No. 130110

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OCHEIL D. KEYS, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-21-0630, 4-22-0017 & 4-22-0018 (Consolidated). There on appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois, No. 17-CF-725. Honorable Nancy S. Fahey, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I. Defense counsel was ineffective in failing to suppress an interrogation video in which Ocheil Keys invoked his right to silence, in failing to redact inadmissible statements by police officers during the interrogation that were not relevant to contextualize any statement made by Keys but in which they expressed their own conclusions regarding Keys's guilt and referenced double hearsay, and in failing to redact suggestions to other crimes.

This argument involves issues on which the appellate court below created a split in Illinois law that this Court granted leave to appeal to resolve, yet the State's brief offers little input on either question. On whether a defendant must use specific language to invoke his right to silence, the State does not cite any case to support its argument that Ocheil Keys's invocation of the right to silence was ambiguous. And on the question of when police statements during an interrogation are admissible and must be accompanied by a limiting instruction–an issue over which the appellate court below explicitly "disagreed" with the published opinion in *People v. Hardimon*, 2017 IL App (3d) 120772–the State cites only one side of the split, ignores the majority of cases inside and outside of Illinois that disagree with its position, and does not even address *Hardimon*. Nor does the State address the points raised in the amicus brief. Case law overwhelmingly supports Keys's arguments. He was denied effective assistance of counsel, and this Court should grant him a new trial on his murder conviction.

A. Counsel performed deficiently.

1. Failure to Suppress Interrogation Due to Fifth Amendment Violation

a. "Ain't nothin' further for us to talk about," constituted a clear and unambiguous invocation of the right to silence.

Keys invoked his right to silence when he responded to an officer's statement that "it's very clear that you caused the disappearance of Barbara [Rose]," by saying "I said I didn't do anything, period, point blank. If that's the case, if you feel like based on your investigation, then do what you gotta do, ain't nothing further for us to talk about." (Exh. 21 53:49-1:00:42)

The State contends Keys's statement was ambiguous as he only said "further discussion would be pointless," or there was nothing more for "him and the detectives" to discuss. (St. Br. 17)

The State cites no case to support its claim. Nor does it meaningfully distinguish any case cited by Keys showing his invocation was clear (Def. Br. 12-17), instead asserting in a conclusory footnote the cases are different. (St. Br. 18) The State apparently believes that because Keys's phrasing was not *identical* to those cases, it was ambiguous. But if a defendant "indicates in any manner" he wishes to remain silent, interrogation must cease. *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). Keys's invocation was no less clear than in the cases he cited. *E.g. People v. Cox*, 2023 IL App (1st) 170761, ¶52 ("I don't wanna answer no more questions, 'cause I can't help you. And I don't wanna dig myself into a hole"). Also, context matters. Keys did not make his invocation in response to a direct question in that regard. Rather, he was a half hour into questioning when he said he had nothing further to talk about, trying to stop the interrogation on his own. (Exh. 21 53:49-54:46) That he also gave a *why* for his invocation–that there was nothing further to discuss–does not render his invocation ambiguous.

b. Clarifying questions solidified Keys's intent.

Keys's assertions following his invocation confirmed his intent. (Def. Br. 17-19) The State contends these statements are "best (or at least reasonably can be) construed as reiterating defendant's claim that he was not responsible for Rose's disappearance, not expressing a desire to end the interview." (St. Br. 18) Yet the State does not reference a single word said by the police or Keys at this time, and the record undermines the State's assertion. During those few minutes, the following discussions occurred, *inter alia*:

- Officer: Okay, so I don't know if you understand, that when you're gonna wanna give this explanation later, cause you're gonna want to, when you see how everything's playing out for ya, that's not gonna be the time to try to come forward and say, okay wait a minute guys, . . . this didn't happen the way you guys think it happened, let me explain this. So we're giving you that opportunity now, okay?

- Keys: Okay. (Exh. 21 54:46-55:46)

- Officer: Once we leave, and it's all said and done, I mean, that's it, man.

  - Keys: Umm-hmm. (Exh. 21 55:42-56:30)

- Officer: Okay, so I'm just asking ya, just man to man, if there's something you want to tell us, I'm willing to listen right now. Is there something you need to get off your chest, is there something you need to tell us?

  - Keys: No, there's nothing. (Exh. 21 56:30-56:59)

- Officer: Now's your time to tell your story. And if that's the story you're gonna stick with, the other side of that story is going to continue to stack higher than the story you're giving us. And that's it. I'm not gonna beg you man, this is your life, this is your decision. These are your decisions. So if that's what you're sticking with and that's what you're going with, it is what it is. Fair enough?

  - Keys: Yeah. (Exh. 21 58:53-59:35)

After this, the police asked Keys if his position was that he had nothing to do with Rose's disappearance, which Keys confirmed. (Exh. 21 59:39-1:00:02) Yet the statements prior to that can *only* be described as confirming he did not want to talk further. As the officers put it, he was "sticking" with his story and had nothing more to say. (Exh. 21 58:53-59:35)

c. The termination of the interview confirms Keys' invocation.

The detectives left the room after this exchange, showing they understood Keys did not want to talk. (Def. Br. 19) The State contends the defendant in one case cited by Keys in this section, *People v. Nielson*, 187 Ill. 2d 271, 287 (1999), was more clear about his desire to stop the interview. (St. Br. 19) In fact, Keys was more clear. In *Nielson*, the defendant invoked his right to silence through actions, *i.e.*, placing his hands over his ears, looking at the ceiling, and chanting "nah, nah, nah" after police told him the victims had been burned at his residence. 187 Ill. 2d at 284-85. Even more clearly, Keys said directly that he had nothing further to talk about and persisted in that decision despite police pressure. The State also notes the *Nielson* defendant was returned to his cell, while here, detectives "ke[pt] defendant in the interview

room." (St. Br. 19) But the State does not address Keys's other cases, where defendants were also left in the interrogation room, which supported their invocations were clear. *People v. Ward*, 2023 IL App (1st) 190364, ¶¶105-06, 116; *Cox*, 2023 IL App (1st) 170761, ¶¶45, 52.

d. The detectives failed to scrupulously honor Keys's right to remain silent.

The State does not dispute this point. Ultimately, it cites no case showing Keys's invocation was ambiguous. He said he had "nothing further" to "talk about" and confirmed his decision, which stopped the interrogation. Since the police later returned and failed to honor his right to silence, counsel was ineffective in failing to file a motion to suppress.

2. Counsel failed to redact inadmissible portions of Keys's interrogation videos.

The State contends counsel was not deficient in failing to redact statements in Keys's interrogation in which police discussed their opinions on his involvement in Rose's disappearance, claimed a non-testifying witness told them Keys confessed, and suggested Keys's involvement in other crimes. (St. Br. 20) Yet the State does not specifically address *any* of these statements, only making general claims about their admissibility. (Def. Br. 23-25) Nor has the State addressed even one case among the multitude of authority inside and outside Illinois (Def. Br. 21-35), showing the statements were inadmissible as they were unnecessary to contextualize any statement made by Keys or change in his demeanor. *See, e.g.*, *People v. Hardimon*, 2017 IL App (3d) 120772, ¶35 (counsel ineffective for failing to challenge prejudicial interrogation statement that resulted in no relevant responses or incriminating information); *State v. Rocha*, 890 N.W.2d 178, 199-200 (Neb. 2017) (police interrogation statements only admissible to provide "necessary context to a defendant's statements in the interview which are themselves admissible").

Against all this authority, the State cites only to *People v. Whitfield*, 2018 IL App 150948 (St. Br. 20-21), the same case upon which the appellate court below relied to disagree with

Hardimon to create its own more lenient standard for admissibility, *i.e.*, whenever police statements are "helpful." *People v. Keys*, 2023 IL App (4th) 210630, ¶¶71-72. Yet Keys explained in his opening brief why the Fourth District's position in this case and *Whitfield* is flawed. (Def. Br 33-36) The State does not acknowledge, let alone challenge, that argument.

Moreover, even *Whitfield* does not support the State's contention here, that the statements where the officers emphasized their conclusions that Keys caused Roses's disappearance were relevant to provide context for Keys's "insistence that he was not involved in Rose's disappearance," and "stone-faced silence when the detectives repeatedly poked holes in his story. . ." (St. Br. 20-21) In *Whitfield*, the defendant conceded his own statements during his interrogation were admissible. *Id*. ¶48. In that context, "[w]ithout the officers' statements and questions, the meaning and significance of defendant's answers, comments, behaviors–or even, at times, his silence–would be difficult to discern." *Id*. ¶49. However, *Whitfield* did not describe *any* statement made by the police that provided context for the defendant's *silence*, other than to simply note generally that "at times" the comments were relevant in that regard. *Id*. ¶49.

In stark contrast to *Whitfield*, Keys never incriminated himself or changed his demeanor in light of the officers' tactics; nine of the 13 statements in which the officers discussed their conclusions of his guilt did not even *allow* a response from Keys. (Def. Br. 26) Under the wealth of authority on this issue (Def. Br. 21-35), the statements were inadmissible. *See* Jones on Evidence, Ch. 40, §40:44, *Police statement of belief or disbelief, or repeating others' statements, during an interrogation* (2023) (where interrogation statements "fail to shake the defendant into confessing or changing his answers, the interrogator's statements become 'commentary' with virtually no legitimate probative value and must be excluded").

Nor has the State offered any explanation as to why the officers' own conclusions about Keys's guilt were relevant to contextualize Keys's assertions that he was innocent. Had Keys

taken the stand at trial and denied guilt, the prosecutor would not have been permitted to assert over and over again that the investigation already proved his guilt, just to see if he persisted in his innocence. *See United States v. Abair*, 746 F.3d 260, 266-67 (7th Cir. 2014) (new trial granted where, *inter alia*, prosecutor badgered defendant by asking her repeatedly if she lied and other accusatory questions); *People v. Lyles*, 106 Ill. 2d 373, 391 (1985) (prosecutor may not voice their opinion about defendant's case). This Court must reject the State's argument that this questioning is relevant when it occurs during the defendant's interrogation video.

The State's reliance on Keys's "stone-faced silence" is also problematic. (St. Br. 20) As explained above, Keys told the officers in his interrogation that he had nothing further to talk about. (Exh. 21 53:49-54:46) Among the police statements discussing their faith in Keys's guilt, the first one led Keys to make that declaration, which was inadmissible. *See Grunwald v. United States*, 353 U.S. 391, 416 (1957).The remaining 12 occurred after Keys said he had nothing to talk about. (*See* Def. Br. 23-25) In fact, almost all the statements occurred at the end of the interrogation, during a speech on why Keys should confess. (Exh. 21 2:40:54-2:46:54)

Thus, rather than being probative evidence of Keys's guilt, the manner in which Keys continued to sit silent in response to the increasingly inflammatory statements made by police primarily shows he *still* did not want to talk to them. Or if Keys's assertion of his right to silence was ambiguous as the State contends, his continued "stone-faced silence" was also ambiguous. *See Commonwealth v. Kitchen*, 730 A.2d 513, 522 (Penn. 1999) (showing portions of video where defendant remained silent during hostile interrogation would violate defendant's right against self-incrimination). Moreover, interrogation statements should not be more admissible, the more that increasingly prejudicial statements have no impact on the defendant. This turns the law of relevance on its head. *See* Ill. R. Evid. 403 (relevant evidence will be excluded when probative value is substantially outweighed by danger of unfair prejudice).

The State also claims Keys's continued assertions of innocence and silence undermined that he killed Rose accidentally. It makes the same argument regarding the detectives' additional claims that Keys's cousin, Nick Patton, a non-testifying witness, told them that Keys confessed to him, while believing Keys may have killed Rose accidentally. (St. Br. 20-22)

However, Keys did not advance a defense at trial that Rose's death was accidental; instead he contended he was innocent, just like in his interrogation. The evidence that Rose's death may have been accidental or reckless came from the State. Specifically, the State's key witness, Carroll Hamilton, testified that Keys told him that Rose was shot when he and Rose were "joking around" while Rose held a starter pistol and Keys had a gun; Rose's starter pistol went off and Keys did not remember what happened next. (R. 128-30) During summation, counsel attacked Hamilton's credibility and argued that Keys was not involved in Rose's death at all. (R. 1205-35) Counsel also argued that while the *State* told the jury, "you have to believe Carroll Hamilton," even that evidence showed Keys "didn't commit murder," but that "it was an accident and none of those murder charges apply." (R. 1233-34) Thus, the theory of an accidental death was presented by the State's evidence, not the defense. To that end, the State's argument that it was necessary to rebut the inference that could be drawn by its own case with evidence that Keys did not admit to killing Rose accidentally in his interrogation is particularly weak. If it did not want the jury to make that finding, it did not have to present Hamilton's testimony. Moreover, Keys had the right at trial to point out in summation what the State's own evidence showed, without needing to admit to the State's theory before trial.

Yet even if the State did validly want to rebut the theory raised by its own evidence through Keys's choice not to admit to an accidental death, it did not have to show the challenged statements. Keys's interview contained other instances where Keys declined specific opportunities to say Rose's death was an accident, even after police told him *directly* that they were giving

him the chance to say it was an accident. (*See* Def. Br. 30-31) There was little to no probative value to the police offering their own opinions on Keys's failure to admit guilt to them, or in violating Keys's confrontation rights by discussing hearsay from a non-testifying witness, just to show again that Keys did not tell the police Rose's death was an accident. As noted above, almost all of the instances where police stated their conclusions did not even offer Keys a chance to respond. The same is true regarding the discussions of hearsay–only *one* was followed by a proper question to Keys, and that question could have been redacted to remove hearsay while still showing the question: ". . . this was kinda something that just happened, and [] you didn't know what to do afterwards. Is that what we're talking about here." (*See* Def. Br. 30)

There are also alternative explanations for Keys's silence or continued assertion of innocence that further diminished any probative value of Keys's non-response to those interrogation tactics. For example, the police told Keys that anything he said during interrogation could be used against him. (Exh. 21 27:51-28:46) Thus, he would have known that if he did admit involvement in Rose's death, even accidental involvement, he would be held to that statement forever, with a risk that no one would ultimately believe it was an accident. *See Doyle v. Ohio*, 426 U.S. 610, 617-20 (1976) (defendant's silence following *Miranda* warnings is inadmissible because it may be nothing more than the "exercise of . . . *Miranda* rights," especially since warnings contain an implicit "assurance that silence will carry no penalty").

Moreover, the State does not dispute that police may lie during an interrogation, or that the State never proved Nick Patton actually did make the statement described during Keys's interrogation. Thus, if Keys never told Nick what the police were saying he did, he would have known the police were lying or did not know what had occurred, and thus believed they could be trying to trick him into an admission. This further illustrates the lack of relevance in associating Keys's guilt with his lack of response to unproven hearsay from a non-testifying witness. The

hearsay confused the facts and risked the jury relying on the unproven statement itself.

In fact, the State offers only one sentence to assert in a conclusory manner that the probative value of these statements was not substantially outweighed by a danger of unfair prejudice, along with a cite to *People v. McCallum*, 2019 IL App (5th) 160279, ¶70. (St. Br. 21) Yet in *McCallum*, the defendant challenged a discrete portion of his interrogation in which the officers commented on a 911 call in which the decedent made a dying declaration. *Id*. ¶54. That portion had significant probative value because the defendant's demeanor "noticeably changed" after hearing the call. *Id*. ¶¶67-68. Also, the video was already redacted such that the prejudicial statements that remained *were* brief. *Id*. ¶70. Here the statements did not lead to any change in Keys's story, the video was not redacted, and the comments were *not* brief.

Ultimately, the State asserts that the admissibility of the statements presents "a close question." (St. Br. 21-22) Only the State's failure to acknowledge the authority cited in Keys's opening brief could lead the State to believe a close question exists. (Def. Br. 20-36) Case law overwhelmingly shows the statements were inadmissible and should have been redacted.

To that end, the State offers a different reason for why counsel might not have challenged the officers' discussions, at least of *Nick's* supposed statement. It ponders if counsel may have concluded that having the jury hear that Keys described Rose's death as an accident to Nick allowed the defense to show that Keys did not kill Rose intentionally, without having to put Keys on the stand. (St. Br. 22) Yet as explained above, *supra*, counsel advanced a theory of total innocence, something she confirmed after trial. (R. 898) Moreover, counsel never mentioned Nick's supposed statement in summation. Instead, she tried to get around it, questioning why the State had not called him as a witness if what the police said about him was true. (R. 1225)

The State also speculates counsel could have believed there was little risk in Nick's statements, since the jury already knew of Keys's statement to Hamilton. (St. Br. 22) However,

counsel argued at length about why Hamilton should *not* be believed. (R. 1217-21, 1232-33, 1234) Allowing the jury to hear the officers state repeatedly, in violation of Keys's right to confrontation, that Keys made a statement similar to Nick only bolstered Hamilton's testimony.

And, again, the officers may have been lying. Because officers may lie during interrogations, the State's position will inevitably lead to jurors considering false evidence, such as when officers falsely claim a witness implicated the defendant or that forensic evidence proves he is the offender. The State's position could also lead officers to play up the defendant's guilt for the jury during a videotaped interview – during Keys's interrogation, for example, one of the officers directly referenced how a jury would see the video. (Exh. 21 2:46:54-2:47:54)

Finally, the State contends counsel was not deficient in failing to remove suggestions of other crimes from the video. It argues first that counsel may have concluded that evidence that Keys was "fighting" other cases when Rose disappeared was "inextricably intertwined" with his explanation for Rose's disappearance, *i.e.*, that she went to Indiana to buy a car. (St. Br. 23) The record refutes this argument, showing the State agreed not to mention the charges Keys faced at the time of Rose's death after counsel filed a motion to preclude that evidence. (C. 219-20; R. 1279) Moreover, the important part of Keys's statement was that Rose went to get a car so they could each have a car, not his plans for the car. (Def. Br. 31-32)

The State argues counsel may have found the statement that Keys was used to talking to police in handcuffs "too fleeting and insubstantial to demand redaction." (St. Br. 23) To the contrary, especially when combined with Keys fighting other cases when Rose died, it suggested he was frequently in trouble with the law and so violent that he needed to be restrained.

3. Counsel failed to request limiting instructions.

The State argues incorrectly that Keys "identifies no Illinois precedent requiring a limiting instruction in the circumstances presented here. . ." (St. Br. 24) Keys cited Illinois Rule of

Evidence 105 and Illinois Pattern Jury Instruction (Criminal 1.01), which require that the jury be given a limiting instruction when evidence is offered for a limited purpose at trial. (Def. Br. 36) He also explained there is no specific instruction for *any* limited evidence in Illinois, including hearsay, but case law nevertheless instructs trial courts to issue limiting instructions when limited evidence is admitted. *E.g. People v. Boling*, 2014 IL App (4th) 120634, ¶135.

Thus, the State wrongly contends counsel cannot be found deficient because no pattern instruction covers police interrogation statements. (St. Br. 24) That argument means no Illinois defense attorney would be required to make sure their client's jury was instructed that limited evidence not be considered substantively. That is not the law. *See People v. Jura*, 352 Ill. App. 3d 1080, 1093-94 (1st Dist. 2004) (counsel ineffective, *inter alia*, for failing "to ask the trial judge for a limiting instruction explaining to the jurors the fact they could not rely on the hearsay as substantive evidence"); *People v. Davila*, 2022 IL App (1st) 190882, ¶72 (without a limiting instruction accompanying police interrogation statements, "it [wa]s quite possible that the jury mistook the video statements for [the detective]'s present opinion of defendant's guilt").

B. Keys was prejudiced.

The State contends Keys was not prejudiced because the "unchallenged evidence" demonstrated his guilt. (St. Br. 25) Yet under *Strickland v. Washington*, 466 U.S. 668 (1984), courts must consider *all* the evidence, not just that supporting a conviction. *Elmore v. Ozmint*, 661 F.3d 783, 868-72 (4th Cir. 2011); *Breakiron v. Horn*, 642 F.3d 126, 139-41 (3d Cir. 2011).

The State also downplays the prejudice from the interrogation video. By failing to suppress the portions following Keys's invocation, counsel allowed the jury to hear the exchanges the State now contends prove Rose's death was not accidental, *i.e.*, his non-assertion of that fact. By failing to redact the challenged police statements, counsel also allowed the jury to hear–*as substantive evidence*–police opinions of his guilt, an alleged confession from a non-testifying

witness, and evidence of other crimes. Each type of evidence is prejudicial. *See Hardimon*, 2017 IL App (3d) 120772, ¶¶38-39 (defendant prejudiced by interrogation statements painting him as a "cold-blooded" murderer as they bolstered State's case and came from recognized authority figures); *People v. R.C.*, 108 Ill. 2d 349, 356 (1985) (improper admission of defendant's out-of-court statement prejudicial where confessions are "the most powerful piece of evidence the State can offer"); *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980) ("The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal.").

Moreover, when contending the evidence of murder was strong, the State focuses on Keys's *concealment* of Rose's death. (St. Br. 25-26) Yet those actions are no more indicative of him having killed Rose intentionally than of Rose's death having come from other means and Keys fearing he would be presumed her killer. Notably, the Illinois concealment statute punishes a defendant for concealing the death of *any* person who has died by homicidal means, whether the acts causing death were "lawful or unlawful." 720 ILCS 5/9-3.1(a),(b-5) (2019). Moreover, if Keys meant to kill Rose, he would have planned better, preparing to cover up her death beforehand rather than frantically taking those actions after the fact. Or even if he made a split-second decision to shoot Rose, it defies common sense that he would involve anyone else in the matter. He would want to keep his actions hidden. But he was with his cousin, Nick Patton, when obtaining supplies to conceal Rose's death. (R. 620-22, 632-40, 660-61)

The State also relies on Hamilton's testimony that Keys told him "that he shot Rose in the head and then burned and dismembered her body." (St. Br. 26) Hamilton actually testified that Keys said he and Rose had been "joking around" when Rose pointed a starter pistol at him, Keys pulled out a gun, Rose's starter pistol went off, and the next thing Keys knew, Rose was bleeding. (R. 130-34) This testimony fell far short of proving Keys killed Rose intentionally. To the contrary, it suggested the opposite. (*See* Def. Br. 45)

The State disagrees, noting a firearms expert testified that a .22-caliber revolver can only be discharged by pulling the hammer and trigger, or performing a long pull of the trigger, depending on which type of gun was involved. (St. Br. 27) This argument highlights an important point: the gun that killed Rose was never recovered. In fact, the only evidence even that a .22-caliber revolver was involved was from Hamilton: when asked if Keys specified the gun involved, Hamilton answered, "I believe it was a .22." The prosecutor asked if Keys "specif[ied] the .22," and Hamilton answered, "Revolver. Revolver." (R. 131) Even if that testimony had been compelling, the State never asked its expert if revolvers may be discharged accidentally.

Nor was Hamilton's testimony compelling – the State admitted at trial that he was a troubling witness. (R. 1198-99) As the State still admits, Hamilton received "a benefit" in exchange for his cooperation. (St. Br. 26) In fact, he obtained multiple benefits, first for his statement and then for his testimony. (*See* Def. Op. Br. 43) The State contends Hamilton's testimony was still reliable because he included details known through other evidence. (St. Br. 26) But the fact that Hamilton recounted evidence already known to the police only makes his testimony more suspicious. (Def. Br. 44) Moreover, Hamilton was contradicted at times: he claimed Keys said he held Rose for "like 30 minutes" before she died (R. 133), but the forensic examiner testified Rose "died within minutes." (R. 236) Nor did Hamilton know a fact the police did not know themselves, *vis*., the location of the gun that killed Rose. Ultimately, what made Hamilton's testimony seem compelling was the officers stating repeatedly that the evidence proved Keys's guilt and that Keys had also confessed to his cousin, Nick.

The State argues "there is no reason to think that jurors relied on the detectives' opinions" when deliberating Keys's guilt. (St. Br. 28) But the State does not address the overwhelming authority discussing the prejudicial impact that police interrogation statements may have on a jury. (Def. Br. 21-48) *See, e.g, Jackson v. State*, 107 F.3d 328 (2019) ("Any chance the jury

would have reasonable doubt regarding Jackson's guilt would have been obviated by quickly recalling the detectives' adamant belief in Jackson's guilt"). Keys also cited law that holds that when a jury is not instructed to limit evidence to its intended purpose, the jury *will* consider that evidence substantively. (Def. Br. 36-37) These risks were nothing but heightened here. Among the inadmissible police statements played for the jury were the following:

- *They're gonna play this in front of the jury* and you're gonna sit here and tell us that you had nothing to do with this when everything up to this point and continuing past this point is gonna prove otherwise. And you, you sat here and had no remorse. None. None. You did it out of cold blood." (Exh. 21 2:46:54-2:47:54) (Emphasis added.)

- . . . I gotta go and tell them, like, man, he wouldn't tell us why he did it. And he was like, man, it wasn't me, I don't know. So that just doesn't look good for you whatsoever down the road. (Exh. 21 2:50:25-2:51-08)

These statements–*offered as substantive evidence*–informed the jury that the entire video and the officers' opinions were evidence the jury should consider. Thus, not only is there reason to believe the jurors' relied on the detectives' opinions when deciding Keys's guilt, but it is downright fanciful to think otherwise. Here, the jury found Keys intentionally and knowingly killed Rose, even though the *only* direct evidence offered of how Rose died (Hamilton's testimony) suggested Rose's death had been an accident. Rarely does a record provide such compelling evidence that a jury was impacted by inadmissible evidence. There can no confidence in *any* trial that risked so many improper ways to find a defendant guilty, but the absence of overwhelming evidence of Keys's guilt makes this verdict more unreliable.

II. This Court should vacate one of Ocheil Keys's dismemberment convictions and two of his concealment convictions.

Under Illinois precedent on the allowable unit of prosecution of criminal statutes, the plain language of the concealment of a homicidal death and dismemberment statutes authorize only one conviction for concealing the same death and one conviction for dismembering the same body. The State cites Colorado law to argue that multiple convictions are permitted under

Illinois statutes when based on multiple courses of conduct. (St. Br. 29, 32) This is incorrect. Yet even if a course of conduct is the deciding factor, Ocheil Keys's multiple convictions remain improper, because that question of fact was never submitted to the jury and because Keys's actions formed the same course of conduct, a position the State advanced in the trial court.

A. The concealment statute only allows for one conviction for acts taken to conceal the same homicidal death.

The legislature was clear on the unit of prosecution of the concealment statute: "conceal" is "the performing of some act or acts for the purpose of preventing or delaying the discovery of a death by homicidal means." 720 ILCS 5/9-3.4(b-5) (2010). The State adds words to the statute that do not exist, arguing it "makes clear that a defendant may not be convicted of separate offenses based on a series of acts committed *as part of a single course of conduct*." (St. Br. 31-32) Yet the words "single course of conduct" do not appear in the statute. *Id*.

The State argues that "nothing in the statute suggests an intent to exempt it from the general rule that a defendant who violates a statute more than once through separate and discrete courses of conduct" may be punished separately. (St Br. 32) There is no such "general rule." The general rule in Illinois is that, "in determining the unit of prosecution, this [C]ourt looks to the language of the statute to determine what precisely has been prohibited by the legislature and in what unit of time, actions, or instances that crime is committed once." *People v. Hartfield*, 2022 IL 126729, ¶83. If there is ambiguity, the second general rule is that courts must apply the "doctrine of lenity" and construe the statute in the defendant's favor. *Id*. ¶94. Thus, the State argues *the opposite* of what this Court requires. Even though the statute explicitly defines the crime as when the defendant commits "some act or acts" to prevent or delay discovery of "a" death, the State adds words to the statute to construe it *against* Keys.

The State cites Colorado law, *Friend v. People*, 429 P.3d 1191 (Colo. 2018), which held that even when a statute has one unit of prosecution, a defendant may be punished separately

for "successive commissions" of the offense. It interprets "successive commissions" as different courses of conduct. (St. Br. 28) Yet since Illinois has its own law on this issue, relying on Colorado law is improper. *Racky v. Belfor USA Group, Inc*., 2017 IL App (1st) 153446, ¶112.

The State's argument is also flawed in light of recent law on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Erlinger v. United States*, __ U.S. __, 144 S.Ct. 1840 (2024), the Court addressed a statute that imposed longer prison sentences on defendants who committed three prior qualifying offenses on separate occasions. The question was "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." *Id*. at 1846. The Court determined that deciding if the defendant's past offenses occurred on three or more occasions was a "fact-laden task." *Id*. at 1851. Since resolution of that fact increased the penalties to which the defendant was exposed, the Court found the case "as nearly on all fours with *Apprendi* and *Alleyne* [*v. United States*, 570 U.S. 99 (2013)] as any we might imagine," and held that only a unanimous jury could be given that task, even when "seemingly straightforward." *Id*. at 1851-52, 1860.

The State's argument here violates the right to a jury trial. As the State concedes, under its argument Keys may only be convicted of one count of concealment if it failed to prove he committed separate courses of conduct. (St. Br. 34, n. 5) (conceding Keys's concealment conviction under the initial information for "movement of Rose's body from the bedroom to the garage" should be vacated for failure to prove a separate course of conduct). Proof of a separate course of conduct thus would be a "fact-laden task" necessary to support Keys's additional concealment convictions, which must be submitted to a jury. Indeed, to try to show different courses of conduct, the State undertakes its own factual analysis of factors it deems relevant. (St. Br. 32-33) Yet Keys's jury was never asked to consider the same factors. Likewise,

Keys had no chance in the trial court to argue against the State's current argument.

Thus, this case is also "as nearly on all fours with *Apprendi* and *Alleyne* as any [this Court] might imagine." *Erlinger*, 144 S.Ct. at 1851-52. If the State's analysis is adopted, the State must allege in the charging instrument that the acts were committed through different courses of conduct and obtain a finding from the jury on that element. *Apprendi*, 540 U.S. at 490; *Alleyne*, 570 U.S. at 108 ("*Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling [of a sentencing range], but also those that increase the floor"). Since the State did not do that here, Keys's multiple convictions remain improper.

Yet even if *Apprendi* were not implicated by the State's argument, there can be no serious dispute that Keys's actions were part of a single course of conduct. The State itself advanced this theory before trial when it obtained a joinder of *all* the charges in this case–murder, concealment, and dismemberment–by arguing those charges were "part of the same comprehensive transaction," where "all of the Defendant's actions related to the murder of Barbara Rose and the multiple, different steps the Defendant took to evade detection and capture for the murder occurred within one week and all occurred within the City of Danville." (C. 130-31)

Trying now for the end it currently wants, the State switches course and contends two of Keys's concealment convictions were actually not part of the same comprehensive transaction, *i.e.*, "moving Roses's intact body from her home to the burn site," and "moving her severed remains to his mother's car." (St. Br. 34) Citing *People v. Sinkiewicz*, 208 Ill. 2d 1, 7-8 (2003), the State asserts those acts were "materially dissimilar in nature, occurred at least one day apart, involved different locations, were very likely separated by the intervening event of defendant's first police interview, and were charged and submitted to the jury as distinct offenses." (St. Br. 32-34) But the *Sinkiewicz* factors are "relevant to an analysis of whether there are one or more acts" underlying different charges, not to determine course of conduct. *Id.* at 7.

In *People v. Bell*, 196 Ill. 2d 343 (2001), this Court considered what constitutes "an unrelated course of conduct" for purposes of extended-term sentences. The State contended the test was if the defendant committed "multiple acts." *Id*. at 350-51. This Court rejected that argument, since then "any two crimes would be considered unrelated, such that an extended-term sentence would be appropriate in nearly every situation." *Id*. at 353. It held that an "unrelated course of conduct" is instead one in which "there was a substantial change in the nature of the defendant's criminal objective," the same test for consecutive sentencing. *Id*. at 353-55.

By relying on the test for multiple acts to determine if a single course of conduct exists, the State similarly blurs an "act" with a "course of conduct," rendering the allowable unit of prosecution of the statute to be meaningless. Thus, if this Court does adopt a course of conduct analysis, deciding whether a single course of conduct occurred should be similar to if an unrelated course of conduct occurred. *i.e.*, if there was a change in the nature of the criminal objective. *Bell*, 196 Ill. 2d at 353-55. Here, Keys's actions to conceal Rose's death sought the same objective of hindering the discovery of her death. *See Nazario v. State*, 746 S.E.2d 109, 118 (Ga. 2013) (only one of defendant's convictions for taking different steps to conceal the same death could stand under language that "[a] person who, by concealing the death of any other person, hinders a discovery of whether or not such person was unlawfully killed is guilty of a felony," because gravamen of offense was conduct hindering "a discovery" of death).

B. The dismemberment statute only allows for one conviction for acts taken to dismember the same deceased human body.

The same result should occur with the dismemberment statute. Whether viewed under this Court's law governing the allowable unit of prosecution or the State's proposed "course of conduct" analysis, only one of Keys's convictions for dismembering the same human body is proper. The dismemberment statute does not reveal a clear intent to authorize multiple acts of dismembering the same human body, and thus lenity requires the statute be construed in

Keys's favor. (Def. Br. 52-55) Nor does it have any language to support the State's argument that multiple courses of conduct support multiple offenses. (St. Br. 29) But even if it did, setting fire to Rose's deceased body and severing her body parts were part of the same course of conduct: the nature of Keys's objective never changed. As the State advanced below, he took those actions "to evade detection and capture for the murder" of Rose. (C. 130-31)

The State submits Keys's argument is "extreme" as the legislature would not want to give "free rein" to allow multiple steps to impede an investigation over time. (St. Br. 30, 31) But dismemberment is a Class X offense with a sentence between six and 30 years. 720 ILCS 5/12-20.5 (d). Thus, the legislature gave courts wide flexibility to impose a higher sentence in the State's hypothetical. But by the State's analysis, *any* time the defendant paused his actions, did something else, and then returned, he would commit a distinct Class X offense. The penalty for dismemberment is to be "a step down, far down, from first-degree murder, the minimum of - of which is twenty years." IL Sen. Tran. 2003 Reg. Sess., 43rd Leg. Day, May 12, 2003, p. 56 (statement of Sen. Haine). The State's position conflicts with this intent, not Keys's.

The State also argues that Keys's argument cannot be squared with *People v. Coats*, 2018 IL 121926, or *United States v. Maldonado-Passage*, 56 F.4th 830 (10th Cir. 2022). (St. Br. 30) Yet *Coats* involved the one-act, one-crime doctrine. 2018 IL 121926, ¶14. While it noted that the *defendant* argued that "in certain circumstances convictions for multiple counts of the same offense can be proper," this Court explained that "[i]n those cases, the question for the court would be to determine the legislative intent behind the statute and to determine whether there is evidence to support multiple violations of the statute." *Id.* ¶24. *Coats*, therefore, reiterated the allowable unit of prosecution analysis upon which Keys relies.

In *Maldonado-Passage*, 56 F.4th at 842, the defendant received two counts of murder-for-hire, where he hired two people at different points in time to kill the same victim. The court

found the unit of prosecution focused on the "means taken to achieve" the harm, not the resulting harm itself. *Id*. at 841. Since "the two hitmen represented two independently operating plots to kill," they were appropriately punished separately. *Id.* Here, the dismemberment statute does *not* authorize multiple prosecutions for acts to achieve the same harm, as explained above.

Finally, the State wrongly contends this case is dissimilar to *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 226 (1952). (St. Br. 30) There, once a week, for six or 20 weeks, the defendant failed to pay minimum wages, violated overtime provisions, and failed to comply with record-keeping requirements. *Id*. at 219-20. If this Court were to accept the State's interpretation on what constitutes a single course of conduct, then the defendant in *C.I.T Credit Corp.* would have committed the offense 20 times, since there were intervening time periods, different methods, and different employees. (*See* St. Br. 32) But the Court held instead that the statute intended one conviction for "all violations that arise from that singleness of thought, purpose or action." *Id*. at 224-25. The multiple acts of dismemberment taken by Keys also had a single purpose, to conceal Rose's death, and thus supported only one conviction.

CONCLUSION

Defendant-Appellant Ocheil Keys respectfully requests that this Court reverse his murder conviction and grant him a new trial under Argument I. Under Argument II, this Court should vacate one dismemberment conviction and two concealment convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

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No. 130110

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OCHEIL D. KEYS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-21-0630, 4-22-0017 & 4-22-0018 (Consolidated). There on appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois, No. 17-CF-725. Honorable Nancy S. Fahey, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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 April 10, 2025, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mailbox in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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