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Brief of the Appellant, People of the State of Illinois v. Di Vincenzo, 700 N.E.2d 981 (Ill. 1997) (No. 82942)

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No. 82942

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IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from The Appellate Court, Second District, No. 95-1454
Plaintiff-Appellee,	)	
v.	)	Original Appeal from the Circuit Court of DuPage County, No. 93 CF 1106
VINCENT DI VINCENZO	)	Honorable Peter J. Dockery, Judge Presiding
Defendant-Appellant.	)	

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Vincent DiVincenzo was indicted on June 17, 1993, for the murder of Joseph Novy. C5. In June 1995 he was tried in Wheaton, Illinois, with Judge Peter J. Dockery presiding. A jury found Vincent guilty (C177), and on October 5, 1995, Vincent was sentenced to 26 years in the Department of Corrections. C269. The Appellate Court of Illinois, Second District, affirmed the conviction on February 13, 1997. No petition for rehearing was filed. On July 25, 1997, this Court granted the Petition for Leave to Appeal. No questions are raised concerning the sufficiency of the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether the defendant who engaged in a six-second weaponless fight with another person of similar size and strength was entitled to an involuntary manslaughter instruction during the first degree murder trial arising out of the fluke death of the individual with whom he fought.

II. Whether the defendant who engaged in a six-second weaponless fight with another person of similar size and strength can be deemed guilty of first degree murder.

III. Whether the indictment should be dismissed because, after the grand jury had already announced its vote to return no bill of indictment on first degree murder, a grand juror breached grand jury secrecy and relayed information about the deliberations to the prosecutor, who proceeded to pressure the grand jury to reconsider its completed vote by delivering a lecture that chastised the grand jurors, misstated the law, and expressed the prosecutor's personal opinion that a true bill should be returned.

STATUTES INVOLVED

The following statutes, the construction of which are at issue in this case, are set forth in an appendix to the brief:

720 ILCS 5/9-1
720 ILCS 5/9-3
725 ILCS 5/112-4

STATEMENT OF FACTS

In order to set forth the facts in a coherent manner, we begin the Statement of Facts with a brief introduction to the central events of the case. We then provide a more detailed discussion of the facts as they emerged in the course of the trial court proceedings.

Introduction

On Thursday May 27, 1993, Vincent DiVincenzo, an 18-year-old senior at Addison Trail High School, was getting ready for his prom on Friday evening. C3240-3241, 3263 After school that Thursday afternoon, Vince and his friend Daniel Frasca worked out together in a local gym and then went to a tanning salon. C2855, C3242-3243. On their way home, Vince and Dan stopped to buy submarine sandwiches for themselves and for Dan's family. C3243-44. Dan was driving his father's car, and Vince was seated in the passenger seat. C3050, 3243. While the car was stopped at a red light, Vince noticed Joseph Novy driving his GEO Tracker C3247 Vince knew Joe Novy, and the two did not like each other very much, in part because Joe had dated Vince's girlfriend several years earlier. C3254. Joe Novy began staring at Vince. As Vince put it, Joe Novy gave him "a cocky stare and was looking at me like what was my problem." C3248.

Vince told Dan that he knew the guy in the Tracker and asked Dan to follow Joe Novy. C3056, 3247-3248. At no time while Dan was following Joe Novy's car did Vince ever say that he intended to fight with Joe Novy. C3248-3251. When Joe Novy pulled his Tracker into a driveway of an Addison family whom both Joe and Vince knew, Vince asked Dan to stop his car as well. C3249-3250. Upon leaving his car, Joe Novy did not go into the house. Instead, he walked toward Vince who, in turn, got out of Dan's car and walked toward Joe. C3251-3252.

As the two young men stood a foot away from each other, Joe confronted Vince, asking, "What the fuck is your problem?" Vince responded, "You know what my fucking problem is." When Joe asked, "Are you still holding a grudge for that girl from like three or four years ago?" Vince said, "Yes.". Vince then asked Joe, "Why the fuck did you give me that stare?" When Joe responded, "What stare?" Vince said, "Well, you gave me a stare for no reason and I just want to know what was wrong." C3254-3255.

At this point, Joe placed his hand on Vince's chest and began to push Vince, but Vince quickly swatted Joe's hand away. C3255. Joe immediately clenched his fist, and it appeared to Vince that Joe was about to punch him. C3256. Vince reacted by hitting Joe in the mouth with the heel of his hand and then following up with a right handed punch to the side of Joe's face. Joe Novy went down on all fours. C3257.

There is a dispute in the testimony about what happened next. According to Vince, he kneed Joe in the side and pushed him down to the ground with both hands. C3259. When Joe scrambled to pick up his hat, Vince said, "Stay down. Just stay there." C3086, 3259. Vince then walked toward the car and left with Dan. C3260. By contrast, a woman named Janet Berens, who saw part of the incident from the window of her home, testified that she saw Vince kick Joe three times with his toe while Joe was on the ground. Ms. Berens testified that the first kick was to Joe's lower back, the second kick was a bit higher in the back, and the third kick was to the back of the head. C2265-2267. Ms. Berens acknowledged that the entire incident took about five or six seconds. C2289.

Tragically, Joe Novy died later that night. The exact cause of death was disputed at trial, although all witnesses agreed that it was a fluke occurrence. The State's expert, Dr. Nancy Jones of the Cook County Medical Examiner's Office, testified that Joe died of a "rare phenomenon" whereby

he suffered a torn cerebral artery as a result of his head snapping back after being punched or kicked. C2608-2609. Dr. Jones acknowledged that this kind of tear is not typically seen with fights involving bare fists, or even kicks. C2679, 2683 A defense expert agreed that Joe Novy's death was not a predictable or natural consequence of any acts committed by Vincent DiVincenzo. C2980-3004.

As a result of this fight, Vince DiVincenzo was charged with first degree murder. Although the prosecution repeatedly acknowledged that Vince never *intended* to kill Joe Novy, and never even *intended* to cause great bodily harm to Joe, the prosecution asserted that Vince was guilty of first degree murder because he *knew* that his acts created a strong probability of great bodily harm C2176. The position of the defense, by contrast, was that Vince may have been guilty of some lesser offense, such as involuntary manslaughter, but was certainly not guilty of first degree murder. C2788. Nonetheless, when the time came for jury instructions, the trial judge refused to deliver a defense-tendered instruction on involuntary manslaughter. C3459, 3552. Without any option of finding Vince guilty of this lesser offense, the jury ultimately convicted Vince of first degree murder. C177.

* * * * *

Having set forth this overview of the key facts, we will now turn to a more thorough, chronological discussion of the evidence and proceedings in this case. In doing so, we begin with the initial 911 call to the Addison Police Department.

A. The Police and Prosecutors' Questioning of Vince DiVincenzo

The Addison Police Department received a 911 call from a witness, Janet Berens, who provided the license plate number of the car Dan Frasca was driving. Addison police officers went to the Frasca residence, but Dan was not home, so they left word that they were looking for Dan and his passenger. C3160. At approximately 7:50 p.m., Dan and Vince learned that the police were

looking for them, and they immediately went to the Addison Police Department, where they were separated for questioning. C2877, 3161-3162. At this time, neither Vince nor Dan had any idea that Joe Novy had been seriously hurt. They assumed they were being questioned in relation to the simple fight that had occurred. C2880, 3378.

Detective David Wall and Detective Sergeant Donald Sommers brought Vince into an office shortly after 8:00 p.m. C2427-2429. After Vince waived his *Miranda* rights in writing, Vince summarized the events of the evening. C2431-2432; People's Exh. 40. According to Detective Wall, Vince explained that once he and Joe Novy got out of their vehicles, they began to have a verbal argument, in which the two swore at each other. C2434-35. This "jawing" continued for a while, until Joe Novy put his hand on Vince's chest and pushed him. Vince told the detectives that at that moment he slapped Joe's hand away, hit Joe across the face with the heel of his hand, and then hit Joe a second time with an "over-the-top right." C2435-2436. According to Detective Wall, Vince stated that he told Joe Novy to stay down and then left with Dan in Dan's car. C2437. When Detective Wall asked Vince if he ever kicked Joe Novy, Vince said that he had not. *Ibid.*

At the end of this interview, Vince agreed to the detectives' request that he write out a statement about what happened. That statement provides, in relevant part, as follows:

> My friend Dan and I were coming from Mario's Deli and we made a right and cut through Foxdale. Then we proceed down Lombard Road and spotted his truck. I thought he had given me a hard look. * * * We followed him and he stopped his truck and got out. Then I got out of the car and he told me if I had a problem. We approached each other talking back and forth. He then put his hand on my chest and I swatted it away. I thought he was clenching his fist so I open-handed hit him in the chin. He stumbled backwards and I then hit him on the lip. He was on the ground getting up and I told him to stay on the ground so I pushed him down. Then my friend and I left. My friend didn't do anything at all.

People's Exh. 41. Shortly after Vince wrote out this statement, Detective Wall and Sergeant Sommers told Vince that there was a witness at the scene who said that Vince had kicked Joe three times. C2441. Detective Wall testified that upon hearing this, Vince acknowledged that he kicked Joe once in the side. C2442.

At approximately 10:35 p.m., the detectives were joined in their interrogation by two DuPage County Assistant State's Attorneys. C2449. Although the questioners knew at this time that Joe Novy had died, they did not relate this information to Vince, who still believed that he was being questioned about a simple fist fight. When a prosecutor asked Vince if he was a "good fighter," Vince responded that he "did not think he was the toughest fighter " C2451

At the close of this conversation, Vince agreed to answer questions on tape. Vince again explained that while he and Joe Novy were swearing at each other and were "jawing back and forth," Joe put his hand on Vince's chest, and Vince swatted Joe's hand away. Joe then "turned to the side" and was "facing to the right" when, as Vince explained,

> I thought he was ready to throw a punch, I thought he cocked his fist ready to throw a punch at me, so I moved in and I hit him with an open palm on his chin on his lip, he stumbled back a little bit and then I came in over the top right and I hit him * * * in the lip or the jaw, which we fell on the ground. I kicked -- I kicked him in the stomach and then he was tryin' to get up, he had his hat in his hand or tryin' to get his hat and he was tryin' to get up and I told him, 'stay the fuck down,' I pushed him down, the neighbor came out and me and my friend took off.

C2462-2464. Vince repeatedly denied ever having kicked Joe Novy in the head and explained that he had no intention of "getting" Joe Novy: "I had no intention, I didn't have no time to plan to get him, it just happened." C2464-66.

It was only after the questioning was completed that Vince was finally told that something awful had happened--Joe Novy had died. Upon hearing this, Vince started crying and repeatedly

asked the Assistant State's Attorney if he was serious. Once the news finally sank in, Vince said, "Jesus Christ. I didn't want this to happen. It's really sorry. He really passed away?" C2471.

B. The Grand Jury Proceedings And The Resulting Motion To Dismiss

On the morning of June 16, 1993, Assistant State's Attorney Kathryn Cresswell presented this matter to a DuPage County Grand Jury, asking it to indict Vince for first degree murder. Supp. C3-4.

1. The Grand Jury's Vote To Return No Bill Of Indictment On First Degree Murder

After the Grand Jury deliberated on all the evidence that the prosecution presented, the grand jurors voted to return a *no bill*--refusing to indict Vince for murder. Supp C10. One of the grand jurors, however, asked ASA Creswell, "Can you come back with a lesser charge or can you bring this back to another Grand Jury?" *Ibid.* ASA Creswell responded that the prosecutors could "bring it to another Grand Jury if there is additional evidence, and then stated, "if you are of the opinion that a lesser charge is appropriate, then you can return a True Bill on a lesser charge." Supp. C10-11. After the foreman indicated that many grand jurors were wrestling with the possibility of a lesser charge, the following colloquy occurred:

MS. CRESWELL: Okay. Are you telling me that you found a No Bill on First Degree Murder but that you want to deliberate as to other possible charges?

A JUROR: Absolutely.

MS. CRESWELL: Okay, I can return this afternoon with the documents for a No Bill on First Degree Murder, and I can bring you at that time the law with respect to lesser offenses and you can continue deliberating on those. Is that what you want to do? The record has to be absolutely clear that you are not finished deliberating on the case. Is that what you are telling me?

A JUROR: As far as First Degree Murder, but a lesser charge, no. Supp. C11-12.

2. The Improper Communication From A Grand Juror To The Prosecutors

During the lunch break, one of the grand jurors approached Officer John Tannahill of the Westmont Police Department who was waiting to testify on another case. Supp. C38-40. In a clear breach of Grand Jury secrecy, the grand juror told Officer Tannahill about the DiVincenzo case. The juror first told the officer that the prosecutors were in the library "brainstorming about a homicide case to get another charge because they had got a No Bill on First Degree Murder." Supp. C41-43. The juror then described the facts of the case and the reasons that the grand jurors had voted a no bill. Specifically, the grand juror told Officer Tannahill that "it was two kids fighting and the one kid had died and there was no weapons involved, and [the grand juror] feels it was just a fist fight." Supp. C44. After receiving this information from the grand juror, Officer Tannahill sought out Assistant State's Attorney Creswell and Assistant State's Attorney John Kinsella and informed the two prosecutors about everything he had heard from the grand juror. Supp. C43-44.

3. The Prosecutor's Pressure On The Grand Jury To Reconsider Its Vote

Although ASA Creswell had been told that the grand jurors were finished deliberating on first degree murder, and although she had promised to come back after lunch with the papers for a No Bill and with lesser charges, the State's Attorney's Office came up with an alternate plan during the lunch break--the same lunch break in which they learned secret information about the grand jury's deliberations. Armed with the information he learned from the grand juror, ASA Kinsella confronted the Grand Jury. (Although Mr. Kinsella had participated in choosing the Grand Jury, he had not been involved in presenting the DiVincenzo evidence.) Without presenting any additional evidence to the Grand Jury, ASA Kinsella delivered a lengthy lecture on the Grand Jury's duties, in which he pressured the jury to abandon its completed vote and to return a true bill on first degree murder.

Supp. C13-36. In the course of this lecture (which is quoted at length at *infra* 55-57), ASA Kinsella claimed repeatedly that the Grand Jury's decision to return a no bill on first degree murder must have been the product of some improper influence. Supp. C14-15. ASA Kinsella also suggested that the Grand Jury was ignoring established law by refusing to indict on first degree murder. Supp. C18. Additionally, ASA Kinsella told the Grand Jury on several occasions that it could return a first degree murder indictment without ever finding that Vince had any knowledge that his acts carried a high likelihood of inflicting great bodily harm. Supp. C26-27.

Toward the end of ASA Kinsella's presentation, a grand juror confronted him with the fact that the Grand Jury had *already voted* to return no bill of indictment on first degree murder. The grand juror protested, "You keep saying that you want to push the Murder One issue " Supp. C27. When some grand jurors asked about lesser offenses, ASA Kinsella stated, "the only other option is that his conduct is reckless. And generally speaking, when someone makes a fist, throws it at somebody's face and hits them, that is usually not a reckless act." Supp. C35.

At the conclusion of this extraordinary Grand Jury session, Mr. Kinsella asked the Grand Jury to "reconsider at this point, the vote on the first degree murder." Supp. C31. The Grand Jury retired to deliberate once again, and this time the foreperson reported that "based on the clarification that you have brought forth we have changed our decision originally and we will go with the First Degree Murder charge, True Bill." C517. The Grand Jury returned a true bill on one count of first degree murder, charging that the defendant struck and kicked Joseph Novy "knowing that such acts created a strong probability of great bodily harm." C5.

Later that day, Officer Tannahill was examined under oath, outside the presence of the grand jurors, about the information he received from the grand juror and conveyed to Assistant State's

Attorneys Creswell and Kinsella. Supp. C38-44. On the following day, the Chief Judge dismissed the grand juror who violated the secrecy rules and admonished him.

4. The Motion To Dismiss The Indictment

In a motion to dismiss the indictment the defense alleged that, in violation of the defendant's rights and the principles of Grand Jury secrecy, "the Assistant State's Attorney coerced and misled the Grand Jury into returning a True Bill as to First Degree Murder without presenting additional evidence." C15-16. In furtherance of the motion, the defense subpoenaed several witnesses to testify at a hearing, including: the grand juror who spoke to Officer Tannahill; Officer Tannahill; and Assistant States's Attorneys Creswell and Kinsella. C420. The trial court refused to conduct an evidentiary hearing, holding that the only relevant source of information in ruling on the defendant's motion was the Grand Jury transcripts themselves.[1] According to the trial court.

> Whatever Miss Creswell, Mr. Kinsella, Mr. Birkett or whoever discussed over the noon hour, whatever they discussed over that period of time, I have to concede the fact, because the transcript reflects that, that the Grand Jury was not given the opportunity to consider the return of a lesser included indictment, but that Mr. Kinsella went on with his statement to the Grand Jury. But whatever was discussed over the lunch hour resulted only in the failure to give the Grand Jury an opportunity to consider the lesser included, which is reflected by omission in the transcripts of the second session, but the transcript doesn't suggest any misconduct of any kind on the part of the State's Attorney during that second session. (C419).

The trial court then refused to dismiss the indictment, ruling that there was no "substantial injustice" as a result of the secrecy violation. The court also found that the grand jury transcripts revealed no undue coercion or misrepresentation of law that amounted to prosecutorial misconduct. C551-552.

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[1]This case was originally assigned to Judge John Nelligan who presided over most of the pre-trial proceedings, including the motion to dismiss the indictment C1083. Judge Nelligan recused himself prior to trial, however, and the case was reassigned to Judge Peter Dockery

C. The Trial

The testimony at trial fell into six general subject areas: (1) testimony about Joe Novy's and Vincent DiVincenzo's backgrounds and activities prior to the incident; (2) testimony about the relationship between Joe Novy and Vincent DiVincenzo; (3) testimony from witnesses who saw all or part of the incident; (4) testimony about Vincent's statements at the police station; (5) testimony about the cause of Joe Novy's death and the force of the blows; and (6) testimony about a prior incident in which Vincent DiVincenzo had punched another teenager in the nose.

1. Testimony About Joe Novy's and Vincent DiVincenzo's Backgrounds And Activities Prior To The Incident

Richard Novy, the father of Joseph Novy, testified that Joe was 20 years old at the time of his death, and that Joe stood 5' 11" and weighed 180 pounds. C2216. Joe was very fit and was a varsity soccer player at Northern Illinois University, where he had so much endurance that usually he played the entire game without substitution. C2222.

Vince DiVincenzo was also an athlete. He had played hockey for 13 years and was the quarterback of the Addison Trail football team. C2468-2469, 3241.

The testimony of three witnesses called by the prosecution established that around 6:00 on the evening of May 27, 1993, Joe Novy had tried to telephone several friends who were not at home. C2233. Joe Novy eventually made plans to play cards with some friends later in the evening. C2229. In the meantime, he decided to go for a short ride in his new GEO Tracker. C2242.

As for Vince's activities that day, the evidence showed that Vince spent that afternoon with his friend Dan Frasca, working out at a gym and going to a tanning salon. C2855, 3242-3243. Dan and Vince had just picked up sandwiches and were driving home when Vince and Joe Novy noticed

each other. Vince asked Dan to follow Joe, even though this was not in the direction that Vince and Dan were going. C3247-3248. When Joe pulled into a driveway, Dan stopped his car at Vince's request. Dan, Vince, and Joe all left their cars, and Vince and Joe began to argue. C2869, 3250.

2. Testimony About The Relationship Between Joe Novy and Vince DiVincenzo

There was very little evidence introduced about the nature of the relationship between Joe Novy and Vince DiVincenzo. The limited amount of evidence on this point was undoubtedly related to the prosecution's admission throughout the trial that there was no allegation that Vince ever intended to kill or inflict great bodily harm on Joe Novy. As the prosector put it in his opening statement: "You will not hear any evidence that the defendant planned to murder Joseph Novy or that he intended to kill Joseph Novy, but you will hear evidence that the cause of death was related to the defendant's beating of Joseph Novy." C2176.

The prosecution did present one witness, David Witt, who testified that on some prior occasions while he was with Vince when the two of them saw Joe Novy, Vince had commented that he did not like, and even hated, Joe Novy. Witt acknowledged on cross-examination that he had last seen Vince and Joe together about three weeks prior to the May 27 incident, and that Vince had not said anything about hating Joe at that time. C2555-2556. The prosecution also introduced evidence of Vince's statements while being questioned by the police, at which time Vince had readily acknowledged that he disliked Joe Novy because of some incident years earlier involving Vince's girlfriend. C2458-2459. Vince was clear, however, that this dislike or "grudge" did not cause him to fight with Joe Novy. Instead, the fight grew out of Joe Novy's confrontational stare, which led to a verbal argument, which, in turn, led to push and a fist fight. C3255.

3. *Testimony from Witnesses Who Saw All Or Part Of The Incident*

Janet Berens, who observed some of the incident from the front window of her home, testified that she saw a Tracker and a black car parked on the street, as well as three boys standing on the parkway. Two of these boys, Joe Novy and Vince DiVincenzo, "seemed to be in a discussion," and the other boy, Dan Frasca, "just stood there watching." C2262-2263, 2287. Ms. Berens looked away for a moment, but when some physical movement caught her eye, she looked back and saw one boy grab himself "around his waist like he had been hit, and he fell to the ground." C2263. Ms. Berens testified that as this boy "was lying motionless" on the ground, the other boy kicked him with his toe in the lower back. This kick was then followed, according to Ms. Berens, by two other kicks with the toe--one higher in the back and one to the back of the head. C2265. Ms. Berens described each of these kicks as "forceful," and "not a tap." C2265-2267. According to Ms. Berens, the entire fight took about five or six seconds. C2289.

Ms. Berens yelled out to her husband, Leon Berens, who testified that by the time he ran outside, the fight was already over and Vince and Dan were getting into their car. C2310, 2326. After yelling out the license plate of the car to his wife, Mr. Berens approached Joe Novy who was lying flat on the ground, face down. When he saw that Joe was having difficulty breathing, Mr. Berens instructed his wife to call 911. C2314.

The testimony of Vince DiVincenzo was basically consistent with that of Ms Berens except for one point: Vince maintained that he had never delivered the three kicks that Ms. Berens claimed to have seen. Instead, Vince acknowledged having punched Joe Novy twice, having kneed him in the side (which he had described at times as a kick), and having pushed Joe Novy to the ground when he tried to get up. C3259.

Dan Frasca, who was watching the verbal argument from near the car, testified likewise that the confrontation between Vince and Joe Novy began as a verbal argument, and then escalated into some shoving. C2870. Dan testified that he saw Vince slap Joe and throw two punches only after Joe Novy stepped back, clenched his fist, and started to bring his arm up in a punching manner. C2870, 2887.[2] Dan Frasca testified that these punches were thrown in a "pretty fast sequence. It was like 1-2-3 pretty much." C2876. Dan never saw Vince kick Joe Novy (C3075), although he did make a statement on the evening of the incident suggesting that Vince hit Joe once while he was going down. C3137. In any event, when Dan and Vince left after about 10 or 12 seconds (C2875), it did not appear to Dan that Joe Novy was hurt. C2873.

4. Testimony about Vincent's Statements at the Police Station

Detective David Wall, who participated in the various sessions during which Vince was interrogated by the police and the prosecutors, testified about the details of Vince's statements. Detective Wall also authenticated the statement that Vince had written out at approximately 9:00 that evening, as well as the taped statement that Vince gave at 10:48 p.m. C400, 3407. The details of these statements have been set forth extensively above in the section captioned "The Police and Prosecutors' Questioning of Vince DiVincenzo." See *supra* 4-7.

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[2]In a statement that Frasca wrote out on the evening of the incident, he stated that "the kid from the Tracker stepped back like ready to throw a punch" before Vince hit him. Def. Exh. 12. Similarly, in a taped statement that Dan Frasca gave on the evening of the incident, Frasca stated that Joe Novy "stepped back, like maybe to throw a punch where you step back with [arms] almost cocked." C3133. In these taped and written statements, Frasca stated that Vince threw two or three punches. C3135-3136; Def. Exh. 13. According to Detective Wall, Dan stated prior to the taped interview that Vince threw four or five punches. C3391. However, Detective Wall had no notes or other documentation that reflected this statement. C3402.

Three witnesses called by the defense--both parents of Vince DiVincenzo and the father of Dan Frasca--each testified that they went to the Addison Police Department while their sons were being questioned. The Addison police, however, did not allow them to see their children until after midnight, once all of the questioning was over. C3159-3175.

5. Testimony about the Cause of Joe Novy's Death

Paramedic Wayne Sherman testified that when the paramedics arrived at the scene of the incident, they realized that Joe Novy was not breathing, and they began to use a bag to ventilate him. C2341. Because there was some blood coming from Joe Novy's lip, the paramedics had difficulty inserting the tube and later chose to establish an airway through an incision in the skin covering the lower part of the larynx. C2346. When an ambulance brought Joe Novy to the hospital at 7:25 p.m., his heart was beating with the aid of a ventilator. C2348. Joe Novy was transported by helicopter to Loyola Medical Center, where he was pronounced dead later that evening.

Dr. Nancy Jones, who performed the autopsy on Joe Novy, testified for the prosecution that she saw several bruises on Joe Novy's face, including a bruise near his right eye, a small bruise near his right nostril, a bruise near his left eye and left cheek, and a bruised and cut lip. C2546-2547. The bruises to the left side of the face were consistent with the injury to Joe Novy's jaw, which had been fractured on the left side (and, by virtue of that fracture, had become dislocated on the right side). C2564. Upon examining Joe Novy's back, Dr. Jones saw some bruising and a small abrasion behind Joe Novy's left ear. C2553. Dr. Jones also reported seeing two small bruises on the right side of Joe Novy's back, one around the area of the armpit, the other in the area of the shoulder blade. C2555.

With respect to the cause of death, Dr. Jones testified that this was not a case in which some direct trauma had caused impact to the brain that lead to death. Rather, Dr. Jones testified, death in this case was the result of a rare phenomenon through which an artery in the middle of Joe Novy's head had torn because of the sharp rotation or hyperextension of the head caused by the trauma to the face. Dr. Jones recognized that Joe Novy's death was not the direct result of any blow, but was the product of a chain of events in which a blow or kick the to the *left side* of the head led to a subarachnoid hemorrhage on the *right side* of the brain. C2590-2591, 2605, 2608. She testified that "it's not like something is actually pushing" an artery as a result of some massive blow. C2641.

Dr. Jones further testified that the "external injuries" she observed on Joe Novy did not even "appear significant." C2645. Nor was it "just the snapping of the head" that led to death. Rather, she testified, "it's the whole rotation. It's not only that the head is moving, but you're also imparting kinetic force." C2642. Dr. Jones acknowledged that injuries of this sort "are rare occurrences. They don't happen very frequently." C2665. She repeatedly emphasized that "I don't disagree that it is a rare phenomenon. I have been saying all along it's a rare phenomenon." C2683. See also C2679.

Dr. Robert Beatty, a board certified neurosurgeon on the faculty of the University of Illinois, was called as an expert witness by the defense. After a review of Dr. Beatty's credentials (C2948-2968), which include his having practiced for more than 30 years and having published more than 30 scholarly articles, Dr. Beatty testified, to a reasonable degree of medical certainty, that Joe Novy died as a result of an aneurism--a natural weakness in an artery--that "blew itself apart." C2980. According to Dr. Beatty, it was the natural process of an aneurism, and not a traumatic tear, that explained the pathological evidence regarding Joe Novy's brain. Dr. Beatty agreed with Dr. Jones

that Joe Novy's death was a fluke occurrence and was not in any way a natural and probable consequence of Vince DiVincenzo's actions. C2980-3025.

Dr. Mark Steinberg, a board-certified surgeon in the area of oral/maxillofacial surgery and a member of the faculty at Loyola School of Medicine, was also called as an expert witness by the defense. Dr. Steinberg testified that the fracture to Joe Novy's jaw could have been caused by a rather minimal force. C3205. Similarly, with respect to the bruise on the back of Joe Novy's head, Dr. Steinberg testified that whatever caused that bruise involved only a minimal force. "I know from the pathology report there were no broken bones under those bruises. So looking at two small bruises with no broken bones and no broken skin, I have to assume it's a minimal amount of force in that area." C3225-3226. Dr. Steinberg explained that he had never seen a case in which force as minimal as that involved here had resulted in a subarachnoid hemorrhage and led to death. C3226.

6. Testimony about a Prior Incident in which Vince had Punched Another Teenager

The prosecution also called Joseph Tomasone, a boy who was involved in a fracas with Vince DiVincenzo when they were both 16 years old in 1991. Joe Tomasone testified that as a result of a punch from Vince DiVincenzo, he had a swollen and bloody nose, as well as a cut to his face. C2723-2724, 3417. As part of its evidence relating to the Tomasone incident, the prosecution called Dr. Robert Kagan, a plastic surgeon who had treated Joseph Tomasone in 1991. Dr. Kagan testified that he examined Joseph two days after the fight and that Joseph had some "bruising and swelling to the left facial area. He had some swelling to his nose He had an x-ray done which showed a nondisplaced nasal fracture." C2736. Dr. Kagan acknowledged that the nature of the fracture was consistent with a minimal amount of force. C2743, 2754-2755. As he put it, the force was "not too great." C2755.

In an effort to show that the 1991 incident was somehow relevant to proving Vince's *knowledge* about the effect of punching somebody in the nose, the prosecution relied on two facts. First, Joseph Tomasone's father testified that when Vince called the Tomasone home on the day after the 1991 fight to speak with Joseph, Joseph's father told Vince that Vince had "hurt him pretty bad, his nose is on the side of his face and he's in a lot of pain." C2732. Second, Joseph Tomasone testified that he saw Vince in gym class several weeks after the 1991 incident, and that Joseph's nose was swollen, he had "like two black eyes," and a scab on his cut. C2725, 3418.

The defense presented an expert, Dr. Mark Steinberg, in response to the prosecution's medical evidence about Joseph Tomasone's broken nose. Dr. Steinberg testified that broken noses are quite common as the result of even "minimal force" because "the nasal bones aren't much thicker than maybe two pieces of paper and it doesn't take much force to break them." C3227-3228. Indeed, he explained that "a broken nose is very common. More common than doctors know, because a lot of people break their nose and never go for treatment." C3228.

D. The Jury Instructions & The Verdict

Beginning with the defense's opening statement to the jury, the defense's position was that Vince may have been guilty of some lesser offense, but he was not guilty of first degree murder. See C2194 ("this may be something else but it certainly isn't a murder case"). Nonetheless, the trial court denied the defense's request that the jury be instructed on the lesser included offense of involuntary manslaughter. Judge Dockery explained that "I do not find that the evidence here indicates that the Defendant's acts were performed recklessly" and that "under any view of the evidence in this case, there is no evidence of recklessness. Therefore, the instruction concerning involuntary manslaughter will be denied." C3455, 3459. The trial court did, however, agree to

instruct the jury on second degree murder, based on the evidence that Vince began striking Joe Novy only after Vince had reason to believe that Joe Novy was about to hit him. C3466. After the judge instructed the jury in accordance with his rulings (C3733-3742), the jury returned a verdict finding Vincent DiVincenzo guilty of first degree murder. C177, 3679.

E. Disposition of the Defendant's Post-Trial Motions & Sentencing

The defendant filed a timely post-trial motion in which he sought a judgment of acquittal, or in the alternative, a new trial. C250. The trial court allowed the defense to place into the record an affidavit from a journalist who had interviewed two of the jurors subsequent to the verdict. C3759. One of these jurors reported that two jurors were very distraught about their limited choices in the case and "very strongly wanted another option" besides first degree murder, such as involuntary manslaughter. C257-259.

The court denied the post-trial motion in its entirety. C261, C3947-3993. Specifically of relevance to this appeal, the trial court rejected the defendant's claims that:

- the trial court had improperly refused to instruct the jury on the lesser offense of involuntary manslaughter (C3961-3992);
- the prosecution had failed to prove that the defendant knew that his conduct created a strong probability of great bodily harm (C3948-49); and
- the Grand Jury indictment should have been dismissed based on the conduct of the prosecutors and the breach of Grand Jury secrecy (C3957-3960).

After a sentencing hearing at which evidence in aggravation and mitigation was presented, the trial court sentenced Vince to 26 years in the Illinois Department of Corrections. In the course of its sentencing statement, the trial court specifically found that Vincent DiVincenzo "did not intend to kill Joseph Novy" and that Vince "did not even intend to cause him great bodily harm." C4667.

F. The Appellate Court's Opinion

The Appellate Court affirmed the conviction. With regard to the trial court's refusal to instruct on involuntary manslaughter, the Appellate Court held that because there was uncontroverted evidence that Vince deliberately punched Joe Novy, and disputed evidence that he kicked Joe Novy, Vince could not be said to have acted recklessly. Therefore, the court ruled, Vince was not entitled to have the jury instructed on involuntary manslaughter. App. 20-21. The Appellate Court recognized that Vince testified and denied having kicked Joe Novy, but the Court ruled that "his voluntary statement to the police was nonetheless an admission which the trial court was free to consider" in declining the lesser included offense instruction. App. 21.

The Appellate Court also rejected the defendant's argument that the evidence could not support a first degree murder conviction given the longstanding principle that weaponless fights do not typically evince the requisite mental state of first degree murder. Relying on the evidence that Vince kicked Joe Novy while he was down, the court stated that "it is brutal and heinous behavior, indicative of wanton cruelty, to kick a man who has been knocked to the ground, and is helpless, defenseless, and is no longer a threat to anyone. * * * We therefore conclude that the State presented sufficient evidence to support the jury's finding that the defendant knowingly inflicted great bodily harm." App. 16.

With regard to the Grand Jury, the Appellate Court ruled that notwithstanding the Grand Jury's announcement that it had voted to return no bill of indictment on first degree murder and did not wish to deliberate any further on that charge, it was "appropriate for Mr. Kinsella to return to the grand jury during the afternoon session to clarify the law" because the grand jury had not yet formally signed the no-bill form. App. 29. The Appellate Court ruled further that "it does not constitute

prosecutorial misconduct that Kinsella commented on his belief that first degree murder was the appropriate charge." App. 29-30. Finally, although the court stated that it "certainly does not look favorably upon or wish to encourage the breach of grand jury secrecy that took place in the instant case," the defendant was not entitled to dismissal of the indictment, or even to an evidentiary hearing, because he had not otherwise shown "actual or substantial prejudice." App. 28, 31.

SUMMARY OF THE ARGUMENT

As the trial court noted during sentencing, "it is, of course, not unusual that teenagers will get into fights with each other." C4664. Whether in barrooms or playgrounds, young men since time immemorial have engaged in fights involving punches and kicks. Judge Thomas Hett put it well when he sentenced a defendant to probation after he had convicted the defendant of involuntary manslaughter arising out of a barroom brawl: "As a kid I was involved in capers like that. * * * I would guess there aren't many men in this courtroom who can look in the mirror and say it hasn't happened to them." *Chicago Tribune*, January 17, 1996, Metro Section., at 4.

Many individuals involved in these sorts of fights have gone uncharged. Others have been convicted of battery or, in some cases, aggravated battery. In a few instances, where through some tragic and unexpected chain of events a death has resulted from a fight, there have been convictions for involuntary manslaughter. Our extensive research into the past hundred years of Illinois precedent has uncovered *no* case, however, in which a person has been convicted of first degree murder after a brief weaponless fight with another able-bodied person of the same general size and strength.

Despite this considerable body of precedent, the trial court refused to instruct the jury on the lesser included offense of involuntary manslaughter. This failure constitutes reversible error. A jury that credited the defense's evidence about what transpired in this case (and even a jury that credited

the prosecution's version) would certainly have been entitled to decide that Vince was reckless with respect to the dangerousness of his acts, and that he should be convicted of involuntary manslaughter instead of first degree murder.

No speculation is needed on this point. The grand jurors and the petit jurors alike appear to have balked at the idea that Vincent DiVincenzo was guilty of first degree murder. In the case of the Grand Jury, the grand jurors actually voted a no bill on first degree murder and asked to be presented with lesser charges. In the case of the petit jury, an affidavit that was made part of the record subsequent to the verdict established that several jurors wanted to be given the option of considering some lesser charges. C3759. Nonetheless, the jury was precluded from considering involuntary manslaughter. Because Vincent was denied the right to a properly instructed jury, the first degree murder conviction must be reversed.

Indeed, the evidence in this case points so squarely to involuntary manslaughter, as opposed to first degree murder, that this Court should either reverse the conviction outright or reduce the offense to involuntary manslaughter. According to the prosecution's own witnesses, the entire altercation in this case lasted six or seven seconds. Only a few blows were delivered, and Vince walked away from the fight of his own volition. This evidence cannot possibly sustain an inference that Vincent DiVincenzo had actual knowledge of the *strong probability* that his acts would cause death or great bodily harm. This Court should either reverse the conviction outright or use its power under Rule 615(b)(3) to reduce the offense to involuntary manslaughter.

In addition to these core issues regarding the defendant's ultimate guilt and his right to a properly instructed jury, this conviction must be reversed because the Grand Jury indictment itself should have been dismissed before the trial ever began. The Grand Jury in this case concluded its

deliberations and voted to return a no bill on first degree murder. Yet the prosecutors ignored this vote and intensively pressured the Grand Jury to indict on first degree murder. In so doing, the prosecutors misrepresented the governing law, took advantage of a breach of Grand Jury secrecy, and violated Vince's right to due process of law.

More generally, the events surrounding the Grand Jury reveal that, from the outset, independent evaluators of the evidence in this case have recognized the inequity of treating this case as first degree murder. The Grand Jury, before it was subjected to the prosecution's pressure, saw this case for what it is: a classic involuntary manslaughter case. Yet the jury that ultimately passed upon Vince's fate was not even given the option of considering that offense. The conviction in this case must not be allowed to stand.

ARGUMENT

I. VINCENT DIVINCENZO WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.

Time and time again, the courts of Illinois and other states have recognized that weaponless fights between individuals of the same general size and strength are classic examples of involuntary manslaughter. In the absence of some extraordinary element--such as a significant size and strength disparity between the defendant and the victim, or an extraordinarily prolonged and severe beating that obviously displays murderous intent--courts have routinely held that a defendant charged with first degree murder based on a weaponless fight is entitled to have the jury instructed on the lesser included offense of involuntary manslaughter. The reason for this is simple. A reasonable jury could certainly conclude that such a defendant was reckless as to the risks of his acts, but did not have the "intent" or "knowledge" that transforms his acts into first degree murder.

The conviction in this case must be reversed for failure to give the requested involuntary manslaughter instruction. To demonstrate this, we will first set forth the general principles regarding the relationship between first degree murder and involuntary manslaughter, and then discuss the law that has developed on how weaponless fights fit within the dichotomy between first degree murder and involuntary manslaughter. We will then show that the evidence in this case clearly entitled Vincent DiVincenzo to an involuntary manslaughter instruction, and that he is now entitled to a new trial before a properly instructed jury.

A. THE DIFFERENCE BETWEEN FIRST DEGREE MURDER AND INVOLUNTARY MANSLAUGHTER INVOLVES THE DEFENDANT'S LEVEL OF CERTAINTY THAT HIS ACTS HAVE THE NATURAL TENDENCY TO DESTROY LIFE, AND THE LAW RECOGNIZES A CRITICAL DISTINCTION BETWEEN THE STATE OF MIND THAT CAN BE INFERRED FROM THE USE OF A LETHAL WEAPON AS OPPOSED TO THE STATE OF MIND THAT CAN BE INFERRED FROM A WEAPONLESS FIGHT.

The difference between first degree murder and involuntary manslaughter is the defendant's state of mind. *People v. Foster*, 119 Ill.2d 69, 87, 518 N.E.2d 82, 89 (1988). While the state of mind for murder is intent or knowledge, the state of mind for involuntary manslaughter is recklessness. *Id.* These two states of mind--"knowledge" and "recklessness"--differ as to the defendant's level of certainty about whether his acts carry the "strong probability" of destroying another's life.

1. The Difference Between First Degree Murder and Involuntary Manslaughter Involves the Defendant's Level of Certainty That His Acts Have the Natural Tendency to Destroy Life.

To sustain a conviction under the "knowledge" prong of the first degree murder statute, the prosecution must show that the defendant *knew* that his acts created a "*strong probability* of death

or great bodily harm." 720 ILCS 5/9-1 (emphasis added). By contrast, the *mens rea* of the involuntary manslaughter statute requires only that the defendant's acts were "*likely* to cause death or great bodily harm" and that the defendant performed the act "recklessly." 720 ILCS 5/9-3 (emphasis added). The Criminal Code provides, in turn, that a person acts "recklessly when he consciously disregards a *substantial and unjustifiable risk* that circumstances exist or that a result will follow * * * and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 4/4-6 (emphasis added).

The drafters of the first degree murder and involuntary manslaughter statutes intended there to be a difference between the two, and they intended that involuntary manslaughter would result when there was a "likelihood," but not a "strong probability" or "practical certainty" of death or great bodily harm. As Justice Schaeffer wrote for the Court in *People* v. *Davis*, 35 Ill.2d 55, 219 N.E.2d 468 (1966):

> The common-law distinctions between murder and manslaughter have always involved considerations of degree, (see, *Morissette v. United States*, 342 U.S. 246, 251, 72 S.Ct. 240, 96 L.Ed. 288, footnote 8,) and similar considerations appear in the Code definitions. In its comments to section 9--1(a)(2) the drafting committee said: "Clearly, no sharp dividing lines can be drawn, but the Committee chose 'strong probability' as the plainest description of the situation which lies between the 'practical certainty' of the preceding subsection, and the 'likely cause' and 'substantial and unjustifiable risk' of the involuntary manslaughter provision (s 9--3, using 'recklessly' as defined in s 4--6). This phrase would seem to require a minimum of further definition in jury instructions, and to permit ready comparison with the other two situations mentioned, when the evidence requires instructions thereon."

People v. *Davis*, 35 Ill. 2d 55, 59, 219 N.E.2d 468, 471 (1966) (quoting 1961 Committee Comments to 720 ILCS 5/9-1 ¶24). See generally *People v. Rosenberger*, 125 Ill. App 3d 749, 763, 466 N.E.2d 608, 617 (4th Dist. 1984) ("The difference between a *strong probability* of death or great bodily harm and the *mere likelihood* of the same should be apparent to anyone as well as the

difference between knowledge and recklessness. Just how a more elaborate exegesis on these principles in the statute would be of assistance escapes us.") (emphasis added).

This distinction in the Illinois statute is consistent with traditional principles of criminal law. As Professor Decker writes in his treatise, "recklessness is different than knowledge in that the former involves a lower level of risk creation. Recklessness arises where there is a 'gross deviation' from the norm or a 'high probability of harm,' whereas knowledge is defined in terms of 'practical certainty' and 'substantial probability." 1 Thomas Decker, *Illinois Criminal Law* 2-74 (1986). See also 1 W. LaFave & A. Scott, *Substantive Criminal Law* 336 (1986) ("'Recklessness' in causing a result exists when one is aware that his conduct *might* cause the result, though it is not substantially certain to happen.").

Thus, in assessing whether a jury in a first degree murder case must be instructed on the lesser included offense of involuntary manslaughter, the court must determine whether a reasonable jury could possibly conclude that the defendant did not have the *mens rea* of a "knowing" killer who acted in the face of a substantial probability of grave consequences. If a reasonable jury could instead conclude that the defendant was only reckless in ignoring risks that were less certain than "strong probability," an involuntary manslaughter instruction must be given.

Because this determination involves an assessment of a defendant's "state of mind, it can rarely be proved by direct evidence." *People v. Williams*, 165 Ill.2d 51, 63, 649 N.E.2d 397, 403 (1995). Rather, the determination typically turns on "inferences to be drawn from the character of the defendant's actions." *People v. Gresham*, 78 Ill. App. 3d 1003, 1006, 398 N.E.2d 398, 401 (3d Dist. 1979). Such inferences are, of course, the classic province of the jury, but the law does recognize certain presumptions that are critical to deciding when jury instructions on involuntary

manslaughter are appropriate. Particularly, in assessing whether the evidence in a case requires an involuntary manslaughter instruction (and whether it can possibly support a first degree murder conviction), the law recognizes a significant distinction between defendants who have used lethal weapons and defendants who have been involved in weaponless fights involving punches and kicks.

2. Very Different Inferences Arise From The Use Of Lethal Weapons As Opposed To Weaponless Fights.

When a defendant has deliberately attacked another with a lethal weapon, such as a gun, a knife, or a baseball bat, courts typically conclude that the nature of the defendant's act demonstrates beyond any doubt that he knew that the natural tendency of his acts was to destroy another's life. For example, a defendant who deliberately shoots a gun into a crowd cannot be heard to deny "knowledge" or "intent" when a person dies as a result. See *People v. Cannon*, 49 Ill.2d 162, 166, 273 N.E.2d 829, 831 (1971); *People v. Gonzales*, 40 Ill.2d 233, 241-242, 239 N.E.2d 783, 789 (1968). This principle makes great sense. When dangerous weapons are involved, the inference of intent or knowledge follows quite directly from the obvious fact that the *natural tendency* of such weapons is to cause death or great bodily harm. See generally *People v. Jefferson*, 260 Ill. App. 3d 895, 912, 631 N.E.2d 1374, 1386 (1st Dist. 1994) ("When the defendant intends to fire a gun, points it in the general direction of her intended victim, and shoots, such conduct is not reckless, regardless of the defendant's assertion that she did not intend to kill anyone.").

By contrast, where a death results from the use of non-lethal weapons, such as a fight involving fists or feet, very different inferences apply.

> Whereas the intentional use of a deadly weapon is accompanied by a presumption the actor knows his acts create a strong probability of death or great bodily harm because a person intends the natural and probable consequences of his acts, generally, no similar presumption

> accompanies the striking of an individual with fists, since death is not a reasonable or probable consequence of a blow with a bare fist.

Gresham, 78 Ill. App. 3d at 1007, 398 N.E.2d at 401-402.

Thus, in a long line of precedents interpreting the current Criminal Code, this Court has held that a brief weaponless fight involving individuals of similar size and strength generally demonstrates the *mens rea* of involuntary manslaughter but does not evince a mental state sufficient to support a murder conviction. Rather, weaponless fights can evince the state of mind necessary for first degree murder only when (a) there is a significant disparity in size and strength between the defendant and the victim that shows that the defendant most certainly intended the result or at least knew of the grave risks associated with his actions, or (b) the brutality, duration and severity of a massive beating evinces that the defendant necessarily had intent or knowledge that the natural consequences of his actions were extraordinarily perilous. The Court recognized the basic principle (and mentioned one of these exceptions) in *People v. Brackett*, 117 Ill.2d 170, 180, 510 N.E.2d 877, 882 (1987):

> The defendant argues that the appellate court ignored a long-standing principle in this State, that death is not ordinarily contemplated as a natural consequence of blows from bare fists. (*People v. Crenshaw* (1921), 298 Ill. 412, 131 N.E. 576; *People v. Mighell* (1912), 254 Ill. 53, 98 N.E. 236; *People v. Gresham* (1979), 78 Ill. App. 3d 1003, 34 Ill.Dec. 723, 398 N.E.2d 398; *People v. Drumheller* (1973), 15 Ill. App. 3d 418, 304 N.E.2d 455.) He therefore asserts he could not know that blows from his bare fists created a strong probability of death or great bodily harm, as charged under section 9-1(a)(2). We do not see that the appellate court ignored this principle. While *Illinois cases do stand for the proposition the defendant recites*, these same cases also stand for the proposition that death may be the natural consequence of blows with bare fists where there is great disparity in size and strength between the two parties.

Brackett, 117 Ill.2d at 180, 510 N.E.2d at 882 (emphasis added). See also *People v. Terrell*, 132 Ill. 2d 178, 204, 547 N.E.2d 145, 156 (1989) (recognizing that "death may be a natural consequence of a blow from a bare fist" and therefore constitute murder "where there is great disparity in size and

strength between the defendant and the victim"); *People v. Ward*, 101 Ill.2d 443, 452, 463 N.E.2d 696, 700 (1984) (holding that a "a blow from a bare fist can result in murder" only where there is "great disparity in size and strength between the defendant and the victim").

Other courts throughout the State have recognized this principle as well. See, *e.g.*, *People v. Rodriguez*, 275 Ill. App. 3d 274, 284, 655 N.E.2d 1022, 1029 (1st Dist. 1995); *People v. Taylor*, 212 Ill. App. 3d 351, 356, 570 N.E.2d 1180, 1183 (5th Dist. 1991); *People v. Summers*, 202 Ill. App. 3d 1, 10, 559 N.E.2d 1133, 1138 (4th Dist. 1990); *People v. Towers*, 17 Ill. App. 3d 467, 475, 308 N.E.2d 223, 228 (1st Dist. 1974); *People v. Drumheller*, 15 Ill. App. 3d 418, 421, 304 N.E.2d 455, 458 (2d Dist. 1973); *People v. Johnson*, 100 Ill. App. 2d 13, 17-19, 241 N.E.2d 584, 586-587 (1st Dist. 1968).

These cases are in keeping with a venerable line of precedents holding that weaponless fights do not typically support an inference of malice aforethought, the standard under the pre-1961 Code. See *People v. Crenshaw*, 298 Ill. 412, 416-417, 131 N.E. 576, 577 (1921) ("the striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences"); *People v. Lurie*, 276 Ill. 630, 636, 115 N.E. 130, 132 (1917) (defendant could be guilty only of manslaughter if he struck the deceased with bare fists); *People v. Mighell*, 254 Ill. 53, 59, 98 N.E. 236, 239 (1912) (defendant could be guilty only of involuntary manslaughter because punches were not acts the consequences of which "would naturally tend to destroy the life of a human being under any conditions reasonably to be anticipated"). *Cf. People v. Swiontek*, 391 Ill. 618, 620, 63 N.E.2d 741, 742 (1945) ("no presumption of malice will arise from an assault and battery with the hands and fists alone," but the evidence about the particular egregious circumstances of the case may be able to show malice).

The realization that weaponless fights do not typically involve intent or knowledge regarding death or great bodily harm is as true today as it was when this Court decided *Mighell*, *Crenshaw*, and *Lurie*. Although the Illinois murder statute has been revised since that time, the old "malice aforethought" standard had long been interpreted to include cases in which the defendant's act was "clearly dangerous." Thus, a person could be convicted of murder even if "the actual intent to kill or do great bodily harm was not proved, and perhaps was disclaimed by the defendant, but the defendant's intentional act was clearly dangerous to life and he acted regardless of the consequences." See 1961 Committee Comments to 720 ILCS 5/9-1, ¶12. As one court has explained:

> Prior to the enactment of section 9-1(a)(2) of the Criminal Code of 1961 (Code), whereby the killing of another without justification became murder if the actor "knows that such acts create a strong probability of death or great bodily harm" (Ill Rev Stat 1961, ch 38, par 9-1(a)(2)), such knowledge upon the part of the actor constituted conduct from which the trier of fact could infer malice or the intent to kill. *People v. Lavac* (1934), 357 Ill. 554, 558, 192 N.E. 568, 569-70; *People v. Crenshaw* (1921), 298 Ill. 412, 416-17, 131 N.E. 576, 577-78.

People v. Folks, 273 Ill. App. 3d 126, 131, 652 N.E.2d 378, 381 (4th Dist. 1995). Thus, the current standard of asking whether a defendant "voluntarily and wilfully committed an act, the natural tendency of which was to destroy another's life," (*People v. Bartall*, 98 Ill.2d 294, 306, 456 N.E.2d 59, 65 (1983)), does not differ in any material way from the malice aforethought standard under which *Mighell, Crenshaw,* and *Lurie* were decided. See *People v. Davis*, 35 Ill. 2d 55, 59, 219 N.E.2d 468, 471 (1966) (Schaeffer, J.) ("The statutory definitions of murder and manslaughter * * * represent a conscious effort on the part of the draftsmen of the Criminal Code of 1961 to express the requirements of the common-law crimes in simple language.")

This longstanding rule about the state of mind that reasonably can be inferred from a weaponless fight comports with reality and common sense. It is simply untrue to say that a person

who engages in a fight without any weapon is committing an act "the natural tendency of which is to destroy another's life." We know that there are hundreds, if not thousands, of fist fights in Illinois each and every day. In the vast majority of these fights, no serious injuries are suffered. Similarly, we know that boxers routinely punch each other in the head, yet serious injuries are thankfully rare, and there is certainly no strong probability of great bodily harm. Moreover, we know, as Vincent DiVincenzo, who had played hockey since age five (C3241), surely knew, that hockey players frequently punch each other with bare fists, with no permanent or serious injuries typically resulting.

Without condoning fighting in any way, it is important to recognize how pervasive such activity is, and how utterly unrealistic it is to say that any person has knowledge that a six-second weaponless fight carries a "strong probability" of leading to disastrous results. Although such fights may cause injuries in some rare cases, it is obvious, as the Court has recognized over and over again, that a typical brief weaponless fight does not create a "strong probability" of fatal or life-threatening injuries. To use the terminology this Court so often uses, a brief fight involving punches and even a few kicks does not constitute an act, the "natural tendency of which is to destroy another's life." *People v. Stanciel,* 153 Ill.2d 218, 234, 606 N.E.2d 1201, 1210 (1992).

As such, a brief weaponless fight of this sort does not evince a state of mind that falls within the first degree murder statute. See *People v. Muir*, 67 Ill. 2d 86, 93, 365 N.E.2d 332, 336 (1977) (overruled on other grounds in *People v. Harris*, 72 Ill. 2d 16, 377 N.E.2d 28 (1978)) (the murder statute's use of the phrase "great bodily harm" must be read in context to "connote the serious nature of the act" and to include only acts "the natural tendency of which is to destroy another life"). See generally Committee Comments to 720 ILCS 5/9-1 ¶ 23 (statute deals with conduct that is "clearly dangerous to life"); 2 Wayne LaFave & Austin Scott, *Substantive Criminal Law* 198 (1986) (when

used in reference to first degree murder, "serious bodily injury" means "something close to, though of course less than, death"); Rollin Perkins, *A Re-Examination of Malice Aforethought*, 43 Yale L. J. 537, 555 (1934) ("a blow, particularly if directed at the head or face, may be expected to cause pain, and even actual injury--such as a broken nose or jaw. Under ordinary circumstances, however, it does not measure up to the degree of violence which the courts have in mind when phrases such as 'grievous bodily harm' or 'great bodily injury' are used in the homicide cases."). There can be no doubt, in light of these principles and the evidence we will now discuss, that the jury was entitled to decide that Vincent DiVincenzo was guilty of the lesser included offense of involuntary manslaughter, as opposed to first degree murder.

B. IT IS THE ROLE OF THE JURY TO MAKE REASONABLE INFERENCES ABOUT THE DEFENDANT'S STATE OF MIND AND VINCENT DIVINCENZO WAS, THEREFORE, ENTITLED TO HAVE THE JURY INSTRUCTED ON INVOLUNTARY MANSLAUGHTER.

This Court has been vigilant in demanding that a jury be instructed on any lesser included offense that is supported by any evidence presented at trial. Earlier this year, the Court reaffirmed this principle in no uncertain terms:

> A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury. *People v. Crane*, 145 Ill.2d 520, 526, 165 Ill.Dec. 703, 585 N.E.2d 99 (1991). Very slight evidence upon a given theory of a case will justify the giving of an instruction. *People v. Bratcher*, 63 Ill.2d 534, 540, 349 N E.2d 31 (1976); see also *People v. Moore*, 250 Ill.App.3d 906, 915, 189 Ill.Dec. 615, 620 N.E.2d 583 (1993); *People v. Lyda*, 190 Ill.App.3d 540, 544, 137 Ill.Dec. 405, 546 N.E.2d 29 (1989). As the appellate court dissent noted: "In deciding whether to instruct on a certain theory, the court's role is to determine whether there is some evidence supporting that theory; it is not the court's role to weigh the evidence." 276 Ill. App. 3d at 1012, 213 Ill.Dec. 499, 659 N.E.2d 415 (Cook, P.J., dissenting); see also *Lyda*, 190 Ill.App.3d at 544, 137 Ill.Dec. 405, 546 N.E.2d 29.

People v. Jones, 175 Ill.2d 126, 132, 676 N.E.2d 646, 649 (1997).

This rule of law applies equally whether the instruction involves some defense to the crime charged or an instruction on a lesser included offense. As this Court explained in *People v. Novak*, 163 Ill.2d 93, 643 N.E.2d 762 (1994), a defendant is entitled to a lesser included offense instruction when there is "'any,' 'some,' 'slight,' or 'very slight'" evidence to support the instruction. *Id.* at 109, 643 N.E.2d at 770. Put another way, in assessing whether a defendant is entitled to an instruction on a lesser included offense, the court must consider the evidence in the light most favorable to the defense and determine whether, when the evidence is viewed in that light, there is "some" evidence to support the instruction. See *People v. Walker*, 267 Ill. App. 3d 454, 459, 641 N.E.2d 965, 969 (1st Dist. 1994); *People v. Alexander*, 250 Ill. App. 3d 68, 76, 619 N.E.2d 863, 869 (2d Dist. 1993). Even when the instruction is inconsistent with the defendant's main theory of defense, he is entitled to the instruction when there is some evidence in the record that can support it. *People v. Whiters*, 146 Ill.2d 437, 441-442, 588 N.E.2d 1172, 1174 (1992).

This entitlement to a lesser included offense has its foundations in State law as well as in a defendant's constitutional right to have a properly instructed jury. See generally *Everette v. Roth*, 37 F.3d 257, 261 (7th Cir. 1994) (the failure to instruct on lesser offense of murder violates due process if the failure results in fundamental miscarriage of justice); *Tate v. Carver*, 917 F.2d 670, 671 (1st Dist. 1990) (same); *Vujosevic v. Rafferty*, 844 F.2d 1023, 1028 (3d Cir. 1988) (it is constitutional error not to instruct a jury on a lesser offense that is supported by the evidence).

The Appellate Court's decision in *People v. Boisvert*, 27 Ill. App 3d 35, 325 N.E.2d 644 (2d Dist. 1975), captured the essence of this rule when it cautioned judges to:

> liberally apply the rules respecting the giving of instructions on lesser included offenses when requested by a defendant so as to give them freely in cases where there is any evidence fairly tending to bear upon the issue of that offense even though the evidence may be weak,

> insufficient, inconsistent or of doubtful credibility. * * * The defendant should be given the benefit of the doubt and the instruction as to the lesser included offense should be given in respect for the jury's central role in our jurisprudence.

Boisvert, 27 Ill. App. 3d at 42-43, 325 N.E.2d at 650.

1. The evidence in this case supported an involuntary manslaughter instruction even when considered in the light most favorable to the prosecution.

In assessing whether a defendant charged with first degree murder is entitled to an involuntary manslaughter instruction, the court must determine whether there is any evidence, when viewed in the light most favorable to the defense, that justifies such an instruction. See *Whiters*, 146 Ill.2d at 441, 588 N.E.2d at 1174 (involuntary manslaughter instruction was mandated even though the defendant's testimony was the sole evidence of recklessness). In light of this rule, there can be no doubt that the jury in this case had to be instructed on involuntary manslaughter. Before proceeding to examine the evidence in that light, however, we first will demonstrate that even if all the evidence is considered in the light most favorable to the prosecution, a reasonable jury could easily have concluded that Vincent DiVincenzo was guilty of involuntary manslaughter There was not simply "some" evidence to support such a finding. Rather, the evidence forcefully supported the conclusion that while Vince DiVincenzo was reckless in light of the risks associated with his actions--he did not know there was a "strong probability" that his acts would have tragic consequences.

As we described above, scores of cases have held that recklessness is *a* possible (if not *the only* possible) jury inference about a defendant's state of mind based on his having engaged in a weaponless fight. See *supra* 27-32. Unless it is absolutely clear that this case fits within one of the exceptions to this principle, the jury should have been allowed to determine whether involuntary manslaughter was the appropriate verdict. Once these exceptions are analyzed, it becomes evident

that this case does not fall within either of them, much less fall within them so squarely that it was permissible to preclude the jury from makings its own inferences.

a. The Exception for Significant Disparity In Size and Strength

Courts have routinely recognized that a significant size disparity between the defendant and the victim can prove that the defendant intended to kill or do great bodily harm or, at the very least, knew about the "strong probability" that his actions would cause such results. *See People v. Reeves*, 228 Ill. App. 3d 788, 797-799, 593 N.E.2d 683, 691-692 (1st Dist. 1992) (where a 250-pound man who went by the name "Crusher" beat a 168-pound man, it could be inferred that "the two would not be evenly matched in a fight").[3] This rule is most often applied in cases where an adult beats a child, and is based on the realization that an adult necessarily understands the life-threatening risks of using even bare fists against a child. See, *e.g.*, *People v. Oaks*, 169 Ill.2d 409, 662 N.E.2d 1328 (1996) (murder conviction affirmed where defendant massively beat a 3-year-old child); *Drumheller*, 15 Ill. App. 3d at 421, 304 N.E.2d at 458 (blows to 14-month-old child supported a murder conviction because even though "a fatal blow from a bare fist" will not typically be considered murder, "where disparity in size and strength are so great, such disparity can warrant a conviction for murder"). This rule has no bearing on this case at all. To the extent there was any size disparity between Vince DiVincenzo and Joe Novy, that disparity *favored Novy*, who was three inches taller and twenty pounds heavier than Vince.

Similarly, this is not a case in which some physically fit defendant beat a weak, elderly, or incapacitated person. See, *e.g.*, *Brackett*, 117 Ill.2d at 180, 510 N.E.2d at 882 (21-year-old

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[3]The Appellate Court relied on *Reeves* without ever recognizing that *Reeves* fits squarely into the exception for disparity in size and strength--a factor that is wholly absent in our case.

defendant who beat an 85-year-old woman could not credibly maintain that he "did not know that his acts created a strong probability of death or great bodily harm"); *People v. Rodgers*, 254 Ill. App. 3d 148, 626 N.E.2d 260 (2d Dist. 1993) (defendant delivered six to eight hard punches to person who was sleeping); *People v. Robinson*, 192 Ill. App. 3d 225, 548 N.E.2d 674 (1st Dist. 1989) (savage beating of victim who was "intoxicated and uncoordinated"). Both Joe Novy and Vince DiVincenzo were young athletic men, Joe Novy was both taller and heavier than Vince. C2221-2222.

b. The Exception for Beatings of Extraordinary Brutality, Duration, and Severity

Even when the size and strength of the defendant and the victim are relatively equal, there are some situations in which the duration of the beating is so prolonged and the brutality of the beating is so extreme that it can readily be determined that the defendant must have intended to cause, or at least must have known about the strong probability of causing, death or great bodily harm. See *People v. Oaks*, 169 Ill.2d 409, 459, 662 N.E.2d 1328, 1350 (1996); *People v. Tye*, 141 Ill.2d 1, 15-16, 565 N.E.2d 931, 938 (1990). Although this Court has always mentioned this exception in conjunction with disparities in size and strength, we are willing to proceed on the assumption that certain types of prolonged, savage beating support the inference that the defendant had a murderous state of mind.

In *People v. Rodgers*, the case upon which the Appellate Court chiefly relied in affirming the denial of an involuntary manslaughter instruction in this case, the defendant had announced that he intended to kill the victim and then broke into the house where the victim was sleeping. As the victim slept, the defendant delivered six to eight full force blows to the victim's head. After the defendant was interrupted by someone trying to defend the victim, the defendant resumed the beating and delivered three to five additional punches, during which, the "defendant's hand was 'splashing blood

all over.'" *Rodgers*, 254 Ill. App. 3d at 149, 626 N.E.2d at 261. The court in *Rodgers* concluded that the utter brutality of the prolonged beating, together with the fact that the defendant had stated his intent to kill the victim, precluded a finding of involuntary manslaughter. *Id.* at 153, 626 N.E.2d at 263. See also *Ward*, 101 Ill.2d 451-452, 463 N.E.2d at 700 (a finding of involuntary manslaughter was impossible in light of the "sickening severity" with which the defendant beat the child-victim).

Nothing about the brutality, duration, or severity of the blows in this case can possibly support a conclusion that this was an extraordinary beating, the "sickening severity" of which necessarily demonstrates that Vincent DiVincenzo had a murderous state of mind This was not a case in which a defendant caved in the skull of his victim or persisted in beating a victim whose head was "splashing blood" around the room. The prosecution's own expert witness agreed that Joe Novy's death resulted from a rare phenomenon, a domino-type reaction, through which the impact of a punch or a kick caused the head to jerk back which, in turn, caused an artery within Joe's brain to tear. C2641-2683 (testimony of Dr. Jones that the tragic results of Vincent DiVincenzo's action were highly unpredictable and the result of a "rare phenomenon"). C2683, 2665, 2679. This is obviously a far cry from the "high probability" standard that would support first degree murder and foreclose consideration of involuntary manslaughter.

Moreover, even when the evidence is viewed in the light most favorable to the prosecution, the entire episode in this case lasted no more than seven seconds. C2289. During this time, according to the prosecution, Vince punched Joe Novy several times, although the only punch that had any relation to Joe's death was a punch to Joe's left jaw. Once Joe was on the ground, the prosecution maintains that Vince kicked him twice in the back. It is clear, though, that neither of these kicks was very hard, for the small black and blue marks on Joe's back were hardly visible to the

naked eye. See C2555. As for the other alleged kick to the back of Joe Novy's neck, no skin was torn in this area and no bones were broken in that region. C2645. The prosecution's expert acknowledged that the external injuries did not even "appear significant." C2645. This evidence negates any notion that this was a savage beating like that involved in *Rodgers* or other cases in which the utter brutality of the defendant's actions demonstrated that he *knew* that the natural consequences of his acts were to destroy another's life.

It is also significant that, unlike the defendants in other cases (such as *Rogers)* who persisted in pummeling their victims until someone pulled them off or the authorities arrived, it is undisputed that Vincent DiVincenzo stopped fighting of his own volition after six or seven seconds, once he realized that Joe Novy was down. Mr. Berens testified that by the time he got outside of his house, Vincent had already stopped fighting and was leaving. C2310, 2326. This action obviously belies any intent or knowledge on Vince's part that his acts would destroy Joe Novy's life, distinguishing this case from *Rogers* and others where the defendants so clearly sought to kill or maim their victims.

Perhaps the best evidence that this was not the type of vicious beating that can support a murder conviction is the prosecution's own admission, and the trial court's clear finding, that Vince did not intend to kill or seriously injure Joe Novy. In its opening statement, the prosecution told the jury that "you will not hear any evidence that the defendant planned to murder Joseph Novy or that he intended to kill Joseph Novy, but you will hear evidence that the cause of death was related to the defendant's beating of Joseph Novy." C2176. Similarly, Judge Dockery was emphatic in finding (during sentencing) that "it is clear that the defendant did not intend to kill Mr. Novy. I believe he did not even intend to cause him great bodily harm." C4667. Were this, in fact, the kind of severe and heinous beating that put the defendant on notice of the grave natural consequences of his acts,

then surely the prosecution would have alleged that Vince intended to harm Joe Novy--that he intended the natural consequences of his act. See *People v. West*, 137 Ill.2d 558, 585, 560 N.E.2d 594, 606 (1990) ("Defendant is presumed to intend the natural and probable consequences of his acts, and evidence that the defendant committed a voluntary and willful act which has the natural tendency to cause death or great bodily harm is sufficient to prove the intent required for the offense of murder.").

This was a fight between two young men, not too unlike so many other fights that occur daily. Even when the evidence is viewed in the light most favorable to the prosecution, there was no indisputable proof that Vincent DiVincenzo knew that this fight would be the one-in-a-million that would end catastrophically. An involuntary manslaughter verdict would have been well within the realm of reasonableness, and the jury had to be given the chance to consider that option.

2. When the evidence is viewed in the light most favorable to the defense, there can be no doubt whatsoever that the jury had to be instructed on involuntary manslaughter.

As we have pointed out above, a defendant is entitled to have the jury instructed on involuntary manslaughter when there is "*any*" evidence in the record to support a finding of recklessness. Once the evidence in this case is examined in this light--in the light most favorable to the defense--there can be no doubt whatsoever that Vincent DiVincenzo was entitled to have the jury instructed on involuntary manslaughter. See *People v. Whiters*, 146 Ill.2d 437, 441, 588 N.E.2d 1172, 1174 (1992) (involuntary manslaughter instruction was mandated even though the defendant's testimony was the sole evidence of recklessness).

Throughout his testimony, and in the statements to the police and prosecutors that were admitted into evidence, Vincent consistently maintained that he had never kicked Joe Novy in the

head. C3259. Rather, Vincent testified that during their verbal altercation, immediately after Joe Novy pushed him, Joe Novy stepped back and clenched his fist as if about to throw a punch. Vincent testified (and told the authorities) that he responded by punching Joe Novy in the face with his right hand. C3256. Vince then punched Joe in the face, at which time Joe fell to the ground "on like all fours sort of like crouched up." C3256-3257. Vincent stated that the only action he took that resembled a kick was "sort of a kneeing motion" while Joe Novy was down on all fours. R3258. Vince also testified that he grabbed Joe Novy with both hands while we was on all fours and pushed Joe Novy down hard. C3259. After he pushed Joe Novy down, Vince said, "stay down. Just stay there." C3259. Vince then walked away. C3260.

Vince further explained that the officers who questioned him asked him whether he had kicked Joe Novy and told him that a witness claimed to have seen him kick Novy. Vince testified that he told the officers, "well, I didn't think of it as a kick, it was sort of like a knee motion." C3268. Vince testified that at the time he left the scene, he did not even think that he had hurt Joe Novy. R3288.

Dan Frasca, the young man who was with Vince DiVincenzo that day, testified likewise that he saw Vince slap Joe and throw two punches only after Joe Novy stepped back, clenched his fist, and started to bring his arm up in a punching manner. C2870, 2887. Dan Frasca testified that these punches were thrown in a "pretty fast sequence. It was like 1-2-3 pretty much." C2876. Dan never saw Vince kick Joe Novy. C3075. Dan Frasca testified that when he and Vince left after the brief fight it did not appear to Dan that Joe Novy was hurt. C2873.

Expert testimony presented by the defense further supported the defendant's right to an involuntary manslaughter instruction. Dr. Beatty testified that there was no way even to determine that Joe Novy had died from any impact to the head, much less that it was the natural consequence

of any such blow to cause grievous injury. C3027. Dr. Mark Steinberg, another expert, testified that the fracture to Joe Novy's jaw could have been caused by minimal force, and that the bruises he saw on the back of Joe Novy (including the one on the head) most certainly involved only minimal force. C3205, 3225-3226. Indeed, Dr. Steinberg testified that he had never seen a case in which such minimal force as that involved here had resulted in this sort of injury, much less death. C3226.

The testimony presented by the defense was unquestionably capable of supporting a jury verdict of involuntary manslaughter. Crediting Vince's testimony (as is the rule when assessing purposes of the entitlement to an involuntary manslaughter instruction), we are left with a fight that involved only bare fists, a knee, and a push. This fight does not even seem particularly rough, much less so violent as to preclude an involuntary manslaughter instruction. Moreover, crediting the expert testimony presented by the defense, we are left with evidence that the blows struck by Vince were ones that even experts would never have expected to cause tragic results.

The Appellate Court ignored the settled principle of looking at the evidence in the light most favorable to the defendant in determining whether an involuntary manslaughter instruction is appropriate. In assessing Vincent's entitlement to an involuntary manslaughter instruction, the Appellate Court relied, at least in part, on the fact that "the defendant told the police that, as he observed the victim struggling on the ground, he kicked the victim in the stomach." Slip op. 20. Recognizing that the defendant (and another eyewitness) testified at trial that there was no such kick, the Appellate Court went on to state:

> Although we are aware that the defendant testified contrary to his recorded police statement at trial, his voluntary statement was nonetheless an admission which the trial court was free to consider. * * * We also note that Dr. Jones' testimony that the victim had bruises on his back and neck lends support to the testimony that the defendant kicked the victim several times.

Slip op. 21. It is plain that the Appellate Court did just what this Court condemned in *Jones:* it decided to "weigh the evidence" on its own rather than "determine whether there is some evidence supporting" the theory of recklessness. *Jones*, 175 Ill.2d at 132, 676 N.E.2d at 649. In assessing the defendant's entitlement to the instruction, the Appellate Court should not have asked whether there was some evidence of a kick (be it an out-of-court admission or any other evidence) that could be admitted against Vince. It should have asked whether there was any evidence that could support an involuntary manslaughter instruction, *i.e.*, that Vince was reckless as to the possible consequences of the fight. There can be no doubt that a jury crediting the defendant's account of the event would have been entitled, if not compelled, to return a verdict of involuntary manslaughter.

The Appellate Court also erred when it suggested that involuntary manslaughter only applies where the defendant acted unintentionally yet recklessly (such as the accidental firing of a gun during a struggle), but does not apply where the defendant acted intentionally but recklessly disregarded the dangerous consequences of his act (such as intentionally punching or kicking someone) Slip op. at 21. This reasoning is fundamentally wrong. As we have explained above, the statute provides that "a person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist *or that a result will follow*." 720 ILCS 4/4-6. Dozens of cases, including the weaponless fight cases that we discussed earlier, have held that involuntary manslaughter follows from *intentional or deliberate acts* that cause death when a defendant is *reckless* about the risks of his acts. See, *e.g.*, *People v. Brooks*, 115 Ill.2d 510, 523, 505 N.E.2d 336, 341 (1987) (intentionally forcing a child to ingest a salt-water solution); *People v. Holmes*, 246 Ill. App.3d 179, 181, 616 N.E.2d 1000, 1002 (3d Dist. 1993) (intentionally shaking a baby); *People v. Parr*, 35 Ill. App. 3d 539, 542, 341 N.E.2d 439, 442 (5th Dist. 1976) (intentionally striking

victim); *People v. Guthrie,* 123 Ill. App. 2d 407, 258 N.E.2d 802 (4th Dist. 1970) (intentionally tying victim to a tree and leaving him there where he died of exposure).

To be sure, because *any* intentional use of a *lethal* weapon is so obviously treacherous, entitlement to an instruction on involuntary manslaughter in cases involving lethal weapons will typically require "evidence that the weapon was not discharged intentionally, but given the surrounding circumstances, the use and presence of a loaded firearm was reckless." *People v. Gresham*, 78 Ill. App. 3d 1003, 1006, 398 N.E.2d 398, 401 (3d Dist. 1979). By contrast, defendants accused of causing deaths resulting "from the use of non-lethal weapons, such as fists" are entitled to involuntary manslaughter instructions even though it is plain that the punches or kicks (but not the awful consequences) were intentional.

Ultimately, the only possible basis for denying the involuntary manslaughter instruction in this case would be to reason--as the trial court apparently did--that the danger of throwing two punches and pushing someone is so manifest that the defendant will not be heard to deny that he possessed knowledge about the strong probability of great bodily harm. See C3454-3459. In other words, that the use of a fist, like the use of a deadly weapon, creates a nigh irrebuttable presumption of knowledge sufficient to support a first degree murder conviction. As we have discussed above, though, the law is precisely to the contrary. See *supra* 27-32. Fights of this sort are ordinarily presumed to result in involuntary manslaughter, not first degree murder, and no case has ever held on facts similar to these that a defendant could properly be deprived of an involuntary manslaughter instruction.

The fact is that courts have routinely found recklessness on facts far more egregious than those involved here. In *People v. Woods*, 80 Ill. App. 3d 56, 398 N.E.2d 1086 (1st Dist. 1979), for example, the court stated:

> After Jones struck defendant once, a blow which admittedly did not hurt, defendant struck Jones four times. One blow was rendered as Jones, who appeared dazed, fell to the ground. Defendant saw Jones holding his head after he fell to the sidewalk. Defendant then bent over him. Although Jones no longer presented any threat to defendant and it was apparent that he was incapable of causing great bodily harm to anyone, nevertheless, defendant would have continued beating Jones if he had not been pulled away. We believe these actions on the part of defendant evidence the type of recklessness defined in the statute.

Id. at 62, 398 N.E.2d at 1091. See also *People v. Earullo*, 113 Ill. App. 3d 774, 447 N.E.2d 925 (1st Dist. 1983) (involuntary manslaughter affirmed where two defendants both punched the victim many times, kicked him 8 or 10 times, threw him against a wall, and then stomped on his back).

In *People v. Gresham*, the court surveyed Illinois law on weaponless fights and explained:

> differences between murder and manslaughter involve consideration of degree. * * * Such considerations are particularly significant when the evidence is conflicting or is susceptible of more than one inference and non-lethal instrumentalities caused death. When the evidence is conflicting and more than one inference may be reasonably drawn from it, it is the province of the jury to decide whether the accused is guilty of manslaughter or murder if there is any evidence which tends to prove the lesser crime.

Gresham, 78 Ill.App.3d at 1007, 398 N.E.2d at 402. Notwithstanding this well-settled principle, the jury that passed upon Vincent DiVincenzo's fate was never given the option of finding him guilty of involuntary manslaughter. The conviction in this case must be reversed so that Vincent DiVincenzo has the benefit of a jury that is given the opportunity to consider the crime that comes to any lawyer's mind when he or she hears about a weaponless fight between teenagers--involuntary manslaughter. As this Court stated in *People v. Bartall*, 98 Ill.2d 294, 456 N.E.2d 59 (1983), "whether the defendant is guilty of murder because his acts created a 'strong probability' of death or

great bodily harm or whether he is guilty of involuntary manslaughter because his acts create a 'substantial and unjustifiable risk' of such results is a question for the trier of fact." *Id.* at 307, 456 N.E.2d at 65.

II. VINCENT DIVINCENZO'S CONVICTION SHOULD BE REDUCED TO INVOLUNTARY MANSLAUGHTER.

For the reasons we have just set forth, there can be no doubt that Vincent DiVincenzo was entitled to have the jury instructed on involuntary manslaughter. Indeed, we submit that the evidence in this case--even when taken in the light most favorable to the prosecution--can support only a finding of involuntary manslaughter, and not first degree murder. For this reason, we ask the Court to reverse the first degree murder conviction outright. Although we acknowledge that this is a more difficult issue than the entitlement to the involuntary manslaughter instruction, we believe that the evidence is incapable of supporting a reasonable inference that Vincent "knew" that his acts created a "strong probability of death or great bodily harm," as those terms are defined for purposes of the first degree murder statute. Under these circumstances, the Court should hold that Vincent DiVincenzo is guilty of no more than involuntary manslaughter. See *Mighell*, 254 Ill. at 59, 98 N.E.2d at 239; *Towers*, 17 Ill. App. 3d at 475, 308 N.E.2d at 228.

In order to find that there was sufficient evidence to support a first degree murder conviction in this case, the Court would have to find that a jury could reasonably infer that Vincent DiVincenzo had actual knowledge that his acts created a "strong probability" of causing death or grievous injury. The Court would have to find that, notwithstanding the prosecution's own expert testimony that Joe Novy's death was a fluke occurrence that even experts could not have predicted, a jury could reasonably infer that Vincent DiVincenzo had actual knowledge that his acts had the natural tendency

to destroy Joe Novy's life. As we explained above, many cases from this Court, as well as from Illinois Appellate Courts, have held that it is unreasonable to infer a murderous state of mind from this sort of weaponless fight. See *supra* 27-32.

Moreover, simple common sense tells us that most fights of this sort do not end up leading to serious injury, much less death. How, then, can it be reasonable for a jury to have concluded that Vincent DiVincenzo had actual knowledge that his acts--be they punches or kicks--created the "strong probability" of such results? The issue in this case is not whether fighting among teenagers should be condemned. The issue is whether a high school senior who fights with another young man for six seconds, using no weapons and walking away from the scene after throwing only a few punches or kicks, has the mental state of a *murderer*. Ultimately, it defies reality and scores of precedents to suggest that such a person is imputed with knowledge that his acts carry a strong probability of great bodily harm of the sort that has the natural tendency to destroy another's life.

One can readily understand why a jury might have decided to convict Vincent DiVincenzo of first degree murder notwithstanding the clarity of the evidence negating any inference that he had the type of knowledge required to support a first degree murder conviction. Because the jury was given no opportunity to consider involuntary manslaughter, it was left with the choice of convicting the defendant of first degree murder or acquitting him totally (thus allowing him to go totally unpunished). As this Court has noted, when faced with such a choice "a jury, which believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense." *People v. Bryant*, 113 Ill. 2d 497, 502, 499 N.E.2d 413, 415 (1986). Given the nature of the evidence in this case it is quite sensible to conclude that the jury here did exactly what the Court in *Bryant* predicted: rather

than acquit Vincent DiVincenzo when he was obviously guilty of *something*, the jury chose to convict him of an offense that was not supported by the evidence.

To convict a defendant of first degree murder is to convict him of the most serious offense known to law. It is, we submit, unthinkable to equate Vince DiVincenzo's actions with those that have been held to constitute murder. It simply cannot be true that a person who has a fight with another person of the same general size and strength is guilty of first degree murder if, by some fluke occurrence, a punch or a kick leads to death. With the benefit of hindsight we now know exactly how treacherous the results of Vincent's acts turned out to be. But this is not a tort case in which a defendant "must take the plaintiff as he finds him" even if the victim suffers an "an injury that ordinarily would not be reasonably foreseeable." *Colonial Inn Motor Lodge v. Gay*, 288 Ill. App. 3d 32, 680 N.E.2d 407, 416 (2d Dist.1997). Nor do we operate under a system that allows no exercise of judgment and requires that any person who kills another be deemed a murderer. See Herman Melville, *Billy Budd* (1948 ed.). Rather, under our system of laws, a first degree murder conviction may only be sustained upon proof beyond a reasonable doubt that Vince DiVincenzo knew before he acted that his acts created a "strong probability"of destroying Joe Novy's life.

Jury verdicts are, of course, afforded considerable deference and the standard of review reflects this deference by considering the evidence in the light most favorable to the prosecution and assessing whether a reasonable jury could have found that the essential elements of the offense were proved beyond a reasonable doubt. *People v. Campbell*, 146 Ill.2d 363, 374, 586 N.E.2d 1261, 1265 (1992). Nonetheless, this Court has made it clear that "while we will not lightly regard the jury's judgment on credibility questions, it is our duty, where a verdict of guilty is returned by a jury not only to carefully consider the evidence but to reverse the judgment if the evidence is not sufficient

to remove all reasonable doubt of defendant's guilt and is not sufficient to create an abiding conviction that he is guilty of the crime charged." *People v. Newell*, 103 Ill.2d 465, 470, 469 N.E.2d 1375, 1377 (1984) (quoting *Bartall*, 103 Ill.2d at 470, 469 N.E.2d at 1377). This standard is designed to protect a defendant's rights under both Illinois law and the United States Constitution's Due Process Clause. See *Jackson v. Virginia*, 443 U.S. 307 (1979). The evidence in this case, we respectfully submit, is decidedly incapable of creating an "abiding conviction" that Vince DiVincenzo is guilty of first degree murder--the most heinous crime known to man.

The gradations within the Criminal Code's treatment of homicide are intended to reflect the very different levels of moral and legal culpability of different defendants whose acts cause death. Even when the evidence is considered in the light most favorable to the prosecution, Vincent DiVincenzo is a young man who got into a fight--he is not a first degree murderer.

This is not to suggest that Vince DiVincenzo should go unpunished. A person who causes death through fighting surely deserves punishment, and involuntary manslaughter is the tool suited for that purpose. As the court recognized in *People v. Parr*, 35 Ill. App. 3d 539, 341 N.E.2d 439 (5th Dist. 1976):

> it is within realm of common experience for an actor to realize that the effect of a blow with a fist is likely to be far greater than the effect of the initial impact on the recipient. Indeed, frequently the objective in such confrontations is knocking down the opponent. Consequently, where an individual sees fit to strike another individual with his fists and, as a direct consequence of such blow, the recipient falls, strikes his head, and dies, we see no justification for reducing the degree of criminal liability from involuntary manslaughter to some lesser offense.

Id. at 542, 341 N.E.2d at 442.

Because the evidence in this case cannot reasonably support the conclusion that Vince DiVincenzo possessed a murderous state of mind, this Court should either remand for trial on

involuntary manslaughter or, in the alternative, reduce the conviction to involuntary manslaughter. As the trial court found, Vincent DiVincenzo is remorseful about the events of that tragic day. C4666. Although he passionately denies that he is guilty of first degree murder, Vincent is prepared to accept responsibility for his acts and believes that justice would have been served had he been convicted of involuntary manslaughter. We respectfully ask, therefore, that this Honorable Court invoke its power under Illinois Supreme Court Rule 615(b) and reduce this conviction to involuntary manslaughter. See generally *People v. Davis*, 112 Ill.2d 55, 63, 491 N.E.2d 1153, 1157 (1986); *People v. Nixon*, 278 Ill.App.3d 453, 459, 663 N.E.2d 66, 70 (3d Dist. 1996).

Vincent DiVincenzo, a young man with no criminal background and a college future, has been sentenced to 26 years in prison as a result of a six second fight. His life, and the lives of his family, have been decimated by the sentence and stigma associated with first degree murder--a label that so clearly does not apply to the conduct of which he is accused. This Court has the power and the authority to mitigate this damage.

III. THE GRAND JURY INDICTMENT SHOULD HAVE BEEN DISMISSED IN LIGHT OF THE PROSECUTION'S CONDUCT IN THE GRAND JURY.

The Grand Jury proceedings in this case were truly extraordinary. After hearing all of the evidence that the prosecution presented, the Grand Jury deliberated and voted to return a no bill on first degree murder . Accordingly, the foreperson instructed the prosecutor to prepare the paperwork for a no bill on first degree murder and to present some appropriate lesser charges. Supp. C10-12. Instead of complying with the vote of the Grand Jury, however, the prosecutors spoke to a source from whom they learned the details of the Grand Jury's secret deliberations, in clear violation of the rules governing Grand Jury secrecy. See 725 ILCS 5/112-6. Then, armed with this information

about the Grand Jury's secret deliberations, one of the prosecutors (who had not even been present when the evidence was presented to the Grand Jury) lectured the grand jurors in a manner that not only misstated the governing law, but forcefully pressured the Grand Jury to discard its vote and to comply with the prosecutors' clear wishes. These pressure tactics worked and the grand jurors ultimately voted to indict on first degree murder. As we will now explain, the prosecutors' conduct in relation to this Grand Jury negated the vital function of the Grand Jury "to act as a buffer between the prosecutor and the accused" so that citizens' rights are "not at the mercy or control of a prosecutor." *People v. Benitez*, 169 Ill.2d 245, 251, 254, 661 N.E.2d 344, 347, 349 (1996).

A. The Prosecution Violated The Independence And Integrity Of The Grand Jury By Unduly Pressuring The Grand Jurors To Reconsider Their Completed Vote Of A No Bill.

When the Grand Jury voted a no bill on the charge of first degree murder against Vincent DiVincenzo, that should have been the end of the matter. Yet, in defiance of the Grand Jury's vote, Mr. John Kinsella--a high ranking official in the State's Attorney's office--spoke to the Grand Jury for the first time and prodded the grand jurors to return a first degree murder indictment. At one point, a grand juror confronted ASA Kinsella, reminding him that the Grand Jury had already voted a no bill on first degree murder and criticizing ASA Kinsella's effort to "push the Murder One issue." Supp. C27. Ultimately, though, the Grand Jury succumbed to the prosecutors' pressure and returned a true bill on first degree murder. Supp C36.

Mr. Kinsella's lecture to the Grand Jury delivered an unmistakable message the State's Attorney's office was very unhappy with the Grand Jury's no bill vote and believed that the grand jurors had somehow ignored their oath of office. Mr. Kinsella's attack on the Grand Jury's vote included the following intimations that the grand jurors were not following the law:

- "If there is information that you are relying upon which was not presented in testimony by any of the witnesses, I would suggest that you point that out." Supp. C14.

- "If anybody has a problem with being objective in this case, you should point that out." Supp. C14.

- "I would suggest to you that it is improper for you to decide that there is no probable cause in light of the facts simply because there is a feeling of sympathy towards the accused." Supp. C15.

- "I am here to make sure everybody follows the law." Supp. C28-29.

It is certainly not surprising that the grand jurors retreated from their position after being bombarded with this flurry of accusations from a high ranking official in the State's Attorney's Office.

There is no way to reconcile this coercive behavior with the need to preserve the "historic independence of the grand jury." *People v. Fassler*, 153 Ill.2d 49, 58, 605 N.E.2d 576, 580 (1992). The Grand Jury "serves the invaluable function in our society of standing between the accuser and the accused * * * to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *People v. Rogers*, 92 Ill.2d 283, 288, 442 N.E.2d 240, 243 (1982) (quoting *Wood v. Georgia*, 370 U.S. 375, 390 (1962)). See generally *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (a Grand Jury proceeding presupposes an "investigative body acting independently of either prosecuting attorney or judge"). For this reason, Illinois courts have long possessed the inherent power to dismiss indictments where the prosecutor's conduct has subverted the role of the independent Grand Jury. See *People v. Lawson*, 67 Ill.2d 449, 367 N.E.2d 1244 (1977); *People v. Haag*, 80 Ill. App. 3d 135, 399 N.E.2d 284 (2d Dist. 1979). As this Court has explained, "the Grand Jury is an integral part of the court, and the court has the inherent power to supervise and prevent perversion of the Grand Jury's process " *In re May 1991*

Will County Grand Jury, 152 Ill.2d 381, 393, 604 N.E.2d 929, 935 (1992). See also *People v. Sears*, 49 Ill.2d 14, 28, 273 N.E.2d 380, 387-388 (1971) ("A supervisory duty, not only exists, but is imposed upon the court, to see that its Grand Jury and its process are not abused, or used for purposes of oppression and injustice.").

Although no Illinois court has, to our knowledge, ever been confronted with the specific type of prosecutorial conduct involved here, several cases from other jurisdictions have dismissed indictments based upon a prosecutor's having pressured the Grand Jury after an initial return of a no bill. See *State v. Pickens*, 183 W. Va. 261, 395 S.E.2d 505 (1990); *State* v. *Butterfoss*, 561 A.2d 312 (N.J. Sup. Ct. 1988); *State v. Hart*, 354 A.2d 679 (N.J. Sup. Ct. 1976); *People v. Groh*, 395 N.Y.S.2d 212 (N.Y. Sup. Ct. 1977).

In *Butterfoss*, the Grand Jury had initially refused to return a kidnaping indictment, but changed that vote as a result of the prosecutor's exhortations. The Court dismissed the resulting indictment, finding that the prosecutor had exerted "improper influence" and had invaded the autonomy of the Grand Jury. The court explained that when the prosecutor, without presenting any new evidence to the Grand Jury,

> asked the Grand Jury to reconsider the kidnaping charge he sent a clear message that it should indict Butterfoss on that charge * * *. Thus, the prosecutor strongly underlined an insistence that the Grand Jury return an indictment which it previously had decided not to return. That action, standing alone, reflects an influence which is not proper. * * * In clear effect, he told the Grand Jury that it should indict, an instruction which interfered with its independence.

561 A.2d at 314-315.

Similarly, in *Groh*, the prosecutor confronted the Grand Jury after it had voted not to bring charges and told the grand jurors that further instructions might enable them to "adequately reach a judgment on the matter." 395 N.Y.S.2d at 214. The court held that the prosecutor's conduct

compromised "the very heart and integrity of the Grand Jury system." *Ibid.* "The methods employed, although no doubt well motivated, were coercive in fact and, if permitted to go unchecked, would tend to destroy both the value and purpose of our Grand Jury system. * * * To sanction such a procedure, no matter how well intentioned it may have been in this case, would permit prosecutors in the future to coerce or badger grand jurors to change their solemnly arrived at determinations." *Id.* at 214, 215.

The Appellate Court in our case sought to distinguish this line of cases by observing that the grand jurors in the DiVincenzo case had not yet formally signed the no-bill form. Slip op. 29. It is beyond dispute, however, that the grand jurors in this case had already voted a no bill, announced that vote to the prosecutor, made it clear that they had completely finished deliberating on first degree murder and had instructed the prosecutor to prepare the no bill. The Appellate Court's focus on whether the form was ever signed ignores the governing statute which makes clear that no formal documents need ever be signed with reference to a no bill. See 725 ILCS 5/112-4 ("When the evidence presented to the grand jury does not warrant the return of a Bill of Indictment, the State's Attorney may prepare a written memorandum to such effect entitled, 'No Bill.'"). As the Committee Comment explains, the formal no-bill document is entirely optional, "it is not necessary." Committee Comment to 725 ILCS 5/112-4. Moreover, the only reason that the form was not signed was that the prosecutor declined to present it to the grand jury: instead of bringing a no-bill form as promised, she brought another Assistant State's Attorney to harangue the grand jury. The Appellate Court was wrong when it allowed the prosecutors' very failure to comply with the grand jury's request for the no-bill form to serve as the prosecutors' justification for continuing to pressure the grand jury to abandon its completed vote.

Similarly, there was no basis for the Appellate Court's suggestion that the prosecutor was simply trying to clear up some confusion that the grand jurors had about the law. Slip op. 29-30. There is absolutely no evidence of any such confusion. Assistant State's Attorney Creswell had made it very clear to the grand jury before the initial vote that Vincent DiVincenzo was being charged with first degree murder on the ground that he had performed acts causing death while *knowing* that such acts created a strong probability of death or great bodily harm. Supp. C4-C5. She told the grand jury in no uncertain terms that there was "nothing * * * about intent" in the provision under which she was asking the grand jury to return a first degree murder indictment. Supp. C4. "If it is charged under this section, we are not required to prove that he intended to kill him or that he was premeditated." Supp. C4-C5. She further explained that

> There is a number of different ways to word an indictment because there is a number of different ways the Legislature has determined constitutes First Degree Murder
>
> The way it has been drafted right now is, under 9-1(a)(2), that he knew that his acts created a strong probability of great bodily harm. It does not include the element of intent.

Supp. C7. Thus, when the grand jurors began their deliberations, there was no risk that they mistakenly believed that they would have to find intent in order to return a first degree murder indictment. Nonetheless, the grand jurors voted a no bill and instructed Assistant Sate's Attorney Creswell to come back with some lesser charge. To her credit, Assistant State's Attorney Creswell made a point of making a clear record of the fact that the Grand Jury had "found a No Bill on First Degree Murder but that you want to deliberate further as to other possible charges." Supp C11.

Contrary to the Appellate Court's suggestion, ASA Kinsella's conduct in this case went far beyond his having "commented on his belief that first degree murder was the appropriate charge " Slip op. 30. This was a lengthy and coercive speech which had the design and effect of accusing the

grand jurors of being either stupid or dishonest if they failed to indict on first degree murder. The grand jury is designed to "protect the public from an overzealous prosecutor by interposing a lay buffer between them." *United States v. Shober*, 489 F. Supp. 393, 406 (E.D. Pa. 1979). It can hardly serve that function if prosecutors can ignore the grand jury's final decision and bully the grand jury until it "sees the light," as the prosecution defines it..

B. The Prosecution Misstated The Governing Law And Misled The Grand Jury.

Mr. Kinsella's successful efforts to pressure the Grand Jury are cause enough to dismiss the indictment in this case. The fact is, however, that the improprieties of ASA Kinsella's lecture went far beyond pressure and included several glaring misstatements of the governing law--misstatements that misled the Grand Jury with respect to the core issue of the case. Over and over again, ASA Kinsella suggested (a) that there was some substantial body of settled law declaring that fist fights leading to death typically constitute first degree murder, and (b) that the Grand Jury could indict for first degree murder without ever finding that Vince had *knowledge* that his acts created a strong probability of great bodily harm. Thus, far from clearing up confusion, ASA Kinsella muddled and manipulated the legal standards.

On at least six occasions, ASA Kinsella suggested that the grand jury could indict Vince DiVincenzo of first degree murder without finding that he had *knowledge* that his acts created a strong probability of great bodily harm. For example, he told the grand jury that it could look at the results of the fight in order to determine whether Vince should be indicted on first degree murder based on what he knew or *should have known*::

> You can look and consider what the consequences were. Okay? Because quite often the way a beating is done is not measured by amounts of pressure per square inch administered through the fist to the face. You look quite often at the results to determine what this person

knew or should have known would be the probable consequences. And you have a situation where the results are a broken bone in the face and the injury that Ms. Creswell just described.

Supp C17.

At another point, ASA Kinsella described the three sub-sections of the first degree murder statute, entirely omitting any "knowledge" component from his discussion of the relevant section:

> One of them I alluded to, which is the pointing of the gun and intent to kill. That is one of the types of Murder there can be. The other type is basically that you know that your acts will cause the death of someone. *And there is the version we are dealing with here, whether the acts created a strong probability of death or great bodily harm.* Supp. C. 19.

A few moments later, Mr. Kinsella told the grand jury that the knowledge element of the first degree murder is satisfied so long as "you perform acts, you know what acts you were performing." C23.

The absence of the knowledge component was glaring in the following colloquy between two grand jurors and Mr. Kinsella. (In order to avoid any charges of plucking quotations out of context, we quote the passage at some length here, italicizing certain passages that we believe to be particularly significant.)

> A JUROR: I am having a hard time with this. You know, I get into a fist fight with somebody. I don't mean to kill somebody but if I hit him and a guy falls and whacks his head and gets a hemorrhage or something like that, that is what I am having my problem with in this thing.
>
> MR. KINSELLA: We are not dealing with a hypothetical set of facts.
>
> THE JUROR: I know that.
>
> MR. KINSELLA: We are dealing with specific facts, and your decision is not whether it is a good thing to indict this person or a bad thing or a fair thing. You are not here to consider favor or fear. You are here to decide probable cause, and *I am suggesting to you that the law is very clear that if somebody strikes someone, whether it be with their fist of their hand,* and we note that the consequences and the results are as indicated, that suggests with what force or velocity it was used and that that conduct does not fit within the self-defense sections we talked about in Second Degree Murder or provocation sections. If it doesn't fit within those,

and that force creates a strong probability of great bodily harm and that person dies as a result of those injuries, then that constitutes First Degree Murder.

Now, your scenario would depend on, if this was an unprovocated attack in which you attacked someone, striking them and kicking them, and *those facts are sufficient to create a strong probability, in this case, probable cause to believe that that creates a strong probable cause of great bodily harm and that person dies as a result, yes, that is First Degree Murder.*

Whether that is the right thing or wrong thing is not what you should be concerned with. You are concerned with whether there is probable cause to believe that these facts fit that law.

Okay? It is not up to you to decide equity and leniency. Okay? The trier of fact may do that. The judge may do that. The prosecutor may do that. You are here to decide probable cause.

Yes, sir.

A JUROR: I understand where you are coming from and the laws and guidelines, but the *you keep saying that you want to push the Murder One issue. I mean, what we got out of it and what we deliberated on, we got nothing out of a Murder One case, and I'm sorry, that's what I felt at the time.*

MR. KINSELLA: Well, what I am suggesting is that -- *take a step back and separate from your consideration emotions and leniency*, and remember what your job is, to believe that that these facts satisfy the elements of that crime. All right? It is not a question of whether he was a good kid or whether he just got out of the penitentiary, whether he had been a choir boy in the seminary his whole life. *The question is whether he performed acts which created a strong probability of great bodily harm and that person died as a result of those acts.*

Furthermore, there is a question to believe -- that is probable cause -- to believe that, and if there is confusion, I want to be sure it is decided appropriately, now is the time to correct it. If all those proper considerations were made and that is the result, so be it. And I am not here to push anything. *I am here to make sure everybody follows the law.* Okay?

Supp. C24-28 (emphases added).

This same absence of the key element of knowledge pervaded Mr. Kinsella's final discussion of the first degree murder statute, in which he stated that "if somebody strikes you and you receive 20 stitches by him beating you up, I would suggest to you that constitutes great bodily harm. *If you die as a result of someone performing such acts, creating a strong probability of great bodily harm,*

that would be murder." Supp. C31. These repeated misstatements of the elements of a first degree murder indictment thoroughly eclipsed the very few times that ASA Kinsella accurately mentioned the presence of a knowledge requirement.

Such plain misstatements of law not only dominated the discussion of first degree murder, but also extended to the discussion of involuntary manslaughter. When asked by a juror about involuntary manslaughter, ASA Kinsella glibly dismissed the issue as irrelevant, telling the jury that "the only other option is that his conduct was reckless. Okay? And generally speaking, when somebody makes a fist, throws it at somebody's face and hits them, that is usually not a reckless act." Supp. C35.

These comments turned the law on its head. As we demonstrated above (*supra* 27-32), scores of cases have held that fist fights leading to death generally support involuntary manslaughter convictions because the defendants' acts evinced reckless disregard of the associated risks. The grand jurors were thoroughly misled, therefore, when they were told that the intentionality of an act--throwing a punch--negates the propriety of an involuntary manslaughter indictment.

Although the trial court reviewed these transcripts and found no evidence of misconduct (C548-556), that court's determination was based on review of the paper transcripts alone, and is therefore not entitled to any special deference by this Court. See generally *People v. Foskey,* 136 Ill.2d 66, 76, 554 N.E.2d 192, 197 (1990) ("when neither the facts nor the credibility of the witnesses is questioned, however, the issue * * * is a legal one and this court will consider the question de novo"). In general, review of a trial court's decision to dismiss or not to dismiss an indictment is conducted de novo. See *People v. Cora,* 238 Ill. App. 3d 492, 504, 606 N.E.2d 455, 463 (1st Dist. 1992).

In *People v. Barton*, 190 Ill. App. 3d 701, 546 N.E.2d 1091 (5th Dist. 1989), the Appellate Court observed that "the cases are consistent that the due process rights of a defendant are violated if the Grand Jury is deliberately or intentionally mislead by the prosecutor." *Id.* at 709, 546 N.E.2d at 1096. Many other courts have similarly ruled that fundamental misstatements of the law require the dismissal of a Grand Jury indictment. See, *e.g., People v. Batashure*, 552 N.E.2d 144, 147 (N.Y. 1990) (defect in instructions given to the Grand Jury "impaired the integrity of the Grand Jury proceeding"); *Crimmins v. Superior Court*, 668 P.2d 882 (Ariz. 1983) (failure to properly instruct the Grand Jury deprived the defendant of his right to fair and impartial Grand Jury consideration); *State v. Inthavong*, 402 N.W.2d 799, 802 (Minn. 1987) (misdescription of law is grounds for dismissing indictment where it is so "misleading or deficient that the fundamental integrity of the indictment process itself is compromised").

Although we do not suggest that this Court should dismiss every indictment in which a prosecutor misstates some legal principle, the misstatement of the law in this case--after the jury had voted a no bill and indicated that it wished to examine lesser charges--spoke to the core issue in the case and formed part of the pattern of abuse of this Grand Jury. As one court has put it, an indictment must be dismissed when the prosecutor's conduct "amounts to overbearing the will of the Grand Jury so that the indictment is, in effect, that of the prosecutor rather than the Grand Jury." *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982). A recent unanimous decision of New York's highest court speaks eloquently to this issue:

> Where, as here, the charges facing the defendant are of the most serious nature, society's interest in justice is especially great. Nevertheless, the prosecutor who submitted defendant's case to the Grand Jury disregarded his role as public officer and his "duty of fair dealing." The Grand Jury minutes are rife with instances of the prosecutor imparting his personal opinion regarding the proper inferences to draw from the testimony or physical evidence,

asking impermissible and inflammatory questions, and conveying--both directly and indirectly--his belief in defendant's guilt.

People v. Huston, 88 N.Y.2d 400, 406, 668 N.E.2d 1362, 1366 (N.Y. 1996).

C. The Prosecutors Took Advantage Of A Blatant Breach Of Grand Jury Secrecy.

If any more evidence of prosecutorial impropriety is deemed necessary to require dismissal of this indictment, that evidence can be found in the prosecutors' opportunistic use of information gained through the illegal breach of Grand Jury secrecy. The record establishes that Assistant State's Attorneys Creswell and Kinsella actively engaged in a conversation with Officer Tannahill, from whom they gained information regarding the Grand Jury's secret deliberations. Supp. C38-44. Then, instead of recusing themselves from any further participation in the Grand Jury, these prosecutors used the impermissibly obtained information to zero in on the issues that had been troubling the grand jurors during their deliberations. All this time, the grand juror who had breached the oath of secrecy was allowed to remain on the Grand Jury (indeed, for all we know, he provided the critical vote to indict). Only after the Grand Jury had returned the first degree murder indictment did the State's Attorney's office ask the Chief Judge to dismiss the grand juror. C460.

The defense subpoenaed several witnesses for an evidentiary hearing to determine exactly what these prosecutors were told about the deliberation before they reproached the Grand Jury. See 725 ILCS 5/114-1(d) (when issues of fact are presented by a motion to dismiss, "the court shall conduct a hearing"). The trial court quashed these subpoenas, however, ruling that two of this Court's precedents precluded the court from examining anything beyond the Grand Jury transcripts when evaluating the proprieties of the Grand Jury proceedings. See C393-394 (relying upon *People v. Linzy*, 78 Ill.2d 106, 398 N.E.2d 1 (1979), and *People ex rel. Sears v. Romiti*, 50 Ill.2d 51, 277

N.E.2d 705 (1971)). The Appellate Court affirmed the denial of a hearing, holding that "a trial court may not go beyond the record and conduct a hearing to receive testimony of grand jurors concerning charges of prosecutorial misconduct during the grand jury proceedings." Slip op. at 28.

We have no quarrel with the principle from *Linzy* which the trial court and Appellate Court articulated, but it has no bearing on this case. Indeed, the courts' decisions turned *Linzy* on its head. *Linzy* held that in light of the need to *preserve grand jury secrecy*, the defendant would not be allowed to call grand jurors as witnesses as to matters that happened *within* the grand jury. By contrast, the defense in this case sought to call witnesses (all but one of whom were not grand jurors) to testify about what happened *outside* of the Grand Jury in order to *combat a breach of Grand Jury secrecy*. The lower courts plainly erred when they deprived the defense of its right to establish the extent of the breach and the full scope of the prosecutorial misconduct that infected the indictments in this case.

Even without the hearing that should have taken place, however, there was enough evidence in the record to lead the Appellate Court to declare that it "certainly does not look favorably upon or wish to encourage the breach of grand jury secrecy that took place in the instant case." Slip op. 31. Yet, the court nonetheless declined to dismiss the indictment. With all respect to the Appellate Court, refusing to dismiss the indictment under these circumstances most certainly will "encourage the breach of grand jury secrecy that took place in the instant case." If there is no downside to a prosecutor's ignoring settled rules and frustrating the purpose of an independent grand jury, then there is every reason to believe that some prosecutors will take that very action when disappointed by a grand jury's vote. A rule with no teeth is no rule at all.

Thus, even if Vincent DiVincenzo was unable to show "actual and substantial prejudice" as a result of the prosecutors' actions, it would still be appropriate for this Court to dismiss the indictment here. The fact is, though, that there was a clear showing of "actual and substantial prejudice" that compels dismissal of the indictment.

D. Vincent DiVincenzo Suffered Actual and Substantial Prejudice As A Result Of The Prosecutorial Misconduct.

The "actual and substantial prejudice" that Vincent DiVincenzo suffered as a result of the prosecutor's misconduct in this case is manifest. See *Fassler*, 153 Ill.2d at 58, 605 N.E.2d at 579. But for the prosecutor's improprieties, the Grand Jury's decision not to indict Vince on first degree murder would have been heeded, and Vince would never have had to face a first degree murder charge. Compare *Fassler, 153* Ill. 2d at 49, 605 N.E.2d at 579 (no "substantial injustice" was caused by the unauthorized presence of the 13-year-old victim's mother while the victim testified); *People v. J.H.*, 136 Ill.2d 1, 17, 554 N.E.2d 961, 968 (1990) (no prejudice where it is clear that Grand Jury would have indicted even without the alleged misconduct). The "substantial injustice" standard for dismissing an indictment was clearly satisfied here. See 725 ILCS 5/114-1(a)(5). The prosecutors pounced on the information they improperly received and then took the highly unusual, if not unprecedented, step of badgering the Grand Jury to reconsider the vote it had already completed. In so doing, they repeatedly misstated the law regarding the state of mind required to support a first degree murder indictment. If this does not constitute "substantial injustice," what does?

Indeed, it is difficult to imagine a more severe breach of the prosecutor's duty to preserve the integrity of the Grand Jury than that which is evident in this case. The Grand Jury serves no meaningful function unless limits are "set on the manipulation of grand juries by over-zealous

prosecutors." *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979). The law sets just such limits, and they were transgressed in this case to the great prejudice of Vincent DiVincenzo. It may be difficult to understand just what drove the prosecution in this case to prevent the Grand Jury (and later the petit jury) from recognizing that this case was a classic example of involuntary manslaughter. It is far less difficult, we submit, to recognize that the indictment in this case must be dismissed. The words of the Second Circuit apply fully here:

> More than in other cases, the minutes of the Grand Jury proceedings in this case reveal what can happen when the prosecutor is too determined to obtain an indictment. The temptations to cut corners, to ignore the rights of an accused, and to toss fair play to the winds gain ascendancy. Prosecutors presenting cases to Grand Juries are firmly subject to due process limitations and bound by ethical considerations. While we fully recognize that a court's power to dismiss an indictment following a conviction at trial rarely is exercised, the prosecution so violated these limitations and obligations as to mandate this indictment's dismissal. Here prosecutorial zeal only illuminates anew the insight of the old adage that the ends cannot justify the means.

United States v. Hogan, 712 F.2d 757, 757-758 (2d Cir. 1983).

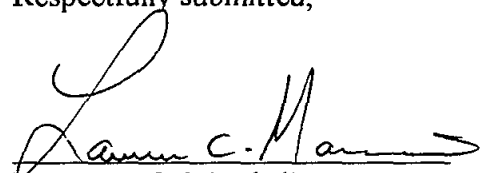
CONCLUSION

WHEREFORE, for the reasons stated in Argument II, this Honorable Court should reverse the first degree murder conviction on the grounds that the evidence was insufficient and the Court should either reduce the offense to involuntary manslaughter or remand for a trial on involuntary manslaughter.

As a less preferred alternative to the relief set forth in Argument II, this Court should, for the reasons stated in Argument I, reverse the conviction and remand for a trial at which the jury is given an involuntary manslaughter instruction.

As a less preferred alternative to the relief set forth in Argument II, this Court should, for the reasons stated in Argument III, dismiss the indictment against Vincent DiVincenzo.

Respectfully submitted,



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AUGUST 29, 1997

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No. 2--95--1454

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. VINCENT DI VINCENZO, Defendant-Appellant.	)	Appeal from the Circuit Court of Du Page County. No. 93--CF--1106 Honorable Peter J. Dockery, Judge, Presiding.

RULE 23 ORDER

Following a jury trial, the defendant, Vincent Di Vincenzo, was convicted of first degree murder in violation of section 9--1(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/9--1(a)(2) (West Supp. 1996)), and sentenced to 26 years' imprisonment. He now appeals, arguing: (1) that the State did not prove him guilty beyond a reasonable doubt; (2) that the trial court erred in refusing to instruct the jury on the lesser offenses of involuntary manslaughter and aggravated battery; (3) that the trial court erred in admitting evidence regarding a prior fist fight in which he was involved; and (4) that the grand jury indictment should have been dismissed due to prosecutorial misconduct during the grand jury proceedings. We affirm.

I. Factual Background

On June 17, 1993, the defendant was indicted on the charge of first degree murder. The indictment alleged that on May 27, 1993, the defendant knowingly caused great bodily harm to the victim, Joseph Novy, which resulted in the victim's death. Specifically, the defendant was alleged to have beaten the victim following a verbal altercation between the two men. The case was tried before a jury on June 9-20, 1995. The evidence presented at trial is summarized below.

A. The Events of May 27, 1993

At the time in question, the defendant was 18 years old and was a senior at Addison Trail High School. On the afternoon of May 27, 1993, the defendant and a friend, Daniel Frasca, were driving a vehicle owned by Frasca's father. Frasca was seated in the driver's seat and the defendant was seated in the passenger seat. While stopped at a red light, the defendant observed the victim driving his Geo Tracker. The defendant testified that he held a "grudge" against the victim because the victim had dated the defendant's girlfriend several years earlier.

The defendant believed that while he was stopped at the red light, the victim gave him a "cocky" stare. The defendant told Frasca to follow the victim's vehicle. Frasca complied with the defendant's request, and they followed the victim's vehicle for some time as it traveled along several different streets. Both the defendant and Frasca testified that they were traveling in a direction opposite their intended destination. Eventually, the victim turned his vehicle into the driveway of a friend's home. At this time, the defendant told Frasca to stop the car. The

defendant and the victim exited their vehicles and met each other on the grass parkway near the driveway.

According to the defendant's recorded police statement, the two men then engaged in a verbal altercation. The defendant stated that the victim asked him "what the f___ was my problem." The defendant's response was "You know what my f___ing problem is." The victim then allegedly stated, "Are you still holding a grudge for that girl from like three or four years ago?" Tne defendant responded, "Yes." The two men continued to argue with one another until the defendant asked him, "Why the f___ did you give me that stare?" The victim replied "What stare?"

The defendant testified that the victim then placed his hand on the defendant's chest and pushed the defendant backwards. The defendant testified that he immediately swatted the victim's hand away from his chest. The defendant testified that the victim then stepped back with his right foot and clenched his fist, as if he was getting ready to throw a punch. The defendant responded by hitting the victim in the mouth with the heel of his hand. This blow caused the victim to stumble backwards, during which time he raised his hands to his face in a defensive posture. The defendant then threw a closed-fisted punch to the side of the victim's face. This blow knocked the victim to the ground. As the victim fell to the ground, the defendant observed blood on his face.

There is a dispute in the testimony as to what happened next. In the defendant's recorded police statement, he stated that after the victim had fallen to the ground, he kicked the victim in the

stomach. The defendant then instructed the victim to stay on the ground. At trial, the defendant denied that he had kicked the victim, but instead testified that he "kneed" the victim in the side. The defendant stated that following this final kick or "knee," he got into Frasca's vehicle and left.

The defendant acknowledged that during the entire incident, the victim did not strike a single blow. The defendant also told the police that the victim had done nothing to provoke the incident. The defendant testified that by the time the victim had fallen to the ground, he was unprotected and was no longer a threat.

Janet Berens testified that she witnessed the incident from the window of her home. She testified that she observed the defendant move his arms. After this movement, she observed the victim fall to the ground. Berens testified that while the victim was laying motionless on the ground, the defendant kicked him three times: the first kick was to the victim's lower back; the second kick was higher in the back; and the third kick was to the back of the victim's head. Berens testified that the victim did not move during the time between the three kicks. Berens testified that following the third kick, the defendant and Frasca got into their vehicle and departed from the scene. She testified that she observed the defendant "slump down" in the front seat of the car.

Berens's husband, Leon Berens, also testified at trial. He testified that at the time of the incident, he was watching television. His wife suddenly told him that a boy was being badly beaten across the street. Leon Berens testified that he then ran

out of his house and yelled, "What the hell are you doing." As he yelled, the defendant and Frasca got into Frasca's vehicle and left. Leon Berens then approached the victim to see if he was alright. When he put his hand under the victim's throat to check for a pulse, his hand became covered with blood.

Janet Berens called 911, and the Addison Police Department was dispatched to the scene. Janet Berens was able to provide the police with the license plate number of the vehicle that Frasca was driving. Addison police officers went to the Frasca residence and left word that they were looking for the defendant and Frasca. Later that evening, the defendant and Frasca appeared at the Addison Police Department. The two men were separated for questioning. Both the defendant and Frasca waived their Miranda rights and gave recorded statements to the police. Both of these statements were admitted into evidence during the trial.

The victim died later on the evening of May 27, 1993, as a result of the injuries he suffered during the incident. The State's expert, Dr. Nancy Jones of the Cook County Medical Examiner's Office, testified that the cause of death was a torn cerebral artery. Dr. Jones testified that the victim's lower jaw was fractured, and that the right side of his jaw joint was pushed away from its normal position. The internal examination of the victim's head revealed an area of hemorrhage on the undersurface of the scalp which corresponded with the 3.5 inch by 2 inch area of bruising and swelling on the outside of the scalp. The back of the victim's neck was imprinted with a bruise, and there were also two other areas of bruising on the right side of the victim's back.

Dr. Jones testified that the victim's brain was very swollen and that, in her opinion, the punches and kicks administered by the defendant broke the victim's jaw, caused external blunt trauma injuries, and resulted in a fatal basal subarachnoid hemorrhage from torn blood vessels at the base of the brain.

The defendant's expert, Dr. Robert Beatty, also testified at trial. Dr. Beatty opined that the victim died of a ruptured aneurysm rather than a torn cerebral artery. Dr. Beatty testified that it was possible that the rupture was caused by a rise in the victim's blood pressure during the argument that preceded the defendant's blows.

B. The Grand Jury Proceedings

Following the defendant's arrest, Assistant State's Attorney Kathryn Creswell presented this matter to the grand jury on June 16, 1993. Creswell requested that the grand jury return an indictment for first degree murder. Creswell presented all of the State's evidence to the grand jury and then explained the offenses of first degree murder and involuntary manslaughter.

Following Creswell's explanation, there was apparently some confusion among the grand jurors regarding the law. One juror asked why the defendant had not been charged with "plain homicide," since the defendant had not intended to cause the victim's death. Another grand juror stated, "I have a lot of problems with this." A third grand juror asked whether the defendant's conduct would be aggravated assault and battery. Before Creswell could adequately respond to these questions, Creswell was asked to leave so that

deliberations could begin. During these deliberations, the grand jury voted a "no bill" as to first degree murder.

After Creswell was informed of the grand jury's vote, a juror inquired whether it would be possible to indict on a lesser charge. Creswell explained that it would be possible to indict on a lesser charge. The following colloquy occurred:

> "STATE'S ATTORNEY: Okay. Are you telling me that you found a No Bill on First Degree Murder but that you want to deliberate as to other possible charges?
>
> A JUROR: Absolutely.
>
> STATE'S ATTORNEY: Okay, I can return this afternoon with the documents for a No Bill on First Degree Murder, and I can bring you at that time the law with respect to lesser offenses and you con continue deliberating on those. Is that what you want to do? The record has be absolutely clear that you are not finished deliberating on the case. Is that what you are telling me?
>
> A JUROR: As far as First Degree Murder, but a lesser charge, no."

During the lunch break, one of the grand jurors approached Officer John Tannahill of the Westmont Police Department. The grand juror told Officer Tannahill about the case and that the grand jury had voted a no bill on first degree murder. The grand juror explained that because the State had not proven that the defendant intended to kill, the grand jury felt that manslaughter would be a better charge. Officer Tannahill reported this conversatien to the prosecutors.

In the afternoon session, Assistant State's Attorney John Kinsella returned to the grand jury with Creswell. Kinsella expressed his concern that there had been confusion about the law during the morning session. He told the grand jurors that it was the obligation of the State's Attorney to properly advise them on the law. Kinsella reminded the jurors of their obligation to be objective; he stated that they should indict based solely on the law and the evidence, and should not consider fear, favor, or sympathy towards the defendant.

Kinsella then re-read the first degree murder statute for the jurors. Kinsella told the jurors that they should not be concerned with whether the accused had the intent to kill, but whether the act was committed knowing that it created a strong probability of death or great bodily harm to the victim. Kinsella defined great bodily harm, reading from the aggravated battery statute where it is defined. Kinsella further stated that there was case law holding that first degree murder could be committed by kicking and beating with fists. The following colloquy between Kinsella and two grand jurors then occurred:

> "A JUROR: I am having a hard time with this. You know, I get into a fist fight with somebody. I don't mean to kill somebody but if I hit him and a guy falls and whacks his head and gets a hemorrhage or something like that, that is what I am having my problem with in this thing.
>
> MR. KINSELLA: We are not dealing with a hypothetical set of facts[,] *** [w]e are dealing with specific facts, and [your] decision is not whether it is a good thing to indict this

person or a bad thing or a fair thing. You are not here to consider favor or fear. You are here to decide probable cause, and I am suggesting to you that the law is very clear that if somebody strikes someone, whether it be with their fist or their hand, and we note that the consequences and the results are as indicated, that suggests with what force or velocity it was used and that that conduct does not fit within the self-defense sections we talked about in Second Degree Murder or provocation sections. If it doesn't fit within those, and that force creates a strong probability of great bodily harm and that person dies as a result of those injuries, that that constitutes First Degree Murder.

* * *

A JUROR: I understand where you are coming from and the laws and guidelines, but then you keep saying that you want to push the Murder One issue. I mean, what we got out of it and what we deliberated on, we got nothing out of a Murder One case, and I'm sorry, that's what I felt at the time.

MR. KINSELLA: Well, what I am suggesting is that -- take a step back and separate from your consideration [e]motions and leniency, and remember what your job is, to believe that these facts satisfy the elements of that crime. *** The question is whether he performed acts which created a strong probability of great bodily harm and that person dies as a result of those acts.

[I]f there is confusion, I want to be sure it is decided appropriately, and if it was decided inappropriately, now is

the time to correct it. If all of those proper considerations were made and that is the result, so be it. And I am not here to push anything. I am here to make sure everybody follows the law. Okay?"

The grand jury then retired to deliberate once again. Following their deliberations, the foreperson reported: "Based on the clarification that you have brought forth, we have changed our decision originally and we will go with the First Degree Murder charge, True Bill." The defendant was then formally indicted on the charge of first degree murder in violation of section 9--1(a)(2) (720 ILCS 5/9--1(a)(2) (West Supp. 1996)).

C. Motion to Dismiss Indictment

The defendant subsequently filed a motion to dismiss the indictment predicated on the State's conduct during the grand jury proceeding. The defendant argued that his rights were violated when the State became aware of the content of the grand jury's secret deliberations. The defendant also argued that Kinsella's statements during the afternoon session were coercive and misled the grand jury regarding the law. Finally, the defendant argued that it was improper for the grand jury to return a true bill, after it had initially declined to do so. During the hearing on the motion, the defendant requested that the trial court conduct an evidentiary hearing. At such a hearing, the defendant wanted to present testimony of one of the grand jurors and Officer Tannahill.

The trial court refused the defendant's request for an evidentiary hearing and ruled that the only relevant source of information was the transcripts from the grand jury proceedings.

The trial court then denied the motion to dismiss the indictment, finding that there had been no prosecutorial misconduct during the second session. The trial court also found that the defendant had not suffered "substantial injustice" as a result of the disclosure of the grand jury's private deliberations.

D. The Defendant's Motion in Limine

During discovery, the State disclosed its intention to introduce evidence relating to a 1991 incident during which the defendant punched Joseph Tomasone, a 16-year-old boy. The punch was thrown directly at Tomasone's face, and caused a hairline fracture to Tomasone's nose and a cut to his face. The State sought to introduce this evidence in order to show that the defendant knew, at the time he struck the victim in this case, that throwing a punch at someone's face would likely result in great bodily harm.

The defendant filed a motion in limine seeking to bar the evidence. The defendant contended that the prior incident was too dissimilar to the instant case to have any probative value. In the prior incident, the defendant was wearing a ring on the hand he used to punch Tomasone's face; in the instant case, the defendant testified that he was not wearing a ring. The trial judge denied the motion in limine, ruling that the events were sufficiently similar to have probative value as to the issue of the defendant's knowledge.

After making this ruling, the trial judge recused himself from the case. After a new trial judge was assigned, the parties argued over what evidence relating to the prior incident could be

admitted. The trial judge ruled that the evidence would be limited to the fact that the defendant punched Tomasone in the face and that Tomasone had suffered a fractured nose. The trial judge barred all evidence relating to events leading up to the punch. The trial judge also barred evidence of Tomasone's facial laceration, finding that this cut was probably caused by the defendant's ring.

E. Jury Instructions

At the close of the evidence, the defendant requested that the trial judge instruct the jury on the lesser offense of involuntary manslaughter. The trial judge denied this request, ruling that the defendant had not introduced any evidence tending to show that he had acted recklessly in performing the acts that caused the victim's death. The trial court did, however, agree to instruct the jury on second degree murder, based on the evidence that the defendant believed that the victim was about to strike him.

The defendant also requested that the trial court instruct the jury on the lesser included offense of aggravated battery. Relying on the testimony of his expert medical witness, the defendant argued that his conduct was not the actual cause of the victim's death. The defendant contended that if the jury accepted his expert's testimony, he would only be guilty of the crime of aggravated battery. The trial judge refused the instruction, ruling that the State was not required to prove that the defendant's acts were the sole cause of the victim's death. The trial court further ruled that, under the evidence presented, no reasonable jury could find that the defendant had knowingly caused

great bodily harm to the victim, but that he had not caused the victim's death.

F. Verdict and Sentencing

The jury found the defendant guilty of first degree murder. The defendant filed a timely post-trial motion in which he sought a judgment of acquittal, or in the alternative, a new trial. The trial court denied the post-trial motion in its entirety. Following a sentencing hearing, the trial court sentenced the defendant to 26 years' imprisonment. The defendant filed a timely notice of appeal.

II. DISCUSSION

A. The Jury's Verdict

The defendant's first argument on appeal is that the State failed to prove him guilty beyond a reasonable doubt. The defendant argues that the State failed to prove that he had the mental state required for a first degree murder conviction. In support of his argument, the defendant relies on numerous authorities which hold that fighting with bare fists does not ordinarily evince a mental state sufficient to support a murder conviction. See People v. Taylor, 212 Ill. App. 3d 351, 356 (1991); People v. Lurie, 276 Ill. 630, 636 (1917).

We note at the outset that it is not the province of this court to retry the defendant. People v. Collins, 106 Ill. 2d 237, 261 (1985). The relevant question is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt.'" (Emphasis in original.) Collins, 106 Ill. 2d at 261, quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789 (1979).

Both parties agree that the defendant did not intend to kill the victim. However, the State is not required to show intent in order to prove the defendant's guilt under section 9--1(a)(2) of the Code. Under section 9--1(a)(2), one commits first degree murder when, "in performing the acts which cause the death: *** he knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9--1(a)(2) (West Supp. 1996). Therefore, the State was not required to prove that the defendant intended to kill the victim, but only that he knowingly performed acts which created a strong probability of death or great bodily harm.

In section 4--5 of the Code (720 ILCS 5/4--5 (West 1994)), knowledge is defined as follows:

> "A person knows, or acts knowingly or with knowledge of:
>
> * * *
>
> (b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4--5 (West 1994).

The trier of fact may infer knowledge from the character and surrounding circumstances of the defendant's acts. People v. Conde, 256 Ill. App. 3d 762, 766 (1993). Furthermore, a defendant is presumed responsible for the consequences of his own acts where he knowingly engages in the activity. People v. Harris, 90 Ill.

App. 3d 703, 705 (1980). To prove murder, it is sufficient for the State to show that the defendant acted voluntarily and wilfully committed an act, the natural tendency of which was to destroy another's life. People v. Bartall, 98 Ill. 2d 294, 307 (1983).

A review of the record demonstrates that there was sufficient evidence from which the jury could have found, beyond a reasonable doubt, that the defendant knowingly caused great bodily harm to the victim. As the defendant stated in his recorded police statement, he held a grudge against the victim and sought out the altercation on the day in question. Although the victim made first contact by placing his open hand on the defendant's chest, the defendant proceeded to punch the victim's face twice, breaking his jaw in two places and causing him to fall to the ground. Janet Berens testified that as the victim laid on the ground, the defendant kicked him three times in the back and head. Following the beating, the defendant left the scene while the victim laid bleeding on the ground. Dr. Jones confirmed that the blows and kicks to the victim's head resulted in a fatal subarachnoid hemorrhage.

The defendant repeatedly argues that fighting with bare fists does not ordinarily evince a mental state sufficient to support a murder conviction. However, we note that in People v. Rodgers, 254 Ill. App. 3d 148, 151 (1993) and People v. Reeves, 228 Ill. App. 3d 788, 799 (1992), reviewing courts upheld first degree murder convictions when presented with similar conduct to that exhibited by the defendant in the instant case (see discussion below). Furthermore, the defendant's argument ignores the testimony of

Janet Berens, as well as his own statements, that the victim was not only punched, but also kicked after he had fallen to the ground. It is brutal and heinous behavior, indicative of wanton cruelty, to kick a man who has been knocked to the ground and is helpless, defenseless, and is no longer a threat to anyone. People v. Merritte, 242 Ill. App. 3d 485, 496 (1993). We therefore conclude that the State presented sufficient evidence to support the jury's finding that the defendant knowingly inflicted great bodily harm.

B. Involuntary Manslaughter Instruction

The defendant's next argument on appeal is that the trial court erred in refusing to instruct the jury on the lesser offense of involuntary manslaughter. As noted above, the trial judge ruled that the defendant's conduct was not reckless, but intentional, and therefore did not fall within the parameters of the involuntary manslaughter statute. The defendant again argues that the trial court's ruling was contrary to authority which holds that fighting with bare fists evinces a mental state sufficient only to demonstrate involuntary manslaughter. See People v. Taylor, 212 Ill. App. 3d 351, 356 (1991); People v. Lurie, 276 Ill. 630, 636 (1917).

When there is credible evidence in the record which would reduce a murder charge to manslaughter, then the jury must be instructed on involuntary manslaughter. People v. Ward, 101 Ill. 2d 443, 451 (1984). Such an instruction should not be given, however, if there is no evidence which would reduce the crime to

involuntary manslaughter. People v. Simpson, 74 Ill. 2d 497, 501 (1978).

The basic difference between involuntary manslaughter and murder is the mental state accompanying the conduct causing the homicide. People v. Foster, 119 Ill. 2d 69, 87 (1987). A person commits first degree murder when he "kills an individual without lawful justification *** if, in performing the acts which cause the death: *** he knows that such acts create a strong probability of death or great bodily harm to that individual." 720 ILCS 5/9--1(a)(2) (West Supp. 1996). A person commits involuntary manslaughter when he "kills an individual without lawful justification *** if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9--3(a) (West Supp. 1996).

Recklessness is defined in section 4--6 of the Code (720 ILCS 5/4--6 (West 1994)) as follows:

> "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4--6 (West 1994).

The trial court made the following comments regarding its decision to refuse to instruct the jury on involuntary manslaughter:

"As the State has pointed out, I believe the case law does indicate [that] merely [because] the Defendant *** did not intend to cause harm, that that does not require giving of an involuntary manslaughter instruction.

I believe that any view of the evidence would be that the Defendant's punch over the top of [the victim]'s arms was such that this was done purposely ***.

Not merely that he intended to throw the punch and was consciously disregarding the consequences, but that he deliberately threw the punch purposely with the intent to so strike [the victim], and thereby causing some harm ***.

That he did not know that he caused great bodily harm to [the victim], does not require the giving of an involuntary manslaughter instruction [and] does not mandate the findings [sic] that there are [sic] some evidence of recklessness."

In urging this court to affirm the trial court's ruling on this issue, the State argues that an involuntary manslaughter instruction would have been inconsistent with the defendant's theory of self-defense advocated at trial. The State argues that the theory of self-defense presupposes an intent to kill or cause great bodily harm which cannot constitute recklessness. However, as the defendant correctly notes, we have repeatedly held that an involuntary manslaughter instruction may be given even when the instruction is inconsistent with the defendant's theory at trial. People v. Gibson, 197 Ill. App. 3d 162, 169 (1990). Therefore, the defendant's theory of self-defense did not preclude him from

seeking an involuntary manslaughter instruction in the instant case. See People v Whiters, 146 Ill. 2d 437, 442 (1992).

As it was proper for the defendant to seek an instruction on involuntary manslaughter, we turn to a consideration of whether the instruction would be appropriate in the instant case. In deciding this issue, we are guided by our holding in People v. Rodgers, 254 Ill. App. 3d 148, 153 (1993). In Rodgers, the trial court refused to give an involuntary manslaughter instruction where the defendant punched the victim's face at least seven times, resulting in the victim's death. 254 Ill. App. 3d at 153. The evidence revealed that the victim had been asleep on a couch at the time of the defendant's attack; that the attack had been unprovoked; and that the victim did not make a single blow to the defendant. Rodgers, 254 Ill. App. 3d at 153.

On appeal, the defendant argued that since he used his bare fists to kill the victim, there was evidence in the record which would support a voluntary manslaughter instruction. We rejected this contention and held that the defendant was not entitled to an involuntary manslaughter instruction merely because he used his bare fists in inflicting the bodily harm. Rodgers, 254 Ill. App. 3d at 153. We further noted that the defendant's lack of intent to kill did not constitute evidence of recklessness. Rodgers, 254 Ill. App. 3d at 154. Rather, we held that the proper consideration in determining whether such an instruction was proper was the brutality of the beating and the severity of the victim's injuries. Rodgers, 254 Ill. App. 3d at 153.

Similarly, in People v. Reeves, 228 Ill. App. 3d 788, 799 (1992), the court held that a defendant was not entitled to an involuntary manslaughter instruction where the victim's death was the result of punching and kicking. In Reeves, the victim died of a subarachnoid hemorrhage caused by blows to the head and neck. 228 Ill. App. 3d at 798. The court held that death can be the natural consequence of blows with bare fists and that an involuntary manslaughter instruction is not necessary when the nature of the defendant's conduct is of such a character as to defeat any assertion of reckless or inadvertent conduct. Reeves, 228 Ill. App. 3d at 799.

In light of these authorities, we examine the record in the instant case for any credible evidence tending to show that the defendant acted recklessly in performing the acts which caused the victim's death. As detailed above, the defendant testified that he held a "grudge" against the victim, and purposely initiated the altercation on the date in question. When the victim placed his hand upon the defendant's chest, the defendant quickly swatted it away and proceeded to throw two punches which were of sufficient force to break the victim's jaw and cause him to fall to the ground. As the victim fell to the ground, the defendant admitted observing blood on the victim's face.

As the defendant acknowledged in his recorded police statement, the incident did not end after the punches to the victim's face. The defendant told the police that, as he observed the victim struggling on the ground, he kicked the victim in the stomach. Therefore, although the defendant had already inflicted

great bodily harm by striking the blows to the victim's face, he nonetheless continued his assault by kicking the victim. We find that such conduct was not reckless, but was instead wilful, vicious, and brutal. See People v. Merritte, 242 Ill. App. 3d 485, 496 (1993). Although we are aware that the defendant testified contrary to his recorded police statement at trial, his voluntary statement to the police was nonetheless an admission which the trial court was free to consider. People v. Mosley, 23 Ill. 2d 211, 214 (1961). We also note that Dr. Jones' testimony that the victim had bruises on his back and neck lends support to the testimony that the defendant kicked the victim several times.

Although the defendant may not have administered the same number of blows as the defendant in Rodgers, the beating was nonetheless brutal and resulted in fatal injury. As the defendant acknowledged, the victim did not initiate the beating and did not strike the defendant. Under such circumstances, a trial court may properly refuse an involuntary manslaughter instruction. See Reeves, 228 Ill. App. 3d at 799. Therefore, after reviewing the defendant's conduct, in the light most favorable to the defendant, we do not find any credible evidence of recklessness, and instead conclude that the trial court did not err in refusing to instruct the jury on the offense of involuntary manslaughter.

C. Aggravated Battery Instruction

The defendant next argues that the trial court erred in refusing to tender the defense's proffered instruction on the lesser included offense of aggravated battery. The defendant argues that he was entitled to the instruction because the

prosecution failed to prove that his acts actually caused the victim's death.

Aggravated battery is a lesser included offense of murder. People v. Liddell, 240 Ill. App. 3d 229, 233 (1992). In order to justify the giving of an instruction for a lesser included offense, the evidence must be sufficient to permit a finding of not guilty on the greater offense but guilty on the lesser included offense. Liddell, 240 Ill. App. 3d at 233. For this reason, when an aggravated battery results in death, the jury cannot be instructed on both aggravated battery and murder, as the jury could not find the defendant guilty of aggravated battery without also finding him guilty of murder. People v. Torres, 283 Ill. App. 3d 281, 293 (1996).

The defendant does not take issue with this point of law, but instead argues that whether his conduct caused the victim's death was vigorously disputed at trial. The defendant argues that his medical expert, Dr. Beatty, testified that the victim died from a ruptured aneurysm, rather than a torn cerebral artery. The defendant contends that Dr. Beatty testified that this ruptured aneurysm was not caused by the blows or kick inflicted by the defendant, but instead occurred as a result of the victim's rising blood pressure during the confrontation.

Contrary to the defendant's representations, however, our review of Dr. Beatty's testimony reveals that he was unable to pinpoint the specific cause of the victim's ruptured aneurism. Beatty could not opine with certainty whether the rupture was

caused by a blow to the victim's head or by the victim's rising blood pressure. Dr. Beatty testified as follows:

> "STATE'S ATTORNEY: So you're saying to this jury that a rise in [the victim]'s blood pressure caused a preexisting aneurysm to burst, and it just so happened that this guy administered a beating seconds after that?
>
> DR. BEATTY: No. I'm not saying that. I'm saying that in th[e] time frame of *** the confrontation, somewhere in that time, the aneurysm ruptured, whether it was when he was hit, when he fell, whatever. Who knows?"

The defendant's assertions notwithstanding, we believe that Dr. Beatty's testimony confirms that the defendant's actions and conduct at the time in question were the cause of the victim's death. As noted by the trial judge, in a murder case, the State is not required to prove that a defendant's acts constituted the sole and immediate cause of death; it is sufficient for the State to establish that the defendant's acts were a contributory cause and that the death did not result from a source independent of those acts. People v. Turner, 127 Ill. App. 3d 784, 791 (1984).

Where the evidence in a case establishes that the victim was killed and not merely subjected to bodily harm, refusal to instruct the jury on aggravated battery as a lesser-included offense of murder is not error. People v. Gresham, 78 Ill. App. 3d 1003, 1009 (1979). Lacking any credible evidence tending to show that the victim's death was not caused by the defendant's conduct, the law prohibited the trial court from instructing the jury on aggravated battery. See Torres, 283 Ill. App. 3d at 293. We therefore

conclude that the trial court did not err in refusing to instruct the jury on aggravated battery.

D. The Defendant's Motion in Limine

The defendant's next contention is that the trial court erred in permitting the State to introduce evidence about the 1991 incident involving Joseph Tomasone. As detailed above, during the incident in question, the defendant threw a punch at Tomasone's nose. The punch caused a hairline fracture to Tomasone's nose and a cut to his face. The trial court ruled that the evidence was relevant to show the defendant's knowledge that throwing a punch to the face creates a strong probability of causing great bodily harm. As noted above, this is the requisite mental state to prove first degree murder pursuant to section 9--1(a)(2) of the Code. 720 ILCS 5/9--1(a)(2) (West Supp. 1996).

The defendant argues that the evidence related to the Tomasone incident was too dissimilar to the instant case to have any probative value. He argues that he did not punch the victim in the nose, as was the case in the prior incident, but instead punched him in the jaw and chin. The defendant also notes that, unlike the instant case, he wore a heavy ring when he punched Tomasone. The defendant argues that the evidence was of little probative value, as reasonable people are aware that a nose can be easily broken by a closed-fisted punch. The defendant therefore concludes that such evidence was unnecessary and was instead improperly used by the State in an attempt to demonstrate the defendant's propensity to commit criminal acts.

The admissibility of evidence at trial is within the sound discretion of the trial court. People v. Illgen, 145 Ill. 2d 353, 364 (1991). A reviewing court will therefore not overturn a trial court's evidentiary ruling absent a manifest abuse of discretion. Illgen, 145 Ill. 2d at 364. A trial court will have been found to have abused its discretion only where the admission of evidence is arbitrary, fanciful, or where no reasonable man would take the view adopted by the trial court. Illgen, 145 Ill. 2d at 364.

Our supreme court has repeatedly held that the State may introduce evidence of other misconduct committed by a defendant if the testimony is offered for some other purpose than simply to establish the defendant's propensity to commit crime, and if the probative value of the evidence outweighs its risk of unfair prejudice. People v. Whalen, 158 Ill. 2d 415, 428 (1994). Thus, in an appropriate case, evidence of uncharged misconduct may be admitted to show modus operandi, presence, identity, motive, intent, knowledge, or other material facts. People v. Oaks, 169 Ill. 2d 409, 454 (1996). In order to introduce such evidence, the State must show that: (1) the "other acts" evidence is evidence of misconduct (Illgen, 145 Ill. 2d at 365); (2) the "other acts" bear a significant similarity to the crime with which the defendant is charged (Illgen, 145 Ill. 2d at 373); and (3) the "other acts" actually took place and were committed by the defendant (People v. Thingvold, 145 Ill. 2d 441, 455 (1991)). As noted above, the trial court held that the evidence regarding the incident involving Tomasone was relevant to show the defendant's knowledge that his

actions toward the victim created a strong probability of doing great bodily harm.

After a careful review of the record, we conclude that the trial court did not abuse its discretion in admitting the evidence. The evidence was relevant to the issue of the defendant's knowledge. The evidence makes the proposition that the defendant knew that his conduct would cause great bodily harm to the victim more probable than it would be without the evidence. Furthermore, the incident was recent enough in time to be probative of the defendant's knowledge on the date in question.

Nor do we find that the probative value of the evidence was outweighed by its prejudicial effect. We note that the trial court strictly limited the evidence to the fact that the defendant struck a blow to Tomasone's face causing a fracture to his nose. The trial court excluded all evidence of the events leading up to the blow, as well as the fact that Tomasone suffered severe lacerations to his face and a broken ankle. As there was no testimony allowed regarding the defendant's criminal fault for the incident, there was no basis for the jury to believe that the defendant had a propensity for engaging in criminal conduct.

We also note that any potential prejudicial effect was minimized by the manner in which the trial court instructed the jury on how it could consider the evidence. Specifically, the jury was instructed that even before it could consider the evidence of the blow to Tomasone's face, it would first have to find that Tomasone suffered great bodily harm. Furthermore, the jury was instructed that it could only consider the evidence for the limited

purpose of determining whether the defendant knew that his conduct created the strong probability of causing great bodily harm. This latter instruction was given not only during final instructions to the jury, but also immediately prior to the beginning of Tomasone's testimony.

As to the defendant's contention that the evidence did not bear a sufficient similarity to the crime with which he was charged, we note that our supreme court has held that evidence of other conduct need not be identical to the crime charged in order to be admissible. Illgen, 145 Ill. 2d at 373. Rather, evidence need only fall within a general area of similarity to the charged offense. Illgen, 145 Ill. 2d at 373. The defendant's conduct towards Tomasone was not so dissimilar to the instant case so as to require its exclusion. Although the blow in the instant case was to the victim's jaw, rather than his nose, both incidents involved punches to the face which resulted in great bodily harm. As the probative value of the evidence was not outweighed by its prejudicial effect, we conclude that the trial court did not abuse its discretion in admitting the evidence.

E. Grand Jury Proceedings

The defendant's final contention on appeal is that his indictment should have been dismissed in light of prosecutorial misconduct committed during the grand jury proceedings. The defendant argues that after the grand jury deliberated and voted to return a no bill on the charge of first degree murder, the State violated the rules governing grand jury secrecy by speaking with a sheriff who had learned of the details of the grand jury's secret

deliberations. The defendant argues that after obtaining this information, the State returned to the grand jury to lecture "the grand jurors in a manner that not only misstated the governing law, but forcefully pressured the grand jury to discard its vote and to comply with the prosecutors' clear wishes." The grand jury subsequently returned a true bill on first degree murder.

In general, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury. People v. Seehausen, 193 Ill. App. 3d 754, 759 (1990). The trial court, however, has the discretion to dismiss indictments where the prosecutor's misconduct has subverted the role of the independent grand jury. People v. Lawson, 67 Ill. 2d 449, 455 (1977). In seeking a dismissal of the indictment, the defendant has the burden of proving that the prosecutorial misconduct complained of resulted in actual and substantial prejudice to the defendant. Seehausen, 193 Ill. App. 3d at 759. The proper standard of review is de novo. People v. Cora, 238 Ill. App. 3d 492, 504 (1992).

At the outset, we note that the trial court did not err in refusing the defendant's request to conduct an evidentiary hearing prior to ruling on the motion to dismiss the indictment. A trial court may not go beyond the record and conduct a hearing to receive testimony of grand jurors concerning charges of prosecutorial misconduct committed during the grand jury proceedings. People v. Linzy, 78 Ill. 2d 106, 109 (1979). Therefore, in ruling on the defendant's motion to dismiss, the trial court properly limited its examination to the transcript of the grand jury proceedings.

We have carefully reviewed the transcript of the grand jury proceedings, a detailed summary of which has been provided above in the recitation of facts. The transcript from the morning session reveals that some of the grand jurors were confused about the elements necessary to show first degree murder, as well as the lesser included offenses. Although Assistant State's Attorney Creswell provided the jury with the applicable statutory language, she was not able to adequately explain the meaning of this language before being dismissed by the grand jury. It is the obligation of the State to properly instruct the grand jurors on the law. Linzy, 78 Ill. 2d at 110. The transcript reveals that Creswell did not have the opportunity to fulfill this duty.

It was therefore appropriate for Assistant State's Attorney Kinsella to return to the grand jury during the afternoon session to clarify the law. Contrary to the defendant's assertions, we conclude that Kinsella's statements to the grand jury were proper. Although Kinsella's statements were lengthy, their length was necessitated by the great number of questions posed by the jurors and their confusion about the applicable law. Nor do we find that Kinsella's statements were coercive or misstatements of the law. As noted by the trial court, Kinsella accurately stated the requirements of first degree murder, as well as involuntary manslaughter. The jurors were therefore instructed and given the opportunity to consider returning a true bill on a lesser included offense. Moreover, we note that Kinsella provided the jury with copies of several authorities in order to further illustrate and explain the law applicable to the case. It does not constitute

prosecutorial misconduct that Kinsella commented on his belief that first degree murder was the appropriate charge. See Linzy, 78 Ill. 2d at 110.

The defendant has cited numerous cases from foreign jurisdictions, as well as several Illinois authorities, which explain the general propositions of law governing the relationship between the court and the grand jury. See People v. Rodgers, 92 Ill. 2d 283, 288 (1982); Lawson, 67 Ill. 2d at 455. However, we find that none of these cases factually supports the defendant's claim here. In People v. Barton, 190 Ill. App. 3d 701, 708 (1989), cited by the defendant, the appellate court affirmed the trial court's dismissal of the indictment based on prosecutorial misconduct. However, that case is clearly distinguishable. In Barton, the prosecutor was guilty of unethical acts and had deliberately misled the grand jury with tampered transcripts. Barton, 190 Ill. App. 3d at 705-07. Although the reviewing court dismissed the indictment in that case, it warned that the courts should not divert their attention from judging the guilt or innocence of the defendant to judging the conduct of the prosecutor. Barton, 190 Ill. App. 3d at 707. In the case before us, the remarks and conduct of the State were neither unethical nor misleading. Nor did the State improperly manipulate or fabricate the evidence heard by the grand jury. We therefore conclude that the defendant has not met his burden of demonstrating that he suffered any actual or substantial prejudice. See Seehausen, 193 Ill. App. 3d at 760.

The defendant also cites several cases from foreign jurisdictions which hold that it is improper for the prosecution to revisit an indictment upon which the grand jury has already deliberated and voted upon. State v. Butterfoss, 234 N.J. Super. 606 (1988); People v. Groh, 395 N.Y. Supp. 2d 212, 214 (1977); State v. Hart, 139 N.J. Super. 565 (1976). We find that these authorities are distinguishable. In each of these cases, the prosecution attempted to re-open grand jury deliberations after the deliberations had been formally concluded. In the instant case, however, the record indicates that the jury did not wish to conclude its deliberations. Instead, the grand jury intended to take up the case again during the afternoon session. We also note that at no time did the grand jury ever sign a formal written "no-bill" on the first degree murder charge.

Nor do we find the indictment defective because of the breach of secrecy as to the grand jury's deliberations. While this court certainly does not look favorably upon or wish to encourage the breach of grand jury secrecy that took place in the instant case, we conclude that it did not result in actual or substantial prejudice to the defendant. We note that the State did not solicit this information, but that it was instead communicated to it by Officer Tannahill. As the jury had not yet concluded its deliberations, and in light of the State's obligation to instruct the grand jury on the applicable law, we do not find that the prosecution's conduct during the afternoon session resulted in any actual or substantial prejudice. We therefore conclude that the trial court acted properly in refusing to dismiss the indictment.

For the foregoing reasons, the circuit court of Du Page County is affirmed.

Affirmed.

GEIGER, P.J., with INGLIS and HUTCHINSON, JJ., concurring.

CRIMINAL SENTENCE FORM AD-152 (Rev 9/93)

UNI[illegible] TES OF AMERICA

STATE OF ILLINOIS COUNTY OF DU PAGE

IN THE CIRCUIT COUR[illegible] E EIGHTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

Vs.

Vincent DiVincenzo Jr.

Defendant

NO. 93 CF 1106-01

DCN #

☑ Indictment
☐ Information
☐ Complaint
☐ Resentence

FILED
95 OCT -5 PM 4:03
CLERK OF THE 18TH JUDICIAL CIRCUIT DU PAGE COUNTY
Stamp Date

PLEA: ☑ NOT GUILTY ☐ GUILTY

FINDING OF GUILTY BY: ☐ COURT ☑ JURY

It is hereby ordered that the defendant is sentenced as follows:

TYPE OF SENTENCE

☐ FINED TOTAL AMOUNT $ ______ which includes court costs, penalties and fees as provided by statute.

☑ FINED $ Ø plus statutory court cost and fees and the following penalties:
- ☑ Criminal Surcharge Fund
- ☑ Violent Crime Victim Assistance Fund
- ☐ Driver's Education Fund

☐ COURT SUPERVISION - END DATE ______

☐ PROBATION ______ months END DATE ______

☐ CONDITIONAL DISCHARGE - END DATE ______

☐ COUNTY JAIL ______ DAYS TO BEGIN ______

☐ PERIODIC IMPRISONMENT
- ☐ Work Release Program
- ☐ Weekend

☑ ILLINOIS DEPARTMENT OF CORRECTIONS 26 years Illinois Dept of corrections w/credit for 99 days served

~~☐ Boot Camp~~

☐ CUSTODY OF THE U.S. ATTORNEY GENERAL

☐ $100 2nd OFFENDER DUI FEE (55 ILCS 5/5-1101)

☐ $ ______ CANNABIS ADDITIONAL ASSESSMENT (720 ILCS 550/10.3)

☐ $ ______ CONTROLLED SUBSTANCE ASSESSMENT (720 ILCS 570/411.2)

☐ $100 ADDITIONAL FINE FOR DOMESTIC VIOLENCE (730 ILCS 5/5-9-1.5)

☐ $10 ADDITIONAL FINE FOR DOMESTIC BATTERY (730 ILCS 5/5-9-1.6)

☐ $100 ADDITIONAL FINE FOR SEXUAL ASSAULT (730 ILCS 5/5-9-1.7)

☐ STATE'S ATTORNEY ALLOWED ______ DAYS PER DIEM FEE

☐ AMENDED CHARGE

☐ NO CREDIT FOR GOOD TIME

☐ NO CREDIT FOR TIME SERVED (Credit will be given unless this box is checked)

SENTENCE

First Degree Murder 720 ILCS 5/ 9-1(a)(2) (class M)

(twenty-six)

26 years Illinois Dept of Corrections w/ credit for 99 days served

Pay statutory court costs

Disposition of companion cases (not sentenced) ______

State's Attorney Ruggiero / Kendall

Defense Attorney Laraia

Deputy Clerk Janet

Reporter Terry

Bailiff Fredricks

JUDGE [signature]

Date 10/5/95

☐ Sentence Stayed Until ______

☐ Defendant released from custody

☐ Appearance on Return Date Required

DUPAGE COUNTY

JOEL A. KAGANN, CLERK OF THE 18TH JUDICIAL CIRCUIT COURT
WHEATON, ILLINOIS 60189-0707

JANET E. DAVITT
DEPUTY CLERK

White - Circuit Court

(NF)

1-CR 35(Re...

UNITED STATES OF AMERICA

STATE OF ILLINOIS COUNTY OF DUPAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

-VS-

Case No. 93 CF 1106

Vincent DiVincenzo Jr
Defendant

FILED
95 NOV -2 PM 1:02
CLERK OF THE 18TH JUDICIAL CIRCUIT DU PAGE COUNTY ILLINOIS
File Stamp Here

ORDER

This cause having come on to be heard upon the motion of the Defendant and the Court being fully advised in the premises, and having jurisdiction of the subject matter.

IT IS HEREBY ORDERED that the Defendant's Motion for A New Trial and Post Trial Motions and the Defendants Motion To Reconsider the Sentence is hereby set for ~~hearing~~ status and setting on November 7, 1995 at 9:00 A.M. It Is Further Ordered that leave be, and the same is hereby, given Dennis and Hubbard P.C., to withdraw as Counsel for the Defendant; the Court further that Attorney Thomas Marshall has filed his appearance herein for the Defendant.

D.P.
NOV - 2 1995
16

Name LARAIA & Hubbard P.C.
DuPage Attorney No. 007
Attorney for Defendant
Address 454 East Roosevelt Rd 1761 So. Naperville Rd
City Wheaton IL. 60187
Phone (708) 690-0600

Enter R.P. Mahoney
Judge

Date 11/2/95

DUPAGE COUNTY
C-000294

JANET E. DAVITT
DEPUTY CLERK

JOEL A. KAGANN, CLERK OF THE 18TH JUDICIAL CIRCUIT COURT
WHEATON, ILLINOIS 60189-0707

APPEAL TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT,
FROM THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee	)	
	)	No. 93 CF 1106
v.	)	
	)	
VINCENT DI VINCENZO	)	
	)	
Defendant-Appellant.	)	

95 NOV 17 PM 2:22

CLERK OF THE CIRCUIT COURT

NOTICE OF APPEAL

Vincent DiVincenzo, defendant-appellant in the above entitled cause, appeals to the Appellate Court of Illinois, Second District, from the final judgment of the Circuit Court of the 18th Judicial District, DuPage County, entered in this cause on November 17, 1995, finding the defendant guilty of murder in the first degree, sentencing the defendant to the Ilinois Department of Corrections for 26 years, and denying the defendant's motions for a new trial and reduction of sentence.

Defendant-Appellant requests that the judgment be reversed, or, in the alternative, that the judgment be reversed and the cause remanded for a new trial, or, in the alternative that his sentence be reduced.

Lawrence C. Marshall
Northwestern U. School of Law
357 East Chicago Ave.
Chicago, Illinois 60611
(312) 503-7412

DuPage County Atty # 34233

COPIES SENT
11-21-95

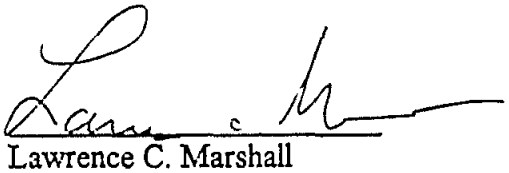
DUPAGE COUNTY
NOV 27 1995
95-000313
CPD
JANET E. DAVITT
DEPUTY CLERK

APPEAL TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT,
FROM THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee	)	
	)	No. 93 CF 1106
v.	)	
	)	
VINCENT DI VINCENZO	)	
	)	
Defendant-Appellant.	)	

PROOF OF SERVICE

Please take notice that I have served a copy of the Defendant-Appellant's Notice of Appeal upon the Clerk of the above Court and upon Anthony Peccarelli, State's Attorney of DuPage County, by depositing the aforementioned motions with the United States Postal Service first class postage prepaid, on this 17th day of November, 1995



Lawrence C. Marshall

DUPAGE COUNTY
C-000314

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C33	Scheduling Order	Oct. 14, 1993
C34	Scheduling Order	Oct. 21, 1993
C35	Order prohibiting defense from contacting or subpoenaing a certain grand juror	Nov 3, 1993
C36	People's Motion to Quash Subpoenas of Assistant State's Attorneys Birkett, Kinsella and Creswell	Nov 15, 1993
C40	Defendant's Memorandum in Opposition to People's Motion to Quash Subpoenas	Nov. 24, 1993
C45	Order quashing subpoenas of Assistant State's Attorneys Birkett, Kinsella and Creswell and John Tannahill	Nov 24, 1993
C46	Answer to People's Motion to Quash Subpoenas	Nov 24, 1993
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C50	Order denying Defendant's Motion to Dismiss	Dec 21, 1993
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C55	Scheduling Order	Feb. 4, 1994
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C59	Memorandum Opinion on Motion to Suppress	Feb 8, 1994
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C63	Scheduling Order	March 18, 1994
C64	Scheduling Order	April 7, 1994

C65	Defendant's Answer to Discovery	April 7, 1994
C67	Scheduling Order	April 21, 1994
C68	Subpeona Return Date	May 26, 1994
C69	Scheduling Order	June 14, 1994
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C71	Scheduling Order	Aug. 9, 1994
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C80	Order impounding iformation pertaining to People Disclosure # 6	Dec. 23, 1994
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C82	Defendant's Motion in Limine regarding prior assault	Jan. 4, 1995
C85	Scheduling Order	Jan. 9, 1995
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C87	Envelope containing memoranda relating to Supplemental Disclisure # 6	Jan 13, 1995
C88	Memorandum Opinion on Defendant's Motion in Limine	Jan. 25, 1995
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C137	Order granting part of Defendant's Motion in Limine and not ruling on other parts	May 9, 1995
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C141	Defendant's Motion for Additional Discovery	May 19, 1995

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C145	Order denying Defendant's Motion for Directed Finding on Nasal Fracture	May 30, 1995
C146	Supplemental Disclosure to Defendant # 8	May 25, 1995
C148	Defendant's Motion for Additional Discovery [regarding Christopher Corona]	May 19, 1995
C151	Order that Sr Cullinane deliver sealed records on C. Corona to court	May 30, 1995
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C272	State's Attorney's Statement of Facts	Oct. 24, 1995
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June 13, 1995

June 14, 1995

June 15, 1995 - Defense's Case

June 16, 1995

June 20, 1995

STATUTORY PROVISIONS INVOLVED

720 ILCS 5/9-1 First Degree Murder

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another, or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another, or

(3) he is attempting or committing a forcible felony other than second degree murder.

720 ILCS 5/9-3 Involuntary Manslaughter

(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide

5/112-4 Duties of Grand Jury and State's Attorney

* * * * *

(d) If 9 grand jurors concur that the evidence before them constitutes probable cause that a person has committed an offense the State's Attorney shall prepare a Bill of Indictment charging that person with such offense. The foreman shall sign each Bill of Indictment which shall be returned in open court.

(e) When the evidence presented to the Grand Jury does not warrant the return of a Bill of Indictment, the State's Attorney may prepare a written memorandum to such effect, entitled, "No Bill"

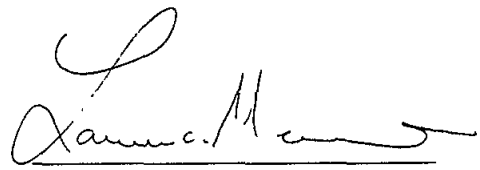
No. 82942

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from The Appellate Court, Second District, No. 95-1454
Plaintiff-Respondent,	)	
v.	)	Original Appeal from the Circuit Court of DuPage County, No. 93 CF 1106
VINCENT DI VINCENZO	)	Honorable Peter J. Dockery, Judge Presiding
Defendant-Petitioner.	)	

PROOF OF SERVICE

Please take notice that I have filed twenty copies of the attached Brief of the Appellant with the Clerk of the Court specified above. I have also served three copies each upon William L. Brower, State's Attorneys' Appellate Prosecutor, 2032 Larkin Avenue, Elgin, Illinois 60123, upon Joseph Birkett, State's Attorney of DuPage County, 505 North County Farm Road, Wheaton, Illinois 60187, and upon James Ryan, Attorney General of Illinois, 100 West Randolph Street, Chicago, illinois, 60601, by depositing same in the United States Mail, first class postage prepaid, on this 29th day of August, 1997.



Lawrence C Marshall