IN THE
INDIANA SUPREME COURT

No. 20A03-1706-CR-1369

MOUSSA I. DAHAB, *Appellant-Defendant*,	Appeal from the Elkhart Superior Court 1,
v.	No. 20D01-1503-F5-77,
STATE OF INDIANA, *Appellee-Plaintiff*.	The Honorable Kristine Osterday, Magistrate.

STATE'S PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

I. Prosecutorial misconduct requires proof that the State acted deliberately to unfairly prejudice a defendant. While Dahab beat his victim with a metal pipe to the head, he invoked ISIS to bolster his intimidating threats. The Court of Appeals held that this unobjected-to evidence was not only inadmissible to prove battery, but that the deputy prosecutor deliberately introduced it to inflame the jury making a fair trial impossible. Did a victim's testimony about Dahab's own statements about ISIS amount to prosecutorial misconduct and fundamental error?

II. No Indiana appellate court has discussed the admissibility in a criminal trial of the simple fact that a court has ordered a defendant to pay a victim's medical bills. Does Evidence Rule 409, which makes inadmissible evidence of a party's payment or offer to pay medical bills, extend further to evidence of a court's finding of liability for paying medical bills—and if so, does its admission make fair trials impossible?

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While Dahab beat an Iraqi refugee in the head with a metal pipe, he exclaimed, "Fuck you. This is ISIS." The trial court admitted this testimony as evidence of Dahab's intent and motive. On appeal and for the first time, Dahab claims that this was an evidentiary harpoon, a form of prosecutorial misconduct that requires that the State deliberately introduce inadmissible evidence for the purpose of maliciously prejudicing the defendant. Despite a well-established standard, a divided Court of Appeals panel found an evidentiary harpoon without explaining how the State deliberately introduced intended unfair prejudice through the victim's description of how Dahab carried out the crime and what he said when doing it. *Dahab v. State*, No. 20A03-1706-CR-1369, slip op. at 10–11 (Ind. Ct. App. March 27, 2018). The majority found that the references to ISIS would have been inadmissible if objected to, and so therefore the State committed misconduct and caused fundamental error by referencing Dahab's own statements about ISIS. *Id.* at 10–11. The Court of Appeals further found fundamental error from prosecutorial misconduct by the unobjected-to admission of evidence that a court had ordered Dahab to pay the victim's medical bills—an issue of first impression. *Id.* at 12. As Judge Bradford noted in dissent, these findings of prosecutorial misconduct and fundamental error are contrary to law and a significant departure from accepted law and practice. *Id.* at 17–25 (Bradford, J., dissenting). Further, the panel decided a previously undecided issue on the scope of Evidence Rule 409 and came to a

conclusion contrary to the plain language of that rule. This Court should grant transfer and affirm Dahab's conviction.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

Rafed Alsaad was an Iraqi who fled Iraq in 2006 after a group of men broke into his home and threatened to kill him and his family if they did not leave within 24 hours (Tr. Vol. II 162–65). Alsaad had been working for the U.S. Army in Iraq and this threat was in retaliation for that employment (Tr. Vol. II 161–65). By January 2015, Alsaad was working at a factory in Elkhart County where he had moved from an entry-level associate position to a leadership role on the manufacturing floor (Tr. Vol. II 165). Dahab worked at this same factory, but only occasionally would Alsaad supervise Dahab (Tr. Vol. II 168, Vol. III 107).

One of Alsaad's tasks would be to ensure that workers such as Dahab were properly loading component parts into manufacturing machines and reporting when supervisees misloaded these components (Tr. Vol. II 170–71). In July 2014, Alsaad reported that Dahab had misloaded a machine (Tr. Vol. II 172–73). In retaliation, Dahab yelled in Alsaad's face in Arabic and threatened him (Tr. Vol. II 172–73). Three months later, Dahab unexpectedly accosted Alsaad, as Alsaad later recalled: "He just come behind me and he start to yell and talk some bad words about my famil[y], my mother and my sister" (Tr. Vol. II 173–74).

Then, approximately three months later, Alsaad happened to be supervising Dahab again (Tr. Vol. II 178). During a break for his supervisees, Alsaad was maintaining the machines' production and recording data output from the machines

(Tr. Vol. II 178–79). While Alsaad was performing these tasks, Dahab came from behind him and hit him in the back of head with a metal pipe (Tr. Vol. II 83, 178–79, Vol. III 72; Exs. 7, 8, 9, 9A, 11). Dahab struck a second time, hitting the front side of Alsaad's head (Tr. Vol. II 178–80). Alsaad was then able to grab the pipe and struggled with Dahab to wrest it from him (Tr. Vol. II 178–79). Alsaad asked Dahab why Dahab hit him (Tr. Vol. II 178–80). Dahab responded in Arabic: "Fuck you. This is ISIS" (Tr. Vol. II 182). Other employees were able to stop Dahab's assault (Tr. Vol. III 24). Alsaad was taken to the hospital to receive four staples in his head (Tr. Vol. II 186, 188; Ex. 10). Within a week of this incident, Alsaad saw Dahab out in public (Tr. Vol. II 197). When Dahab saw Alsaad, Dahab shouted at him and made a hand signal that Alsaad would later testify meant "ISIS win" (Tr. Vol. II 195–98).

Dahab was charged with battery and the case proceeded to a jury trial (App. 21, 23). Alsaad testified to Dahab's statements and gestures relating to ISIS with no objection (Tr. Vol. II 182, 197–98). Alsaad also testified, in response to the prosecutor's questioning about a court order relating to medical bills:

> Q Did you do anything else to protect yourself and your family from [Dahab]?
>
> A In this day or after?
>
> Q At any time.
>
> A Yes. I went to the court, I have the protective order and I go to court for the medical bills [because] it's too high.
>
> ***

Q And you said there was something else that you did with the court?

A It's for the medical bills. It's coming too high and I can't pay, that's why I went to the court, ask if he's guilty or he need to pay.

Q So did the Court order him to pay your medical bills?

A Yes.

(Tr. Vol. II 199–200). Dahab did not object to this testimony. Dahab's counsel also agreed that Alsaad could answer a submitted juror question about the collateral order: "Did the court already ask Mr. Dahab to pay your medical bills?" to which Alsaad responded, "Yes" (Tr. Vol. III 9–10). The jury rejected Dahab's defense that he did not batter Alsaad at all, and he was found guilty (App. 23–25; Tr. Vol. III 121).

A divided Court of Appeals panel reversed Dahab's convictions finding, first, prosecutorial misconduct by way of evidentiary harpoon, and, second, fundamental error. *Dahab*, slip op. at 10–16. The majority held that Dahab's comments about ISIS were inadmissible under Evidence Rule 403 and that these comments alone were prosecutorial misconduct and that the trial court allowed fundamental error to occur. *Id.* at 10–11. The majority also held that evidence of an order requiring Dahab to pay Alsaad's medical bills was inadmissible under Evidence Rule 409. *Id.* at 11–13. Then, considering the two errors the Court had found together, the panel

held: "[T]he cumulative effect … had such an undeniable and substantial effect on the jury's decision that a fair trial was impossible for Dahab." *Id.* at 13.[1]

Judge Bradford dissented because the record did not show that the State introduced any of this evidence for the deliberate purpose of unfair prejudice. *Id.* at 20–25 (Bradford, J., dissenting). He found that Dahab's self-expressed affiliation with ISIS was relevant evidence of motive, and therefore, it was not error for the trial court to admit such evidence. *Id.* at 20–21 (Bradford, J., dissenting). As for the collateral-order evidence, Judge Bradford agreed that it was inadmissible, but recognized: "It is important to note that a potential inaccurate grasp of the rules of evidence, perhaps by all trial counsel in this case, does not amount to prosecutorial misconduct … [T]o find that the deputy prosecutor did act with the deliberate intent to prejudice Dahab would require us to rely purely on speculation." *Id.* at 23 (Bradford, J., dissenting).

ARGUMENT

Prosecutors do not commit misconduct or cause fundamental error by offering evidence that a trial court finds admissible and to which the defendant does not object.

The Court of Appeals majority ignored this Court's longstanding precedent that requires a showing of deliberate maliciousness before finding prosecutorial misconduct. *Id.* at 18–19, 21–22 (Bradford, J., dissenting). And based solely on a finding that evidence of the crime itself—and Dahab's own words—was more

[1] The majority held that sufficient evidence was presented to allow for a re-trial without violating double-jeopardy prohibitions. *Id.* at 14–15. The dissent concurred in this portion of the majority's opinion. *Id.* at 17 (Bradford, J., dissenting).

prejudicial than probative, the Court of Appeals wrongly held that the trial court committed fundamental error by permitting its admission even in the absence of an objection. *Id.* at 13–14. It further found, for the first time, that Evidence Rule 409, which makes inadmissible evidence of a party's offer to pay damages or medical costs, extends beyond its plain language to encompass a court order to pay medical bills—and further that violating this new rule despite no objection constituted prosecutorial misconduct. *Id.* at 11–13. These holdings warrant transfer of jurisdiction and this Court should affirm Dahab's conviction. Ind. Appellate Rule 57(H)(2), (6).

A. Dahab's references to ISIS were admissible, not an evidentiary harpoon, and did not cause fundamental error.

This Court has repeatedly held that a claim of an evidentiary harpoon requires not only a showing that evidence proffered by a party was inadmissible, but also proof that the prosecutor acted deliberately to cause unfair prejudice. *Lucio v. State*, 907 N.E.2d 1008, 1010 n.2 (Ind. 2009) (citing *Williams v. State*, 512 N.E.2d 1087, 1090 (Ind. 1987)); *Overstreet v. State*, 877 N.E.2d 144, 154 (Ind. 2007); *Evans v. State*, 643 N.E.2d 877, 879–80 (Ind. 1994); *Keller v. State*, 560 N.E.2d 533, 535 (Ind. 1990); *McDonald v. State*, 542 N.E.2d 552, 554 (Ind. 1989); *Pallett v. State*, 269 Ind. 396, 402, 381 N.E.2d 452, 456 (1978) ("Because this last answer was not deliberately sought, talk of an 'evidentiary harpoon' is misplaced."). The majority's analysis in this case merely focused on the admissibility of the evidence, and, when it found the evidence here inadmissible, it jumped directly to prosecutorial misconduct, and then even further to fundamental error.

The majority failed to address one of the two requisite questions in the evidentiary-harpoon analysis: whether the State deliberately introduced the evidence to unfairly prejudice Dahab's defense. Dahab's statements that used ISIS to threaten the victim were not admitted in violation of a motion in limine or any other prohibition that could show the State's malicious motive in tendering the ISIS evidence. Instead, the trial court indicated that it recognized that ISIS references would be relevant (Tr. Vol. II 20).

Contrary to the majority's claim that the State engaged in a "drumbeat of ISIS references" sounding throughout the "opening statement, case-in-chief, and closing argument," *Dahab*, slip op. at 14, the prosecutor never mentioned ISIS in the State's opening statement, and only mentioned it one time in closing argument (Tr. Vol. II 66–69, Vol. III 170). And the reference in the State's closing was to note that while Dahab himself invoked ISIS during his brutal attack, the State was expressly decrying any intent to actually prove Dahab was a member of the terrorist organization:

> Rafed Alsaad told you that he was challenged to again fight with Moussa Dahab, saying, "Come on. Come on. Come on." Said it three times and he holds up his fingers like this to intimidate Rafed Alsaad. He'd been intimidating Rafed Alsaad the entire eight months since he met Rafed Alsaad at Chassix. That's what was going on, that's what Rafed testified to. And why was he doing that? Was he part of ISIS? Who knows. That was what he said. Who knows if that's what it really was or if that's what he knew would scare Rafed Alsaad.

(Tr. Vol. III 170).

The prosecutor did not ask the jury to convict Dahab because there was some vague link to ISIS; it properly encouraged the jury to see that Dahab's own words

show he acted intentionally and with the motive to bully and scare Alsaad, an Iraqi refugee. Notably, this argument occurred in the face of Dahab's defense that he did not batter Alsaad at all, but instead that Alsaad just slipped and fell. These arguments about motive and intent were a fair attempt to defeat that defense.

The remainder of the mentions of ISIS were in Alsaad's testimony and in both State and jury questioning (Tr. Vol. II 182–84, 198–99, Vol. III 9, 10). In fact, at least four of the references to ISIS were elicited by questions from the jurors, not the State (Tr. Vol. II 182–83, Vol. III 9–10). The Court of Appeals' mere counting of the times that ISIS appears in the transcript was not only inaccurate or misleading, but they gave no consideration to the proper context in which these references were elicited.

Further, the majority's reasoning employed the incorrect standard of review and came to a conclusion that is incompatible with Evidence Rule 403 jurisprudence. The majority sought to "attempt to balance the mandate of Evidence Rule 403 regarding unfair prejudice and probative value." *Dahab*, slip op. at 11. This is contrary to the standard of review. Questions of admissibility do not turn on whether members of an appellate panel would have decided the question differently in the first instance, but instead ask only whether the trial court abused its broad discretion when it conducted the Rule-403 balancing. *Pierce v. State*, 29 N.E.3d 1258, 1264 (Ind. 2015) (citing *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014)). Particularly in questions falling under Rule 403, this Court has held that substantial deference on appeal is the correct lens through which to view a decision

to admit evidence: "A trial court decision regarding whether any particular evidence violates Evidence Rule 403 will be accorded a great deal of deference[.]" *Tompkins v. State*, 669 N.E.2d 394, 398 (Ind. 1996) (citing *Steward v. State*, 652 N.E.2d 490, 501 (Ind. 1995)). The panel gave no deference to the trial court's decision.

Not only did the panel majority employ the incorrect standard of review, its analysis misinterprets the record. In finding a Rule 403 violation, the majority wrote: "Moreover, in the post-9/11 era, gratuitously linking a person of Middle Eastern descent to a terrorist organization—ISIS—is both unfair and uncalled for." *Dahab*, slip op. at 11. This misses the point: there was nothing gratuitous about presenting this evidence when Dahab invoked ISIS while beating an Iraqi refugee with a metal pipe. Dahab's own words and conduct made the ISIS link, not the State. As Judge Bradford rightly noted, the majority's "assertion fails to take into account how Dahab's words were relevant to the issue of motive." *Id.* at 19 (Bradford, J., dissenting); *Tompkins*, 669 N.E.2d at 397 (citing *Halbig v. State*, 525 N.E.2d 288, 291 (Ind. 1988)) ("More generally, it is well settled that evidence of motive is relevant in the proof of a crime. Further, the admission of evidence having a tendency to create an inference of motive is within the discretion of the trial court.").

There is no doubt that linking violence and terror groups to Middle Eastern immigrants can be inflammatory, but that is precisely why Dahab chose to do just that when battering Alsaad. This Court has sanctioned the use of a defendant's abhorrent and inflammatory statements when they are relevant and part of the

story of the crime. *Tompkins*, 669 N.E.2d at 396–98 (finding no abuse of discretion when the trial court admitted testimony that the white defendant who murdered a black victim had called the road leading to his house "no nigger lane" because it was relevant to motive). "Because this testimony was admissible, talk of an 'evidentiary harpoon' here is misplaced." *Block v. State*, 265 Ind. 569, 571, 356 N.E.2d 683, 685 (1976). The Court of Appeals' opinion below failed to apply this controlling law and has created confusion for prosecutors in cases where defendants invoke highly inflammatory language during their crimes.

Even if an evidentiary-harpoon claim could be successful, any error was not fundamental. Because Dahab failed to object to Alsaad's testimony or the single time the prosecutor mentioned it during closing argument, he waived his claim of error, and must prove fundamental error. Fundamental errors are only those errors that any minimally competent trial judge would be compelled to remedy without the need for an objection. *Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014). The claimed violation must "'constitute clearly blatant violations of basic and elementary principles of due process'" and "'present an undeniable and substantial potential for harm.'" *Ryan v. State*, 9 N.E.3d 663, 667–68 (Ind. 2014) (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). The fundamental error doctrine is intended to be highly restrictive because it is only meant to address "the most egregious and blatant trial errors[.]" *Id.* at 668. A fundamental error must make a fair trial "'impossible[.]'" *Brewington*, 7 N.E.3d at 974–75 (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)).

Telling the jury about how Dahab taunted his victim while viciously beating him without provocation does not make a fair trial impossible in violation of Dahab's due process rights. To the majority, it appears that the question boiled down to only whether the evidence was inadmissible. The panel's affirmative response to this question led to their near-immediate conclusion that fundamental error resulted. Error alone is insufficient to constitute fundamental error; the error must completely deprive a defendant of any ability to have a fair trial of his guilt. *Bruno v. State*, 774 N.E.2d 880, 883 (Ind. 2002) ("The defendant, however, must prove that the error was so prejudicial as to make a fair trial impossible."). "[I]t would be speculation and illogical to assume that the jury was so inflamed by the mere mention of a terrorist organization that it ignored the evidence presented during trial and automatically inferred the defendant's guilt." *Dahab*, slip op. at 22 n.4 (Bradford, J., dissenting). The prosecutor committed no misconduct and no fundamental error occurred in this trial.

B. The admissibility of a court order concerning a victim's medical expenses is a previously undecided question, and its admission was neither misconduct nor fundamental error.

The majority below also held that the evidence that some other court had ordered Dahab to pay Alsaad's medical expenses also warrants this Court's review. Notably, unlike the ISIS testimony, the panel did not hold that the collateral-order evidence was itself an evidentiary harpoon or itself caused fundamental error. *Id.* at 11–13. It merely held that the evidence was inadmissible. *Id.* at 13. This conclusion

is incorrect and a proper analysis proves exactly why this was not an evidentiary harpoon.

This evidence was not inadmissible under the plain language of Evidence Rule 409, which prohibits evidence of "paying, furnishing, promising to pay, or offering to pay" medical expenses "to prove liability for the injury or damage." Evid. R. 409. An order by a court requiring a person to pay does not fall under this rule. Further, exclusion of testimony about this order would not further the policy reasons behind the rule's existence. Commentary for the federal version of Rule 409 reveals that its policy goal is to not dissuade people from voluntarily making recompense for their harmful acts: "'[T]he reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.'" Fed. Evid. R. 409, commentary (quoting Admissibility of Evidence Showing Payment, or Offer or Promise of Payment, of Medical, Hospital, and Similar Expenses of Injured Party by Opposing Party, 20 A.L.R. 291, 293 (1952)).

More importantly, whether this order was admissible is an open question. The Court of Appeals even conceded that there is a "dearth of legal precedent on this issue." *Dahab*, slip op. at 12. The panel attempted to analogize the facts here to facts in another panel's opinion in *Simon v. Clark*, 660 N.E.2d 634, 637 (Ind. Ct. App. 1996). The questionable testimony in *Simon* was evidence that the plaintiff had received medical coverage payments under the defendant's insurance policy. *Id.* This is evidence clearly falling under the rule prohibiting evidence of "paying"

medical expenses. Evid. R. 409. The collateral order here was not evidence that payment had been or even would be paid. It certainly does not indicate that Dahab voluntarily paid Dahab's medical expenses—the act sought not to be discouraged under Rule 409. The majority's analogy is inapposite.

The importance of this issue being open means that the deputy prosecutor did not introduce this evidence under a clear prohibition against its inadmissibility. When the admissibility of a piece of evidence is an undecided legal question, then it is not possible for it to be introduced for the deliberate purpose of unfair prejudice. The party introducing it must know that it is inadmissible, and when the question of admissibility is undecided, that knowledge is non-existent. Therefore, the State could not have introduced this evidence with a malicious purpose to unfairly prejudice Dahab. Further, neither counsel nor the trial court interjected when this evidence was elicited—providing further evidence that this testimony did not cause fundamental error. *Dahab*, slip op. at 23 (Bradford, J., dissenting) ("It is unclear from the record whether this evidence of liability for medical payment had any effect on the jury, much less that it aroused their passions."). In any event, even if it were inadmissible, considering the weight of evidence against Dahab and his incredibly dubious defense that Alsaad slipped and fell onto the same pipe with which Dahab was proved to have struck Alsaad, any error would be harmless. *See id.* at 24 (Bradford, J., dissenting). The Court of Appeals wrongly held that this evidence was inadmissible and then further erred in holding that it contributed to prosecutorial misconduct and fundamental error.

CONCLUSION

This Court should grant transfer and affirm the trial court's judgment.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Undersigned counsel verifies that this petition to transfer contains no more than 4,200 words, and verifies that this petition contains 3,594 words.

/s/ Tyler G. Banks
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 26, 2018, I electronically filed the foregoing document using the Indiana E-Filing System ("IEFS"). I also certify that the foregoing document was served April 26, 2018, upon opposing counsel via IEFS:

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