitution amount, a trial court "shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim." 730 ILCS 5/5-5-6(b) (West 2020). "The court must determine the actual costs incurred by the victim; a guess is not sufficient." *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 25. "Alleged losses which are unsupported by the evidence must not be used as a basis for awarding restitution." *People v. Jones*, 206 Ill. App. 3d 477, 482 (1990).

¶ 144 Here, the record shows that the trial court properly assessed the out-of-pocket expenses incurred by the Chicago Police Department. The trial court heard the City's victim impact statement at the sentencing hearing, which attested that the Chicago Police Department had spent 1837 overtime hours investigating Smollett's false reports. This was not wholly unsupported by the evidence. To the contrary, the OSP submitted an accounting of overtime expenses that the City incurred as a result of Smollett's false report.

¶ 145 To the extent Smollett argues that there were descriptions lacking on some timecards, officers' names on the timecards were not all introduced at trial, some overtime expense reports were undated, and other discrepancies, we note that he never objected to such alleged discrepancies at the sentencing hearing or in his posttrial motion to reconsider his sentence, and thus he has forfeited this argument on appeal. See *People v. Marlow*, 303 Ill. App. 3d 568, 570 (1999) (a defendant who fails to object to an alleged error at sentencing or in a postsentencing motion forfeits any sentencing issues on appeal). While Smollett challenged the restitution order in his motion to

reconsider sentence, it was based on the argument that the Chicago Police Department could not be considered a "victim" within the meaning of the restitution statute, not on the amount or accounting, thus depriving the trial court of the opportunity to review these alleged accounting issues. See *People v. Greco*, 336 Ill. App. 3d 253, 260 (2003) (if defendant felt the restitution amount "was excessive, he should have objected," and the issue is forfeited on appeal).

¶ 146 We find *People v. Hanson*, 2014 IL App (4th) 130330, to be illustrative. There, the defendant failed to object to the amount of restitution at trial. *Id.* ¶ 40. The appellate court found that, given the specificity of the amount, "we doubt that the State just made up that amount without any basis for requesting it." *Id.* The court found that, where the only error complained of is the absence of some type of receipt or testimony in the record proving that the victim incurred the amount offered by the State, it is forfeited on appeal. *Id.* Likewise in the case at bar, where Smollett did not object at trial or in his motion to reconsider his sentence to the amount of overtime expenses incurred by the City, we find that he has forfeited such argument on appeal. Accordingly, the trial court did not abuse its discretion when it sentenced Smollett.

¶ 147 III. CONCLUSION

¶ 148 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 149 Affirmed.

¶ 150 JUSTICE LYLE, dissenting:

¶ 151 "A prosecutor is duty bound [by the public] to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). At times, the exercise of that mandate is done through plea bargaining. "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely

called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). "Plea bargaining is an important and, perhaps, the central component of our criminal justice system." *People v. White*, 2011 IL 109616, ¶ 35 (Theis, J., specially concurring).

¶ 152 When handling a case, the State has many options. One set of options is a unilateral decision such as a unilateral *nolle prosequi*, dismissal, or deciding to not indict at all. Alternatively, the State can enter into bilateral agreements, such as plea agreements, nonprosecution agreements, deferred prosecutions, cooperation agreements, and immunity agreements. When the State makes a bilateral agreement as part of a prosecution, it is a "pledge of public faith—a promise made by state officials—and one that should not be lightly disregarded." *State v. Davis*, 188 So.2d 24, 27 (Fla. Dist. Ct. App. 1966). When immunity-type agreements, such as cooperation agreements, deferred prosecutions, or nonprosecution agreements, "are made by the public prosecutor, or with his authority, the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept. The prosecuting officer has also the power to enter a nolle prosequi [to effectuate that promise]." *Commonwealth v. St. John*, 54 N.E. 254, 254 (Mass. 1899).

¶ 153 The majority states that a *nolle prosequi* "is not a final disposition of the case, and will not bar another prosecution for the same offense." (Internal quotation marks omitted.) *People v. Milka*, 211 Ill. 2d 150, 172 (2004). While this is an accurate representation of the rights of the State in a unilateral *nolle*, the State can bargain away that right and others when making a bilateral agreement, such as a plea agreement, cooperative agreement, or a nonprosecution agreement. *State v. Kallberg*, 160 A.3d 1034, 1042 (Conn. 2017). In those circumstances, the State is typically making a concession to the defendant whether it is not prosecuting on the top charge, providing a

sentencing recommendation, or deciding to not prosecute at all, usually in exchange for the defendant to forgo his or her constitutional rights. *People v. Reed*, 2020 IL 124940, ¶ 25. In the context of a plea, defendants concede their right to a trial or, in the context of a cooperation agreement, self-incrimination. *Reed*, 2020 IL 124940, ¶¶ 25-26. When the State enters a *nolle* pursuant to a plea agreement, the State does so without the intention and ability to reinstate the charges, unless the plea falls apart. *Reed*, 2020 IL 124940, ¶ 25; see Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001); see also *Butler v. State*, 228 So.2d 421 (Fla. Dist. Ct. App. 1969) (where the prosecution agreed to nol-pros the charges if the defendant passed a polygraph with the understanding being that he would not be recharged); *People v. Reagan*, 235 N.W.2d 581 (Mich. 1975) (where the prosecution agreed to "dismiss" the charges against the defendant if he submitted to a polygraph and on the court date, the prosecutor entered an order of *nolle prosequi* on the charges pursuant to the agreement).

¶ 154 In *Reagan*, 235 N.W.2d at 582, the State entered into an agreement to dismiss the prosecution against the defendant if he passed a polygraph test. Pursuant to the agreement, the State sought a *nolle prosequi* order after the defendant passed the test. *Reagan*, 235 N.W.2d at 583. The State then reneged on the agreement and reinstituted the prosecution after discovering that the polygraph examination of the defendant may not have been reliable. *Reagan*, 235 N.W.2d at 583. The defendant was convicted and appealed his conviction. *Reagan*, 235 N.W.2d at 583. On appeal, the Michigan Supreme Court found that the State "gave a pledge of public faith which became binding when the *nolle prosequi* order was approved by the trial judge." *Reagan*, 235 N.W.2d at 583. The court found that "[n]ormally a *nolle prosequi* is a dismissal without prejudice which does not preclude initiation of a subsequent prosecution. [Citation.] Under the facts of this case,

however, entry of the order of *nolle prosequi* was by its presents [*sic*] the final act of fruition of a binding agreement." *Reagan*, 235 N.W.2d at 587.

¶ 155 Here, Smollett did not enter into a plea agreement with the State, but a bilateral agreement took place, which bound the State, nonetheless. The majority contends that there is no evidence in the State's agreement that the parties intended for the agreement to be tantamount to a dismissal with prejudice. I disagree.

¶ 156 As part of the appointment of the special prosecutor, the second directive of the OSP was to determine if any person within the Cook County State's Attorney's Office engaged in any wrongdoing. As part of the investigation, special prosecutors interviewed 53 people including the assistant state's attorney who entered the agreement on the record, the first assistant state's attorney of the Cook County State's Attorney's Office, and the chief deputy and chief ethics officer of the Cook County State's Attorney's Office, and they reviewed more than 26,000 documents. The OSP explained to the trial court that it drafted a 60-page report. In the redacted version of the report, it stated that the first assistant state's attorney spoke to the chief deputy and chief ethics officer and told her that the "terms of the dismissal" were similar to the requirements of the Deferred Prosecution Program (DPP). The report further asserted that, a day after the dismissal hearing, the assistant state's attorney who entered the *nolle* agreement on the record sent an e-mail to the assistant state's attorneys who led other branches or divisions in the Cook County State's Attorney's Office. According to the report, the assistant state's attorney stated:

> "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 [assistant state's attorneys] 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."

¶ 157 On December 15, 2021, the OSP filed a motion to lift the seal on its August 17, 2020, summary report of its findings, as to the second directive, so that the report could be released to the public. On December 20, 2021, Judge Toomin lifted the seal on the report. In the report, the OSP stated:

> "[T]he CCSAO dismissed the entire indictment against Mr. Smollett on the following terms: (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 relation 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

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participate in the CCSAO's Deferred Prosecution Program (Branch 9) ("DPP"), which would have required a one-year period of court oversight over Mr. Smollett.

The report further contended that the statement that the assistant state's attorney read during the dismissal hearing was drafted in conjunction with Smollett's counsel.

¶ 158 Those reports, which are contained in the record, confirm that there was a verbal agreement between the State and Smollett. From the collaboration in drafting the statement to the discussion of specific terms of the agreement, the record shows that there was a verbal agreement reached by the State and Smollett. That agreement required Smollett to complete 15 hours of community service and forfeit his bond, in exchange for a *nolle* of the charges. Having acknowledged that indeed there was an agreement and there being no argument that the State exceeded its authority in negotiating and entering such an agreement, the dispute arises as to its impact. The majority's position is that the State entering the *nolle* did not bar further prosecution, a position that is unsupported legally and factually.

¶ 159 The OSP in its brief and at oral argument concedes that an agreement took place between Smollett and the State wherein the State agreed to nol-pros the charges if Smollett performed community service and forfeited his bond. At oral argument, the OSP stated that "if you actually look at the record, Smollett bargained for and received a nolle pros." Both the OSP and the majority contend that the bargain was for a *nolle* with Smollett understanding that the State could reinstate charges at any time. The majority aptly notes that no Illinois court has ever applied principles of contract law in interpreting the scope of a *nolle prosequi* disposition and whether a *nolle prosequi* agreement bars further prosecution. However, it is well established that contract law applies in the precharging phase, such as a nonprosecution agreement (*People v. Marion*, 2015 IL App (1st) 131011, ¶ 39) and a cooperation agreement (*People v. Smith*, 233 Ill. App. 3d 342, 347 (1992)),

and also the conviction and sentencing stage, when there is a plea agreement (*People v. Absher*, 242 Ill. 2d 77, 87 (2011)). Nothing in Illinois jurisprudence suggests that contract law would not apply in the circumstances of a deferred prosecution. Where there is no Illinois case law on the issue, however, we are "to look to other jurisdictions for persuasive authority." *Allstate Insurance Co. v. Lane*, 345 Ill. App. 3d 547, 552 (2003).

¶ 160 I find the analysis and explanation of *nolles* by the Connecticut Supreme Court in *Kallberg*, 160 A.3d at 1036-39, persuasive and believe that case is analogous to the case before us. In that case, the defendant and the State negotiated a global disposition in four separate cases, where the State agreed to nol-pros three cases in exchange for the defendant pleading guilty to possession of drug paraphernalia. *Kallberg*, 160 A.3d at 1036-39. On the day of the entry of the plea, the trial judge who was previously handling the case was not present, and the State renegotiated with the defendant to nol-pros all the counts if the defendant paid an amount to the victim's fund. *Kallberg*, 160 A.3d at 1036-39. The defendant paid the amount to the fund, and the State nol-prossed each of the four cases. *Kallberg*, 160 A.3d at 1036-39. However, the State subsequently charged and convicted the defendant, over his objection in the form of a motion to dismiss, of the larceny charges that were nol-prossed as part of the agreement. *Kallberg*, 160 A.3d at 1036-39. The Connecticut Supreme Court started its analysis with a discussion of unilateral versus bilateral *nolles*. *Kallberg*, 160 A.3d at 1041.

¶ 161 The Connecticut Supreme Court stated, when a prosecutor enters a unilateral *nolle*, it is a "unilateral act by a prosecutor, which ends the pending proceedings without an acquittal and without placing the defendant in jeopardy." (Internal quotation marks omitted.) *Kallberg*, 160 A.3d at 1041-42. The court then clarified that "[a] nolle may, however, be bargained for as part of a plea agreement; [citations]; or as part of an agreement whereby the defendant provides something else

of benefit to the state or the victim in exchange for entry of a nolle." *Kallberg*, 160 A.3d at 1042. In those circumstances, the *nolle* is equivalent to dismissal with prejudice of a nol-prossed charge. *Kallberg*, 160 A.3d at 1042. "Bilateral agreements in which the defendant provides a benefit to the state or the victim other than a guilty plea to a charge are typically treated as the functional equivalent to a plea agreement, in that subsequent prosecution is barred as long as the defendant has performed his obligation." *Kallberg*, 160 A.3d at 1042.

¶ 162 In the *Kallberg* case, the Connecticut Supreme Court found that there was an ambiguity as to whether the prosecutor "intended to enter unilateral nolles on three of the cases and effectuate a nolle agreement confined to only the drug case" and, if the intent of the prosecutor was to enter an agreement on the drug charge only, "it was incumbent on the prosecutor to make that explicit on the record." *Kallberg*, 160 A.3d at 1047. The court noted that, since the State is the drafter of the agreement and holds disproportionate power, any ambiguity is weighed in favor of the defendant. *Kallberg*, 160 A.3d at 1043. The court held that the State breached the *nolle* agreement and reversed the convictions and remanded the case for specific performance of the *nolle* agreement, namely not filing future charges on those matters. *Kallberg*, 160 A.3d at 1048.

¶ 163 Essentially, the *Kallberg* case stands for the proposition of fairness that, if the State makes a deal, it must stand by it. It is not a matter of guilt or innocence but holding the State to its bargain. The State has broad discretion in its disposition of a case, but once it negotiates a deal to nol-pros the charges, it cannot reinstate them. *Kallberg*, 160 A.3d at 1042. As a result, I find that Smollett entered into a *nolle* agreement, wherein the State agreed to nol-pros the case in exchange for him forfeiting his bond and completing community service. According to the record, at the time of the hearing the conditions appeared to be met to the State's satisfaction, and it entered the *nolle* pursuant to the agreement, barring it from future prosecution on the circumstances that led to those

charges. As stated in *Kallberg*, a unilateral *nolle* allows the State to refile charges because there is no agreement. However, a bilateral agreement binds the State because the defendant is giving up something of value in return for the complete resolution of his or her case. That is what occurred here. While that result may have appeared unjust to some, another trial court judge, unrelated to the proceedings, cannot unilaterally renege on the deal and grant the authority to a special prosecutor to violate a deal that bound the State. See *State v. Platt*, 783 P.2d 1206, 1206 (Ariz. Ct. App. 1989) (stating a deferred prosecution agreement "may not, however, be rescinded simply because the state, on reflection, wishes it had not entered into the agreement at all"). That does not just violate contract law but would be manifestly unjust and would make every agreement the State enters into with a defendant tenuous, leaving defendants wondering whether public outcry would destroy the carefully crafted negotiation with the State. See *People v. Starks*, 106 Ill. 2d 441, 449 (1985). Public policy considerations and reverence for our justice system disfavor reneging on such agreements and should never be outweighed by a cacophony of criticism as to the terms of the agreement.

¶ 164 Unlike the circumstances of unilateral *nolles*, the State, in this case, explicitly stated on the record that, "[a]fter reviewing the facts and circumstances of the case, including Mr. Smollett's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, the State's motion in regards to the indictment is to nolle pros." After the State reviewed the case and Smollett completed 15 hours of community service, in addition to forfeiting his bond, the State nol-prossed the case. That was the agreement and different than the State simply entering a unilateral *nolle*.

¶ 165 Further, the evidence contained in the reports suggests the intention of the parties was more akin to a dismissal with prejudice. In the conversation the first assistant state's attorney had with

the chief deputy and chief ethics officer, he stated that the agreement with Smollett tracked with the DPP, implying that the agreement was a deferred prosecution. While the requirements were not the same as the DPP, the disposition tracked with the DPP, which provided for entry of *nolle prosequi* upon Smollett's successful completion of the requirements. Cook County Cir. Ct. G.A.O. 11-03 (Feb. 17, 2011) ("If the candidate successfully complies with all of the conditions of the agreement, the State's Attorney's Office shall motion the case up in Branch 9. The court shall be advised in the premises and the state shall nolle prosequi all charges against the candidate."); Cook County Cir. Ct. G.A.O. 11-06 (Feb. 28, 2011) (stating "[i]f the candidate successfully completes the program, his or her case will be *nolle prosequi* by the state's attorney"). While there is no appellate case in Illinois that specifically states this, it is *well established* that, if a defendant successfully completes the DPP, the Cook County State's Attorney's Office cannot reinstate the nol-prossed charges against the defendant. The fact that the State, which has broad discretion in the management of a criminal case, chose to pursue an informal or atypical deferred prosecution does not remove the restriction on the State to not prosecute again. See *People v. Hubbard*, 2012 IL App (2d) 120060, ¶ 23 (stating the State has exclusive discretion in the management of a criminal prosecution and is entrusted with using that discretion to determine the extent of societal interest in the prosecution).

¶ 166 Additionally, the assistant state's attorney's e-mail highlights that it was an informal deferred prosecution and meant to dismiss the charges against Smollett. In her request for dispositions of informal deferred prosecutions, she made it clear that the terms *nolle* and dismissal were interchangeable in her mind, resulting in a conclusion of the case nonetheless. However, if there is any question as to the scope of the agreement that took place, this court should remand the case for an evidentiary hearing as to the scope of the agreement that took place.

¶ 167 In *Starks*, 106 Ill. 2d 441, our supreme court reviewed whether the defendant entered into a pretrial agreement with the State wherein the charges would be dismissed if he passed a polygraph test. In that case, the first discussion on the record of the purported agreement did not occur until a hearing on a posttrial motion for a new trial. *Starks*, 106 Ill. 2d at 446. The trial court would not consider the argument of the pretrial agreement. *Starks*, 106 Ill. 2d at 445-46. On appeal, the defendant sought to supplement the record on appeal with an unsigned affidavit from his trial counsel, which the appellate court did not allow. *Starks*, 106 Ill. 2d at 446. However, as part of the posttrial hearing, the defendant testified that his understanding of the pretrial agreement was that, if he passed the polygraph test, the charges would be "drop[ped]." *People v. Starks*, 122 Ill. App. 3d 228, 232 (1983). Our supreme court ruled that there was not enough evidence in the record to establish that there was a pretrial agreement. *Starks*, 106 Ill. 2d at 446-47. While the supreme court did not place any value in the unsigned affidavit, it found that the testimony of the defendant was sufficient to merit an evidentiary hearing on whether an agreement took place. *Starks*, 106 Ill. 2d at 447-48. The court reasoned the hearing could be resolved by calling the assistant state's attorney assigned to the case or defendant's trial counsel to testify. *Starks*, 106 Ill. 2d at 448. The court subsequently stated that, if there was an agreement, the State would be bound to the agreement. *Starks*, 106 Ill. 2d at 452.

¶ 168 In this case, the trial court did not make a ruling on whether a pretrial agreement was in place but rather deferred to the ruling of Judge Toomin appointing a special prosecutor and empowering it to investigate the handling of the case and reindict Smollett if appropriate. As a result, it did not address *Starks*, 106 Ill. 2d at 452, which states that, if such an agreement is in place, the State is bound to its agreement. Unlike in *Starks*, 106 Ill. 2d at 448, the trial court did not conduct an evidentiary hearing on the motion, so there was no testimony from Smollett's trial

counsel, Smollett, or the assistant state's attorney who entered the *nolle*. If the majority has questions about the terms of the agreement, the appropriate prescribed solution, outlined in *Starks*, 106 Ill. 2d at 453, is to reverse the convictions and remand for an evidentiary hearing to ascertain the terms of the agreement and the parties' intent. At the conclusion of the hearing, if the trial court finds that the terms were not meant as a dismissal with prejudice, the convictions and sentence would be reinstated. *Starks*, 106 Ill. 2d at 453. The majority asserts that there are no questions raised, as Smollett bargained for and received a *nolle*, which did not bar a reinstatement of the charges.

¶ 169 While a defendant might appreciate the gift of a *nolle* when not part of underlying negotiations, why would a defendant bargain for uncertainty? When negotiating a disposition, a defendant is bargaining for the certainty that a plea, a cooperation agreement, or deferred prosecution agreement provides rather than rolling the dice with a trial. *Reed*, 2020 IL 124940, ¶¶ 25-27. From a public policy standpoint, if defendants knew that the State was not bound to its agreement when it enters a *nolle* on the top count of an indictment in a plea agreement, as the majority and the OSP suggest, it would likely erode the very foundation of plea negotiations. *Starks*, 106 Ill. 2d at 449 ("The prosecution must honor the terms of agreements it makes with defendants. To dispute the validity of this precept would surely result in the total nullification of the bargaining system between the prosecution and the defense."). For that reason, the intention of the parties is paramount (*People v. Donelson*, 2013 IL 113603, ¶ 18), and in this case, that intention is evident.

¶ 170 In the case before us, Smollett gave up something of value, community service and bond forfeiture, in exchange for a *nolle* of the whole indictment. To suggest that Smollett entered into the agreement without the mutuality of understanding that the *nolle* acted as a dismissal with

prejudice is to suggest either Smollett contracted for no guarantee or Smollett thought he was getting a dismissal when the State had no intention of dismissing the charges. That defies logic or suggests that the State engaged in a level of gamesmanship and bad faith that should be condemned. See *People v. Norris*, 214 Ill. 2d 92, 104 (2005) (finding that the State is not barred from reinstating nolled charges unless there is a showing of harassment, bad faith, or fundamental unfairness). The appointment of a special prosecutor to reindict Smollett after he had entered into a binding agreement, which he completed, with the State was fundamentally unfair. Additionally, it was common sense that Smollett was bargaining for a complete resolution of the matter, not simply a temporary one. See *McElroy v. B.F. Goodrich Co.*, 73 F.3d 722, 726 (7th Cir. 1996) ("There is no novelty in interpreting contractual language in the light of common sense.").

¶ 171 Contracts, in the criminal context, "contain implicit as well as explicit terms. [Citations.] Especially implicit terms necessary to head off absurdities." *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). "[A] contract will not be interpreted literally if doing so would produce absurd results, in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek." *Beanstalk Group, Inc. v. AM General Corp.*, 283 F.3d 856, 860 (7th Cir. 2002).

¶ 172 Even if the literal interpretation of the agreement was that the State would nol-pros the charges with the ability to reinstate the charges, that would lead to an absurd result. In circumstances where a defendant reaches an agreement with the State, he puts himself in a better position. The benefit that the majority mentions, the ability to move freely without having to appear in the future, is illusory at best. First, even if that were considered a benefit, it was one that could change immediately. While unusual, the State could have refiled charges that same day or the next. Second, that belies the fact that, under that alleged scenario, Smollett could have negotiated for a

final resolution of his case that removed the necessity to come back to court and eliminated the State's ability to reinstate charges. As shown, under the scenario where a *nolle* could be literally interpreted as a dismissal without prejudice, that would lead to an absurd result, which the parties are unlikely to have sought. *Beanstalk Group, Inc.*, 283 F.3d at 860. Therefore, the implicit term necessary to head off any absurdities is that the *nolle* operated as a dismissal with prejudice. *Barnett*, 415 F.3d at 692.

¶ 173 However, in actuality, there is no need to go into analysis of the implicit and explicit terms of the agreement because the intention of the State was plain. While the State could have exercised greater semantical precision on the record by stating that the case was terminated with no intention of refiling, from the record it is apparent that was its intent. Any argument that suggests that the State had no intention of dismissing this case, as a conclusion and disposition of the prosecution, fails. The intent of the prosecutor to exercise the authority of the State in crafting and tendering its agreed disposition to the trial court was evident. The prosecutor stated she believed "this outcome [was] a just disposition and appropriate resolution to this case." Merriam-Webster defines the term "disposition" as "the act or the power of disposing or the state of being disposed: such as" "final arrangement" or "settlement." See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/disposition (last visited Nov. 16, 2023) [https://perma.cc/KKW9-KPJ2]. Those words denote a finality that would not exist if the State merely sought to refile the charges. In reality, there is no indication in the record or in any brief that the Cook County State's Attorney's Office had any intention to reinstate the charges. However, the State could not have predicted the public outcry precipitating an unprecedented appointment of a special prosecutor who would violate its lawful agreement with impunity. Ordinarily, when the State disposes of a case, the case file stays within its exclusive control and possession. *Hubbard*, 2012 IL App (2d)

120060, ¶ 23. Based on the aforementioned analysis, I believe Smollett's convictions should be reversed and the case remanded for specific performance of the *nolle* agreement.

¶ 174 The matter boils down to one of procedural fairness. If a *nolle* agreement has no effect, the State can reinstate charges for any number of defendants for whom it has entered *nolles*. The OSP reports indicated that the Cook County State's Attorney's Office, in the 2 years prior to Smollett's disposition, had referred over 5000 individuals into the DPP. I have noted that the guidance from the administrative order is for the State to nol-pros the case after completion of the program. This opinion has the effect of scaring every defendant who entered the DPP and completed it successfully, that the State can reinstate charges against them as long as it does not run afoul of the statute of limitations. This does not just affect the defendants, as in most circumstances, the State contacts victims before entering into a deferred prosecution agreement with the defendants. As a result, this ruling could reopen cases that victims had thought were previously resolved. I would hope that the State, as by all accounts the Cook County State's Attorney's Office intended to do here, would stand by its agreements. However, this allows assistant state's attorneys to operate in a dishonorable way if they so choose. That sort of fundamental unfairness runs afoul of every notion of justice that this nation claims to represent. Rich or poor, famous or infamous—the State is called to prosecute everyone fairly and justly and not be swayed simply by public criticism. Unfortunately, this case shows that outcry from some members of the community and media pressure can lead to a dismantling of such an agreement between the State and a defendant.

¶ 175 I close my dissent with this admonishment by Justice Hutchinson from the Second District of the Illinois Appellate Court about the duties of prosecutors.

> "Society reposes in its prosecutors an awesome and sacred trust. They alone possess the authority to institute the sole state-sanctioned process through which a citizen's liberty

and life may legally be ended. Not surprisingly, the grant of such staggering power carries with it commensurate responsibilities. Prosecutors have as their preeminent goal not victory, but justice. See, *e.g.*, *People v. Lyles*, 106 Ill. 2d 373, 411-12 (1985) (it is the prosecutor's responsibility to safeguard the constitutional rights of all citizens, including the defendant's); see also 145 Ill. 2d R. 3.8(b) (prosecutor must disclose exculpatory and mitigating evidence). Without a doubt, prosecutors must discharge their duties with vigor and zealousness. See *United States v. Young*, 470 U.S. 1, 7, 84 L. Ed. 2d 1, 7, 105 S. Ct. 1038, 1042 (1985); see also 134 Ill. 2d R. 1.1, Preamble to Illinois Rules of Professional Conduct. However, prosecutors who—blinded by this zealousness—lose sight of their ultimate goal breach both their ethical code and public trust. They do so at their peril." *People v. Weilmuenster*, 283 Ill. App. 3d 613, 626 (1996).

No. 1-22-0322

***People v. Smollett*, 2023 IL App (1st) 220322**

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 20-CR-3050; the Hon. James B. Linn, Judge, presiding.
Attorneys for Appellant:	Nnanenyem E. Uche, of Uche P.C., and Heather A. Widell, both of Chicago, for appellant.
Attorneys for Appellee:	Dan K. Webb, Special Prosecutor, of Winston & Strawn, of Chicago (Sean G. Wieber and Samuel Mendenhall, of counsel), for the People.
***Amicus Curiae*:**	Mary B. Richardson-Lowry, Corporation Counsel, of Chicago (Myriam Zreczny Kasper, Suzanne M. Loose, Stephen G. Collins, and Jane M. Chapman, Assistant Corporation Counsel, of counsel), *amicus curiae*.

Order of Commitment and Sentence to CCDOC (Rev. 02/10/15) CCCR 0303

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
v.
JUSSIE SMOLLETT
Defendant

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

ORDER OF COMMITMENT AND SENTENCE TO COOK COUNTY DEPARTMENT OF CORRECTIONS

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

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

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

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

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

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

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

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

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

CERTIFIED BY _____ _____ 1544
S. Sims Judge Linn, James B Judge's No.

VERIFIED BY _____

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

[redacted]

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

Printed: 3/10/2022 7:16 PM

Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	Court Interpreter
242	Defendant Sheet #1	Criminal Division, Courtroom 700 2650 South California Avenue, Chicago, IL, 60608	

Case Number	Defendant Name	Attorney Name	Session Date	Session Time
20CR0305001	SMOLLETT, JUSSIE	GLANDIAN, TINA 006331077	3/10/2022	09:00 AM -

CB/DCN#	IR #	EM	Case Flag	Bond #	Bond Type	Bond Amt
	2397168			I00005720	I	

CHARGES	** COURT ORDER ENTERED	CODES
C1 720 ILCS 5/26-1(a)(4) FALSE REPORT OF OFFENSE 12/9/2021 Verdict of Guilty	MFNT - DENIED Sentence All counts concurrent 30 MOS PROBATION ~~180~~ 150 DAYS CCT NO TCS $120,106 Restitution to City of Chicago, $2,500 fine DNA & costs ordered	
C2 720 ILCS 5/26-1(a)(4) FALSE REPORT OF OFFENSE 12/9/2021 Verdict of Guilty		
C3 720 ILCS 5/26-1(a)(4) FALSE REPORT OF OFFENSE 12/9/2021 Verdict of Guilty		
C4 720 ILCS 5/26-1(a)(4) FALSE REPORT OF OFFENSE 12/9/2021 Verdict of Guilty		
C5 720 ILCS 5/26-1(a)(4) FALSE REPORT OF OFFENSE 12/9/2021 Verdict of Guilty		
C6 720 ILCS 5/26-1(a)(4) FALSE REPORT OF OFFENSE 12/9/2021 Verdict of Not Guilty		

JUDGE: Linn, James B	JUDGE'S NO: 1544	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:	VERIFIED BY:

C 1712

130431

Criminal and Traffic Assessment Order (06/28/19) CCCR N118 A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

v.

Jussle Smollett

Defendant

Case No. 20 CR 03050-01

CRIMINAL AND TRAFFIC ASSESSMENT ORDER

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

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

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

1. Fines

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

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

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

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

[redacted]

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

3. Conditional Assessments (check all that apply)

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

[redacted]

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

4. Other Assessment

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

5. Credit

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

6. Offsets of Assessments

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

Criminal and Traffic Assessment Order (06/28/19) CCCR N118 D

The Court orders:

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

1.	Total Fines	$ 25,000.00
2.	Total Criminal Assessments	$
3.	Total Conditional Assessments	$
4.	Total Other Assessments	$
5.	Total Credits	$ 750.00
6.	Bond Deduct	$
7.	Total Offsets	$
	Total Amount Due	$ 24,250.00

ENTERED:

Dated:

Judge

1544

Judge's No.

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

Signature of Defendant

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

[redacted]

Sentencing Order **(03/09/20) CCCR 0090 A**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

or

A Municipal Corporation

v.

JESSIE SMOLLETT

Defendant

☒ Criminal Division

☐ Municipal District No. _____

Br/Rm 700

Case No. 20 CR 03050-01

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

AOIC Code: _____

IR No. 2397168 SID No. _____

CB No. 19771648

SENTENCING ORDER

☐ **SOCIAL SERVICE** ☒ **ADULT PROBATION**

☐ **SUPERVISION** ☐ **CONDITIONAL DISCHARGE** ☐ **STANDARD PROBATION**

IT IS HEREBY ORDERED that

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

☐ Scheduled Termination Date: _____
☐ Misdemeanor ☒ Felony ☐ Standard Probation
☐ Adult Probation Drug Court ☐ Adult Probation Mental Health Court ☐ Adult Probation Veterans Court
☐ Adult Probation ACT Court ☐ Adult Probation Mental Health Unit
☐ Adult Probation Sex Offender Program (additional requirements - see additional order)

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

☐ Reporting (All DUI orders are reporting) ☒ Non-Reporting
☐ Limited Reporting (Monitor community service or restitution only)

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

STANDARD CONDITIONS

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

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

[redacted]

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

DRUG/ALCOHOL/DUI RELATED CONDITIONS

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

SPECIAL CONDITIONS

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

DOMESTIC VIOLENCE

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

[redacted]

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

SEX OFFENDER

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

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

RESTITUTION

☒ Make restitution to: Stephen J. Kane
City of Chicago Department of Law in the amount of $ 120,106, payable through the Social Service Department or Adult Probation Department at the rate of $ _____,
per _____ with final payment due on or before ~~60 days prior to termination date~~ March 10, 2024

☐ **OTHER** _____

☒ **ADDITIONAL ORDERS**

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

☐ Next Court Date: _____

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

Jessie Smollett

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

Defendant DOB: [redacted]

Address: [redacted] City: [redacted]

State: [redacted]

Telephone: [redacted] Email: [redacted]

Prepared by: Office of the Special Prosecutor

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

ENTERED:

Dated: _____

James B. Linn 1544

Judge Judge's No.

Iris Y. Martinez, Clerk of the Circuit Court of Cook County, Illinois
cookcountyclerkofcourt.org

[redacted]

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

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

NOTICE OF APPEAL

Joining Prior Appeal/**Separate Appeal**/Cross Appeal

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken:

Illinois First District Appellate Court

(2) Name of Appellant and address to which notices shall be sent.

Name: JUSSIE SMOLLETT

Address: C/O Nnanenyem E. Uche
314 N. Loomis St.,
Suite G2
Chicago, IL 60607

Email: nenye.uche@uchelitigation.com

(3) Name and Address of Appellant's Attorney on appeal.

Name: Nnanenyem E. Uche

Address: 314 N. Loomis St.,
Suite G2
Chicago, IL 60607

Email: nenye.uche@uchelitigation.com

[redacted]

If appellant is indigent and has no attorney, does he want one appointed?: N/A

(4) Date of judgment or order: March 10, 2022

(5) Offense of which convicted: Five Counts of Disorderly Conduct

(6) Sentence: 30 months felony probation with the first 150 days to be served in the custody of the Cook County jail, and restitution of $120,106.00 and $25,000 in fines, DNA and costs ordered.

(7) If appeal is not from a judgment, nature of order appealed from: N/A

(8) If appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal.

NNANENYEM E. UCHE

/s/ Nnanenyem E. Uche
Attorney for Defendant-Appellant

Nenye E. Uche
Cook County No. 49900
Uche P.C.
314 N. Loomis St.,
Suite G2
Chicago, IL 60607
312.380.5341
nenye.uche@uchelitigation.com

[redacted]

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SECOND SUPPLEMENT TO THE RECORD ("SUP2 C")

REPORT OF PROCEEDINGS ("R")

July 14, 2021: (in camera) Evidentiary Hearing - Witness Examination

November 29, 2021: Jury Trial - Opening Statements **Page**

November 30, 2021: Jury Trial - Witness Examination

	Direct	Cross	Redir.	Recr.
Det. Michael Theis	(R 1256 -1432)	(R 1432 - 1537)	(R 1537 - 1547)	(R 1548 - 1556)
Off. Muhammad Baig	(R 1561 - 1590)			
Sgt. Joseph Considine	(R 1590 - 1614)			

December 1, 2021: Jury Trial - Witness Examination

	Direct	Cross	Redir.	Recr.
Det. Kimberly Murray	(R 1623 -1670)	(R 1670 - 1684)	(R 1684 - 1686)	(R 1686 - 1688)
Det. Robert Graves	(R 1689 - 1759)	(R 1759 - 1777)	(R 1777 - 1779)	(R 1779)
Abimbola Osundairo	(R 1809 - 1991)	(R 1999 - 2102)	(R 2103 - 2125)	(R 2125 - 2131)
Olabinjo Osundairo	(R 2135 - 2220)			

December 2, 2021: Jury Trial - Witness Examination

	Direct	Cross	Redir.	Recr.
Olabinjo Osundairo cont'd		(R 2226 - 2333)	(R 2333 - 2335)	(R 2335)

December 2, 2021: Jury Trial - End of Prosecution Case in Chief **Page**

December 2, 2021: Jury Trial - Witness Examination continued

December 6, 2021: Jury Trial - Witness Examination

December 6, 2021: Jury Trial - Conference in Chambers **Page**

December 7, 2021: Jury Trial - Witness Examination

December 7, 2021: Jury Trial - End of Defense Case in Chief **Page**

December 8, 2021: Jury Trial - Closing Arguments **Page**