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APPELLATE COURT 1ST DISTRICT

No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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

REPLY BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I.

THE RENEWED PROSECUTION OF MR. SMOLLETT VIOLATED HIS DUE PROCESS RIGHTS BECAUSE (1) MR. SMOLLETT FULLY PERFORMED HIS PART OF A NONPROSECUTION AGREEMENT WITH THE STATE BY PERFORMING COMMUNITY SERVICE AND FORFEITING HIS $10,000 BAIL BOND; AND (2) THE STATE BENEFITED FROM TAKING AND KEEPING MR. SMOLLETT'S BAIL BOND WITHOUT PERFORMING ITS END OF THE BARGAIN. THUS, THE VIOLATION OF DUE PROCESS WAS PREJUDICIAL AND REQUIRES REVERSAL OF MR. SMOLLETT'S CONVICTIONS AND A DISMISSAL OF THE CHARGES AGAINST HIM.

(1) A nolle prosequi is irrelevant to the issue of a prosecutorial contractual breach.

As it pertains to this issue, the OSP spends most of their response arguing that Mr. Smollett's agreement with the State is of little value since the case was dismissed via a *nolle prosequi*. (OSP. Br. 15-16). According to the OSP, Mr. Smollett did not bargain for a permanent dismissal since the State can refile a case that was dismissed via a *nolle prosequi*. *Id*.

The OSP's position categorically misunderstands the law on prosecutorial contractual breach because whether the State has the mechanical ability to refile a charge is irrelevant to the issue of a breach of an agreement where prosecutors *intended to and indeed agreed* to privately bargain away the State's ability to re-prosecute a Defendant in exchange for something of value from the Defendant.

This is critical, because in every major case cited by both parties regarding the issue of contractual violation, there was no statutory law mechanically restraining the prosecutor's ability to bring charges. For example, there was no law restraining prosecutors in the *Starks* case from continuing with their prosecution even after *Starks* had passed the polygraph. *People v. Starks*, 106 Ill. 2d 441 (1985).[1] Likewise, in *Stapinski*, there was no law restraining prosecutors from

[1] Importantly, the *Starks* ruling relied solely on cases where prosecutors had previously dismissed charges via a *nolle prosequi*. *Starks*, 106 Ill. 2d at 449-450.

filing charges against the defendant in *Stapinski* after he had received an unauthorized promise from police officers. *People v. Stapinski*, 2015 IL 118278, ¶ 35. Nor did this Court in *Marion* declare any law restraining prosecutors from filing charges against the Defendant in *Marion*. *People v. Marion,* 2015 IL App (1st) 131011, ¶ 38. Rather, in every single one of those cases, even though prosecutors had the mechanical ability to continue with charges or to file charges, Illinois appellate courts still restrained prosecutors because they had the *intention* and indeed the *agreement* to privately bargain away their ability to bring charges.

Moreover, it is long-standing precedent that upon a showing of harassment, bad faith or fundamental unfairness, Illinois courts will prevent prosecutors from refiling criminal charges even after a *nolle prosequi*. *People v. DeBlieck*, 181 Ill. App. 3d 600, 606 (2d Dist. 1989). Thus, we are back to square one. The ultimate question regarding this issue is whether it is fundamentally fair and in good faith, under the rule of law and no matter how unpopular a defendant may be, for the State to violate a promise not to prosecute after taking Mr. Smollett's $10,000 bail bond and restraining his liberty while making him perform community service in exchange for that promise. The Appellant respectfully submits that it is both fundamentally unfair and in bad faith to re-prosecute him under those circumstances.

Additionally, in the present case, 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 Mr. Smollett in exchange for Mr. Smollett's $10,000 bail bond and Mr. Smollett's performance of community service. For instance, the prosecutor, while dismissing charges, had stated: "we believe this outcome is a just disposition and appropriate resolution to this case." Mr. Smollett respectfully submits that those words are clearly words of finality.[2]

[2] It is worth noting too, that in his prepared written Information Release to announce the second indictment, Special Prosecutor Dan K. Webb also acknowledged that the case had been *resolved* when he stated: "…the OSP has obtained sufficient factual evidence to determine that it disagrees with how the CCSAO resolved the Smollett case."

The OSP's use of *People v Smith*, 233 Ill. App. 3d 342 (2d Dist. 1992), in making its *nolle prosequi* argument is perplexing because not only does the *Smith* Court separate the prosecutorial contractual breach issue from its analysis of the *nolle prosequi* (where the court analyzed the first prong of the double jeopardy clause protection against a second prosecution after an acquittal), but the court also noted, while agreeing with and employing the *Starks* reasoning, that the effect of a *nolle prosequi* is irrelevant to the prosecutorial contractual breach issue. *Id* at 347, 348-349. *See also*, (OSP. Br. 17). 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.

People v Smith, 233 Ill. App. 3d 342, 351 (2d Dist. 1992). (Emphasis in bold added). *See also, Smith*, 233 Ill. App. 3d at 347 (noting that the trial court it was reviewing never based its decision on specific performance or on contractual breach).

(2) An agreement does not have to be "formal" to be enforced.

Additionally, the OSP argues that "Smollett cites no evidence in the record to support the notion that he bargained for a formal non-prosecution agreement." (OSP. Br. 15). The OSP's use of the word "formal" is inconsequential and holds no place in Illinois appellate courts enforcement of prosecutorial agreements. To be clear, it is an iron-clad contractual principle that agreements do not have to be in writing, can be oral and can be gleaned from the record or transcripts. *See example*, *Smith*, 233 Ill. App. 3d at 346-448 (2d Dist. 1992).

(C727). Thus, even the OSP recognized, at an earlier point, that Cook County prosecutors had every intention to *resolve* and end Mr. Smollett's prosecution when they dismissed his charges.

(3) Starks and Stapinski are not limited to cooperation agreements.

Next, the OSP attempts at limiting the *Stapinski* and *Starks* decision to cooperation agreements is flawed. (OSP. Br. 16-17). Starting from *Starks*, our Supreme Court has called for the enforcement of all pre-trial prosecution agreements. *Starks*, 106 Ill. 2d at 454 (Ward, J., dissenting, joined by Moran and Miller, JJ.). Importantly, the *Stapinski* court's reasoning rejects any notion that its holding is limited to cooperation agreements when it noted:

> 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.

Stapinski, 2015 IL 118278, ¶ 48 (emphasis in bold added).

(4) Unauthorized plea bargaining does not excuse a prosecutorial breach of contractual obligation if the defendant's reliance on the agreement has constitutional consequences.

Finally, the OSP argues, while citing Judge Toomin's order appointing a special prosecutor, that the first prosecution team lacked authority and likewise any agreement they made was void. (OSP. Br. 17-18). This argument is flawed for two reasons. First, the Toomin order that the OSP cites never specifically analyzed the effect of a so-called lack of authority on a bargained agreement. (C 446-466). Second, *Stapinski* made it clear that unauthorized promises will be enforced on due process grounds if the defendant's reliance on such promises has constitutional consequences. *Stapinski*, 2015 IL 118278, ¶ 55. Thus, if the Illinois Supreme Court enforced an unauthorized promise from non-lawyers (police officers) in *Stapinski*, then surely the so-called unauthorized promises from licensed Illinois attorneys and sworn Assistant State's attorneys should likewise be enforced even if "unauthorized" and particularly since there are obvious constitutional consequences for Mr. Smollett because of his reliance on the bargained agreement.

II.

THE SECOND INDICTMENT AND ADDITIONAL PUNISHMENT OF MR. SMOLLETT VIOLATED HIS DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENTS BECAUSE MR. SMOLLETT WAS ALREADY PUNISHED FOR THE SAME OFFENSES BY HIS PERFORMANCE OF COMMUNITY SERVICE AND FORFEITURE OF HIS BAIL BOND TO THE CITY OF CHICAGO AS PART OF A PRETRIAL AGREEMENT THAT WAS A CONDITION FOR THE DISMISSAL OF CHARGES IN THE FIRST PROSECUTION.

(1) A nolle prosequi is irrelevant to an analysis of a violation of the multiple punishment prong of the double jeopardy clause.

The OSP erroneously argues that jeopardy did not attach to Mr. Smollett because Mr. Smollett's case was dismissed via a *nolle prosequi*. In reaching this conclusion, the OSP cites cases to argue that a *nolle prosequi* has the effect of an acquittal and thus, jeopardy did not attach for Mr. Smollett. (OSP. Br. 18-20). But this argument is once again irrelevant to the issue at hand because Mr. Smollett has never argued that he was acquitted and thus, the first prong of the double jeopardy clause protection against a second prosecution after acquittal is not implicated here.[3] (Def. Br. 27-35). Rather, Mr. Smollett's issue, one that seems to be of first impression in Illinois, involves whether the double jeopardy prong against multiple punishments was implicated when he completed his end of a bargained pretrial agreement. (Def. Br. 27-35).

[3] Consequently, the OSP's entire list of cases cited to bolster their *nolle prosequi* argument is irrelevant to the double jeopardy multiple punishment claims Mr. Smollett raises. A cursory review of their list of cases demonstrates this: *People v. Cabrera*, 402 Ill. App. 3d 440, 447 (1st Dist. 2010) (involving the first two prongs of the double jeopardy clause *via a vis* a second prosecution for the same offense after an acquittal and after a conviction); *People v. Delatorre*, 279 Ill. App. 3d 1014, 1019 (2d Dist. 1996) (analysis of a civil forfeiture proceeding's effect on a criminal case); *People v. Portuguez*, 282 Ill. App. 3d 98, 101 (3rd Dist. 1996) (same issues as *Delatorre*). *People v. Milka*, 211 Ill. 2d 150 (2004) (analyzing the acquittal (first) prong of the double jeopardy clause). *People v. Hughes*, 2012 IL 112817 (analyzing the acquittal (first) prong of the double jeopardy clause); *People v. Norris*, 214 Ill. 2d 92 (same issues as *Hughes*).

(2) There was no rational, nonpunitive reason to require Mr. Smollett to perform community service and forfeit his bond, and an expressed intent to punish can be shown.

The OSP also seems to argue that Mr. Smollett's pretrial agreement with prosecutors was not tantamount to a diversionary program because it was not formal or pursuant to statute. (OSP. Br. 20- 21). But this argument fails to recognize that a pretrial diversionary agreement does not have to be agreed upon pursuant to a statute or court order. In fact, contrary to what OSP has argued, in each of the persuasive authorities listed by Mr. Smollett in his opening brief, from *State v. Urvan*, 4 Ohio App. 3d 151 (Ohio Ct. App. 1982) to *State v. Maisey*, 600 S.E. 2d 294 (W. Va. 2004), the Appellate Courts' decisions were not based on the formality of the agreements but on the fact that the defendant's performance of an agreement rose to the level of punishment.

Thus, the real question regarding this issue is whether Mr. Smollett's completion of the terms of his pretrial agreement with prosecutors constituted punishment. In the present case, Mr. Smollett respectfully submits that it did. For instance, in *United States v. Halper,* 490 U.S. 435 (1989), (abrogated on other grounds by *Hudson v. United States*, 522 U.S. 93 (1997), the Court noted, "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 448. See also Austin v. United States,* 509 U.S. 602,610 (1993); *Bell v. Wolfish,* 441 U.S. 520, 538-39, 560-61 (1979) (holding that a challenged sanction constitutes punishment if an expressed intent to punish can be shown or if there is no rational, nonpunitive reason for it). Here, there was no rational, nonpunitive reason for the $10,000.00 bail bond forfeiture, which closely resembles the statutory amount of fines for felony offenses, (730 ILCS 5/5-4.5-50(b)),[4] other than to serve as

[4] A violation of the disorderly conduct statute with which Mr. Smollett 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, and a fine may not exceed, for each offense, $25,000 or the amount specified in the offense, whichever is greater. *See* 730 ILCS 5/5-4.5-50(b).

punishment. Upon the dismissal of the case, the bail bond would normally be returned to the accused, less bail bond costs not to exceed $100.00.[5] *See* 725 ILCS 5/110-7(f). However, despite Mr. Smollett's full compliance with all bail conditions, the forfeiture of his bond was required as a condition of the dismissal of charges against him. Therefore, the bond forfeiture was intended to serve retributive or deterrent purposes.[6]

Indeed, the State's Attorney's Office made it clear that its intention was to punish Mr. Smollett by using the word "forfeit" during the dismissal hearing, (R1458-1459; R4-5); a word historically associated with punishment in both civil and criminal settings. *See, e.g., Austin v. United States*, 509 U.S. 602, 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").[7]

It is also noteworthy that in the seminal case that expanded double jeopardy to protect against multiple punishments, the United Supreme Court's decision was driven mainly because the defendant's fine was unrecoverable since it had "passed into the treasury of the United States and beyond the legal control of the court." *Ex parte Lange*, 85 U.S. 163, 175 (1874). Here too,

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

[6] The bond forfeiture cannot constitute victim restitution because Illinois courts have repeatedly held that a police department or government agency is not considered a "victim" within the meaning of the restitution statute. *See, e.g.*, *People v. Chaney*, 188 Ill. App.3d 334,544 N.E.2d 90 (3d Dist. 1989) (rationalizing that where public money is expended in pursuit of solving crimes, the expenditure is part of the investigatory agency's normal operating costs, and the agency is not considered a "victim" for purposes of restitution). Moreover, after the dismissal of the first prosecution against Mr. Smollett, the City of Chicago filed a civil lawsuit against Mr. Smollett to recoup the $130,106.15 amount it alleged it was owed in restitution thus, demonstrating that the bond forfeiture in the criminal case was punitive not remedial. That lawsuit is still pending. *See*, *City of Chicago v. Smollett*, No. 19-cv-04547.

[7] Even the public domain record is replete with statements from prosecutors with the Cook County State's Attorney's Office indicating belief in Mr. Smollett's guilt which in turn, can be interpreted as an expressed intent by the Cook County State's Attorney's Office to punish Mr. Smollett by requiring him to forfeit his bail bond. *See, e.g.,* Faith Karimi & Melissa Alonso, *The prosecutor who dropped Jussie Smollett's charges says he believes the actor lied to the police*, CNN (Mar. 27, 2019), *available at* https://www.cnn.com/2019/03/27/entertainment/jussie-smollett-wednesday.

Mr. Smollett's forfeited money is unrecoverable because it has passed into the City of Chicago's Law Division and treasury and is beyond the control of the courts. (R5). Like the bond forfeiture, there was no rational, nonpunitive reason to require Mr. Smollett 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).

Finally, it is worth noting that in his prepared written Information Release to announce the second indictment, Special Prosecutor Dan K. Webb acknowledged that Mr. Smollett had already been punished for the offenses at issue, noting that 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 added).

Thus, Mr. Smollett's performance of community service and forfeiture of his bail bond constitute criminal punishment, barring further punishment for the same offenses.

III.

THE RENEWED PROSECUTION OF MR. SMOLLETT WAS INVALID ON ITS FACE BECAUSE (1) STATUTORY AUTHORITY WAS LACKING FOR THE APPOINTMENT OF A SPECIAL PROSECUTOR, (2) THE APPOINTMENT ORDER WAS VAGUE AND OVERBROAD, (3) THE APPOINTMENT OF A *PRIVATE* SPECIAL PROSECUTOR, I.E., DAN WEBB AND THE OFFICE OF THE SPECIAL PROSECUTOR, WAS NOT STATUTORILY ALLOWED WHERE PUBLIC AGENCIES WERE WILLING AND ABLE TO ACCEPT THE APPOINTMENT, AND (4) THE CIRCUIT COURT JUDGE IMPROPERLY DENIED THE DEFENSE MOTION FOR SUBSTITUTION OF JUDGE FOR CAUSE BASED ON HIS EXPRESS BIAS AND PREJUDGMENT OF GUILT TOWARDS MR. SMOLLETT, RENDERING EVERY SUBSEQUENT RULING AND ACTION IN THIS CASE NULL AND VOID

(1) ***Mr. Smollett properly challenged the appointment of a special prosecutor in his criminal case because his right of challenge was vested when he had been formally accused by the appointed special prosecutor.***

The OSP acknowledges that Mr. Smollett's motion to intervene in the appointment of a special prosecutor was denied on July 31, 2019. (R 115- R 146); (OSP. Br. 11). The Illinois Supreme Court also denied Mr. Smollett's emergency relief request. (SUP C 671); (OSP. Br. 11). Yet, the OSP still insists that Mr. Smollett could have challenged the appointment, when he was charged, nearly six months later, on February 11, 2020. (OSP. Br. 11). However, pursuant to Illinois Supreme Court Rule 303 & 606, a party has 30 days to appeal a final order. Here, more than 30 days had passed between Toomin's final order appointing a special prosecutor and when that appointed special prosecutor filed new charges against Mr. Smollett. (CI 6-26); (SUP C 671). Thus, Mr. Smollett's only avenue to pursue his challenge—which he did—was to challenge the appointment of a special prosecutor in criminal court once he has been recharged. Even the trial court seemed to acknowledge this when it noted: "I will point out if it ever becomes necessary, now you have appealable issue because now we are talking about something you filed in this court and if you should ever have to go to court of review, it's preserved." (R 231).

(2) ***Cook County Prosecutors did not lack authority to prosecute Mr. Smollett.***

The OSP also erroneously claims that the initial prosecution of Mr. Smollett was void because the State's Attorney and her entire office had been "recused" under 55 ILCS 5/3-9008(a-15) even though, as has been argued in the opening brief, the State's Attorney never filed any formal recusal request pursuant to 55 ILCS 5/3-9008(a-15) (Def. Br. 35-37). Based on this belief, the OSP argues that Cook County State's Attorneys lacked authority to prosecute Mr. Smollett. (OSP. Br. 13-14). But the OSP's argument is flawed for the following reason:

a. The State's Attorney had the power to delegate her authority to her first assistant.

Judge Toomin's ruling was premised on the court's erroneous conclusion that by informally recusing herself and appointing First Assistant Joe Magats as "the Acting State's

Attorney for this matter," State's Attorney Foxx attempted to create an office which she did not have the authority to create and thus, the prosecution was void.[8] (CI 21; SUP 2 C 86-109).

But contrary to the court's ruling, Ms. Foxx did not attempt to create a new office, nor did she appoint Mr. Magats as a special prosecutor in this case. Rather, Ms. Foxx delegated her authority to one individual, her First Assistant, to be exercised in a particular, individual, criminal prosecution. (CI 11-12; SUP 2 C 86-109). Such a delegation has been sanctioned by Illinois courts. *See, e.g., People v. Marlow*, 39 Ill. App. 3d 177, 180 (1st Dist. 1976) *see also People v. Munson at Home, Int'l,* 88 Ill. 2d 279, 299 (1981).

None of the cases the circuit court relied on supported the contention that State's Attorney Foxx could not delegate her authority to her first assistant. *People v. Munson,* 319 Ill. 596 (1925), and *People v. Dunson*, 316 Ill. App. 3d 760 (2d Dist. 2000), are inapplicable, as they involve the delegation of authority to *unlicensed* prosecutors. Here, State's Attorney Foxx turned the Smollett case over to her first assistant, who the circuit judge described as "an experienced and capable prosecutor." (CI 21; SUP 2 C 86-109).

The circuit court also relied on *People v. Jennings*, 343 Ill. App. 3d 717 (5th Dist. 2003), *People v. Ward*, 326 Ill. App. 3d 897, and *People v. Woodall*, 333 Ill. App. 3d 1146 (5th Dist. 2002) which are readily distinguishable. All those cases involved the delegation of power to attorneys from the State's Attorneys Appellate Prosecutor's office, who were officers limited by specific statute.

[8] Even if there had been no valid commission to prosecute Mr. Smollett, the circuit court erred in holding that the prior proceedings were null and void because Mr. Smollett did not challenge the allegedly defective commission to prosecute. *Woodall*, 333 Ill. App. 3d 1157 (noting that "the right to be prosecuted by someone with proper prosecutorial authority is a personal privilege that may be waived if not timely asserted in the circuit court.").

In contrast to the State Attorney's Appellate Prosecutor's office, the Supreme Court of Illinois has explained that Assistant State's Attorneys are "officers for the performance of the general duties of the offices of state's attorney." *People ex rel. Landers v. Toledo, St. L. & W.R. Co.,* 267 Ill. 142, 146 (1915). *See also*, *People v. Nahas*, 9 Ill. App. 3d 570, 575-76 (3d Dist. 1973). (Stating that assistant state's attorneys have full powers of state's attorney); In *Office of the Cook County State's Attorney v. Ill. Local Labor Relations Bd.,* 166 Ill. 2d 296, 303 (1995) (Assistant State's Attorneys act as surrogates for the State's Attorney); *People v. Audi*, 73 Ill. App. 3d 568, 569 (5th Dist. 1979).

IV.

THE TRIAL COURT VIOLATED MR. SMOLLETT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO COUNSEL WHEN IT (1) HELD AN EVIDENTIARY HEARING INTO AN ALLEGED ATTORNEY CONFLICT EVEN THOUGH NO CONFLICT WAS EVER DISCLOSED AND (2) SUBSEQUENTLY ORDERED THAT LEAD DEFENSE ATTORNEY BE PROHIBITED FROM CROSS-EXAMINING THE PROSECUTION'S STAR WITNESSES EVEN THOUGH THE OSP FAILED TO MEET ITS BURDEN OF DISCLOSING AND SHOWING A CONFLICT DURING AN IN-CAMERA EVIDENTIARY HEARING.

Amongst other flawed arguments, Appellee relies upon the presence of "sworn affidavits" by the Osundairo brothers and their mother to argue that the Trial Court's holding of an evidentiary hearing was proper (OSP Br. at 24-25). Appellee fails however, to address the fact that the affidavits were completely devoid of any information that would create or have the potential to create a conflict of interest which would affect Mr. Smollett's interests at trial. (C 1294 - 1299; C 1300 - 1305). In fact, the only information either the Osundairo brothers or their mother indicate they told to Attorney Uche was not only discoverable evidence per the rules of Ill. Sup. Ct. R. 412 but also most of which was public knowledge in the media by the time the

information would have even been transmitted to Attorney Uche. (R 546 - 739; C 1294 - 1299; C 1300 - 1305). (See Def. Br. 43-48).

V.

THE SENTENCE IMPOSED ON MR. SMOLLETT BY THE TRIAL COURT WAS EXCESSIVE WHERE THE SENTENCE PORTION REQUIRING MR. SMOLLETT TO SERVE THE FIRST 150 DAYS OF HIS THIRTY-MONTH PROBATION SENTENCE IN THE CUSTODY OF THE COOK COUNTY DEPARTMENT OF CORRECTIONS WAS NEITHER COMMENSURATE WITH THE NATURE OF THE OFFENSE NOR THE OVERWHELMING MITIGATION PRESENTED BY THE DEFENSE AND WHERE THE CRIME MR. SMOLLETT 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 CASE LAW

Appellee argues that the Trial Court was within its discretion to sentence Mr. Smollett to the terms outlined in the sentence but fails to address Appellant's argument that the sentence in its entirety was at great variance "with the spirit and purpose of the law or if it is manifestly disproportionate to the nature of the offense" and thus can be clearly deemed excessive and an abuse of the Trial Court's discretion. *People v. Brown*, 2015 IL App (1st) 130048, ¶ 42. (OSP Br. at 49-52; Def. Br. 58-62). In fact, the Appellee's reference to the Trial Court's highly inappropriate comments (OSP. Br. 50), unsupported by evidence, only proves Appellant's argument that the Trial Court relied on retribution in crafting his sentence to Mr. Smollett rather than the appropriate factors. *Brown*, 2015 IL App (1st) 130048, ¶ 42. (Def. Br. 58-62).

Finally, in regard to the Trial Court ordering restitution to the City of Chicago as part of the sentence, both Appellee and the City in their respective briefs first argue that the issue of restitution is waived for appeal as the defense did not object to the portion of the sentence regarding restitution and in fact "conceded" that the Trial Court was permitted to give restitution. (OSP. Br. 53-54; Am. Br. 7). However, neither Appellee nor the City provide any case law to

suggest that a party orally conceding that a Trial Court has the "power to give restitution" as a sentence waives the issue for appeal or that it authorizes the Trial Court to order restitution to an entity that's not entitled to restitution. More importantly, the defense specifically made a timely and proper objection to the order of restitution in its written Motion to Reconsider Sentence, which was timely filed instanter and acknowledged by the Trial Court. (SUP C 2221- 2222; R 3559).

Appellee and the City further argue that restitution is proper in this case because officers being paid for overtime work is tantamount to a government agency or police department being compensated for out of pocket expenses or other costs that would not have ensued but for Defendant's conduct. (OSP Br. 52-55; Am. Br. 7-10). Such an argument is flawed. (Def. Br. 60-62). The Appellee's and the City's reasoning is problematic due to the existence of severe deficiencies in the receipts provided by the OSP to support the officers' overtime work as addressed in Appellant's opening brief (Def. Br. 60-62). Finally, assuming arguendo restitution was allowed to be ordered to a police department for work it would have been paid for regardless of a defendant's ultimate conviction, the Appellee's and the City's attempts to respond to the receipt deficiencies are lacking and only highlight how vague and inherently unreliable the provided "receipts" were to justify the sum. (OSP Br. 55; Am. Br. 10-11). *See* 730 ILCS 5/5-5-6, *See also,* e.g.*, People v. Evans,* 122 Ill. App. 3d 733 (3d Dist. 1984); *People v. Derengoski*, 247 Ill. App. 3d 751, 752-53 (1993); (Def. Br. 60-62).

VI.

THE TRIAL COURT VIOLATED MR. SMOLLETT'S DUE PROCESS RIGHT WHEN IT ALLOWED THE ENTIRETY OF MR. SMOLLETT'S GOOD MORNING AMERICA VIDEO INTERVIEW INTO JURY DELIBERATIONS AS A PROSECUTION EXHIBIT EVEN THOUGH ONLY A SMALL PORTION HAD BEEN PLAYED FOR IMPEACHMENT DURING TRIAL.

Appellee argues that the Trial Court did not abuse its discretion by allowing the jury to receive the entire Good Morning America ("GMA") video during deliberations because the GMA video "was authenticated, received into evidence, and published to the jury" during the trial. (OSP Br. 43-44). Appellee fails entirely however, to address Appellant's argument that because only a limited portion of the GMA video had been published to the jury–and even that portion was only used for the purpose of impeachment–it was not automatically permissible in jury deliberations, and in fact, should have specifically been barred. (Def. Br. 67-69).

VII.

THE TRIAL COURT VIOLATED MR. SMOLLETT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN IT FAILED TO UTILIZE OVERFLOW ROOMS WITH LIVE FEED AND INSTEAD (1) REMOVED ALL MEMBERS OF THE PUBLIC FROM THE COURTROOM DURING *VOIR DIRE* (2) ARBITRARILY ENFORCED ITS COVID-19 HEADCOUNT PROTOCOL DURING THE TRIAL AND (3) EJECTED A MEMBER OF THE PUBLIC FROM THE TRIAL AFTER THAT INDIVIDUAL MADE OUT-OF-COURT COMMENTS CRITICAL OF CHICAGO POLICE TO THE MEDIA DURING AN INTERVIEW.

Appellee argues that because Defendant did not make an objection to the Covid-19 protocols excluding the public that the issue is waived for appeal. (OSP. Br. 36). While the Defense may not have objected to the protocols denying Mr. Smollett his right for a public trial, as Appellee correctly points out in its brief, the issue need not be preserved through contemporaneous objection where the error was clear and obvious and was so serious as to affect the fairness of the trial and challenge the integrity of the judicial process. (OSP. Br. 37). In the

present case, the lack of a contemporaneous objection is irrelevant because both the fairness and integrity of the process were challenged. For more than two years, the media inundated the public with highly negative press regarding Mr. Smollett's involvement and thus, the exclusion of even one member of the public denied the public access to the actual facts of the case.

VIII.

MR. SMOLLETT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS WERE VIOLATED WHEN (1) A DEFENSE WITNESS TESTIFIED THAT A PROSECUTOR WITH THE OSP HAD PRESSURED HIM TO CHANGE HIS ORIGINAL STATEMENT (2) AN OSP PROSECUTOR MADE COMMENTS DURING CLOSING ARGUMENTS REGARDING MR. SMOLLETT'S FAILURE TO PRODUCE VIDEO EVIDENCE, THUS SHIFTING THE BURDEN, AND (3) THE OSP PROSECUTORS MADE COMMENTS ON MR. SMOLLETT'S POST ARREST SILENCE.

In their response, Appellee states that the defense "called a witness and elicited perjury" and that the trial court quickly recognized this "tactical gamesmanship". (OSP Br. at 45). This accusation is unsubstantiated, baseless and unfortunate coming from a licensed attorney. Appellee provides not a scintilla of evidence to support the notion that the testimony from the witness stand constituted perjury and in fact made no attempts to cross examine the witness about the allegations of pressure or to conduct a perjury investigation into the matter. (Def. Br. 72-75). Instead, Appellee merely categorically says the witness "lied", accuses him of "perjury", and accuses defense counsel of condoning the same. (OSP Br. at 46). But the focus shouldn't be lost on the real issue. And the real issue here is that a witness testified, under oath and unrebutted that he was pressured by the prosecutor cross-examining him to change his account of events.

CONCLUSION

For the reasons argued in Appellant's opening brief and reply brief we ask this Honorable Court to reverse Mr. Smollett's convictions or reverse his convictions and remand for a new trial.

CERTIFICATE OF COMPLIANCE

I, Nnanenyem E. Uche, certify that this Appellant Reply Brief and Argument conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service is 15 pages.

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No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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

NOTICE OF FILING

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Please take NOTICE that on May 24, 2023, I electronically submitted to the Clerk of the Illinois Appellate Court of the 1st District, through an authorized electronic filing service vendor of the Illinois courts, the following documents to be filed in the above-captioned cause:

- ***Defendant-Appellant's Reply Brief and Argument***

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So certified, this 24th day of May 2023

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, 735 ILCS § 5/1-109, the undersigned certifies that on May 24, 2023, this notice and the above listed document (***Defendant-Appellant's Reply Brief and Argument***) were duly served pursuant to Illinois Supreme Court Rule 11(c)(3) by submitting the same electronically with the Clerk of the Court through an authorized electronic filing service vendor of the Illinois courts, and requesting and thereby causing service to be effected electronically to the following email address(es):

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