No. 130431

IN THE SUPREME COURT OF ILLINOIS

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

BRIEF OF THE PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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7/10/2024 1:11 PM
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NATURE OF THE CASE

The Cook County State's Attorneys' Office (CCSAO) charged defendant by indictment with 16 counts of felony disorderly conduct for falsely reporting that he had been the victim of a hate crime. After the CCSAO dismissed those charges by *nolle prosequi*, a special prosecutor was appointed, and a special grand jury returned a new indictment charging six counts of felony disorderly conduct for making several false police reports regarding defendant's fake hate crime. Following a jury trial, defendant was found guilty of five counts of felony disorderly conduct and sentenced to serve a 30-month term of probation, with the first 150 days to be served in jail, and ordered to pay restitution to the City of Chicago to reimburse it for overtime expenses incurred as a result of his false reports. Defendant appeals from the appellate court judgment affirming his convictions and sentence. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether defendant's prosecution comported with due process because the *nolle prosequi* of the initial charges was neither a dismissal with prejudice nor pursuant to a non-prosecution agreement under which the People promised not to prosecute defendant in exchange for his voluntary forfeiture of his bond and voluntary performance of community service.

2. Whether defendant's prosecution comported with the Fifth Amendment's double jeopardy clause because defendant's voluntary forfeiture of his bond and voluntary performance of community service in exchange for a *nolle prosequi* of the initial charges was not punishment for any offense.

3. Whether defendant was prejudiced by the trial court's failure to perform an *in camera* review pursuant to Supreme Court Rule 412 of notes from an interview with the Osundairo brothers.

4. Whether the trial court properly exercised its discretion at sentencing by ordering that defendant serve the first 150 days of his 30-month term of probation in Cook County Jail.

5. Whether the trial court properly exercised its discretion at sentencing by ordering defendant to pay restitution to the City of Chicago for overtime expenditures incurred as a result of defendant's false reports of a hate crime.

JURISDICTION

On March 27, 2024, this Court allowed defendant's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

The disorderly conduct charges in this case arise from defendant's false reporting of a fake hate crime—a staged attack supposedly motivated by racism and homophobia—committed against him in the early morning hours of January 29, 2019. (CI 30–46).[1] Following an investigation of the fake hate crime by the Chicago Police Department during Chicago's historic polar vortex, defendant was indicted on 16 counts of felony disorderly conduct in Case No. 19 CR 03104-01. (CI 28–46; CI 71). The charges were based on false police reports that defendant made to two different officers. (CI 28–46).

[1] The common law record, supplement to the record, and second supplement to the record are cited as "C_", "SUP C_" and "SUP2 C_," respectively. The impound record is cited as "CI_," and the record of proceedings and supplemental record of proceedings are cited as "R_" and "SUP R_," respectively. Defendant's opening brief is cited as "Def.'s Br._."

Shortly after defendant was arraigned on those charges, the CCSAO advanced the case from a future status hearing date and moved for a *nolle prosequi*. (SUP C 7–10). The CCSAO explained that, "[a]fter reviewing the facts and circumstances of this case, including [defendant'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." (SUP C 8–9). Defendant did not object to the *nolle prosequi* (as opposed to a dismissal with prejudice) as inconsistent with any purported agreement with the CCSAO. (SUP C 7–10). Defendant also "voluntarily forfeited" his $10,000 bond in connection with the *nolle prosequi*. (C 692) (Defendant's February 24, 2020 Motion to Dismiss Indictment for Violation of Defendant's Right Against Double Jeopardy, stating "*Under the circumstances of this case where the bond was voluntarily forfeited* as a condition of the dismissal of the charges (as opposed to an involuntary bond forfeiture which results when the accused fails to comply with bail conditions)….") (emphasis added). Immediately following the *nolle prosequi*, defendant's counsel "adamantly denied that any deal [with the CCSAO] was made at all." (C 442).[2]

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[2] Quoting from *Kim Foxx Defends Jussie Smollett Decision as Office Says She 'Did Not formally Recuse Herself'*, Chicago Tribune, March 28, 2019, *available at* https://www.chicagotribune.com/2019/03/28/kim-foxx-defends-jussie-smollett-decision-as-office-says-she-did-not-formally-recuse-herself/ (last visited July 10, 2024).

As explained more fully below, *see infra* I.D., immediately following the *nolle prosequi* on March 26, 2019, defendant's attorney told the media, "[t]here is *no deal*. The State dismissed the charges." *See Jussie Smollett's Attorney Says 'There Was No Deal' to Get Charges Dropped*, Yahoo, March 26, 2019, *available at*: https://www.yahoo.com/lifestyle/jussie-smollett-attorney-says-no-161817405.html (last visited July 10, 2024); "Charges Dropped Against Empire Actor Jussie Smollett, Press Conference," YouTube, March 26, 2019, *available for viewing at* https://www.youtube.com/watch?v=t3AsD3_1Xf4 (last visited July 10, 2024). The Court can take judicial notice of these public statements made by defendant's counsel to the news

The *nolle prosequi* of the charges was not made pursuant to the CCSAO's Deferred Prosecution Program (DPP). (C 1460) (assistant state's attorney's statement that "she had not modeled the terms [of defendant's *nolle prosequi*] … after the DPP"). For example, unlike a dismissal made pursuant to the DPP, the *nolle prosequi* of the charges against defendant was made without requiring that defendant: (i) participate in any program, let alone one year of court-ordered supervision; (ii) pay restitution to the City of Chicago, in accordance with 730 ILCS 5/5-6-3.3; (iii) complete the minimum number of hours of community service (30), much less the CCSAO's standard number of hours (96); or (iv) comply with other program requirements, such as not possessing a controlled substance for one year. (C 1460–61).

Following the CCSAO's decision to *nolle prosequi* the charges, a retired appellate justice filed a *pro se* petition to appoint a special prosecutor which was docketed in a separate case number. (C 40–67; C 68–76). After briefing and argument, that court appointed a special prosecutor to conduct an "independent investigation" and, among other things, if "reasonable grounds exist to further prosecute [defendant], in the interest of justice" to "take such action as may be appropriate." (C 365; C 368–70).

Following that investigation, the special prosecutor convened a special grand jury, which returned a new indictment charging six counts of felony disorderly conduct for making four false police reports to three different CPD officers in violation of 720 ILCS 5/26-1(a)(4). (C 652–58; CI 60–66).

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media. *People v. Peterson*, 2022 IL App (3d) 220206, ¶ 14, n. 2 (taking judicial notice of an attorney's statements to the media).

On February 24, 2020—the day of defendant's arraignment—defendant filed two emergency motions before this Court: an Emergency Motion for Supervisory Order Pursuant to Supreme Court Rule 383 and an Emergency Motion to Stay this case based on supposed infirmities with the appointment of the special prosecutor and the renewed prosecution of defendant. (C 949–71). On March 6, 2020, this Court denied defendant's emergency motions. (SUP C 671).

At arraignment, defendant moved to dismiss the indictment as violating his rights against double jeopardy. (C 683–700). After briefing and oral argument, the trial court denied the motion, finding that jeopardy had not attached in connection with the initial charges. (SUP R 2224–79).

Twenty months later, defendant moved to dismiss the indictment on the ground that the prosecution on the new charges violated an "agreement" with the CCSAO to dismiss the initial charges. (CI 324–36). Defendant did not present any evidence in support of his allegation that there was such an agreement, such as affidavits from any of his lawyers or the assistant state's attorneys who handled the initial charges, nor did he request an evidentiary hearing to present evidence and witness testimony under oath, including from defendant. *Id.* After hearing argument, the trial court denied the motion. (C 1343; R 901–14).

The evidence at trial showed that defendant recruited two brothers, Abimbola and Olabinjo Osundairo, to help him stage a fake hate crime, which he then reported to police as a real hate crime. The Osundairo brothers testified that defendant paid them $3,500 by check to carry out the fake attack (R 1913–17 (Abimbola Osundairo); R 2176–78 (Olabinjo Osundairo)), and their testimony was corroborated by phone records, ride share records,

text messages, and social media messages between defendant and the brothers (R 1322–24; R 1349–53; R 1394–1402; R 1431–32); video surveillance footage and GPS evidence showing defendant's multiple visits to the brothers' apartment, their travel to practice a "dry run" of the fake attack, and the brothers' movements on the day of the fake attack (R 1299–1312; R 1355–62; R 1364–75; R 1405–10); the hardware store receipt where the Osundairo brothers bought supplies for the fake attack, a bank deposit slip, and a $3,500 check that defendant made out to the brothers (R 1379–81; R 1388). Five police officers testified about receiving defendant's false reports of the crime (R 1572–90 (Ofc. Baig); R 1641–59 (Det. Murray); R 1701–32 (Det. Graves)), and the officers' subsequent extensive investigations into the reported attack (R 1281–1432 (Det. Theis); R 1597–1614 (Sgt. Considine)). Following deliberations, the jury found defendant guilty on five of the six counts of felony disorderly conduct. (R 3314–16; C 1420).

At sentencing, the trial court considered a victim impact statement submitted by the City of Chicago (C 1685–87), numerous letters of support submitted by defendant (CI 93–104; R 3468–90), and testimony from various witnesses presented by defendant (R 3439–68, 3556). The trial court also considered the facts and circumstances of the offense, as well as the factors in mitigation and aggravation—including that (i) defendant "committed hour upon hour of pure perjury" on the witness stand at trial (R 3555–56), and (ii) caused "damage" to "real hate crime victims," to people who fight against "social injustice," and to the City of Chicago (R 3550–55). The trial court sentenced defendant to 30 months' probation, with the first 150 days to be served in Cook County Jail. (R 3555–57). Defendant was also ordered to pay a $25,000 fine and $120,106 in restitution to the City of Chicago. *Id.*

On appeal, defendant argued, *inter alia*, that his prosecution by the special prosecutor violated due process because the CCSAO's *nolle prosequi* of the initial charges was part of a "non-prosecution agreement" and also violated double jeopardy because his voluntary performance of community service and voluntary forfeiture of his bond in connection with that *nolle prosequi* constituted prior punishment. Defendant further argued that the trial court had erred by not reviewing certain witness interview notes *in camera*, and that his sentence was excessive, both because he had to serve the first 150 days of probation in jail and because he had to pay restitution to the City of Chicago.

The appellate court affirmed defendant's convictions and sentence. The court found that the record did not show any non-prosecution agreement between the CCSAO and defendant, and explained that the *nolle prosequi* requested by the CCSAO and granted, by its nature, is not a final disposition of a case and does not bar future prosecution for the same offenses. A9–13, ¶¶ 27–39. Similarly, the court held that the prosecution did not violate defendant's rights against double jeopardy because jeopardy had never attached where the initial charges were nol-prossed before any jury was impaneled and no final judgment was ever entered. A13–17, ¶¶ 41–48. The court held that defendant failed to establish he was prejudiced by the trial court's error in not conducting an *in camera* review of notes from an interview with the Osundairo brothers. A23, ¶¶ 65–66. And the court held that the trial court appropriately exercised its sentencing discretion in ordering defendant to serve the first 150 days of his probation term in jail and properly ordered restitution to the City of Chicago. A49–53, ¶¶ 136–146.

STANDARDS OF REVIEW

"Generally, a reviewing court considers a trial court's ultimate ruling on a motion to dismiss charges under an abuse-of-discretion standard, but where the issues present

purely legal questions, the standard of review is *de novo.*" *People v. Stapinski*, 2015 IL 118278, ¶ 35. Where a motion to dismiss only involves the application of law to uncontested facts, a reviewing court reviews a motion to dismiss on double jeopardy grounds *de novo*. *People v. Bellmyer*, 199 Ill. 2d 529, 537 (2002).

"Violation of the discovery provisions in Rule 412 does not require reversal of a conviction unless prejudice is shown." *People v. Szabo*, 113 Ill. 2d 83, 93 (1986).

"The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the 'cold' record." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). "In considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." *Id.* Restitution orders are also reviewed for an abuse of discretion. *People v. Brooks*, 158 Ill. 2d 260, 272 (1994).

ARGUMENT

Defendant's request to overturn the jury's verdict and his felony convictions for reporting a fake hate crime rest on two false premises—*first*, that defendant and the CCSAO entered into a "non-prosecution agreement," and, *second*, that a bond forfeiture in connection with a *nolle prosequi* constitutes punishment despite no conviction having been entered or sentence imposed for any offense. These premises are contrary to the evidence in the record and well-established Illinois law.

To the extent the *nolle prosequi* represented any "agreement" between defendant and the CCSAO, that record shows that such agreement was only for the CCSAO to move for a *nolle prosequi* on then-pending charges in exchange for defendant's admitted-voluntary forfeiture of his bond (C 692), as well as his "volunteer service in the community." (SUP C 8). Indeed, immediately following the *nolle prosequi* on March 26, 2019, defendant's counsel adamantly proclaimed, with defendant by at her side, that there was "***no deal***" with the CCSAO. Under this Court's long-standing precedent, the *nolle prosequi* entered in the initial charges did not forever bar the People from pursuing charges against defendant.

The subsequent decision to pursue charges against defendant also did not run afoul of the Double Jeopardy Clause, for jeopardy never attached in the initial charges. Nor was defendant found guilty and sentenced for any offense, such that his forfeiture of his bond (which defendant admitted was done "voluntarily," (C 692)), and already-performed "volunteer service in the community" (SUP C 8) could not constitute prior punishment for any offense.

Further, as the appellate court correctly concluded, defendant failed to show any prejudice from the trial court's error in not conducting an *in camera* review of notes from an interview with the Osundairo brothers, for the trial evidence overwhelmingly supported the conviction. And the trial court appropriately exercised its discretion in fashioning the sentence and awarding restitution to the City of Chicago for its overtime expenses in investigating defendant's fake hate crime. Accordingly, the appellate court correctly affirmed defendant's convictions and sentence.

I. The Appellate Court Correctly Concluded That Defendant's Prosecution Did Not Violate Due Process Because There Was No Non-Prosecution Agreement.

Defendant's prosecution did not violate due process because it did not violate any non-prosecution agreement with the CCSAO. Indeed, the record does not establish that the CCSAO moved for a *nolle prosequi* as part of *any* agreement. In fact, defendant and his counsel were adamant immediately following the *nolle prosequi* in March 2019 that there was "***no deal***" with the CCSAO. But, to the extent that an agreement could be inferred from the in-court statement by the prosecutor on March 26, 2019, that agreement could only have been for the CCSAO to move for a *nolle prosequi* in exchange for defendant's voluntary forfeiture of his bond and already-performed volunteer community service. Defendant's contrary arguments lack any support in the record or law.

A. The CCSAO sought and defendant received a *nolle prosequi* on the initial charges, which does not bar subsequent prosecution.

The record is clear that the CCSAO moved for a *nolle prosequi* on the initial charges in connection with defendant "voluntarily" forfeiting his bond (as admitted by defendant) (C 692), and defendant's "volunteer service in the community." (SUP C 8). In the appellate court, defendant conceded and "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." A9, ¶ 28 (emphasis added). During that March 26, 2019 hearing, the prosecutor stated that "[a]fter reviewing the facts and circumstances of this case, including [defendant'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." (SUP C 8–9). Defendant did not dispute the CCSAO's explanation of the dismissal, nor did he object to the CCSAO's request for a *nolle prosequi* (rather than a dismissal with prejudice)

as inconsistent with any alleged agreement. *Id.* The dismissal via a *nolle prosequi* makes clear that the parties had not entered into a non-prosecution agreement.

There is also no reference to a purported "non-prosecution agreement" in the March 26, 2019 transcript—or any reference to the dismissal of the initial charges being "final" or "with prejudice." *Id.* The absence of any such reference is not surprising, since before the trial court, defendant "offered numerous, different—and oftentimes, conflicting—framings of the purported 'agreement' that was struck with the CCSAO on March 26, 2019." A10, ¶ 31. Defendant had, for example, called it, among other things, an "informal agreement," "analogous to a negotiated plea agreement," a "negotiated agreement," "effectively pretrial diversion," a "contractual immunity agreement," and an "immunity-type agreement." *Id.* (internal quotations omitted). It was only during the briefing on defendant's direct appeal that he coined the alleged "agreement" with the CCSAO as a "non-prosecution agreement." *Id.*

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.'" *People v. Daniels*, 187 Ill. 2d 301, 312 (1999) (quoting *People v. Watson*, 394 Ill. 177, 179 (1946)). Rather, a *nolle prosequi* "leaves the matter in the same condition as before the prosecution commenced." *People v. Hughes*, 2012 IL 112817, ¶ 23. Accordingly, when the court entered the *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 without entering into a recognizance to appear at any other time." *Id.* (internal quotation marks omitted).

Defendant concedes that the CCSAO "disposed of the matter by way of a *nolle prosequi*," Def.'s Br. 2, but insists that the "agreement" pursuant to which it did so was an agreement to a dismissal with prejudice, not a *nolle prosequi*. *Id.* at 14–19. But, defendant offers no record support for his invented assertion that the parties entered a non-prosecution agreement, and the record provides none. Instead, defendant points to portions of the record that refer to *some* form of an "agreement," and asks the Court to infer that the agreement was a non-prosecution agreement with the CCSAO. For example, defendant notes that, in explaining why it was going to enter a *nolle prosequi*, the prosecutor used the word "agreement" and described a *nolle prosequi* as a "'just disposition and appropriate resolution to this case.'" Def.'s Br. 15–16 (quoting SUP C 8–9). But the fact that the prosecutor stated that a *nolle prosequi* was the "appropriate resolution" does not suggest that the parties agreed to a disposition other than the one that the CCSAO sought—a nol-pros. And under Illinois law, a *nolle prosequi* does not bar a subsequent prosecution. *Hughes*, 2012 IL 112817, ¶ 23.

Defendant attempts to avoid this conclusion by speculating that the CCSAO's announcement that it was entering a *nolle prosequi* in connection with defendant's voluntary forfeiture of his bond "was at most a scrivener's error," and asks this Court to infer that the use of the words *nolle prosequi* indicates "finality of the matter." Def.'s Br. 17. But the record provides no basis for such a finding—to the contrary, the record shows both parties acting consistently with a disposition of a *nolle prosequi*, with the defendant standing by while the CCSAO sought its entry. Had defendant actually agreed to a dismissal with prejudice, he surely would have objected when the CCSAO announced its

motion for a *nolle prosequi*. That he did not confirms that defendant received exactly what he expected.

In the same fashion, defendant repeatedly argues that this Court should ignore the "mechanical way," or the "formalities," in which the CCSAO dismissed the charges and focus on "the true intent of the parties." *Id.* at 10–14. But, there is no basis under Illinois law for this proposition that courts should throw out the express words spoken on the record and instead look into the unspoken, subjective intent of the parties. In fact, this Court's precedent makes clear that the express words matter, since there is a significant legal distinction between a dismissal via *nolle prosequi* and a dismissal "with prejudice." *See People v. Creek*, 94 Ill. 2d 526, 531 (1983) ("The term 'with prejudice' has a well-recognized legal import; it is the converse of the term 'without prejudice' and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the complainant.") (citation omitted).

Had they wished to do so, defendant and the CCSAO certainly could have entered into a non-prosecution agreement under which the charges would be dismissed with prejudice. But there is no evidence that they entered into such an agreement, for that is not the type of dismissal the CCSAO moved for and was entered on March 26, 2019. (SUP C 8–9). Defendant's request that the Court disregard the express words used by the CCSAO—that it was moving for a *nolle prosequi*—in favor or the unarticulated "true intent of the parties" rests on nothing more than speculation and conjecture. Accordingly, the appellate court correctly found "no ambiguity as to what occurred between [defendant] and the CCSAO," and "the record in this case is silent regarding any nonprosecution agreement between the CCSAO and [defendant]." A10, ¶ 30; A12, ¶ 37.

Moreover, even when the nature of a dismissal is ambiguous as to whether it is a *nolle prosequi* or a dismissal with prejudice—and there is no such ambiguity here—the appellate court has rejected arguments like defendant's that the ambiguous initial dismissal was a dismissal with prejudice. For example, in *People v. Gill*, 379 Ill. App. 3d 1000 (4th Dist. 2008), the prosecution moved to dismiss charges without specifying if it was a *nolle prosequi* or a dismissal with prejudice, then refiled the charges months later. *Id.* at 1001–02. The trial court dismissed the refiled charges, but the appellate court reversed, holding that "the trial court erred by inferring that the State intended to dismiss with prejudice." *Id.* at 1008. As *Gill* explained, "before a trial court may determine that the State is dismissing a charge with prejudice, the prosecutor must clearly and explicitly state that she is doing so." *Id.* Similarly, in *People v. Ryan*, 259 Ill. App. 3d 611 (2d Dist. 1994), the prosecution dismissed a single count from an indictment without specifying the type of dismissal, then later reindicted the defendant on the same charge. *Id.* at 612. The trial court dismissed the new charge as barred by the prior dismissal, and the appellate court reversed because there was "nothing in the record to show that the dismissal was with prejudice." *Id.* at 614. The appellate court recognized that "[w]hile defendant no doubt intended that the charges should be dismissed with prejudice, that is not enough for us to find that, in fact, they were so dismissed." *Id.*; *accord People v. Smith*, 233 Ill. App. 3d 342, 346–48 (2d Dist. 1992) (where prosecution sought "outright dismissal" of charges as part of "cooperation-immunity" agreement, prosecution was barred from refiling charges because "[i]f a *nolle prosequi* had been intended, it is likely that the charges would have been nol-prossed"). As a result, any ambiguity in the record regarding the nature of the

dismissal must be resolved against defendant—only a clear, express dismissal of charges with prejudice bars subsequent charges.

In sum, the record unambiguously shows that the CCSAO moved for a *nolle prosequi* in connection with defendant's voluntary forfeiture of his bond and voluntary performance of community service. To the extent this represented the CCSAO's performance of its obligation under some form of an agreement, defendant received a *nolle prosequi* which under well-established Illinois law, that *nolle prosequi* did not bar further prosecution of defendant for his false police reports.

B. The *nolle prosequi* did not require defendant to waive any constitutional right, such that it might be construed as an agreement for a dismissal with prejudice.

Defendant tries to draw parallels between his case and cases where courts have enforced agreements made between prosecutors and defendants in the context of plea bargains, cooperation agreements, or immunity agreements. Def.'s Br. 5–8, 19–23. But, none of the agreements in those cases resemble the "agreement" for a *nolle prosequi* that defendant alleges he reached with the CCSAO. Moreover, in all cases where courts have enforced such agreements, the defendants surrendered significant constitutional rights—which defendant did not do in this case—as part of their agreement with prosecutors, raising legitimate due process concerns.

Defendant primarily relies on this Court's decision in *People v. Starks*, 106 Ill. 2d 441 (1985), to argue that "a non-prosecution agreement is enforceable within a *nolle prosequi* context." Def.'s Br. 10–11. But *Starks* involved a completely different type of agreement than the alleged agreement here. In *Starks*, the defendant agreed to cooperate and submit to a polygraph examination prior to trial based on the prosecutor's representation "that the charge would be dismissed if the defendant passed the test." 106

Ill. 2d at 444. After the defendant took the polygraph and passed, the prosecutor did not dismiss the charges, but instead proceeded to trial, where the defendant was convicted. *Id.* This Court found that "[b]y submitting himself to the polygraph examination, the defendant surrendered his fifth amendment privilege against self-incrimination." *Id.* at 451. The Court noted out-of-state cases involving similar polygraph agreements, under which defendants forfeited their self-incrimination rights by agreeing to take a polygraph exam in exchange for a promise that charges would be dismissed. *Id.* at 449–52.

Thus, this Court reversed and held that if there was a pretrial agreement to dismiss the charges in exchange for the defendant surrendering their Fifth Amendment right against self-incrimination through a polygraph, then the prosecution must fulfill its end of the bargain and dismiss. *Id.* at 452. The Court also remanded for an evidentiary hearing, which confirmed the existence of the agreement whereby the prosecution would "nol-pros the charge if the defendant passed a polygraph examination." *People v. Starks*, 146 Ill. App. 3d 843, 844 (2d Dist. 1986). The appellate court did not address the distinction between a *nolle prosequi* and a dismissal outright, and affirmed the dismissal of the charge against the defendant, finding that he "fulfilled his part of the agreement and surrendered his fifth amendment privilege against self-incrimination." *Id.* at 848. As with this Court, the appellate court emphasized the constitutional right surrendered by the defendant as part of the agreement, which barred subsequent prosecution. *Id.*

Defendant also relies on cases that did not involve an agreement to submit to a polygraph, including *Santobello v. New York*, 404 U.S. 257 (1971), *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), and *United States v. Castaneda*, 162 F.3d 832 (5th Cir. 1998). Def.'s Br. 6–8. But like *Starks*, the defendants in these cases, as part of their agreement

with the government, surrendered a constitutional right and as a result risked foreclosing their ability to defend against future charges. In *Santobello*, for example, the defendant agreed to plead guilty to a lesser offense, and in exchange, the prosecutor would not make a specific sentencing recommendation. 404 U.S. at 259. But a new prosecutor later reneged on that deal and recommended the maximum sentence, and the United States Supreme Court held that any inducement or promises made by prosecutors in connection with a guilty plea "must be fulfilled." *Id.* at 262. In *Carter*, the defendant similarly pled guilty and "incriminated himself" in exchange for a promise that he would not be prosecuted in other jurisdictions, which other federal prosecutors later did not keep. 454 F.2d at 427. The court held that "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. Finally, in *Castaneda*, the defendant agreed to a proffer with the prosecutors and investigators in exchange for immunity, to which the prosecutors later reneged by charging the defendant. 162 F.3d at 834–35. The court held that the indictment violated the immunity agreement. *Id.* at 839–40.

Therefore, in each of the above-cited cases, the defendants made significant concessions involving the surrender of a constitutional right which implicated their ability to defend themselves in their agreements with the prosecuting authority, and the reviewing courts held the prosecution to their side of the bargain. Indeed, this Court reiterated that rationale in *People v. Boyt*, 109 Ill. 2d 403 (1985), when it declined to enforce a plea agreement that the prosecution allegedly withdrew prior to the defendant entering a plea. *Id.* at 406, 417. The defendant in *Boyt* suggested that *Starks* required enforcement of his agreement, but this Court rejected that argument, stating that the rationale for the "specific

enforcement of the agreement in *Starks* was necessary because the defendant had 'surrendered his fifth amendment privilege against self-incrimination' by submitting himself to the polygraph examination." *Id.* at 416 (quoting *Starks*, 106 Ill. 2d at 451). In contrast, the defendant in *Boyt* had "surrendered nothing," *id.*, and the prosecution's actions in refusing to honor a prior plea deal were "of no constitutional significance." *Id.* at 415; *see also Stapinski*, 2015 IL 118278, ¶ 55 (reaffirming principle that "[a]n unauthorized promise [made by the police] may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences").

In this case, by contrast, defendant did not surrender any similar constitutional right in exchange for the CCSAO's *nolle prosequi*. As defendant conceded in the briefing on his motion to dismiss on double jeopardy grounds, he "voluntarily forfeited" his $10,000 bond. (C 692) ("*Under the circumstances of this case where the bond was voluntarily forfeited* as a condition of the dismissal of the charges (as opposed to an involuntary bond forfeiture which results when the accused fails to comply with bail conditions)….") (emphasis added). And immediately following the hearing at which the CCSAO moved to dismiss the charges via a *nolle prosequi*, defendant's lawyer told the media gathered at the courthouse that the forfeiture of the bond money was not a condition of dropping the charges.[3]

Defendant nevertheless argues that there are "more constitutional violations in this case than in *Stapinski*" because by prosecuting defendant after the bond forfeiture, the special prosecutor somehow denied him "proper notice and an impartial hearing as to the

[3] *See supra* n. 2. (Reporter: "To be clear the $10,000, was that a condition of dropping the charges, forfeiting that money?" Smollett's Lawyer: "No. No.").

proprietary of that forfeiture." Def.'s Br. 21–22. But defendant's admission that he voluntarily surrendered his property (C 692) eliminates any claimed constitutional concerns, and defendant does not explain why he would be entitled to notice in connection with his own decision to forfeit his bond money. Moreover, the voluntary forfeiture of bond is fundamentally unlike the waiver of constitutional rights by other defendants in connection with a plea, cooperation, or immunity agreements. 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. But here, defendant's voluntary forfeiture of his bond is not equivalent to a waiver of the constitutional rights to remain silent or to hold the People to its burden at trial.

Accordingly, *Starks* and the other authority defendant cites do not compel enforcement of anything different than what defendant received—a *nolle prosequi*.

C. Defendant failed to develop an evidentiary record supporting his supposed "non-prosecution agreement," and therefore, forfeited his request for an evidentiary hearing.

Before the appellate court, defendant "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." A9, ¶ 28. If this Court were inclined to look beyond that transcript for evidentiary support for defendant's purported "agreement," it will find none because defendant failed to develop any evidentiary record of an agreement. And, contrary to defendants' argument, Def.'s Br. 23–24, there is no basis to remand for an evidentiary hearing so that defendant can now attempt to make the record that he failed to make below.

To begin, if defendant believes that there is evidence of a non-prosecution agreement with the CCSAO but that his trial counsel failed to present that evidence to the

circuit court, then this direct appeal is not the appropriate means to pursue that claim—he must pursue a postconviction claim that trial counsel was ineffective for failing to make a record of the agreement that may have barred his prosecution. *See People v. Harris*, 2018 IL 121932, ¶ 48 (denying defendant's request to remand for an evidentiary hearing to develop record on direct appeal and directing him to postconviction proceedings, where he could raise the claim that counsel was ineffective for not developing the record). In other words, if, as defendant suggests by his request for an evidentiary hearing, "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." *People v. Veach*, 2017 IL 120649, ¶ 46.

Moreover, even if defendant was not limited to bringing his request to develop the record in postconviction proceedings, this Court still should deny his request for an evidentiary hearing because he failed to request such a hearing in the trial court, resulting in forfeiture. *See People v. Cruz*, 2013 IL 113399, ¶ 20 ("[A]n issue not raised in the trial court is forfeited on appeal."). Defendant then forfeited this request again on appeal by failing to raise the issue of an evidentiary hearing until his petition for rehearing. *See* Ill. Sup. Ct. R. 341(h)(7) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *People v. Wendt*, 163 Ill. 2d 346, 350–51 (1994) (noting that "defendant [inappropriately] raised this issue for the first time in her petition for rehearing in the appellate court").

Defendant relies on *Starks*, 106 Ill. 2d 441, to argue that remand for an evidentiary hearing is appropriate if the Court finds that his arguments fail on this record. Def.'s Br. 23–24. But *Starks* did not remand for an evidentiary hearing simply because the Court

could not grant relief on the record before it—the Court remanded for an evidentiary hearing because the trial court had "refused to allow [defense] counsel to make any record pertaining to the agreement" that the defendant alleged barred his prosecution. 106 Ill. 2d at 446.

In *Starks*, the defendant moved for a new trial based in part on the existence of the agreement to dismiss the charges against him in exchange for taking and passing a polygraph, but the "trial judge refused to consider this pretrial agreement or allow counsel to make any record pertaining to the agreement." *Id.* At the post-trial hearing, "the defendant testified that the prosecution told him that if he took the polygraph test and passed, then the armed-robbery charge would be dismissed." *Id.* at 447. In addition and on direct appeal, the defendant moved to supplement the record "with affidavits which tended to establish that there was a pretrial agreement," including two affidavits from the defendant's trial and current counsel stating that there was a "pretrial agreement." *Id.* at 446. On top of that evidentiary record, the State in *Starks* did "not deny the existence of the agreement." *Id.* at 447.

Here, by contrast, defendant presented the trial court with no evidentiary support whatsoever for his allegation of a non-prosecution agreement. He did not testify to the existence of a non-prosecution agreement, submit affidavits averring to the existence of an agreement, or heed this Court's advice in *Starks* to subpoena "the trial counsel and/or the assistant State's Attorney involved in the alleged agreement." *Id.* Nor, as noted, did he ever request an evidentiary hearing, either at the pre-trial hearing on the motion to dismiss based on the alleged agreement or at the full-day hearing on his post-trial motions. (R 901–14; R 3366–3369). And, defendant has never sought to supplement the record on appeal

with any such evidence. Thus, unlike in *Starks*, the trial court here did not err because defendant never made any request to develop an evidentiary record relating to the purported non-prosecution agreement.

Under these circumstances where defendant has failed to develop any affirmative record, remanding this case for defendant to attempt to develop the record now would rest entirely on speculation, for defendant has provided no basis to believe that he could muster any evidence in support of his claim. Without record evidence to support the purported "non-prosecution agreement," defendant offers only conjecture. For example, he claims that "the Cook County prosecutors do not dispute the terms of the agreement," Def.'s Br. 26, but fails to cite any record evidence where a member of the CCSAO was confronted with his characterization of their agreement as a non-prosecution agreement and did not dispute that characterization. No evidentiary hearing is warranted here given the absence of any record support for the alleged non-prosecution agreement and defendant's failure to even attempt to muster such support.

D. The evidence beyond the March 26, 2019 transcript shows there was "no deal" for a non-prosecution agreement, and therefore, no evidentiary hearing is necessary.

As demonstrated above, *see supra* § I.A, defendant and the CCSAO did not enter into a "non-prosecution agreement." As noted, defendant admitted that the *only* indication of the supposed "non-prosecution agreement" in the record is the transcript of the March 26, 2019 hearing, A9, ¶ 28, and that transcript shows that there was no non-prosecution agreement. This Court's inquiry can end there. However, to the extent this Court wants to take judicial notice of the evidence outside the record on appeal, that evidence completely debunks the notion that there existed any non-prosecution agreement.

Most notably, following entry of the *nolle prosequi* on March 26, 2019, defendant's "defense team adamantly denied that any deal was made at all." (C 442). Defendant and his lawyers similarly denied the existence of any "deal" with the CCSAO in other public statements. For example, during a press conference at the criminal courthouse immediately following the March 26, 2019 hearing, defendant's lead attorney—with defendant standing by her side—stated:

> Today as you have figured out, the State made a ***motion to nolle pros*** the charges against Jussie Smollett and to seal the record in this case …. This is not—***there is no deferred prosecution*** …. Jussie ***voluntarily*** agreed to the forfeiture of the bond money …. ***There is no deal***. ***The State dismissed the charges***. (emphasis added).[4]

Defendant fails to square his argument that there was a "non-prosecution agreement" with this unambiguous and contemporaneous evidence demonstrating that there was "no deal."[5]

In addition, defendant's assertion that the "intent of the parties was to form an agreement that tracked deferred prosecution" is plainly wrong. Def.'s Br. 16; *see also id.* at 3 ("the impact of this agreement was meant to track the Deferred Prosecution

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[4] *See* "Charges Dropped Against Empire Actor Jussie Smollett, Press Conference," YouTube, March 26, 2019, *available for viewing at* https://www.youtube.com/watch?v=t3AsD3_1Xf4 (last visited July 10, 2024). The Court may take judicial notice of these statements since they are "readily verifiable" and "capable of instant and unquestionable demonstration." *Peterson*, 2022 IL App (3d) 220206, ¶ 14, n. 2 (taking judicial notice of an attorney's statements to the media).

[5] Further, the "Criminal Disposition Sheet" signed on March 26, 2019 states "MSNP – G," which stands for "motion state *nolle prosequi* – granted." The Criminal Disposition Sheet is available to the public via the Clerk of the Circuit Court of Cook County, Illinois Portal, *available at*: https://cccportal.cookcountyclerkofcourt.org/CCCPortal/ (last visited July 10, 2024). The disposition sheet contains no mention of an alleged "non-prosecution agreement." The Court can take judicial notice of it since it is a document entered on the docket of another court. *In re Linda B.*, 2017 IL 119392, ¶ 31, n. 7 ("Public documents, such as those included in the records of other courts and administrative tribunals, fall within the category of 'readily verifiable' facts capable of instant and unquestionable demonstration of which a court may take judicial notice.").

Program."); A62, ¶ 165 (Lyle, J., dissenting) ("While the requirements were not the same, the disposition tracked the DPP …."). In fact, the prosecutor who moved to dismiss the charges *nolle prosequi* stated that "she had not modeled the terms … after the DPP." (C 1460). Moreover, the resolution of the charges did not "track" the DPP in a significant number of ways: (i) the charges were dismissed without requiring defendant to participate in any program, let alone one year of court-ordered supervision; (ii) defendant did not have to pay full restitution to the City of Chicago, in accordance with 730 ILCS 5/5-6-3.3; (iii) defendant did not have to complete the minimum number of hours of community service (30) or even come close to the CCSAO's standard number of community service hours (96); and (iv) defendant did not have to comply with other program requirements, such as not possessing a controlled substance for one year. (C 1460–61).

Thus, even if this Court were to look beyond the March 26, 2019 transcript for supposed evidence of a "deal," the aforementioned judicially noticeable material further demonstrates that defendant bargained only for a dismissal *nolle prosequi*—not a "deal" that was modeled after the DPP—which did not bar a subsequent prosecution. Accordingly, this Court should not entertain defendant's forfeited request for an evidentiary hearing.

E. The circuit court concluded that the initial charges were void, which is the law of the case.

Defendant's arguments that the proceedings on the initial charges bars subsequent prosecution because those proceedings ended with a non-prosecution agreement (which they did not, *see supra* § I.A) is further foreclosed by the circuit court's judgment holding that those proceedings were void, which defendant did not challenge and therefore is now law of the case and must be given effect as such. *See Stocker v. Hinge Mfg. Co. v. Darnel*

Indus., Inc., 94 Ill 2d 535, 544-45 (1983) (circuit court's order, when not appealed from, was law of the cause and barred request for relief based on alleged impropriety of that order). The circuit court held that all of the actions by the CCSAO concerning the initial charges were void, including those resulting in the *nolle prosequi*. (C 465). Because the circuit court held that the initial charges and related proceedings were a nullity and that holding is no longer subject to review, defendant cannot challenge his conviction on the subsequent charges brought by the special prosecutor on the basis that they were barred by the proceedings on the initial charges.[6]

F. Public policy does not support barring prosecution absent proof of a non-prosecution agreement.

Finally, there is no merit to defendant's assertion that the appellate court's holding that a defendant cannot rely on an agreement other than a non-prosecution agreement to bar future prosecution will lead to "[c]haotic results" where "future citizen activists" or "newly elected prosecutorial administrations" who are "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 [appellate court's] opinion in hand as justification." Def.'s Br. 28. The appellate court simply held,

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[6] In addition, the special prosecutor did not simply reinstate the initial, nol-prossed charges against defendant. Rather, the special prosecutor convened a special grand jury which brought a completely different indictment against defendant. Indeed, the original, 16-count indictment was based on two different false police reports made by defendant—one to Officer Muhammed Baig, and another to Detective Kimberly Murray on January 29, 2019. (CI 28–46). But, the indictment returned by the special grand jury related to four different false police reports by defendant: (1) to Officer Muhammed Baig at 2:45 a.m. on January 29, 2019 (Counts 1 and 2); (2) to Detective Kimberly Murray at 5:55 a.m. on January 29, 2019 (Counts 3 and 4); to Detective Murray at 7:15 p.m. on January 29, 2019 (Count 5); and to Detective Robert Graves at 12:15 p.m. on February 14, 2019 (Count 6). (CI 60–66). As such, Counts 5 and 6 were not even included in the initial charges that were nol-prossed.

consistent with binding Illinois law, that a *nolle prosequi* cannot be used to bar future prosecution. Defendants who enter into non-prosecution agreements continue to be protected from future prosecution. And, no "chaotic results" have come to pass in the five-plus years since the appointment of the special prosecutor following the *nolle prosequi* of the initial charges.

Moreover, defendant ignores the enormous consequences that would flow if in evaluating dispositions between prosecutors and defendants, courts were to bar prosecutions based on agreements that are not, by their terms as reflected in the record, non-prosecution agreements. Not only would this overturn nearly a century of Illinois law recognizing a *nolle prosequi* as "not bar[ring] another prosecution for the same offense," *Daniels*, 187 Ill. 2d at 312, but by rendering a *nolle prosequi* equivalent to a "final disposition," it would also flood the trial courts with requests for evidentiary hearings whenever a defendant sought to bar prosecution based on an agreement that, on its face, is plainly not a non-prosecution agreement. The Court should decline to upend Illinois law by untethering agreements from the language used to define their terms, as reflected in the record.

II. Defendant's Prosecution Did Not Violate Double Jeopardy Because Jeopardy Never Attached.

Defendant's claim that he was put in legal jeopardy and "punished" when he forfeited his bond in exchange for a dismissal *nolle prosequi* ignores bedrock Illinois and United States Supreme Court precedent establishing the bright-line rule that jeopardy does not attach until a jury is sworn in a jury trial, the first witness is sworn in a bench trial, or a guilty plea is accepted—none of which occurred here. Defendant tries to avoid this conclusion by arguing that his admitted-voluntary forfeiture of his bond constituted

punishment and therefore triggered the Double Jeopardy Clause's prohibition against multiple punishments, but this argument ignores United States Supreme Court precedent holding that the "multiple punishment" prong of the Double Jeopardy Clause applies only to prohibit imposing multiple sentences for the same conviction. Nonetheless, defendant pushes his legally defunct "multiple punishments" theory by relying on either bad, inapplicable or out-of-state case law. Because jeopardy never attached to defendant's initial charges and he was never convicted or sentenced on those charges, double jeopardy did not bar the subsequent prosecution or sentence.

A. The initial charges were dismissed by *nolle prosequi* before jeopardy attached.

As the appellate court found, A14–A15, ¶¶ 43–44, defendant's double jeopardy argument is squarely foreclosed by binding Illinois and U.S. Supreme Court precedent that double jeopardy protections only come into play ***after*** a defendant has been put in jeopardy. Because there is no dispute jeopardy never attached in the initial charges, defendant's double jeopardy claim fails.

As this Court has repeatedly held, "'[t]he starting point in any double jeopardy analysis … is determining whether or not jeopardy had attached.'" *Bellmyer*, 199 Ill. 2d at 538 (quoting *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 534 (1979)); *People v. Gaines*, 2020 IL 125165, ¶ 25 (stating and quoting the same). Indeed, the United States Supreme Court has "consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge." *Serfass v. United States*, 420 U.S. 377, 388 (1975). Therefore, the "protections against double jeopardy are triggered only

after the accused has been subjected to the hazards of trial and possible conviction." *Bellmyer*, 199 Ill. 2d at 537.

Defendant ignores the fundamental, blackletter-law question of whether jeopardy even attached in the first place because there is only one answer—jeopardy did not attach. There are three ways in which jeopardy may attach: (1) "in a jury trial when the jury is empaneled and sworn;" (2) "[i]n a bench trial … when the first witness is sworn and the court begins to hear evidence;" and (3) "when the guilty plea is accepted by the trial court." *Id.* at 538 (internal quotation marks omitted). Importantly, the proposition "that there can be no double jeopardy without a former jeopardy … is as appropriate to multiple punishments for the same offense when sought in separate proceedings as it is to successive prosecutions for the same offense." *People v. Delatorre*, 279 Ill. App. 3d 1014, 1019 (2d Dist. 1996); *see also People v. Portuguez*, 282 Ill. App. 3d 98, 101 (3d Dist. 1996) (adopting analysis and holding from *Delatorre*).

It is undisputed that jeopardy did not attach during the 12 days that the initial charges against defendant were pending before they were dismissed via a *nolle prosequi*. *See People v. Milka*, 211 Ill. 2d 150, 172 (2004) ("[A] *nolle prosequi* is not a final disposition of the case, and will not bar another prosecution for the same offense.") (internal citation omitted). As the appellate court noted, "[n]o jury had been impaneled, no witness had been sworn in, no evidence had been introduced, and [defendant] had not pled guilty." A14, ¶ 44. And "[b]ecause none of these actions occurred, jeopardy did not attach to [defendant's] first criminal prosecution." *Id.* Accordingly, there is no double jeopardy bar to defendant's prosecution. *See Hughes*, 2012 IL 112817, ¶ 23 ("if a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant").

B. The "multiple punishments" prong of the Double Jeopardy Clause applies only to imposing multiple sentences for the same conviction.

Even if jeopardy had attached while the initial charges were pending (it did not), defendant's claim that he was subjected to "multiple punishments" for the same offense is foreclosed by binding United States Supreme Court precedent holding that the Double Jeopardy Clause does not apply in the absence of a criminal sentence.

The United States Supreme Court has repeatedly defined the purpose of the "multiple punishment" prong of the Double Jeopardy Clause. As the Court has explained, "the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). "[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Jones v. Thomas*, 491 U.S. 376, 381 (1989). In other words, in cases where jeopardy has attached, the Double Jeopardy Clause prohibits multiple sentences for the same conviction. For example, "if a penal statute [ ] provided for a fine *or* a term of imprisonment upon conviction," then a sentencing court "could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution." *Whalen v. United States*, 445 U.S. 684, 688 (1980).

It is undisputed that no sentence was imposed on March 26, 2019, in connection with the dismissal of the initial charges against defendant. Instead, the CCSAO moved to

dismiss the charges *nolle prosequi* which was granted and entered. (SUP C 8–9). Defendant, without any evidentiary support, argues that his forfeiture of his bond and performance of community service in connection with the *nolle prosequi* was punishment because there was an "intention to punish" him and there was "no rational, nonpunitive reason" for doing these things. Def.'s Br. 38–39. But this argument is belief by the record, which establishes that defendant "voluntarily forfeited" his bond (C 692), and performed "volunteer service in the community" prior to the March 26, 2019 hearing. (SUP C 8–9). In other words, defendant was not ordered to forfeit his bond or perform community service by any court—as part of a criminal sentence or otherwise—and so it is not punishment cognizable under the Double Jeopardy Clause.

In sum, because jeopardy did not attach, and because no criminal sentence or "punishment" of any kind was imposed in the initial case, defendant's double jeopardy argument fails.

C. Defendant's authority does not support his legally unfounded "multiple punishments" argument.

Defendant's argument that this Court need not determine whether jeopardy attached because that question is irrelevant to his assertion of a violation of "the multiple punishment prong," Def.'s Br. 31, is incorrect. Defendant relies on two cases for what he terms the "Punishment Analysis," one of which was incorrectly decided and the other of which doesn't involve double jeopardy at all. Def.'s Br. 31–34.

To begin, defendant's reliance on *United States v. Halper*, 490 U.S. 435 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93 (1997), Def.'s Br. 31, is misplaced. In *Halper*, the defendant was indicted, tried, and convicted of federal criminal charges. 490 U.S. at 437. The government then brought a lawsuit against him under the civil False

Claims Act. *Id.* at 438. Because there was no question that jeopardy had attached in the prior criminal proceeding, the only question in *Halper* was "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." *Id.* at 446. *Halper* held that punishment of any kind, civil or criminal, was subject to double jeopardy constraints if the sanction "serves the goals of punishment." *Id.* at 448.

But *Hudson* abrogated *Halper* because its analysis "deviated from [the Court's] traditional double jeopardy doctrine." 522 U.S. at 101. *Hudson* explained that *Halper* "bypassed the threshold question: whether the successive punishment at issue is a 'criminal' punishment." *Id.* Instead, just as defendant attempts to do so here, *Halper* "focused on whether the sanction" "constitute[d] punishment." *Id.* Thus, *Hudson* explained, *Halper*'s "deviation from longstanding double jeopardy principles was ill considered." *Id*. 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. *Id.* at 95, 103. In short, defendant ignores that *Halper*'s holding was abrogated by *Hudson*.

United States v. Chouteau, 102 U.S. 603 (1880), on which defendant also relies, *see* Def.'s Br. 31–32, similarly does not support his argument. In *Chouteau*, the Supreme Court considered whether a distiller's sureties were civilly liable for the distiller's breach of certain bond conditions by removing spirits from a distillery warehouse without first paying taxes. *See* 102 U.S. at 608–10. The distiller was first indicted for tax fraud but reached a "compromise with the government … by which a specific sum was paid by him,

and received by the government, in full satisfaction, compromise, and settlement of said indictments and prosecutions, which were accordingly dismissed and abandoned." *Id.* at 610 (internal quotations omitted). The government then sought to recover penalties in a civil action for the same conduct. *Id.* The Supreme Court held that the government could not recover the "same penalty" "based upon the same offence" when the offending party "effected a full and complete compromise with the government." *Id.* at 610–11. Although the Court in *dicta* likened the situation where "a former acquittal or conviction may be invoked to protect against a second punishment for the same offence," *Chouteau* did not address the Double Jeopardy Clause at all, much less consider when jeopardy attaches. *Id.* Simply put, contrary to defendant's assertion, there was no double jeopardy "Punishment Analysis" in *Chouteau*.

Likewise, neither *Bell v. Wolfish*, 441 U.S. 520 (1979), nor *Austin v. United States*, 509 U.S. 602 (1993), also cited by defendant, Def.'s Br. 34, considered, analyzed, or applied the Double Jeopardy Clause. *Bell* considered whether security restrictions in a jail "constitute[d] 'punishment' in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment," 441 U.S. at 560–61, and *Austin* involved the Excessive Fines Clause of the Eighth Amendment, 509 U.S. at 604. And none of defendant's other cases, *see* Def.'s Br. 34–37 (citing *State v. Urvan*, 4 Ohio App. 3d 151 (1982); *Commonwealth v. McSorley*, 335 Pa. Super. 522 (Pa. Super. Ct. 1984); *State v. Maisey*, 600 S.E. 2d 294 (W. Va. 2004), which are all from out of state, embrace his legally unsupported "Punishment Analysis." Not only are these cases distinguishable on that ground, but they are also distinguishable on their facts because the defendant in each had successfully completed a pretrial diversion program—which, as the appellate court

recognized, A15, ¶ 44, undisputedly did not occur in defendant's case because defendant never entered the DPP and the resolution of the initial charges was not intended to track, and did not track, the DPP (C 1460–61).

In sum, none of the abrogated, inapplicable, or out-of-state authority defendant cites supports his legally incorrect "multiple punishments" theory or calls into question the bright-line rule that jeopardy must attach for the prohibition against double jeopardy to be implicated. Because defendant was never placed in jeopardy on the initial charges, defendant's argument that the subsequent prosecution violated double jeopardy fails as a matter of law.

III. Defendant Was Not Prejudiced By The Trial Court's Failure To Perform An *In Camera* Review Of The Notes From An Interview With The Osundairo Brothers.

The appellate court correctly held that defendant "failed to establish that he was prejudiced" by the non-disclosure of the notes from an interview with the Osundairo brothers and the trial court's error in not reviewing those notes *in camera*. A23, ¶ 66. The appellate court correctly applied this Court's precedent in reaching this conclusion, and defendant's disagreement with the ruling is not a basis for overturning his conviction.

Defendant contends that "it was prejudicial error for the trial court to refuse to conduct an *in-camera* inspection of the OSP's notes" since "the Osundairo brothers' credibility and veracity was the crux of the OSP's case." Def.'s Br. 43. On the contrary, there was no prejudice to defendant because he had the police reports, transcripts, and video recordings memorializing the Osundairo brothers' interviews with the Chicago Police Department, as well as the brothers' grand jury testimony. (R 246). Defendant thus was not limited in his ability to confront the Osundairo brothers with their prior statements to police and the grand jury.

Moreover, the appellate court correctly found that "there was substantial evidence that corroborated the Osundairo brothers' testimony" and, relying on *People v. Young*, 128 Ill. 2d 1 (1989), that any error by the trial court in failing to conduct an *in camera* inspection did not prejudice defendant. A23, ¶ 65. In *Young*, this Court held that the defendant was not prejudiced by the lack of disclosure and *in camera* inspection of the prosecution's notes of an interview with a chief prosecution witness because that witness's testimony "was not the only evidence tending to establish" the defendant's guilt. 128 Ill. 2d at 44–45. The Court also rejected the argument that the lack of an *in camera* inspection of the interview notes "deprived the defendant an opportunity to effectively cross-examine" the witness. *Id.* at 42–45 ("[W]e do not believe that the denial of the opportunity to use the interview notes in cross-examining [the witness] affected the reliability of the fact-finding process at trial.").

As in *Young*, the Osundairo brothers' testimony was not the only evidence tending to establish defendant's guilt. To the contrary, as the appellate court observed, A23, ¶ 65, the Osundairo brothers' testimony was overwhelmingly corroborated by "substantial evidence," which included phone records, ride share records, text messages, and social media messages between defendant and the brothers (R 1322–24; R 1349–54; R 1394–1402; R 1431–32); video surveillance footage and GPS evidence showing defendant's multiple visits to the brothers' apartment, their travel to practice a "dry run" of the fake attack, and the brothers' movements on the day of the fake attack (R 1299–1312; R 1355–62; R 1364–75; R 1405–10); and the hardware store receipt where the Osundairo brothers bought supplies for the fake attack, a bank deposit slip, and a $3,500 check that defendant

made out to the brothers (R 1379–81; R 1388). Defendant has never contested the sufficiency of this evidence to sustain his convictions.

For this reason, the present case is like *Young*, and distinguishable from *People v. Szabo*, 94 Ill. 2d 327 (1983), on which defendant relies. Def.'s Br. 41–43. In *Szabo*, the challenged testimony "was the only evidence tending to establish that [the defendant] premeditated the murders." 94 Ill. 2d at 347. By contrast, as explained, defendant's guilt was established through an overwhelming amount of physical evidence, video evidence, cell phone evidence, and testimony from several CPD officers and detectives, all of which corroborated the Osundairo brothers' testimony that defendant orchestrated a fake hate crime and reported it as a real hate crime. This Court, like the appellate court, should find that any error in failing to perform an *in camera* review did not prejudice defendant.

IV. The Trial Court Acted Within Its Discretion When It Sentenced Defendant To Serve 150 Days Of Probation in Jail.

In seeking to overturn his sentence as "excessive," defendant argues that this Court should reweigh the aggravating and mitigating factors because he disagrees with how the trial court weighed them. But trial courts enjoy "great discretion … to fashion an appropriate sentence within the statutory limits." *Fern*, 189 Ill. 2d at 53. The appellate court correctly found "nothing in the record to indicate that the trial court abused its discretion in fashioning [defendant]'s sentence," A50, ¶ 137, and this Court should affirm.

As the appellate court observed, because the trial court imposed a sentence within the statutory sentencing range, it is presumed to be proper. A48–49, ¶ 135; *see also People v. Burton*, 2015 IL App (1st) 131600, ¶ 36 ("We presume that sentences within the statutory mandated guidelines are proper."); *People v. Busse*, 2016 IL App (1st) 142941, ¶ 27 ("If a sentence is within the statutory range, we presume it is not excessive."). Indeed,

defendant's sentence was far less severe than the trial court could have imposed. Because defendant was convicted of five Class 4 felonies, the trial court could have imposed a term of imprisonment of between one and three years for each felony, 730 ILCS 5/5-4.5-45(a), imposed a sentence of periodic imprisonment of up to 18 months, 730 ILCS 5/5-4.5-45(b), and ordered defendant to spend 180 days of his probationary term in jail, 730 ILCS 5/5-6-3(e).

Defendant nevertheless argues that he has "made an affirmative showing rebutting the presumption that his sentencing was proper" because the trial court allegedly considered "improper aggravating factors" in fashioning its sentence. Def.'s Br. 45. Defendant is incorrect. This Court has held that when determining an appropriate sentence, the trial court must consider such factors as the "defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Fern*, 189 Ill. 2d at 53. Moreover, "[a] reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the 'cold' record." *Id.*

Here, the trial court fashioned its sentence after listening to the evidence over the course of the two-week trial, including defendant's testimony (which the jury rejected), as well as the evidence, including defendant's mitigation evidence, at the full-day post-trial motion and sentencing hearing. (R 3439–68; R 3548). The trial court had an opportunity to observe defendant's credibility and demeanor and, consistent with the jury's guilty verdicts, the court found that defendant's "performance on the witness stand" was "hour upon hour upon hour of pure perjury." (R 3555–56). With regard to defendant's "general

moral character," the court observed that "pretending to be a victim of a hate crime" was "shameful," "disgraceful," and "selfish" (R 3536; R 3553; R 3554–55), both because defendant's actions had done "damage to real … hate crime victims," to people who fight "social injustice," and to the City of Chicago (R 3538; R 3550–56), and because he "used up the police resources for [defendant's] own benefit" (R 3551–52). Contrary to defendant's argument, Def.'s Br. 45–47, these observations were not inappropriate, but instead directly pertain to his "credibility, demeanor, [and] general moral character," all of which are relevant to fashioning an appropriate sentence, *Fern*, 189 Ill. 2d at 53.

There was likewise nothing inappropriate about the trial court's characterization of defendant's case as a "heater" when considering the nature of his crime. *See* Def.'s Br. 45–46. As defendant recognizes, his case attracted significant public attention. By reporting a fake hate crime, defendant plainly intended to exploit this attention and would have expected his report to "cause[] a major investigation to take place which got many people involved and caused great stress throughout the city." (R 3548). Thus, as the trial court observed, defendant "used up the police resources for [his] own benefit." (R 3551–52) ("I have never seen, even in some murder cases, the amount of police work that went into this investigation."). The public's reaction to defendant's fake reports and the enormous amount of resources expended in investigating his hoax were properly considered by the trial court when fashioning his sentence.

Defendant's assertion that the trial judge "took on a personal retributive tone" also misses the mark. Def.'s Br. 46. Defendant cites *People v. Brown*, 2015 IL App (1st) 130048, but that case is of no help to him. In *Brown*, the trial court considered "uncertain speculative evidence of the gun jamming to support a phantom aggravating factor that but

for defendant's gun jamming, defendant would have caused more violence." 2015 IL App (1st) 130048, ¶ 44. Here, by contrast, the trial court's remarks were made in the context of explaining its rationale for the sentence it was about to impose. (R 3531) ("The sentence that's going to be rendered today is going to be strictly for [defendant]. It's going to be fashioned for him. And when a judge sentences somebody—and I've been doing this for quite a while now. You have to look at both the crime that was committed and the person that committed it."). This does not make the court's sentence excessive—it makes it considered, well-reasoned, and appropriately tailored to the unique facts of the case.

Defendant also asserts that sentencing him to a period of 150 days in jail overlooks the evidence in mitigation. Def.'s Br. 47. But a trial court is presumed to have considered all mitigation evidence presented. *People v. Burton*, 184 Ill. 2d 1, 34 (1998). As the appellate court held, defendant failed to overcome this presumption because he did not "make any affirmative showing that the trial court failed to give proper weight to mitigating evidence offered at his sentencing hearing." A49, ¶ 137. In fact, the trial court noted that "[t]here is a lot of mitigation in this case" (R 3556), and expressly commented on that evidence, including the letters submitted on defendant's behalf, demonstrating that the mitigation evidence was not overlooked.

Defendant's remaining arguments are meritless. He notes that the probation department categorized him as "low risk" in its presentence investigative report. Def.'s Br. 47. But, that assessment was based on the Ohio Risk Assessment System (CI 92), a predictive tool for assessing the risk of recidivism; the probation department did not purport to assess an appropriate sentence. Defendant next claims that a jail term was inappropriate because of "the health risk a custodial setting will pose to [defendant] within the context

of the current COVID 19 epidemic." Def.'s Br. 47. But all defendants are "at risk" for exposure to COVID-19 (and other illnesses) in the custodial setting. More important, the COVID-19 pandemic has subsided. *See* Pub. L. No. 118-3 (bill terminating national COVID-19 emergency). Defendant's argument that incarceration is inappropriate because he is "unpopular[,]" Def.'s Br. 47, is likewise misplaced; the trial court could, and did, address this concern by ordering that defendant be placed in protective custody (SUP C 1774).

In short, the trial court did not abuse its discretion in fashioning defendant's sentence, and this Court should affirm that sentence.

V. The Trial Court Did Not Abuse Its Discretion In Sentencing Defendant To Pay Restitution To The City of Chicago.

In incorrectly asserting that the trial court abused its discretion when it sentenced him to pay restitution to the City of Chicago in the amount of $120,106,[7] Def.'s Br. 49, defendant ignores recent Illinois decisions holding that "there is no *per se* rule prohibiting a law enforcement agency from receiving restitution." *People v. Ford*, 2016 IL App (3d) 130650, ¶ 29; *see also People v. Danenberger*, 364 Ill. App. 3d 936, 944 (2d Dist. 2006) ("[W]e do not hold that a law enforcement agency can *never* be a victim entitled to restitution").[8]

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[7] The City of Chicago's overtime expenses totaled $130,106 (C 1685–87), and the trial court reduced the amount of restitution ordered by $10,000 to account for defendant's voluntary forfeiture of his bond in March 2019. (C 1720).

[8] Defendant initially conceded that the trial court could order restitution, and instead argued that he could not afford to pay it. (R 3523) ("[The Special Prosecutor] talked about the restitution, that your Honor has the power to give restitution. And we concede that point at this time. Judge, what I remind you is if [defendant] has to pay that amount or any amount your Honor deems fit, he's lost nearly everything."); (SUP C 1724) ("[Defendant] cannot pay the requested $130,106.00 restitution amount unless he is allowed to over a period of time, while he is out of custody and trying to regain his livelihood.").

The appellate court considered both *Ford* and *Danenberger*, and concluded that defendant's case was like *Ford* and unlike *Danenberger* and that the City was entitled restitution. A50–A51, ¶¶ 139–142. Specifically, defendant's case is unlike *Danenberger*, where the court vacated an order of restitution to a police department because "[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*," and there was "no evidence that anyone who investigated defendant's report was paid anything beyond his or her normal compensation for working on defendant's case." 364 Ill. App. 3d at 942. Instead, defendant's case is like *Ford*, where the court affirmed an order of restitution to a Peoria narcotics enforcement group for the cost of a van that was damaged by the defendant's reckless conduct. 2016 IL App (3d) 130650, ¶ 30. The court found that the restitution amount "did not reimburse the Peoria MEG unit for its normal costs of investigating crime," and instead was for out-of-pocket "cost of repairing a law enforcement vehicle that was damaged as a direct result of defendant's criminal conduct." *Id.*

Here, the trial court ordered defendant to pay restitution to the City only for the overtime or out-of-pocket expenses incurred in investigating the fake hate crime. (C 1685–93). As the appellate court found, "the restitution in this case did not reimburse the City for its normal cost of investigating a crime but rather for its overtime expenses" incurred as a result of the investigation defendant's false report engendered. A51, ¶ 142. Thus, the restitution order is valid under Illinois law and should not be disturbed.

Defendant belatedly attacks the City's evidence of its overtime expenses by arguing that the first three pages of the expense reports are undated, the timecards lack "descriptions" (even though police officers do not "bill" time like some lawyers do), and

many of the officers' names were not introduced at trial. Def.'s Br. 49. But the appellate court correctly found that defendant had forfeited these complaints by failing to raise them at sentencing and in his motion to reconsider his sentence. A52–53, ¶¶ 145–46; *see People v. Thompson*, 238 Ill. 2d 598, 611–612 (2010) (holding that defendant forfeited arguments on appeal by failing to "both object at trial and include the alleged error in a written post-trial motion"). Defendant argues that he actually did raise the issue, Def.'s Br. 50, but the cited record page shows only that his counsel made a passing comment when mocking the special prosecutor's recommended sentence. (R 3513). Defendant did not articulate any objection to the accounting or argue that the restitution amount was unsupported at sentencing, in his post-trial motion, or in his motion to reconsider the sentence. The appellate court thus correctly found his present argument forfeited. A52–53, ¶¶ 145–46.

Forfeiture aside, the evidence of CPD's expenditure of resources was more than sufficient to support the restitution order. During trial, the special prosecutor elicited evidence that the CPD had invested considerable resources in solving defendant's reported hate crime. There was evidence that 24 to 26 detectives worked around the clock during Chicago's historic polar vortex, totaling over 3,000 hours of work, and that they reviewed 1,500 hours of video footage. (R 1267–69). At the sentencing hearing, the trial court received a victim impact statement from the City of Chicago, signed by the City's deputy corporation counsel and its police superintendent, attesting that "CPD also spent 1,837 overtime hours investigating [defendant's] false reports, costing the City $130,106." (C 1685–87). In light of this evidence, the trial court "properly assessed the out-of-pocket expenses incurred by the Chicago Police Department," A52, ¶ 144, and correctly ordered defendant to pay $120,106 in restitution to the City.

In sum, the appellate court correctly held that the restitution order was adequately supported by the record evidence. This Court should deny defendant's request to vacate the restitution order.[9]

CONCLUSION

At bottom, Smollett's appeal to this Court is a last-ditch attempt to overturn the jury's unanimous verdicts through novel legal arguments based on contrived and completely unsupported assertions with no evidentiary support. Smollett's convictions and sentence are well-supported by Illinois law, and accordingly, this Court should affirm the appellate court's judgment.

Dated: July 10, 2024

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[9] For the first time (despite his erroneous assertion that it "has been stated before"), defendant argues the federal civil case between the City and defendant (which is stayed by agreement of the parties pending resolution of defendant's criminal appeals) relating to the overtime expenses the City incurred investigating the fake hate crime is "the proper venue for determining the legitimacy of restitution." Def.'s Br. 50 n.17 (referring to *City of Chicago v. Smollett*, No. 19-cv-04547 (N.D. Ill.)). Not only has defendant forfeited this argument by failing to raise it on appeal to the intermediate appellate court, *see People v. Marlow*, 303 Ill. App. 3d 568, 570 (1999), but it is of no moment because as soon as defendant complies with the sentencing order by paying $120,106 in restitution to the City, the parties will almost assuredly dismiss the stayed case.

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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 or words contained in 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 43 pages.

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PROOF OF FILING AND SERVICE

Under the 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. The undersigned further certifies that on July 10, 2024, the foregoing Brief of the State-Appellee was electronically filed with the Clerk, Supreme Court of Illinois, thereby causing service to be affected electronically to:

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