No. 129026

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. DANIEL D. BASILE, Defendant-Appellee.	) Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-21-0740)) There on Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois, No. 19 CF 2828)) The Honorable Brendan Maher, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

MATTHEW D. SKIBA
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(872) 272-0756
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

E-FILED
1/11/2024 11:35
CYNTHIA A. GRANT
SUPREME COURT CLERK

ARGUMENT

As the People's opening brief established, the appellate court erred in affirming the trial court's judgment dismissing defendant's indictment with prejudice and without leave to reindict.

The trial court exceeded its authority by dismissing the indictment, and it should be reinstated. Defendant needed to show that the People committed prosecutorial misconduct that denied him due process, and that he was prejudiced as a result. *See People v. DiVincenzo*, 183 Ill. 2d 239, 257 (1998). But defendant can show neither. *See* Peo. Br. 10-31 (misconduct), 31-35 (prejudice).[1] First, defendant cannot show prosecutorial misconduct, because a due process violation requires that the People acted with culpability indicative of bad faith. *See infra* Part II.A. And though the People did not commit prosecutorial misconduct under any conception of the legal standard, any error was at worst inadvertent. Second, and regardless, defendant was not prejudiced by any error in the grand jury presentation because the grand jury heard ample testimony that defendant engaged in sexual acts while victim Jane Doe was too intoxicated to understand the nature of the acts or give knowing consent. *See infra* Part II.B.

In the alternative, the People should be granted leave to reindict. *See infra* Part III. The circuit court should have dismissed the indictment

[1] The People follow the same citation conventions as in the opening brief, with the following additions: "Peo. Br. _" and "Def. Br. _" refer to the People's opening brief and defendant's brief, respectively.

without prejudice, so that the People can again present the sexual-assault charges before the grand jury without the challenged testimony. Tellingly, defendant does not respond to the People's arguments in the opening brief that the proper remedy for the error in this case is — at most — dismissal without prejudice.

I. This Court Reviews De Novo Whether Defendant Was Denied Due Process and Whether He Suffered Prejudice.

As noted above, whether the circuit court erred in dismissing the indictment hinges on two legal questions: (1) whether the People committed prosecutorial misconduct that denied defendant due process, and (2) whether that misconduct prejudiced him. *DiVincenzo*, 183 Ill. 2d at 257 (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256-57 (1988)). As explained in the People's opening brief, Peo. Br. 9, this Court reviews both questions de novo. *See People v. Stapinski*, 2015 IL 118278, ¶ 35.

Defendant mistakenly suggests that this Court should review each question for an abuse of discretion. Def. Br. 9, 14. To be sure, the abuse-of-discretion standard governs review of the circuit court's choice of remedy for a prejudicial denial of due process, so this Court reviews for an abuse of discretion the circuit court's decision to dismiss with prejudice, rather than without prejudice. *Stapinski*, 2015 IL 118278, ¶ 35. But the circuit court receives no deference on the threshold question of whether defendant suffered a prejudicial denial of due process in the first place. *Id.*

That bifurcated standard of review makes practical sense, as this Court is on equal footing with the circuit court in its ability to answer that threshold question. The circuit judge was not present during the People's grand jury presentation, and thus he acknowledged the difficulty in using the "cold, dead [grand jury] transcript," R47, to answer whether the People committed a prejudicial denial of due process. Indeed, the parties "agree[d] to a non-evidentiary hearing (no live witness testimony)," and thus the only "facts" the court could consider were the grand jury transcript and defendant's recorded interview. A16. This Court is faced with that identical evidence.

II. The Circuit Court Erred in Dismissing the Indictment.

A. The People did not deny defendant due process.

The circuit court dismissed the indictment under *DiVincenzo*, which permits dismissal for prosecutorial misconduct that "rise[s] to the level of a deprivation of due process" under the Fourteenth Amendment. 183 Ill. 2d at 257 (citing, *e.g.*, *People v. Lawson*, 67 Ill. 2d 449, 455 (1977), which grounded the court's "inherent authority to dismiss" an indictment on this basis under the Fourteenth Amendment). *DiVincenzo* requires a showing that the "prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence." *Id.*

As this Court has stressed, a court's authority to dismiss the indictment on due process grounds is a narrow one and appropriate only for

an unequivocal denial of due process. *See People v. Fassler*, 153 Ill. 2d 49, 61 (1992) ("[C]ourts must ascertain pre-indictment denial of due process with certainty.") (citing *Lawson*, 67 Ill. 2d at 457); *see also Stapinski*, 2015 IL 118278, ¶ 33 ("[A] trial court has the inherent authority to dismiss an indictment in a criminal case for any reason given in section 114-1 of the Code of Criminal Procedure of 1963, or where there has been a clear denial of due process").

The circuit court exceeded its authority in dismissing the indictment because defendant cannot show a clear denial of due process.

1. Defendant must show that the People presented deceptive or inaccurate testimony with a culpable state of mind indicative of bad faith.

Defendant does not contest that this case concerns only *DiVincenzo*'s catch-all category for "other deceptive or inaccurate evidence." Dismissal under that category requires a showing of bad faith, not just inadvertent error. At a minimum, that requires that the People know or should know that the grand jury testimony is deceptive or inaccurate.

a. The appellate court erred in concluding that a defendant can obtain dismissal based on the inadvertent presentation of deceptive or inaccurate evidence.

The appellate court held that dismissal was appropriate even if the People only inadvertently presented deceptive or inaccurate evidence. Not so. *DiVincenzo* requires that defendant show that the People present the

"deceptive or inaccurate" evidence with a culpable state of mind indicative of bad faith. *See* Peo. Br. 15-24.

DiVincenzo's culpability requirement squares with guidance from *Bank of Nova Scotia*, the case on which *DiVincenzo* based its test for prejudice, *see* 183 Ill. 2d at 257. *Bank of Nova Scotia* suggests that dismissal of an indictment is inappropriate even if the grand jury heard false or misleading testimony unless the government *knew* that the testimony was false or misleading. 487 U.S. at 261; *see also* Wayne LaFave, *et al.*, *Criminal Procedure* § 15.7(e) (4th ed. 2015) (*Bank of Nova Scotia* "appeared to require knowledge as a prerequisite for a misconduct finding in the federal courts"). And in keeping with *Bank of Nova Scotia*, the majority of courts have held that the government does not commit prosecutorial misconduct — much less misconduct that denies a defendant due process — when the government only inadvertently presents false or misleading testimony to the grand jury. *See* Peo. Br. 15-18 (collecting cases).

DiVincenzo is consistent with that approach. *DiVincenzo*'s first two categories expressly require a showing of culpability: claims based on "mislead[ing]" testimony require a showing that the People acted "deliberately or intentionally," and claims based on "perjured or false testimony" require the falsity to be "known" to the prosecutor. 183 Ill. 2d at 257. Even before *DiVincenzo*, this Court cited *Bank of Nova Scotia* for the proposition that prosecutorial misconduct warranting dismissal of an

indictment "*may* occur where a prosecutor deliberately or intentionally misleads the grand jury to the prejudice of the defendant." *See People v. J.H.*, 136 Ill. 2d 1, 13 (1990) (citing, *e.g.*, *Bank of Nova Scotia*, 487 U.S. at 260-62) (emphasis in the original)). Those mental-state requirements would be meaningless if a defendant can employ a "other deceptive or inaccurate evidence" catch-all to obtain dismissal even if the People did not act intentionally or knowingly.

Defendant nevertheless maintains that *DiVincenzo*'s silence on the required mental state for "other deceptive or inaccurate" evidence means that the category includes inadvertent errors, effectively rendering the People's intent irrelevant. *See* Def. Br. 8. But he fails to acknowledge the tension between his position and *Bank of Nova Scotia* and its progeny. And he ignores that his proposed rule would put *DiVincenzo* at odds with analogous claims in the trial context, where this Court has said that inadvertent errors do not violate due process. *See People v. Prante*, 2023 IL 127241, ¶ 69 (for due process claims based on false trial testimony under *Napue v. Illinois*, 360 U.S. 264 (1959), and its progeny, a "defendant must allege that the State's use of false testimony was *knowing* in order to establish a constitutional violation" (quoting *People v. Brown*, 169 Ill. 2d 94 (1995) (emphasis added)). Defendant does not even attempt to justify a rule under which due process requires a lesser showing in the grand jury context. *See also* Peo. Br. 26-27

(explaining that such a rule would be "anomalous" given that trial errors are more serious than grand jury errors).

Defendant's invocation of the shock-the-conscience standard for substantive due process cases, Def. Br. 13 — which this Court applied in in *Stapinski*, 2015 IL 118278, ¶ 51 (upholding dismissal of an indictment based on the breach of a cooperation agreement) — only undercuts his position further. As the United States Supreme Court has explained in another context, only "egregious" and "outrageous" misconduct — not inadvertent harm — suffices to shock the conscience under the Fourteenth Amendment. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848 & n.8 (1998) (explaining that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process" and that conduct "intended to injure" someone "would most probably support a substantive due process claim"); *cf. also Badgett v. D.C.*, 925 F. Supp. 2d 23, 33 (D.D.C. 2013) ("'Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress'" under substantive due process) (quoting *Silverman v. Barry,* 845 F.2d 1072, 1080 (D.C. Cir. 1988)). Thus, there is no merit to defendant's position that the Due Process Clause supports dismissal without any showing of culpability.

Due process principles aside, defendant argues that his reading of *DiVincenzo* is the correct one because any culpability requirement renders the "other deceptive or inaccurate evidence" category redundant. But

defendant's proposed reading of the opinion would itself lead to redundancy. As explained, those culpability thresholds for *DiVincenzo*'s first two categories would be meaningless under defendant's reading, where a defendant could obtain dismissal under a catch-all for "other deceptive or inaccurate" evidence *regardless of* the People's culpability. *See* Peo. Br. 18-20. Had this Court intended to include inadvertent errors, surely it would have been more economical for *DiVincenzo* to outline one category instead of three, proscribing the presentation of "*any* deceptive or inaccurate evidence," simpliciter.

To be sure, there is some overlap among *DiVincenzo*'s categories. But this Court can give each category independent meaning while preserving the requirement that defendant show culpability. The "deliberately or intentionally mislead[ing]" testimony category, *DiVincenzo*, 183 Ill. 2d at 257, appears to include affirmative misrepresentations, omissions, and exaggerations that are not outright falsehoods. Such falsehoods are covered by the second category, for "known perjured or false testimony." *Id.* The "other deceptive or inaccurate evidence" catch-all, *id.*, covers bad-faith conduct between those poles, such as "half-truths" that are technically correct but are intended to imply a falsehood. *See* Half-Truth, Black's Law Dictionary (11th ed. 2019) (defining a half-truth as "[a] statement that is only partly true, made [usually] to mislead or to keep something secret," or alternatively, as "[a] statement that mixes truth with falsity in order to

confuse or deceive"). For example, an attorney's statement, "I did not lose in court today" on a day that the attorney was not in court is technically correct, but intentionally (and falsely) implies that the speaker won. Such a statement would be deceptive, and at least partially inaccurate. Notably, half-truths encompassed by *DiVincenzo*'s third category are actionable as prosecutorial misconduct under *Napue*. *See United States v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2011) (*Napue* claims include "'half-truths' and vague statements that could be true in a limited, literal sense but give a false impression to the jury"). And they are *not* otherwise encompassed by *DiVincenzo's* first two categories.

The distinctions between *DiVincenzo*'s categories are slight. But that is precisely the problem with defendant's literal reading of the opinion. Nothing about *DiVincenzo* suggests that the requirement to show culpability turns on philosophical differences between what constitutes "mislead[ing]" and "perjured or false testimony" on the one hand, and "deceptive or inaccurate evidence" on the other.

DiVincenzo's citation to *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983), does not supply defendant with the missing hook necessary to show that inadvertent errors give rise to a due process violation, as the opening brief explains. *See* Peo. Br. 20-24. As even defendant concedes, *see* Def. Br. 9-10, the foundation for *Hogan*'s suggestion that the government's intent is irrelevant has eroded. *Hogan* has been all but overruled following *Bank of*

Nova Scotia and *United States v. Williams*, 504 U.S. 36 (1992), as well as intervening decisions from the Second Circuit. *See* Peo. Br. 21 & n.4. Critically, the Second Circuit has recently said that a defendant has a "very heavy burden of establishing a due process violation to dismiss an indictment for outrageous governmental misconduct" and — consistent with this Court's formulation in *Stapinski*, 2015 IL 118278, ¶ 51 — must show that the "governmental conduct, standing alone, is so offensive that it shocks the conscience." *United States v. Walters*, 910 F.3d 11, 27 (2d Cir. 2018) (quotation marks omitted). That standard is met, the court continued, only in cases of "extreme" misconduct on par with acts of coercion or "violations of bodily integrity." *Id.* at 27-28; *see also id.* at 28 (leak of confidential grand jury information was "deeply disturbing and perhaps even criminal" but was not extreme enough to shock the conscience).

Finally, defendant contends that a reaffirmation of *DiVincenzo*'s culpability requirement will "weaken the grand jury's function as a shield for the individual" and encourage "sloppy grand jury practices." Def. Br. 20-21. But there is no indication that defendant's parade of horribles has come to pass in any of the multitude of jurisdictions across the country that require a showing of culpability. *See* Peo. Br. 13-15. At bottom, defendant would have this Court presume that a culpability requirement would encourage prosecutors to flout their ethical responsibilities and risk dismissal of their indictments — with or without prejudice. That presumption is unwarranted.

Regardless of this Court's legal standard, prosecutors will have every incentive to continue to take due care in ensuring that the grand jury presentations are accurate and not deceptive.

In short, the People do not commit prosecutorial misconduct in the presentation of testimony to the grand jury that denies defendant due process through inadvertent errors in that testimony.

b. At most, this Court should require that a defendant show that the People knew or should have known that the testimony was deceptive or inaccurate.

As a fallback, defendant argues — for the first time — that "perhaps" *DiVincenzo*'s third category encompasses instances where the prosecutor ought to have known of the "false and misleading" nature of the testimony or where the prosecutor was "reckless" in her preparation. *See* Def. Br. 6-7.

As an initial matter, defendant has forfeited his theory by presenting only a cursory, undeveloped argument without the backing of any legal authority. *See* Ill. S. Ct. R. 341(h)(7) ("Points not argued are forfeited[.]"); *People v. Aljohani*, 2022 IL 127037, ¶ 61 ("point raised in a brief but not supported by citation of relevant authority fails to satisfy Rule 341"). Although defendant — as the appellee — may provide alternative bases for affirmance, it was nevertheless incumbent on him to present a developed argument that his preferred culpability threshold is the correct one. *See Fassler*, 153 Ill. 2d at 62 (appellee forfeited reliance on specific "grounds upon

which the trial judge dismissed the indictment" by failing to argue them in brief).

The issue is also not presented on the facts of this case, because the People did not act recklessly. *See infra* Part II.A.2. However, to the extent that this Court does consider the precise culpability threshold, it should clarify that the *DiVincenzo* standard encompasses instances where the People knew or should have known that grand jury testimony was deceptive or inaccurate. The United States Supreme Court has acknowledged that it is a "closer call[]" whether "something more than negligence but less than intentional conduct, such as recklessness or gross negligence" may be enough to shock the conscience, and that the answer would depend on the context. *Lewis*, 523 U.S. at 849. But the precise culpability threshold is thus far unsettled in the grand jury context.

The *Napue* analogue is instructive on what that threshold should be. Constructive knowledge satisfies the knowledge requirement for such claims. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) (knowledge established if the government "knew, or should have known," of falsity); *Prante*, 2023 IL 127241, ¶ 69 (rejecting due process claim based on false trial testimony because there were "no allegations . . . that the State *knew or should have known*" that testimony was false) (emphasis added)). Thus, the knew-or-should-have-known standard is an appropriate place to draw the line for comparable grand jury claims.

2. The People did not clearly present any deceptive or inaccurate testimony under any understanding of *DiVincenzo*'s standard.

In the end, this Court need not resolve any lingering questions about the proper legal standard because the People did not present deceptive or inaccurate testimony under any formulation of the standard.

Defendant challenges the colloquy between Rockford Police Detective Vince Kelly and a grand juror, who had additional questions following Kelly's testimony about Jane Doe's allegations:

> JUROR: Besides that she said that this occurred, was there any other evidence that he actually did this to her?
>
> KELLY: I'm not sure I completely understand the question.
>
> JUROR: You said the person was extremely intoxicated, correct?
>
> KELLY: Correct.
>
> JUROR: How do we know that the person she claims did this to her did it to her?
>
> KELLY: He told me he did.
>
> JUROR: That is all I needed to know.

CS18. The transcript suggests that Detective Kelly answered the grand juror's question as he reasonably understood it. And at the very least, defendant cannot show "with certainty," *Lawson*, 67 Ill. 2d at 457, that Kelly's statement was deceptive or inaccurate (let alone intentionally or knowingly so, or even recklessly so).

Defendant's attempt to show a clear denial of due process becomes all-the-more difficult because of lingering ambiguity of the question he was

answering in the first place. The difficulty in parsing the grand juror's question with only the benefit of the "cold, dead [grand jury] transcript" cannot be overstated. Language is contextual, and the tone and emphasis of a speaker's voice can help clarify the meaning of a question. That key context is missing here. The question, "How do we know that *the person* she claims did this to her did it to her?" has a different connotation than, "How do we know that the person she claims *did this* to her *did it* to her?" Only those present in the grand jury room could hear the grand juror's inflections as the juror sought to clarify the question after Kelly's initial confusion.

But as the People's opening brief explains, the limited context the grand jury transcript can provide undermines defendant's claim that the grand juror questioned Doe's credibility given her "extreme[]" intoxication. *See* Peo. Br. 28-29. Doe's extreme intoxication, and her resulting inability "to understand the nature of the act" or "give knowing consent," was the very basis for the People's charges in the first place. *See* C7. In other words, the People necessarily had to highlight Doe's extreme intoxication for the grand jury to return a true bill of indictment. And given that Doe's intoxication, in fact, supported the charges, Kelly could reasonably construe the question to ask about something other than Doe's credibility, such as how Doe knew it was defendant who engaged in sexual acts with her. *See* Peo. Br. 29.

It is no answer to say, as defendant does, that this case "was never a whodunit." Def. Br. 17. The People have never claimed that the question at

trial will be whether defendant, rather than some other unnamed third party, assaulted Doe. But that does not mean that the grand juror could not have been curious on this point. And such curiosity would have been reasonable, as Doe was drinking with several other friends that night. *See* CS16. And Doe's other friends helped her get into a car after she had been falling-down drunk. *Id.* Indeed, the grand juror referred to defendant as "the person *she claims* did this to her," suggesting that the juror may have sought certainty that defendant was the only suspect. Had the question been framed as defendant reads it, the doubt would have attached to the *act* rather than the *person* — such that the juror might have worded the question, "how do we know that the person *did what she claims*?"

Read in that light, Kelly's answer of, "he told me he did" was neither deceptive nor inaccurate, but correctly told the grand juror that the juror could be sure that defendant engaged in the sexual acts with Doe. But at the very least, the aim of the grand juror's question was not so clear that Kelly knew or should have known that his answer was deceptive or inaccurate. No one disputes that defendant claimed that the sex was consensual. But that does not mean that Kelly knew or should have known that his answer gave a false impression to the contrary.

Nor is there merit to defendant's claim that Kelly's answer could "only be interpreted one way," in that it suggests that defendant confessed to the sexual assault. Def. Br. 17-18. Kelly did not say that defendant confessed —

i.e., that defendant knew that Doe was too intoxicated to understand the nature of the sexual act or give knowing consent. And it is not apparent that *any* of the grand jurors would have interpreted the answer that way. Indeed, the grand jurors would have reasonably wondered why Kelly had buried the lede by addressing Kelly's "confession" only *after* the grand juror asked a question and after Kelly expressed confusion as to that question.

But even if defendant is right about the grand juror's question, he still cannot show that he was denied due process. At worst, Kelly misunderstood the question or gave an imprecise answer. That is not misconduct — either by the prosecutor or Kelly himself. *See United States v. Cavallo*, 790 F.3d 1202, 1220 (11th Cir. 2015) (finding no misconduct from answer to grand juror's "imprecisely-worded question" where "[d]efendants have failed to demonstrate that the agent intentionally made a false statement, or that the prosecutor would so interpret his testimony"); *cf. also United States v. Garcia*, 793 F.3d 1194, 1208 (10th Cir. 2015) (answer to "imprecise questioning" did not violate *Napue*).

B. Any prosecutorial misconduct did not prejudice defendant.

Even if the People committed misconduct (and they did not), the circuit court lacked authority to dismiss the indictment because defendant was not prejudiced. *See Fassler*, 153 Ill. 2d at 58 ("A court has authority to dismiss an indictment procured through prosecutorial misconduct only when the accused

can show that such misconduct results in actual and substantial prejudice to him.") (citing *Bank of Nova Scotia*, 487 U.S. at 256-57).

Defendant needs to demonstrate that prosecutorial misconduct "had an effect on the grand jury's decision to indict," in that it "substantially influenced the grand jury's decision to indict" or leaves "grave doubt that the decision to indict was free from the substantial influence of such violation." *Bank of Nova Scotia*, 487 U.S. at 256, 263. That assessment turns on the strength of the unchallenged testimony before the grand jury. *See People v. Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶¶ 56, 62.

As defendant correctly conceded in the trial court, *see* R37, 51, the testimony preceding the colloquy between Kelly and the grand juror was enough by itself to establish probable cause. The grand jury heard unchallenged testimony that: (1) Doe was "falling down" after a night drinking with defendant and a group of friends; (2) she was intoxicated to the point that she needed assistance getting into defendant's car; (3) after defendant drove her home, she fell again on a couch in her mudroom and told defendant he could leave; (4) defendant then removed her pants and underwear and "had sexual intercourse" with her while in her mudroom; (5) she was "in and out of awareness due to her intoxication," and does not remember taking off her shoes or getting to her bedroom; (6) "she became aware again" in her bedroom as defendant was "licking her feet"; (7) defendant had "sexual intercourse" with her again in her bedroom; and (8)

Doe "did not perform any sexual acts on [defendant] and stated because of her intoxication she would have been unable to do so." CS15-18. That testimony more than suffices to establish probable cause that defendant committed an act of sexual penetration while Doe was unable to understand the nature of the act or give knowing consent. C7.

Defendant doubles down, Def. Br. 22-23, on the appellate court's conclusion that Doe's intoxication made her less credible, and that Kelly's answer was necessary to secure the indictment. *See* A8 (finding that the evidence was "weak" because Doe's account "would have been questionable at best" given her "extreme[] intoxication"). As explained, however, Doe's "extreme[] intoxication" is the very reason why the People sought to charge defendant in the first place and does not undermine the showing of probable cause. If defendant is correct that Doe's intoxication undermines her credibility to such a degree that the People could not show probable cause, it is hard to image a scenario where the People could ever obtain indictments in sexual assault cases where the victim is heavily intoxicated — voluntarily or otherwise — even to the point of complete unconsciousness. *See* Peo. Br. 33-35.

Moreover, defendant's attempts to question Doe's credibility at this juncture seek to expand the grand jury's role beyond its limited station as a check against frivolous or arbitrary prosecutions. *See People v. Rodgers*, 92 Ill. 2d 283, 289 (1982) (grand jury is the "'primary security to the innocent

against hasty, malicious and oppressive persecution'" and protects the accused by ensuring that charges are "'founded upon reason'" rather than "'dictated by an intimidating power or by malice and personal ill will'") (quoting *Wood v. Georgia*, 370 U.S. 375, 390 (1962)). That does not entail a preliminary inquiry into a defendant's ultimate guilt or innocence. *See People v. J.H.*, 136 Ill. 2d 1, 11 (1990) (grand jury presentation is not a "'kind of preliminary trial'") (quoting *Costello v. United States* 350 U.S. 359, 363 (1956)); *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., in chambers) ("The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand his trial.").

Defendant speculates on reasons why the grand jury may have found Doe incredible. As defendant tells it, the grand juror "had a problem" with the fact that Doe said she "was good" yet did not tell defendant to stop, and, defendant speculates, the juror "struggled" with the fact that Doe could remember certain details about the sex acts defendant performed on her. Def. Br. 23. But such conjecture about the juror's thinking is no more than a preview of defendant's trial theory; it is not a prejudice argument. The petit jury may choose to accept defendant's version of the incident, but only after hearing from Doe personally (and defendant, if he chooses to testify) — on both direct and cross examination.

III. In the Alternative, the Circuit Court Should Have Dismissed the Indictment without Prejudice.

Even if this Court were to conclude that defendant has suffered a prejudicial denial of due process, the circuit court nonetheless abused its discretion in dismissing the indictment with prejudice and without leave to reindict. Because any error in Kelly's testimony was at most inadvertent, the circuit court should have — at worst — dismissed the indictment *without* prejudice. *See* Peo. Br. 35-38.

Defendant does not challenge the People's arguments that dismissal without prejudice is the appropriate remedy if this Court concludes that any error was inadvertent. For good reason. Barring prosecution for an inadvertent error is a disproportionate remedy that provides a windfall to defendant at Doe's and the public's expense. *See* Peo. Br. 35-37. And given that inadvertent constitutional errors at trial do not bar retrial, inadvertent constitutional errors before the grand jury should not bar prosecution entirely. *See* Peo. Br. 35-37.

Indeed, a dismissal with prejudice for other instances of prosecutorial misconduct pre-trial or at trial is reserved only for egregious misconduct. *See United States v. Russell,* 411 U.S. 423, 431-32 (1973) (stating in dicta that there may be instances "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"); *see also, e.g.*, *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 252 (3d Cir. 2005) (surveying caselaw).

But even where the misconduct *is* egregious, courts have barred prosecution only in truly exceptional cases. *See id.* at 254 ("[D]ismissal with prejudice is in practice a rare sanction for any constitutional violation."); *see also id.* at 254 n.6 (citing, as an example, an instance where a district court dismissed charges for a repeated breaches of *Brady* because the court "found that the government had 'breached the duty of professionalism and candor owed to the court' and doubted 'whether [government had] proceeded . . . in good faith'") (quoting *United States v. Dollar,* 25 F. Supp. 2d 1320 (N.D. Ala. 1998)).

Thus, this Court should hold that a dismissal with prejudice is reserved for egregious, deliberate misconduct — which is absent here. *See supra* Part II.A.2

The remedy of dismissal without prejudice is more than commensurate with the harm. Doing so penalizes the prosecutor, as the People must expend the resources necessary to seek a new indictment before the grand jury. And just as a petit jury's verdict renders harmless any errors in the grand jury presentation, *see United States v. Mechanik*, 475 U.S. 66, 70 (1986), a grand jury's decision to re-indict cures any constitutional violation that led to the first indictment.

CONCLUSION

This Court should reverse the appellate court's judgment and direct the circuit court to reinstate the indictment against defendant.

January 11, 2024

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

MATTHEW SKIBA, Bar No. 6330455
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(872) 272-0756
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 5,124 words.

/s/ Matthew D. Skiba
MATTHEW D. SKIBA
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 11, 2024, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following:

Mark A. Byrd
308 West State Street, Suite 450
Rockford, Illinois 61101
byrdlaw@comcast.net

/s/ Matthew Skiba
MATTHEW SKIBA
Assistant Attorney General
eserve.criminalappeals@ilag.gov