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.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

A grand jury returned a true bill of indictment charging defendant with two counts of criminal sexual assault of Jane Doe when she was unable to either understand the nature of the act or give knowing consent. Defendant moved to dismiss the charges, arguing that the People had presented the grand jury with deceptive or inaccurate testimony. The circuit court agreed and dismissed the indictment with prejudice and without leave to reindict. The appellate court affirmed, and the People now appeal that judgment. A question is raised on the charging document: whether the circuit court erred in dismissing the indictment on the grounds of prejudicial prosecutorial misconduct before the grand jury.

ISSUES PRESENTED FOR REVIEW

1. Whether dismissal of the indictment on grounds of prosecutorial misconduct was unwarranted where the record reveals no errors in the presentation of grand jury testimony, much less intentional errors that are unambiguously clear from the record.

2. Whether dismissal of the indictment was also unwarranted for lack of prejudice from the challenged testimony, where (i) the charges alleged that defendant knowingly committed an act of sexual penetration while Jane Doe was unable to understand the nature of the act or give knowing consent, and (ii) the unobjectionable grand jury testimony alleged that Jane Doe was heavily intoxicated to the point of falling down, had blacked out during and

between defendant's sexual acts, and was unable to participate in the sexual acts because of her intoxication.

3. In the alternative, whether the circuit court abused its discretion in dismissing the indictment with prejudice and without leave to reindict where the record makes clear that any error in presenting grand jury testimony was at most inadvertent.

JURISDICTION

The People appeal from the appellate court's judgment affirming the circuit court's order dismissing an indictment with prejudice. *See* Ill. S. Ct. R. 604(a); *People v. DeJesus*, 127 Ill. 2d 486, 495 (1989) ("The State retains the right to appeal in any case of a judgment the substantive effect of which results in dismissal of a charge.").

On January 25, 2023, this Court allowed the People's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315, 604(a), and 612(b).

STATEMENT OF FACTS

A. Grand Jury Presentation and Indictment

In October 2019, Jane Doe reported to the Rockford Police Department that defendant had sexually assaulted her while she was heavily intoxicated. *See* C68-C70.[1] The People filed a criminal complaint against defendant on

[1] "A", "C," "CS," "R," and "Def. Exh." refer, respectively, to the appendix to this brief, common law record, sealed common law record, report of proceedings, and defendant's exhibits.

allegations of criminal sexual assault under 720 ILCS 5/11-1.20(a)(2), on the grounds that he knowingly committed an act of sexual penetration while Jane Doe "was unable to understand the nature of the act or unable to give knowing consent." C7.

The Winnebago County State's Attorney's Office then sought an indictment and presented to the grand jury the testimony of Detective Vincent Kelly, who was one of the officers who took Doe's statement. CS16. As Kelly testified before the grand jury, Doe reported that on the night of the assault, she was drinking with defendant and a group of friends at two bars in Rockford. *Id.* At the second bar, Doe became intoxicated to the point where she was "falling down" and needed assistance getting to defendant's car. *Id.* Defendant drove her home after midnight, and Doe fell onto a couch in her mudroom. *Id.* Doe then told him that she "was good," meaning that defendant could leave. *Id.*

Defendant did not leave. CS16-CS17. Instead, he took off Doe's pants and underwear and had sexual intercourse with her while in the mudroom, then took her to her bedroom to have intercourse again. CS17. Doe was "in and out of awareness" because of her intoxication and did not remember how they got to her bedroom. *Id.* She only became "aware again" in her bedroom as defendant was licking her feet, and she could not remember how her shoes had come off. *Id.* Because of her intoxication, Doe "did not perform any sexual acts" on defendant and "would have been unable to do so." *Id.*

Defendant also gave a recorded statement to Detective Kelly. *See* Def. Exh. B. Before the grand jury, Kelly alluded to defendant's account only upon questioning from a grand juror. At the close of Kelly's testimony, the prosecutor asked the grand jurors whether anyone had questions for Kelly. CS18. Only one juror asked a question, producing this exchange:

> 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.

Id. The grand jury returned a true bill of indictment on two charges of criminal sexual assault under 720 ILCS 5/11-1.20(a)(2). A22-24.

B. Dismissal

Defendant moved to dismiss the indictment on grounds of prosecutorial misconduct. CS13. He argued that Detective Kelly's response to the grand juror suggested that he (defendant) had confessed to the crime of sexual assault, when in fact he merely acknowledged having sex with Jane Doe in his statement to Kelly. *Id.*

Defendant presented the recording of his statement to Kelly in support of his motion to dismiss. *See* Def. Exh. B. In the recorded statement,

defendant claimed that Doe was not too intoxicated to have sex and that she was a willing participant. *Id.* at 42:39-44:54. However, he acknowledged that Doe was drunk and unsteady at the second bar and that she had fallen and needed help getting up. *Id.* at 28:20-28:30, 36:40-36:55. He further acknowledged that, before leaving the bar, Doe was "swaying" and needed assistance in getting to the bathroom and back to defendant's car. *Id.* at 38:30-38:45, 40:20-40:30, 41:15-41:22, 59:00-59:05. Defendant also stated that he asked Doe several times if she was sure whether she wanted to have sex. *Id.* at 43:40-44:00. But he claimed he did so out of concern for their age disparity and the fact that they did not know each other well, rather than her intoxication. *Id.* at 43:40-44:00, 53:00-54:00.

Defendant sought dismissal under *People v. DiVincenzo*, which provides that an indictment may be dismissed for prejudicial prosecutorial misconduct that rises "to the level of a deprivation of due process or a miscarriage of justice." 183 Ill. 2d 239, 257 (1998). As relevant here, this Court explained that a defendant's due process rights "may be violated" if "the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence." *Id.* Even with such a showing of prosecutorial misconduct, the indictment must stand unless defendant can make a further showing that the "prosecutorial misconduct affected the grand jury's deliberations." *Id.*

Under *DiVincenzo*'s rubric for prosecutorial misconduct, defendant argued that he was denied due process because Kelly's answer to the grand juror's question was false or misleading, regardless of the intent in presenting this testimony. CS23. On this point, defendant argued that he could succeed on a due process claim even if the prosecutor only inadvertently presented deceptive or inaccurate evidence through Kelly's testimony. CS24. Finally, defendant claimed that he was prejudiced from the colloquy because of the effect that a confession has on a jury and because Doe's "veracity" would have otherwise been "in doubt." CS26.

The People responded that Kelly did not implicitly or explicitly suggest that defendant confessed to the crime. C155. Instead, the People interpreted the grand juror's inquiry — "[h]ow do we know that *the person* she claims did this to her did it to her" — to go to the offender's identity, i.e., to ask how, given her intoxicated state, Doe was able to identify the person who assaulted her. *Id.* (emphasis in original). Under that reading, there was no "deceptive, false, or misleading" testimony, because defendant admitted that he was the person who engaged in sex acts with Doe. C157. Contrary to defendant's understanding of *DiVincenzo*, the People argued, defendant could not prevail on a due process claim unless he established that either the prosecutor or Kelly acted with an intent to mislead. *Id.* Regardless, the People argued, dismissal was unwarranted because defendant had not been prejudiced by the colloquy. *Id.*

At a hearing, defendant's counsel emphasized that he did not believe that the assistant state's attorney "deliberately or intentionally" misled the grand jury but faulted her for failing to clarify Kelly's answer. R6. The court, too, acknowledged that there was no intentional error on the assistant state's attorney's part. R38. But it generally expressed concern that she was not better informed about the case before she presented the charges to the grand jury. *See* R37-R39.

As to prejudice, the circuit court acknowledged that Kelly's testimony clearly established probable cause for the charges had the grand juror not followed up with questions. *See* R30. Defendant conceded as much, agreeing "that if you excise all of the question[s] that the grand juror . . . asked and Detective Kelly's answer there would be enough for probable cause." R51. But defendant nonetheless maintained that the grand jury would not have indicted defendant but for the colloquy, as the question demonstrated that there were concerns about Doe's veracity "at least in [one] juror's mind and likely in the other juror's minds." R54. The circuit court generally agreed, but acknowledged the challenge of "second guessing what the grand jury would have done" based on only a "cold, dead [grand jury] transcript." R47.

Nevertheless, the circuit court granted defendant's motion and dismissed the indictment with prejudice and without leave to reindict. A10-A21. The court rejected the possibility that the grand juror had questioned how Doe could identify the perpetrator. A19-A20. Instead, the court said,

the People presented a "she said, he said case," A16, and suggested that the grand juror questioned Doe's credibility given her "extreme[]" intoxication, A19. Therefore, the court said, Kelly's statement was "tantamount to informing the Grand Jury" that defendant had confessed to sexual assault, and thus the prosecutor had a duty to correct the testimony. A19-A20. Kelly's answer, the court concluded, "was false, deliberately misleading, inaccurate and deceptive testimony." A19. And though the court reiterated that the People would have established probable cause but for Kelly's colloquy with the grand juror, A18, the court found — with little elaboration — that defendant had been prejudiced as a result. A20.

C. Direct Appeal

The People appealed, and the appellate court affirmed. A1 at ¶ 1. Addressing the question de novo, the appellate court agreed that defendant was denied due process under *DiVincenzo*, but for different reasons. A4, A6 at ¶¶ 12, 17. Specifically, the court assessed defendant's claims solely through the lens of *DiVincenzo*'s third category for "other deceptive or inaccurate evidence." A6, A8 at ¶¶ 17, 23.

On that understanding, the court agreed with defendant that the People had committed prosecutorial misconduct in presenting Kelly's testimony regardless of whether his alleged error was inadvertent. A8 at ¶ 23. And the court concluded that Kelly's testimony was in fact "deceptive

or inaccurate" because it gave the mistaken impression that defendant had confessed to the crime. A6 at ¶ 18.

The appellate court further agreed that defendant had been prejudiced, noting that the evidence was not strong enough to indict defendant without Kelly's "false testimony." A7-A8 at ¶ 21. The court claimed that Doe's testimony "would have been questionable at best" because she was "extremely intoxicated." *Id.*

STANDARDS OF REVIEW

Whether defendant "was denied due process, and whether that denial was sufficiently prejudicial to require the dismissal of the charges, are questions of law, which are reviewed de novo." *People v. Stapinski*, 2015 IL 118278, ¶ 35.

If this Court determines that defendant "suffered a prejudicial violation of his due process rights," it should review for an abuse of discretion "the trial court's decision on the appropriate remedy — whether it be dismissal of the indictment or some other remedy." *Id.*

ARGUMENT

This Court should reverse the appellate court's judgment for three independent reasons. First, the People did not commit misconduct in securing defendant's indictment before the grand jury. Second, and regardless, dismissal was inappropriate because the alleged error did not prejudice defendant. Finally, even if the circuit court's decision to dismiss

the indictment was sound, it was a clear abuse of discretion to dismiss with prejudice and without leave to reindict.

I. Dismissal of the Indictment Was Unwarranted Because Defendant Cannot Show Any Deceptive or Inaccurate Grand Jury Testimony, Much Less Any Intentional Misrepresentation, That Is Unequivocally Clear from the Record.

This Court should reverse the appellate court's judgment and direct that the indictment be reinstated because the People did not commit misconduct before the grand jury.

The question whether defendant has been denied due process cannot be answered without first examining background principles on the grand jury's role. A "grand jury determines whether probable cause exists that an individual has committed a crime, thus warranting a trial," *DiVincenzo*, 183 Ill. 2d at 504 — a determination that need not be unanimous. *See* 725 ILCS 5/112-2(a) (grand jury has 16 members, with 12 constituting a quorum); 725 ILCS 5/112-4(d) (requiring 9 votes to find probable cause). In making the probable cause determination, the grand jury's task is thus to screen out frivolous or arbitrary prosecutions. *People v. Rodgers*, 92 Ill. 2d 283, 289 (1982) (the 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)).

The grand jury's screening function, however, is a limited one. The grand jury presentation is not a "'kind of preliminary trial,'" as a grand jury is not tasked with determining guilt or innocence. *People v. J.H.*, 136 Ill. 2d 1, 11 (1990) (quoting *Costello v. United States* 350 U.S. 359, 363 (1956)). The "procedural safeguards" available to defendants are thus "substantially limited," and the grand jury is "'unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial.'" *Rodgers*, 92 Ill. 2d at 286 (quoting *United States v. Calandra*, 414 U.S. 338, 349 (1974)). The prosecution, for instance, is free to present evidence obtained via an unlawful search, *see J.H.*, 136 Ill. 2d at 11, and generally need not present exculpatory evidence, *see United States v. Williams*, 504 U.S. 36, 52 (1992). And "a valid indictment may be based entirely on hearsay." *People v. Fassler*, 153 Ill. 2d 49, 60 (1992).

A defendant's limited rights in the grand jury context are in recognition that "[t]he most important protection for the accused in our system of law is a fair trial itself," even though "a trial is inconvenient, time-consuming and expensive . . . burden not repaid by acquittal." *People v. Creque*, 72 Ill. 2d 515, 527-28 (1978). Indeed, the petit jury's verdict following trial generally renders harmless any error in the grand jury's decision to indict. *United States v. Mechanik*, 475 U.S. 66, 70 (1986).

It is against this backdrop that this Court identified a narrow rule permitting dismissal of an indictment based on prosecutorial misconduct that

"rise[s] to the level of a deprivation of due process or a miscarriage of justice." *DiVincenzo*, 183 Ill. 2d at 257. Consistent with the limited nature of grand jury challenges more generally, courts should employ dismissal "with restraint" and only where "the violation is clear and can be ascertained with certainty." *People v. Lawson*, 67 Ill. 2d 449, 457 (1977); *see also Fassler*, 153 Ill. 2d at 61 (same).

Defendant cannot show "with certainty" that the People presented any deceptive or inaccurate evidence, let alone with the culpable state of mind that *DiVincenzo* requires.

A. A defendant cannot show prosecutorial misconduct that rises to the level of a deprivation of due process where the People inadvertently present deceptive or inaccurate testimony.

As an initial matter, the appellate court erred in concluding that inadvertent errors in the grand jury presentation are sufficiently grave to give rise to a due process claim.

DiVincenzo did not so hold. This Court identified three relevant instances where the People's grand jury presentation denies a defendant due process: where "the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony," or the third, catch-all category on which the appellate court relied — where the prosecutor presents "other deceptive or inaccurate evidence." *DiVincenzo*, 183 Ill. 2d at 257 (citing *J.H.*, 136 Ill. 2d at 13; *United States v. Hogan,* 712 F.2d 757, 759-62

(2d Cir. 1983); and *People v. Barton,* 190 Ill. App. 3d 701, 708-09 (5th Dist. 1989)).

The appellate court relied on its prior decision in *People v. Oliver*, 368 Ill. App. 3d 690, 696 (2d Dist. 2006), which read *DiVincenzo* to suggest that the "presentation of deceptive evidence denie[s] [a] defendant due process, regardless whether the deception was intentional." Not so. *DiVincenzo* requires defendants to show that the People presented inaccurate testimony with a culpable state of mind indicative of bad faith. But to the extent that *DiVincenzo* left open the question of the required mental state, this Court should clarify that inadvertent error does not suffice.

1. *DiVincenzo* requires that the People present deceptive or inaccurate testimony with a culpable state of mind.

a. Consistent with the weight of authority across the country, *DiVincenzo*'s three-part test requires a showing of intentionality.

DiVincenzo reaffirmed that the Fourteenth Amendment safeguards against serious forms of prosecutorial misconduct in the grand jury room. *See DiVincenzo*, 183 Ill. 2d at 257; *see also Lawson*, 67 Ill. 2d at 456 (explaining that the Fourteenth Amendment provides pre-trial protections that could justify dismissal of an indictment for an "unequivocally clear denial of due process"). This Court did not suggest that *all* errors in grand jury testimony can give rise to a due process claim. To the contrary, as the Second District correctly recognized in an earlier case, "there must be, at the very least, intent on the part of some State actor to materially mislead the

grand jury in order to give rise to a violation of due process." *People v. Hart*, 338 Ill. App. 3d 983, 991 (2d Dist. 2003); *see also Oliver*, 368 Ill. App. 3d at 701 (Grometer, J., concurring) (outlining why *Hart* was consistent with *DiVincenzo*); *People v. Reimer*, 2012 IL App (1st) 101253, ¶ 65 (Quinn, J., concurring) (agreeing with *Hart* and Justice Grometer's concurrence in *Oliver*).

By its terms, *DiVincenzo*'s three-part test contemplates that the People must act with sufficient culpability before a defendant can prevail on a due process challenge. The limitations in the first two categories are explicit: dismissal for "mislead[ing]" testimony requires that the People act "deliberately or intentionally," and dismissal for "perjured or false testimony" requires the falsity to be "known" to the prosecutor. *DiVincenzo*, 183 Ill. 2d at 257. This Court made clear, then, that dismissal on either score requires a defendant to establish that the People acted with ill intent.

It is true that *DiVincenzo* does not speak with absolute clarity on the level of culpability necessary to warrant dismissal under the third, "other deceptive or inaccurate evidence" category. *See Oliver*, 368 Ill. App. 3d at 701 (Grometer, J., concurring) (observing that *DiVincenzo*'s language is "less than clear" and inquiring whether "the phrase 'deliberately or intentionally' applies to all three grounds that follow" or whether "'deliberately or intentionally' applies only to the phrase 'misleads the grand jury'") (cleaned up). But context removes any ambiguity and makes clear that this Court did

not intend to require a weaker showing for the "other deceptive or inaccurate evidence" catch-all.

To start, the Due Process Clause generally requires a threshold of culpability before defendants can succeed on a challenge to an indictment. Indeed, the weight of authority across the country holds that the prosecution does not commit misconduct in the grand jury presentation *at all* — much less misconduct that rises to a due process violation — unless it acts with culpable intent. *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), which *DiVincenzo* cited in support of its test for prejudice, *see infra* Part II, supports this understanding. Although addressing federal courts' supervisory authority rather than the scope of due process protections,[2] the Supreme Court suggested that dismissal requires, at a minimum, that the prosecutor *knowingly* presented misleading and inaccurate testimony. *Id.* at 261 (although "the Government may have had doubts about the accuracy of certain aspects of the [evidence], this is quite different from having

[2] The trial court in *Bank of Nova Scotia*, however, invoked both the Fifth Amendment and its supervisory authority in dismissing the indictment. *See United States v. Kilpatrick*, 821 F.2d 1456, 1465 (10th Cir. 1987) (reversing dismissal of indictment). And on appeal, the Tenth Circuit appeared to view the due process and supervisory analyses as coextensive. *See id.* (observing that "[d]ismissal of an indictment for prosecutorial misconduct rests upon two distinct though closely related theories:" a Fifth Amendment challenge based on the "Due Process or Grand Jury Clauses," or a challenge based on a court's "supervisory powers"); *see also id.* at 1475 ("We remain convinced that the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories, cannot be exercised without a significant infringement on the grand jury's ability to exercise independent judgment").

knowledge of falsity"). That the Supreme Court found mere falsity alone insufficient for a prosecutorial misconduct claim demonstrates that defendant cannot obtain dismissal where the People merely inadvertently present such testimony.

Consistent with *Bank of Nova Scotia*, a majority of state and federal courts require a defendant to "show that the prosecutor acted with some measure of scienter" to establish prosecutorial misconduct in the grand jury setting. *See* Wayne LaFave, et al., *Criminal Procedure* § 15.6(a) (4th ed. 2015). A near consensus of federal appellate courts agree that a defendant cannot obtain dismissal based on the inadvertent presentation of false or misleading testimony. *See, e.g.*, *United States v. Cavallo*, 790 F.3d 1202, 1220 (11th Cir. 2015) ("[government] agent's inadvertent giving of false testimony before the grand jury does not warrant dismissal of an indictment" in challenge to agent's response to "imprecisely-worded question"); *United States v. Lombardozzi*, 491 F.3d 61, 79 (2d Cir. 2007) (no prosecutorial misconduct "*even if grand jury were misled*" by testimony, as defendant had "not shown that such misleading was reckless or intentional or anything more than [witness's] simple inability to remember accurately all of the details") (emphasis added); *United States v. Crockett*, 435 F.3d 1305, 1316 (10th Cir. 2006) (dismissal inappropriate even if testimony was "considered false," as there was no "deliberate attempt by the prosecution to unfairly sway the grand jury"); *but see United States v. Feurtado*, 191 F.3d 420, 425

(4th Cir. 1999) (affirming dismissal of indictment without prejudice for inadvertent error).

In cases where the defendant explicitly invokes the protections of due process, courts are similarly in accord that the defendant must establish culpability on the part of the government. The Fifth Circuit has explained, for instance, that a violation of due process may be found only for "'outrageous'" "'[g]overnment misconduct,'" which can be "found only in the rarest circumstances." *United States v. Forte*, 65 F. App'x 508, 2003 WL 1922910, at *6 (5th Cir. 2003) (quoting *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995)). Dismissal on this basis requires that the testimony be not just false, but "knowingly sponsored by the government." *Id.*; *see also United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (rejecting Fifth Amendment due process claim where "there is no evidence that the prosecutor knew that [government agent] committed perjury in his testimony to the grand jury, as opposed to making a misstatement, *material as though that misstatement appears to be*") (emphasis added). Or as one court put it in the federal habeas context, "[t]here is no clearly established Supreme Court precedent providing state prisoners a due process right to be indicted by a grand jury solely on truthful testimony." *United States ex rel. Brown v. Pierce,* No. 10-7369, 2012 WL 851519, at *4 (N.D. Ill. Mar. 13, 2012).

Only one federal appellate court appears to have held that dismissal may be proper even for inadvertent errors in testimony. *See Feurtado*, 191

F.3d at 425. But *Feurtado*'s holding was not grounded in due process principles. And tellingly, the court concluded that dismissal *without* prejudice was the "correct course" where the errors are unintentional. *Id.* What is more, given the procedural posture of *Feurtado*, the Fourth Circuit had no occasion to address whether it was error to dismiss at all. There, the defendants — not the government — appealed the trial court's decision to dismiss without prejudice, as they argued that dismissal should have been dismissed *with* prejudice. *Id.* at 423. The government subsequently obtained new indictments that resulted in convictions, and thus it had no reason to challenge the trial court's conclusion that it had committed prosecutorial misconduct in securing the first indictment. *See id.* at 423-24.

Nothing about *DiVincenzo* suggests this Court — in outlining a catch-all for "other deceptive or inaccurate evidence" — proceeded on a different understanding about the scope of due process protections. Quite the opposite. The connotations of the term "deceptive" suggest that this Court contemplated conduct that by its nature suggests an underlying culpable state of mind.[3] And including this category under the umbrella of "prosecutorial misconduct" carries pejorative connotations that suggest

[3] *See*, *e.g.*, *Deceit*, Black's Law Dictionary 510 (11th ed. 2019) (defining the term, with the verb "deceive," to mean — among other things — "the act of intentionally leading someone to believe something that is not true; an act designed to deceive or trick," or a "false statement of fact made by a person knowingly or recklessly . . . with the intent that someone else will act on it"); *Deceptive*, The American Heritage Dictionary 371 (2d ed. 1982) ("intended or tending to deceive; misleading").

something more than mere inadvertence. *Cf. People v. Williams*, 2020 IL App (4th) 180554, ¶ 75 ("[W]hen a trial judge makes an erroneous ruling, is that judicial misconduct? Or when defense counsel asks an improper question, is that attorney misconduct? With very rare exceptions, the answer is no. The same thinking should apply to claims that the prosecutor did something erroneous.").

More fundamentally, *DiVincenzo*'s first two categories would be meaningless if the third encompassed inadvertent conduct. In requiring that the People act deliberately or knowingly for the first two categories, this Court made clear that inadvertence in misleading the jury on the one hand, and presenting "perjured or false testimony" on the other, does not suffice. These limitations were purposeful, and consistent with the principles that "[c]hallenges to grand jury proceedings are limited," *DiVincenzo*, 183 Ill. 2d at 255, and the power to dismiss an indictment should be utilized "with restraint," *Lawson*, 67 Ill.2d at 455-56. These limits would be gutted if a defendant can employ the "other deceptive or inaccurate" category — which significantly overlaps with the other two — and seek dismissal *regardless* of the prosecutor's culpability.

Read in that light, this Court's allowance for dismissal based on "other deceptive or inaccurate evidence" is most naturally read as creating a category for intentional or knowing errors that do not fit neatly into *DiVincenzo*'s first two categories. And because this Court concluded that the

prosecutor in *DiVincenzo* had not made any misstatements, 183 Ill. 2d. at 259, it had no reason to consider the precise scope of the "other deceptive or inaccurate evidence" category. It is clear, though, that this imprecise category cannot do more work than — and subsume — the well-defined categories that precede it.

This Court could not have intended to announce a test that is inherently self-defeating. Thus, a defendant cannot show prosecutorial misconduct that rises to the level of a due process violation based on inadvertent error in grand jury testimony.

b. *DiVincenzo*'s citation to *Hogan* does not support the appellate court's contrary conclusion.

Oliver (and, by extension, the appellate court here) does not meaningfully grapple with the weight of contrary authority against its position. Nor does it acknowledge the inherent contradictions it reads into *DiVincenzo*. Instead, relying on this Court's unexplained citation to *Hogan*, a Second Circuit decision from 1983, *Oliver* concluded that, under *DiVincenzo,* intent is irrelevant for the "other deceptive or inaccurate evidence" category. *Oliver*, 368 Ill. App. 3d at 693 (citing *Hogan*, 712 F.2d at 759-62). *Hogan* does not support dismissal here.

True, the *Hogan* court said that prosecutorial misconduct may be found "[r]egardless of the government's intent" and even if "factual misstatements" are "inadvertent." 712 F.2d at 762. But even accepting the

facial appeal of this statement, the Second Circuit — like most federal appeal courts — has since required a showing of intentionality. *See Lombardozzi*, 491 F.3d at 79; *see also supra* Part I.A.1.a. *Hogan* is therefore no longer good law.[4]

Regardless, the *Oliver* court reads the Second Circuit's musings out of context from facts of the case. The inadvertent misstatements were *part of* the *Hogan* court's calculus in determining that the indictment should be dismissed. 712 F.2d at 762. But the court concluded that the indictment should be dismissed only after recounting the "cumulative[]" effect of multiple instances of misconduct that, collectively, were "flagrant and unconscionable." *Id.* at 761-62.

The "flagrant and unconscionable" misconduct included the prosecutor's "inflammatory rhetoric" in presenting the drug charges, which concerned an uncompleted drug deal with an undercover officer. *Id.* at 760 (recounting that the prosecutor said that "[i]f the deal would have gone

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[4] *Lombardozzi* aside, courts have called *Hogan* into question because the Second Circuit decided it when federal courts had what has since been recognized as an inflated view of their inherent authority to dismiss indictments. *See United States v. Garner*, No. 19-CR-54, 2019 WL 2646584, at *4 (W.D.N.Y. June 26, 2019); LaFave, *supr*a, § 15.5(b) (explaining that until 1992, lower federal courts had for 30 years "developed an extensive 'common law' of prosecutorial misconduct in presenting evidence"). The Supreme Court rejected that view in *Williams*. *See* 504 U.S. at 45-46. In *Williams*'s aftermath, courts in the Second Circuit have observed that the type of inadvertent conduct at issue in *Hogan* is "likely not the type of misconduct that can lead to dismissal" today. *Garner*, 2019 WL 2646584, at *4 (quoting *United States v. Fisher*, 225 F. Supp. 3d 151, 168 (W.D.N.Y. 2016)).

forward we would have had a real hoodlum trying to sell heroin" and that even if defendant "back[ed] out" of the crime, he should be indicted "a matter of equity"). The court was also troubled by "extensive hearsay and double hearsay speculation" — some of which was demonstrably false. *Id.* That evidence, the court said, "added a false aura of factual support to the government's case and may well have deceived the grand jurors." *Id.* Given the multiple misdeeds from the prosecution, *Hogan* has little import beyond its facts. *See United States v. Garner*, No. 19-CR-54, 2019 WL 2646584, at *4 (W.D.N.Y. June 26, 2019) (stressing *Hogan*'s unique facts and casting doubt on whether "inadvertent misrepresentation . . . can justify dismissing an indictment").

Regardless, nothing in *DiVincenzo* suggests that this Court sought to wholesale adopt *Hogan*'s reasoning, let alone endorse every jot and tittle of the opinion. As explained, such a reading would put the citation at cross purposes with the Court's requirements that misleading testimony be "deliberate[] or intentional[]," and the fact that testimony is "perjured or false" be "known" to the prosecutor. *See supra* Part I.A.1.a. To read *DiVincenzo*'s unexplained citation to four pages from *Hogan* — which spans all the misconduct in that case — so expansively as to nullify these limits would find an elephant hidden in a mousehole. *Cf. Atkins v. Crowell*, 945 F.3d 476, 479 (6th Cir. 2019) (rejecting notion that Supreme Court "alters its expressed holdings" in case citations, as "[n]either Congress nor the Supreme

Court hide elephants in mouseholes" (cleaned up)).

Were that not enough to limit the effect of *Hogan*, the two Illinois cases this Court cited in deriving the *DiVincenzo* test further suggest that dismissal should hinge on the culpability of the prosecutor or witness. *See Oliver*, 368 Ill. App. 3d at 700 (Gromoter, J., concurring) (acknowledging that though *Hogan* "can be read" to suggest that "deception need not be intentional," *DiVincenzo*'s citation to *J.H.* and *Barton* "suggest[] that intent is required"). The *J.H.* court, addressing defendant's challenge that the prosecutor presented unlawfully obtained evidence that would be excluded at trial, concluded that the "supposedly tainted testimony . . . could not have undermined the integrity of the judicial process" where the evidence "was not so clearly inadmissible that the prosecutor perpetrated a fraud on the grand jury in presenting it for consideration, *knowing* that it would not be admissible at trial." 136 Ill. 2d at 13 (emphasis added). In doing so, this Court added that a "prosecutor should not be inhibited in his presentation of a case to a grand jury by fear of dismissal due to his *ultimately erroneous*, *but honest*, appraisal of the admissibility of certain evidence for trial purposes." *Id.* (emphasis added). Thus, contrary to *Oliver*, this Court considered the intentions of the prosecutor to be relevant to the question of whether the defendant had shown prosecutorial misconduct.

Barton — though affirming the dismissal of an indictment for deliberate misconduct — further underscores the critical distinction between

intentional and inadvertent behavior. 190 Ill. App. 3d at 708. The trial and appellate courts found that the prosecutor indicted the defendant for "political and vindictive reasons" and called the State's Attorney's conduct "wholly unjustified and inappropriate," "appalling," "reprehensible," "outrageous, totally unacceptable, unethical, and disgraceful." *Id.* Yet the "misconduct and unethical acts" of the prosecutors, the court explained, were only relevant insofar as they "show[ed] that the misleading of the grand jury by the special prosecutor *was not accidental or a mistake*." *Id.* at 709 (emphasis added). The question of whether the misleading of the jury would be more than "accidental or a mistake" would be irrelevant if *Oliver*'s reading of *DiVincenzo* were the correct one.

At bottom, *DiVincenzo*'s citation to *Hogan* does not suggest this Court sought to jettison the requirement that the prosecutor act with culpable intent. Thus, this Court should make explicit what *DiVincenzo* makes — at the very least — implicit: a defendant cannot show that he has been denied due process based on inadvertent error from the prosecutor or government witness.

2. Dismissal of the indictment would be a disproportionate remedy for inadvertent error.

To the extent *DiVincenzo* leaves open the question of the required showing, there is good reason to clarify that dismissal is unwarranted for inadvertent misstatements.

Even a dismissal without prejudice is an "extreme sanction." *See People v. Mattis*, 367 Ill. App. 3d 432, 436 (2d. Dist. 2006). Whether conduct warrants dismissal depends on a balancing of interests that considers the importance of deterrence on the one hand, and protecting the public's interest in the prosecution of criminal behavior on the other. *See J.H.*, 136 Ill. 2d at 11 (citing *Calandra,* 414 U.S. at 351-52, which outlines the balancing of interests).

That balancing of interests cuts decisively in favor of letting an indictment stand where the misstatements are inadvertent. Dismissal will not yield any meaningful deterrent effect because only intentional misconduct can be deterred. *Cf. People v. LeFlore*, 2015 IL 116799, ¶ 24 (explaining, under the exclusionary rule, that in cases of "simple, isolated negligence" "'the deterrence rationale loses much of its force and exclusion cannot pay its way'" (quoting *Davis v. United States,* 564 U.S. 229, 238 (2011)). That is why the exclusionary rule "is invoked only where police conduct is both 'sufficiently deliberate' that deterrence is effective and 'sufficiently culpable' that deterrence outweighs the cost of suppression." *Id.* (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). So too here: any chance of deterrence is remote at best unless the prosecutor or her agents act with sufficient culpability.

On the other side of the ledger, the costs of dismissing an indictment are considerable. Dismissal harms the victim and the public broadly by

halting — or in this case, preventing entirely — the prosecution of alleged criminal conduct before a petit jury has a chance to weigh in. *See Calandra*, 414 U.S. at 350 (observing that applying exclusionary rule in grand jury context "would halt the orderly progress of an investigation" and would cause delay that "[i]n some cases . . . might be fatal to the enforcement of the criminal law"); *see also United States v. Derrick*, 163 F.3d 799, 807 (4th Cir. 1998) ("The dismissal of an indictment altogether clearly thwarts the public's interest in the enforcement of its criminal laws in an even more profound and lasting way than the requirement of a retrial."). And at the same time, dismissal is not the only recourse for an aggrieved defendant, as "prosecutorial misconduct can usually be 'remedied adequately by means other than dismissal,'" which "'allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.'" *J.H.*, 136 Ill. 2d at 12 (quoting *Bank of Nova Scotia*, 487 U.S. at 262-64); *see also Bank of Nova Scotia*, 487 U.S. at 263 (stating that the errors could be remedied through contempt, disciplinary proceedings, or chastisement in a published opinion).

Even dismissal without prejudice is too strong of medicine for an inadvertent error that can be rendered harmless by jury trial. *See Mechanik*, 475 U.S. at 70. Indeed, the contrary holding would elevate *DiVincenzo* claims over analogous due process claims in the trial context, which require "an allegation of the *knowing* use of false testimony, or at least some lack of

diligence on the part of the State." *People v. Brown*, 169 Ill. 2d 94, 106 (1995) (emphasis added) (applying *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). It would be anomalous to permit a defendant to obtain dismissal — and possibly bar prosecution entirely — under *DiVincenzo* for conduct that would not warrant a new trial under *Napue*. If anything, trial court errors are *more* serious given that they are less prone to correction on appeal, and defendants challenging an indictment have an extra layer of protection in the petit jury — "the most important protection for the accused in our system of law." *Creque*, 72 Ill. 2d at 527. *see also* LaFave, *supra*, § 15.7(e) (explaining that courts have expressed doubt on whether *Napue*'s standards "can readily be carried over to the grand jury's decision to indict" given "the limited function of the indictment and the continued availability of the trial to correct errors before the grand jury" (quotation marks omitted)).

* * *

In sum, a defendant cannot challenge an indictment on due process grounds unless he can show the People acted with a culpable state of mind. This Court should therefore reverse the appellate court's judgment, which was predicated on the notion that inadvertent error is enough.

B. The People did not present any deceptive or inaccurate testimony under any understanding of the *DiVincenzo* test, or at most, did so inadvertently.

A de novo review of the grand jury transcript shows that the People did not present "deceptive or inaccurate" testimony, no matter the appropriate

legal test. At the very least, the indictment should stand because it is not "unequivocally clear" or "certain[]" that the People presented deceptive or inaccurate testimony, and did so with culpable intent. *Lawson*, 67 Ill. 2d at 455-56.

Defendant appropriately conceded in moving to dismiss and in the appellate court below that the presenting prosecutor did not deliberately or intentionally deceive the grand jury. *See* R6; Brief and Argument for the Defendant-Appellee at 3, *People v. Basile*, 2022 IL App (2d) 210740. And the record belies the conclusion that Detective Kelly presented deceptive or inaccurate testimony, either. Instead, after concluding his testimony, Kelly did his level best to clarify and answer a series of ambiguous questions from the grand juror.

The grand juror first asked, "[b]esides that she said that this occurred, was there any other evidence that he actually did this to her?" CS18. Kelly asked for clarification because he did not "completely understand the question." *Id.* The grand juror then sought to clarify and, starting from the premise that Doe "was extremely intoxicated," asked "[h]ow do we know that the person she claims did this to her did it to her?" *Id.* Read without the benefit of the grand juror's tone of voice or inflection, the follow-up question leaves open to interpretation what the grand juror meant by "the person," "did this," and "did it to her."

The circuit court interpreted the "cold, dead transcript," R47, to suggest that the grand juror questioned Doe's credibility given that she was "extremely intoxicated." But that strained reading is divorced from the context of the charges presented to the grand jury, which alleged that Doe was unable to understand the nature of the act or give knowing consent *because of* her intoxication. C7. Thus, the fact that Doe was extremely intoxicated supports, not undermines, a probable cause finding. Just as in the trial context, this Court should not presume that the grand juror misunderstood the nature of the charges. *Cf. McDonnell v. McPartlin*, 192 Ill. 2d 505, 535 (2000) (presuming that petit jury understood and followed jury instructions).

And given that Doe's intoxication was a key factual predicate for the charges in the first place, Kelly reasonably interpreted the question to ask about something other than her credibility. In that light, the grand juror's question about "*the person* she claims *did this* to her" is most naturally read as questioning how Doe could have identified the person who assaulted her if she was so intoxicated. CS18 (emphasis added). It is not farfetched to believe that the grand juror wanted clarification on how the police knew that defendant — and not one of the friends who drank with Doe and helped her get to defendant's car, *see* CS16 — was the person who assaulted her. And Kelly's testimony merely acknowledges that defendant did not dispute that he was the one who took her home that night and had sex with her.

In concluding otherwise, the trial and appellate courts interpreted Kelly's answer to be tantamount to a statement that defendant had confessed to the crime. But Kelly did not use that verbiage, and nothing in the transcript suggests that he intended to portray defendant's statement as having the force of a confession. And the courts could only speculate that the grand juror's statement, "[t]hat is all I needed to know," CS18, meant the juror interpreted Kelly's testimony that way.

In any event, any inference that the grand juror *may* have misunderstood Kelly's testimony does not suffice to show that defendant was denied due process. The test for prosecutorial misconduct focuses on the intent and actions of the prosecutor or government witness, not the subjective, idiosyncratic misunderstanding of one juror. *See DiVincenzo*, 183 Ill. 2d at 257. For example, if one were to say that "the Bears won today" and referred to the Chicago Bears, it would strain credulity to call the statement deceptive or inaccurate merely because the listener instead thought that the statement referred to the Golden Bears of the University of California.

Finally, and for these reasons, it would not have been obvious to the prosecutor that Kelly either suggested that defendant confessed or that the grand juror understood his testimony that way. It may have been better practice for the prosecutor to follow up to clarify Kelly's answer out of an abundance of caution. But the mere fact that the prosecutor did not do so does not rise to the level of a violation of due process. *See People v. Rebollar-*

Vergara, 2019 IL App (2d) 140871, ¶ 73 (finding no prosecutorial misconduct where the testimony was ambiguous, even though the testimony "could have been presented more clearly and completely"); *see also People v. Sampson*, 406 Ill. App. 3d 1054, 1060 (3d Dist. 2011) (reversing dismissal, even though appellate court agreed "with the circuit court that the prosecutor could have conducted the grand jury proceedings in a more careful manner").

In the end, this Court can only speculate on the aim of the grand juror's imprecise question. That is precisely why dismissal of the indictment was improper, as defendant cannot show that he has "unequivocally" been denied due process. *Lawson*, 67 Ill. 2d at 456. Rather, the transcript shows that Detective Kelly — in good faith — asked the grand juror to clarify the question and then answered it as he reasonably understood it. That is far from the culpable mental state that *DiVincenzo* demands.

II. Dismissal Was also Improper Because Defendant Was Not Prejudiced by the Challenged Testimony.

In the alternative, this Court should reverse the appellate court's judgment because Kelly's colloquy with the grand juror had no effect on the grand jury's deliberations. *See DiVincenzo*, 183 Ill. 2d at 257.

To warrant dismissal, any prosecutorial misconduct must have resulted in "actual and substantial prejudice to" defendant. *Fassler*, 153 Ill. 2d at 58 (citing *Bank of Nova Scotia*, 487 U.S. at 256-57). "Actual and substantial prejudice" results "only if the grand jury would not have otherwise indicted the defendant" — i.e., where the other evidence "was so

weak that the misconduct induced the grand jury to indict." *Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶¶ 56, 62. Where, on the other hand, "the evidence is strong enough that the grand jury would have indicted the defendant despite the misconduct, the misconduct is not prejudicial." *People v. Barker*, 2021 IL App (1st) 192588, ¶ 36.

Defendant conceded — and the circuit court agreed — that Kelly's testimony before his colloquy with the grand juror would have established probable cause. *See* R30, R51. That concession all but establishes that defendant could not have been prejudiced by the colloquy. *See, e.g.*, *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 33 (finding no prejudice where People "produced enough evidence to indict defendant even without [witness's] false testimony").

Indeed, the People presented testimony (1) that Doe was falling down drunk both before and while she was at her home with defendant, (2) that she blacked out between her mudroom and her bedroom, (3) that she was "in and out of awareness due to her intoxication" as defendant twice sexually penetrated her, and (4) that she did not, and could not, participate in the sex acts because of her intoxication. CS16-CS17. This evidence was more than sufficient to find probable cause wholly apart from Kelly's confirmation that defendant acknowledged that he had engaged in sex acts with Doe. *J.H.*, 136 Ill. 2d at 17 (requiring only "some evidence, independent of any alleged impropriety, which connected defendant to the crime"); *cf. People v. Fisher*,

281 Ill. App. 3d 395, 397 (2d Dist. 1996) (affirming conviction for criminal sexual assault where, among other things, evidence showed victim consumed large quantities of alcohol and was "unconscious immediately prior to and during at least part of the sex act").

Nevertheless, the appellate court found that the grand jury would not have indicted had the People's presentation not been bolstered by the suggestion that defendant confessed to the crime. A7, A8 at ¶¶ 21-22. That was so, the appellate court said, because the other evidence of sexual assault was "weak," as Doe was "extremely intoxicated" and thus "her account as reported by Kelly would have been questionable at best." A8 at ¶ 21. But as explained, that conclusion rests on several mistaken assumptions. Kelly's testimony was not deceptive or inaccurate (let alone intentionally so); he did not suggest that defendant confessed; and the grand juror was unlikely to have been questioning Doe's credibility given the nature of the charges. *See supra* Part I.B. Nor does the record give any indication that there was a critical mass of grand jurors that questioned Doe's credibility such as to create the likelihood of a no bill of indictment.

Moreover, the grand jury's task was not to determine whether Doe's account was sufficiently credible to support a conviction, as the grand jury's screening function is not akin to an assessment of the guilt or innocence of the accused. *J.H.*, 136 Ill. 2d at 11. It is the job of the petit jury, not the grand jury, "to resolve factual disputes, assess witness credibility, and

determine the sufficiency of the evidence." *People v. Nolan*, 2019 IL App (2d) 180354, ¶ 22. Any more than a passing assessment of Doe's credibility is thus premature at this stage.

Indeed, taken to its logical extent, it is unclear — if the appellate court's theory was sound — how the People could ever obtain an indictment even in cases of extreme *involuntary* intoxication, such as where the perpetrator administers rohypnol — the "date rape" drug. In such cases, the memory lapses could be even more severe; as one expert described it, rohypnol can cause, among other things, "hypnosis, anterograde amnesia," blackouts, and — when combined with alcohol — "a deeper state of unconsciousness." *Sera v. Norris*, 400 F.3d 538, 541-42 (8th Cir. 2005). To require the victim to present her account with perfect clarity to secure an indictment would shield perpetrators from prosecution and harm survivors of sexual assault, not to mention undermine the General Assembly's policy choice to treat involuntary intoxication as an aggravating factor. *See* 720 ILCS 5/12-14(a)(7) (elevating to aggravated criminal sexual assault where "the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance").

Defendant will, in due time, be able to put the government to its proof about what happened during the night of the alleged assault. But that time

is before the petit jury, where he will be afforded the full panoply of constitutional and evidentiary protections attendant to a criminal trial. The grand jury presentation was more than sufficient to advance this case to trial.

III. Even If Defendant Suffered a Prejudicial Denial of Due Process, the Circuit Court Abused Its Discretion in Dismissing the Indictment with Prejudice.

If this Court concludes that defendant has been denied due process and has suffered prejudice, it should nevertheless reverse the appellate court's judgment and direct the circuit court to dismiss the indictment without prejudice.

A. Dismissal for the inadvertent presentation of deceptive or inaccurate testimony should be at most without prejudice.

Given that dismissal of the indictment should be the exception to the rule, *J.H.*, 136 Ill. 2d at 12, it follows that dismissal with prejudice and without leave to reindict is a remedy of last resort. For many of the same reasons why any dismissal is improper, *see supra* Part I.A.2, courts should not dismiss with prejudice for inadvertent error.

As explained, even the lone federal appellate court to hold that inadvertent error could support dismissal found that dismissal without prejudice was the "correct course," particularly where "other portions of the grand jury's testimony [were] free from taint supported the indictment." *Feurtado*, 191 F.3d at 425. Illinois courts are in accord. *See, e.g.*, *People v. Richardson*, 2022 IL App (2d) 210231-U, ¶ 64 (determination that

prosecution intentionally presented false or misleading evidence "can inform the trial court's decision as to whether the dismissal will be with prejudice or whether the State may seek to reindict a defendant" (citing *People v. Hunter*, 298 Ill. App. 3d 126, 131-32 (2d Dist. 1998))[5]; *Reimer*, 2012 IL App (1st) 101253, ¶ 33 (directing circuit court to dismiss without prejudice where the prosecutor's misstatement of law "may or may not have been inadvertent").

That approach is the correct one. As explained, dismissal with prejudice will not yield any marginal deterrent effects because only intentional misconduct is subject to deterrence. *LeFlore*, 2015 IL 116799, ¶ 24. Any benefits are far outweighed by the costs of forever barring the prosecution of criminal conduct, which would harm victims and society more broadly. *See supra* Part I.A.2.

Here, too, barring prosecution altogether is grossly disproportionate to the violation, as judged from inadvertent errors in the trial context. Where the government only inadvertently breaches its obligations under *Brady v. Maryland*, 373 U.S. 83 (1967), for example, the usual remedy is to grant a new trial, not to bar prosecution entirely. *People v. Beaman*, 229 Ill. 2d 56, 59 (2008). Dismissal of an indictment on *Brady* grounds is appropriate only where the "violation is flagrant and substantially prejudicial to the defendant." *United States v. Barr*, No. 14-CR-287, 2019 WL 8643948, at *5 (N.D. Ill. Jan. 7, 2019), *aff'd*, 960 F.3d 906 (7th Cir. 2020); s*ee also Virgin*

[5] Copies of all nonprecedential orders cited in this brief are available at https://www.illinoiscourts.gov/top-level-opinions/. *See* Ill. S. Ct. R. 23(e)(1).

Islands v. Fahie, 419 F.3d 249, 255-56 (3d Cir.2005) (finding that dismissal of indictment on *Brady* grounds was improper because there was no reckless or willful misconduct); *United States v. Pasha*, 797 F.3d 1122, 1139 (D.C. Cir. 2015) (dismissal of an indictment on *Brady* grounds "appropriate only as a last resort"). Defendant cannot show that inadvertent error at the grand jury stage is somehow more serious than an inadvertent *Brady* violation at the trial stage.

For these reasons, this Court should hold that dismissal with prejudice and without leave to reindict is inappropriate where the prosecutor commits only inadvertent misconduct.

B. The circuit court committed a clear abuse of discretion in dismissing the indictment with prejudice and without leave to reindict.

As explained, the presentation of deceptive or inaccurate testimony was at most inadvertent. *See supra* Part I.B. Thus, to the extent dismissal is appropriate at all, the only proper remedy is dismissal without prejudice.

The circuit court's characterization of Detective Kelly's testimony as intentionally misleading does not change matters. To be sure, the circuit court has discretion to order the appropriate remedy once it has determined that there has been a prejudicial denial of due process. *See Stapinski*, 2015 IL 118278, ¶ 35. But the circuit court receives no deference on the threshold question of whether there has been a prejudicial denial of due process in the first place — a pure question of law that is reviewed de novo. *Id.* For good

reason; the circuit court was in no better position to make that determination given that it was similarly limited to the "cold, dead [grand jury] transcript." R47. And critically, the appellate court here apparently rejected the circuit court's characterization and proceeded on the assumption that any deceptive or inaccurate testimony was only inadvertently presented.

In any event, the circuit court, in fashioning its extreme remedy, proceeded on the same basic misunderstanding as the appellate court. The grand juror's question did not concern Doe's credibility. *See supra* Part I.B. Kelly did not say, explicitly or implicitly, that defendant confessed to sexual assault. *Id.* Instead, Kelly gave a good faith response to the grand juror's question as he understood it. *Id.* It is far from "unequivocally" clear that he answered the grand juror's question inaccurately or with any ill intent. *Lawson*, 67 Ill.2d at 456. Therefore, any misrepresentation was at most inadvertent, and it cannot support the extreme remedy of a dismissal with prejudice.

CONCLUSION

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

May 10, 2023

Respectfully submitted,

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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 pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 39 pages.

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

APPENDIX

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No. 2-21-0740
Opinion filed September 23, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. DANIEL D. BASILE III, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 19-CF-2828 Honorable Brendan A. Maher, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Hutchinson and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 The State appeals from the judgment of the circuit court of Winnebago County dismissing a grand jury indictment against defendant, Daniel D. Basile III. Because the trial court did not err in dismissing the indictment, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by complaint with one count of criminal sexual assault based on his having sexually penetrated the victim, Jane Doe, knowing that she was unable to understand the nature of the act or to give knowing consent (720 ILCS 5/11-1.20(a)(2) (West 2018)).

¶ 4 Before the grand jury, the State presented only the testimony of Detective Vince Kelly of the Rockford Police Department. He described what Doe told him about the incident. Doe had

gone to a bar with a group of friends, including defendant. After drinking at two bars, Doe was "falling down." Defendant and some friends helped Doe get to defendant's car. Defendant then drove Doe home and went into her home with her. Doe then fell onto a couch in the mudroom and told defendant that she was "good" and that he could leave. Doe told Kelly that she could recall defendant removing her pants and underwear and having sexual intercourse with her in the mudroom. According to Kelly, Doe reported being in and out of awareness because of her intoxication. Doe could not remember how her shoes came off. She later became aware that she was in her bedroom and that defendant was licking her feet. Doe did not know how she got to her bedroom. Defendant then had sexual intercourse with Doe while in her bedroom. Doe denied having performed any sexual acts on defendant, because she was too intoxicated to do so. Doe knew defendant because they both worked at the Rockford Police Department.

¶ 5 At the end of Kelly's testimony, the prosecutor asked if any of the grand jurors had questions for Kelly. One juror asked, "Besides that [Doe] said that this occurred, was there any other evidence that [defendant] actually did this to her?" Kelly answered that he did not completely understand the question. The juror then asked, "You said that [Doe] was extremely intoxicated, correct?" Kelly responded, "Correct." The juror then asked, "How do we know that the person [Doe] claims did this to her did it to her?" Kelly answered, "He told me he did." The juror then commented, "That is all I needed to know."

¶ 6 The grand jury returned an indictment, charging defendant with two counts of criminal sexual assault based on lack of consent (720 ILCS 5/11-1.20(a)(2) (West 2018)). Defendant filed a motion to dismiss the indictment, contending that he was denied due process because Kelly's answer to the grand juror's question was false and misleading in that it conveyed to the grand jury that defendant had confessed to the crime. In support of the motion to dismiss, defendant submitted

the transcript of the grand jury proceeding and a video-recorded interview of defendant in which he (1) told Kelly that the sexual encounter with Doe was consensual, (2) denied Doe's version of events as to lack of consent, and (3) denied committing criminal sexual assault.

¶ 7 In its response, the State argued that the grand juror's question pertained only to the identity of the person who had sex with Doe and not to whether the sex was consensual or nonconsensual. Correspondingly, when Kelly answered, "[Defendant] told me he did," Kelly was conveying simply that defendant admitted having sex with Doe and not that defendant confessed that the sex was nonconsensual. Thus, according to the State, Kelly's testimony was not false and misleading.

¶ 8 Following a hearing on defendant's motion to dismiss, the trial court found that the grand juror's question was not one of identity and that Kelly's answer essentially informed the grand jury that defendant had confessed to sexually assaulting Doe. That answer was false and misleading, the court determined, because defendant had not confessed to the crime in the video-recorded interview. The court held that, once Kelly gave his answer, the prosecutor was obliged to clarify whether Kelly meant that defendant had confessed to sexually assaulting Doe or had merely admitted that he was the one who had had sex with Doe. The court agreed with the State that, before the grand juror questioned Kelly, the State had presented sufficient evidence to establish probable cause. Nonetheless, the court concluded that Kelly's false and misleading testimony so prejudiced the grand jury proceeding that the indictment must be dismissed. The State, in turn, filed this timely appeal.

¶ 9 II. ANALYSIS

¶ 10 On appeal, the State contends that we should reverse the trial court's dismissal of the indictment because defendant failed to demonstrate that Kelly's answer to the grand juror denied defendant due process. The State specifically argues that defendant failed to establish that (1) the

State acted intentionally in presenting what defendant claims was deceptive or inaccurate evidence, (2) it was "unequivocally clear" (internal quotation marks omitted) (*People v. Nolan*, 2019 IL App (2d) 180354, ¶ 10) that the State indeed presented deceptive or inaccurate evidence, and (3) defendant suffered "actual and substantial" prejudice (internal quotation marks omitted) (*Nolan*, 2019 IL App (2d) 180354, ¶ 10) from that evidence.

¶ 11 Before we discuss the merits, we note that the State has filed a motion to strike as argumentative the section titled "Additional Facts for Consideration" in defendant's brief. Illinois Supreme Court Rule 341(h)(6) (eff. Oct. 1, 2020) requires that the facts in an appellate brief be "stated accurately and fairly without argument or comment." We agree with the State that portions of the section contain impermissible commentary, and we remind defendant's counsel that our supreme court rules "are not mere suggestions but have the force of law and should be followed." *People v. Ruhl*, 2021 IL App (2d) 200402, ¶ 56. Nonetheless, we decline to strike the entire section but instead will disregard any noncompliant portions.

¶ 12 We turn to our standard of review. Because there is no factual dispute as to the contents of the grand jury transcript or the content of defendant's statement in the video-recorded interview, we review *de novo* whether defendant was denied due process. See *People v. Oliver*, 368 Ill. App. 3d 690, 695 (2006).

¶ 13 The grand jury determines whether probable cause exists that an individual has committed a crime, thus warranting a trial. *Nolan*, 2019 IL App (2d) 180354, ¶ 9 (citing 725 ILCS 5/112-4 (West 2014)). Interposing a grand jury between the individual and the State limits indictments for higher crimes to those offenses charged by a group of one's fellow citizens acting independently of the State and the court. *Nolan*, 2019 IL App (2d) 180354, ¶ 9. In that independent role, a grand jury performs two distinct, but equally important, functions: (1) serving as an accuser sworn to

investigate and present for trial persons suspected of wrongdoing and (2) standing as a shield between the accuser and the accused, protecting the individual citizen against oppressive and unfounded prosecution. *Nolan*, 2019 IL App (2d) 180354, ¶ 9.

¶ 14 To preserve the grand jury's independence, challenges to its proceedings are limited. *Nolan*, 2019 IL App (2d) 180354, ¶ 10 (citing *People v. DiVincenzo*, 183 Ill. 2d 239, 255 (1998), *abrogated on other grounds by People v. McDonald*, 2016 IL 118882). Generally, a defendant may not question the validity of an indictment returned by a legally constituted grand jury. *Nolan*, 2019 IL App (2d) 180354, ¶ 10. Nor may a defendant challenge the sufficiency of the evidence considered by a grand jury, as long as "some evidence" was presented. *Nolan*, 2019 IL App (2d) 180354, ¶ 10. A defendant may, however, challenge an indictment that was procured through prosecutorial misconduct. *Nolan*, 2019 IL App (2d) 180354, ¶ 10. "A defendant's due process rights can be violated if the prosecutor deliberately misleads the grand jury, knowingly uses perjured or false testimony, 'or presents other deceptive or inaccurate evidence.' " *Nolan*, 2019 IL App (2d) 180354, ¶ 10 (quoting *DiVincenzo*, 183 Ill. 2d at 257). However, the denial of due process must be "unequivocally clear" and the prejudice "actual and substantial." (Internal quotation marks omitted.) *Nolan*, 2019 IL App (2d) 180354, ¶ 10.

¶ 15 We begin with the State's assertion that defendant was required to establish that the State acted intentionally in presenting deceptive or inaccurate evidence. He was not.

¶ 16 In *Oliver*, 368 Ill. App. 3d at 696, we acknowledged our comment in *People v. Hart*, 338 Ill. App. 3d 983, 991 (2003), that "there must be, at the very least, intent on the part of some State actor to materially mislead the grand jury in order to give rise to a violation of due process." We

characterized our comment in *Hart* as *dicta*. *Oliver*, 368 Ill. App. 3d at 696.[1] More importantly, we noted that such a proposition was untenable in light of *DiVincenzo* (see *DiVincenzo*, 183 Ill. 2d at 257). *Oliver*, 368 Ill. App. 3d at 696. Accordingly, in light of *DiVincenzo*, we held that the State's presentation of a police officer's deceptive testimony denied the defendant due process, regardless of whether the deception was intentional. *Oliver*, 368 Ill. App. 3d at 696. Here, we follow our more recent holding in *Oliver* and conclude that defendant was not required to establish that the State's production of deceptive or inaccurate evidence was intentional.

¶ 17 We next address whether the State did indeed present deceptive or inaccurate evidence. In answering that question, we initially note that the State does not dispute that defendant never admitted to Kelly that the sexual encounter with Doe was nonconsensual or otherwise confessed to the crime. Rather, the State asserts that Kelly's answer to the grand juror's question was neither deceptive nor inaccurate, because it did not suggest that defendant had confessed to the crime. We disagree.

¶ 18 We begin with the grand juror's questions. When the grand juror asked Kelly if there was any evidence, other than Doe's statement, that defendant "actually did this to [Doe]," Kelly responded that he did not completely understand the question. The grand juror then rhetorically asked if Kelly had testified that Doe was extremely intoxicated, and Kelly answered that he had.

[1]The court in *Oliver* agreed with Justice McLaren's special concurrence in *Hart*, wherein he related: "In addition to this being *obiter dicta*, it is incorrect to require deception on the part of a State actor. The case cited by defendant and its precursors suggest the opposite conclusion. See *People v. DeCesare*, 190 Ill. App. 3d 934 (1989); *People v. Wolfe*, 114 Ill. App. 3d 841 (1983); *People v. Rivera*, 72 Ill. App. 3d 1027 (1979)." *Hart*, 338 Ill. App. 3d at 995 (McLaren, J., specially concurring).

The grand juror then asked, "How do we know that the person [Doe] claims did this to her did it to her?" The State maintains that the grand juror was asking merely about the identity of the person who had sex with Doe. We disagree. The operative verbiage of the grand juror's question was not "person" but "actually did this to her" and "did it to her." That is, the grand juror was asking not what other evidence identified defendant as the person who had sex with Doe but, rather, what other evidence established the sex as sexual assault. Since the grand juror was asking whether there was any other evidence that defendant had committed the crime, Kelly's answer that defendant "told [Kelly] he did" can only be interpreted as meaning that defendant had confessed to the crime. That of course, was deceptive and inaccurate, as defendant never admitted to engaging in nonconsensual sex with Doe or otherwise confessed to the crime.

¶ 19 We next address whether defendant suffered actual and substantial prejudice from Kelly's false testimony. He did.

¶ 20 A due process violation based on prosecutorial misconduct before a grand jury is actually and substantially prejudicial only if, without it, the grand jury would not have indicted the defendant. *Oliver*, 368 Ill. App. 3d at 696-97. Thus, a court must balance the gravity and seriousness of the misconduct with the sufficiency of the evidence supporting the probable cause finding. *Oliver*, 368 Ill. App. 3d at 697. If the evidence was strong enough that the grand jury would have indicted the defendant despite the misconduct, the misconduct was not prejudicial. *Oliver*, 368 Ill. App. 3d at 697. However, if the evidence was so weak that the misconduct induced the grand jury to indict, prejudice is shown. *Oliver*, 368 Ill. App. 3d at 697.

¶ 21 Here, the evidence apart from Kelly's false testimony that defendant had confessed was not so strong that the grand jury would have indicted defendant on that evidence alone. As discussed, Kelly was the only witness to testify. His testimony was based on statements from the

victim. Because she was extremely intoxicated, her account as reported by Kelly would have been questionable at best. Indeed, the grand juror prefaced his/her question by noting Doe's extreme intoxication. Further, the grand juror then asked if there was any evidence, beyond what Doe had told Kelly, to show that defendant had committed the crime. That certainly implies that at least one grand juror did not think that there was sufficient evidence to establish probable cause. We conclude that the evidence was weak enough that the grand jury would not have indicted defendant apart from Kelly's deceptive and inaccurate testimony.

¶ 22 This conclusion becomes even clearer when we consider the intrinsic weight of Kelly's deceptive and inaccurate testimony that defendant confessed to the crime. " 'A confession is like no other evidence.' " *People v. Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶ 119 (McLaren J., dissenting) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (plurality opinion)). It is probably the most probative and damaging evidence that can be admitted against a defendant. *Fulminante*, 499 U.S. at 296. It is so damaging that a jury should not be expected to ignore it despite being instructed to do so. *Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶ 119 (McLaren J., dissenting) (citing *Fulminante*, 499 U.S. at 292 (White, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.)). Our supreme court has noted that a confession is the most powerful piece of evidence that the State can offer, and its effect on a jury is incalculable. *People v. Simpson*, 2015 IL 116512, ¶ 36. Put another way, "[t]here is nothing more damning than a defendant's own words admitting his guilt." *Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶ 119 (McLaren, J., dissenting).

¶ 23 Given the extremely incriminating impact of a defendant's confession, we do not doubt that the grand jury was swayed by Kelly's testimony that defendant admitted to the offense. Such impact was manifest in the grand juror's comment that defendant's confession to Kelly was "all

[the juror] needed to know." We emphasize that, no matter whether Kelly meant to deceive, the State had a duty to correct his false testimony. See *People v. Simpson*, 204 Ill. 2d 536, 552 (2001). Presumably, had the State asked follow-up questions, Kelly would have clarified that defendant had not in fact confessed to sexual assault but, rather, had merely admitted to having consensual sex with the victim. In response to defendant's motion to dismiss, the State advised the court that an assistant state's attorney unfamiliar with the case presented it to the grand jury. Such a questionable practice certainly does not excuse the failure to clarify Kelly's testimony. As it happened, the State left unabated the prejudicial impact of Kelly's deceptive and inaccurate testimony. Thus, when we balance the powerful incriminating impact of Kelly's deceptive and inaccurate testimony that defendant confessed to the crime against the weak independent evidence of his guilt, we conclude that defendant was actually and substantially prejudiced by Kelly's testimony.

¶ 24 Because the State submitted deceptive and inaccurate testimony that defendant confessed to the crime, and that testimony resulted in actual and substantial prejudice to defendant, there was a clear and unequivocal denial of due process. Thus, the trial court properly dismissed the indictment.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 27 Affirmed.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
vs.	)	**Case No(s).: 2019-CF-2828**
	)	
DANIEL D. BASILE	)	
	)	
Defendants.	)	

ORDER
("Motion to Dismiss Indictment with Prejudice")[1]

On **May 27, 2021**, the defendant, Daniel D. Basile ("Basile") filed his pending "Motion to Dismiss Indictment with Prejudice" ("Motion to Dismiss"), and on **July 29, 2021**, the State filed its "People's Response to Defendant's Motion to Dismiss" ("People's Response").

The only evidence presented with respect to Basile's Motion to Dismiss was:

(1) A true and correct copy of the "Testimony of Vince Kelly" to the Grand Jury on **November 6, 2019** (Defendant's Exhibit A). As the Grand Jury transcript reflects, a Prosecutor who was not the Prosecutor assigned to this case presented this case to the Grand Jury through Detective Vince Kelly's sworn testimony[2]; and

(2) A true and correct copy of a digital video disk of Basile's audio and video recorded interview with Detective Kelly on **October 13, 2019** (Defendant's Exhibit B).[3]

Following the Court's review of the parties' written pleadings and Defendant's Exhibits A and B, the case was argued to the Court on **October 22, 2021**, and then taken under advisement the Court's consideration and for decision.

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[1] See 725 ILCS 5/114-1 ("Motion to dismiss charge"). Basile's written motion claims a "... substantial and unequivocal denial of [Basile's] Due Process rights" for the reasons indicated in the motion.

[2] To her credit, the Prosecutor who is responsible for this prosecution informed the Court that the Prosecutor who presented the case to the Grand Jury was not responsible for this case and may not have known details of the investigation that led to the filing of the Criminal Complaint and, eventually, the return of the Bill of Indictment by the Grand Jury.

[3] In his written motion, Basile alleges that Jane Doe was interviewed by Detective Kelly on October 12, 2019, and that her interview was also recorded.

A. Motion to Dismiss - Preliminary Observation

As recently as **April 11, 2019**, the Appellate Court of Illinois, Second District ("Second District") noted in a published opinion that the Appellate Court was:

> "... not unsympathetic to the trial court's frustration with the [Winnebago County State's Attorney's Office's] cursory grand-jury presentation. Indeed, we note that, after giving his name and job title [Deputy] Kaiser spoke only 29 words to the grand jury, merely agreeing with the prosecutor's leading questions..." *People v. Nolan*, 2019 IL App (2d) 180354, ¶23.

In *People v. Nolan*, the Winnebago County trial court dismissed the bill of indictment with prejudice and the State appealed. *Nolan* was a case in which a law enforcement officer, responding to leading questions by a prosecutor, attributed statements to a defendant in the Grand Jury. Based on that presentment, and with no questions posed by any Grand Juror in the Grand Jury, a Bill of Indictment was returned.

The defendant later testified at a hearing that he never made the statements attributed to him by the law enforcement officer in the Grand Jury. Based on the specific facts in *Nolan* – that the law enforcement officer testified that statements were made and the defendant, at his motion hearing, testified that he did not make those statements at all – the Second District reversed and remanded the case for further proceedings. The Second District, under the circumstances then presented, noted that when there is a factual dispute, it is the function of the jury to determine the facts. See also *People v. Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶¶110-113 (no questions posed by the Grand Jury; Justice Jorgensen, specially concurring, ¶¶114-143; Justice McLaren, dissenting).

Post-*Nolan*, on **October 23, 2019**, the defendant, Daniel D. Basile ("Basile") was charged in a one count Criminal Complaint with having committed the offense of Criminal Sexual Assault against "Jane Doe" on or about **October 11, 2019**." Detective Vince Kelly signed as the Complainant and under oath.

B. Motion to Dismiss Indictment With Prejudice (5/27/21)

Basile's "Motion to Dismiss Indictment With Prejudice" ("Motion to Dismiss") sets forth in some detail the basis for his request for an order dismissing the Bill of Indictment with prejudice.

The motion provides a brief summary of the recorded statements Jane Doe made to Detective Kelly as well as a somewhat longer summary of the audio and video recorded statements that Basile made to Detective Kelly. Both Jane Doe's statements and Basile's statements were taken prior to the November 6, 2019, Grand Jury presentment and in a format that the Detective Kelly certainly could have (and may have) reviewed prior to his Grand Jury testimony to refresh his recollection

before testifying. Basile's motion also quotes directly from the Grand Jury transcript with respect to the questions a Grand Juror asked Detective Kelly and the answers Detective Kelly gave to the Grand Jury in response.

Based on the overall in-context Grand Jury presentment, as set forth in the transcript, Basile argues that this Court should conclude that the presentment as a whole violated his Due Process rights, focusing on the questions asked by a Grand Juror and the answers Detective Kelly provided the Grand Jury in response to those questions. Basile asserts that Detective Kelly's statements were false, deceptive and misleading when the Grand Juror's questions and Detective Kelly's answers are read together in context.

The State filed its written Response to Defendant's Motion to Dismiss on **July 27, 2021**, and on that date the State and the defense stipulated to the authenticity of **Defendant's Exhibit B**, a DVD of Detective Kelly's recorded interview with Basile on **October 13, 2019**, and asked that the Court review the recorded interview in camera prior to a hearing on Basile's Motion to Dismiss.

Ultimately, the State and the defense agreed that the Motion to Dismiss could be decided based on the parties written pleadings, Court's review of the Grand Jury transcript and Basile's recorded interview and the arguments of counsel.

C. Applicable Law - Motion to Dismiss Charge - Due Process Violation

A trial court may dismiss criminal charges before trial only for the reasons set forth at 725 ILCS 5/114-1(a) ("Motion to dismiss charge") or where there has been a clear denial of due process that prejudices the defendant. *People v. Sparks*, 221 Ill.App.3d 546, 547-48 (3d Dist. 1991); see also *People v. Newberry*, 166 Ill.2d 310, 313-14 (Ill. 1995). While Section 114–1(a) of the Code does not contain a specific provision addressing the a trial court's ability to dismiss a criminal charge for a due process violation, this ability is nevertheless recognized as part of the trial court's inherent authority to guarantee the defendant a fair trial. *People v. Lawson*, 67 Ill.2d 449, 456 (Ill. 1977).

The Court is independently familiar with both the applicable statute and with much, if not most, of the governing appellate court authorities, including, but not limited to, the authorities cited by both Basile and by the State in their respective written pleadings.

In particular, when adjudicating other Motions to Dismiss Charge on their specific facts, this Court has previously reviewed and considered *People v. DiVincenzo*, 183 Ill.2d 239 (1998); *People v. Oliver*, 368 Ill.App.3d 690 (2d Dist. 2006); *People v. Mattis*, 267 Ill.App.3d 432 (2d Dist. 2006); *People v. Creque*, 72 Ill.2d 37 (1960); *People v. Fassler*, 153 Ill.2d 49 (Ill. 1992); *People v. Hunter*, 298 Ill.App.3d 126 (2d Dist. 1998); and *People v. Torres*, 245 Ill.App.3d 297 (2d Dist. 1997).

Though each case is decided on its own facts and circumstances, in general, the "due process rights of a defendant may be violated if a prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence." *People v. Oliver*, 368 Ill.App.3d 690, 694-95. To permit the dismissal of an indictment, the denial of due process must be unequivocally clear." *Id.*; see also *People v. DiVincenzo*, 183 Ill.2d 239, 256-57 (Ill. 1998)("To warrant dismissal of the indictment, however, the defendant must ordinarily show that ... any prosecutorial misconduct affected the grand jury's deliberations.").

When a trial court does not determine any issue of fact and instead bases its decision to dismiss a bill of indictment on the transcripts of the grand jury (and, in this case, on Basile's recorded interview), the Appellate Court reviews *de novo* whether the defendant was denied due process and, if so, whether that denial was prejudicial. *Oliver* at 695.

D. Evidence Reviewed and Considered by the Court

On **October 13, 2019**, before the State filed its Criminal Complaint charging Basile with Criminal Sexual Assault, and before the Grand Jury returned the at-issue Indictment, Basile had voluntarily consented to an audio and video recorded interview Detectives Vince Kelly and Jane Martin both of whom were investigating allegations made by Jane Doe.

Basile's recorded interview took place at the District 2 police station in Interview Room 5 starting at approximately 2:10 a.m. Detectives Kelly and Martin were in the interview room with Basile. Detective Kelly took the lead during the interview and was an active participant in questioning Basile about the allegations Jane Doe had made to law enforcement and provided Basile with the opportunity to tell the detectives about his interactions with Jane Doe on the evening and into the early morning hours of **October 11-12, 2019**.

This Court has watched Basile's entire recorded interview twice and, at defense counsel's request at argument, has re-reviewed the segments of the interview from time-stamp **41:30 to 48:05**; from **50:30 to 58:00**; and from **1:13:30 to 1:17** to the extent that the defense believes those segments are relevant to Basile's pending Motion to Dismiss.

During the period of time between **41:30 to 48:05**, Basile tells Detective Kelly, among other things: that he and Jane Doe walked to Basile's car when they left the bar; that Jane Doe told Basile where to drive; that they arrived at her Jane Doe's house; that Jane Doe invited Basile into her house; that she opened the door and they went into a foyer between the garage and house; that Jane Doe started kissing him and he kissed her back; that they were "making out;" that before they had sex, he asked Jane Doe if she was "sure this was OK," and she said "yes" and said that he did not want to do anything she did not want to do. Basile also told Detective Kelly that after having sex in the foyer, they went upstairs to Jane Doe's bedroom and had sex again in the bedroom. Basile also told Detective Kelly that, after sex, he and Jane Doe talked about Jane Doe's age and, after Jane Doe went to sleep, Basile left Jane Doe's house to go home.

During the time period between **50:30 to 58:00**, Basile again tells Detective Kelly that before Basile had sex with Jane Doe, he asked Jane Doe if having sex with her was OK and she said yes. Basile told the detectives that Jane Doe never said anything to indicate that having sex was not OK, and that he wanted to make sure that Jane Doe wanted to have sex before they had sex. Basile made several statements to that effect to detectives at this point during his interview. Basile said he did not ask those questions because he thought she was "too intoxicated" but that he "just wanted to ask her" to be sure that she wanted to have sex.

During the time period between **1:13:30 to 1:17,** Basile tells the detectives that he didn't do anything "where she told me no." If Jane Doe had ever told him "No," he wouldn't have had sex with her.[4] Basile also tells the detectives that Jane Doe was "walking fine" from Basile's car to her house when the arrived at her house and she asked Basile to come into the foyer area and, eventually, up to her bedroom. Basile also told detectives that Jane Doe walked into and around her house when she was going to and from the bathroom and upstairs to the bedroom and that he waited for her in her bedroom while she used the bathroom. Basile tells the detectives that he and Jane Doe had both been drinking, but that he never thought or believed Jane Doe was intoxicated to the point of not being able to consent to sex.

During his recorded interview, Basile never tells the detectives anything to the effect that he perceived Jane Doe to have been in and out of awareness due to her intoxication (Testimony of Vince Kelly, Page 4, lines 6-8), or that Jane Doe did not know how she got to her bedroom (Testimony of Vince Kelly, Page 4, lines15-16), or that Jane Doe was intoxicated to the point of not being able to consent to having sex with him (Testimony of Vince Kelly, Page 4, lines 21-24).

On **November 6, 2019** (less than a month after Basile was interviewed by detectives), the State presented a proposed two count Bill of Indictment to the Grand Jury.

Before leading Detective Kelly through his testimony to the Grand Jury, the Prosecutor presenting the case informed the Grand Jury that the State was "seeking a true bill of indictment" against "Daniel Duallo Basile, III, in a two-count bill of indictment: **Count 1, criminal sexual assault without consent; Count 2, criminal sexual assault without consent**."

Detective Kelly was the State's only witness in the Grand Jury. Including stating his name and his place of employment, Detective Kelly initially spoke only thirty-one (31) words to the Grand Jury, merely agreeing with the presenting Prosecutor's leading questions. Grand Jury Transcript, Page 1, Line 18, to Page 5, Line 9.

The Prosecutor then asked the Grand Jury if it had "any questions for Detective Kelly." In this case, a Grand Juror did ask follow up questions directly to Detective Kelly and Detective Kelly

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[4] At this point in the interview, Detective Kelly tells Basile, "I believe you."

answered the Grand Juror's questions in his role as one of the detectives assigned to investigate the case. The Grand Juror first asked Detective Kelly whether, "Besides that she [Jane Doe] said that this occurred, was there any other evidence that he [Basile] actually did this to her?" Testimony of Vince Kelly, Page 5, lines 12-14. Detective Kelly responded that he was "... not sure he completely underst[ood] the question."

The Grand Juror then stated, "You said the person [Jane Doe] was extremely intoxicated, correct?" Detective Kelly responded, "Correct." Testimony of Vince Kelly, Page 5, lines 15-19. The Grand Juror then asked Detective Kelly, "How do we [Grand Jury] know that the person [Basile] she [Jane Doe] claims did this to her did it to her?" Detective Kelly immediately responded, "**He [Basile] told me he did**." The Grand Juror responded, "**That is all I needed to know**." Testimony of Vince Kelly, Page 5, lines 20-23.

At that point, other than asking the Grand Jury if it had "any other questions for Detective Kelly," the Prosecutor presenting the case to the Grand Jury did not ask Detective Kelly any follow up or clarification questions of Detective Kelly. In particular, the Prosecutor did not ask Detective Kelly what he meant when he testified to the Grand Jury that Basile "told [Kelly] he did" criminally sexually assault Jane Doe.

Based on the questions asked by the State and the answers given in the Grand Jury room by Detective Kelly, as well as questions asked directly by a Grand Juror to Detective Kelly and the answers Detective Kelly provided to those questions, the Grand Jury returned the at-issue two count Bill of Indictment charging Basile with having committed two counts of Criminal Sexual Assault Without Consent against Jane Doe.

E. Arguments Presented (10/22/2021)

Though his retained counsel, Basile argued that the manner in which the Prosecutor in the Grand Jury presented the this case to the Grand Jury, including the Prosecutor's failure to follow up with, or redirect, Detective Kelly when he answered the questions put to him by a Grand Juror, constituted, if not outright "false" testimony, testimony that was, at a minimum, deceptive, inaccurate and highly misleading testimony.

As noted above, Basile asked this Court to focus on the segments of his recorded interview with Detectives Kelly and Martin at the time marks 41:30 to 48:05, 50:30 to 58:00 and 1:13:30 to 1:17, all of which involve Basile being questioned about the events that took place at Jane Doe's house and in Jane Doe's house.

Basile asserted that, in light of Detective Kelly's first hand knowledge of Basile's repeated statements about his interactions with Jane Doe, Detective Kelly's response to the Grand Juror asking, "How do we [Grand Jury] know that the person [Basile] she claims did this to her did it to

her" by saying "He [Basile] told me he did" was so deceptive, inaccurate and misleading that it would have affected the Grand Jury's deliberations. More specifically, Basile argued that the Prosecutor who was permitted to present this case to the Grand Jury had an obligation to follow up and, if necessary, correct or clarify Detective Kelly's false or misleading testimony to the Grand Jury before the presentation was concluded.

The State argued that Basile is not able to demonstrate that he suffered actual and substantial prejudice based on Detective Kelly's sworn testimony in response to the presenting Prosecutor's leading questions and that Prosecutor's decision not to further inquire of Detective Kelly when he told the Grand Jury that Basile told him that he "did" the things to Jane Doe that Jane Doe told detectives Basile did. In support of its arguments, the State cited to and relied on the authorities referenced in the People's Response to the Motion to Dismiss.

F. Analysis of Evidence and Arguments

In this case, with the parties agreeing to a non-evidentiary hearing (no live witness testimony), the "facts" in this case to be considered by this Court are set forth in the Grand Jury Transcript (Defendant's Exhibit A) and in the recorded interview of Daniel Basile by Detectives Kelly and Martin (Defendant's Exhibit B).

Though Basile was not placed under oath by the detectives when he was interviewed, this Court, for purposes of this motion hearing only, accepts as accurate all of the statements Basile made to detectives in that Basile's statements were clearly known to Detective Kelly when the Grand Juror was questioning Detective Kelly at the Grand Jury presentment.

Put another way, when he was questioned by the Grand Juror, Detective Kelly knew that Basile had not told Detective Kelly that he had criminally sexually assaulted Jane Doe or that he had sex with Jane Doe knowing that she did not or could not consent to having sex.[5] To the contrary, although Basile admitted to having had sex with Jane Doe in the foyer and in the bedroom of her home, Basile consistently told the detectives that the sex was consensual and that he had asked Jane Doe several times if she wanted to have sex before he had sex with her.

Based only on the information presented to this Court through the two defense exhibits, this case appears to be a "she said, he said" case. This Court assumes for purposes of this motion that Detective Kelly's answers to the presenting Prosecutor starting on Page 2, line 21, and ending at Page 5, line 6, were hearsay statements attributed to Jane Doe and were being accurately

[5] Though this Court is aware that Jane Doe also gave a recorded interview and made statements to the investigating detectives, this Court is unaware of whether Jane Doe was under oath when she was questioned or whether she gave a verified or sworn written statement.

communicated by Detective Kelly to the Grand Jury either *verbatim* or as an accurate summary of specific statements Jane Doe made to detectives when she was interviewed.

This Court has not been made aware of any witnesses who will or could testify to the events that took place between Jane Doe and Basile at Jane Doe's home in her foyer and in her bedroom after Basile drove Jane Doe to her home from the bar. Though Basile was asked questions in his recorded interview about other people present at the bar he and Jane Doe left from to go to Jane Doe's house, the content of the recorded interview does not indicate that any of those people would have direct, non-hearsay knowledge of what took place at Jane Doe's residence later that night. In his interview, Basile stated that Jane Doe told him that her brother was in the residence that night, but neither Basile nor the State have informed the Court that Jane Doe's brother heard or saw any of the interactions between Basile and Jane Doe in the house that night.

This Court rejects the State's characterization of the Grand Jury presentment in the section of the People's Response titled "This Court Should Deny the Defendant's Motion to Dismiss Indictment with Prejudice as the Testimony to the Grand Jury was not Deceptive, False or Misleading" (Page 3, Paragraphs 6-10).

In its Response, the State posits that the Grand Juror who directly asked Detective Kelly questions was trying to determine "the identification of the person" who had criminally sexually assaulted Jane Doe. That characterization is entirely at odds with any reasonable, in-context review of the Grand Jury transcript. The first thing the presenting Prosecutor told the Grand Jury was that the State was seeking a true bill of indictment against "Daniel Duallo Basile, III" for criminal sexual assault. A number of Detective Kelly's answers to the presenting Prosecutor's questions again named "Dan Basile" as "the person" that Jane Doe was with on the day(s) in question. Detective Kelly mentioned "Dan Basile" or "Basile" in his testimony nine times.

No reasonable Grand Juror would, at the end of State's initial presentation, have been unclear on who "the person" who "did this" to Jane Doe was; every Grand Juror knew the person they were being asked to consider for indictment was Daniel Basile.

In its Response, the State asserts that it had no obligation to present evidence to the Grand Jury that "the defendant made denials that the victim in this case was intoxicated to the point of being unable to render consent," which "would constitute a potential defense to the sexual assault allegations contained in the indictment." People's Response, Page 4, citing *People v. Torres*, 245 Ill.App.3d 297, 300-01 (2d Dist. 1993). That the State, in general, does not have an affirmative obligation to present the Grand Jury with exculpatory evidence is not, however, the issue in this case.

By way of contrast, in *Torres* opinion, there is no indication that any Grand Juror asked any questions to the presenting Prosecutor in the Grand Jury.[6] Instead, the legal issue was whether the State had duty or obligation to present exculpatory statements to the *Torres* Grand Jury that had been made by a co-defendant in a taped statement. The Second District reversed the trial court in *Torres* on its finding that "no Illinois case" supported the proposition that "the State has an ongoing obligation to present exculpatory information to the grand jury," and writing that "rather, quite the opposite appears to be the case" and that the "State has no general duty to present exculpatory evidence to the grand jury." *Torres* at 300-301.

The *Torres* court observed, however, that "under certain circumstances, a prosecutor's intentional withholding of such evidence could result in a denial of due process," and specifically wrote that "if the grand jury is deliberately or intentionally misled by the prosecution," the right to due process may be violated. *Id.* at 301.

As the State properly argued in this case, if no Grand Juror had asked Detective Kelly any questions following the Prosecutor's invitation to ask questions (Page 5, line 9), the State had presented sufficient evidence, on a probable cause basis, for the Grand Jury to return its Bill of Indictment. In this case, however, the presenting Prosecutor **did** invite questions, and a Grand Juror **did** ask questions. At that point, both Detective Kelly and the presenting Prosecutor had an affirmative obligation **not** to present false testimony, or to present deceptive, inaccurate or otherwise misleading evidence in response to the Grand Juror's questions.

From a review of the Grand Jury transcript and of the Basile's recorded interview, this Court makes the following **FINDINGS** of fact and reasonable inferences to be drawn from the facts:

1. When he was testifying to the Grand Jury, Detective Kelly knew that Basile had admitted to having had consensual sex with Jane Doe in the foyer and in the bedroom at Jane Doe's house; had told Detective Kelly that he asked Jane Doe if she really wanted to have sex before having sex; and had never told Detective Kelly that he had sexually assaulted Jane Doe or that he engaged in sex with Jane Doe knowing that she was intoxicated to the point that she could not voluntarily consent to sex.

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[6] None of the following cases cited by the parties appears to involve a Grand Jury presentment in which one or more Grand Jurors asked a witness or the Prosecutor questions: *People v. Hruza*, 312 Ill.App.3d 319 (2d Dist. 2000)(claim of perjury by a law enforcement officer when Prosecutor asked if defendant failed field sobriety tests; officer said "he did fail," and defendant had passed one test); *People v. Hart*, 228 Ill.App.3d 983 (2d Dist. 2003)(only evidence presented was officer testimony in response to Prosecutor's leading questions; video turned out to be inconsistent with officer's grand jury testimony); *People v. Fassler*, 153 Ill.2d 49 (Ill. 1992)(no indication that any grand juror asked any questions; legal issues different and due process claims different); *People v. J.H.*, 136 Ill.2d 1 (Ill. 1990)(no indication that any grand juror asked any questions, four eyewitnesses presented in grand jury, different legal issues). The case that appears to be most similar to the facts of this case is *People v. Hunter*, 298 Ill.App.3d 126 (2d Dist. 1998).

2. Read in context, the Grand Juror who asked questions was not asking for the identity of "the person" who had sexually assaulted Jane Doe; the identity of Dan Basile was apparent to all of the Grand Jurors based on the initial questioning of Detective Kelly by the presenting Prosecutor.

3. Instead, read in context, the Grand Juror who asked questions was focused on Detective Kelly's testimony that Jane Doe was "extremely intoxicated" (Page 5, lines 17-18) and wanted to know "how" the Grand Jury could "know that the person [Basile] she [Jane Doe] claims did this to her did it to her." Page 4, lines 20-21.

4. Detective Kelly's immediate and only response was, "He [Basile] told me he did."

5. The Grand Juror's immediate and only response was, "That is all I needed to know."

6. Neither Detective Kelly nor the presenting Prosecutor sought to clarify, supplement or correct Detective Kelly's "He told me he did" answer.

7. In the context of the Grand Jury transcript, and knowing that Detective Kelly had interviewed Basile and knew or should have known all of the statements Basile made to Detectives Kelly and Martin, Detective Kelly's actual response to the Grand Juror was tantamount to informing the Grand Jury that Basile had confessed to having sexually assaulted Jane Doe when, in fact, Basile made no statements in his interview admitting to any type of improper sexual contact with Jane Doe.

8. Knowing that Detective Kelly had very recently interviewed Basile, and knowing that Basile had not made any statement admitting to any improper sexual conduct with Jane Doe, Detective Kelly's conclusory statement that Basile "... told [Detective Kelly] he did" was false, deliberately misleading, inaccurate and deceptive testimony in direct response to a pointed inquiry by the Grand Juror on the critical issue presented for the Grand Jury's consideration – two counts of "criminal sexual assault without consent" in a "she said, he said" case.

9. It is the State's responsibility to insure that deliberately or intentionally misleading testimony, or other false, deceptive or inaccurate evidence is not presented to the Grand Jury and to correct such testimony if it is presented. In this case, the presenting Prosecutor was not the Prosecutor assigned to this case. That fact does not excuse the State from it's relatively minimal responsibility to protect a defendant's due process rights in the Grand Jury.

10. Upon hearing Detective Kelly's answer – "He told me he did" in response to the Grand Juror's question – "How do we know that the person she claims did this to her did it to her," the Prosecutor, at that point, had an affirmative obligation to follow up and confirm with Detective Kelly whether Basile had confessed to having criminally sexually assaulted Jane Doe, or whether instead he had only admitted to having had sex, or consensual sex, with Jane Doe.

11. In response to the Grand Juror's question, the State did nothing to clarify that Basile did not confess to the charges of criminal sexual assault and did not admit to any inappropriate or illegal sexual conduct with Jane Doe. And Detective Kelly provided the Grand Jury with "all [it] needed to know" to indict Basile.

Illinois courts have repeatedly observed that "a confession is the most powerful piece of evidence the State can offer" and that it's effect on the finder of fact is "incalculable." See, e.g. *People v. Simpson*, 2015 IL 116512, ¶36; citing *People v. R.C.*, 108 Ill.2d 349, 356 (Ill. 1985); see also *People v. Lofton*, 2015 IL App (2d) 130135, ¶33.

This Court finds and concludes that Detective Kelly's five word, "He told me he did" answer to the Grand Juror's question, "How do we know that the person [Basile] she [Jane Doe] claims did this to her did it to her?," to which the Grand Juror responded, "That is all I needed to know" left the Grand Jury with the impression that Basile had admitted to, or confessed to having unwanted sexual contact with Jane Doe. And, in fact, Detective Kelly knew, and the presenting Prosecutor should have known, that Basile made no such admissions during his interview and instead repeatedly denied doing anything that Jane Doe did not want to do that night.

Under the specific facts and circumstances of this case, this Court further **FINDS** that Basile has demonstrated an unequivocally clear denial of his due process rights warranting the dismissal of the Bill of Indictment, and that Basile has met his burden of showing that prosecutorial misconduct in the Grand Jury in this case directly affected the Grand Jury's deliberations, resulting in the return of the two count Bill of Indictment against Basile.

E. Conclusion & Order

As explained above, this Court finds and concludes that the State, through the uncorrected and un-clarified sworn testimony of Detective Kelly in response to a Grand Juror's questions, knowingly misled the Grand Jury.

The State clearly used, at a minimum, highly misleading, highly inaccurate, and, given Basile's interview statements, false testimony on the issue of whether Basile admitted - "told me" - he sexually assaulted Jane Doe. In effect, the State left the Grand Jury with the unmistakable impression that Basile had confessed charges being presented to the Grand Jury when, in fact, he had done no such thing.

Accordingly, and tor all of the reasons set forth above, this Court **GRANTS** the Motion to Dismiss Indictment With Prejudice filed by and on behalf of the defendant, **Daniel D. Basile**, and hereby **DISMISSES** the two-count Bill of Indictment returned by the Grand Jury on **November 6, 2019**, **WITH PREJUDICE** and **WITHOUT LEAVE TO RE-INDICT**.

SO ORDERED.

Entered: 11/23/2024

JUDGE OF THE CIRCUIT COURT (#51)

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

THE PEOPLE OF THE STATE OF ILLINOIS

Plaintiff,

No. 2019CF002828

vs.

DANIEL DUALLO BASILE III,
6/6/1968

Defendant(s).

BILL OF INDICTMENT

The Grand Jury charges:

Count 1 of 2

That on or about the 12th day of October, 2019, in the County of Winnebago, State of Illinois, DANIEL DUALLO BASILE III committed the offense of CRIMINAL SEXUAL ASSAULT WITHOUT CONSENT, in that the defendant knowingly committed an act of sexual penetration and knew that the victim was unable to understand the nature of the act or was unable to give knowing consent in that he made contact between his penis and the sex organ of Jane Doe DOB 4/4/1996 while in the bedroom of Jane Doe's home, in violation of 720 ILCS 5/11-1.20(a)(2). (Class 1 Felony) (MAX 4-15 years IDOC; MSR 2 years: Fines up to $25,000)[truth in sentencing applies pursuant to 730 ILCS 5/3-6-3(a)(2)(ii) Non probationable pursuant to 730 ILCS 5/5-5-3(2)(H); mandatory consecutive pursuant to 730 ILCS 5/5-8-4(d)(2)](This offense requires registration pursuant to 730 ILC 150/1 et seq.)(OFT Code = 0015788)

Count 2 of 2

That on or about the 12th day of October, 2019, in the County of Winnebago, State of Illinois, DANIEL DUALLO BASILE III committed the offense of CRIMINAL SEXUAL ASSAULT WITHOUT CONSENT, in that the defendant knowingly committed an act of sexual penetration and knew that the victim was unable to understand the nature of the act or was unable to give knowing consent in that he made contact between his penis and the sex organ of Jane Doe DOB 4/4/1996 while in the mud room of Jane Doe's home, in violation of 720 ILCS 5/11-1.20(a)(2). (Class 1 Felony) (MAX 4-15 years IDOC; MSR 2 years: Fines up to $25,000)[truth in sentencing applies pursuant to 730 ILCS 5/3-6-3(a)(2)(ii) Non probationable pursuant to 730 ILCS 5/5-5-3(2)(H); mandatory consecutive pursuant to 730 ILCS 5/5-8-4(d)(2)](This offense requires registration pursuant to 730 ILC 150/1 et seq.)(OFT Code = 0015788)

A TRUE BILL

Foreman

LIST OF WITNESSES

Vincent Kelly

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

The within indictment returned in open court this 6 day of

Nov., 2019. Bail set at $ 10,000.

[ ] Warrant to be issued

[XX] No warrant issued

[ ] **NEED TO SUPPRESS**

Judge of the Circuit Court

Daniel Duallo Basile III
6/6/1968
9373 Riverview Trail
Roscoe, IL 61073

APPELLATE NO.:_____

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT COURT, WINNEBAGO COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	) **Appeal From Winnebago County**
	) **Circuit Court No. 17th**
	)
v.	) **CASE NO.: 19 CF 2828**
	)
DANIEL D. BASILE	) **Date of Notice: December 14, 2021**
	) **Trial Judge: Honorable Brendan Maher**

NOTICE OF APPEAL

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

(1) Court to which appeal is taken: Appellate Court of Illinois for the Second District, Elgin, Illinois

(2) Name of appellant and address to which notices shall be sent.
Name: People of the State of Illinois
Address: J. Hanley, State's Attorney for WINNEBAGO County, 400 N. State Street, Rockford, IL 61101

(3) Name and address of appellant's attorney on appeal:
Name: Edward R. Psenicka, Deputy Director
Address: State's Attorney's Appellate Service Commission, 2032 Larkin Ave., Elgin, IL 60123

(4) Date of judgment or order: November 23, 2021

(5) Offense of which convicted: Not applicable.

(6) Sentence: Not applicable.

(7) Nature of Order Appealed from: This is an appeal by the People of the State of Illinois of the November 23, 2021 order granting Defendant's Motion to Dismiss Indictment with Prejudice.

By: _____
Kenneth LaRue
First Assistant State's Attorney

PROOF OF SERVICE

I, Kenneth LaRue on oath states that on December 14, 2021 before 5:00 p.m., I served this Notice of Filing, along with the documents referred to herein, by mailing them to the above listed parties at the their listed addresses.

Kenneth LaRue

SUBSCRIBED AND SWORN to before me

this 14th day of December

OFFICIAL SEAL
RENEE ANDREWS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 6/20/2025

NOTARY PUBLIC

Index to the Record on Appeal

People v. Basile, 2019-CF-2828 (Winnebago Cty. Cir. Ct.)

I. Common Law Record (cited as "C__")

II. Sealed Record (cited as "CS__")

III. Report of Proceedings (cited as "R__")

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 May 10, 2023, the foregoing **Brief and Appendix 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:

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/s/ Matthew D. Skiba
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