



## TABLE OF CONTENTS

TABLE OF CITATIONS .....	iii
NATURE OF THE PROCEEDINGS.....	1
SUMMARY OF THE ARGUMENT .....	2
STATEMENT OF FACTS.....	3
A. The House Fire.....	3
B. The Proffered Motive.....	6
C. The Admissions.....	8
D. The Fire Experts.....	10
E. The State’s Closing Argument .....	14
I. PROSECUTORS REPEATEDLY MISREPRESENTED THE EVIDENCE AND IMPROPERLY ASKED THE JURY TO CONSIDER FAIRNESS TO THE VICTIMS DURING ITS SUMMATION, DEPRIVING MR. JONES OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, MANDATING REVERSAL. ....	18
A. Question Presented.....	18
B. Standard And Scope Of Review .....	18
C. Merits Of The Argument.....	20
i. Prosecutors Tainted The Summation By Repeatedly Misrepresenting The Witnesses’ Trial Testimony .....	20
a. The “Walked Through The Fire” Comment Was Improper .....	21
b. The “Carmen Study” Comment Was Improper .....	22
c. The “Wrong Documents” Comment Was Improper.....	23
ii. The Prosecutor Purposely And Improperly Asked The Jury To Consider Fairness To The Victims In Order To Evoke An Emotional Response From The Jury.....	24
iii. Prosecutors’ Misconduct Prejudiced Mr. Jones And Compromised The Integrity Of The Jury Trial .....	25
a. This Was A Close Case Involving A Cast Of Colorful Characters, Including Several Convicted Felons As State’s Witnesses, A Prolonged Investigation Lasting Several Years, and Competing Expert Opinions .....	25
b. The State’s Errors Affected The Central Issue Of The Case- Jones’ Culpability .....	26
c. The Court’s Admonition To The Prosecutors Was Insufficient To Mitigate The Effects Of The State’s Errors.....	27
d. Mr. Jones Was Prejudiced By The Cumulative Errors.....	28
CONCLUSION .....	29
SENTENCING ORDER.....	EX. A

## TABLE OF CITATIONS

### DELAWARE SUPREME COURT

<i>Baker v. State</i> , 906 A.2d 139 (Del. 2006).....	18
<i>Bennett v. State</i> , 164 A.2d 442 (Del. 1960).....	19
<i>Brokenbraugh v. State</i> , 522 A.2d 851 (Del. 1987).....	29
<i>Daniels v. State</i> , 859 A.2d 1008 (Del. 2004).....	18
<i>DeShields v. State</i> , 534 A.2d 630 (Del. 1987).....	23, 24
<i>Flonnory v. State</i> , 893 A.2d 507 (Del. 2006).....	19
<i>Hooks v. State</i> , 416 A.2d 189 (Del. 1980).....	27
<i>Hughes v. State</i> , 437 A.2d 559 (Del. 1981).....	19
<i>Hunter v. State</i> , 815 A.2d 730 (Del. 2002).....	19
<i>Kirkley v. State</i> , 41 A.3d 372 (Del. 2012).....	20, 26
<i>Mills v. State</i> , 2007 WL 4245464 (Del. Dec. 3, 2007).....	20
<i>Sullivan v. State</i> , 636 A.2d 931 (Del. 1994).....	24
<i>Trump v. State</i> , 753 A.2d 963 (Del. 2000).....	29
<i>Whittle v. State</i> , 77 A.3d 239 (Del. 2013).....	27

### OTHER JURISDICTIONS

<i>Brandley v. State</i> , 691 S.W.2d 699 (Tex. Crim. App. 1985).....	28
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### OTHER AUTHORITIES

A. B. A., Standards for CRIM. JUST. § 5.8 (1971).....	20
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## NATURE OF THE PROCEEDINGS

On June 10, 2013, Travis Jones was arrested in connection with a house fire that caused the death of his girlfriend, Teyonna Watts, and their two daughters, B.J. and J.J.<sup>1</sup> He was subsequently indicted on August 5, 2013 and charged with three (3) counts of Murder First Degree<sup>2</sup> and one (1) count of Arson First Degree<sup>3,4</sup>

During an office conference held before the Honorable Judge Streett on November 22, 2013, the State provided noticed of its intent to seek the death penalty.<sup>5</sup> Trial commenced on May 26, 2015 and ended on June 15, 2015 when the jury returned a guilty verdict on three (3) counts of the lesser-included offense of Manslaughter.<sup>6</sup> Mr. Jones was acquitted of the Arson First Degree charge.

On October 2, 2015, Mr. Jones filed a timely Notice of Appeal. This is his Opening Brief.

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<sup>1</sup> A001.

<sup>2</sup> 11 Del. C. § 636

<sup>3</sup> 11 Del. C. § 803

<sup>4</sup> A001.

<sup>5</sup> A002.

<sup>6</sup> A015, A027-31.

## SUMMARY OF THE ARGUMENT

- I. State prosecutors impinged Mr. Jones's constitutional due process rights under the Fourteenth Amendment to the United States Constitution and Article I, section VII of the Delaware Constitution when they repeatedly misstated the evidence<sup>7</sup> and appealed to the jury's emotions. Reversal is required.

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<sup>7</sup> Defense counsel timely objected to the prosecutors' misstatements, preserving the issues for appeal, as evidenced on the following pages in the record: A133, (objecting to the State's mischaracterization of expert witness testimony as "wrong"), A134 (objecting to the State's mischaracterization of the "Carmen Study"), A135 (objecting the State's request that the jury consider fairness to the victims), A136-37 (objecting to the State's "Walking Through The Fire" mischaracterization).

## STATEMENT OF FACTS

### **A. The House Fire**

On October 4, 2010 at approximately 5:45 A.M., Charles Hitchens and John Pollinger, two union carpenters and volunteer firefighters, were alerted to a house fire in the area of 101 Clinton Street, Delaware City, Delaware.<sup>8</sup> Hitchens and Pollinger were on their way to work, but they instead responded to the 100 block of Clinton Street.<sup>9</sup> Shortly after arriving on scene, the two volunteer firefighters noticed flames blowing out of a rear window located at 101 Clinton Street.<sup>10</sup> Pollinger ran towards the front of the house and attempted to gain access to the home after he heard a neighbor call out the name, “Teyonna.”<sup>11</sup> As he kicked in the front door, “there was big thick black smoke in the residence down to the floor. Smoke started pouring out.”<sup>12</sup> Hitchens and Pollinger both tried to crawl into the residence, but due to the visibility conditions and lack of appropriate fire protection gear, they only proceeded inside approximately six feet before backing out.<sup>13</sup>

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<sup>8</sup> A032-36.

<sup>9</sup> A032-36.

<sup>10</sup> A032-36.

<sup>11</sup> A039.

<sup>12</sup> A039.

<sup>13</sup> A039-41.

Pollinger contacted the New Castle Emergency Center and advised the dispatcher of a “working alarm and subjects trapped in the residence.”<sup>14</sup>

After realizing that he could not enter from the ground floor, Hitchens retrieved a nearby ladder and placed it in one of the front windows of the second floor.<sup>15</sup> Hitchens climbed the ladder, removed the screen, and lifted the window. Despite his efforts, Hitchens could not enter through that window because the “the smoke and heat from it were so bad.”<sup>16</sup> He decided to try a different window, but to no avail.<sup>17</sup>

Once Hitchens climbed down from the ladder, he noticed that the Delaware City Fire Company had arrived.<sup>18</sup> Hitchens ran over to the fire truck and stretched the hose towards the back of the home.<sup>19</sup> He then handed the hose to Brad Speakman, a volunteer with the Port Penn Volunteer Fire Company, who was the first firefighter to arrive in full gear.<sup>20</sup> Speakman explained that he entered the home through the front door and “eventually [] made it to the rear of the structure . . . where [he] found most

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<sup>14</sup> A041-42. Pollinger explained that a “working alarm” provides additional resources to the initial alarm.

<sup>15</sup> A043.

<sup>16</sup> A043.

<sup>17</sup> A044-45.

<sup>18</sup> A044.

<sup>19</sup> A044.

<sup>20</sup> A045-48.

of the fire.”<sup>21</sup> Through a side window, he received the hose and knocked down the fire in the kitchen, but testified that “[t]here was no fire in any other part of the house.”<sup>22</sup>

After Hitchens handed the hose to Speakman, he retrieved a ladder and climbed to the second story of the home.<sup>23</sup> As he looked through a window, he observed a baby in one of the bedrooms.<sup>24</sup> Hitchens climbed through the window, picked up the baby and exited the home via the front stairs.<sup>25</sup> Two Delaware City firefighters found the baby’s mother laying on a mattress and another young child in the same bedroom.<sup>26</sup> The young child was carried out through the window and down a ladder.<sup>27</sup>

During this time, Pollinger heard a request for assistance in carrying the mother, later determined to be Teyonna Watts, down the narrow stairwell.<sup>28</sup> Pollinger answered the call by helping Delaware City firefighters carry Watts out of the front door of the house.<sup>29</sup> Watts and the children were then placed in the care of the Emergency Medical Services

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<sup>21</sup> A048.

<sup>22</sup> A048.

<sup>23</sup> A050-51.

<sup>24</sup> A050-51.

<sup>25</sup> A050-51.

<sup>26</sup> A052.

<sup>27</sup> A052-53.

<sup>28</sup> A054-55.

<sup>29</sup> A054-55.



personnel.<sup>30</sup> All three were transported to the hospital where they were later pronounced dead.<sup>31</sup> Dr. Jennie Vershovsky, a forensic pathologist with the Division of Forensic Sciences, determined the cause of death to be soot and smoke inhalation.<sup>32</sup>

### **B. The Proffered Motive**

During its opening statement, the State conceded that the case did not involve “intentional or premeditated murder.”<sup>33</sup> Instead, it argued that Mr. Jones deliberately set a fire in the kitchen of his home, knowing that Watts and their two daughters were inside, because he was “in a fit of rage, jealousy, [and] fueled by drugs.”<sup>34</sup>

In support of this theory, the State presented testimony from Watt’s friend, Nicole Cebenka. Cebenka told the jury that Watts had started spending time with another man, Marcus P. Smith (“Marcus”).<sup>35</sup> Cebenka testified that she and Watts were good friends and that, together, they personally visited Marcus in Wilmington on at least one occasion.<sup>36</sup>

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<sup>30</sup> A055.

<sup>31</sup> A056-57.

<sup>32</sup> A056-57.

<sup>33</sup> A059.

<sup>34</sup> A060.

<sup>35</sup> A062.

<sup>36</sup> A063.

However, Cebenka acknowledged that Watts “wasn’t the best person when she was around [Marcus].”<sup>37</sup>

Natalie Greene, a long-time family friend,<sup>38</sup> testified that sometime during August 2010, she witnessed an argument between Watts and Jones related to Marcus.<sup>39</sup> Greene overheard Watts and Jones “hollering at each other,” and noticed Chinese food all over them.<sup>40</sup> Not long after that incident, Greene witnessed a second argument between Watts and Jones.<sup>41</sup> She testified that Jones “was hollering something about hearing [that their youngest daughter] wasn’t his [biological child].”<sup>42</sup> However, Greene counseled Jones. Rather than remain angry, Jones was saddened that he had doubted whether he was the father of the younger child.<sup>43</sup>

Finally, Sherry Voshell, another family friend,<sup>44</sup> testified that the day prior to the fire, Watts mentioned that she and Jones had been arguing and that Watts had planned on moving into her grandmother’s house.<sup>45</sup> Watts also informed Voshell that she might bring her children over to spend the

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<sup>37</sup> A066.

<sup>38</sup> A067.

<sup>39</sup> A070.

<sup>40</sup> A070-71.

<sup>41</sup> A070-72.

<sup>42</sup> A070-72.

<sup>43</sup> A070-73.

<sup>44</sup> A070-74.

<sup>45</sup> A078-79.

night due to the fighting.<sup>46</sup> Several witnesses characterized Watts and Jones's relationship as being "on-again, off-again."<sup>47</sup>

While the State argued that Jones intentionally set the fire because he was jealous, it presented several witnesses who testified otherwise. For example, Voshell testified that, while on the way home from the methadone clinic, Jones said that he and Watts "had been partying the night before... that he might have killed his family, that he left the stove on. He lit a cigarette, might have left the stove burner on."<sup>48</sup> Cebenka also testified that she and Jones entered into a romantic relationship in October of 2010. During the course of the relationship, Jones told Cebenka "he lit the cigarette off the stove to grab the trash off the back door, locked the back door, and walked out."<sup>49</sup> Therefore, several of the State's own witnesses contradicted the State's theory that the fire was intentionally set.

### **C. The Admissions**

The State also presented testimony of Mr. Jones's apparent admissions. Jeremy Kokotaylo, a former friend and probationer, testified that Jones told him, "I believe I killed the kids," but that he "didn't mean

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<sup>46</sup> A077-79.

<sup>47</sup> A080.

<sup>48</sup> A082.

<sup>49</sup> A085.

to.”<sup>50</sup> Kokotaylo testified that he did not receive any leniency for his testimony and claimed that he came forward because he wanted to do the “right thing.”<sup>51</sup> Jones, through counsel, impeached Kokotaylo’s credibility by highlighting his significant criminal history.<sup>52</sup>

The State then called Robert Valentine, an inmate who briefly shared a cell with Jones at the Howard R. Young Correctional Institution in 2013.<sup>53</sup> Valentine testified that Jones asked him whether he had ever read a book called “*The Perfect Crime*.”<sup>54</sup> After some discussion, Jones purportedly admitted to Valentine that he was writing the book based on a true story.<sup>55</sup> According to Valentine, Jones revealed to him the following:

So, he said after he smoked [PCP], he went home, he went into the house, he said he instantly went to the kitchen, pulled the stove out, he said he busted the gas line on the back of the stove, he said he sparked a flame and the whole back of the stove, the wall at the back of the stove lit on fire. And he said after that, he said that the kitchen caught on fire. I guess in minutes, he left out of the house, he said he went to the back of his house and watch the whole back of the house just light on fire.<sup>56</sup>

Valentine did not come forward with this information until a significant

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<sup>50</sup> A086-87.

<sup>51</sup> A088.

<sup>52</sup> A089-95.

<sup>53</sup> A096.

<sup>54</sup> A097.

<sup>55</sup> A097.

<sup>56</sup> A098.

amount of time later when he was facing a fifteen-year prison time.<sup>57</sup> In exchange for his cooperation, the State agreed to recommend a seven (7) year reduction of Valentine's fifteen (15) year sentence for committing burglary.<sup>58</sup> At trial, the State's own expert witnesses discredited Valentine's testimony relating to the cause and origin of the fire.

#### **D. The Fire Experts**

The State called Paul Gemmato, a Special Agent with the Bureau of Alcohol, Tobacco, and Firearms, (the "ATF"), to opine on the cause and origin of the fire.<sup>59</sup> Agent Gemmato testified that the fire originated on the north side of the kitchen.<sup>60</sup> However, he could not identify the ignition source<sup>61</sup> and did not detect whether any accelerants had been used.<sup>62</sup> Nevertheless, Agent Gemmato testified that the fire was "incendiary," which is a "fire deliberately set with the intent of lighting a fire where it should not be set."<sup>63</sup>

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<sup>57</sup> A099.

<sup>58</sup> A096, A101.

<sup>59</sup> A102.

<sup>60</sup> A106. Gemmato specifically eliminated the stove as a potential source and found no evidence that the gas line had been disconnected. A104.

<sup>61</sup> A106.

<sup>62</sup> A107-08.

<sup>63</sup> A109.

The State also called Michael Keller, Senior Electrical Engineer at the ATF's Fire Research Laboratory.<sup>64</sup> Agent Keller examined a receptacle from the south side of the kitchen<sup>65</sup> and the gas range,<sup>66</sup> but he did not examine the wiring to the toaster oven, microwave, or any debris containing loose wiring.<sup>67</sup> Agent Keller testified that the receptacle showed "no evidence of electrical failure"<sup>68</sup> and that the gas range, including its components, "were consistent with not having any sort of failure that could have caused the fire."<sup>69</sup> Agent Gemmato relied upon Agent Keller's conclusions when forming his own opinions about the origin and cause of the fire.<sup>70</sup>

Finally, the defense called Robert Paul Bieber, Director of the Arson Research Project, to analyze the reliability and validity of Gemmato's fire investigation.<sup>71</sup> Bieber testified that the National Fire Protection Association, ("NFPA"), sets the standard for scientific-based investigation and analysis of fire incidents in the "Guide for Fire and Explosion

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<sup>64</sup> A110.

<sup>65</sup> A111-15. Keller testified that Gemmato needed his assistance in analyzing the receptacle because one of the power rails had partially melted.

<sup>66</sup> A111-15.

<sup>67</sup> A111-15.

<sup>68</sup> A111-15.

<sup>69</sup> A111-15.

<sup>70</sup> A116.

<sup>71</sup> A117.

Investigations” known as NFPA 921.<sup>72</sup> To demonstrate how a fire develops, Bieber prepared a slideshow presentation using NFPA 921 illustrations that depicted the progression of a hypothetical fire at different time intervals.<sup>73</sup> On cross-examination, Bieber acknowledged that his illustrations were in color, whereas the illustrations in the 2014 edition of NFPA 921 were not, and that the time intervals on his slide may have been taken from an older version of NFPA 921.<sup>74</sup>

Bieber also described for the jury a NFPA 921 fire dynamic known as flashover, which occurs in enclosed room fires “where the heat from the trapped thick layer of smoke radiating down onto the floor will ignite every combustible item in the room nearly simultaneously.”<sup>75</sup> He explained that flashover conditions could quickly turn into what is called “full-room involvement.”<sup>76</sup> Full-room involvement occurs when ventilation from a window or door provides fresh air to the fire and the smoke inside of the room, which is flammable, impinges on other combustible items within the room.<sup>77</sup> Bieber explained the significance of full-room involvement:

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<sup>72</sup> A118, A119.

<sup>73</sup> A120-21.

<sup>74</sup> A122. On re-direct, Bieber testified that the time intervals served as a “reference point,” not as an example of flashover. A123.

<sup>75</sup> A124.

<sup>76</sup> A125. Bieber testified that flashover is a transitory experience in fire.

<sup>77</sup> A125.

But the point of this is, once the fire reaches full-room involvement, where, potentially, every square inch of the room, in a three dimensional sense, that has smoke it in can be horribly damaged by heat and can be exposed to the hottest aspects of the fire. Again, it has nothing to do with where the fire started. So, at this point, fire investigators going in and trying to apply fire pattern analysis to the damage that they observe are likely to be absolutely wrong in their area of origin determination. Once the wrong area of origin is determined, their efforts to figuring out what caused the fire are going to be futile.<sup>78</sup>

Next, Bieber presented the findings of Steve Carmen, a former ATF agent, who conducted an exercise in which 53 students from his advanced arson origin class were asked to determine “the quadrant of origin” in two different room fires that had burned for two minutes past the flashover stage.<sup>79</sup> “With two minutes of post flashover conditions, 50 of the 53 fire investigators chose the wrong quadrant of origin in both fires.”<sup>80</sup> Bieber acknowledged that the exercise did not amount to “an academic study or research study.”<sup>81</sup>

Bieber concluded, however, that Carmen’s study suggested that “the methodologies . . . although in conformance with NFPA 921, don’t appear to result in reliable or accurate conclusions” where pre-flashover pattern

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<sup>78</sup> A125.

<sup>79</sup> A126.

<sup>80</sup> A126.

<sup>81</sup> A126-28.



analysis is applied to post-flashover fires.<sup>82</sup> He testified that, in his expert opinion, the fire at 101 Clinton Street exhibited characteristics of flashover and full-room involvement.<sup>83</sup> Bieber believed that because neither the ignition source nor the first fuel ignited could be determined, the cause of the fire could also not be determined.<sup>84</sup>

### **E. The State's Closing Argument**

In summation, the State attacked Bieber's credibility:

And look at the slide, it even has NFPA 921, 2014. So he came before you as an expert. Details matter, accuracy matters. And he presented this to explain how flashovers develop and the time. It came directly out of NFPA 921. That's what he told you.

The State introduced the last slide in that series from NFPA 921 when Mr. Gemmato testified. There's no T equals anything. Mr. Gemmato testified that in NFPA 921, 2008, I think maybe 2004, 2008, 2011, 2014, those pictures which are showing the development of flashover fire to full-room involvement have no time sequence on them whatsoever. But Mr. Bieber told you that it came directly from NFPA 921. When an expert comes before you and he is espousing a theory and using documents to prove his theory, and they are wrong, his credibility –<sup>85</sup>

Defense counsel objected on the grounds that the documents were not wrong, but rather the time intervals do not appear in the 2014 edition of NFPA 921.<sup>86</sup> The Court did not sustain the objection, but it instructed the

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<sup>82</sup> A129.

<sup>83</sup> A130.

<sup>84</sup> A131-32.

<sup>85</sup> A133.

<sup>86</sup> A133.

prosecutor to “be more accurate as to how you characterize the document that was shown.”<sup>87</sup>

However, almost immediately thereafter, the State inaccurately characterized trial testimony when it described the exercise created by former ATF agent, Steve Carmen:

And, then, he talked, if you remember, about this exercise rate from a study done by a guy by the name of Steve Carmen. And he talked about how in flashover and post flashover, there is a 93-percent error rate in the study. Fire investigators going to fire scenes that are post flashovers, they got it wrong 93 percent of the time.<sup>88</sup>

Defense counsel again objected, stating that it “was a controlled experiment conducted by the ATF lab.”<sup>89</sup> At sidebar, the prosecutor apologized for his mistake and then informed the jury that he misspoke.<sup>90</sup>

On rebuttal, and in response to a comment made by defense counsel regarding whether it would be fair to convict Mr. Jones based on his alleged confession to Robert Valentine, the prosecutor asked the jury, “is it fair to Teyonna, to B.J. —.”<sup>91</sup> Defense counsel immediately objected. At sidebar, the prosecutor claimed that the “comment was going to be that you are the judges of the facts. Robert Valentine is a criminal. You get to judge the

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<sup>87</sup> A133-34.

<sup>88</sup> A134.

<sup>89</sup> A134.

<sup>90</sup> A134.

<sup>91</sup> A135.

credibility of the evidence, and that is what the State is asking you to do.”<sup>92</sup>

The trial court instructed the jury to disregard “that last question.”<sup>93</sup>

Finally, the State argued that the fire at 101 Clinton Street did not progress from flashover into full-room involvement:

The one thing [the experts] both agreed on is a firefighter could not walk through a room that’s in flashover or full involvement and survive because the heat is too great.

And maybe Mr. Bieber forgot that Brad Speakman said when he got into that house he walked through the kitchen to get the hose to suppress the fire. This was not full-room involvement.

Defense counsel objected and a sidebar conference was called:

MR. MAURER: I deliberately stayed away from any comment of walking through fires.

That is surrebuttal, and that is improper. I didn’t talk about something that wasn’t raised during the course of the defense’s argument.

MR. DOWNS: Rebutting the flashover argument, that’s what Mr. Maurer raised in his argument.

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MR. MAURER: It’s not even accurate. That’s worse.  
I can’t ever argue it to –

THE COURT: I don’t remember exactly what the firefighter said.

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<sup>92</sup> A135.

<sup>93</sup> A135.

I don't remember him saying he walked into the burning building. So, from that standpoint it is improper because it is not accurate.

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THE COURT: As far as full-room involvement and flashover, it's not sandbagging. He can respond to that, rebut that.

So I think you need to couch it in such a way that it is not – that what you are saying is not a statement of facts, because if it is inaccurate, then there is a problem and it is unfair.

So what are you going to say?

MR. DOWNS: I will say that he walked through the fire, he walked to the window, the firefighters had a hose that was spraying water into the kitchen, and he took that hose and he suppressed the fire.

THE COURT: I believe it would be proper to say your recollection controls as to what point Mr. Speakman walked into the house.<sup>94</sup>

The State then continued on:

Ladies and gentleman, your recollection controls about what evidence when Mr. Speakman testified about when he walked into that kitchen, what he saw when he walked in, and the evidence of – that there was a hose that he went to get that was being used and he went and got that. That's what your recollection will control on.<sup>95</sup>

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<sup>94</sup> A136-37.

<sup>95</sup> A137.

**I. PROSECUTORS REPEATEDLY MISREPRESENTED THE EVIDENCE AND IMPROPERLY ASKED THE JURY TO CONSIDER FAIRNESS TO THE VICTIMS DURING ITS SUMMATION, DEPRIVING MR. JONES OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, MANDATING REVERSAL.**

**A. Question Presented**

Whether under the Due Process Clause of the United States Constitution and Art. I § 7 of the Delaware Constitution, the prosecution tainted a jury trial when it 1) repeatedly misrepresented the witnesses' trial testimony and 2) appealed to the jury's emotions by asking them to consider fairness to the victim.<sup>96</sup>

**B. Standard And Scope Of Review**

The prosecutors in this case made three statements that constitute misconduct and require reversal of Mr. Jones's manslaughter convictions. This Court conducts a "harmless error" review if "defense counsel raised a timely and pertinent objection to prosecutorial misconduct at trial, or if the trial judge intervened and considered the issue *sua sponte*."<sup>97</sup> Here, defense counsel raised timely objections to each of the improper statements.<sup>98</sup>

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<sup>96</sup> Defense counsel timely objected to the prosecutors' misstatements, preserving the issues for appeal, as evidenced on the following pages in the record: A133, (objecting to the State's mischaracterization of expert witness testimony as "wrong"), A134 (objecting to the State's mischaracterization of the "Carmen Study"), A135 (objecting the State's request that the jury consider fairness to the victims), A136-37 (objecting to the State's "Walking Through The Fire" mischaracterization).

<sup>97</sup> *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

<sup>98</sup> Defense counsel timely objected to the prosecutors' misstatements, preserving the issues for appeal, as evidenced on the following pages in the record: A133, (objecting to the State's mischaracterization of expert witness testimony as "wrong"), A134 (objecting to the State's

When conducting a “harmless error” review, the Court first reviews the record *de novo* to determine whether misconduct occurred. “If [this Court] determines that that no misconduct occurred, [the] analysis ends there.”<sup>99</sup> If, however, the Court finds that the prosecutors engaged in misconduct, the Court reviews “whether the improper comments or conduct prejudicially affected the defendant’s substantial rights necessitating a reversal of his conviction.”<sup>100</sup>

To make this determination, this Court applies the three-factor *Hughes* test analyzing “(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.”<sup>101</sup> Any one factor can be determinative.<sup>102</sup> If, after applying the *Hughes* test, this Court finds that the errors do not require reversal, the fourth and final step requires examination of all of the errors to determine “whether the prosecutor’s statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.”<sup>103</sup>

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mischaracterization of the “Carmen Study”), A135 (objecting the State’s request that the jury consider fairness to the victims), A136-37 (objecting to the State’s “Walking Through The Fire” mischaracterization).

<sup>99</sup> *Id.* at 148 (footnote omitted) (citing *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004)).

<sup>100</sup> *Id.* at 149 (citing *Daniels*, 859 A.2d at 1011).

<sup>101</sup> *Id.* (citing *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (citing *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002) (per curiam)).

### **C. Merits Of The Argument**

A prosecutor may not misrepresent the evidence presented at trial.<sup>104</sup> A prosecutor's duty "to see that justice be done by giving [a] defendant a fair and impartial trial" extends through closing arguments.<sup>105</sup> Although a prosecutor may argue all reasonable inferences from the evidence in the record, the prosecutor must not misstate evidence or mislead the jury as to the inferences it may draw therefrom.<sup>106</sup> Additionally, the prosecution may not "appeal to the jurors' passions and prejudices."<sup>107</sup>

#### **i. Prosecutors Tainted The Summation By Repeatedly Misrepresenting The Witnesses' Trial Testimony**

Prosecutors play dual roles as both an "advocate" and a "minister of justice."<sup>108</sup> This position requires the prosecutor to seek a conviction with measured self-restraint to ensure fairness in the proceedings. A prosecutor must "avoid improper suggestions, insinuations, and assertions of personal knowledge."<sup>109</sup> Nevertheless, prosecutors are given considerable leeway to argue reasonable inferences that are established and supported by the evidence.<sup>110</sup> "The

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<sup>104</sup> *Flonnory v. State*, 893 A.2d 507, 540 (Del. 2006).

<sup>105</sup> *Hughes*, 437 A.2d 559 at 568 (quoting *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960)).

<sup>106</sup> *Hughes*, 437 A.2d at 567 (citing A.B.A Standards for CRIM. JUST. § 5.8 (1971)).

<sup>107</sup> *Hunter*, 815 A.2d 730 at 732.

<sup>108</sup> *Mills v. State*, 2007 WL 4245464, at \*3 (Del. Dec. 3, 2007).

<sup>109</sup> *Id.* at \*3.

<sup>110</sup> *Id.* at \*3.

inferences, however, must flow from the evidence presented.”<sup>111</sup>

**a. The “Walked Through The Fire” Comment Was Improper**

In rebuttal, the prosecutor argued that the fire at 101 Clinton Street did not reach the point of flashover or become fully involved because Brad Speakman, the first firefighter to arrive in full gear, supposedly “got into that house [and] he walked through the kitchen to get the hose to suppress the fire.”<sup>112</sup> The prosecutor argued to the jury that Speakman could not have survived walking through the kitchen if the fire had reached the point of flash over or full involvement because the heat would have been prohibitive.<sup>113</sup> According to the State, because Speakman was alive and well, the fire could not have reached the flash over or full involvement stage.

However, the record reflects that Speakman entered through the front door of the home and proceeded to back of the house. From there, Speakman located a door that led to the area most affected by the fire.<sup>114</sup> He entered into the enclosed kitchen and through a window to his left, Speakman was handed a hose to knock down the fire.<sup>115</sup> Prior to entering that room, he did not observe fire in any other part of the house.<sup>116</sup> In other words, Speakman did not walk **through** the kitchen

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<sup>111</sup> *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012).

<sup>112</sup> A136.

<sup>113</sup> A136.

<sup>114</sup> A047-48.

<sup>115</sup> A047-48.

<sup>116</sup> A047-48.



to get the hose. On the contrary, the record reflects that Speakman walked through a portion of the home that did not catch fire. In claiming otherwise, the prosecutor improperly misstated the evidence and asked the jury to make an inference that was not supported by the record. The prosecutor's mischaracterization of the evidence is misconduct.

**b. The "Carmen Study" Comment Was Improper**

During summation, the prosecutor attempted to downplay the significance of former ATF Agent Steve Carmen's experiments concerning post-flashover fire investigation, in which he found a 93% error rate, by suggesting that it involved "[f]ire investigators going to fire scenes that are post flashover."<sup>117</sup> In actuality, the Carmen study involved a controlled exercise in which arson investigators were asked to identify the quadrant of origin in a post flashover room fire.<sup>118</sup> After defense counsel objected, the prosecutor informed the jury that he misspoke and that "it was a study, 53 fire investigators going to a room that had been set on fire."<sup>119</sup>

Although the prosecutor attributed his misrepresentation to mistake, the prosecution had retained Agent Carmen as a trial consultant and had attempted to

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<sup>117</sup> A134.

<sup>118</sup> A129.

<sup>119</sup> A134.

utilize him as a fact witness.<sup>120</sup> The prosecutor admitted that Carmen prepared a list of things that “he thought Mr. Bieber misrepresented or misstated about his work.”<sup>121</sup> These circumstances weigh heavily against a finding that the prosecutor mistakenly misrepresented Carmen’s work. Since the prosecutors were well aware of Carmen’s experiments, the mischaracterization of the experiments was part of an improper, calculated strategy to discredit the defense expert’s testimony, which constituted misconduct.

**c. The “Wrong Documents” Comment Was Improper**

Finally, the State further attacked Bieber, the defense’s expert witness, by mischaracterizing pictures Bieber included in his PowerPoint presentation as “wrong.” The record reflects that that the documents were not wrong; rather, the time intervals that Bieber included in the slide did not appear in the newest edition of NFPA 921.<sup>122</sup> The Court’s instruction to the prosecutor to “be more accurate as to how you characterize the document that was shown”<sup>123</sup> did not address or remedy the mischaracterization before the jury. Instead, the prosecutor was permitted to discredit Mr. Bieber’s slides as “wrong,” even though there was nothing factually erroneous with the slides. The State’s mischaracterization constituted misconduct.

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<sup>120</sup> A138-40. The Court ultimately ruled that Carmen could not testify because he was an expert witness that the State failed to identify prior to trial. A140.

<sup>121</sup> A139.

<sup>122</sup> A121-22.

<sup>123</sup> A133-34.

**ii. The Prosecutor Purposely And Improperly Asked The Jury To Consider Fairness To The Victims In Order To Evoke An Emotional Response From The Jury**

When a prosecutor unfairly appeals to the emotions of a jury, s/he prejudices the defendant's right to a fair trial. "A guilty verdict must be based upon the evidence and the reasonable inferences therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury."<sup>124</sup> "Appeals to sympathy and jurors' emotions are impermissible because they go beyond the facts of the case and the reasonable inferences from the facts."<sup>125</sup> Moreover, a prosecutor may not request that a jury place themselves in the place of the victim (the "Golden Rule").<sup>126</sup>

Here, the prosecutor improperly responded to defense counsel's argument that it would be unfair to convict Mr. Jones based on his dubious admission to Robert Valentino by appealing to the jurors' emotions and requesting that the jury view the evidence in the light of the victims' perspective. The State's inquiry about whether a conviction would be "fair to the victims" "impermissibly [drew] the jury's attention away from the evidence in [the] case"<sup>127</sup> and requested an "abandonment of objectivity"<sup>128</sup> rather than a legal analysis of guilt. The prosecutor's request to consider fairness to the victims could only have been done

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<sup>124</sup> *DeShields v. State*, 534 A.2d 630, 642 (Del. 1987).

<sup>125</sup> *Id.*

<sup>126</sup> *Sullivan v. State*, 636 A.2d 931, 941-42 (Del. 1994).

<sup>127</sup> *DeShields*, 534 A.2d at 642 (internal quotations omitted).

<sup>128</sup> *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985).

to evoke the sympathy of the jury and was improper.

**iii. Prosecutors' Misconduct Prejudiced Mr. Jones And Compromised The Integrity Of The Jury Trial**

The prosecutors' misconduct prejudiced a close case and reversal is required under the *Hughes-Hunter* multi-pronged test. Under *Hughes*, this Court considers the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error. The Court then ascertains whether cumulative errors compromised the integrity of the trial.

**a. This Was A Close Case Involving A Cast Of Colorful Characters, Including Several Convicted Felons As State's Witnesses, A Prolonged Investigation Lasting Several Years, and Competing Expert Opinions**

The State's case against Mr. Jones was entirely dependent on the jury's credibility determinations of several of Mr. Jones' family members, former friends, a temporary prison cellmate, and competing expert testimony. Because the State pursued a murder first-degree charge according to a felony murder theory, the State did not argue that Mr. Jones intentionally committed the murders that killed his family. Instead, the State argued that Mr. Jones intentionally started a fire in his home while he was in a drug-induced and jealous rage.

The jury acquitted Mr. Jones of the charges requiring an intentional *mens rea*: arson and intentional murder. However, he was found guilty of the lesser-included offense of manslaughter, reckless causation of death. A person is guilty

of manslaughter under 11 *Del. C.* § 632 when he “recklessly causes the death of another person.” Therefore, the jury was conflicted about the cause and origin of the fire. The jury consequently had to determine whether Mr. Jones recklessly caused the fire. The jury’s indecision about the cause and origin of the fire illustrates that the case was a close call as to how and why the fire started. Given the inconsistent witness testimony and contradictory expert opinions, it “was not obvious” that Mr. Jones recklessly caused the death of another.<sup>129</sup>

**b. The State’s Errors Affected The Central Issue Of The Case-  
Jones’ Culpability**

The State’s misconduct affected the crux of the case—the cause of the fire and whether Mr. Jones started it. Because the closeness of the case was intimately linked to the witnesses’ credibility, “the jury’s assessment of the believability of either version was dispositive of its finding of guilt or innocence.”<sup>130</sup> Whether the jury found Bieber’s opinions convincing made it more or less probable that Mr. Jones started the fire. “Against this backdrop and at the risk of distortion,”<sup>131</sup> many of the improper prosecutorial comments were directed at Bieber’s credibility. The State’s request for fairness to the victims injected an impermissible plea specifically directing the jury to consider finding Mr. Jones guilty for emotional reasons and not based on the evidence. Since the jury’s findings came down to

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<sup>129</sup> See *Kirkley*, 41 A.3d 372 at 379 (finding a close case because it was not obvious whether defendant formed the requisite intent).

<sup>130</sup> *Hughes*, 437 A.2d 559 at 572 (internal quotations and citations omitted).

<sup>131</sup> *Id.*

whether Mr. Jones recklessly caused the fire, the State's plea for fairness affected a central issue in the case- Mr. Jones's culpability and whether he should be convicted at all. Therefore, this factor weighs in favor of a finding that the State's errors prejudiced Mr. Jones.

**c. The Court's Admonition To The Prosecutors Was Insufficient To Mitigate The Effects Of The State's Errors**

With respect to the State's comment about Speakman walking through the fire, the Court did not sustain the objection or issue a curative instruction. Instead, the Court instructed the prosecutor to simply inform the jury that their recollection of the testimony controls. This Court has reiterated that there is a "possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office."<sup>132</sup> After arguing that Speakman walked through a room on fire, the State's cursory statement that the jury's recollection controlled without any judicial intervention failed to sufficiently mitigate the effect of the error.

As for the improper Carmen Study comment, although the prosecutor informed the jury that he misspoke, that comment was made shortly after the Court advised him to "be more accurate" in describing the documents used during

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<sup>132</sup> *Whittle v. State*, 77 A.3d 239 (Del. 2013), *as corrected* (Oct. 8, 2013) (citing A.B.A., Standards for CRIM. JUST. § 3-5.8 (1993)).

Bieber's PowerPoint presentation. Where "there is a growing tendency toward carelessness on the part of counsel, whether caused by inexperience, excessive zeal or otherwise, it should be discouraged and not condoned by inaction."<sup>133</sup> Because the trial court failed to cure the misstatements about the Carmen study and Bieber's use of the wrong documents, the third *Hughes* factor also weighs in Mr. Jones's favor.

**d. Mr. Jones Was Prejudiced By The Cumulative Errors**

While the three misstatements of the evidence may not have individually caused prejudice since the jury ultimately acquitted Mr. Jones of the intentional Arson charge, the cumulative impact of repeated misstatements in combination with the request for fairness to the victims requires reversal. The determination of guilt rested on contested and conflicting evidence. Improper pleas for fairness injected improper emotional considerations into the analysis of guilt and prejudiced Mr. Jones, resulting in a due process violation. Under the *Hunter* prong of the *Hughes-Hunter* test, this Court should find that the cumulative impact of the repeated errors compromised the integrity of the murder trial.

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<sup>133</sup> *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).

## CONCLUSION

The prosecution's cumulative errors produced sufficient misconduct to raise a significant question as to the fairness of the jury verdict. Given the prosecutors' special role in the judicial system, they should have been "especially careful to let the evidence speak for itself."<sup>134</sup> As the Court pointed out in 1987, "[a] repetition of the same type or category of errors adversely affects the integrity of the judicial process."<sup>135</sup> The prosecution's improper comments and appeal to the jury's emotions deprived Mr. Jones of his right to due process and a fair trial.

Based upon the facts and legal authorities set forth above, Defendant-Below, Appellant Travis Jones respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Respectfully submitted,

/s/ Eugene J. Maurer, Jr.  
Eugene J. Maurer, Jr. (#821)  
1201-A King Street  
Wilmington, DE 19801  
(302) 652-7900

Appointed Attorney for Appellant,  
Defendant Below

Dated: May 10, 2016

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<sup>134</sup> *Trump v. State*, 753 A.2d 963, 969 (Del. 2000).

<sup>135</sup> *Brokenbraugh v. State*, 522 A.2d 851, 864 (Del. 1987).



# EXHIBIT

A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

VS.

TRAVIS M JONES

Alias: See attached list of alias names.

DOB: 10/05/1985

SBI: 00417560

CASE NUMBER:  
1306004908

CRIMINAL ACTION NUMBER:  
PN13-06-1715  
MANSLAUGHTER (F)  
LIO:MURDER 1ST  
PN13-06-1716  
MANSLAUGHTER (F)  
LIO:MURDER 1ST  
PN13-06-1717  
MANSLAUGHTER (F)  
LIO:MURDER 1ST

**COMMITMENT**

Nolle Prosequi on all remaining charges in this case  
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

SENTENCE ORDER

NOW THIS 18TH DAY OF SEPTEMBER, 2015, IT IS THE ORDER OF  
THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged.  
The defendant is to pay the costs of prosecution and all  
statutory surcharges.

AS TO PN13-06-1715- : TIS  
MANSLAUGHTER

Effective June 10, 2013 the defendant is sentenced  
as follows:

- Pursuant to 11 Del.C.4204(K), the level 5 shall be served without benefit of any form of early release.
- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5
- Suspended after 20 year(s) at supervision level 5
- For 2 year(s) supervision level 4 DOC DISCRETION

\*\*APPROVED ORDER\*\*      1      May 9, 2016 14:24

STATE OF DELAWARE  
VS.  
TRAVIS M JONES  
DOB: 10/05/1985  
SBI: 00417560

- Suspended after 6 month(s) at supervision level 4 DOC DISCRETION

- For 18 month(s) supervision level 3

- Hold at supervision level 5

- Until space is available at supervision level 4 DOC DISCRETION

AS TO PN13-06-1716- : TIS  
MANSLAUGHTER

- Pursuant to 11 Del.C.4204(K), the level 5 shall be served without benefit of any form of early release.

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- Suspended after 20 year(s) at supervision level 5

- Followed by 1 year(s) at supervision level 3

Probation is concurrent to criminal action number PN13-06-1715 .

AS TO PN13-06-1717- : TIS  
MANSLAUGHTER

- Pursuant to 11 Del.C.4204(K), the level 5 shall be served without benefit of any form of early release.

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- Suspended after 20 year(s) at supervision level 5

- Followed by 1 year(s) at supervision level 3

Probation is concurrent to criminal action number PN13-06-1716 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE  
VS.  
TRAVIS M JONES  
DOB: 10/05/1985  
SBI: 00417560

CASE NUMBER:  
1306004908

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed appropriate.

Have no contact with Watts Family

Zero tolerance alcohol or drugs

TASC to evaluate and monitor. The Court retains the jurisdiction to modify this sentence.

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JUDGE DIANE C STREETT

FINANCIAL SUMMARY

STATE OF DELAWARE  
VS.  
TRAVIS M JONES  
DOB: 10/05/1985  
SBI: 00417560

CASE NUMBER:  
1306004908

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED

TOTAL CIVIL PENALTY ORDERED

TOTAL DRUG REHAB. TREAT. ED. ORDERED

TOTAL EXTRADITION ORDERED

TOTAL FINE AMOUNT ORDERED

FORENSIC FINE ORDERED

RESTITUTION ORDERED

SHERIFF, NCCO ORDERED 165.00

SHERIFF, KENT ORDERED

SHERIFF, SUSSEX ORDERED

PUBLIC DEF, FEE ORDERED 100.00

PROSECUTION FEE ORDERED 100.00

VICTIM'S COM ORDERED

VIDEOPHONE FEE ORDERED 3.00

DELJIS FEE ORDERED 3.00

SECURITY FEE ORDERED 30.00

TRANSPORTATION SURCHARGE ORDERED

FUND TO COMBAT VIOLENT CRIMES FEE 45.00

SENIOR TRUST FUND FEE

AMBULANCE FUND FEE

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TOTAL 446.00

\*\*APPROVED ORDER\*\* 4 May 9, 2016 14:24

LIST OF ALIAS NAMES

STATE OF DELAWARE  
VS.  
TRAVIS M JONES  
DOB: 10/05/1985  
SBI: 00417560

CASE NUMBER:  
1306004908

TRAVIS JONES

AGGRAVATING-MITIGATING

STATE OF DELAWARE  
VS.  
TRAVIS M JONES  
DOB: 10/05/1985  
SBI: 00417560

CASE NUMBER:  
1306004908

AGGRAVATING

EXCESSIVE CRUELTY  
REPETITIVE CRIMINAL CONDUCT  
NEED FOR CORRECTIONAL TREATMENT  
UNDUE DEPRECIATION OF OFFENSE  
MAJOR ECONOMIC OFFENSE OR SERIES OF OFFENSES  
PRIOR ABUSE OF VICTIM  
LACK OF REMORSE  
LACK OF AMENABILITY  
VULNERABILITY OF VICTIM  
CHILD DOMESTIC VIOLENCE VICTIM  
OFFENSE AGAINST A CHILD