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.	)	

REPLY BRIEF OF DEFENDANT-APPELLANT

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E-FILED
7/24/2024 10:42 PM
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POINTS AND AUTHORITIES

ARGUMENT

I.

THIS APPELLANT BARGAINED FOR AND RECEIVED A NON-PROSECUTION AGREEMENT.

In its opening brief, the OSP argues that a non-prosecution agreement did not exist because the prosecutor dismissed this Appellant's case with a *nolle prosequi*. Brief of the Plaintiff-Appellee People of the State of Illinois 10-15 ["OSP Br."]. Thus, the OSP argues that since prosecutors can refile charges after a *nolle prosequi*, "the parties returned to their position before the charges were filed—the CCSAO, just as before it filed the initial charges, retained discretion to prosecute defendant for his offenses, and defendant, as before the initial charges were filed, was free to go …" OSP. Br. 11. This argument is a complete misapprehension of the *issue* in this case. To be clear, this Appellant has never quarreled with the general principle that Illinois prosecutors can bring back charges after a *nolle prosequi*. Brief and Appendix of Defendant-Appellant 12-15 ["Def. Br."]; *see also People v. Smollett*, 2023 IL App (1st) 220322, ¶¶ 159-64 (J. Lyle, dissenting). Instead, the issue here is whether a non-prosecution agreement can be enforced within the context of a *nolle prosequi*. *See Smollett*, 2023 IL App (1st) 220322 at ¶ 159 (J. Lyle, dissenting).

If the OSP's position were correct, then the entire body of Illinois appellate and supreme court caselaw surrounding the *Starks* opinions would not make any sense. In *People v. Starks*, 106 Ill. 2d 441 (1985) (hereinafter, *Starks* '85), this Court *sua sponte* remanded the case for an evidentiary hearing to determine whether a non-prosecution agreement existed even though there was no mention in the opinion that prosecutors had promised Starks a dismissal *with prejudice*. 106 Ill. 2d at 444, 447 (wherein the opinion describes the alleged promise made to Starks as a "dismissal"). Similarly, in *People v.*

Starks, 146 Ill. App. 3d 843 (2d Dist. 1986) (hereinafter, *Starks* '86), the Second District enforced a non-prosecution agreement even though Starks was promised a *nolle prosequi* and not a *dismissal with prejudice*. 146 Ill. App. 3d at 844, 855. Surely this Court and the Second District were aware of the age-long principle that prosecutors can refile charges after a *nolle-prosequi*. See, *People v. Watson*, 394 Ill. 177, 179 (1946). And yet, both *Starks* '85 and *Starks* '86 still insist that Illinois courts contractually enforce non-prosecution agreements when a defendant has detrimentally relied on such an agreement, irrespective of the context of dismissal. *Starks*, 146 Ill. App. 3d at 848 (*Starks* '86); *Starks*, 106 Ill. 2d at 452-53 (*Starks* '85).[1] The implication of the *Starks* cases is clear: a prosecutor can refile a case dismissed after a unilateral *nolle prosequi*, but is barred from refiling a case dismissed via a non-prosecution agreement, or a bilateral *nolle prosequi*, wherein they intend to, and indeed do, bargain away their right to bring back charges.[2] *Smollett*, 2023 IL App (1st) 220322 at ¶¶ 153, 159-64 (J. Lyle, dissenting) (citing, *State v. Kallberg*, 326 Conn. 1, 160 A.3d 1034, 1042 (Conn. 2017)).[3]

[1] It bears mention that the *Starks* '85 Illinois Supreme Court ruling was significantly reliant on out-of-state cases involving the enforcement of non-prosecution agreements within the context of a *nolle prosequi*. *Starks*, 106 Ill. 2d at 449-52 (*Starks* '85).

[2] For example, if prosecutors had walked into court and, on their own motion, without any agreement, and for whatever reason, dismissed this Appellant's first set of charges, the State would have been well within its rights to refile charges. However, the record is clear that prosecutors bargained away their rights to refile charges as a result of an agreement with this Appellant to perform community service and forfeit his bail bond. This Appellant carried out his end of the bargain; thus, the non-prosecution agreement should be enforced.

[3] The *Kallberg* Case is in tandem with the *nolle prosequi* fairness protections barring prosecutions after a *nolle prosequi* when there are relevant statutory or constitutional defenses, or a presence of fundamental unfairness, bad faith, or harassment in the refiling of charges. *Smollett*, 2023 IL App (1st) 220322 at ¶ 170 (J. Lyle, dissenting) (citing *People v. Norris*, 214 Ill. 2d 92, 104 (2005)).

But rather than address the *Starks* or *Kallberg* cases, the OSP takes cover with cases that are inapplicable and irrelevant to the issues in the present case. For example, the OSP cites *People v. Gill*, 379 Ill. App. 3d 1000 (4th Dist. 2008) and *People v. Ryan*, 259 Ill. App. 3d 611 (2d Dist. 1994), both of which are based on facts involving a unilateral *nolle prosequi* by a prosecutor. OSP Br. 14. Further, the OSP's use of *People v Smith*, 233 Ill. App. 3d 342 (2d Dist. 1992), in making its *nolle prosequi* argument is equally perplexing because not only did the *Smith* court separate the prosecutorial contractual breach issue from its analysis of the *nolle prosequi* as it pertained to the Double Jeopardy Clause (where the Court analyzed the first prong of the Double Jeopardy Clause protection against a second prosecution after an acquittal), but the court also implicitly noted, while agreeing with and employing the *Starks* reasoning, that the effect of a *nolle prosequi* is irrelevant to the prosecutorial contractual breach issue. *Smith*, 233 Ill. App. 3d at 347, 348-49. For instance, the *Smith* Court noted that:

> The supreme court in *Starks* quoted from and relied on a Florida case, *Butler v. State* (Fla. App. 1969), 228 So. 2d 421, in which the prosecutor agreed to drop charges if the defendant passed a polygraph test. If the defendant failed the polygraph test, those results would be admissible at his trial. The defendant passed the test, and the charges were nol-prossed. However, the State subsequently indicted the defendant for the same offense. The Florida Appellate Court held that the State was bound to abide by its agreement with the defendant.

Smith, 233 Ill. App. 3d at 351. *See also id*. at 347 (noting that the trial court it was reviewing never based its decision on specific performance or on contractual breach).

The OSP essentially argues against the application of contractual principles within the present context. OSP. Br. 12-14. But such an argument goes against the grain, as demonstrated by *Starks* '85 and *Starks* '86. Moreover, it is well established that contract

law applies "in the precharging phase, such as a nonprosecution agreement." *Smollett*, 2023 IL App (1st) 220322 at ¶ 159 (J. Lyle, dissenting).

In her dissent, Justice Lyle correctly queried, "[w]hile a defendant might appreciate the gift of a *nolle* when not part of underlying negotiations, why would a defendant bargain for uncertainty?" *Id*. at ¶ 169 (J. Lyle, dissenting). This question is even more relevant considering this Appellant gave up his bail bond. *Id*. at ¶ 4. If indeed he bargained for a unilateral *nolle prosequi*, as the OSP argues, then there was no need for the State to enter an agreement requiring him to forfeit his bail bond and perform community service since the State could unilaterally dismiss the case and refile as they pleased. Again, the prosecutor's words were crystal clear, that there was an agreement in place. *Id*. at ¶ 4. And as Justice Lyle noted, internal investigations conducted by the OSP itself "suggests the intention of the parties was more akin to a dismissal with prejudice." *Id*. at ¶ 165 (J. Lyle, dissenting).

II.

THIS NON-PROSECUTION AGREEMENT SHOULD BE ENFORCED BECAUSE THIS APPELLANT DETRIMENTALLY RELIED ON THE STATE'S PROMISE THAT THE DISMISSAL OF CHARGES WERE A "JUST DISPOSITION AND APPROPRIATE RESOLUTION" OF HIS FIRST PROSECUTION.

In its brief, the OSP maintains that this Appellant's case is distinguishable from the body of caselaw enforcing non-prosecution agreements because, according to the OSP, the Appellant did not surrender any significant constitutional rights which would have raised "legitimate due process concerns." OSP. Br. 15.

This argument is plainly wrong, and the OSP's error is emphasized when considering their utilization of *Starks* '85 to point out the fact that matter centered upon Starks' bargaining away his Fifth Amendment right. OSP. Br. 15-16. Ironically, the *Starks*

’85 opinion never mentions the due process clause. Rather, the Illinois Supreme Court in *Starks* ’85 was focused on ensuring that prosecutors “honor the terms of agreements it makes with defendants.” *Starks*, 106 Ill. 2d at 449 (*Starks* ’85). In essence, *Starks* ’85 takes a purely contractual analysis of the case; so much so that an inadmissible polygraph test was used as contractual consideration for the non-prosecution agreement at issue. *Id*. at 451-53.

Additionally, for the OSP’s argument to make sense, one has to take the position that a defendant’s interest in his property has no constitutional implication. However, the opposite is true. It is an undebatable principle in American constitutional jurisprudence that property interest implicates constitutional rights, specifically, the due process clause. *See* U.S. Const. Amend. XIV (“nor shall any state deprive any person of life, liberty, or property without due process of law”); *see also People v. Stapinski*, 2015 IL 118278, ¶ 50 (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).

Finally, the OSP attempts to distinguish the present case from the body of caselaw enforcing non-prosecution agreements by arguing, “in those contexts, defendants agreed to undertake actions that could foreclose their ability to defend against future charges, such as submitting to an incriminating interview, pleading guilty, or otherwise admitting to involvement in a crime.” OSP. Br. 19. Even if this argument is to be taken seriously, the OSP fails to meet their own proposed, unconventional, constitutional standard. Afterall, till date, this Appellant has been *foreclosed* from retrieving his bail bond which he forfeited as part of a non-prosecution agreement with the State.

III.

THIS MATTER SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING IF THIS COURT DETERMINES THAT THERE EXIST A GENUINE ISSUE OF FACT AS TO THE EXISTENCE OF A NON-PROSECUTION AGREEMENT.

In its brief, the OSP suggests that if "the record is incomplete or inadequate for resolving his claim because counsel did not make an adequate record at trial, then his claim is better suited to collateral proceedings." OSP. Br. at 20. This argument is flawed because it implies that this Appellant's motion to dismiss was denied on the merits after a substantive hearing.

In fact, however, the trial court denied hearing this Appellant's motion to dismiss on the merits. (R913). Specifically, the trial court declared, "I cannot find a way to give pretrial relief." (R913).[4] *See also Smollett*, 2023 IL App (1st) 220322 at ¶ 168 (J. Lyle, dissenting) (observing that the motion to dismiss was never heard on the merits).

Had the trial court heard the motion to dismiss on the merits, then, like the countless criminal cases handled in courtrooms around Illinois, the OSP, as prosecutors, presumably would have challenged the four corners of the motion to dismiss which, in turn, would have led to a defense request for an evidentiary hearing or the trial court's *sua sponte* order for an evidentiary hearing.

Nor should it be forgotten that in response to the motion to dismiss, the OSP argued that the trial court "summarily deny" the motion to dismiss based on procedural grounds. (R911-912). Thus, the OSP *cannot have its cake and eat it too* by advocating and achieving

[4] Even though the trial court had found the contractual issue had never been litigated, it still went on to erroneously find that it lacked the authority to hear the motion because – in the proceedings involving the appointment of the OSP – another circuit court had found that the Cook County State's Attorney's Office lacked the authority to plea-bargain with this Appellant due its State's Attorney's recusal. (R912; 913; 914).

a denial without a hearing on the merits at the trial level, and then making a U-turn at the Supreme Court to complain that the facts surrounding the motion to dismiss have not been properly developed *via* fault of the defense.

The OSP's attempt to distinguish this case from *Starks* '85 also falls flat. As was noted by Justice Lyle in her dissent, "if the majority has questions about the terms of the agreement, the appropriate prescribed solution, outlined in *Starks* is to reverse the convictions and remand for an evidentiary hearing to ascertain the terms of the agreement and the parties' intent." *Smollett*, 2023 IL App (1st) 220322 at ¶ 168 (J. Lyle, dissenting); *see also* Def. Br. at 23-26.

In the present case, and as Justice Lyle noted in her dissent, the OSP concedes that an agreement took place. *Smollett*, 2023 IL App (1st) 220322 at ¶ 159 (J. Lyle, dissenting). However, the disagreement lies in whether this agreement was for a non-prosecution agreement. Thus, as was the case in *Starks* '85, this case should be remanded to determine the terms of the agreement.

IV.

THE EVIDENCE OF A NON-PROSECUTION AGREEMENT IS CLEAR FROM THE RECORD.

In its brief, the OSP argues that there is no evidence of a non-prosecution agreement because the defense admitted during appellate oral arguments that the only indication of the non-prosecution agreement is the March 26, 2019, transcripts. But during questioning from Justice Lyle the defense also acknowledged that there was another record indicating an agreement existed. In fact, Justice Lyle noted in dissent that the OSP's own investigatory report reveals that Cook County prosecutors intended to enter into a non-prosecution agreement with this Appellant. *Id.* at ¶ 165 (J. Lyle, dissenting). Importantly too, the plain

language of the March 26, 2019, transcript makes it clear that prosecutors and this Appellant had an agreement to reach a *just disposition* and *appropriate resolution* of the first prosecution after this Appellant had performed community service and had agreed to forfeit his bail bond. *Id*. at ¶ 4.

Also erroneous is the OSP's reliance on defense attorneys' statements to media houses after the termination of the first prosecution and wherein a defense attorney stated, "there is no deal." OSP. Br. 23-24. A defense attorney posturing to media houses, amidst an avalanche of negative publicity targeted toward a defense client, is not facts in evidence.[5]

Additionally, OSP's reliance on *People v. Peterson*, 2022 IL App (3d) 220206, is flawed. *See* OSP. Br. 4, fn. 4. The *Peterson* case had nothing to do with the non-prosecution, contractual issues addressed in this matter. Moreover, statements made during an international media circus are in no way a supplement to on-the-record and in-court statements made by officers of court to a trial judge, as was the case in the present matter.

But if one were to take attorney media statements into account, then surely the media statements of a specially appointed prosecutor's office, ethically bound, carries enormous weight, including when the OSP openly complained during a media-press release, explaining its reasoning for mounting the second prosecution to be that it "disagrees with how the CCSAO **resolved** the Smollett case" (C727) (emphasis in bold added).

[5] It is not inconceivable that the set of defense attorneys at that time would have made such statements to the media as a public relations spin to avoid the risk that the use of the phrase "deal" could further engulf this Appellant in more public scorn.

Finally, it is baffling that the OSP argues against an evidentiary hearing. If indeed, as Justice Lyle aptly noted in her dissent, that "prosecutors have as their preeminent goal not victory, but justice," and if indeed there is a genuine issue of material fact as to the existence of a non-prosecution agreement, then the OSP should be eager, as arbiters of justice, to get to the bottom of what transpired (*vis a vis* whether there exists a non-prosecution agreement) between the defense and Cook County prosecutors. *See Smollett*, 2023 IL App (1st) 220322 at ¶ 175 (J. Lyle, dissenting) (quoting).

V.

THE CIRCUIT COURT'S FINDING THAT THE INITIAL PROSECUTION WAS VOID IS NOT RELEVANT TO THE NON-PROSECUTION AGREEMENT.

The OSP also argues that this Appellant waived any argument involving his non-prosecution agreement when he did not appeal a circuit court's order from a proceeding involving the appointment of the OSP which found the initial prosecution proceedings to be void. OSP. Br. 24-25.

This argument lacks any merit. First, the non-prosecution agreement was never addressed in the OSP appointment proceedings. (R900; 912-13) (trial court observing that the contractual issues were never addressed in the petition hearing order). *See e.g.*, *People v. Stapinski*, 2015 IL 118278 (enforcing unauthorized promises when there are constitutional consequences). Second, during the OSP appointment proceedings, this Appellant was not charged with a crime. However, once he was charged in the second prosecution, he retained the right, as any other defendant, to challenge the four corners of his indictment. In fact, this Appellant raised the non-prosecution issue prior to trial.

The OSP also argues, albeit *via* footnote, that the non-prosecution agreement is not applicable because the charges that were *nolle prosequi* in the first prosecution did not

include an additional officer and an additional report found in the second prosecution. OSP. Br. fn. 6. The OSP has made this flawed argument before, but within the context of the double jeopardy clause. (C750). In response, the Appellant reiterated the age-long principle that the double jeopardy clause will bar additional new charges that share the same element as the prior charges. (C775).

Here, as it pertains to the non-prosecution agreement, the State bargained away its right to mount a second prosecution involving charges bearing not just the same underlying conduct, but the same elements. In no real world can it be expected that this Appellant performed community service and forfeited his bail bond as part of an agreement to bar his prosecution for just one set of indictments and not another set that bare the same elements and the same course of conduct.

VI.

PUBLIC POLICY SUPPORTS THE ENFORCEMENT OF THE NON-PROSECUTION AGREEMENT.

For its public policy argument, OSP argues that "the appellate court simply held, consistent with binding Illinois law, that a *nolle prosequi* cannot be used to bar future prosecution." OSP. Br. 25-26. But the OSP cites no binding law in support of this statement, because the opposite is true. In the OSP's entire response to this issue, it never addresses *Starks* '86 enforcement of a non-prosecution agreement within the context of a *nolle prosequi*. Nor do they address this Court's reliance on out-of-state precedent upholding the enforcement of non-prosecution agreements within the context of a *nolle prosequi* in *Starks* '86.

Likewise, the OSP declared, without offering more, "defendants who enter into non-prosecution agreements continue to be protected from future prosecution." OSP. Br.

26. Certainly, if the OSP wants to radically alter Illinois law on enforcement of non-prosecution agreements after a defendant's specific performance, then the OSP should, at the very least, provide examples about how its radical ideas will not affect the hundreds of formal and informal deferred prosecution agreements within the context of a *nolle prosequi*.

Finally, the OSP erroneously argues that a reversal will have the effect of "rendering a *nolle prosequi* equivalent to a 'final disposition'[.]" OSP. Br. 26. This repeated line of argument from OSP demonstrates the OSP's misapprehension of the caselaw surrounding non-prosecution agreements. Again, at no point has this Appellant argued that prosecutors cannot re-file charges after a unilateral *nolle prosequi*. Rather, within the context of a non-prosecution agreement, Illinois courts and courts nationwide have enforced such agreements if prosecutors have bargained away their right to refile charges. *Starks*, 106 Ill. 2d 441 (1985) (*Starks* '85); *Starks*, 146 Ill. App. 3d 843 (2d Dist. 1986) (*Starks* '86); *Kallberg*, 326 Conn. 1, 160 A.3d 1034 (Conn. 2017).

VII.

THE PUNISHMENT PRONG OF THE DOUBLE JEOPARDY CLAUSE IS REVIEWED DIFFERENTLY FROM THE ACQUITTAL AND CONVICTION PRONG.

The OSP argues that the double jeopardy clause was not violated because jeopardy never attached since this Appellant was not put through the hazards of trial and possible convictions. OSP. Br. 28. Essentially, the OSP argues that the punishment prong should be treated with the same analysis as the acquittal and conviction prongs of the Double Jeopardy Clause. For this contention, the OSP cites to *Hudson v. United States*, 522 U.S. 93 (1997). Specifically, the OSP argues, "thus, *Hudson* explained, *Halper*'s 'deviation from longstanding double jeopardy principles was ill considered.' In abrogating *Halper*

and applying 'traditional double jeopardy principles to the facts of [Hudson's] case, the Supreme Court held that the government's 'administratively imposed monetary penalties' did not bar a later criminal prosecution for the same conduct under the Double Jeopardy Clause." OSP. Br. 31.

But the above quote was not in reference to the traditional methods the U.S. Supreme Court had analyzed the acquittal and conviction prongs; rather, it was in reference to the traditional methods the U.S. Supreme Court has analyzed the punishment prong of the Double Jeopardy Clause. *Hudson,* 522 U.S. at 99-103.

In analyzing the sentencing prong of the Double Jeopardy Clause, the *Hudson* Court held that the focal point is for courts to determine if the penalty is criminal in nature. *Id*. at 101-03. In effect, the courts must look to statutory construction, when necessary, to determine whether the legislature meant for a proceeding to be civil or criminal. *Id*. at 99.

In *Hudon,* the Court found that the plain language of the statute in question was civil and not criminal in nature. *Id.* at 103. But the *Hudson* Court did not stop the double jeopardy analysis. The *Hudson* Court found that a civil penalty, could still violate the Double Jeopardy Clause if, by clear proof, "the statutory scheme was so punitive either in purpose or effect." *Id*. at 99-100. In determining whether a civil penalty is punitive in purpose of effect, the *Hudson* Court outlined a seven-factor test:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment -- retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. It is important to note, however, that these factors must be considered in relation to the statute on its face, and only the clearest proof

> will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

Id. (Internal quotation marks omitted).[6]

If, as the OSP claims, double jeopardy attaches to the punishment prong as it does to the acquittal and conviction prong, then the seven-factor test outlined above for civil penalties would be pointless since no person in a civil proceeding can be exposed to the hazards of criminal trial or conviction. Instead, the *Hudson* Court has made it clear that jeopardy attaches in relation to the punishment prong if the penalty is criminal in nature or, if, under the seven-factor test, a civil penalty can be construed as criminal in nature. *Id*.

Unlike *Hudson*, this Appellant's performance of community service and bail bond forfeiture occurred in a criminal court and as a result of a criminal prosecution. Beyond this setting, and as discussed in Def. Br. 38-40, the performance of community service and bail bond forfeitures are traditional forms of punishment in criminal court. *See also* (C683); (C777). Thus, under the *Hudson* rule, Appellant's performance of community service and forfeiture of his bail bond are criminal in nature and, thus, the State of Illinois was barred from the second prosecution and any punishment that flowed from it.

As a result, the seven-factor *Hudson* step is not applicable since this Appellant's performance of community service and bail bond forfeiture did not occur in a civil court or in a civil forfeiture proceeding but in a criminal court.

Finally, it is noteworthy that at the start of the second prosecution against this Appellant, the OSP recognized that his performance of community service and bail bond

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[6] Thus, *Hudson's* critique of *Halper* was rooted in the fact that the *Halper* Court did not consider, as a threshold, if the legislative intent was to make a penalty civil or criminal in nature. *Hudson*, 522 U.S. at 100-01. Nonetheless, this seven-factor test, when applicable, is still not far off from *Halper*'s *punishment analysis*.

forfeiture was a form of punishment. For example, in his prepared written Information Release on February 11, 2020, the Special Prosecutor acknowledged that this Appellant was previously punished but took issue with the leniency of the punishment. Specifically, he complained that during the initial criminal prosecution of this Appellant, the "**only punishment** for Mr. Smollett was to perform 15 hours of community service . . . [and] requiring Mr. Smollett to forfeit his $10,000 as restitution to the City of Chicago." (C727) (emphasis in bold added).

Conclusion

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

Respectfully submitted,

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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 14 pages.

/s/ Nnanenyem E. Uche
Nnanenyem E. Uche

CERTIFICATE OF SERVICE

I certify, under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and that the foregoing Reply Brief of Defendant-Appellant was served on all counsel of record via Odyssey eFile & Serve Illinois on July 24, 2024.

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