No. 130431

IN THE SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>State-Respondent,<br><br>v.<br><br>JUSSIE SMOLLETT,<br><br>Defendant-Petitioner. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | On Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-22-0322<br><br>There on Appeal from the Circuit Court of Cook County, Illinois, Criminal Division, No. 20 CR 03050-01, The Honorable James B. Linn, Presiding |

# THE OFFICE OF THE SPECIAL PROSECUTOR'S ANSWER TO JUSSIE SMOLLETT'S PETITION FOR LEAVE TO APPEAL

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## ANSWER TO PETITION FOR LEAVE TO APPEAL

Defendant-Petitioner Jussie Smollett's Petition for Leave to Appeal ("Petition" or "Pet.") should be denied because it fails to satisfy *any* of the bases under Illinois Supreme Court Rule 315(a). Indeed, the Appellate Court's decision did not misapply Illinois law, create any conflicts in the lower courts, or otherwise set new precedent inconsistent with Illinois law.

Despite those truisms, the Petition repeatedly claims, in typical Smollett-hyperbolic fashion and without support in law or fact, that the Appellate Court's decision somehow will have "wide-reaching implications" (Pet. at 1), because it supposedly "reinterpret[s]" and "effectively reverses" "American criminal jurisprudence" while purportedly "overturn[ing] binding Illinois Supreme Court" and "appellate court precedent" allegedly in place for "nearly a century" (*id.* at 3, 4), while at the same time setting "a dangerous precedent" (*id.* at 19), that will immediately lead to "chaotic results" if upheld (*id.* at 14). These self-serving proclamations are not only gross mischaracterizations of the Appellate Court's clear decision—they are also false. The Appellate Court correctly affirmed Smollett's felony convictions and sentence in accordance with long-standing Illinois law which did not bar re-prosecution of Smollett or implicate his double jeopardy rights since his prior case was dismissed via a *nolle prosequi*.

Because the Petition fails to satisfy Rule 315(a), and for the additional reasons noted herein, the State-Respondent, through the Office of the Special Prosecutor ("OSP"), respectfully requests that this Court deny the Petition.

## STATEMENT OF FACTS

Smollett's "Statement of Jurisdiction" (which operates as a Statement of Facts) mischaracterizes the record and omits relevant facts and procedural history. Therefore, the OSP sets forth the following Statement of Facts, *see* Ill. Sup. Ct. R. 315(f).

Smollett's disorderly conduct felony charges arise from his reporting of a fabricated hate crime against him in the early morning hours of January 29, 2019. (CI 30–46). After a rigorous investigation of the incident by the Chicago Police Department during the dangerously cold conditions of Chicago's historic polar vortex, Smollett was indicted on 16 counts of felony disorderly conduct in Cook County, Case No. 19 CR 03104-01 (the "Prior Charges"), and that case was assigned to the Honorable Judge Steven Watkins. (CI 30–46; CI 71). Smollett was arraigned on those charges on March 14, 2019. (CI 71).

Only 12 days after Smollett's arraignment, on March 26, 2019, the Cook County State's Attorney's Office ("CCSAO") advanced the status hearing date before Judge Watkins and made a motion for *nolle prosequi*. (SUP C 7–10). During the hearing, Assistant State's Attorney Risa Lanier stated: "After reviewing the facts and circumstances of this case, including Smollett's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, the State's motion in regards to the indictment is to nolle pros." (SUP C 8–9).

After the CCSAO's motion to *nolle prosequi* the Prior Charges, retired appellate justice Sheila O'Brien filed a *pro se* Petition to Appoint a Special Prosecutor. (C 40–67; C 68–76). Ms. O'Brien's petition was docketed as a new case, Case No. 19 MR 00014, and ultimately assigned to the Honorable Judge Michael B. Toomin on May 10, 2019. (C 108–09). After briefing and argument, Judge Toomin entered an order granting the

appointment of a special prosecutor on June 21, 2019 (the "Appointment Order"). (C 446–66). On August 23, 2019, Judge Toomin appointed Dan K. Webb as Special Prosecutor to, amongst other things, conduct an "independent investigation" and if "reasonable grounds exist to further prosecute Smollett, in the interest of justice" to "take such action as may be appropriate." (C 365; C 368–70).[1]

Following investigation by the Special Prosecutor in conjunction with a special grand jury, the special grand jury indicted Smollett on six counts of felony disorderly conduct on February 11, 2020, namely making false police reports in violation of 720 ILCS 5/26-1(a)(4). (C 652–58). This case was assigned to the Honorable Judge James B. Linn. (C 10).

On February 24, 2020—the day of Smollett's arraignment—Smollett filed two emergency motions before this Court: (1) Emergency Motion for Supervisory Order Pursuant to Illinois Supreme Court Rule 383, and (2) Emergency Motion to Stay. (C 949–971); *see also Jussie Smollett v. The Hon. Michael P. Toomin*, No. 125790. In the Emergency Motion for a Supervisory Order, Smollett asked this Court to void both the Appointment Order and the order appointing Dan Webb as Special Prosecutor because the appointment was supposedly "contrary to Illinois law." (C 970–971). According to Smollett, the February 2020 felony disorderly conduct charges were "truly unprecedented" (C 957), and a Rule 383 supervisory order was necessary because "the public interest and

[1] Dan Webb and Winston & Strawn LLP undertook the Special Prosecutor appointment pro bono. During Smollett's sentencing hearing, the trial court thanked Winston & Strawn for its pro bono service. (R 3527–28) (remarking that "there is a tremendous amount of attorney manpower and billable hours that were lost by the Winston Strawn firm and they did it selflessly. They did it because they thought they needed to do the right thing. All I can say as a member of the judiciary thank you, because that was very, very extraordinary.").

confidence in the integrity of the judiciary [wa]s implicated." (C 956). Smollett also asked this Court to stay "the criminal proceedings related to the second prosecution." (C 955). The OSP submitted fulsome briefing to this Court in opposition to Smollett's emergency motions. (SUP C 582–669).

On March 6, 2020, this Court denied Smollett's emergency motions, and the case proceeded before Judge Linn in the trial court. (SUP C 671).

The trial court held a two-week jury trial starting on November 29, 2021 (R 917–3259), and on December 9, 2021, the jury returned a verdict of guilty on five of the six counts of felony disorderly conduct. (R 3314–16; C 1420). On March 10, 2022, the trial court sentenced Smollett to 30 months' probation, the first 150 days to be served in the Cook County Jail. (R 3557). Smollett was also ordered to pay a $25,000 fine and pay restitution to the City of Chicago in the amount of $120,106. (*Id.*).

The next day, Smollett filed his Notice of Appeal and Docketing Statement to the First District, as well as Emergency Motion to Stay Sentence and/or Grant Bail Pending Appeal. (Pet. at 2). On March 16, 2022, the Appellate Court entered an order staying Smollett's sentence of incarceration and granted him bond pending the disposition of his appeal.[2] (*Id.*)

On December 1, 2023, the Appellate Court issued its decision, rejecting all 14 of Smollett's arguments and affirming his convictions and sentence in a thorough, well-

[2] Smollett's March 2022 emergency motion was granted by Justice Joy V. Cunningham, who was sitting on the First District during the pendency of the motion (*see* Ill. Sup. Ct. R. 2.11(A)(5)(f)), and Justice Thomas E. Hoffman. Justice Maureen Connors dissented from the grant of the emergency motion.

reasoned, 53-page decision. (*Id.* at A1–A53). Smollett filed a Petition for Rehearing, which the Appellate Court denied on January 2, 2024. (*Id.* at 2.).

## ARGUMENT

Smollett attempts to manufacture a basis for this Court's review where one does not exist. When Smollett's outlandish exaggerations and mischaracterizations of the Appellate Court's decision are appropriately set aside, it is clear that the Appellate Court correctly applied long-standing Illinois law and reached a decision that is compelled by this Court's precedent. As such, this Court should deny the Petition.

### I. THE COURT SHOULD DECLINE REVIEW OF THE APPELLATE COURT'S DECISION ON SMOLLETT'S ALLEGED "NON-PROSECUTION" AGREEMENT.

#### A. Smollett Forfeited Multiple Arguments that Were Not Raised in the Trial Court or Appellate Court.

Smollett focuses on a Second District decision, and argument stemming from that decision, that was *never* raised in the trial court, *nor* raised in the Appellate Court in Smollett's opening or reply briefs, or at oral argument. Specifically, the Petition relies on *People v. Starks*, 146 Ill. App. 3d 843 (2d Dist. 1986) ("*Starks '86*") and argues that the Appellate Court should have ordered an evidentiary hearing to determine whether the parties intended to enter into a "non-prosecution agreement" (they did not). (Pet. at 5–8, 11–12). But this argument and reliance on *Starks '86* (which was not cited in the dissent) was raised for the first time in Smollett's Petition for Rehearing to the Appellate Court and is therefore waived.

Smollett never requested an evidentiary hearing at the trial court, and "[i]t is well settled in Illinois that an appellant who fails to raise an issue before the trial court forfeits the issue and may not raise it for the first time on appeal." *Williams v. Bruscato*, 2019 IL

App (2d) 170779, ¶ 24. *See also People v. Cruz*, 2013 IL 113399, ¶ 20 ("[A]n issue not raised in the trial court is forfeited on appeal."). He then waived the issue again on appeal. Illinois Supreme Court Rule 341(h)(7) is clear that "[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." In interpreting Rule 341(h)(7), this Court has reiterated that "points not raised or argued in an opening appellate brief are waived." *People v. Wendt*, 163 Ill. 2d 346, 350–51 (1994) (citing Rule 341(e)(7), which was amended to Rule 341(h)(7), and noting that the "defendant [inappropriately] raised this issue for the first time in her petition for rehearing in the appellate court"). Moreover, "parties may not argue new points in a petition for rehearing." *People v. Wright*, 194 Ill. 2d 1, 23 (2000).

As such, Smollett waived any reliance on *Starks '86* as well as any argument that he was entitled to an evidentiary hearing to determine whether there was a "non-prosecution agreement," and therefore, this Court cannot consider those new arguments here.

### B. The Appellate Court Correctly Applied Illinois Law and Found that the CCSAO Dismissed Smollett's Prior Charges via a *Nolle Prosequi*.

The Petition claims, without any support, that the Appellate Court supposedly "overturn[ed] binding Illinois Supreme Court and appellate court precedent by erroneously holding that a nonprosecution agreement cannot be enforced within the context of a *nolle prosequi*." (Pet. at 3). This is wrong, as the Appellate Court's decision did ***not*** overturn any precedent or otherwise rule "contrary to well-established precedent." (*Id.* at 5). Moreover, Smollett's argument relies upon the baseless assertion that he, in fact, entered into a so-called "non-prosecution" agreement with the CCSAO. As the Appellate Court concluded, in accordance with "well-established Illinois law," the CCSAO's *nolle prosequi*

of the Prior Charges "was not a final disposition of the case," and that the "record does not establish that Smollett entered into a non-prosecution agreement with the CCSAO." (*Id.* at A9–A10, ¶¶ 28–30).

In reaching this correct conclusion, the Appellate Court noted that before the trial court, Smollett had "offered numerous, different—and oftentimes, conflicting—framings of the purported 'agreement' that was struck with the CCSAO on March 26, 2019." (*Id.* at A10, ¶ 31). Smollett 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.*) It was only during the briefing on Smollett's direct appeal that he coined the alleged "agreement" with the CCSAO as a "non-prosecution agreement." (*Id.*) Yet, when pressed at oral argument before the Appellate Court, Smollett "agreed that the ***only*** indication in the record of the 'agreement' between him and the CCSAO is the transcript of the March 26, 2019, court proceeding." (*Id.* at A9, ¶ 28) (emphasis added). With that concession and admission in hand, the Appellate Court further evaluated the record from the March 26, 2019, hearing before Judge Watkins, in which the CCSAO unambiguously stated "the State's motion in regards to the indictment is to ***nolle pros***." (SUP C 8–9) (emphasis added).

Under this Court's "well-established" precedent (Pet. at A9, ¶ 29), 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)). "A *nolle prosequi* is not an acquittal of the underlying conduct that served as the basis for the original charge but, rather, it leaves the matter in the same

condition as before the prosecution commenced." *People v. Hughes*, 2012 IL 112817, ¶ 23; *see also People v. Milka*, 211 Ill. 2d 150, 176 (2004) ("[T]his court has long held that, while a *nolle prosequi* discharges a defendant on the charging document or count which was nol-prossed, there is nothing inherent in the *nolle prosequi* itself which causes it to operate as an acquittal."). Thus, the Appellate Court correctly found the record "clearly show[ed]" that Smollett bargained for and received a *nolle prosequi* in March 2019 (Pet. at A9, ¶ 28), and under binding Illinois precedent, the March 2019 *nolle prosequi* did not bar the subsequent prosecution. (*Id.* at A9–A10, ¶¶ 29–30). *See also People v. Snell*, 357 Ill. App. 3d 491, 494 (4th Dist. 2005) (holding that "the State's July 2003 motion to nol-pros did not operate as a final adjudication on the merits or act as an acquittal and does not bar a subsequent revocation proceeding").

Unlike the *nolle prosequi* that Smollett received, this Court has recognized that when the State formally moves to dismiss a case "with prejudice," it is "equivalent to a final adjudication on the merits of the case." *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). But, that is not the type of dismissal the CCSAO made in March 2019, or the type of dismissal that was granted. Indeed, as the Appellate Court found, there was "***no ambiguity*** as to what occurred between Smollett and the CCSAO." (Pet. at A10, ¶ 30) (emphasis added).

In cases where there was ambiguity as to the type of dismissal (*nolle prosequi* or "with prejudice"), Illinois appellate courts have rejected arguments that the initial dismissal

represented "finality" or a dismissal with prejudice. For example, in *People v. Gill*, 379 Ill. App. 3d 1000 (4th Dist. 2008), the State filed a motion to dismiss without specifying if it was a *nolle prosequi* or "with prejudice," and months later, identical charges were refiled. *Id.* at 1001–02. The trial court dismissed the refiled charges, but the appellate court concluded that "the trial court erred by inferring that the State intended to dismiss with prejudice." *Id.* at 1002–03, 1008 ("We hold that 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."). Similarly, in *People v. Ryan*, 259 Ill. App. 3d 611 (2d Dist. 1994), the State dismissed a single count from an indictment, without specifying the type of dismissal, following a motion to dismiss by the defendant, and then later reindicted the defendant on the same charge. *Id.* at 612. The trial court found the prior dismissal was with prejudice, but the appellate court reversed and reinstated the charge, finding that there was "nothing in the record to show that the dismissal was with prejudice." *Id.* at 614. Notably, the appellate court remarked 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.*

Other precedent cited by Smollett in the Appellate Court (but conspicuously absent from the Petition) and addressed by the Appellate Court, such as *People v. Smith*, 233 Ill. App. 3d 342 (2d Dist. 1992), is consistent with *Gill* and *Ryan*. In *Smith*, the defendant bargained for a "cooperation-immunity" agreement in which the defendant cooperated in exchange for a dismissal of the charges. *Id.* at 344. After cooperating, the State dismissed the charges but later re-filed them. *Id.* at 344–45. The trial court dismissed the new indictment because the State had sought an "outright dismissal" of the charges, which

functioned as a dismissal "with prejudice and operated as an acquittal," but was "not a *nolle prosequi*." *Id.* at 346–48. The appellate court agreed that the dismissal was with prejudice and noted that "[i]f a *nolle prosequi* had been intended, it is likely that the charges would have been nol-prossed …." *Id.* at 348.

This precedent demonstrates what is clear under Illinois law—the type of disposition and the words made on the record effectuating that result have legal import and meaning. Here, the Appellate Court's holding was both compelled by the record—where there was "no ambiguity" that a *nolle prosequi* motion was bargained for and entered (Pet. at A10, ¶ 30)—and long-standing Illinois precedent that a *nolle prosequi* does not bar a subsequent prosecution.

### C. Smollett's Unsupported Arguments Would Upend Long-Standing Illinois Law.

For the first time on appeal, Smollett introduces *yet another* framing of his imaginary "non-prosecution" agreement (not raised in the trial court or in his briefing before the Appellate Court)—a supposed "bilateral" agreement "within the context of a *nolle prosequi*." (Pet. at 5). Borrowing from the dissent[3] and noncontrolling out-of-state case law, Smollett's newly invented concept of a "unilateral *nolle prosequi*" and "bilateral *nolle prosequi*" is completely unsupported under Illinois law. Indeed, based on the OSP's research, there are zero cases in the history of Illinois (which entered the Union in 1818) that even reference a "unilateral" or "bilateral" *nolle prosequi*. In other words, the core argument in Smollett's Petition rests on concepts unrecognized under Illinois law for more than 200 years. This Court should reject Smollett's invitation for the creation of new law

[3] The dissenting justice only took issue with this portion of the Appellate Court's decision and did not address any other aspects of the decision.

that would undermine the already long-established meaning and consequence of a *nolle prosequi*.

To support his proposed and brand-new legal concept, Smollett relies heavily on this Court's decision in *People v. Starks*, 106 Ill. 2d 441 (1985)—but that decision said nothing about "unilateral" and "bilateral" *nolle prosequi*. In fact, the Appellate Court also considered *Starks* and correctly found that it was distinguishable from the record in Smollett's case. (Pet. at A12–13, ¶¶ 36–37). *Starks* involved a defendant who agreed to cooperate and submit to a polygraph examination prior to trial in exchange for a complete dismissal of his case. 106 Ill. 2d at 444–45. Despite taking the polygraph, the State never dismissed the charges and the defendant's case proceeded to trial where he was convicted. *Id.* This Court reviewed and found that—unlike in Smollett's case—the record was "unclear as to the exact terms of the agreement," and that "[b]y submitting himself to the polygraph examination, the defendant surrendered his fifth amendment privilege against self-incrimination." *Id.* at 451. Thus, this Court reversed and held that if there was a pretrial agreement to dismiss the charges in exchange for the defendant's cooperation with a polygraph, then the State must fulfill its end of the bargain and dismiss. *Id.* at 452. And, Smollett's newly (and waived, *see* Section I.A. *supra*) cited appellate opinion after remand, *Starks '86*, adds nothing to this Court's decision, as it simply affirmed that the State must fulfill its agreement. 146 Ill. App. 3d at 848.

The Appellate Court correctly concluded that Smollett's proceedings are nothing like *Starks* because "the record in this case is silent regarding any nonprosecution agreement between the CCSAO and Smollett." (Pet. at A12, ¶ 37). Rather, unlike *Starks*, the CCSAO did fulfill its agreement "to 'nolle pros' the indictment, which does not impart

finality." (*Id.*) As the Appellate Court stated, "[n]o questions are left by the State's actions on that date." (*Id.*) And, since there was there was "no ambiguity as to what occurred between Smollett and the CCSAO,"[4] the Appellate Court correctly found that "further proceedings," like those required in *Starks*, "are not necessary to add clarity." (*Id.* at A10, ¶ 30). The Petition offers no reason under Illinois law or otherwise to disturb that well-supported conclusion.

Finally, Smollett proclaims in his Petition that the Appellate Court's decision will somehow create "[c]haotic results" where "future citizen activists" 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 …." (Pet. at 14). Nonsense. Notwithstanding the fact that zero "chaotic results" have come to pass in the nearly five years since Judge Toomin granted the appointment of a special prosecutor, Smollett's supposed "policy" arguments regarding the OSP's appointment were previously considered and rejected by this Court. (SUP C 671).

Moreover, Smollett ignores the enormous consequences that would flow if his (and the dissent's) concept of a "bilateral" *nolle prosequi* were adopted. As an initial matter, nearly a century of Illinois law from this Court regarding a *nolle prosequi*—which under this Court's precedent is "not a final disposition of the case, and will not bar another

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[4] Even if there was some ambiguity as to what sort of "agreement" was reached on March 26, 2019, between the CCSAO and Smollett (there is no ambiguity), one need not look any further than what Smollett's *own attorneys* told the media at a press conference that same day at the courthouse minutes after leaving Judge Watkins' courtroom: "***There was no deal***. The State dismissed the charges." *See* Tim Baysinger & Jennifer Maas, *Jussie Smollett's Attorney Says 'There Was No Deal' to Get Charges Dropped*, Yahoo (March 26, 2019), https://www.yahoo.com/lifestyle/jussie-smollett-attorney-says-no-161817405.html (emphasis added).

prosecution for the same offense" (*Daniels*, 187 Ill. 2d at 312)—would be upended, since a *nolle prosequi* would take on new meaning, i.e., equivalent to a "final disposition" and bar re-prosecution. Worse, if Smollett's (and the dissent's) suggestion was adopted, defendants facing reinstated charges that were previously dealt with via a *nolle prosequi* would flood the courts with requests for supposed "evidentiary hearings" under the guise of allegedly determining each party's "subjective intent" surrounding the prior proceedings—no doubt unnecessarily delaying justice while also burdening the trial courts. Moreover, defendants with convictions in such circumstances would launch a wave of appeals and post-conviction collateral proceedings, seeking relief via an "evidentiary hearing" under the ruse of "determining" the prosecutor's and defendant's post hoc intention for the *nolle prosequi*—years after the fact.

The Petition does not warrant or support such upheaval of well-established and previously relied-upon Illinois law, and therefore should be denied.

## II. THE COURT SHOULD DECLINE REVIEW OF THE APPELLATE COURT'S CORRECT "DOUBLE JEOPARDY" DECISION.

Smollett also incorrectly claims that his case and its supposed "double jeopardy" implications are matters of "first impression" (Pet. at 3, 17). However, the Appellate Court properly applied long-standing Illinois precedent on the effects of a *nolle prosequi* prior to the attachment of jeopardy. The Petition simply retreads old, previously rejected arguments that Smollett raised before the trial court and on appeal—none of which are worthy of review here.

As he did before the Appellate Court, Smollett's sleight of hand continues in this argument, with his supposed "non-prosecution agreement" discussed above now magically becoming a "compromise agreement" (Pet. at 15). This intentional deception is needed

since, even under Smollett's own failed theory, a non-prosecution agreement implies no punishment, whereas his double jeopardy argument rests on the theory that he was somehow already punished when the CCSAO made a motion to *nolle prosequi* the Prior Charges—albeit without requiring him to: plead guilty; accept responsibility for filing false police reports; be formally sentenced; or enter into a deferred prosecution program.

Setting aside Smollett's continued self-serving and ever-shifting framing of the purported "agreement," the Appellate Court correctly reviewed this Court's long-standing precedent regarding the effect of a *nolle prosequi* on a defendant's right against double jeopardy and concluded that "jeopardy did not attach to Smollett's first criminal prosecution." (Pet. at A14, ¶ 44). This Court has explained that "[t]he starting point in ***any*** double jeopardy analysis, of course, is determining whether or not jeopardy had attached." *People v. Bellmyer*, 199 Ill. 2d 529, 538 (2002) (quoting *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 534 (1979)) (emphasis added). Therefore, the "protections against double jeopardy are triggered ***only*** after the accused has been subjected to the hazards of trial and possible conviction." *Id.* at 537 (emphasis added).

Here, as the Appellate Court found, the Prior Charges were dismissed via a *nolle prosequi* a mere 12 days after arraignment. (Pet. at A14, ¶ 44). Smollett does not dispute that no jury was impaneled, no witnesses were sworn in, no evidence was introduced, and that he had not pled guilty to the Prior Charges. These concessions are dispositive under Illinois law, and the straightforward result is that Smollett's right against double jeopardy was not violated. (Pet. at A15, ¶ 45) (quoting *Milka*, 211 Ill. 2d at 172) ("[A] *nolle prosequi* is not a final disposition of the case, and will not bar another prosecution for the same offense."). In the proceedings below, Smollett asked the trial court and Appellate Court to

ignore the record evidence of the CCSAO's motion for a *nolle prosequi* and argued that jeopardy somehow attached to the Prior Charges despite their dismissal via a *nolle prosequi* 12 days after arraignment. Through this Petition, Smollett invites this Court to upend its blackletter precedent and adopt new law on the meaning and effect of a *nolle prosequi* on re-prosecution. Smollett's invitation should be declined.

Finally, although Smollett admits he never entered into a formal deferred prosecution program, the Petition retreads arguments based on out-of-state case law where a double jeopardy violation was found after formal competition of such a program. (Pet. at 15–16). Although it was not required to, the Appellate Court considered these non-binding out-of-state decisions, and correctly rejected them since there was no record evidence that Smollett ever entered into a formal deferred prosecution program with the CCSAO. (Pet. at A15, ¶ 44).

At bottom, there is nothing of "first impression" about Smollett's double jeopardy argument or the Appellate Court's decision related thereto, and thus, there is no basis for this Court's review.

## III. THIS COURT SHOULD DECLINE REVIEW OF THE APPELLATE COURT'S RULE 412 DECISION.

The Appellate Court did not "effectively reverse[]" any mandate by this Court. (Pet. at 17). Rather, the Appellate Court concluded, consistent with this Court's precedent, that the "trial court erred in denying Smollett's motion to compel discovery of the OSP notes from the October 5, 2019 meeting with the Osundairo Brothers without conducting an *in camera* review of the notes …." (Pet. at A23, ¶ 65) (citing *People v. Szabo*, 94 Ill. 2d 327 (1983) and *People v. Young*, 128 Ill. 2d 1 (1989)). And, also consistent with this Court's precedent in *Young*, the Appellate Court found that any such error was harmless

"beyond a reasonable doubt." (Pet. at A23, ¶ 65); *see Young*, 128 Ill. 2d at 43 ("[W]e reject the argument that the circuit court's ruling denying an *in camera* inspection deprived the defendant of the opportunity to effectively cross-examine [a chief prosecution witness].").

In reaching that conclusion, the Appellate Court noted that "[i]n addition to testimony and police reports, there was substantial evidence that corroborated the Osundairo brothers' testimony and tended to establish Smollett's guilt, including video evidence, cell phone GPS data, and text messages." (Pet. at A23, ¶ 65). Accordingly, the Appellate Court concluded that Smollett "failed to establish that he was prejudiced by the OSP's nondisclosure of the notes" where the "Osundairo brothers' testimony was corroborated by substantial evidence that established that Smollett was guilty of disorderly conduct for falsely reporting to the police that he was the victim of a violent attack." (*Id.* at A23, ¶ 66).

Smollett simply disagrees with the Appellate Court's decision that the error was harmless. But mere disagreement with a harmless error analysis is not a basis to grant the Petition under Rule 315(a). The Appellate Court's decision does not create a risk of a "dangerous precedent" (Pet. at 19)—it simply follows the precedent created by this Court in *Young* which applied harmless error analysis for Rule 412 violations of this sort. *Young*, 128 Ill. 2d at 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."). The Court should decline review of the Appellate Court's Rule 412 decision.

## IV. THE COURT SHOULD DECLINE REVIEW OF THE APPELLATE COURT'S SENTENCING DECISION.

Finally, in two sentences, with undeveloped argument, Smollett seeks review of his sentence—specifically, that the terms were allegedly "excessive," and incorrectly arguing

that restitution could not be awarded to the City of Chicago. (Pet. at 19–20). Both of these issues were subject to an abuse of discretion standard on direct appeal, and the Appellate Court thoroughly considered and rejected these challenges. (*Id.* at A48–A53, ¶¶ 133–146). Indeed, the Appellate Court correctly concluded that Smollett's challenge to the order of restitution had been forfeited on appeal. (*Id.* at A52, ¶ 145).[5] Accordingly, review of Smollett's sentence is not warranted.

## CONCLUSION

For the foregoing reasons, the OSP respectfully requests that this Court deny Smollett's Petition for Leave to Appeal, thereby paving the way for Smollett to return to the Cook County Jail to serve the remainder of his sentence of incarceration ordered nearly two years ago after having been convicted beyond a reasonable doubt in 2021 by a jury of his peers of five felonies under Illinois law.

Dated: February 26, 2024

Respectfully submitted,

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[5] It is properly forfeited again here in the Petition because Smollett's conclusory and undeveloped argument fails to meet the requirements of Rule 341(h)(7). *Sobczak v. Gen. Motors Corp.*, 373 Ill. App. 3d 910, 924 (1st Dist. 2007); *see also Bartlow v. Costigan*, 2014 IL 115152, ¶ 52 ("[A] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented." (internal quotations omitted)).

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 315(d), 315(f), 341(a) and (b). The length of this answer, excluding the items identified in Rule 341(b)(1), is 17 pages.

s/ *Sean G. Wieber*

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**PROOF OF FILING AND SERVICE**

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that on February 26, 2024, the foregoing Office of the Special Prosecutor's Answer to Jussie Smollett's Petition for Leave to Appeal was electronically filed with the Clerk, Supreme Court of Illinois, thereby causing service to be effected electronically to:

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