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Case Number 14,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY KENT,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	**No. 14, 2015**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR

NEW CASTLE COUNTY

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DATE: August 21, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

Jeffrey Kent ("Kent") was arrested and indicted for murder first degree and possession of a firearm during commission of a felony ("PFDCF") on February 18, 2013 in connection with a homicide that occurred in June 2011. (A-9).

On August 8, 2014, defense counsel filed a memorandum requesting that the State be prohibited from calling a witness in its case-in-chief or alternatively to appoint Kent new counsel because of a conflict that had arisen with his representation. (A-27). The request was denied. (D.I. #55). On September 7, 2014 Kent filed a motion to dismiss on the basis of *Brady* violations. (A-34). The Court denied the motion from the bench. *See* oral ruling attached as Ex. A.

Kent went to trial on September 8, 2014. (D.I. #47). He was found guilty on both counts. (D.I. #47). On September 25, 2014 Defense counsel filed a post-trial motion for new trial pursuant to Sup. Ct. Crim. R. 33 alleging prosecutorial misconduct and improper vouching. (A-153). The motion was denied. (D.I. #57). Kent was sentenced on December 19, 2014 to life in prison. *See* Sentence Order attached as Ex. C.

Kent filed a timely appeal. This is his Opening Brief as to why his convictions must be reversed.

SUMMARY OF THE ARGUMENT

1. The Prosecutor violated Kent's constitutional rights when it failed to disclose evidence casting serious doubts on the reliability of its star witnesses until the eve of trial which prevented the defense from using the material effectively. Therefore, reversal is now warranted to prevent a manifest injustice.

2. The Prosecutor's closing argument amounted to prosecutorial misconduct that impermissibly shifted the burden to the Defendant in violation of his constitutional rights when he repeatedly stated misleading and inaccurate statements in addition to improper vouching during rebuttal closing argument. Reversal is now warranted.

3. Kent was denied his right to independent and effective assistance of counsel in violation of the 6th Amendment to the United States Constitution and Article I Section 7 of the Delaware Constitution stemming from dual representation that created divided loyalties between the present client, Mr. Kent, and the State's star witness, Thurman Boston. Reversal is now required.

4. Kent's trial was riddled with error. The combination of the errors and their cumulative impact in this case substantially affected Kent's right to a fair trial. Thus, reversal is now required.

STATEMENT OF THE FACTS

On or about June 30th, 2011, at 11:57 P.M., the decedent's truck was stopped at the intersection of W. 8th St. and Monroe St. in Wilmington, Delaware. (A-115-116). Around that time, a male subject on a bike approached the truck, and spoke with the decedent through the truck's open window. (A-88). After an indeterminate amount of time witnesses heard a gunshot and saw a flash. (A-90). The male subject allegedly put his hand in his pocket and fled north on Monroe St. Meanwhile, the truck accelerated west on 8th St. and, after traveling five to six car lengths, collided with a utility pole. (A-90).

Shortly thereafter, the Wilmington Police Department arrived on the scene. Officer Donald Bluestein, the first responding officer found the decedent nonresponsive in his truck. (A-84). Police searched the 700 and 800 blocks of Monroe Street and the 500 to 800 blocks of W. 8th St. Police recovered no evidence related to the incident. (A-123). Police were able to lift three sets of fingerprints from the decedent's truck. However, none of these fingerprints matched Kent. (A-130-131). Police also searched Kent's home on July 22nd, 2011 but found no evidence related to the shooting. (A-131).

In July 2011, police obtained video surveillance footage from a nearby convenience store at 7th and Adams St. and from a Downtown Visions Camera positioned at 8th St. and Monroe St. (A-125). The surveillance footage from the convenience store shows Kent at the store at 2:18 P.M. on June 30th wearing a white sleeveless shirt, dark jeans, and flip flops. (A-125-126). Kent again appears on the convenient store footage at 9:57 P.M. wearing the same clothing. (A-125-127). The Downtown Visions Camera captured a black male wearing a white t-shirt riding a bicycle in the area of 8th and Monroe at 11:45 P.M. (A-133). However, none of the footage captured the purported shooting or the truck colliding with the utility pole. (A-124-125).

Dr. Jennie Vershvosky performed the decedent's autopsy and determined the cause of death to be the result of a homicide. Dr. Vershvosky testified that the autopsy showed no evidence of close fire and that the weapon was at least two to three feet away. (A-138).

Thurman Boston testified that he witnessed the incident take place. (A-90). According to Boston's testimony, he was driving home from his sister's fiancée's house on the date in question. He testified that just before the incident, he was positioned behind the decedent's truck at the corner of W. 8th St. and Monroe St. (A-87). A male subject on a bicycle was at the

truck's window, and it appeared that the decedent and the man were having a conversation. (A-88). Boston testified that he heard a pop and saw a flash. The male subject turned towards Boston's car before fleeing north on Monroe St. (A-90). Boston testified that he and the man exchanged glances, and that he recognized that the man as Kent, who he knew from around his neighborhood. (A-90).

Shortly thereafter, Boston called Sargent Tom Looney of the Wilmington Police Department, with whom Boston had worked before as a paid informant. (A-93). Although a detective showed Boston a lineup including Kent's picture, Boston did not identify Kent as the shooter. (A-94-95). In fact, Boston did not identify Kent as the shooter until the summer of 2013, when he was in custody on charges of robbery. (A-96-97).

Brianna and Dajuan'ya Brown, ages 12 and 15 at the time of the incident, testified that they saw Kent near the scene on June 30, 2011. (A-108). Both sisters testified that they witnessed the incident from the front steps of their home at 814 W. 8th St, while playing a game. (A-103). Both testified that the shooter was wearing tan cargo shorts and no shirt. (A-106). They could not recall any other characteristics of the alleged shooter. (A-106-107).

Monica Miller also lived at 814 W. 8th Street on June 30th, 2011. (A-142). Miller testified that if one were on the front steps on 814 W. 8th St. on a night in June, one would not be able to see anything on the corner of 8th St. and Monroe St. (A-143). Trees along the street would obstruct the view to the corner. (A-144). Further, the house is about a football field's length away from the corner and headlights from cars down the street would have made it difficult to see. (A-144).

Kent was not arrested until February of 2013, more than a year and a half after the incident in question. (A-135).

I. THE PROSECUTION VIOLATED KENT'S DUE PROCESS RIGHTS AND RIGHT TO A FAIR TRIAL WHEN IT FAILED TO PROVIDE *BRADY* MATERIAL IN THE FORM OF STATEMENTS FROM ITS STAR WITNESSES UNTIL THE EVE OF TRIAL THUS PREVENTING DEFENSE COUNSEL FROM USING THE EVIDENCE EFFECTIVELY.

Question Presented

Whether the Prosecution betrays the constitutional obligations mandated by *Brady v. Maryland*[1] when it fails to disclose evidence casting serious doubts on the reliability of its star witnesses until the eve of trial which prevents the Defendant from using the material effectively? The issue was preserved by defense counsel's motion to dismiss. (A-34).

Standard and Scope of Review

Questions of law and constitutional claims, such as claims that the State failed to disclose exculpatory evidence, are reviewed *de novo*. *Wright v. State*, 91 A.3d 972, 982 (Del. 2014).

Argument

"There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it"[2]

Defense counsel was appointed to represent the defendant on

[1] 373 U.S. 83, 87 (1963).
[2] *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013).

February 22, 2013. On February 26, 2013, a Rule 16 discovery request was sent to the State which included a request for any exculpatory material pursuant to *Brady v. Maryland*.[3] The State responded to the defendant's initial discovery request on May 14, 2013.[4] On July 16, 2014, defense counsel again requested the names of witnesses in order to perform conflict checks.[5] The State did not immediately respond to that request. The State eventually advised that witness information would be provided but only if the Court signed a protective order preventing defense counsel from sharing the witness information with the defendant.[6] The protective order was signed but the witness information was not immediately provided. Over a period of weeks, transcripts and recorded statements of some witnesses were provided. However, many other witness statements and information were not provided until the eve of trial.

Jury selection in this case commenced on September 8, 2014. On September 6, 2014, the State advised that they reviewed the requested statements of its key witnesses: Archy Wallace, Dexter Briggs and Raheem Smith and found no exculpatory material within those statements and

[3] (See Ex. A to September 7, 2014 motion to dismiss).
[4] (See Ex. B to September 7, 2014 motion to dismiss).
[5] (See Ex. C to September 7, 2014 motion to dismiss).
[6] (See Ex. D to September 7, 2014 motion to dismiss).

declared those statements as not disclosable.[7] Astonishingly, the next day, September 7th, via e-mail, the State advised that they now believed the video statement of Wallace Archy is arguably *Brady* material and provided the statement.

At the same time the State provided Archy's statement, the statement of Raheem Smith was provided.[8] His statement was also *Brady* material given that: [1] his testimony would impeach both Briana and Dajuan'ya Brown because he said it is not possible to see the corner of 8th and Monroe Streets from the bench where the girls were sitting; [2] he indicated he was at the corner of 8th and Monroe Streets just prior to the shooting and did not see a white guy; and [3] his testimony would impeach the testimony of Thurman Boston, the State's star witness, who identified Kent and testified that the victim was a white male sitting in a parked truck at the intersection of 8th and Monroe Streets.

Monica Miller is another witness whose statement was provided on the eve of trial thus preventing defense counsel from effectively using it.

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[7] (See Ex. E to September 7, 2014 motion to dismiss).

[8] In his statement, Smith indicates he was in front of same house with the girls and heard a gunshot. Smith says that right before the shooting he was walking up Monroe Street towards West 8th Street and did not see a white guy at the corner of 8th and Monroe or he would have noticed. He also said he was with the "little girls" out front of their house sitting on a bench. He heard a shot, he ran into the house, he heard the truck crash and the he came back outside. He told the officer that it was not possible to see to the corner of 8th and Monroe Streets from where he was sitting with the girls. According to Mr. Smith, "you can't, actually where I'm at, you can't look down there with all them cars."

The transcript of Monica Miller's recorded statement was provided by the State on September 2nd (6 days before jury selection). A copy of the DVD recording was provided on September 5th (the Friday before jury selection). Miller's statement included exculpatory material consistent with *Brady v. Maryland*. Miller advised that two of the State's three eyewitnesses, Briana Brown and Dajuan'ya Brown, were not in a position where they could have seen the shooting occur and that they in fact did not see the shooting. Specifically, Miller's testimony would be impeachment evidence of two of State's star witnesses.

Brady violation occurs when: (1) evidence is favorable to the accused because it is exculpatory or impeaching; (2) evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Favorable evidence is "material" if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.*

The State is obligated to disclose information that could be used to impeach State witnesses, especially where the witness's testimony, as was here, is an important part of the State's case. *Giglio v. United States*, 405

U.S. 150 (1972). *See also Bagley*, 473 U.S. at 676-77 (impeachment evidence subject to *Brady* disclosure); *U.S. v. Wilson*, 605 F.3d 985, 1006-07 (D.C. Cir. 2010) (internal investigation of officer subject to *Brady* disclosure as investigation could have been used as impeachment evidence against officer). In Delaware, "the jury is the sole trier of fact, responsible for determining witness credibility and resolving conflicts in testimony." As such, "jurors should be afforded every opportunity to hear impeachment evidence that may undermine a witness' credibility." *Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001).

In the instant case, the statements of Wallace Archy, Raheem Smith and Monica Miller all fell under *Brady*. Their statements fit the classic definition of impeachment evidence against the State's key witnesses. The jury, as the sole trier of fact, should be allowed to hear evidence in order to make a determination regarding the witness' credibility and in order to assist the jury to resolve conflicts in testimony. As such, the failure to timely disclose their statements violated the defendant's due process rights pursuant to *Brady v. Maryland.*

Here, the unreasonably delayed disclosure prevented Kent from using *Brady* material effectively. It is not enough that the State provide the *Brady* material prior to trial, but the disclosure must not be delayed to the point

where the defendant does not have sufficient time to effectively use the material. *Leka v. Portuondo*, 257 F.3d 89 (2d. Cir. 2001). When the *Brady* material is a witness statement, it stands to reason that the opportunity to use the material effectively is insufficient when the disclosure is so close to trial that defense counsel does not have time to interview and subpoena the witness. "When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case. " *Id.* at 101. Here, the State's delayed disclosure of the exculpatory statements made by Archy, Smith and Miller prevented defense counsel from interviewing and securing these individuals as witnesses for the defense to use effectively.

In this case, the entirety of the State's evidence against Kent was based on the eyewitness testimony of three individuals. There was no physical evidence that connected Kent to this crime. The statements made by Wallace Archy, Raheem Smith and Monica Miller to the police contradicting the State's eyewitnesses fell within the *Brady* rule because it is "favorable to the accused so that, if disclosed and used effectively, it might make the difference between conviction and acquittal." *Michael v. State*,

529 A.2d 752, 756 (Del. 1987) *citing United States v. Bagley*, 473 U.S. 667 (1985). There is no doubt in the instant case, that any evidence undermining the credibility of the statements made by Briana Brown, Dajuana'ya Brown and Thurman Boston made the difference between conviction and acquittal. As such, reversal is now required.

Failing To Disclose Brady Material In A Timely Fashion Runs Contrary To The Prosecution's Special Role In The Search For The Truth In A Criminal Trial.

On August 1, 2014, an office conference was held in chambers. With Kent's trial for murder quickly approaching, one of the primary issues brought to the Court's attention was defense counsel's concern that the State was not turning over *Brady* material with adequate time for the defense to review the evidence with its investigators. (A-20).[9] In particular, witness statements that they had in possession for approximately three years.

The State made clear that its intention was to provide the materials approximately "a week or so before trial" in order to "keep them close to the vest for as long as [they] can[.]" (A-20). The Prosecutor stood by the position that the defense was only entitled to a week and a half to prepare its case in a murder trial. His reasoned that this was equitable because this was

[9] Complicating matters was defense counsel's limitations as a result of the Court granting the State's protective order restricting discovery to facilitate defense counsel's ascertainment of potential conflicts in representation. (A-11).

not a civil case and the State had to prove its case beyond a reasonable doubt. (A-21). Such an approach contributes to a harmful notion that the criminal justice system is a game, and that victory rather than justice is a prosecutor's goal.

Underlying *Brady's* unequivocal demand is the recognition that prosecutors are subject to heightened ethical obligations by virtue of their office. *Berger v. United States*, 295 U.S. 78, 88 (1935). As representatives of the sovereign, prosecutors operate outside the "pure adversary model." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). Their responsibility is not to win at all costs but rather to "ensure that a miscarriage of justice does not occur." *Id*. at 675. Crucial to that effort is "disclos[ing] evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id*.

Brady jurisprudence has been founded on the prosecutor's obligation to seek justice—what the U.S. Supreme Court has called the "special role played by the American prosecutor" in the search for truth, *Strickler*, 527 U.S. at 281—and therefore focuses on the favorable effect of the evidence, not the conduct of the defendant, or, indeed, of the prosecutor, *Brady*, 373 U.S. at 87. Proper administration of justice requires that prosecutors always err on the side of disclosure. Rather than grudgingly withhold arguably

favorable evidence based on lack of a request, availability from other sources, or arguable non-materiality, the Court expects that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); accord *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."). As the *Kyles* Court acknowledged, "[s]uch disclosure will serve to justify trust in the prosecutor as the 'representative … of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" 514 U.S. at 439 (quoting *Berger*, 295 U.S. at 88).

A prosecutor has a duty to learn of any favorable evidence known to the others acting on government's behalf in the case, including the police. *Wright*, 91 A.3d at 988. The duty to disclose arises regardless of whether the Defendant makes a request for the evidence. *Bagley*, 473 U.S. at 682. There is a structural asymmetry between the prosecution and the defense. *United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980). In addition to having, frequently, a general superiority in resources and staff, the prosecution always has numerous "inherent information-gathering advantages": the ability to conduct the investigation while the facts are still fresh; the power to "'compel people, including the defendant, to cooperate'";

the right to "'search private areas and seize evidence'"; and the means to tap networks of informants and the "'vast amounts of information in government files.'" *Wardius v. Oregon*, 412 U.S. 470, 476, 477 n.9 (1973).

The defense, by contrast, typically must rely on the protections of due process to offset those advantages—including, critically, the Brady rule. *Id.* at 480 (Douglas, J., concurring in the result) ("Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution."). *Id*. 17 And this imbalance is particularly acute in the case of indigent defendants. E.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Moreover, Prosecutors are bound to comply with these standards under their ethical obligations. The ABA's Model Rules of Professional Conduct impose special responsibilities on prosecutors. Model Rules of Prof'l Conduct R. 3.8; see also Model Code of Prof'l Responsibility DR 7-103(B) (1980). In particular, a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." ABA Model Rules of Prof'l Conduct R. 3.8(d).

Sadly, the State's unprofessionalism in this case is not the exception. In *State v. Braden*, Del. Super. Ct., No. 0709030642, Witham, J. (May 19, 2009), the Court dismissed the case against the defendant charged with

Murder in the Second Degree and other charges because the State failed to timely disclose the exculpatory statement of a witness until the eve of trial. The information was not provided within a time period for defendant to effectively use the information as defense counsel was unable to locate the witness. In fact, *Brady* violations have reached epidemic proportions in recent years both at the state and federal level.[10]

Here, the Prosecutor violated Kent's constitutional rights when it failed to disclose evidence casting serious doubts on the reliability of its star witnesses until the eve of trial which prevented the defense from using the material effectively. Therefore, reversal is now warranted to prevent a manifest injustice.

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[10] *Smith v. Cain*, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012); *United States* v. *Sedaghaty*, 728 F.3d 885 (9th Cir. 2013); *Aguilar* v. *Woodford*, 725 F.3d 970 (9th Cir. 2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); S*immons v. Beard*, 590 F.3d 223 (3d Cir. 2009); *Douglas* v. *Workma*n, 560 F.3d 1156 (10th Cir. 2009); Harris v. Lafler, 553 F.3d 1028 (6th Cir. 2009); *United States* v. *Zomber*, 299 F. Appx. 130 (3d Cir. 2008); United States v. *Triumph Capital Grp., Inc*., 544 F.3d 149 (2d Cir. 2008); *United States v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008); *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2004); *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003); *United* S*tates v. Lyon*s, 352 F. Supp. 2d 1231 (M.D. Fla. 2004); *Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000); *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998); *People* v. Uribe, 162 Cal. App. 4th 1457, 76 Cal. Rptr. 3d 829 (Cal. Ct. App. 2008); *Miller v. United* States, 14 A.3d 1094 (D.C. 2011); *Deren* v. *State*, 15 So. 3d 723 (Fla. Dist. Ct. App. 2009); *Walker* v. *Johnson*, 282 Ga. 168, 646 S.E.2d 44 (Ga. 2007); *Aguilera v. State*, 807 N.W.2d 249 (Iowa 2011); *DeSimone v. Stat*e, 803 N.W.2d 97 (Iowa 2011); *Commonwealth* v. *Bussell*, 226 S.W.3d 96 (Ky. 2007); *State ex rel. Engel v. Dormir*e, 304 S.W.3d 120 (Mo. 2010); *Duley v. State*, 304 S.W.3d 158 (Mo. Ct. App. 2009); *People v. Garrett*, 106 A.D.3d 929, 964 N.Y.S.2d 652 (N.Y. App. Div. 2013); *Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011); *In re Stenson*, 174 Wn.2d 474, 276 P.3d 286 (Wash. 2012); *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (W.Va. 2007).

II. THE PROSECUTOR'S REPEATED IMPROPER STATEMENTS AND VOUCHING DURING CLOSING ARGUMENT WAS PROSECUTORIAL MISCONDUCT AMOUNTING TO IMPROPER BURDEN SHIFTING IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I SECTION VII OF THE DELAWARE CONSTITUTION, WARRANTING REVERSAL.

Question Presented

Whether the Prosecutor's closing argument amounts to prosecutorial misconduct that impermissibly shifts the burden to the Defendant in violation of his constitutional rights when he repeatedly stated misleading and inaccurate statements in addition to improper vouching during rebuttal closing argument? The issue was preserved by defense counsel's motion for new trial and objection during closing argument. (A-153).

Standard and Scope of Review

The scope of review for determining prosecutorial misconduct is "harmless error". *Baker v. State*, 906 A.2d. 139, 148 (Del. 2006).

Argument

Kent submits that the State's closing argument, specifically the rebuttal, which reiterated, albeit incorrectly, the lack of corroboration by the Defense, amounted to impermissible burden shifting and vouching, thus violating his due process rights under the Fourteenth Amendment of the

United States Constitution and Article I Section VII of the Delaware Constitution. Delaware "law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." *Boyer v. State*, 436 A.2d 1118, 1125 (Del. 1981). *See United States v. Mastrangelo*, 172 F.3d 288, 298 (3d. Cir. 1999) (Burden-shifting is another form of prosecutorial misconduct which may require the reversal of a conviction and the granting of a new trial).

During defendant's closing argument, defense counsel pointed out to the jury that, in his third statement to Detective Kirlin, Thurman Boston volunteered that the shooter was not wearing a shirt. Boston had said in his previous statements that the shooter was wearing a white "wife beater" tank top t-shirt. The State's only other two eyewitnesses, Briana and Dajuan'ya Brown, described the shooter as being shirtless. Defense counsel asked the jury if Boston might be comporting his description of the shooter to match the description given by the two Brown sisters. In rebuttal, the State instructed the jury that to make such a finding would be a violation of the rule against speculation. (A-165-166).

This reference to the rule against speculation improperly caused the jury to switch the burden of proof from the State to the defense. A jury is free make reasonable inferences from the facts in evidence. In addition,

the credibility of each witness is to be determined by the jury. (*See* Jury Instructions p.p.14-15).[11] A jury may consider conflicts in the testimony of each witness. As the sole judges of the credibility of each witness, a jury decides what weight to give the testimony of each. In this case, a jury could reasonably infer that Boston was aware of the description given by the Brown sisters of a shirtless gunman. Specifically, Boston volunteered that the shooter was shirtless. He was not asked about the gunman's clothing or appearance prior to making the statement. The defendant had been charged with the murder prior to Boston's final statement. Boston testified that he did not speak up earlier because he didn't want to be the only person identifying the defendant as the shooter. As he put it, he did not want to be alone "on front street." A jury could reasonably infer that Boston was less than truthful in his final statement based on the above information.

The prosecutor's statement that the rule against speculation prohibits the jury from making such a conclusion was legally incorrect, misleading

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[11] Jury Instructions-p.14:

> You are the sole judge of the credibility of each person who has testified and of the weight to be given to the testimony of each . . . If you should find the evidence in this case to be in conflict, then it is your duty to reconcile the conflicts if you can. If you cannot reconcile these conflicts, then it is your duty to give credit to that portion of the testimony which you believe is worthy of credit, and you may disregard that portion of the testimony which you do not believe to be worthy of credit.

and improperly shifted the burden to the defendant to prove that Boston was aware that the Brown sisters previously described the shooter as shirtless.

In another instance, the Prosecutor incorrectly argued that defense counsel failed to read in closing argument the entire redacted version of the letter allegedly written by the defendant. (A-179-180). Recognizing the blatant misstatement the Court *sua sponte* called counsel to sidebar and instructed the State to correct its erroneous statement regarding defense counsel's closing remarks. (A-180-181).

The State also mislead the jury when it said that defense counsel stated in his closing argument that we don't know if Thurman Boston received a benefit for his identification of the defendant in June of 2013. (A-165). Defense counsel clearly argued that the benefit he received was the opportunity to speak with a detective other than Detective Conner in hopes of receiving help in recovering video surveillance to prove his innocence.

Finally, on a fourth occasion, the prosecutor erroneously told the jury that Wallace Archy, a defense witness, said that he heard gunshots and then **immediately** saw the truck drive through the intersection. (A-183). Defense counsel objected due the factual inaccuracy of the description of

Archy's statement. Archy in fact had stated that the truck drove through the intersection 10 to 15 seconds after he heard the gunshots. Rather than advise the jury that his prior statement was erroneous, he merely restated that Archy said he saw the truck enter the intersection 10 to 15 seconds after hearing the gunshots rather that immediately upon hearing the shots.

To determine whether prosecutorial misconduct prejudicially affects a defendant's substantial rights, the Court applies three factors: (1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the effects of the error. *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981). If reversal is not warranted under *Hughes*, the court can still reverse if it finds the prosecutor's statements or misconduct are repetitive errors that cast doubt on the integrity of the judicial process. *Hunter v. State*, 815 A.2d 730 (Del. 2002).

Kent submits that the State's evidence with regard to both Murder in the First Degree and Possession of a Firearm was a close case. The only evidence connecting the defendant to these crimes was conflicting eyewitness testimony of Thurman Boston, Briana Brown and Dajuana'ya Brown. No weapon was ever seen by a witness or recovered by police. There was no forensic evidence presented which linked Kent to the crime. The State's entire case was based solely on the credibility of three witnesses

who contradicted each other along with Downtown Visions video footage that failed to capture any of the incident.

The second prong of the *Hughes* test is the centrality of the issue affected by the alleged error. Here, the jury's determination of the credibility of Boston's trial testimony and third statement to the police in particular, was dispositive of both indicted charges for which he was convicted. Since the State produced no physical evidence to support Boston's account, and since Boston is one of only three witnesses who identified Kent as the shooter, the prosecutor's comments are central to the issue affected by the error. By improperly advising the jury that they could not conclude that Boston changed his story in his third statement to the police due to the rule against speculation, the State effectively limited the jury's role as finder of fact. Further, such an instruction limited the jury's role of sole judge of witness credibility.

The final prong this Court must evaluate are the steps taken to mitigate the errors. *Hughes*, 437 A.2d 559, 571 (Del. 1981). All of the Prosecutor's misleading and incorrect statements were heard by the jury. Following one of the four instances, the Court *sua sponte* ordered the Prosecutor to correct the misrepresentation that defense counsel had failed to read the entire letter allegedly authored by the defendant. Defense counsel

objected to the State's misrepresentation that Wallace Archy had testified that the truck drove through the intersection immediately after hearing the gunshots. However, the State, without acknowledging that his prior argument was factually incorrect, simply advised that Archy had testified that he saw the truck enter the intersection 10 to 15 seconds after hearing the gunshots. Given the repetitive nature of improper argument and the closeness of this case, the steps taken to mitigate the effects of the error undermined the integrity of the jury verdict in this matter. The lack of curative measures or adequate mitigative steps caused substantial prejudice to Kent. Moreover, the burden of proof was improperly shifted to the Defense, when it was constitutionally the Prosecution's burden. Thus, such burden shifting violated Kent's constitutional rights warranting reversal.

Lastly, the Prosecutor's improper vouching during closing arguments also demonstrates that reversal is required. "Improper vouching occurs when the prosecutor implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness testified truthfully." *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013) *citing White v. State*, 816 A.2d 776, 779 (Del. 2003). This Court has held that "improper vouching is especially problematic when a witness' credibility is at issue 'because jurors may easily interpret vouching by the prosecutor as an official

endorsement of the witness.'" *Whittle*, 77 A.3d at 244. The Court cautioned prosecutors to "choose their words in a closing argument with great care" to avoid jurors placing undue weight on prosecutorial statements caused by improper vouching. *Id. citing Trump v. State*, 753 A.2d 963, 967 (Del. 2000).

In the instant case, the prosecutor improperly vouched for the witnesses Brianna and Dajuan'ya Brown. In his rebuttal closing argument, the prosecutor stated:

> Do you remember what happened when Briana was asked to identify the man she knew as Forty? Do you remember where she was looking? She was looking at you and she went like that. She couldn't even look at him. She didn't want to be here. But, she told you the same thing she told the police. I know who shot the man at 8th and Monroe. I know him because he's a neighbor and his name is Forty. That's what both the girls said. And they've got no reason to come in here and tell you something other than the truth.

(A-172-173). By arguing that the Brown sisters have no reason to tell the jury something other than the truth is equivalent to the State telling the jury that the sisters are telling the truth. Such a statement by a prosecutor in closing argument is improper vouching. Improper vouching can be "so fundamental and serious" that it deprives the defendant of his right to a fair trial. *Whittle*, 77 A.3d at 249. Just as in the *Whittle* case, the effects of improper vouching are amplified by the central role of witness credibility in

a close case with little physical evidence. *Id.* In the case at bar, the State's entire case was based on witness testimony. The prosecutor's improper vouching for the credibility of two of the three State's witnesses who identified the defendant as the shooter deprived the defendant of his right to a fair trial.

III. KENT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION VII OF THE DELAWARE CONSTITUTION WHEN THE TRIAL COURT FAILED TO PRECLUDE THE STATE FROM PRESENTING A CRITICAL WITNESS AT TRIAL WHICH RESULTED IN A CONFLICT OF INTEREST AS TO KENT'S REPRESENTATION.

Question Presented

Whether Kent was denied his right to independent and effective assistance of counsel in violation of the 6th Amendment to the United States Constitution and Article I Section 7 of the Delaware Constitution stemming from dual representation that created divided loyalties between the present client, Mr. Kent, and the State's star witness, Thurman Boston? The issue was preserved by defense counsel's request to prohibit the State from calling Boston in its case-in-chief or in the alternative appoint Kent new counsel. (A-27).

Standard and Scope of Review

This Court reviews claims alleging the infringement of a constitutional right *de novo. Williams v. State*, 56 A.3d 1053, 1055 (Del. 2012). Because a conflict of interest is a question of law, review is *de novo. Hitchens v. State*, 931 A.2d 437, 2007 WL 2229020, at *2 (Del. 2007).

Argument

The Public Defender's Office ("PDO") was appointed to represent Kent in Superior Court and a file was opened on February 22, 2013. (A-21). A Rule 16 Discovery Letter was sent to the State on February 26, 2013, requesting the identification of State witness for purposes of conflict checks. On April 11, 2013, and on June 28, 2013, an attorney from the PDO was appointed to represent Thurman Boston for charges in Superior Court. (A-21). These files were closed on June 28, 2013 and March 11, 2014, respectively. As part of Boston's defense, the PDO's psycho-forensic evaluator completed an assessment of Boston. Additionally, the office accessed and reviewed his medical records and prescription information.

The State did not respond with the identities of the witnesses in Kent's trial until July 29, 2014, more than a full year after the request was sent. (A-21). The PDO learned at this time that Boston was a witness in Kent's trial. Because the office was unaware of the identity of the witness, Boston's cases were not reassigned to conflict counsel as they would have been had the conflict been known. Instead, Kent and Boston were concurrently represented and had charges pending simultaneously. As a result, the PDO became aware of confidential information concerning Boston that was material to Kent's trial. As a result of the aforementioned circumstances,

defense counsel requested that the Court prohibit the State from calling Boston in its case-in-chief or in the alternative appoint Kent new counsel. The Court denied the request. Notably, neither Kent nor Boston waived the conflict and at trial Boston testified as one of the State's key witnesses against Kent.

Counsel with divided loyalties is ineffective. The Sixth Amendment right to the effective assistance of counsel provides for representation that is "free from conflicts of interest or divided loyalties." *See Lewis v. State*, 757 A.2d 709, 714 (Del. 2000) (*quoting United States v. Acty*, 77 F.3d 1054, 1056 (8th Cir. 1996)). Since the State was permitted to use Boston as a witness in this instance, Kent no longer received counsel that was free from divided loyalties. In *Mirabel v. State*, this Court determined that "[b]ecause trial counsel's divided loyalties diminished Mirabel's ability to present his defense . . . Mirabel was denied his right to effective assistance of counsel under the Sixth Amendment." 86 A.3d 119 (Del. 2014). Similarly, here, because Boston testified, loyalty was compromised.

Here, representation by the PDO denied Kent his right to independent and effective assistance of counsel. The trial court erred by permitting the PDO to represent Kent since it concurrently represented Boston. The conflict of interest manifested when the State presented Boston as a witness

because it created divided loyalties between the present client, Kent, and the adverse witness, Boston. *Rule 1.9(c) of the Delaware Lawyers' Rules of Professional Conduct* prevents lawyers who have formerly represented a client in a matter from representing another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client. Matters are "substantially related" for purposes of the Rule if "they involve the same transaction or legal dispute **or** if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *Comm. 3 on Rules of Prof. Conduct, Rule 1.9.* Rule 1.9(c) specifically state's a lawyer who has formerly represented a client cannot:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Professional Rules of Conduct 1.9(c).

Even in cases where a court determines that no conflict exists, new counsel should be appointed to avoid the appearance of impropriety. *State v. Sykes*, 2005 WL 1177567 (Del. Super. Ct.). The Court in *Sykes* ruled

that it would seek waivers of any potential conflict from both the defendant and potential state's witness since such representation may appear unjust and threaten the legitimacy of the proceedings. *Id. at* *3. The Court advised that if either party chose not to waive the conflict, conflict counsel would be required to represent the defendant. *Id.* Here, neither Kent nor Boston waived the recognized conflict of interest.

At the very least, the State should have been precluded from presenting Boston as a witness in the case against Kent. The record shows that Kent's trial counsel held divided loyalties to an adverse witness that affected trial counsel's performance and denied Kent his Sixth Amendment right to the effective assistance of counsel. Thus, reversal is now required.

IV. THE INSTANT CASE WAS FILLED WITH ERROR AND THE CUMULATIVE EFFECT OF THE ERRORS PREJUDICED KENT BY DENYING HIM HIS RIGHT TO A FAIR TRIAL.

Question Presented

Whether the errors committed in Kent's trial, which have supported reversals having occurred in isolation, taken together renders the trial so unfair that a new trial is warranted? The issue is of a magnitude so clearly prejudicial to substantial rights as to jeopardize the fairness of the trial. Del.Sup.Ct.Rule 8.

Standard and Scope of Review

When there are several errors at trial, this Court determines whether they add up to plain error. *Wright v.State*, 405 A.2d 685, 690 (Del. 1979).

Argument

Errors occur in every trial and most are unavoidable and harmless. "A defendant is entitled to a fair trial but not a perfect one."*Lutwak v. United States*, 344 U.S. 604, 619 (1953). However, "some trials are so inundated with errors that the only recourse is to begin anew." [12] This trial belongs in that category.

[12] *State v. Savage*, 2002 WL 187510 at *8 (Del. Super. Ct. Jan. 25, 2002).

As this Court has noted, "where there are several errors in a trial, a reviewing court must also weigh the cumulative impact to determine whether there was plain error from an overall perspective."[13] Moreover, where a "credibility contest" is the central issue in an undisputed close case, the cumulative prejudicial effect of the errors cannot be deemed harmless. The question of whether errors at trial are prejudicial is less complicated when the State's case is a strong one. However, for this Court to find that the total effect of the errors here did not cause actual prejudice and were thus harmless would be conjecture against the backdrop of the State's case that relied exclusively on the witnesses credibility which had glaring contradictions that can't be ignored.

Most of the errors committed in this trial have supported reversals of other convictions when they occurred in isolation. When they occur together, the cumulative effect renders the trial so unfair to the Defendant that a new trial must be granted. The combination of errors in this case substantially affected Kent's right to a fair trial under the Constitution of the United States and the Delaware Constitution. Therefore, reversal is required.

[13] *Michael v. State,* 529 A.2d 752 (Del. 1987) (citing W*right v. State*, 405 A.2d 685 (Del. 1979)).

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Jeffrey Kent's convictions and sentences must be reversed.

Respectfully submitted,

/s/ Santino Ceccotti_____
Santino Ceccotti, Esquire

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