

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	On Petition for Leave to Appeal
)	from the Appellate Court of
)	Illinois, Second Judicial District
Plaintiff-Appellant,)	No. 2-21-0740
)	
)	There on Appeal from the Circuit
v.)	Court of the 17 th Judicial Circuit.
)	Winnebago County, Illinois.
)	No. 19 CF 2828
)	
DANIEL D. BASILE,)	The Honorable
)	Brendan Maher,
)	Judge Presiding.
Defendant-Appellee.)	

BRIEF OF THE DEFENDANT/APPELLEE

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TABLE OF CONTENTS

	<u>Page(s)</u>
ADDITIONAL FACTS FOR CONSIDERATION.....	1
POINTS AND AUTHORITIES	
ARGUMENT.....	4
I. THE LOWER COURTS’ OPINIONS IN THIS CASE SHOULD BE AFFIRMED AS THE SWORN SUGGESTION BY DETECTIVE KELLY THAT DEFENDANT CONFESSED TO COMMITTING SEXUAL ASSAULT ON JANE DOE CANNOT REASONABLY BE CHARACTERIZED AS INADVERTENT, AND OPERATED TO DENY DEFENDANT’S RIGHT TO BE INDICTED BASED ON NON-PERJURED TESTIMONY.....	4
<i>People v. DiVincenzo</i> , 183 Ill.2d 239, 700 N.E.2d 981 (1998).....	<i>Passim</i>
<i>People v. McDonald</i> , 2016 IL 118882.....	4
Black’s Law Dictionary 1142 (5 th ed. 1979 (definition of reckless)).....	6
Illinois Pattern Instruction (Criminal) 5.01 (definition of reckless).....	6
<i>People v. Oliver</i> , 368 Ill.App.3d 690, 859 N.E.2d 38 (2 nd Dist. 2008).....	8, 9
<i>United States v. Hogan</i> , 712 F.2d 757 (2 nd Cir. 1983).....	8, 9
<i>United States v. Samango</i> , 607 F.2d 877 (9 th Cir. 1979).....	8
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S.Ct. 1246 (1991).....	10
<i>People v. Simpson</i> , 2015 IL 116512.....	10
<i>People v. R.C.</i> , 108 Ill.2d 349 (Ill. 1985).....	10
<i>People v. Fox</i> , 319 Ill. 606, 150 N.E. 347 (1926).....	10
<i>People v. Rebollar-Vergara</i> , 2019 IL App (2d) 140871, 128 N.E.3d 1059.....	10

<i>People v. Lofton</i> , 2015 IL App (2d) 130135.....	10
<i>People v. Uselding</i> , 85 Ill.App.2d 323, 325, 230 N.E.2d.1 (1 st Dist. 1967).....	10
II. THE DECISION OF THE CIRCUIT COURT SHOULD BE AFFIRMED BECAUSE THE REQUIREMENTS UNDER <i>DIVINCENZO</i> FOR DISMISSAL WITH PREJUDICE WERE MET BY DEFENDANT BECAUSE THE DEFENDANT SUFFERED ACTUAL AND SUBSTANTIAL PREJUDICE AS A CONSEQUENCE OF THE STATE’S MISCONDUCT.....	11
<i>United States v. Calandra</i> , 414 U.S. 338, 94 S.Ct. 613 (1974).....	12
<i>Branzburg v. Hayes</i> , 408 U.S. 665, 92 S.Ct. 2646 (1972).....	12
<i>Bank of Nova Scotia v. United States</i> , 487 U.S. 250, 101 L.Ed.2d 228 (1988).....	<i>passim</i>
<i>United States v. Mechanik</i> , 475 U.S. 66, 106 S.Ct. 938 (1986).....	12, 13
<i>People v. Stapinski</i> , 2015 IL 118278, 40 N.E.3d 15 (2015).....	13
<i>People v. McCauley</i> , 163 Ill.2d 414, 425, 645 N.E.2d 923 (1994).....	13
<i>In re Detention of Seveda</i> , 354 Ill.App.3d 373, 820 N.E.2d 987 (1 st Dist. 2004).	13
<i>Rochin v. California</i> , 342 U.S. 165, 72 S.Ct. 205 (1952).....	13
<i>People v. Fassler</i> , 153 Ill.2d 49, 605 N.E.2d 576 (1992).....	13, 14
<i>People v. Sears</i> , 49 Ill.2d 14, 273 N.E.2d 380 (1971).....	13
<i>People v. DiVincenzo</i> , 183 Ill.2d 239, 700 N.E.2d 981 (1998).....	<i>passim</i>
<i>People v. Spears</i> , 49 Ill.2d 14, 36, 273 N.E.2d 380 (1971).....	13
<i>People v. J.H.</i> , 136 Ill.2d 1, 554 N.E.2d 961 (1990).....	14
<i>People v. Rebollar-Vergara</i> , 2019 IL.App. (2d) 140871.....	<i>passim</i>
<i>People v. Mattis</i> , 367 Ill.App.3d 432, 854 N.E.2d 1149 (2 nd Dist. 2006).....	14, 15
<i>People v. Oliver</i> , 368 Ill.App.3d 690, 859 N.E.2d 38 (2 nd Dist. 2008).....	15

<i>People v. Simpson</i> , 2015 IL 116512.....	18
<i>People v. R.C.</i> , 108 Ill.2d 349 (Ill. 1985).....	18
<i>People v. Lofton</i> , 2015 IL App (2d) 130135.....	18
III. THE RULINGS OF THE LOWER COURTS SHOULD BE AFFIRMED BECAUSE THE PRECEDENT ASKS THIS COURT TO SET WOULD WEAKEN THE FUNCTION OF THE GRAND JURY AS A SHIELD AND PLACE A PREMIUM ON SLOPPY GRAND JURY PRACTICES BY PROSECUTORS AT THE EXPENSE OF DEFENDANTS' CONSTITUTIONAL RIGHTS.....	20
<i>People v. Rodgers</i> , 92 Ill.2d 283, 289, 442 N.E.2d 240 (1982).....	20, 22
<i>Wood v. Georgia</i> , 370 U.S. 375, 390, 82 S.Ct. 1364 (1962).....	20
<i>People v. Rebollar-Vergara</i> , 2019 IL.App. (2d) 140871.....	21, 22
<i>People v. Spears</i> , 49 Ill.2d 14, 36, 273 N.E.2d 380 (1971).....	22
CONCLUSION.....	25
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

ADDITIONAL FACTS FOR CONSIDERATION

Defendant Basile met with Detective Vincent Kelly and another Rockford Detective following Jane Doe's accusation against him and gave a recorded interview. (Defendant's Exhibit B, E 2). He met with the detectives freely and voluntarily, and waived his right to have counsel present for the interrogation. Throughout the interview, which exceeded an hour in duration, Basile repeatedly denied that he had sexually assaulted Jane Doe, and in great detail stated that she was not drifting in and out of consciousness as she had reported. Further, Basile explained to Detective Kelly that she gave him directions to get to her residence from the bar they had been at, and that she walked from his car to her house on her own and without difficulty. He further described that she retrieved her keys from her purse on her own when they arrived at the door, and that she opened the door and invited him into her residence. (*Id.*).

Defendant Basile explained to Detective Kelly how once he was invited into the residence, Jane Doe invited him to have sexual intercourse with her not once but twice, as well as how she gave direction to him on what specific acts and positions to perform and not to perform with her. (*Id.*). For example, Basile told Detective Kelly that he planned to perform oral sex on Jane Doe, and that she advised him that she was currently menstruating. (*Id.*). According to Basile's statement, she never once said "No" or "Stop" or anything indicating to him that the intercourse was not consensual. (*Id.*). He further told Detective Kelly that she was never passed out, and never drifted in and out of consciousness. (*Id.*). Defendant also told Detective Kelly that after first having sex in the mud room of her home, Jane Doe told Basile that she wanted them to go upstairs to her bedroom and have intercourse again, and to be very quiet because her brother was asleep in the other bedroom and she did not want to wake him. (*Id.*). Basile recalled that

prior to the intercourse, he asked her several times whether she was sure she wanted to have sexual intercourse with him. According to Basile's statement to Detective Kelly, he did this because they had both been drinking alcohol, there was a definite age difference between the two of them, and they worked together at the time for the Rockford Police Department, Basile as a police officer and Doe as a civilian dispatcher. As Basile maintained throughout the interview, when asked if she was sure she wanted to have intercourse, Jane Doe indicated that she did each time. (*Id.*). The Circuit Judge was provided with a copy of the videotaped interview of the Defendant, and reviewed it prior to issuing his ruling in this case. (C-169-180, at 172).

Detective Kelly was a sworn law enforcement Detective for the City of Rockford, a municipal corporation of the State of Illinois. Detective Kelly was acting as a state actor while testifying before the grand jury in this case.

According to the Assistant State's Attorney that argued the Defendant's Motion on behalf of the People, the Assistant State's Attorney who presented the case to the grand jury that day was not the prosecutor assigned to the case, and that it she had been handed the file and asked to cover the hearing just before the grand jury proceedings commenced, and that she likely was not even aware of Defendant's statement to Detective Kelly or what Basile said therein. (R. 35-39). According to the State's position at the hearing, the prosecutor before the grand jury knew nothing about the case and didn't even have access to the police reports. (R. 35-39). At page 35 of the hearing transcript, the prosecutor assigned to argue the hearing before the trial court stated:

Judge, I don't believe Ms. Ohtani, the way the grand jury, she is not the assigned prosecutor, she's not the screening prosecutor, she doesn't have access to the police reports. So I don't believe Ms. Ohtani knew of the facts beyond what was presented to the grand jury in they statement of fact....[s]he doesn't know the information. So to say

Ms. Ohtani should have followed up. I can't say that because she doesn't know that answer may or may not need clarification. She doesn't know anything about the case when she is reading it. So I think its unfair to say shouldn't Ms. Ohtani have followed up? Because I don't - - she doesn't know anything about the case so she would not know how that answer relates to anything that happened in the case."

(R. 35).

Before the grand jury, the name Daniel Basile appears in the 4 ½ page transcript a total of 12 times. No other male name appears anywhere in the transcript. (grand jury Proceedings at 4, CS 17). The very first statement made by the prosecutor to the grand jury was the following:

MS. OHTANI: The State is 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.

grand jury Proceedings at 1, CS 15.

The Circuit Judge prior to issuing its Order granting Defendant's Motion to Dismiss with Prejudice reviewed the recorded interrogation between Defendant and Detective Kelly twice, and certain portions Defendant requested he review a third time. (A13-A14; C 172-173). The Court found that "[n]o reasonable Grand Juror would, at the end of the 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 was Daniel Basile." (A17; C 176). The Court further found that "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 inquiry presented for the Grand Jury's consideration-two counts of "criminal sexual assault without consent..." (A19; C 178).

The Second District Appellate Court similarly opined that the grand juror’s question was not directed at whether some other individual may have sexually assaulted Jane Doe, but rather, given “[t]he 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...what other evidence established the sex as sexual assault....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...”. (A7). Further, the Second District found that but for “Kelly’s deceptive and inaccurate testimony...the grand jury would not have indicted defendant...”. (A8).

ARGUMENT

I.

THE LOWER COURTS’ OPINIONS IN THIS CASE SHOULD BE
AFFIRMED AS THE SWORN SUGGESTION BY DETECTIVE KELLY
THAT DEFENDANT CONFESSED TO COMMITTING SEXUAL
ASSAULT ON JANE DOE CANNOT REASONABLY BE CHARACTERIZED AS
INADVERTENT, AND OPERATED TO DENY DEFENDANT’S
RIGHT TO BE INDICTED BASED ON NON-PERJURED TESTIMONY.

Throughout the Appellant’s Brief, the State suggests that the Circuit Court and the Appellate Court for the Second District improperly applied *People v. DiVincenzo*, 183 Ill.2d 239 (1998), *abrogated on other grounds by People v. McDonald*, 2016 IL 118882. In *DiVincenzo*, however, the Court did not limit the term prosecutorial misconduct to those situations where the State knowingly or deliberately uses false or deceptive evidence, but to all situations where false or deceptive evidence is introduced which likely impaired the grand jury function by influencing its decision to indict when omission of the false or deceptive evidence would likely have result in

return of a no bill. The operative language forming the crux of the issue before this Court is the *DiVincenzo* Court's statement:

Prosecutorial misconduct must rise to the level of a deprivation of due process or a miscarriage of justice. The due process rights of a defendant 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...[t]o warrant dismissal of the indictment, defendant must therefore show that the prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.**

DiVincenzo, 183 Ill.2d 239, 257 (emphasis added).

The State's position on the *DiVincenzo* language cited above is that the Court had to intend for the clause "or presents other deceptive or inaccurate evidence..." to require prosecutorial intent to mislead as there would be no reason to use "deliberately" "intentionally" or "known" in the earlier portion of the sentence if in fact inadvertent presentation of false, deceptive, or perjured testimony was all that was required. (Appellant's Brief, at 19-20). In fact, the State goes so far as to suggest that the phrase "presents other deceptive or inaccurate evidence..." was intended for some undefined category of "intentional or knowing errors that do not fit neatly into *DiVincenzo*'s first two categories." (Appellant's Brief, at 19). No examples of what type of intentional or knowing errors that do not neatly fit into *DiVincenzo*'s first two categories are offered by the State in brief.

The problem with the State's position on this issue is that the more compelling argument assumes that all words in a Supreme Court opinion have meaning, and that words and phrases are chosen carefully by courts in an effort to create clear and unequivocal precedent. Had the *DiVincenzo* Court intended for the "other deceptive or inaccurate evidence" clause to require

intent on the part of the prosecutor, the clause would have read “knowingly presents other deceptive or inaccurate evidence...”. In fact, if intent or knowledge of the “other deceptive or inaccurate evidence” being submitted to the grand jury was what the *DiVincenzo* Court intended, the entire last clause would be redundant, unnecessary, and omitted from the opinion altogether since “deceptive or inaccurate” evidence is evidence that is inherently “misleading, false, or perjured.” The fact that the final clause discussing “deceptive or inaccurate” without reference to any particular mental state exists at all in the *DiVincenzo* opinion strongly suggests that deliberate action or intent on the part of the prosecutor is not required under the third clause. Perhaps that clause exists to encompass reckless conduct, such as what is present on the record in this case on the part of the prosecution. Perhaps the clause is there to encompass intent, knowledge, or deliberate perjury on the part of the testifying state actor, in this case Detective Kelly, who at the very least knew that his answer to the grand juror’s question was false and misleading.

Reckless is defined in Black’s Law Dictionary to include “careless, heedless, and indifferent to consequences.” Black’s Law Dictionary 1142 (5th ed. 1979). Illinois Pattern Instruction (Criminal) 5.01 defines reckless by stating that a “person is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or a result will follow, and such disregard constitutes a gross deviation of the standard of care which a reasonable person would exercise in the situation.” Both the Circuit Court in this case as well as the Second District Appellate Court noted that the practice of sending a prosecutor before the grand jury who was completely unfamiliar with the case and had no access to the files or interviews and no time to prepare enabled the prosecutor in this case to fail in her responsibility

to clarify Detective Kelly's testimony so that false, deceptive or inaccurate evidence was not presented to the grand jury. That at the very least constitutes recklessness on the part of the prosecution in this case, since the practice demonstrates a "careless indifference to consequences" that in this case occurred as a result. Further, the scenario created a "substantial and unjustifiable risk" that what in fact happened would happen, since the prosecutor was not armed with the tools to protect Defendant's due process rights before the grand jury. The practice employed in this case by the prosecutor's office constituted a "gross deviation of the standard of care" which a reasonable prosecutor would exercise in the situation. Perhaps the latter clause in the *DiVincenzo* holding was intended for situations where actual knowledge by the prosecutor is not present on the face of the record, but constructive knowledge is there. It cannot be seriously disputed that the prosecutor in this case "should have known" that Detective Kelly's testimony in response to the grand juror's question was false and misleading, as the Circuit Court found. (C 179, A20). Both the Circuit Court as well as the Second District were critical of the way this matter was presented to the grand jury. Instead of sending in a prosecutor familiar with the case who would have very easily caught Detective Kelly's arguably intentional and grossly misleading answer to the grand juror's question, the State sent a prosecutor totally unfamiliar with the case, and who was unable to correct the misrepresentation before Defendant's due process rights were impacted.

It stands to reason that the *DiVincenzo* Court, in choosing the language it chose, did not intend to limit prosecutorial misconduct to intentional actions when such actions prevent the grand jury from returning a meaningful indictment. Otherwise, the portion which states "or presents other deceptive or inaccurate evidence" is redundant to the portion immediately

preceding it in the Court's holding. In other words, given that implicated portion doesn't state "or knowingly presents other deceptive or inaccurate evidence" suggests that even negligent, reckless, or inadvertent introduction by the prosecution of false or deceptive evidence suffices when it prevents the grand jury from returning a meaningful indictment because it was misled. That is how the Circuit Judge and Second District interpreted *DiVincenzo*, and it was not error to so find. In fact, such an interpretation is consistent with prior appellate opinions in Illinois, as well as several federal appellate cases relied upon by this Court to support its holding in *DiVincenzo*.

In *People v. Oliver*, 368 Ill.App.3d 690, 696, 859 N.E.2d 38 (2nd Dist. 2008) the Second District interpreted this Court's holding in *DiVincenzo* to not require intent at all to make the case for misconduct resulting in a denial of due process, noting that in addition to this Court's language in *DiVincenzo* as argued above, its reliance in *DiVincenzo* on *United States v. Hogan*, 712 F.2d 757, 759-62 (2d Cir. 1983), proves instructive to the issue of this Court's position on the degree of culpability required to constitute prosecutorial misconduct. The *Hogan* Court stated in its holding, citing to *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979):

'[The government] was duty bound not to introduce false and misleading testimony. While the factual misstatements in the * * * testimony may have been inadvertent, as the government now argues, the fact remains that the [defendants] were prejudiced by the misstatements of important facts and the grand jury's independent role was impaired. Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role...'. Regardless of the government's intent, we believe the grand jury was probably misled by this presentation.

United States v. Hogan, 712 F.2d 757, 759-62 (2d Cir.

1983), citing *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979).

Based upon this analysis, the Second District in *Oliver* concluded with good reason that *DiVincenzo* stood for the proposition that intent to deceive on the part of the prosecutors is but one way and perhaps the most egregious form of prosecutorial misconduct before a Grand Jury, but was not in fact the only form of misconduct warranting dismissal if a violation of a defendant's due process rights could be established as a consequence of the misconduct:

[T]hus, in light of *DiVincenzo*, we hold that the State's presentation of deceptive evidence denied defendant due process, regardless whether the deception was intentional.

Oliver, at 696.

Because both the Circuit Court and the Second District in this case properly interpreted this Court's holding in *DiVincenzo* as not exclusively requiring intent to deceive to constitute a due process violation based on prosecutorial misconduct, the State's suggestion should be denied as it was not an abuse of discretion for the Circuit Court to conclude that both prongs were clearly established by the Defendant, and that in this case prosecutorial misconduct as defined by this Court usurped the grand jury function in a manner that operated to deprive Defendant of his due process rights by influencing the grand jury deliberative process through the presentation of misleading, false, or inaccurate evidence that impacted their deliberations in a manner that casts doubt on the integrity of the True Bill.

The State in brief attacks *Oliver* and *Hogan* by arguing that the *Oliver* Court read too much into the *DiVincenzo* Court's reliance on the *Hogan* opinion, and that in today's climate *Hogan* is no longer even good law. While there have been subsequent Second Circuit cases that

indicate that it is unlikely that the facts in *Hogan* would lead to a dismissal of the Indictment today, your author has found no authority explicitly overturning the legal principles articulated in *Hogan*. In *Hogan*, the facts involved prosecutorial statements made to the grand jury to the effect that the suspect was a “hoodlum” and that the grand jury should return a true bill as a “matter of equity.” *Hogan*, at 760, Further, the *Hogan* prosecutor made statements to the grand jury that *Hogan* was a police officer “on the take” and that he had “received bribes from gamblers” and was himself a “suspect” in murders under investigation that were not the subject of the grand jury’s investigation in that case. *Id.* Most egregiously, the detective witness testified to *Hogan* having a predisposition to possess Heroin, in anticipation of a defense of entrapment. *Hogan*, at 761-62.

While the cases cited by the State indicating that the *Hogan* facts might not justify dismissal of the Indictment in the more modern era of Second Circuit jurisprudence, it must be noted that there is an ocean of difference between influencing the grand jury and impairing their independent role by hearsay and innuendo, and deliberately misleading the grand jury by a sworn detective testifying under oath that a defendant confessed to a crime when in fact he did nothing of the sort and instead did the exact opposite. Those are the facts before this Court in this case, and it is universally recognized that a confession is the most damaging evidence the State can admit against a defendant. *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246 (1991); *People v. Simpson*, 2015 IL 116512, ¶ 36; *People v. R.C.*, 108 Ill.2d 349 (Ill. 1985); *People v. Fox*, 319 Ill. 606, 609--610, 150 N.E. 347 (1926)(“A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt and therefore it is admitted as proof of the crime to which it refers.”); *People v. Rebollar-*

Vergara, 2019 IL App (2d) 140871 at ¶ 119, 128 N.E.3d 1059 (McLaren, J., dissenting); *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 33; *People v. Uselding*, 85 Ill.App.2d 323, 325, 230 N.E.2d.1 (1st Dist. 1967)("Judicial confessions are accorded high probative value because they are statements which damage the natural interests of the declarant.").

Despite the State's efforts to convince this Court that it should rule as a matter of law that mere inadvertence is an insufficient basis for dismissing an Indictment under *DiVincenzo*, the facts at bar simply do not support the conclusion that they were inadvertent. In all of the cases involving dismissal of an Indictment, the ultimate issue regarding the dismissal is whether the trial courts abused discretion in concluding that the essential independent function of the grand jury was impaired by the actions of the State thereby depriving the defendant of due process. The Circuit Court in the case at bar so found, the Second District Court of Appeals affirmed, and Defendant respectfully submits that there was no abuse of discretion in so finding on the factual record of this case, and that holdings of the lower courts should be affirmed by this Court.

II.

THE DECISION OF THE CIRCUIT COURT SHOULD BE AFFIRMED
BECAUSE THE REQUIREMENTS UNDER *DIVINCENZO* FOR
DISMISSAL WITH PREJUDICE WERE MET BY DEFENDANT
BECAUSE THE DEFENDANT SUFFERED ACTUAL AND SUBSTANTIAL
PREJUDICE AS A CONSEQUENCE OF THE STATE'S MISCONDUCT.

The State in brief makes a valiant effort to convince this Court that the behavior of the State before the grand jury in this case was "inadvertent." Despite its efforts, such an interpretation on the facts in the record would be an unreasonable interpretation of the colloquy between Detective Kelly and the grand jury who expressed doubts about the evidence presented

during Kelly's testimony. Given his knowledge of the interview with Defendant, as well as his ability to have provided a non-misleading accurate answer to the grand juror's questions, it can only be concluded that Detective Kelly acted knowingly and with the intent to deceive the grand jury. There is no inadvertence on the record in this case. By leading the grand jury through deceptive testimony to believe that Defendant had confessed to committing criminal sexual assault on Jane Doe, the grand jury was undoubtedly influenced by the false testimony, and the matter of returning a true bill became a foregone conclusion. As the grand juror stated after being told that the Defendant confessed, "[t]hat's all I needed to know." (CS 18, at 5). In fact, that was all any of the grand juror's needed to know, in light of the aforementioned authority discussing the strength of a confession in the evidentiary continuum. By knowingly and intentionally misleading the grand jury, the State usurped the grand jury's function as an investigative body independent of the courts and prosecution, and thwarted its historical function as "a shield, standing in between the accused and the accuser, protecting the individual citizen against oppressive and unfounded government prosecution." *United States v. Calandra*, 414 U.S. 338, 342-43, 94 S.Ct. 613, 617-18 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 686-86, 92 S.Ct. 2646, 2659-60 (1972).

In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256, 108 S.Ct. 2369 (1988), the U.S. Supreme Court adopted Justice O'Connor's language in her concurring opinion in *United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938 (1986) as the test to determine whether dismissal of an Indictment is an appropriate remedy for allegations such as those made by Defendant in this case:

[D]ismissal of the indictment is appropriate only 'if it is established

that the violation substantially influenced the grand jury's decision to indict' or if there 'is grave doubt' that the decision to indict was free from substantial influence of such violations.

Bank of Nova Scotia, at 256.

In discussing what is required to constitute a due process violation and warrant dismissal of an Indictment, this Court in *People v. Stapinski*, 2015 IL 118278, 40 N.E.3d 15, relied on its earlier holding in *People v. McCauley*, 163 Ill.2d 414, 425, 645 N.E.2d 923 (1994):

In *McCauley*, we held that due process is implicated 'whenever the State engages in conduct toward its citizens deemed oppressive, arbitrary, or unreasonable.' Further, since the essence of due process is 'fundamental fairness,,' due process essentially requires 'fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections'. To violate substantive due process, the government's conduct must 'shock the [] conscience' and violate the 'decencies of civilized conduct.'"

Stapinski, 2015 IL 118278, at ¶ 51 (citing *McCauley*, 163 Ill. 2d at 425, 441, and *In re Detention of Sveda*, 354 Ill.App.3d 373, 380, 820 N.E.2d 987 (1st Dist. 2004)(quoting *Rochin v. California*, 342 U.S. 165, 172-73, 72 S.Ct. 205 (1952)).

In *Stapinski*, this Court reversed the decision of the appellate court and reinstated the dismissal of an Indictment procured following fulfillment of an cooperator's agreement with the agents assigned to the case. *Id.* at ¶ 55. Similarly applied to the context of grand jury proceedings, this Court in *People v. Fassler*, 153 Ill.2d 49, 605 N.E.2d 576 (1992), stated:

The defendant correctly notes that a trial judge has the inherent authority to dismiss an indictment for reasons other than those listed in section 114-1(a). 'The preservation of the historic independence of the grand jury, however, requires that such supervisory power be exercised only when failure to do so will effect a deprivation of due process or results in a miscarriage of justice.

Fassler, at 58 (citing *People v. Sears*, 49 Ill.2d 14, 31,

273 N.E.2d 380 (1971)).

Applied to the facts at bar, it was no abuse of discretion for the Circuit Court applying the principles articulated in *Bank of Nova Scotia, McCauley, Stapinski, Sears, Fassler*, and *DiVincenzo* to conclude that the State in this case presented intentional or knowing deceptive or inaccurate evidence to the grand jury, and that the intentional or known deceptive or inaccurate testimony by Detective Kelly that Defendant had in fact confessed when Kelly knew the exact opposite clearly affected and impaired the Grand Jury function and affected deliberations in a manner that both shocks the conscience and resulted in substantial prejudice to the Defendant by influencing the outcome of the grand jury deliberations and preventing it from returning a meaningful Indictment. In *People v. Fassler*, 153 Ill.2d 49, 58, 605 N.E.2d 576, 580 (1992), this Court noted that:

A court has authority to dismiss an indictment procured through prosecutorial misconduct only when the accused can show that such misconduct results in actual and substantial prejudice to him.

Fassler, at 58 (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256-57, 108 S.Ct. 2369 (1988) and *People v. J.H.*, 136 Ill.2d 1, 18, 554 N.E.2s 961 (1990)).

Six years later, this Court in *DiVincenzo* further expounded upon this requirement and indicated that in establishing actual and substantial prejudice, a Defendant must demonstrate that the prosecutorial misconduct must be established to have affected the Grand Jury deliberations in such a manner that rises to the level of a deprivation of due process or a miscarriage of justice:

To warrant dismissal of the indictment, however, defendant must ordinarily show that...any prosecutorial misconduct affected the grand jury deliberations...[p]rosecutorial misconduct must rise to the level of a deprivation of due process or a miscarriage of justice...[t]o warrant dismissal of the indictment, defendant must therefore show that the

prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.”

DiVincenzo, at 257-58. (citing *Bank of Nova Scotia v. United States*, at 256-57; *Fassler*, at 58; *People v. J.H.*, 136 Ill.2d. 1, 12-13, 554 N.E.2d 961 (1990)); *People v. Rebollar-Vergara*, 2019 IL.App. (2d) 140871, at ¶ 56; *People v. Mattis*, 367 Ill.App.3d 432, 854 N.E.2d 1149, 1152 (2nd Dist. 2006) (“presentation of deceptive or inaccurate evidence may violate a defendant’s due process rights, justifying dismissal if the defendant can show that the misconduct affected the grand jury’s deliberations.”) citing *DiVincenzo*, at 257; *People v. Oliver*, 368 Ill.App.3d 690, 694-95, 859 N.E.2d 38 (2nd Dist. 2008)(“Denial of due process must be unequivocally clear and the prejudice must be actual and substantial.”).

Based upon the foregoing, examination of the relevant facts presented to the Circuit Court and the Second District clearly establishes that in fact prosecutorial misconduct occurred, and that the misconduct affected the Grand Jury deliberations in a manner that rose to the level of a denial of the Defendants due process rights by affecting the outcome of the Grand Jury’s deliberations.

The State’s response to this is that it should receive a pass because Detective Kelly’s statements were inadvertent, and the prosecutor didn’t know any better to correct the record and ensure that the grand jury did not receive false and deceptive testimony under oath. The record however is clear in demonstrating that there was no inadvertence, and for the prosecutor, not knowing any better is insufficient to remove or justify the due process violation. There is little question that the testimony presented by the State before the Grand Jury was false and deceptive, in that Detective Kelly’s response to the grand juror’s questions was known by him to be incorrect at the time he answered them. In what can only be characterized as questions directed at the alleged victim’s (Jane Doe’s) credibility, the grand juror and Detective Kelly engaged in the following colloquy:

A JUROR: Besides that she said that this occurred, was there any other evidence that he actually did this to her?

THE WITNESS: I'm not sure I completely understand the question.

A JUROR: You said the person was extremely intoxicated, correct?

THE WITNESS: Correct.

A JUROR: How do we know that the person she claimed did this to her did it to her?

THE WITNESS: He told me he did.

A JUROR: That is all I needed to know.

Grand Jury Transcript, at 5, CS 18

Proper evaluation of the veracity of Detective Kelly's testimony in response to the grand juror's question requires examination of the custodial interview between Detective Kelly and the Defendant which the Circuit Court viewed several times before issuing its opinion. (C 172, A13). In light of his actual knowledge of Defendant's steadfast denial of sexually assaulting Jane Doe, Detective Kelly's answer to the questions asked by the grand juror can only be characterized as false, deceptive, and misleading.

In an effort to characterize the colloquy between Defendant and Detective Kelly as being an example of inadvertent confusion on Detective Kelly's part in his interpretation of a confusing question by the inquisitive Grand Juror, who was arguably questioning how given Jane Doe's level of intoxication the Grand Jury could be certain that it was Defendant and not some third party who goes unmentioned in the Grand Jury proceedings, the State ignores numerous facts that militate against the conclusion they seek from this Court. First, there was absolutely nothing confusing about the grand juror's line of inquiry. The very first words out of the prosecutor's

mouth as she began her presentation to the grand jury was to unequivocally name the Defendant as the alleged perpetrator, and describe what the State was seeking from them:

MS. OHTANI: The State is 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.

Grand Jury Proceedings at 1, CS 15.

The State's position also ignores the fact that in the entirety of the grand jury proceedings in this case as supported by the transcript of the same, the name Daniel Basile appears in the 4 ½ page transcript a total of 12 times. No other male name appears anywhere in the transcript. (Grand jury Proceedings at 4, CS 17). Despite their efforts to characterize it as such, this case was never a whodunit. At the time the grand juror engaged in his colloquy with Detective Kelly, all of the testimony was directed at Defendant Daniel Basile, and it is clear that the "it" in the question of how do we know the Defendant "did it" to her was no mystery either. From the first statement out of the prosecutor's mouth, it was clear to the grand jury that the "it" was two Counts of Criminal Sexual Assault without consent. (grand jury proceedings at 1, CS 15). It certainly was no abuse of discretion for the Circuit Court to conclude that armed with the knowledge Detective Kelly possessed in light of his extensive interview with the Defendant, he mislead the grand jury by suggesting that Defendant had confessed to the two Counts of Criminal Sexual Assault without consent. "He told me he did" can only be interpreted one way, and that's the way the inquisitive grand juror did given his response to Detective Kelly's deception when he stated "that's all I needed to know." (CS 15-18).

The Circuit Court and Second District holding both implicitly and expressly recognized that fact Detective Kelly's statement essentially conveyed to the grand jury that the Defendant had confessed to committing the crimes for which the Indictment was sought, and the State fails to appreciate the power that evidence of a confession has on a grand jury. The fact that a confession is the most powerful form of evidence the State can procure is a well settled fact in American Jurisprudence. As also noted in the dissent of Justice McLaren in *People v. Rebollar-Vergara*, 2019 IL App (2d) 140871, 128 N.E.3d 1059:

The majority also fails to appreciate the staggering effect that tales of a 'confession' can have on jurors, whether grand or petit. 'A confession is like no other evidence.' (citing *Arizona v. Fulminante*, 499 U.S. at 296, 111 S.Ct. 1246 (1991)). It is 'probably the most probative and damaging evidence that can be admitted against a defendant....The Illinois Supreme Court has stated that "a confession is the most powerful piece of evidence the State can offer, and its effect on a jury is incalculable."

Rebollar-Vergara, at ¶ 119 (McLaren, J., dissenting).

The Trial Court noted this principle as well in its Order granting Defendant's Motion. (C 179 citing *People v. Simpson*, 2015 IL 116512, ¶ 36; *People v. R.C.*, 108 Ill.2d 349 (Ill. 1985); and *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 33). Finally, the comment made by the grand juror in response to Detective Kelly's false testimony readily demonstrates the "incalculable" effect that the misconduct had on Defendant's Grand Jury, when the juror stated "That's all I needed to know." (CS 18). Taking it one step further, the Trial Judge further noted that:

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....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.

Trial Court Order, at C 179.

But for the colloquy between the prosecutor and the grand juror, an opposite result might reasonably have been reached by the Circuit Judge and the Second District. The fact remains however that the colloquy did occur, and the end result was that false and deceptive testimony provided the grand jury with misleading information that the Defendant had confessed to the crimes, which undoubtedly impacted grand jury deliberations in a way that was incalculable, and the prosecutor who was simply handed the file and told to go in and get the Indictment at the last second apparently was not armed with sufficient familiarity with the case and the evidence to be aware that she had an obligation to correct the record and preserve the Defendant's rights of Due Process. The Second District noted in its Opinion that:

...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."

(A8-A9, at ¶23).

Defendant-Respondent respectfully submits that it was not an abuse of discretion for the Circuit Court to conclude the same, and that the well-reasoned Opinion of the Second District was the correct result and should not be reversed on appeal to this Court. Defendant has met both his burden of establishing prosecutorial misconduct that usurped the Grand Jury function in this

case, and that as a consequence he suffered actual and substantial prejudice. For these reasons, Defendant respectfully submits that the decision of the Circuit Court and Second District Court of Appeals should be affirmed.

III.

THE RULINGS OF THE LOWER COURTS SHOULD BE AFFIRMED BECAUSE THE PRECEDENT ASKS THIS COURT TO SET WOULD WEAKEN THE FUNCTION OF THE GRAND JURY AS A SHIELD AND PLACE A PREMIUM ON SLOPPY GRAND JURY PRACTICES BY PROSECUTORS AT THE EXPENSE OF DEFENDANTS' CONSTITUTIONAL RIGHTS.

It is universally recognized that one of the essential functions of the Grand Jury process is to stand as a shield and protect the individual citizens against malicious or arbitrary prosecutions not grounded in fact or reason. In *People v. Rodgers*, 92 Ill.2d 283, 289, 442 N.E2d 240 (1982) this Court, quoting the United States Supreme Court in *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364 (1962), noted:

Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Rodgers, at 289.

In essence, the State in asking this Court to retreat from its holding in *DiVincenzo* and require going forward that an Indictment may only be challenged based on prosecutorial misconduct when it is established that the presentation of false or deceptive evidence was done intentionally.

That would unequivocally weaken the grand jury's function as a shield for the individual in this State, and place a premium on poor grand jury practices in State's Attorney and Attorney General's Offices throughout the State. It would make the best practice on the part of the State to send into the grand jury unprepared prosecutors ill equipped to perform their duties to seek justice rather than just simply indict. Justice Jorgensen in her special concurrence in *Rebollar-Vergara* stated the following:

The use of a grand jury is a very powerful tool-one solely in the prosecutions hands. The vesting of such authority mandates at the very least that an assistant state's attorney appearing before the grand jury be prepared, with full and accurate knowledge of the facts. We expect that he or she has reviewed anticipated testimony with each witness and has verified the critical facts contained therein. We further expect such preparation so that clear and unambiguous questions can be posed before the grand jury. Here, the State failed to satisfy these basic standards for preparation and, further, the high standards of professional ethics that we hold for the prosecution. Indeed, as the court's judgment pointed out, 'under different facts, testimony about a confession that did not occur certainly can be misleading and reversible.

Rebollar-Vergara, at ¶ 113 (Jorgensen, J., specially concurring).

Defendant respectfully submits that this case presents the very type of set of facts of which Justice Jorgensen spoke when articulating the aforementioned special concurrence.

It stands to reason that Justice Jorgenson's expectations of prosecutors before grand juries was completely disregarded in this case, and the State requests this Court to countenance these deficiencies by establishing precedent that overlooks gross negligence, recklessness, and arguably intentional and known perjury in favor of a very difficult if not insurmountable standard of proving malicious intent when the focus should actually be on impairment of the grand jury's deliberation function and the long-standing principles that its deliberation be grounded in actual

facts rather than misleading characterizations of facts insulated by claims of negligence or inadvertence on the part of prosecutors. This seems to be the sound position articulated by Justice McLaren in his dissent in *Rebollar-Vergara*, citing *People v. Spears*, 49 Ill.2d 14, 36, 273 N.E.2d 380 (1971), and *People v. Rodgers*, 92 Ill.2d 283, 289, 442 N.E.2d 240 (1982), when he noted that:

‘[T]he grand jury is an integral part of the court and not the tool of the prosecutor and neither the prosecutor nor the grand jury is vested with the power to proceed without regard to due process.’ The grand jury is ‘to act as a shield against arbitrary prosecutions.’ However, no one is protected when the State is allowed to present inaccurate, false, or misleading statements to the grand jury with impunity.

Rebollar-Vergara, at ¶ 115 (McLaren, J, dissenting).

Defendant respectfully submits that the facts of this case overwhelmingly support the proposition that prosecutorial misconduct occurred in this case, whether it be intentional, deliberate, or through gross negligence, and that neither the Trial Judge nor the Second District erred in their decision to dismiss and affirm dismissal of the Indictment in this case with prejudice. The findings that the State committed prosecutorial misconduct and that said misconduct usurped the grand jury function in a case weak on the facts are clear and not an abuse of discretion.

Examination of the full 4 ½ page transcript of the Grand Jury proceedings in this case demonstrates the inherent weakness of which the Second District spoke. (CS 15-18). The very first question asked by the grand juror is whether there was any other evidence suggesting that Defendant “actually did this to her?” (CS 18,). The grand juror was clearly having doubts about the account Jane Doe had given, and was seeking to know if there is any other evidence to support her claims. After Detective Kelly sought clarification of the question, the next question

is “how do we know the person she claims did this to her did it to her?” Again, the grand juror is questioning if there is anything else in terms of evidence to corroborate her claims. Perhaps the grand juror had a problem with Jane Doe’s account that she was too intoxicated to say “NO” or “STOP” but that she was not too intoxicated to say she “was good” which, according to her meant that the Defendant could leave, although nothing about “I’m good” sounds or means anything like “you can leave now.” (CS 15-18).

Perhaps in the grand juror’s mind he struggled with accepting that one could be in an out of consciousness due to alcohol consumption but remember as much as she did to be able to explain the details of the encounter she conveyed to Detective Kelly such as the Defendant having intercourse with her the first time, removing her pants and underwear in the mud room, later licking her feet, and having intercourse with her the second time in her bedroom. (CS 15-18). Consideration of the entirety of Detective Kelly’s account before the grand jury demonstrates that the Second District did not err in its conclusion that the evidence to establish probable cause in this case absent the false and misleading testimony stating that Defendant had confessed was manifestly weak even under a probable cause standard. Despite the State’s protestations to the contrary, this is undoubtedly what precipitated the inquisitive grand juror to question why Jane Doe should be believed in the first place, including his question as to whether there was “any other evidence that he actually did this to her?” (CS 15-18).

The State’s position in this case ultimately urges this Court to embark upon a dangerous course that will ultimately promote poor grand jury practice on the part of prosecutors throughout this state and place all Defendants at risk of facing prosecution without meaningful presentation to a grand jury, as required by the Fifth and Fourteenth Amendments to the United States

Constitutions. In essence, the State seeks an Order from this Court that allows Defendant's Indictment to stand notwithstanding the fact that the testimony of the only witness in this case was perjured, false, and deceptive, and despite the fact that the grand jury was clearly misled by the State's intentional testimony by Detective Kelly that Defendant confessed to the crimes in which the State was seeking Indictment, when in fact the Detective knew beyond a shadow of a doubt that Defendant had not confessed, and instead did exactly the opposite. The basis for the State's position boils down to suggesting that the reckless practice of sending a prosecutor into a grand jury setting with no knowledge of the case, no access to the files, no access to the interview between Detective Kelly and the Defendant, and no time to prepare for the presentation and fulfill the prosecutorial responsibility to ensure that the grand jury receives non-perjured, non-deceptive and accurate information so that its role as an independent shield for the Defendant may be maintained.

There can be little doubt that Detective Kelly's testimony was knowingly false and inaccurate. There can also be little doubt that the grand jury was unduly influenced by the perjured testimony. The cases noting that the strongest evidence that a prosecutor can produce is a confession out of the very mouth of the accused are legion and span every jurisdiction in this country. Not that a prosecutor's responsibility or a defendant's due process rights to be properly and constitutionally indicted should rise or fall based on time crunches or a supervisory decision to replace the assistant state's attorney assigned to the case with someone totally unfamiliar with the facts of the case at the last minute, but it bears noting that the State in this case was not up against a statute of limitations whereby waiting to present when the prosecutor who was familiar with the case was available would have cost it the ability to indict. The Indictment at issue was

procured on November 6, 2019. The alleged crime supposedly occurred on October 10, 2019, less than 30 days prior to presentation to the grand jury. (CS 14, 16). In light of all of this, the State vociferously argues for this Court to excuse all of that and simply let an Indictment procured through perjured testimony proceed unhindered and despite the fact that the grand jury was unduly influenced. Such a stange result should not be countenanced by this Court on this record.

CONCLUSION

For the foregoing reasons, the Appellee, DANIEL D. BASILE, respectfully pray this Honorable Court enter an Order affirming the rulings of the Circuit Court of Winnebago County and the Second District Appellate Court, as well as granting such other and further relief as this Court deems equitable and just.

Respectfully Submitted,
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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this Brief of the Appellee conforms to the requirements of Rules 315(c) and (d), and 341 (a) and (b). The length of this Brief of the Appellee, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the Answer under Rule 315(c)(6), is twenty-five pages.

/s/ Mark A. Byrd
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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 December 1, 2023, the foregoing **Brief of the Appellee** 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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