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Thomas D. Palella
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APPELLATE COURT 1ST DISTRICT

No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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

BRIEF AND ARGUMENT OF DEFENDANT APPELLANT

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Jussie Smollett was convicted of five counts of disorderly conduct, following a jury trial in the Circuit Court of Cook County, Illinois. (C1420); (C1714-1721). He was sentenced on March 10, 2022, to a term of two years of felony probation, with the first 150 days to be served as a term of imprisonment in the Cook County Department of Corrections, for the offenses of Disorderly Conduct (vis a vis filing a false police report) (C652-C658, C1709). A notice of appeal was timely filed on March 10, 2022. (C1710-C1711;C1722-C1723; C1714-1721).

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Whether the State's failure to perform its part of a non-prosecution agreement deprived Mr. Smollett of due process where Mr. Smollett detrimentally relied on the non-prosecution agreement and fully performed his part of the agreement by completing community service and forfeiting his $10,000 bail bond (which has never been returned to him), warranting a reversal of his convictions and dismissal of the charges.

2. Whether Mr. Smollett's bail bond forfeiture and performance of community service in his first prosecution and as part of a pretrial agreement, constitutes punishment, thereby rendering his subsequent prosecution and additional punishment for the same alleged offenses as a violation of the Double Jeopardy clause of the Fifth Amendment prohibiting multiple punishments for the same offense.

3. Whether the unprecedented renewed prosecution of Mr. Smollett was invalid on its face, where (1) statutory authority was lacking for the appointment of a special prosecutor, (2) the appointment order was vague and overbroad, (3) the appointment of a private special prosecutor was not statutorily allowed, and (4) the circuit court judge improperly denied the defense motion for substitution of judge for cause, rendering every subsequent ruling and action in this case null and void.

4. Whether the trial court violated Mr. Smollett's Sixth Amendment Right to counsel when it prohibited lead defense counsel from cross-examining the OSP's star witnesses during the trial due to an alleged conflict that was never disclosed or presented even during an in-camera evidentiary hearing where the trial court also prevented the defense from inquiring as to the nature of the conflict.

5. Whether the trial court violated Illinois Supreme Court Rule 412 when it denied Mr. Smollett's discovery motion to compel the OSP to turn over notes to the trial court for an in-camera review and which pertained to interviews the OSP conducted with the central witnesses against Mr. Smollett.

6. Whether the trial court violated Illinois Supreme Court Rule 431 and committed reversible error when it barred attorneys from directly questioning prospective jurors in a highly publicized case.

7. Whether the trial Court committed reversible error by failing to give an Illinois Pattern Jury Instruction on accomplice testimony in a case where the prosecution's star witnesses testified to assisting the defendant in planning his alleged crime.

8. Whether the sentence imposed on Mr. Smollett by the trial Court was excessive where the maximum fines were imposed, the sentence portion requiring Mr. Smollett to serve the first 150 days of his term of probation in custody was not commensurate with the nature of the crime or mitigation presented in sentencing, and where the crime Mr. Smollett was convicted of lacked a "victim" which would allow for restitution to be paid in addition to a fine already imposed.

9. Whether the trial court violated Mr. Smollett's Due Process Rights when it made several uninvited commentaries during defense cross-examination of prosecution witnesses.

10. Whether the trial Court violated the Defendant's Fourteenth Amendment Rights to Due Process and Equal Protections under the law and thus committed reversible error by depriving Defendant of a jury of his peers where the trial court repeatedly made rulings in violation of the principles established in *Batson v. Kentucky* during jury selection.

11. Whether the trial Court violated Mr. Smollett's due process right by allowing Mr. Smollett's Good Morning America video interview to go back to jury deliberations even though during the trial, the jury only saw a portion of the same interview for impeachment purposes.

12. Whether the trial court violated Mr. Smollett's Sixth Amendment Right to a fair trial when it restricted the public's access to the courtroom during *Voir Dire*, ejected a member of the public from the trial for speaking to the press and arbitrarily enforced its own COVID-19 protocol.

13. Whether Mr. Smollett's Constitutional rights to due process and fair trial were violated when (1) a witness testified that the OSP prosecutor pressured him into changing his statement, (2) prosecutors made comments during closing argument that implied Mr. Smollett failed to produce evidence, and (3) prosecutors questioned witnesses concerning Mr. Smollett's post arrest silence.

JURISDICTION

Jussie Smollett appeals from a final judgment of conviction in a criminal case. He was sentenced on March 10, 2022, to a term of two years of felony probation, with the first 150 days to be served as a term of imprisonment in the Cook County Department of Corrections, for the offenses of Disorderly Conduct (vis a vis filing false police report) (C652-C658, C1709) A notice of appeal was timely filed on March 10, 2022. (C1710-C1711, C1722-C1723).

Jurisdiction therefore properly lies in this Court pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court rules 603 and 606.

STATEMENT OF THE FACTS

Mr. Smollett was charged by way of felony indictment (No. 19 CR 3104), on March 7, 2019, with 16 counts of "Disorderly Conduct"/ "FALSE REPORT OFFENSE". (CI 30-46). On March 26, 2019, by agreement of the parties, the State's Attorneys made a motion to nolle pros all 16 counts charged, which the trial Court granted. (CI 47-52; CI 73; SUP C 7 -11).

Shortly after the charges against Mr. Smollett were dismissed, several petitions were filed with the chief judge of the Cook County Circuit Court including a motion for appointment of a special prosecutor to prosecute and investigate the charges and dismissal of charges against Mr. Smollett under case: 19 CR 3104. (C 44-76; C 418-435; C 206-209). Attorneys on behalf of Mr. Smollett filed an objection to the petitions. (C 77-84). The State's Attorney's Office also filed an objection. (SUP2 C 7-29, SUP2 C 30, SUP2 C 71-85). Judge Toomin issued an Order granting the appointment of a special prosecutor. (Office of Special Prosecutor, hereinafter, "OSP"). (C 446-467). Attorneys on behalf of Mr. Smollett filed several other motions in relation to objecting to the appointment of the special prosecutor, including a motion for SOJ for cause. (SUP C1046-1056; R 155-147). On February 11, 2020, a new true bill of indictment was filed against Mr. Smollett, by the special prosecutor, charging him with six counts of "DISORDERLY CONDUCT"/"FALSE REPORT OFFENSE". (C 652-658).

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

On February 25, 2022, the defense filed a Post-Trial Motion for Judgment Notwithstanding the Verdict and for New Trial. (C 19; C 1578-1660). The matter proceeded to

hearing on post-trial motions on March 10, 2022. (R 3355-3561). The trial court denied the defendant's Motion for Judgment Notwithstanding the Verdict and for New Trial and the matter proceeded to sentencing. (R 3355-3402, R3402-3434). A presentence investigation report was presented, and the parties offered evidence and argued in aggravation and mitigation. (CI 84-92; R 3435; C 1685-1693; R 3435-3439, CI93-CI104/R3439-R3490). The trial Court sentenced Mr. Smollett to 30 months of felony probation with the first 150 days of the sentence to be served in the custody of the Cook County Jail, as well as the maximum fines of $25,000 and restitution in the amount of $120,106. (C 1712; C1714; R 3557). Counsel for Defendant filed a Motion to Reconsider Sentence following the sentencing, which was denied (SUP C 2221-SUP C 2222; SUP C 1613- SUP C 1614; R 3559). A notice of appeal was timely filed on March 10, 2022. (R 3559-3560, C 1721-1723). This matter now comes before this Court on direct appeal from a judgment in the criminal case of five counts of Disorderly Conduct.

Procedural History

After Mr. Smollett was indicted the second time for the same crime, counsels for Mr. Smollett filed several motions to dismiss with different bases and were all denied (C10, C 857-877; SUP2 C 8-512), C13, C14). On February 24, 2020, counsels for the Defendant filed a Motion to Dismiss Indictment for Violation of Double Jeopardy, which was denied by the trial court on June 12, 2020. (C 10; C 683 - 728; SUP R 2224-2290). Subsequently, on July 20, 2020, the defense filed another Motion to Dismiss Indictment and Memorandum of Law in Support (C 857-877; SUP2 C 7-512) This motion too was denied by the Court on or about September 10, 2020. (C 13; R 208-259). On September 9, 2020, counsels for the defense filed a Motion to Quash and Dismiss Indictment, this time based upon violations of the 5th Amendment (C 13; CI 346-422). This motion was also denied by the Court on or about October 14, 2020 (C14; SUP2 R 525-590).

In late February 2021, an Intervenor's Motion to Disqualify Defense Counsel was filed and on March 8, 2021, the defense filed a Motion in Opposition. (C 1294-1305; CI 281-293). Between March 9, 2021, and July 6, 2021, several other objections and pleadings were filed in regard to the Motion to Disqualify Defense attorney and the trial Court's order for an evidentiary hearing on the matter. (CI 193-CI 194; CI 277-281; CI 256-262; CI 275; CI 715-717). After denying the entirety of the defendant's motions to reconsider, the trial court conducted an in-person in camera evidentiary hearing on July 14, 2021, regarding the prosecution's Motion to Disqualify Defense Counsel. (R 537-789). On July 29, 2021, the trial court filed an order making a ruling that barred lead defense counsel from cross-examining the Osundairo brothers at trial. (C 1319-1328; CI 745-754). On August 27, 2021, the defense filed a Motion to Reconsider Rulings and Findings and Motion to Strike and Unseal. (CI 423-713; CI 745-754). The Court denied both motions on September 2, 2021, but made a small adjustment to its written ruling. (CI 198-199). On October 13, 2021, the Defense filed a Motion to Dismiss on the theory of breach of contract. (CI 324-336). On October 15, 2021, counsel for the Defense filed a Motion to Disqualify the OSP. (C 1335-1342). On October 15, 2021, Defendant filed his Motion to Compel Discovery (C 16, CI 337-345). The trial court denied all three of Defendant's motions on or about October 15, 2021. (C 1343, R 897-916).

ARGUMENT

I.

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

A. Standard of Review

This Court should review this issue *de novo*, since the trial court never analyzed facts pertaining to this issue and since Mr. Smollett argues that he was prejudiced when he was denied due process. *People v. Stapinski*, 2015 IL 118278, ¶ 35.

B. Legal Analysis

The State of Illinois' breach of a non-prosecution agreement, by re-prosecuting Mr. Smollett, violated Mr. Smollett's due process rights because Mr. Smollett fully performed his part of the agreement to his detriment while the State benefited from the agreement.

In Illinois, it has long been established that pretrial agreements between the prosecution and the defense will be enforced. *People v. Starks*, 106 Ill. 2d 441 (1985). Illinois courts apply common law contractual principles when determining the existence of such agreements. *Starks*, 106 Ill. 2d at 451; *Stapinski*, 2015 IL 118278, ¶ 47.

For instance, in *Starks*, the prosecution had promised the defendant that armed robbery charges would be dismissed if the defendant submitted to and passed a polygraph examination. *Starks*, 106 Ill. 2d at 444. The defendant passed the polygraph and prosecutors reneged on the agreement. *Id*. A jury trial was held, and the defendant was convicted. *Id*.

The Illinois Supreme Court in *Starks* applied contractual principles in reviewing the agreement in *Starks*. *Id.* at 451. The Court rejected the State's argument that the alleged agreement lacked consideration and thus, was a "gift-type" of bargain. *Id.* Instead, the *Starks* Court noted that consideration existed in the agreement because "the defendant surrendered his fifth amendment privilege against self-incrimination" and thus, submitted to the risk of exposing guilt. *Id.* at 452.

The existence of an agreement formed the basis of the *Starks* court's main conclusion that "the prosecution must honor the terms of agreements it makes with defendants." *Id.* at 449. Especially if, as the *Starks* court noted, the defendant has "fulfilled his part of it," *Id.* at 452. The *Starks* court decision echoed the contractual principle that every agreement has an implied duty of good faith and fair dealing which the *Starks* court implicitly noted was significant in preventing the nullification of the essential bargaining system within the criminal justice system. *Id* at 449-452. Even though the *Starks* court did not explicitly tie its reasoning to the fundamental fairness found in due process, this Court did that when it succinctly stated in another breach of a non-prosecution agreement case that:

> [t]o allow the government to receive the benefit of its bargain without providing the reciprocal benefit contracted for by the defendant would do more than violate the private contractual rights of the parties -- it would offend all notions of fairness in the related criminal proceedings, which are protected by constitutional due process.

People v. Marion, 2015 IL App (1st) 131011, ¶ 38.

This fundamental fairness rationale for enforcing prosecutorial agreements has even been extended to cover situations where police officers make *unauthorized* promises to defendants. *Stapinski*, 2015 IL 118278, ¶ 55. In such situations, the fundamental fairness rationale of enforcing

such agreements is made where the defendant's reliance on the agreement has constitutional consequences. *Id* at ¶ 55.

And as was the case in *Starks and Marion*, the *Stapinski* decision was driven by a fundamental fairness rationale stemming from the Due Process Clause of the Fourteenth Amendment. *Id.* at ¶¶ 48-49. As our Supreme Court explained:

> Due process is implicated whenever the State engages in conduct towards its citizens deemed oppressive, arbitrary, or unreasonable. Further, since the essence of due process is fundamental fairness, due process essentially requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections. To violate substantive due process, the government's conduct must shock the conscience and violate the decencies of civilized conduct.

Id. at ¶ 51 (internal quotation marks omitted).

Accordingly, the *Stapinski* court recognized that this fundamental fairness rationale requires that courts should enforce agreements where "the defendant has acted to his detriment or prejudice in reliance upon the agreement." *Id* at ¶ 48.

The *Stapinski* court also explained that such a breach violates "the right not to be hauled into court at all which operates to deny due process of law." *Id at* ¶ 46*; see also People v. Smith*, 233 Ill. App. 3d 342, 350 (2d Dist. 1992).

Additionally, at the crux of the *Stapinski* holding was the Illinois Supreme Court's firm rejection of the State's argument that it was not bound by an agreement between a police officer and the defendant, since the State's Attorney's office never approved the agreement. *Id.* at ¶¶ 53-55. The *Stapinski* court could not have been clearer when it held that "whether the cooperation agreement was valid in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences." *Id.* at ¶ 55. As a result, the *Stapinski* court found that

the defendant in that case incriminated himself when he relied upon the non-prosecution cooperation agreement. *Id.* Thus, the breach of the agreement by the prosecution was a prejudicial violation of the defendant's due process rights. *Id.*[1]

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

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

Stapinski, 2015 IL 118278, ¶ 48 (emphasis added). *See also*, *U.S. v. Lyons*, 670 F.2d 77, 80 (7th Cir. 1982) ("any agreement made by the government must be scrupulous performed and kept").

In the aforementioned quote, the *Stapinski* court's reasoning is all encompassing and focused on a call to generally enforce prosecutorial agreements that have been detrimentally relied upon by a defendant. This should come as no surprise since the *Stapinski* court based the foundation of its fundamental fairness rationale on the holding in *Starks*; a case not involving the typical cooperation agreement seen in *Stapinski*. *See*, *Stapinski*, 2015 IL 118278, ¶ 38-49.[2]

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

[2] Even the dissent in *Starks* acknowledged that the *Starks* ruling applied to all pre-trial agreements when the dissent stated, "the majority paints with too broad a brush when it says that the prosecution must honor the terms of all agreements made with defendants." *Starks*, 106 Ill. 2d at 454 (Ward, J., dissenting, joined by Moran and Miller, JJ.).

Thus, the gist of *Stapiniski*, is that its ruling expands this principle to unauthorized agreements.

Interestingly too, Justice Ward's dissent in *Starks* was informed by the fact that the polygraph test was inadmissible at trial and hence, the dissent believed the "defendant here gave up nothing." *Id*. Thus, even under the *Starks*' dissent reasoning, a breach occurred here since Mr. Smollett gave up his $10,000 bail bond.

Also, other jurisdictions around the United States have gone beyond the modern-typical cooperation agreements and have enforced agreements in ***analogous contexts*** involving deferred prosecutions. *See, e.g*., *State v. Platt*, 162 Ariz. 414, 783 P.2d 1206 (Ariz. Ct. App. 1989) (holding that a deferred prosecution agreement may not be rescinded "simply because the state, on reflection, wishes it had not entered into the agreement at all"); *see also United States v. Garcia*, 519 F.2d 1343, 1345 (9th Cir. 1975).

The present case implicates the same fundamental fairness and due process concerns that were present in *Starks*, *Stapinski,* and their progeny. As an initial matter, the record is amply clear that the State and Mr. Smollett entered into an agreement and that Mr. Smollett performed all that was required of him pursuant to that agreement. (SUP C 1458-1459; R 4-5). *See example, Smith,* 233 Ill. App. 3d at 344, 346 (an evidentiary hearing on the existence of a contractual agreement between the state and defendant is not necessary if it can be gleaned from court transcripts that such an agreement was made).

The consideration for the agreement is also equally clear—Mr. Smollett forfeited something of value (his $10,000 bail bond) which benefited the State to his detriment.[3]

Even without forfeiture of his bail bond, Mr. Smollett's cooperation alone, in agreeing to perform community service, is sufficient consideration under the holdings of *Stapinski* and *Smith*.

Under the *Starks* holding, this contractual non-prosecution agreement between the State and Mr. Smollett should be enforced because Mr. Smollett's contractual rights were violated by re-prosecution because as part of the non-prosecution agreement, Mr. Smollett gave up his $10,000 bail bond to the State's benefit *and to his detriment*. (SUP C 1458-1459; R 4-5). Thus, the policy

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

considerations of promoting good faith and fair dealing and avoiding nullification of the criminal court's bargaining system are equally applicable here, if not more so, as it was in *Starks*. By reindicting Mr. Smollett, the State not only reneged on its agreement, but it resurrected and nullified a *dead*, *buried*, and already enforced agreement.

Further, even assuming, *arguendo,* the Cook County prosecutors, did not have authorization to enter into an agreement with Mr. Smollett, his assigned prosecutor's promises are no different than that of the unauthorized promises made by police in *Stapinski*. (C 710; C 1475). And like the defendant in *Stapinski*, the agreement here should be enforced on due process grounds because Mr. Smollett's reliance on the promise has constitutional consequences.

First, the impact of the State's actions on Mr. Smollett's Fourteenth Amendment substantive due process right is as apparent as it was in *Stapinski*. Under the Fourteenth Amendment due process analysis, there is nothing *fair or honorable* about the State *pulling a fast one* and pocketing Mr. Smollett's $10,000 bail bond money and making him perform community service to his detriment, while blatantly failing to meet its end of the bargain.

Also, there are even more constitutional violations in this case than in *Stapinski*, as the State's breach of the non-prosecution agreement with Mr. Smollett violates not only Mr. Smollett's substantive due process rights but also his procedural due process rights. For example, Mr. Smollett has a property interest in his $10,000 bail bond, which the State cannot deprive him of without due process of law, as explicitly guaranteed by the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. Amend. XIV ("nor shall any state deprive any person of life, liberty, or property without due process of law"). However, the State did just that. By re-prosecuting Mr. Smollett in direct contravention of its non-prosecution agreement pursuant to which Mr. Smollett

agreed to forfeit his $10,000 bail bond, the State has effectively denied Mr. Smollett proper notice and an impartial hearing as to the propriety of that forfeiture.

Nor should it be forgotten, the *Stapinski* court's finding that due process is not just designed to protect an individual's personal rights, but also to protect an individual's property rights from arbitrary and capricious governmental action. *Stapinski*, 2015 IL 118278, ¶ 50. Thus, the State's breach of the agreement after taking of Mr. Smollett's bail bond is a violation of Mr. Smollett's substantive and procedural due process rights. In fact, this is precisely the scenario this Court denounced in *Marion* when it warned that "to allow the government to receive the benefit of its bargain without providing the reciprocal benefit contracted for by the defendant would…offend all notions of fairness…which are protected by constitutional due process." 2015 IL App (1st) 131011, ¶ 38. Thus, fundamental fairness requires the State and its appointed agents, fulfill their end of the bargain.

In addition to the forfeiture of his bail bond and performance of community service, the State further violated Mr. Smollett's due process rights when it breached the essence of the non-prosecution agreement, which was *his right not to be hauled into court*, as the *Stapinski* and *Smith* courts described. The subsequent prosecution of Mr. Smollett flatly contradicted the State's on-the-record representation that Mr. Smollett's compliance with the agreement and subsequent dismissal of the charges was "a just disposition and appropriate resolution in this case." (SUP C 1458-1459; R 4-5). The prosecutor's words made it clear that the case was *permanently* over. And if not clear enough, "basic considerations of fairness dictate that any ambiguity in the agreement should be resolved in favor of the defendant." *See*, *People v. Weilmuenster*, 283 Ill. App. 3d 613, 625 (2d Dist. 1996). Even in technical terms, it was never intended by the prosecution to *haul* Mr.

Smollett back into court, because upon the forfeiture of the $10,000 bail bond, there was nothing binding him to the court and Mr. Smollett's obligation to appear in court had terminated.

There should be no doubt that the second prosecution of Mr. Smollett was driven by the unpopular discretionary decision of an elected State's Attorney's Office, which, as a motive, cannot and should never override fundamental fairness and due process. For example, when a special prosecutor was later appointed in this case, one of his tasks was to investigate whether there was any misconduct or improper influence by any third parties leading to the resolution reached between the State's Attorney's Office and Mr. Smollett. The specially appointed prosecutor concluded **there was not**. (C 1478-1480; C 892). While the agreed-upon resolution was unpopular, it was a legal and valid exercise of prosecutorial discretion. Our courts have recognized that the State's Attorney, as an elected official, has "been afforded a broad range of discretion within which to perform [his or her] public duties." *Starks*, 106 Ill. 2d at 449, *citing*, *People v. McCollouch*, 57 Ill. 2d 440, 444 (1974). The actions of the State of Illinois, in reneging on the non-prosecution agreement is particularly egregious here, where a non-elected special prosecutor's office second-guessed the discretion exercised by the elected State's Attorney's Office and chose to breach a non-prosecution agreement entered by that office. *See e.g*., (C 727) (Where the OSP, in its prepared written Information Release to announce the second indictment, stated that it "disagrees with how the CCSAO resolved the Smollett case.").

In virtually every jurisdiction, non-prosecution agreements like the one entered here have been enforced, despite a change of heart or disagreement with the terms. *See, again, State v. Platt*, 162 Ariz. 414, 783 P.2d 1206 (Ariz. Ct. App. 1989) (finding a deferred prosecution agreement enforceable even if the "state, on reflection, wishes it had not entered into the agreement at all"); *see also*, *People v. Reagan*, 395 Mich. 306, 235 N.W.2d 581 (1975) (agreement enforced even

though prosecutors discovered the basis of forming the agreement may have been unreliable); *State v. Thompson*, 48 Md. App. 219, 222-23, 426 A.2d 14, 16 (1981) (enforcing a non-prosecution agreement and stating that "the awesome power, vested by the people in the State's Attorney, should not be employed for the purpose of applying balm to a wounded ego or to the fulfillment of a personal vendetta").

Consequently, no matter the scenario triggering prosecutorial regret towards an agreement, there should never be "judicial approval of the government violating its agreement" with a defendant. *People v. Schmitt*, 173 Ill. App. 3d 66, 101 (1st Dist. 1992).

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

In the present case, the Cook County State's Attorney's Office entered and executed the agreement with Mr. Smollett. In doing so, the Cook County State's Attorney's Office did so on behalf of its principal, the State of Illinois and no one else. Likewise, the OSP was appointed to act on behalf of the State of Illinois during its investigation and eventual prosecution of Mr.

Smollett. *See*, (C 369), (order appointing Dan K. Webb as the special prosecutor and noting that "the Special Prosecutor shall be vested with the same powers and authority of the elected State's Attorney of Cook County, limited only by the subject matter of this investigation"). In fact, the caption of the Special Counsel's indictment papers against Mr. Smollett reads: "State of Illinois v. Jussie Smollett." (C 652). This caption also reflects the fact that the Office of Special Counsel represents the State of Illinois and no one else. Also, as a fundamental tenet of agency, the act of an agent is attributable to the principal.[4] Thus, the non-prosecution agreement formed and executed between the Cook County State's Attorney's Office and Mr. Smollett is binding on the State of Illinois and cannot be undone or ignored by changing the agent—in this case, by bringing in a special prosecutor to re-prosecute Mr. Smollett.

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court's ruling for failing to dismiss Mr. Smollett's indictment on due process grounds.

II.

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

A. Standard of Review

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

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

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

B. Legal Analysis

Mr. Smollett's negotiated bail bond forfeiture and performance of community service during his first prosecution constituted punishment and thus, his second prosecution and punishment for the same offenses violated the Double Jeopardy Clause protection against multiple punishments for the same offense.

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

The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989).

Importantly, as it pertains to the third of these protections—the one at issue here—punishment pursuant to a compromise agreement, *even in the absence of a conviction or judgment*, constitutes punishment for purposes of the Double Jeopardy Clause. *See, United States v. Chouteau*, 102 U.S. 603, 611 (1880); *State v. Maisey*, 600 S.E. 2d 294 (W. Va. 2004); *Commonwealth v. McSorley*, 335 Pa. Super. 522 (Pa. Super. Ct. 1984).

1. For purposes of double jeopardy, jeopardy attaches when criminal punishment is imposed.

It is undisputed that as a part of a negotiated disposition in connection with the first indictment (which was tantamount to an alternative prosecution or pretrial diversion agreement or program[5]), Mr. Smollett satisfied the State as to his performance of community service and forfeited his $10,000 bond. (SUP C 1458-1459; R 4-5). When the court accepted this disposition and entered an order dismissing the charges and forfeiting the bond, jeopardy attached, thereby barring further prosecution of Mr. Smollett for the same offenses under the Double Jeopardy Clause.

Although it does not appear that Illinois has had the occasion to consider the application of double jeopardy principles to diversion agreements (since it is virtually unheard of for the State to re-prosecute someone who has successfully completed such a program), other states which have considered this issue have held that jeopardy attaches when a defendant completes the terms of a

[5] Deferred prosecution, also referred to as alternative prosecution or alternative sentencing, or pretrial diversion is a program offered to divert offenders from traditional criminal justice into a program of supervision and services. Programs may impose terms of probation or supervision, some impose extensive and invasive counseling or treatment, others impose fines, while others do not impose sanctions at all. *See generally,* 22A C.J.S. Criminal Procedure and Rights of Accused § 290 (Nature and purpose—Deferrals).

pretrial diversion program and that subsequent prosecution is barred by the Double Jeopardy Clause, even in the absence of a conviction or sentence.[6]

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

In reversing the judgment on appeal, the court explained that "[i]f pretrial diversion programs are to be effective, the state must live up to its agreements. It cannot avoid its obligation by splitting responsibilities between its agencies and pretending that it acts disparately. What it knew and did in Medina County through its agent it knew in legal contemplation in Cuyahoga County and was bound in both places by applicable federal and state constitutional principles." *Id.* at 157. The court added that "[n]egligence or oversight on the part of Cuyahoga County does not legalize the consequences." *Id* at 156.

The court also noted that completing the terms of a pretrial diversion program amounts to criminal punishment. *Id* at 157. As the court explained, "[i]t may seem a novel idea to some, but it is not far-fetched to conclude that success in a diversion program is the constructive equivalent

[6] Our research has not uncovered any authority which provides that jeopardy must attach in the traditional sense (empaneling and swearing of a jury in a jury trial, swearing in of first witness at a bench trial, or acceptance of guilty plea) in cases implicating the multiple punishment prong of the Double Jeopardy Clause. Rather, the guidance by the High Court is that imposition of a criminal punishment is itself another method by which jeopardy attaches. *See United States ex rel. Marcus v. Hess,* 317 U.S. 537, 548-49 (1943) ("[C]riminal punishment . . . subject[s] the defendant to 'jeopardy' within the constitutional meaning."). The Illinois Supreme Court has recognized that double punishment is distinct from the other double jeopardy protections. *See, e.g., People v.* Milka, 211 Ill. 2d 150, 174 (Ill. 2004) ("The purpose of the prohibition of double jeopardy, questions of double punishment aside, finds expression in the maxim nemo debet bis vexari pro una et eadem causa, no one shall be twice vexed for one and the same cause.").

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

An appellate court in Pennsylvania confronted a similar issue in *Commonwealth v. McSorley*, 335 Pa. Super. 522 (Pa. Super. Ct. 1984). There, a diversionary program for DUI drivers inadvertently sent the defendant an application which required him to attend driving school and to pay a $50.00 fee for the program. *Id.* at 524-525. The defendant completed the program successfully. *Id*. After successfully completing the program, prosecutors moved to prosecute the defendant, arguing that he was not eligible for the program. *Id*.

Although the *McSorley* court found that the first letter directing the defendant to appear at the driving classes appeared to be an administrative error and that the procedures outlined in the code of criminal procedure were not followed, the court still found that the defendant detrimentally relied on the letter and that he was justified in doing so. *Id* at 526; 530. As the court explained, the "inadvertence" occurred within the District Attorney's Office and "[w]hat the district attorney's office knew and did with its right hand (sending the notification that appellant could reasonably

have interpreted as evidencing his acceptance into ARD), it cannot take away with its left hand (by claiming that appellant was ineligible)." *Id.* Thus, the court held that the defendant was implicitly accepted into ARD and that the Commonwealth was restrained from further prosecuting him based on double jeopardy. *Id.*

The Supreme Court of Appeals of West Virginia also confronted a similar issue in *State v. Maisey*, 600 S.E. 2d 294 (W. Va. 2004), where an 18-year-old defendant had been charged with carrying a concealed and deadly weapon. *Id* at 295-97. The trial court issued a pretrial diversion order that required the defendant to complete 50 hours of community service, to not violate any laws, and to not have any unexcused absences from school. *Id*. After several months passed, the prosecutor mailed a letter to the defendant's counsel claiming that the defendant had failed to comply with the pretrial diversion order because he had not provided proof of his community service. *Id*. As a result, the prosecutor then filed a motion to terminate the pretrial diversion order and reinstate the criminal complaint and warrant. *Id*. The court subsequently held a bench trial and found the defendant guilty, fining him $100 plus costs and fees, and sentencing him to 30 days in jail, with only 5 days to be served and the other 25 days suspended in exchange for completion of 50 hours of community service. *Id*.

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

> We agree that when a person charged with a criminal offense successfully complies with the terms of a **pretrial diversion agreement**, the State may not prosecute the

> defendant for that criminal offense, or for the underlying conduct, in the absence of an agreement that the defendant will plead guilty or nolo contendere to a related offense.

Id. (Emphasis in bold added).

The cases above are instructive. The rationale in these cases is that a defendant who has agreed to terms of a pretrial diversion agreement and who successfully completes the terms of the agreement, has kept his part of the bargain and should be able to consider the matter closed and final, without fear that the matter will arise again. These holdings are consistent with the United States Supreme Court's explicit directive 140 years ago that punishment pursuant to a compromise agreement, even in the absence of a conviction or judgment, bars a second punishment for the same offense. *See United States v. Chouteau*, 102 U.S. 603, 611 (1880). These holdings are also consistent with the Supreme Court's directive that the question of assessing whether jeopardy attaches is *not* to be decided by any mechanical test. *See Illinois v. Somerville*, 410 U.S. 458, 467-71 (1973); *United States v. Jorn*, 400 U.S. 470, 486-87 (1971); *United States v. Sisson*, 399 U.S. 267, 305-308 (1970).

Because it is undisputed that Mr. Smollett held up his end of the bargain of what was in essence an alternative prosecution, jeopardy attached at the time Mr. Smollett's charges were dismissed and his bond forfeited. And the successive prosecutions of Mr. Smollett by the Cook County State's Attorney's Office and the Office of the Special Prosecutor must be viewed as the acts of a single sovereign under the Double Jeopardy Clause, *see Brown v. Ohio*, 432 U.S. 161, 164, fn. 4 (1977). *See* (C 369; SUP2 C 7-29, SUP2 C 30, SUP2 C 364).

2. Smollett's conviction and punishment violates the spirit of the Double Jeopardy Clause and should be reversed on public policy grounds.

The second prosecution and sentencing of Mr. Smollett not only violates the spirit of the double jeopardy clause but sets dangerous precedent because it upends the executive discretionary powers recognized by our courts as afforded to prosecutors while burdening Illinois taxpayers who might foot the bill for numerous re-prosecutions when elected prosecutors are second-guessed. *See again, Starks*, 106 Ill. 2d at 449.

The underlying aim of the Double Jeopardy Clause is that "the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty." *Green v. United States*, 355 U. S. 184, 187-88 (1957).

It is well settled that the rules regarding double jeopardy should not be applied in a rigid, mechanical nature, especially if the situation is such that the interests the rules seek to protect are not endangered and a mechanical application would frustrate society's interest in enforcing its criminal laws. *See Illinois v. Somerville*, 410 U. S. 458, 467-69 (1973). Indeed, the Supreme Court has admonished against the use of "technicalities" in interpreting the Double Jeopardy Clause, and the normal rule as to the attachment of jeopardy is merely a presumption which is rebuttable in cases where an analysis of the respective interests of the Government and the accused indicates that the policies of the Double Jeopardy Clause would be frustrated by further prosecution. *See Id.*

Here, the only reason there was even a second indictment was because the elected state's attorney's office's resolution of the first indictment was not well received by the public, prompting a *pro se* petition for the appointment of a special prosecutor by a "concerned citizen." SUP2 C 7-29, SUP2 C 30, SUP2 C 71-85). And, as Special Prosecutor Webb complained, in his opinion, the punishment for the first indictment (community service and bond forfeiture) was not harsh enough.

(C 687-688; C 726-728). However, "the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding" *See United States v. Halper*, 490 U.S. 435, 451 n.10 (1989) (abrogated on other grounds by *Hudson v. United States*, 522 U.S. 93 (1997)).

If Mr. Smollett's convictions are allowed to stand, this case will set a dangerous precedent by giving prosecutors a second bite at the apple any time there is dissatisfaction with another prosecutor's exercise of discretion. This will have disastrous effects on our criminal justice system and have the dual impact of violating deep-rooted constitutional protections while burdening taxpayers with the costs of successive criminal prosecutions based on prosecutorial disagreement.

Conclusion

For all the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court's ruling denying Mr. Smollett's motion to dismiss the indictment against him for violating the Double Jeopardy Clause of the Fifth Amendment.

III.

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

A. Introduction

Disqualification of a duly elected State's Attorney must not be taken lightly, for in essence such action disenfranchises the very electorate who in its wisdom has

> selected that person for public office. The Office of the State's Attorney is an office of constitutional dimension reposing in the executive branch of government, co-equal to the legislature as well as the judiciary. Although the legislature has empowered judges to affect the removal of the State's Attorney in certain limited situations, respect for the doctrine of separation of powers militates against the exercise of such power unless clearly warranted.

E.H. v. Devine (in re Harris), 335 Ill. App. 3d 517, 525 (1st Dist. 2002).

B. Standard of Review

In Illinois, legal issues regarding the propriety of the appointment of a special prosecutor are reviewed de novo. *Devine (in re Harris)*, 335 Ill. App. 3d at 525-526.

C. Legal Analysis

The unprecedented, renewed prosecution of Mr. Smollett stemmed from the improper and unlawful appointment of a special prosecutor in a manner that failed to comply with Section 3-9008 of the Illinois statute (55 ILCS 5/3-9008), and applicable law.

1. The circuit court abused its discretion because the appointment of a special prosecutor lacked statutory authority.

The duties and powers of a State's Attorney in the State of Illinois are governed by Section 3-9005 of the Counties Code, which provides that a State's Attorney "shall commence and prosecute all actions, suits, indictments, and prosecutions, civil and criminal, in the circuit court of his county, in which the people of the State or county may be concerned." 55 ILCS 5/3-9005(a)(1) (West. 2018). The State's Attorney, as a public official and a member of the executive branch of government, is vested with exclusive discretion of the initiation and management of criminal prosecutions in his county. *People v. Novak*, 163 Ill. 2d 93, 113 (1994).

In very limited situations a State's Attorney's prosecutorial authority can be challenged. Section 3-9008 of the Illinois Compiled Statutes provides the entire legal framework by which a court is permitted to appoint a special prosecutor in a criminal proceeding in the State of Illinois.

55 ILCS 5/3-9008 (a-5); (a-10); (a-15). The specific subsection relevant to this matter reads as follows:

> (a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney **may file** a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate, and the court shall appoint a special prosecutor as provided in this Section.

55 ILCS 5/3-9008 (a-15). (Emphasis in bold added).[7]

There is no authority allowing the court or anyone else to appoint a special prosecutor under subsection (a-15) absent a formal recusal petition from the prosecutor. The reason is subsection (a-15) does not anticipate scenarios with any actual conflicts. Moreover, State's Attorney Foxx never intended to trigger statutory authority (a-15) because she never filed a petition to recuse herself with the courts. Finally, State's Attorney Foxx objected to the appointment of a special prosecutor. (C 155; SUP2 C 7-29, SUP2 C 30, SUP2 C 71-85). The matter should have ended there.

By finding that Ms. Foxx triggered subsection (a-15) *through media reports rather than a formal filing,* the court misapplied the law, erroneously created statutory language that does not exist and exceeded its authority. [8] Accordingly, the appointment of a special prosecutor under 55 ILCS 5/3-9008 is void and the prosecution invalid since the appointment was not done in accordance with the statute's plain language. *See In re Appointment of Special Prosecutor,* 2019 IL App (1st) 173173, ¶¶ 23–30. *See also, People v. Ward*, 326 Ill. App. 3d. 897, 902 (5th Dist. 2002).

a. A special prosecutor could not be appointed to a matter that was no longer pending.

[7] Here, although the petition for appointment of a special prosecutor sought the appointment based on subsections (a-5) and (a-10), the court correctly denied relief under those subsections but erroneously appointed the special prosecutor based exclusively on subsection (a-15). (CI 20-21; SUP2 C 7-29, SUP2 C 30, SUP2 C 86-109).

[8] (SUP2 C 7-29, SUP2 C 30, SUP2 C 88).

The plain language of 55 ILCS 5/3-9008 (a-15) demonstrates that it is intended to apply to a very narrow and specific set of situations in order to allow certain *pending* matters to be properly prosecuted or defended despite the inability of the State's Attorney to proceed. *People v. Morley*, 287 Ill. App. 3d 499, 503-04 (2d Dist. 1997). Indeed, the statutory language "to prosecute or defend a cause or proceeding" presupposes that there is a live proceeding in need of zealous prosecution. *See* 55 ILCS 5/3-9008; *see also, Devine (in re Harris),* 335 Ill. App. 3d at 520.

Here, the case which the petitioner sought to have a special prosecutor appointed to (19 CR 03104-01) had already been prosecuted by representatives of the Cook County State's Attorney's Office, *nolle prossed,* and dismissed. (R 1458 -1459; R 4-5). Because at the time the Petition was filed there was no criminal case pending in which the State's Attorney was unable or unwilling to perform her prosecutorial duties, there was no statutory authority to appoint a special prosecutor, and the circuit judge exceeded its jurisdiction in doing so.

2 The circuit court abused its discretion because the appointment order was vague and overbroad.

The order's broad prescription of authority to the special prosecutor, namely that the special prosecutor may "further prosecute" Mr. Smollett if reasonable grounds exist, was unquestionably vague and overbroad. (CI 26; SUP2 C 7-29, SUP2 C 30, SUP2 C 86-109). The order did not limit the investigation in any way or specify a date or event that would terminate the special prosecutor's appointment. Illinois courts have held that such a deficiency renders the appointment vague and overbroad. *See, e.g., In re Appointment of Special Prosecutor,* 388 Ill. App. 3d 220, 233 (3d Dist. 2009).

3 The circuit court abused its discretion in failing to appoint a public agency to the position that indicated it was willing to accept the appointment.

The circuit court further violated 55 ILCS 5/3-9008 by appointing a *private* attorney when public prosecuting agencies were willing and able to take the appointment, in direct contravention of the statute.

Subsection (a-20) of 55 ILCS 5/3-9008 addresses the specific steps necessary for a court to appoint a private attorney rather than a public agency as a special prosecutor in a given case. The section reads in relevant part:

> Prior to appointing a private attorney under this Section, the court shall contact public agencies, including, but not limited to, the Office of Attorney General, Office of the State's Attorneys Appellate Prosecutor, or local State's Attorney's Offices throughout the State, to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and *shall appoint a public agency if they are able and willing to accept the appointment.*

55 ILCS 5/3-9008(a-20) (West 2006) (emphasis in italics added).

Here, Judge Toomin verbally told the parties that pursuant to the statute he had contacted numerous public agencies and that at least three public prosecutors had indicated their willingness and ability to accept the appointment. (C 446-467; R 148-159; SUP2 C 7-29, SUP2 C 30, SUP2 C 86-109). Yet, Judge Toomin summarily ruled that although these agencies were willing to accept the appointment, it was his opinion that they were not *able* to do so, and as such, he looked to the private sector for options, ultimately appointing Dan Webb of Winston & Strawn LLP as the special prosecutor in this matter. (C 446-467; R 148-159; SUP2 C 7-29, SUP2 C 30, SUP2 C 86-109). The court failed to provide the parties with any further information including which public agencies were contacted by the court, which expressed their willingness and ability to accept the appointment, and on what basis the court believed the three willing public prosecutors were not "able" to accept the appointment. (C 446-467; R 148-159; SUP2 C 7-29, SUP2 C 30, SUP2 C 86-109).

Because the appointment of private counsel violated the statutory mandate that a public agency be appointed if it is able and willing to accept the appointment, the Office of the Special Prosecutor lacked the authority to prosecute this matter and Mr. Smollett's convictions must be reversed.

4 The circuit court judge improperly denied the defense motion for substitution of judge for cause because of his explicit bias towards Mr. Smollett, rendering every subsequent ruling and action in this case null and void.

On July 19, 2019, after Judge Toomin issued his order appointing a special prosecutor, counsel for Mr. Smollett timely filed a Motion for Substitution of Judge for Cause, based on comments from the Order, as well as a Motion for Reconsideration of the Order Granting the Appointment of Special Prosecutor. (SUP C 1046-1056; SUP C 883-1035; TEMP SUP2 C 7-29, SUP2 C 30, SUP2 C 33-119). But Judge Toomin denied this motion along with all other concurrently-filed motions on the grounds that Mr. Smollett did not have the right to intervene in the proceedings (yet another erroneous ruling). (R 115-147; SUP2 C 7-29, SUP2 C 30, SUP2 C 328-361).

In Illinois, it is settled law that "[a] fair trial under due process of law requires an impartial judge free from personal conviction as to the guilt or innocence of the accused." *People* ex *rel*. *Przyblinski v. Scott,* 23 Ill. App. 2d 167, 170 (1958), *aff'd* sub *nom. People* ex *rel. Przybylinski v. Scott*, 19 Ill. 2d 500 (1960). To protect the integrity of the principles of due process and a fair trial as they relate to an impartial judiciary, Section 114-5(d) of the Code of Criminal Procedure provides that a defendant may move, at any time, for a substitution of the judge for cause, which shall be heard "by a judge not named in the motion." 725 ILCS 5/114-5(d). Section 1001(a)(3) of the Code of Civil Procedure similarly provides that a party in a civil action may petition the court for the substitution of judge for cause, which shall be heard "by a judge other than the judge

named in the petition." 735 ILCS 5/2-1001(a)(3). Though Mr. Smollet was neither a defendant nor a party (because Judge Toomin denied his motion to intervene) the same due process principles should apply here in the interests of justice because the eventual second prosecution of Mr. Smollett implicated his Constitutional rights.

Things that may affect a trial judge's performance of his duties in a particular cause, such as a pervasive attitude of animosity, hostility, ill will, or distrust, are to be carefully reviewed, and may be factors to determine whether a trial judge should be disqualified for cause. *People v. Blanck*, 263 Ill. App. 3d 224, 232 (1994). *See also*, *People* v. *Robinson,* 18 Ill. App. 3d 804, 807 (1974); *see also People* v. *Chatman*, 36 Ill. 2d 305, 309 (1967).

Similarly, Illinois Supreme Court Rule 63A(9) (Canon 3 of the Code of Judicial Conduct) provides that "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice." Supreme Court Rule 63C(1)(a) further provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party." *See also People* v. *Bradshaw*, 171 Ill. App. 3d 971, 975-76 (1988).

From the very start of the circuit court's order granting the appointment of a special prosecutor, Judge Toomin explicitly, unequivocally, and improperly set forth an opinion that Mr. Smollett was, in fact, guilty of charges which a) Mr. Smollett specifically pled not guilty to, and b) which, at the time of the appointment, had been duly dismissed. (CI 6-26; SUP2 C 7-29, SUP2 C 30, SUP2 C 86-109). For instance, Judge Toomin noted: "**in perhaps the most prominent display of his acting potential, Smollett conceived a fantasy that propelled him from the role of a sympathetic victim of a vicious homophobic attack to that of a charlatan who fomented**

a hoax the equal of any twisted television intrigue." (CI 6-26; CI 7; CI 10-11; SUP2 C 7-29, SUP2 C 30, SUP2 C 86-109).

Both the Illinois and United States Constitution's guarantee the presumption of innocence to an accused in a criminal case. In the case at bar, Judge Toomin denied Mr. Smollett that constitutional guarantee. Significantly, at the juncture where Judge Toomin made "findings" of Mr. Smollett's so-called guilt, there was ***no actual admissible evidence*** anywhere in the record based on which the court could have even made such factual findings. SUP2 C 7-29, SUP2 C 30, SUP2 C 88)

The Order appointing a special prosecutor is unequivocally tainted by Judge Toomin's improper conclusions as to Mr. Smollett's guilt. Because Judge Toomin improperly denied the defense motion for substitution of judge for cause, every subsequent ruling and action by him in this case—including his denial, in effect, of the Motion for Reconsideration of the Order, his appointment of Dan Webb as the special prosecutor, and the renewed prosecution of Mr. Smollett by the Office of the Special Prosecutor including the resulting convictions and sentence—is null and void. *See In re Marriage of Roy,* 2014 IL App (5th) 130260-U, ¶ 13 ("the wrongful refusal of a proper request for substitution of judge renders all subsequent orders by that judge entered in the case void.").

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court's ruling for failing to dismiss Mr. Smollett's indictment.

IV.

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

A. Standard of Review

Generally, a trial court's decision to disqualify an attorney is reviewed under the abuse of discretion standard. *People v. Buckhanan*, 2017 IL App (1st) 131097, ¶ 26. However, in the present case, the defense argues that the trial court's decision to hold an evidentiary hearing was based on an erroneous legal ruling and the procedures the trial court applied in conducting the evidentiary hearing were also based on an erroneous legal ruling. Thus, this involves questions of law, and this court should review this issue *de novo*. *See e.g.*, *People v. Walker*, 308 Ill. App. 3d 435, 438 (2d Dist. 1999).

B. Legal Analysis

The trial court violated Mr. Smollett's Due Process and Sixth Amendment rights by holding an evidentiary hearing about a harmful conflict of interest that was never disclosed. Further, the trial court violated Mr. Smollett's Sixth Amendment right to counsel of his choice when it prohibited defense counsel from cross-examining the OSP's star witnesses.

The Sixth Amendment provides that a defendant in a criminal prosecution has a right to the assistance of counsel. *U.S. Const. amend. VI*. Within this right, is a presumption in favor of defendant's counsel of choice. *People v. Buckhanan*, 2017 IL App (1st) 131097, ¶ 26.

Nevertheless, this presumption can be overcome if the State proves that there is either an actual conflict of interest or a serious potential for conflict. *Id*.

This Court has outlined factors to consider when determining a prosecutor's challenge to a defendant's counsel of choice. *Id* ¶ 27. First, courts must determine if defense counsel has "a specific professional obligation that actually does conflict or has a serious potential to conflict with defendant's interests." *Id*. Second, courts must also consider "whether the interests threatened by that conflict are weighty enough to overcome the presumption in favor of a defendant's counsel of choice." *Id*. This Court has also noted that in weighing the interests in the second factor, courts should "consider the likelihood that a conflict will actually occur." *Id*.

Additionally, within a conflict analysis, Illinois courts also consider:

> (1) the defendant's interest in having the undivided loyalty of counsel; (2) the State's right to a fair trial in which defense counsel acts ethically and does not use confidential information to attack a state's witness; (3) the appearance of impropriety should the jury learn of the conflict; (4) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction.

People v. Buckhanan, 2017 IL App (1st) 131097, ¶ 27.

Importantly, vague allegations and unsupported speculation do not qualify as a conflict. *Id* ¶ 33. For example, in rejecting allegations that a defense attorney's alleged conflict created an unfair advantage to the defense, this Court noted that "…from the record before us, we cannot discern what information Junior could have gained from Senior—inadvertently or otherwise—that would have allowed him an unfair advantage in cross-examining Gambrell." *Id*. This Court also noted that, "vague and unsupported speculation is insufficient to overcome the constitutional presumption in favor of a defendant's counsel of choice." *Id.*

Here, the first factor is not implicated since Mr. Smollett waived any conflict. (CI193-CI194; R374-R375); (SUP 2 C 4-6) *See also*, *Buckhanan*, 2017 IL App (1st) 131097, ¶ 30.

1. The decision to hold an evidentiary hearing was erroneous because the alleged harmful conflict of interest was never specified, disclosed or articulated.

In the present case, from the inception of the Osundairo brothers' intervenor's allegation of a conflict, neither the OSP nor the intervenors ever disclosed the harmful conflict that would give the defense an unfair advantage over the prosecution witnesses. (CI 205- 211; C1 303-305). In their intervenor's motion, they claimed that *significantly harmful* information was given to lead counsel which they believed enabled lead counsel to form an opinion as to their "credibility and innocence." (C1 294-305).[9] At no point in time did the OSP or intervenors ever disclose the alleged significantly harmful information. (CI 294-304; CI 738-744; R 537-785). Further, in response to the intervenor's filings, the defense repeatedly objected to the lack of disclosure of this alleged harmful conflict. (CI 237-245); (R 415).

In fact, leading up to the evidentiary hearing, the OSP repeatedly failed to disclose the conflict. (R 432).[10] (CI 738-744); (CI 154-166).

Further, prosecutors for the OSP admitted that even after meeting with the Osundairo brothers, they did not know the nature of the statements or information relating to the conflict because they did not want to infringe on the Osundairo brothers' attorney-client privilege. (R 531-

[9] It is noteworthy that on a March 9, 2021, status hearing, the OSP joined and adopted the Intervenor's motion claiming they believed it to be "well founded," even though they admitted they didn't know the nature of the actual conflict and were yet to interview the Osundairo brothers about the conflict (R 378-R379; CI 205).

[10] Though the trial court's order called for the disclosure of the conflict, the OSP at the March 19, 2021 status hearing, claimed that issues might arise due to privilege. As a result, the trial court appeared to go back on its order for the disclosure of the conflict, while insisting on only hearing whether there was enough conversation that triggered the formation of an attorney-client relationship. (R 441-446). The court again reiterated this new position during the April 6, 2021 status hearing. (R 461-462).

534). This explanation was given even though the evidentiary hearing was to be done in-camera. (R 432-434).

Notwithstanding OSP's failure to disclose the harmful conflict, the trial court insisted that an evidentiary hearing would proceed because, according to the trial court, the only issue to be inquired about was whether lead defense counsel had an attorney-client relationship with the Osundairo brothers. (R 510; R 494-534).

The OSP's failure to disclose the conflict should have been a tell-tale sign that there was no harmful conflict. Hence, the conflict allegations were rooted in vagueness and speculation. *See again., Buckhanan*, 2017 IL App (1st) 131097, ¶ 33. For this reason, the trial court erred in its decision to call for an evidentiary hearing.

Additionally, the OSP also informed the court that they were preparing to issue subpoenas for a conference call number that had an area code that matched lead defense counsel's number. (R 456-458). According to the OSP, this conference number had made *systematic*, *repeated*, and *lengthy* calls with the Osundairo brothers during the periods they allegedly spoke to lead defense counsel. (R 457). By the next status hearing on May 4, 2021, the OSP had failed to turn over the phone records pertaining to their subpoena into the conference call number. (R 511-517). The OSP also failed to produce these records during the hearing. (R 763-778; R 766; R 593; CI 433-450).

2. The trial court erred in prohibiting lead defense counsel from cross-examining OSP's star witnesses because the conflict was never disclosed during an in-camera hearing and the OSP did not meet its burden during the evidentiary hearing.

In the present case, the trial court erred in barring lead defense counsel from cross-examining the Osundairo brothers at trial, because the OSP failed to meet its clear and convincing burden of showing a conflict. (CI 745-754; CI 424-754); (R 432-434).

During the hearing, the OSP failed to disclose the conflict. (R537-785). Additionally, the trial court prohibited defense counsel from any line of questioning that inquired as to the nature of the conflict. (R 648, R 664-665, R 670-671, R 674-677).[11] *See*, *People v. Shepherd*, 2015 IL App (3d) 140192, ¶ 28 (finding a failure to meet burden in a suppression evidentiary hearing due to a failure to establish harmful conflict).

Additionally, the OSP failed to tender phone records of all cellphones the Osundairo brothers claimed to have used to talk to lead defense counsel. (R 589-620; R 638-680; R 704-739; R 740-747; R 763-778; CI 435-444).

Furthemore, the testimony of the Osundairo brothers was not credible. For example, Ola Osundairo testified that he called lead counsel in April of 2019 to terminate his services. (R 590-591). Yet, in Ola Osundairo's 2021 affidavit, he claimed that lead counsel never communicated to them that he was declining their case and they believed that he would be available to represent them if their current counsel became unable or unwilling. (CI 309-310).

Also, the hearing established that none of the Osundairos had ever signed any agreements or paid any fees to hire lead counsel as their attorney, directly contradicting their affidavits indicating they believed lead counsel would still be available to represent them. (R 589-620, R 599-601, R 638-680; CI 303-312).

Further, during the hearing all but one of the limited phone records submitted in evidence by the OSP corroborated the lead defense attorney's earlier status hearing statements that he only had a conversation with the mother of the Osundairo brothers. (R 582-591; CI 435-444). Only one phone record showed a call from one of the Osundairo brothers to the lead defense attorney, lasting

[11] On the May 4, 2021, status hearing, the trial court had warned the OSP that discussing subject matters alone was not enough to meet their burden. (R 533; R 531-535). During the evidentiary hearing, the trial court changed course when it sustained objections to defense attorneys' line of questioning into the specifics of the alleged conflict and when it allowed the OSP to essentially inquire into subject matter topics only.

exactly one minute. (R 584-585, R 590-591; CI 435-444). But as the defense argued, this was more likely evidence that Ola Osundairo had only reached the lead defense attorney's voicemail due to the exact one-minute length of the call. (R 767). Moreover, this call occurred in April of 2019, outside the timeframe in which the alleged undisclosed harmful conflict was transmitted to lead defense counsel. (R 766-768).

Moreover, the defense submitted, at the trial court's suggestion, an affidavit along with a WhatsApp exchange wherein lead defense attorney informed the Osundairo brothers' mother that he could not speak to, meet with, or give legal advice to her sons if they already had representation. (R 778-779; CI 451, CI 1032-1036; CI 1037-1038). During the hearing, Mrs. Osundairo admitted that the number shown in the WhatsApp message was hers. (R 717; R 717-719). This evidence, along with the OSP's own phone records, corroborated lead attorney's on-the-record statements that he had only spoken to the Osundairos' mother. It is also worth noting that this WhatsApp record was never addressed in the trial court's ruling. (CI 745- CI 754; CI 1037-1038).

Finally, in the trial court's ruling, the court seemed to imply that Mr. Smollett's Sixth Amendment right to his attorney of choice was not infringed upon because of the presence and ability of other "highly skilled" attorneys to represent him or perform the cross examinations that the trial court denied lead defense counsel. (CI 745-754). However, this Court affirmed in *People v. Graham*, 2012 IL App (1st) 102351, ¶ 32, that the right to counsel of choice is separate and distinct from the right to effective representation of counsel and denying a defendant his attorney of choice cannot be conflated with the quality of representation available at trial. *See also*, *People v. Bingham*, 364 Ill. App. 3d 642 ¶ 683 (2006).

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial court and grant him a new trial with a new trial judge assignment. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BECAUSE IT VIOLATED ILLINOIS SUPREME COURT RULE 412 WHEN IT DENIED THE DEFENSE MOTION TO COMPEL THE OSP TO DISCLOSE TO THE COURT, FOR IN-CAMERA REVIEW, NOTES GENERATED FROM INTERVIEWS WITH THE CENTRAL WITNESSES TO THE CASE AGAINST MR. SMOLLETT.

A. Introduction

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

B. Standard of Review

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

C. Legal Analysis

The trial court erred when it denied Mr. Smollett's motion to compel OSP to turn over, for an in-camera review, notes that covered its interviews with its central witnesses.

Illinois Supreme Court Rule 412 compels the prosecution to produce upon written motion of the Defendant:

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

Ill. Sup. Ct. R. 412.

Additionally, the Supreme Court of Illinois has repeatedly defined and interpreted the prosecution's obligation under Rule 412 to mean that a prosecutor's notes of witness statements are discoverable subject to the prosecutor's right to have work product excised therefrom. *People v. Szabo*, 94 Ill. 2d 327 (1983).

For example, in *Szabo*, the Supreme Court was faced with a scenario where the prosecutor's notes of witness interviews had been destroyed. *Id* at 346-47. Unable to determine if denial of the notes to the defense was prejudicial since the contents of the notes were destroyed, the *Szabo* court first determined whether the notes involved a witness that was central to the prosecutor's case and thus, potentially important for any defense cross examination. *Id* at 347. In putting aside any *prejudicial analysis* and in reversing and remanding for a new trial, the *Szabo* court reasoned:

> We simply cannot tell what opportunities for cross-examination, if any, were denied Szabo by the nondisclosure of the notes. Consequently, we cannot say either that the nondisclosure resulted in prejudicial error, or that any error that occurred was harmless beyond a reasonable doubt.

Id at 350. *See also, People v. Bassett*, 56 Ill. 2d 285, 290-92 (1974) (holding the same).

Szabo's mandate essentially reiterated the ironclad principle that prosecutors must disclose all materially exculpatory evidence. *Brady v. Maryland*, 373 U.C. 83 (1963).

In the present case, the defense is unable to determine the contents of the OSP notes since the defense has never had the opportunity to inspect the notes. Thus, the defense is unable to delve into any prejudicial analysis as to the value of the notes to the defense. Nevertheless, Mr. Smollett requests a new trial with instructions for the notes to be turned over for an in-camera review by a trial court since the potentially discoverable nature of the notes is as obvious as it was in *Szabo*. Here, the witnesses interviewed by the OSP were the Osundairo brothers, the OSP's central witnesses (only witnesses with any personal knowledge that the attack was allegedly a hoax), and witnesses whose credibility and veracity was at the crux of the OSP's case against Mr. Smollett.

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court and grant him a new trial with a new trial judge assignment if reversed. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

VI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BECAUSE IT VIOLATED ILLINOIS SUPREME COURT RULE 431 WHEN IT (1) NEVER BALANCED ANY OF THE FACTORS SET FORTH IN ILLINOIS SUPREME COURT RULE 431 BUT INSTEAD FOCUSED ON PREVENTING PRESUMED INDOCTRINATION OF JURORS BY ATTORNEYS DURING *VOIR DIRE* AND (2) BARRED ATTORNEYS FROM DIRECTLY QUESTIONING JURORS.

A. Standard of Review

The manner and scope of *voir dire* is within the discretion of the trial court, and Illinois appellate courts review *voir dire* decisions using an abuse of discretion standard. *People v. Rinehart*, 2012 IL 111719, ¶450.

B. Legal Analysis

The trial court's refusal to allow the defense to directly examine the venire was prejudicial to Mr. Smollett and violated Illinois Supreme Court Rule 431, because this was a highly publicized case which required rigorous vetting of the venire for potential bias against Mr. Smollett.

Illinois Supreme Court Rule 431 requires the trial court to allow counsel to "supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of the examination by the court, the complexity of the case, and the nature of the charges." Ill. Sup. Ct. R. 431 (2021). Notwithstanding these factors, the Illinois Supreme court has held that the trial court retains discretion to determine what direct questioning will be allowed, as long as the court exercises its discretion in accordance with the requirements of the rule. *People v. Garstecki*, 234 Ill. 2d 430, 444 (2009). The key inquiry is whether the trial court weighed the aforementioned factors in determining whether to allow direct questions to prospective jurors. *Id. See also*, *People v. Gonzalez*, 2011 IL App (2d) 100380, ¶24 (where trial court was found to have erred when it did not consider Rule 431 factors in denying attorneys an opportunity to directly examine the jurors).

Additionally, Illinois courts have been instructed that "trial courts may no longer simply dispense with attorney questioning whenever they want…the trial court is to exercise its discretion in favor of permitting direct inquiry of jurors by attorneys." *Id.*

In the present case, the trial court did not consider any Rule 431 factors. For instance, the present case was highly publicized and focused on Mr. Smollett's guilt even before any trial and

conviction. (C1639) (*See*, footnote 55); (C 706). (Paragraph 1 of page 2)[12]. Even the trial court acknowledged the high-profile media nature of the case. (R 865); (R 870); (R 881); (R 881).

Yet despite this publicity which added to the complexity of the case, the trial court barred the attorneys from directly questioning the venire. (R 871); (R 874-80). Instead, the trial court made clear at various times that it was going to "take control of" voir dire and that it had its "method of operation" when it came to *voir dire*. (863-80); (R873); (R867); (R863-64). Despite the publicity surrounding this case, the trial court insisted on treating *voir dire* no differently than any other case. (R 880).

Further, in setting its procedure for *voir dire*, the trial court weighed a factor not listed in Rule 431. For example, the trial court explicitly, without evidence, expressed its concern that the lawyers might attempt to influence the jurors with direct questioning. (R 871); (R 874).

Moreover, most of the critical questions submitted by the defense were ignored and never posed to many of the jurors. (CI 726-728). For example, the defense submitted the following questions:

> "Did you form an opinion about this case upon reading about it or seeing it in the media." (CI 726).
>
> "Have you or someone close to you ever been accused of committing a hate crime? If so, explain." (CI 728).
>
> "Have you seen any comedy routines or satire on the subject matter of this case?" (CI 726).

The importance of these questions cannot be missed. For example, potential jurors can be quick to agree with a judge to put aside potential bias, but what opinion they have formed about a case in the media is critical to exposing any potential immovable bias. Additionally, this is a case

[12] https://www nbcchicago.com/news/local/charlatan-who-fomented-a-hoax-read-judges-full-ruling-on-smollett-special-prosecutor/131743/

concerning accusations of a hate crime hoax involving an openly gay defendant and whether a potential juror has been accused of a hate crime is critical to vetting any bias. Finally, questions about the comedy routine were critical since there had been a popular comedy routine, watched by millions of Americans, which lampooned Mr. Smollett and declared his guilt before a trial. (R 880-881).

In fact, at the trial court's first opportunity in bringing up one of the defense's submitted questions, the following occurred:

> "Q. Have you ever done any personal research on this case by Googling or any social media posts on this one?
>
> A. Just the television stuff.
>
> Q. Just what you see on T.V., and you have agreed to put that aside. All right. Have you been the victim of a hate crime?
>
> A. No.
>
> Q. **The lawyers want me to ask you this question, but I'm not sure why but do you watch TMZ?**
>
> A. No.

(R 972), (emphasis in bold added).

The trial court's failure to ask follow-up questions after the juror's affirmative answer regarding internet research demonstrates Rule 431 factors were not considered. (CI 726) (submitted but never asked). The trial court's declaration to the juror that he wasn't sure why he was asking the TMZ question not only removed the importance of the question to the juror but also further demonstrates that the trial court never balanced Rule 431 factors.

Finally, in the present case, Mr. Smollett suffered prejudice when the trial court denied his attorneys the ability to directly examine the venire. For example, during the trial court's questioning of one prospective juror, Rosemary Mazzola (who was later impaneled as a juror),

Mrs. Mazzola informed the trial court that numerous members of her family were current and former members of law enforcement. (R 1118-1120). As Mrs. Mazzola responded to questions regarding her family's law enforcement affiliation, she attempted to supplement her answers, not once, but twice. (R 1120). But rather than inquire further into the law enforcement issue or allow Mrs. Mazzola to provide complete responses, the Court abruptly interrupted Mazzola. (R 1120-1121). Mrs. Mazzola also indicated to the court that she did Internet research and when the court asked her if she was "going to put that aside," Mrs. Mazzola responded, "No, I thought…" but the rest of her statement was subsequently interrupted by the judge. (R 1121).

When the Defense asked the Court to consider a motion for cause as to Mrs. Mazzola, the Court denied the motion. (R 1131-32). At a later point, before the jury had been empaneled, the defense requested that further inquiry be made of Mrs. Mazzola because of her law enforcement ties and the judge agreed to inquire further. (R 1177). However, no inquiries were ever made. (R 1177-79). And this failure to further inquire contradicted the trial court's earlier assurances to the defense that sidebars and follow up questions would be permitted. (R 872).

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court and grant him a new trial with a new trial judge assignment. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

VII.

THE TRIAL COURT ERRED BY FAILING TO GIVE AN ACCOMPLICE JURY INSTRUCTION TO THE JURY WHERE THE PROSECUTION'S STAR WITNESSES TESTIFIED TO ASSISTING MR. SMOLLETT IN ALLEGEDLY PLANNING HIS CRIME.

A. Standard of Review

A trial court's failure to give an accomplice jury instruction is viewed under an abuse of

discretion standard. *People v. Fane,* 2021 IL 126715, ¶ 33; ¶39.

B. Legal Analysis

The trial court committed reversible error by failing to allow the defense to provide an accomplice jury instruction where the facts of the case specifically called for such an instruction to be given. (R 3000-3010).

Illinois Pattern Jury Instructions 3.17 "Testimony of an Accomplice" provides:

> When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.

I.P.I. Criminal 3.17. (West 2020).

Despite the instruction's title there exists no requirement that the witness testifying must have ever actually been charged in the matter as an accomplice. *People v. Lewis*, 240 Ill. App. 3d 463 (1st Dist. 1992). On the contrary, Illinois courts have held that an accused is entitled to have IPI 3.17 given to the jury, regardless of the witness's status as a charged accomplice, if evidence of the following is present:

> …whether the witness could have been indicted for the offense in question either as a principal or under a theory of accountability. If this test is satisfied, the defendant is entitled to an accomplice instruction even if the witness denies involvement in the crime.

Id at 466-467. *see also*, *People v. Montgomery*, 254 Ill. App. 3d 782 (1st Dist. 1993). *People v. Howard*, 209 Ill. App. 3d 159 (1st Dist. 1991).

Notably too, "although the term 'accomplice' is generally applied to those testifying against their fellow-criminals, an accomplice can be one who is in some way concerned in or associated with another in the commission of a crime." *Fane,* 2021 IL 126715, ¶ 38.

The accomplice testimony instruction was specifically put in place to assure that a jury would subject any such testimony to cautious suspicion and scrutiny given the motivations of the witnesses to lie to avoid punishment or liability. *People v. Riggs,* 48 Ill. App. 3d 702, 705, (1977).

Here, the circumstances existed for the trial Court to give the IPI 3.17 instruction to the jury. Both Osundairo brothers admitted to being involved in planning the attack on Mr. Smollett. (R1887-1897); (R1884-1907); (R2170-2171); (R2231-2234); (R2302). Thus, under *Fane* and *Montgomery*, the Osundairo brothers did not have to complete the task of calling 911 or reporting the attack to be considered accomplices in the disorderly conduct crime.

Since the only direct evidence of Mr. Smollett's involvement in the attack comes from the uncorroborated self-serving testimony of the Osundairo brothers, Mr. Smollett's guilt or innocence depended entirely on the credibility, or lack thereof, of the Osundairo brothers. (R 1805-1991; R 1999-2133; R 2134-2220; R2226-2335). For precisely circumstances such as this, where the record shows varying versions of events from witnesses who may have faced criminal liability but for their statements implicating another rather than themselves, it was necessary to provide *any* jury instruction which would allow a defendant to present his theory of the case where evidence in the record supports such a theory. *See People v. Unger,* 66 Ill. 2d 333, 338 (1977).

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial court's ruling and grant a new trial with a new trial judge assignment. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

VIII.

THE SENTENCE IMPOSED ON MR. SMOLLETT BY THE TRIAL COURT WAS EXCESSIVE WHERE THE SENTENCE PORTION REQUIRING MR. SMOLLETT TO SERVE THE FIRST 150 DAYS OF HIS THIRTY-MONTH PROBATION SENTENCE IN THE CUSTODY OF THE COOK COUNTY DEPARTMENT OF CORRECTIONS WAS NEITHER COMMENSURATE WITH THE NATURE OF THE OFFENSE NOR THE OVERWHELMING MITIGATION PRESENTED BY THE DEFENSE AND WHERE THE CRIME MR. SMOLLETT WAS CONVICTED OF DOES NOT ALLOW RESTITUTION AS THE CITY OF CHICAGO AND ITS POLICE DEPARTMENT CANNOT BE CONSIDERED "VICTIMS" PER THE TERMS OF THE RESTITUTION STATUTE AND CASE LAW.

A. Standard of Review

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

B. Legal Analysis

The trial court abused its discretion by sentencing Mr. Smollett to excessive sentencing terms given the nature of the offense(s) charged, and the overwhelming mitigation presented in the sentencing hearing. Further, the trial court erred in ordering restitution be paid to the City of Chicago as the charge Mr. Smollett was convicted of does not allow municipalities or public agencies to be viewed as victims under the restitution statute.

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

or if it is manifestly disproportionate to the nature of the offense." *Brown*, 2015 IL App (1st) 130048, ¶ 42.

The 150-day jail term was excessive

In the present case Mr. Smollett was convicted of non-violent disorderly conduct class 4 felonies. (C 1420); (C 1713-1721). Additionally, Mr. Smollett received a pre-sentence report from the adult probation department which ranked him as a low risk (CI 92); (CI 84-92). And as the defense argued, a low-risk ranking calls for "minimum supervision or non-reporting supervision." (SUP C 1744); (SUP C 1726). Thus, the adult probation department did not view Mr. Smollett as a candidate for incarceration. Additionally, Mr. Smollett's mitigation demonstrated that he was not recidivist. For instance, the defense put forth substantial letters from civic leaders and organizations as well as testimony in mitigation on behalf of the defendant regarding his character and significant public service. (CI 93-CI 104; R3439-R3490). Also, the defense presented an affidavit from an epidemiologist declaring the health risk a custodial setting will pose to Mr. Smollett within the context of the current COVID 19 epidemic. (SUP C 1721 - SUP C 1773); (SUP C 1745-1773). Additionally, a custodial setting posed a great danger to Mr. Smollett due to his unpopularity. This risk was obvious to the trial court which ordered that the 150-day jail term be served in protective custody. (SUP C 1774). Apart from the obvious cost to taxpayers, protective custody causes physical and mental isolation and is also no guarantee of Mr. Smollett's physical safety. (SUP C 1731-1733).

Mr. Smollett's 150-day jail sentence was also unnecessary since the trial judge had imposed the maximum fine of $25,000 on Mr. Smollett. Also, the trial court found that the conviction had destroyed Mr. Smollett's life and career. (R 3532); (R 3554). Thus, the 150-jail term was excessive given the circumstances.

Finally, the sentencing judge's closing remarks demonstrated that Mr. Smollett's sentencing took on a personal retributive tone and was based on speculative information which can't be considered under this court's decision in *Brown*. *See e.g., Brown*, 2015 IL App (1st) 130048, ¶ 44. (R 3524-3557). For instance, during sentencing, the trial court remarked that Mr. Smollett was a hypocrite on social justice issues who wanted to throw a national pity party. (R 3534). Additionally, the trial court accused Mr. Smollett of being selfish, arrogant, and narcissistic and accused him of using up policing resources "for your own benefit and that's a problem here." (R 3536); (R 3551-3552).[13] Further, the judge accused Mr. Smollett of taking off "some scabs off some healing wounds" of America's past of social injustice. (R 3536). The judge also informed Mr. Smollett, that he created a "heater case" (i.e. a case of public consciousness) and "the heater has to be addressed." (R 3552). Lastly, the trial court accused Mr. Smollett of having caused "some damage to real victims of hate crime and caused "great stress throughout the city." (R 3539) (R 3538); (R 3548).

Invalidity of Restitution

In imposing restitution upon a defendant as a portion of a sentence, the trial court is bound by the terms of the statutory language set forth in chapter 5, section 5-5-6 of the Illinois compiled statutes. 730 ILCS 5/5-5-6. To be clear, the statute makes no allowances for sums to be paid for punitive purposes or for expenses that would have occurred with or without the defendant being the cause. *Id*. More importantly, Illinois courts have repeatedly held that a police department or other government agency is not considered a "victim" within the meaning of the restitution statute. *See,* e.g*., People v. Evans,* 122 Ill. App. 3d 733 (3d Dist. 1984); *People v. Derengoski*, 247 Ill.

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

App. 3d 751, 752-53 (1993), et al.[14] Thus, the trial court erred when it imposed $120,106 restitution on Mr. Smollett for the overtime expenses incurred by the Chicago police department during his investigation. (SUP C 1777); (C 1712); (C 1685-1693); R3435-3439). Moreover, the OSP's receipts justifying such restitution were fraught with issues. For example, the first three pages of the receipts submitted by OSP are devoid of any dates, times, or description of work done to corroborate regular or overtime hours. (C 1689-1691). Pages four and five have dates but lack any description of work done. (C 1692-1693). Second, nearly all the officers listed in the receipts as working on the case are nowhere in any of the evidence or records presented during pretrial discovery or at trial. (C 1689-1693). Third, in the receipts that do have dates listed, only two entries occurred on or before Mr. Smollett was arrested on February 15, 2019. (C 1692-1693). The remaining hours worked occurred on dates after Mr. Smollett's arrest and when he had been officially charged with disorderly conduct. (C 1692-1693). Accordingly, the only conceivable overtime should have occurred when officers were looking for Mr. Smollett's attackers prior to him being charged. Lastly, as an example of the deficiencies with the receipts, Officer Kimberly Murray testified at trial that she only worked on the Smollett case for two days, January 29-30, 2019. (R 1667-1669). On the page of receipts that lists Officer Murray, she is listed as having accrued 50.75 hours of overtime and 17 hours of regular time. (C 1690). Given the two-day (48-hour) time-period Officer Murray admitted to being involved with the case, accruing 67 hours of work is simply not possible.

Conclusion

[14] *People v. Chaney,* 188 Ill. App.3d 334 (3d Dist. 1989); *People v. Winchell,* 140 Ill. App.3d 244 (5th Dist. 1986); *People v. Gaytan,* 186 Ill. App.3d 919 (2d Dist. 1989); *People v. Lawrence*, 206 Ill. App.3d 622 (5th Dist. 1990); *People* v. *McGrath,* 182 Ill. App.3d 389 (2d Dist. 1989)

Therefore, for the foregoing reasons, Mr. Smollett respectfully requests that this Court reduce his sentencing by removing the 150-day jail and the $120,106 restitution.

IX.

THE TRIAL COURT VIOLATED MR. SMOLLETT'S DUE PROCESS RIGHTS WHEN IT MADE UNINVITED COMMENTARY THAT WAS DISMISSIVE OF LINES OF DEFENSE QUESTIONING THAT HAD SOUGHT TO ESTABLISH HOMOPHOBIA, A CENTRAL THEORY OF THE DEFENSE CASE; MADE COMMENTARY DEFENDING A DETECTIVE'S INVESTIGATIVE DECISION DURING CROSS-EXAMINATION; ACCUSED ONE OF THE DEFENSE COUNSEL'S, WITHOUT BASIS, OF EDITORIALIZING DURING CROSS-EXAMINATION; AND MADE COMMENTARY THAT SOUGHT TO HURRY ALONG PARTS OF THE DEFENSE CROSS-EXAMINATION; ALL OF WHICH OCCURRED IN FRONT OF THE JURY.

A. Standard of Review

Inappropriate comments by a judge during a jury trial implicate a defendant's due process right to a fair trial. *People v. Wiggins*, 2015 IL App (1st) 133033¶ 43-46. Prejudicial denials of due process are reviewed de novo. *People v. Stapinski*, 2015 IL 118278, ¶ 35.

B. Legal Analysis

In Illinois, "a hostile attitude toward defense counsel, an inference that defense counsel's presentation is unimportant, or a suggestion that defense counsel is attempting to present a case in an improper manner may be prejudicial and erroneous." *People v. Edwards*, 2021 IL App (1st) 200192, ¶ 57-59. *See also*, *Wiggins*, 2015 IL App (1st) 133033, ¶ 43-50. However, a verdict will only be disturbed upon showing that the comments constituted a material factor in the conviction or there is prejudice to the defendant from the comments. *Id*. In evaluating whether inappropriate comments from the trial judge was a material factor in conviction or caused prejudice to the defendant, Illinois courts must "consider the evidence, the context in which the comments were made, and the circumstances surrounding the trial." *Id.*

1. The commentary, context and impact on the evidence

Inappropriate and dismissive commentary from trial judge

In the present case, the Defense sought to show that detectives rushed to judgment and did not properly investigate Mr. Smollett's claims that he was a victim of a real attack which was driven by the homophobic motives of his attackers. During cross examination, the defense was consistently frustrated in those goals by inappropriate commentary from the trial court, in front of the jury. For instance, the defense attempted to cross-examine Detective Theis on implicit homophobic statements made by a fellow detective, in his presence, during an interrogation. Specifically, the offending detective had described Mr. Smollett as having a *pretty face*. (R 1486-1489). The trial court was dismissive of this line of questioning when it declared, in front of the jury, and after an objection from the OSP, "he can answer did he say that. **So what**? Did he say it?" (R 1488-1488). (Emphasis in bold added).

Additionally, the defense sought to establish that Detective Theis had failed to interview Alex McDaniels, a gay man, whom detectives learned had been the victim of a homophobic attack from one of the Osundairo brothers. (R 1479-1482). During questioning on this issue, the trial court asked defense counsel to "move on" while sustaining hearsay objections, even though the defense never solicited any statements during cross-examination. (R 1479). *See also*, (R1487) (Where the trial court, in front of the jury, told defense counsel "Let's go, let's go, come on").

Additionally, while sustaining the OSP's objection to defense questioning into Detective Theis' failure to charge the Osundairo brothers with narcotics found in their home, the trial court offered an explanation for the detectives' decision not to charge when it noted: "**You can try different questions**. **Don't assume every case and every police officer, that's not fair. Ask a**

different question. (R 1551-1553). The trial court could have sustained the objection without making remarks about fairness that had the effect of favoring the detective's investigative decision.

Also, during cross examination when the defense attempted to question Detective Theis on his failure to arrest and charge the Osundairo brothers with the contraband (narcotics and guns) found in their home, the trial court, while sustaining objections from the OSP, commented that the defense was going "far afield", and when the defense tried to make a record, the trial court on several occasions told the defense to "stop arguing" and finally declared "I want finish this witness please." All these statements were said in the presence of the jury. (R 1552-1554). Also, this commentary from the trial judge was particularly egregious because even the trial court had earlier recognized the significance of such *contraband* cross-examination during motion in Limine discussions prior to trial. (R 816-829; R 828-829).

To make matters worse, during the defense cross examination of Ola Osundairo on his homophobic tweets, the judge declared, in front of the jury, that defense counsel was not "focused" and that the issues sought to be cross-examined where "very collateral matters." (R 2255). Additionally, in response, the defense made an oral motion for a mistrial which the defense maintains was erroneously denied by the trial court. (R 2256-2264).

Prejudicial comments about defense counsel

The trial court, in front of the jury, again rushed defense counsel's cross-examination and accused the defense counsel, without justification, of "editorializing" (R 1553-1554).

2. The context in which the comments were made, and the circumstances surrounding the trial.

The dismissive commentary, *hurrying* of the defense during cross-examination as well as the prejudicial and unwarranted insinuations about *editorialization*, certainly created jury distrust of the defense team, which no doubt was extended to Mr. Smollett, who faced a fragile situation

because of his highly publicized case where his guilt was publicly presumed. *See e.g.*, (C1639-1640) (Footnote 55).

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court and grant him a new trial with a new trial judge assignment if reversed. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

X.

THE TRIAL COURT VIOLATED THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTIONS UNDER THE LAW BY REJECTING AND OVERRULING ARGUMENTS BY THE DEFENSE MADE PURSUANT TO *BATSON V. KENTUCKY* AND IN DOING SO STRIKING ALL BUT ONE AFRICAN AMERICAN FROM THE JURY AND STRIKING A JUROR WITH A SIMILAR SEXUAL ORIENTATION AS MR. SMOLLETT, THUS DEPRIVING MR. SMOLLETT OF A JURY OF HIS PEERS.

A. Standard of Review

Batson claims are reviewed using a clearly erroneous standard. *People v. Bradshaw*, 2020 IL App (3d) 180027 ¶ 37.

B. Legal Analysis

Mr. Smollett's Fourteenth Amendment Rights to Due Process and Equal Protections under the law were violated when the trial court deprived Mr. Smollett of a jury of his peers by allowing the prosecution to strike all but one African American juror and a gay juror, over the defense's objections during jury selection pursuant the principles established in *Batson v. Kentucky* 476 U.S. 79 (1985).

A pattern of racial discrimination during jury selection has been held to offend and violate the Equal Protections Clause of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79

(1985). *See also*, *United States* v. *Robinson*, 421 F. Supp. 467, 473 (1976), *United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977).

Where racial discrimination during jury selection is suspected, the defense may make a "Batson" motion where the defense provides prima facie showing of racial discrimination in the prosecution's use of peremptory challenges. *Batson*, 476 U.S. 79. *See also*, *People v. Davis*, 231 Ill. 2d 349, 360, 362-363 (2008). In evaluating whether a prima facie case exists to show a pattern of racial discrimination, the Court is *required* to consider seven factors before giving the prosecution an opportunity to offer a race-neutral reason for the strike. *People v. Jones*, 2021 IL App (1st) 181266, ¶ 33.

In the present case, the trial court erred when it did not consider the *Batson* factors discussed below.

First, the trial court failed to properly consider the sameness in identity between Mr. Smollett and the stricken potential jurors, as the jurors being stricken by the prosecution were mostly African American and in the case of one person, gay.[15] (R 922-1047, R 1047-1061, R 1062-1130, R 1131-1147, R 1148-1169, R 1170-1177, R 1178-1179). Second, the trial court seemed to dismiss the prosecution's pattern of strikes against potential jurors of the same racial and sexual orientation groups as Mr. Smollett. (R 1131-1147); (R 1148-1169); R 1170-1177). Third, the trial court failed to consider the disproportionate use of the prosecution's peremptory strikes against members of Mr. Smollett's protected classes. (R 1131-1147, R 1170-1177). Fourth, the trial court completely overlooked the level of representation of the protected racial group or class in the potential jury venire versus their actual representation in the jury creating a scenario where only

[15] The prosecution used three of their seven peremptory challenges on African American potential jurors and a fourth on the sole gay man in the venire, making almost 60% of their peremptory challenges used to exclude jurors who represented appropriate cross sections of Mr. Smollett's community.

one African American juror was empaneled in the already underrepresented presence in the prospective venire. (R922-R1130, R1131-R1147, R1148-R1169, R1170-R1177, R1178-R1179). Fifth, the trial court improperly dismissed the clearly pretextual reasons the prosecution repeatedly used to excuse their strikes to exclude Mr. Smollett's protected classes from serving on the jury (R 1131-1147, R 1170-1177). Sixth, the trial court failed entirely to take into consideration the potential jurors stricken by the prosecution were an otherwise heterogenous group sharing race (or other protected class) as their only common characteristic with the defendant and each other. (R 922-1130, R 1131-1147, R 1148-1169, R 1170-1177, R 1178-1179). Seventh, the trial court ignored the clear implications of excluding African American representation from a jury on a trial that so heavily included African American persons, from the defendant to the prosecution's critical witnesses. (R 922-1130, R 1131-1147, R 1148-1169, R 1170-1177, R 1178-1179).

Finally, it is the defense position that Mr. Smollett's right to a jury of his peers was violated when an alternate was prevented from sitting in the jury even when the necessity for an alternate arose. The first alternate, who was an African American woman, would have replaced a white male juror. (R 1172-1174); (R 3260-3266).

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial court's ruling and grant a new trial with a new trial judge assignment. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

XI.

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

A. Standard of Review

The admission of evidence into jury deliberations should be reviewed under an abuse of discretion standard People *v. Hunley*, 313 Ill. App. 3d 16, 37 (1st Dist. 2000).

B. Legal Analysis

The trial court abused its discretion by allowing an entire Good Morning America ("GMA") Video interview of Mr. Smollett into jury deliberations even though the jury only saw a portion of the GMA video, for impeachment, during the trial.

In Illinois, the decision whether to allow jurors to have any particular evidence or exhibits in the jury room during deliberations is left to the discretion of the trial court but is not absolute. *Hunley*, 313 Ill. App. 3d at 37-38. Additionally, an exhibit admitted into evidence only for purposes of impeachment cannot be given to the jury during their deliberations. *People v. Carr*, 53 Ill. App. 3d 492, 499 (1977). Lastly, Illinois courts have found that it erroneous for a trial court to allow a witness' entire statement to go to the jury during deliberations where only a portion of the statement was presented at trial. *Nelson v. Northwestern Elevated R.R. Co.*, 170 Ill. App. 119 (1st Dist. 1912).

In the present case, prior to the matter being given to the jury for deliberations, the trial court ruled to allow the entirety, rather than a select portion previously shown to the jury for impeachment purposes, of a GMA interview involving Mr. Smollett (R 2974-2976; R 3290; R 3291-3293); (R 2966-3000; R 3285-3312).

Finally, by allowing the GMA interview to go back to the jury, the jury got to see more out-of-court testimony from Mr. Smollett and might have observed or heard new facts without explanation from the defense. *See e.g.*, *United States v. Sheets*, No. 95-50463, 1996 U.S. App. LEXIS 30004 at *6-7 (9th Cir. Nov. 15, 1996) ("Videotape testimony is inherently more

susceptible of undue emphasis by the jury because it is the functional equivalent of live testimony").

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court and grant him a new trial with a new trial judge assignment if reversed. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

XII.

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

A. Standard of Review

The standard of review for determining whether an individual's constitutional rights have been violated is *de novo. People v. Radford*, 2020 IL 123975, ¶107. Thus, this issue should be reviewed *de novo*.

B. Legal Analysis

The removal of the public from the courtroom during *voir dire*, the removal of most members of the public from the courtroom for five days during the trial as well as the arbitrary enforcement of COVID 19 restrictive protocols, all violated Mr. Smollett's right to a public trial.

It is well established that the Sixth Amendment of the United States Constitution (U.S. Const., amend. VI) guarantees the accused the right to a public trial. *People v. Evans*, 2016 IL App (1st) 142190. So prominent is this right, that a violation of it falls into the limited category of

"structural errors," which requires automatic reversal without the need to show prejudice. *People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010). Likewise, this constitutional guarantee of a free and public trial also applies to the *voir dire* portion of a jury trial. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

Even the removal of *one* member of the public from a courtroom has been deemed a violation of the Sixth Amendment Right to a public trial. *Evans*, 2016 IL App (1st) 142190.

The *Evans*' Court gave specific conditions that must be met for any sort of closure to the public when it stated:

(i) whether there exists an overriding interest that is likely to be prejudiced, (ii) whether the closure is no broader than necessary to protect that interest, (iii) whether the trial court considered 'reasonable alternatives' to closing the proceeding, and (iv) whether the trial court made adequate findings to support the closure." *Id* at ¶10. *See also*, *Radford*, 2020 IL 123975, ¶27.

Finally, the *Evans court* made it clear that it is for the trial court to consider reasonable alternatives to closing the proceedings to the public **and not** for the attorneys to offer reasonable alternative suggestions to a trial court. *Id* at ¶14.

In the present case, Mr. Smollett's Sixth Amendment right to a public trial was violated. For instance, prior to Mr. Smollett's trial, the trial court created a COVID-19 capacity limit which was arbitrarily enforced. (C1667-1668); (C1669-1670).

1. The Voir Dire Proceedings

During the *Voir Dire* process, the trial court barred members of the public from being inside the courtroom due to Covid 19 concerns. (C 1677-1680); (R 920-922).

The defense does not now challenge the COVID 19 protocols which the defense had agreed to. However, having the public removed from the courtroom during *voir dire* was never discussed

in any of the trial court's exchanges with attorneys prior to the start of *voir dire*. (C 1667-1676); (R 863-882); (R 921-922). And allowing the members of the public to watch the *voir dire* proceedings via the courtroom open door and in the hallways was not a reasonable alternative in protecting Mr. Smollett's right to a public trial. (C 1677-1680). The reasonable alternative would have been to create an overflow courtroom with a live feed (which was done 5 days into the trial, C 1680). *See, e.g. State v. Brimmer*, 2022 Iowa Sup. LEXIS 110.

2. The Trial Proceedings

The defense does not challenge the trial court's COVID-19 capacity protocol, but rather, the protocol's arbitrary enforcement (C 1677-1680).

3. Ejection of Ms. Ambrell Gambrell from the Courtroom

On December 2021, a Chicago Tribune news report detailed how Ms. Ambrell Gambrell ("Bella BAHHS), one of Mr. Smollett's guests, was barred by the trial court, from the courtroom, for two days, after giving a media interview where she criticized the Chicago police (C 1663-1666); S*ee also*, (C 1677, paragraph 3). The Tribune article also got confirmation from the Cook County Sheriff's Office that the trial court had "made a verbal order barring an individual seated in the gallery of his courtroom..." (C 1664).

The article does note that when reached for comments, the trial court stated that it did "not ban anyone from the courtroom but asked the person in question not be in the first row." (C1663).[16] Though the same article states that when asked, at an earlier point, about Ms.

[16] The colloquy involving Ms. Gambrell occurred in the absence of the court reporter. (C 1665). Nonetheless, in post trial filings, the defense reminded the trial court of what transpired. (C 1604).

Gambrell's ejection, the trial court had commented in an issued statement, "nobody is going to infect this trial." (C 1665).

Notably, the OSP in their response to the defense post-trial motions, never challenged Ms. Gambrell's account as documented by the Tribune. (C 1702; footnote 5). Instead, the OSP suggested that the removal of one spectator was inconsequential to the right to a public trial. (C 1702; footnote 5).

Conclusion

For the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court and grant him a new trial with a new trial judge assignment if reversed. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

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

A. Standard of Review

Constitutional issues implicating prosecutorial misconduct should be reviewed *de novo*. *People v. Wheeler,* 226 Ill. 2d 92, 121 (2007).

B. Legal Analysis

Mr. Smollett's Constitutional rights to due process and to a fair trial were denied by prosecutorial misconduct including allegations that a defense witness was pressured to change his statement, two distinct *Doyle* violations during trial, and shifting the burden during closing arguments.

Testimony of Anthony Moore

A defendant's fundamental right to present witnesses in his own defense is violated if there exists evidence of improper prosecutorial influence exerted on witnesses. *People v. Muschio*, 278 Ill. App. 3d 525 (1st Dist. 1996).

In the present case, instances of prosecutorial misconduct were clear and egregious. For example, Mr. Moore was an independent eyewitness who saw the assailants who attacked Mr. Smollett. (R 2500-2537). In his initial statements to police, Mr. Moore described one of these attackers to be a white man. (R2507). However, after meeting with the OSP, Mr. Moore eventually signed a statement written by the OSP that it was "possible but not probable" that the attacker was probably black. (R 2510; R 2511-2516). When the defense asked Mr. Moore to explain his inconsistent statements, Mr. Moore stated under oath that he was "pressured" by one of the OSP prosecutors to change his original statements. (R 2514-2515). When the defense asked Mr. Moore if would be able to recognize the prosecutor who had pressured him, Mr. Moore identified one of the OSP prosecutors in open court as the prosecutor who had pressured him. (R 2515).

The fair trial implications are obvious. For example, Mr. Moore's credibility was likely negatively impacted in front of the jury due to having inconsistent statements. Additionally, Mr. Smollett's testimony that one of his attackers had pale skin loses corroboration if the jury viewed Mr. Moore's testimony as inconsistent. (R 1275, R 1438-1444; R 1540; R 1651-6152; R 1674; R 1684; R 1708; R 1730; R 1732; R 2904-2906; R 291).

After Mr. Moore's testimony, the defense made a motion to disqualify the identified OSP prosecutor, which the trial court denied. (R2821-2825). This motion should have been granted

since the prosecutor in question had essentially turned into a witness. *See, People v. Rivera*, 2013 IL 112467 (2013).

Improper burden-shifting statements by the OSP during rebuttal closing arguments.

A prosecutor may be considered to have shifted the burden of proof by suggesting to the jury that the defendant was obligated to present evidence at trial. *People v. Giangrande*, 101 Ill. App. 3d 397 (1st Dist. 1981).

Here, in rebuttal closing arguments, the prosecutor argued, "Mr. Uche gave you no evidence of any video that was missing" (R3226). This comment is the equivalent to asking "where's the evidence." *See e.g.*, *Giangrande*, 101 Ill. App. 3d at 401-405. By arguing to the jury that the counsel for the defendant failed to prove a fact or produce evidence that defendant had absolutely no burden to prove, the prosecutor implied that Mr. Smollett was required to prove his own innocence. That implication alone is sufficient to result in substantial prejudice to the defendant. *Id* at 403.

Prosecutorial witness examinations that violated Doyle

The Supreme Court has held that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 617-618 (1976).

The Illinois courts have even taken the rule a step further holding that it is impermissible to impeach a defendant with his post-arrest silence regardless of whether the defendant had yet been given Miranda warnings. *People v. Clark*, 335 Ill. App. 3d 758, 763 (3d Dist. 2002). Finally, the Courts have held that evidence of post-arrest silence is to be considered neither material nor relevant to proving or disproving a defendant's charged offense and that admission of the same constitutes reversible error. *People v. Sanchez*, 392 Ill. App. 3d 1096, 1096-1097 (3d Dist. 2009).

In the present case, the OSP specifically violated *Doyle* on two separate occasions. The first occurred during the direct examination of prosecution witness Detective Theis, where the prosecution asked a series of questions as to whether Defendant "ever" made statements regarding the Osundairo brothers having done "nothing wrong" or any statements where Defendant "came clean". (R 1431-1432). This line of questioning directly violates the Defendant's Due Process rights by allowing the prosecution to "impeach" the Defendant's exculpatory testimony told for the first time at trial. *Doyle,* 426 U.S. at 620.

The second instance occurred when the Prosecution asked Abimbola Osundairo if Defendant "ever made a statement to the public where he admitted that the hate crime was a hoax." (R 1984-1985). Again, Illinois Courts have held that a prosecutor's line of questioning suggesting that "defendant's trial testimony was fabricated because he could have told the police officers the same story during the investigation but did not" was specifically improper. *See, People v. Gagliani*, 210 Ill. App. 3d 617 (2d Dist. 1991). This can be particularly where a defendant's credibility is integral to his defense, as was the case here. *Id*. at 627. In fact, even the trial court sustaining an objection and giving instructions to the jury does not cure and thus still constitutes reversible error. (R 1985); *Gagliani*, 210 Ill. App. 3d at 627.

Conclusion

Therefore, for the foregoing reasons, Mr. Smollett respectfully requests that this Court reverse the trial Court and grant him a new trial with a new trial judge assignment if reversed. *See*, *People v. Jackson*, 409 Ill. App. 3d 631, 650 (1st Dist. 2011).

CERTIFICATE OF COMPLIANCE

I, Nnanenyem E. Uche, certify that this Appellant Brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 66 pages (and per this Court's January 30, 2023, Order is 19,977 words, not exceeding 20,000 words).

/s/ *Nnanenyem E. Uche* .
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
v.
JUSSIE SMOLLETT
Defendant

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

ORDER OF COMMITMENT AND SENTENCE TO COOK COUNTY DEPARTMENT OF CORRECTIONS

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

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

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

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

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

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

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

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

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

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

VERIFIED BY _____

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

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

Printed: 3/10/2022 7:16 PM
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Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	Court Interpreter
242	Defendant Sheet #1	Criminal Division, Courtroom 700 2650 South California Avenue, Chicago, IL, 60608	

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

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

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

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

C 1712

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

v.

Jessie Smollett

Defendant

Case No. 20 CR 03050-01

CRIMINAL AND TRAFFIC ASSESSMENT ORDER

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

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

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

1. Fines

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

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

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

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

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

3. Conditional Assessments (check all that apply)

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

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

4. Other Assessment

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

5. Credit

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

6. Offsets of Assessments

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

The Court orders:

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

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

ENTERED:

Dated:

Judge

1544

Judge's No.

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

Signature of Defendant

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

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

or

A Municipal Corporation

v.

JESSIE SMOLLETT

Defendant

☒ Criminal Division

☐ Municipal District No. _____

Br/Rm 700

Case No. 20 CR 03050-01

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

AOIC Code: _____

IR No. 2397168 SID No. _____

CB No. 19771648

SENTENCING ORDER

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

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

IT IS HEREBY ORDERED that

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

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

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

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

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

STANDARD CONDITIONS

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

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

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

DRUG/ALCOHOL/DUI RELATED CONDITIONS

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

SPECIAL CONDITIONS

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

DOMESTIC VIOLENCE

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

SEX OFFENDER

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

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

RESTITUTION

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

☐ **OTHER** _____

☒ **ADDITIONAL ORDERS**

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

☐ Next Court Date: _____

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

Jussie Smollett

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

Defendant DOB: 6/21/82

Address: 220 W. 148th St., Apt. 2C City: New York

State: NY Zip: 10039

Telephone: 310-993-1649 Email: jussie.smollett@gmail.com

Prepared by: Office of the Special Prosecutor

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

ENTERED:

Dated: _____

James B. Linn 1544
Judge Judge's No.

C 1720

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

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

NOTICE OF APPEAL

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

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

(1) Court to which appeal is taken:

Illinois First District Appellate Court

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

Name: JUSSIE SMOLLETT

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

Email: nenye.uche@uchelitigation.com

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

Name: Nnanenyem E. Uche

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

Email: nenye.uche@uchelitigation.com

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

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

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

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

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

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

NNANENYEM E. UCHE

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

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

No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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

NOTICE OF FILING

TO: Attorney(s) for Plaintiff/Appellee:
Office of Special Prosecutor
% Dan Webb (DWebb@winston.com)
Sean G. Wieber (SWieber@winston.com)
Sam Mendenhall (SMendenh@winston.com)
Matt Durkin (MDurkin@winston.com)
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
D: 1(312) 558-5769
F: 1(312) 558-5700

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

- **BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT and APPENDIX**

By: /s/ Heather Widell
Attorney for Defendant-Appellant

Heather A. Widell
The Law Offices of Heather A. Widell
1507 E. 53rd Street, Suite 2W
Chicago, Illinois 60615
Ph: (773) 955-0400
Email: heather@thelawofficehaw.com
Cook County Atty No. 59374 (ARDC# 6311451)

CERTIFICATE OF SERVICE

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

SERVICE LIST

Attorney(s) for Plaintiff-Appellee:
Office of Special Prosecutor
% Dan Webb (DWebb@winston.com)
Sean G. Wieber (SWieber@winston.com)
Sam Mendenhall (SMendenh@winston.com)
Matt Durkin (MDurkin@winston.com)\
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
D: 1(312) 558-5769
F: 1(312) 558-5700

BY: /s/ Heather A. Widell
Attorney for DEFENDANT-APPELLANT

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