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Case Number 304,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSE MORETA, Defendant Below, Appellant. v.	:	No. 304, 2018
STATE OF DELAWARE Plaintiff Below, Appellee.	:	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE I.D. NO. 1603013733

APPELLANT'S OPENING BRIEF

FILING ID 62549227

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NATURE OF THE PROCEEDINGS

On March 17, 2016, Jose Moreta was arrested in connection with a fatal shooting that occurred on North Connell Street in Wilmington, Delaware. (A1; A47). Mr. Moreta was indicted on the following offenses:

I. Murder First Degree;

II. Attempted Murder First Degree;

III. Reckless Endangering First Degree;

IV. Three (3) counts of Possession of a Firearm During Commission of a Felony;

V. Carrying a Concealed Deadly Weapon;

VI. Conspiracy First Degree;

VII. Burglary Second Degree;

VIII. Aggravated Act of Intimidation; and

IX. Resisting Arrest.

(A160).

Trial began on January 8, 2018 and lasted seven days. (A11). The Superior Court granted Mr. Moreta's motion for judgment of acquittal on the charge of Aggravated Act of Intimidation. (A11–A12). On January 17, 2018, the jury returned its verdict. (A177). Mr. Moreta was found Not Guilty of Resisting Arrest. (A178). He was found Guilty of all remaining charges except Burglary Second

Degree, for which he was convicted of a lesser included offense—Criminal Trespass. (A177–A178).

On May 25, 2018, Mr. Moreta was sentenced to a term of natural life plus twenty-seven years at Level 5 incarceration, followed by decreasing levels of probation. (A15–A21). Mr. Moreta filed a timely Notice of Appeal. This is his Opening Brief.

SUMMARY OF THE ARGUMENT

I. The trial court erred in allowing the co-defendant's Facebook post to be introduced against Mr. Moreta at trial. The statement was not made during the course and in furtherance of the conspiracy and, thus, amounted to inadmissible hearsay. Reversal is required because the State relied on this hearsay evidence to suggest that Mr. Moreta was guilty of murder under the theory of accomplice liability.

II. The prosecutor compromised the integrity of the trial process by improperly expressing his personal belief as to the guilt of Mr. Moreta. During closing argument, he told the jury three times that it was "clear that the defendant intended to kill." The cumulative impact of this repetitive error resulted in plain error and warrants a new trial.

STATEMENT OF FACTS

On March 17, 2016, Jerry DeLeon and Christian Serrano received word that their friend, Hector Guzman ("Junji"), was being chased by Mr. Moreta.[1] After hearing this, DeLeon, Serrano, and another friend, Alfredo Gonzalez ("June"), went looking for Junji.[2] While doing so, they ran into Mr. Moreta and confronted him about chasing Junji.[3] Mr. Moreta, who was with his co-defendant, Joshua Gonzalez, denied the allegation.[4]

However, the confrontation escalated and at some point, DeLeon heard Mr. Moreta tell Gonzalez to "hit him."[5] DeLeon testified that Gonzalez did not hit him, but DeLeon retaliated by striking Mr. Moreta with the back of his hand.[6] Mr. Moreta did not hit DeLeon back.[7] And soon after, DeLeon, Serrano, and June walked away.[8]

After reaching Third Street, June noticed that Mr. Moreta and Gonzalez were following them.[9] DeLeon testified that he told June to run ahead and "tell everybody to get off the porch" because he "assumed something was going to happen."[10]

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[1] A58–A59.
[2] A57, A59.
[3] A59.
[4] A59–A60, A62–A63.
[5] A59–A60.
[6] A59, A65.
[7] A59, A65.
[8] A59.
[9] A60.
[10] A60.

Although he could not be certain that Mr. Moreta had a gun, DeLeon was positive that Gonzalez had one and pulled the trigger.[11] After the shots were fired, Gonzalez and Mr. Moreta ran in opposite directions.[12] DeLeon turned back and noticed that Serrano was on the ground.[13] DeLeon later realized that a bullet had grazed his left arm, but he did not seek medical attention.[14] He waited three days to give a statement to police.[15]

At trial, Junji characterized Gonzalez as Mr. Moreta's "pet," but also suggested that he was scared of Mr. Moreta.[16] Junji testified that, prior to being chased, he overheard Mr. Moreta say to Gonzalez, "Move out of the way, I'm about to light the block up."[17] However, Junji claimed that he was not chased by Mr. Moreta or Gonzalez, but by an unnamed African-American male who was with them that day.[18] No video surveillance supported this claim, despite Detective Fox's efforts to locate it.[19]

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[11] A61, A66.
[12] A67.
[13] A60–A61. Serrano died as a result of a gunshot wound to the head. A130.
[14] A61.
[15] A61.
[16] A68–A69.
[17] A70.
[18] A70.
[19] A56. Video surveillance did show Junji running through the streets of Fourth and Connell, but it did not capture him being chased by anyone. A50, A56.

By agreement of the parties, a redacted version of June's testimony from Gonzalez's trial was read into evidence at Mr. Moreta's trial.[20] June could not recall the confrontation between Mr. Moreta and DeLeon.[21] He remembered being followed afterwards, but he was not present when the shooting occurred.[22]

Corporal Marino of the Wilmington Police Department was handling a loitering complaint in the 200-block of North Franklin Street when he heard the shots fired.[23] After returning to his patrol car, he drove towards the sound of the gunshots and saw Mr. Moreta—wearing a black jacket and khaki pants—running westbound on Third Street.[24] Corporal Marino thought Mr. Moreta might have been holding a gun, so he quickly exited his car and gave chase.[25]

After turning onto Broom Street, a bystander pointed at a house on the corner and told Corporal Marino that Mr. Moreta "got in there."[26] Corporal Marino, now joined by other responding officers, commanded him to come out and Mr. Moreta complied immediately.[27] When he was taken into custody, Mr. Moreta was no longer wearing a black jacket.[28] Officers later found the black jacket inside the

[20] Jan 2 Pretrial Conf. at TT at 8-9.
[21] A77, A80.
[22] A78, A80.
[23] Jan. 10 TT at 119-121.
[24] Jan. 10 TT at 121.
[25] Jan. 10 TT at 121, 127.
[26] Jan. 10 TT at 128.
[27] Jan. 10 TT at 128, 132.
[28] Jan. 10 TT at 130.

house, under a child's bed.[29] However, no weapon was located along the path of chase, inside the house, or on Mr. Moreta's person.[30]

Krista Saucier, who lived on West Third Street at the time, also heard the sound of gunshots.[31] When she looked out the window, she saw two men running up North Connell Street—one wearing white and the other wearing black.[32] Ms. Saucier grabbed her cell phone and snapped a photo of the two men as they came to the intersection of North Connell and West Third. She testified that the man wearing white was holding a gun.[33] But she never saw the man in black holding a weapon.[34]

Two days after the shooting, the residents of 239 North Broom Street found a gun in their fenced-in backyard and reported it to the police.[35] After collecting it as evidence, the gun was compared to the eight casings collected from the crime scene.[36] Carl Rone, the State's former firearms examiner, testified that all eight casings were fired from that gun.[37]

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[29] A84, A114, A136–A137.
[30] A117.
[31] A89–A90.
[32] A90.
[33] A90.
[34] A90–A91.
[35] A96–A97.
[36] A97, A108.
[37] A109.

Particles from gunshot residue ("GSR") were found on the palm of Mr. Moreta's right hand and on the back of his left hand.[38] The firearm found at 239 North Broom Street was swabbed for DNA evidence, which produced a mixed profile: one major female contributor and one minor male contributor.[39] No determinations could be made as to minor contributor.[40]

Detective Fox, acting as the Chief Investigating Officer, collected video surveillance from several businesses and stores in the area.[41] These videos captured the events leading up to the shooting, but no video of the actual shooting was recovered.[42] The surveillance footage depicted Gonzalez following behind Mr. Moreta as they proceed towards Connell Street.[43]

Prior to trial, Mr. Moreta objected to the admission of a Facebook post made by Gonzalez two days after the shooting as inadmissible hearsay.[44] The trial court allowed the State to introduce it for the purpose of establishing a conspiracy and accomplice liability.[45] The jury was instructed that it could only consider Gonzalez's statement for that limited purpose.[46]

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[38] A123.
[39] A134–A135.
[40] A135.
[41] A48.
[42] A50–A53, A56.
[43] A52.
[44] A29–A32.
[45] A38, A141.
[46] A152.

At trial, the prosecution argued that Gonzalez attempted to shoot DeLeon, but missed and hit Serrano instead.[47] It asked the jury to find Mr. Moreta guilty as an accomplice.[48] In closing summation, the prosecutor told the jury three times that "it was clear" Mr. Moreta intended to kill.[49]

[47] A171.

[48] A171.

[49] A170 ("It's clear that the defendant intended to kill.); A171 ("It's clear, ladies and gentleman, at the point that the defendant led Joshua Gonzalez up Franklin Street, down Third Street, into the corner of Connell Street, that he intended to kill."); A172 ("Why? Why did this happen? . . . It will become clear that the reason this happened is Jose Moreta.").

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE CO-DEFENDANT'S FACEBOOK POST TO BE ADMITTED UNDER THE CO-CONSPIRATOR HEARSAY EXCEPTION.

A. Question Presented

Whether the co-conspirator exception to the hearsay rule, Delaware Rule of Evidence 801(d)(2)(E), extends to statements posted on Facebook two days after completion of the conspiracy's primary objective?[50]

B. Standard and Scope of Review

This Court reviews a trial judge's decision concerning the admissibility of evidence for an abuse of discretion.[51] A trial judge abuses his discretion when the judge has "exceeded the bounds of reason in view of the circumstances, [or] . . . so ignored recognized rules of law or practice so as to produce injustice."[52] If this Court finds error or abuse of discretion in the rulings, then it must determine whether the mistakes constituted significant prejudice so as to have denied the appellant a fair trial.[53] Whether Mr. Moreta's constitutional rights were infringed raises a question of law that this Court reviews *de novo.*[54]

C. Argument

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[50] Issue preserved at A29–A32; A140–141.
[51] *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007) (citing *McGriff v. State,* 781 A.2d 534, 537 (Del. 2001).
[52] *Id*. (quoting *Lilly v. State,* 649 A.2d 1055, 1059 (Del. 1994)).
[53] *Id*.
[54] *McGriff,* 781 A.2d at 537.

While hearsay evidence is generally inadmissible, a statement is not hearsay if it (1) "is offered against an opposing party" and (2) "was made by the party's co-conspirator during and in furtherance of the conspiracy. . ."[55]

A declaration made by a co-conspirator after termination of the conspiracy is inadmissible under the co-conspirator hearsay exclusion against any co-conspirator other than the declarant.[56] A conspiracy terminates "upon accomplishment of the principal objective unless evidence is introduced indicating that the scope of the original agreement included acts taken to conceal the criminal activity."[57] Duration of a conspiracy depends on the fact-specific scope of the original agreement.[58] "Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one . . . Continuity of action to produce the unlawful result, or . . . 'continuous co-operation of the conspirators to keep it up' is necessary."[59]

In this case, the conspiracy ended when the murder was committed. Nevertheless, the trial court allowed the State to introduce a Facebook post made by

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[55] See Delaware Rule of Evidence ("DRE") 801(d)(2)(E); see also, *Lloyd v. State*, 534 A.2d 1262, 1264 (Del. 1987) (citing *Carter v. State*, 418 A.2d 989, 994 (Del. 1980)).

[56] *Lutwak v. United States,* 344 U.S. 604, 617–618 (1953); *Krulewitch v. United States,* 336 U.S. 440, 443 (1949) (reversing conviction where post-conspiracy declaration improperly admitted under exception).

[57] *Reyes v. State*, 819 A.2d 305, 312 (Del. 2003).

[58] *Smith v. State*, 647 A.2d 1083, 1089 (Del. 1994) (citing *Lutwak,* 344 U.S. at 617–618; *Krulewitch,* 336 U.S. at 443).

[59] *Fiswick v. United States*, 329 U.S. 211, 216 (1946) (internal citations omitted).

Mr. Moreta's co-defendant, Gonzalez, two days after the murder. The post read: "Fuckin wit tha gang you'll end up ina box M.O.E.T. You know what we pop anything drop when tha bullets fly by in da hood man you better watch a lot 100 #AllBegan #MoneyGateMixTape #FreeC #FreeP."[60] The trial court reasoned that Gonzalez "at this point had absconded from the scene, and this is just two days later and it's still part of the whole situation that's going on in the case. So, the gun's missing at this point, still."[61]

But those facts do not convert the conspiracy into a continuing one. First, there is no evidence to suggest that the scope of the original agreement included acts taken to conceal the criminal activity. Simply put, the record is devoid of any facts that would shed light on what Mr. Moreta and Gonzalez discussed. But even if Mr. Moreta and Gonzalez had agreed to hide the gun,[62] the conspiracy did not continue until the gun was found. Such a rule would render the clause "during the course and in furtherance of the conspiracy" meaningless because a conspiracy could continue into perpetuity if the gun is never found. Instead, this Court should reaffirm the general rule that a conspiracy terminates upon accomplishment of the primary

[60] A152.
[61] A38.
[62] Under those circumstances, Mr. Moreta submits that the conspiracy would terminate once the gun had been discarded or hidden as agreed.

objective. Here, the primary objective was accomplished when Gonzalez pulled the trigger for the final time.

Second, that Gonzalez had absconded from the crime scene does not support admission of his subsequent Facebook post. At the time of the post, Mr. Moreta was in police custody and, thus, could not access Facebook. Consequently, Gonzalez's statement could not have been to "inform others of the status of a conspiracy."[63] Nor could it have been made to conceal the conspiracy, as it was posted for all of Gonzalez's Facebook friends to see.[64] A statement made publicly (or even semi-publicly) serves to expose, rather than conceal, the conspiracy.

Third, and perhaps most importantly, the Facebook post was not made during the course of the conspiracy. Although the trial judge relied on this Court's holding in *Williams v. State*,[65] that case is inapplicable here. *Williams* involved a residential robbery in which the proceeds of the crime were later distributed among the

[63] *United States v. Weaver*, 507 F.3d 178, 186 (3d Cir. 2007) ("statements made to inform others of the status of a conspiracy only further the conspiracy if the addressees are also interested in the status of the conspiracy").

[64] *Id*. ("statements made for the purpose of concealing a conspiracy can further the conspiracy regardless of whether the addressee is a co-conspirator"); see also, *Everett v. State*, 186 A.3d 1224, 1236 (Del. 2018) (there is no reasonable expectation of privacy in incriminating information shared on social media platforms, such as Facebook, Twitter, and Snapchat).

[65] 494 A.2d 1237 (1985).

conspirators.[66] While splitting up the proceeds, one of the conspirator's girlfriends observed their demeanor to be "bragging, excited, and happy."[67]

The trial judge ruled the girlfriend's testimony admissible because the proceeds of the robbery were being divided when she observed their demeanor.[68] This Court, in affirming that decision, noted that "the only testimony concerning the conspirators' post-crime discussions was made in response to a question pertaining to the demeanor of the conspirators."[69] Though the "bragging" testimony was not directly responsive to the question asked, this Court held "it is fair to conclude that the *observation* offered by the witness was *not offered to prove the truth of any statements* by a conspirator."[70]

Here, unlike the demeanor testimony in *Williams*, the trial court allowed the State to introduce Gonzalez's Facebook post through Detective Fox. While the State claimed it was not offering Gonzalez's statement to prove the truth of the matter asserted, one might wonder why, then, "the fact that he said it is important"?[71] According to the prosecutor, the Facebook post "is relevant here because of the similarities between the two hashtags [MoneyGateMixTape] in that it connects what

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[66] *Id*. at 1239.
[67] *Id*. at 1242.
[68] *Id*.
[69] *Id*.
[70] *Id*. (emphasis added).
[71] A31 ("The truth value of what is actually said in this statement is not important, the fact that he said it is important.").

Joshua Gonzalez is saying about the murder two days after it happened . . ."[72] In fact, the State emphasized that Gonzalez "is essentially saying two days after the murder that if you mess with MOET, you're going to end up in a box."[73]

These comments do not suggest that the veracity of his statement was irrelevant. On the contrary, it becomes apparent that the only plausible purpose was to show that Gonzalez committed the murder on behalf of MOET, a gang to which Mr. Moreta belonged. Thus, the Facebook post was not made during the course and in furtherance of the conspiracy; rather, it was offered to prove the truth of the matter asserted.

The statement amounted to inadmissible hearsay and its introduction into evidence requires reversal of Mr. Moreta's convictions. The Facebook post was critical because it painted Mr. Moreta as a member of a violent gang. But the shooting was not gang-related. It began as a verbal disagreement and erupted into a violent altercation. Nevertheless, in its opening remarks, the State relied on Gonzalez's statement to explain why he would commit a murder on Mr. Moreta's behalf.[74] And in its closing summation, the prosecutor once again read his statement to the jury and claimed Gonzalez was "bragging about what he just did for his

[72] A30.
[73] A30.
[74] A43.

buddy."[75] The State's reliance on this inadmissible hearsay proves that the error was not harmless beyond a reasonable doubt.

The trial court abused its discretion in allowing Gonzalez's Facebook post to be admitted under DRE 801(d)(2)(E), violating Mr. Moreta's constitutional right to a fair trial under the Due Process Clause of the United States Constitution and Art. I §7 of the Delaware Constitution.

[75] A171.

II. THE PROSECUTOR TAINTED THE SUMMATION BY REPEATEDLY INJECTING HIS PERSONAL OPINION AS TO THE GUILT OF MR. MORETA, CASTING DOUBT ON THE INTEGRITY OF THE TRIAL AND RESULTING IN PLAIN ERROR.

A. Question Presented

Whether a prosecutor compromises the integrity of a trial by repeatedly injecting his personal opinion that the defendant "clearly intended to kill"?

This issue was not preserved in the trial court.[76] However, the prosecutor's insistence that Mr. Moreta "clearly intended to kill" jeopardized the fairness of the trial by undermining his constitutionally guaranteed presumption of innocence. This repetitive error was so clearly prejudicial, and merits review, because it cast doubt on the integrity of the trial process.

B. Standard and Scope of Review

Because Mr. Moreta did not timely object to the prosecutor's comments and the trial judge did not intervene *sua sponte*, we review for plain error.[77] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[78]

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[76] A170 ("It's clear that the defendant intended to kill.); A171 ("It's clear, ladies and gentleman, at the point that the defendant led Joshua Gonzalez up Franklin Street, down Third Street, into the corner of Connell Street, that he intended to kill."); A172 ("Why? Why did this happen? . . . It will become clear that the reason this happened is Jose Moreta."). Defense counsel did not object to these remarks.

[77] *Mills v. State*, 2007 WL 4245464, at *4 (Del. Dec. 4, 2007).

[78] *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986).

"The doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[79]

Plain error review of asserted prosecutorial misconduct requires a tripartite analysis.[80] First, we examine the record *de novo* to determine whether misconduct occurred.[81] If this Court finds no misconduct, the analysis ends.[82]

Second, we apply the standard articulated in *Wainwright v. State*[83] to determine whether any misconduct constituted plain error.[84] To satisfy *Wainwright,* the defendant must show that "the error complained of [was] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[85] If this Court finds plain error under *Wainwright,* it must reverse without reaching the third step of the analysis.[86]

Third, even if the misconduct does not require reversal under *Wainwright,* this Court may reverse under *Hunter v. State*[87] if it finds that "the prosecutor's statements

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[79] *Id*. (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981)).
[80] *See Spence v. State,* 199 A.3d 212, 219–30 (Del. 2015).
[81] *Baker v. State,* 906 A.2d 139, 150 (Del. 2006).
[82] *Id*.
[83] 504 A.2d 1096 (Del.1986).
[84] *Baker,* 906 A.2d at 150.
[85] *Wainwright*, 504 A.2d 1100 (citing *Dutton v. State,* 452 A.2d 127, 146 (Del. 1982)).
[86] *Morales v. State*, 133 A.3d 527, 530 (Del. 2016).
[87] 815 A.2d 730 (Del. 2002).

are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[88]

C. Argument

1. The Prosecutor's "Clearly Intended to Kill" Comments Were Improper.

This Court has repeatedly held that it is improper for a prosecutor to express his or her personal belief or opinion as to the guilt of a defendant.[89] Such comments, when made without qualification, risk denying a defendant's right to a fair trial by "emasculat[ing] the constitutionally guaranteed presumption of innocence."[90] Accordingly, improper remarks that "prejudicially affect[ ] substantial rights of the accused" ordinarily require reversal.[91]

In *Spence*, this Court found a prosecutor's PowerPoint slide improper because it displayed bold, italicized, and proportionately enlarged text that read: "The defendant is guilty of all the charges against him."[92] And more recently, in *Morales*, this Court held a similar remark was improper: "The defendant is *clearly guilty* of

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[88] *Id*. at 733.
[89] *Morales*, 133 A.3d at 530 (citing *Spence,* 129 A.3d at 229; *Kirkley v. State*, 41 A.3d 372, 378 (Del. 2012); *Brokenbrough v. State*, 522 A.2d 851, 858 (Del.1987)).
[90] *Id*. (quoting *Kirkley*, 41 A.3d at 378).
[91] *Id*. (citing *Brokenbrough*, 522 A.2d at 855).
[92] *Id*. at 227.

robbery that happened that day. I ask you to return a verdict of guilty on both offen[s]es."[93]

Here, the prosecutor expressed his opinion as to Mr. Moreta's guilt by stating "[i]t's clear that the defendant intended to kill."[94] This remark was repeated three times without the common qualifier: 'the evidence demonstrates.'[95] This Court's decisions in *Spence* and *Morales* control the outcome here. The prosecutor's "clearly intended to kill" comments were improper on their face.

2. The Prosecutorial Misconduct Constituted Repetitive Errors That Require Reversal.

Viewed in isolation, the "clearly intended to kill" comments do not amount to plain error under *Wainwright*.[96] But taken together, the misconduct constituted repetitive errors that require reversal under *Hunter*. The cumulative impact of the prosecutor continually expressing his personal opinion as to Mr. Moreta's intent (and, by extension, his guilt) cast doubt on the integrity of the trial process.

This Court has warned of the "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

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[93] *Morales*, 133 A.3d at 531.
[94] A170, A171, A172.
[95] See *Spence,* 199 A.3d at 227.
[96] *Morales*, 133 A.3d at 532 (prosecutorial misconduct was isolated to one statement during summation and did not constitute repetitive errors that require reversal).

available to the office."[97] That concern looms large in this case. As such, this Court must hold that the cumulative impact of the errors compromised Mr. Moreta's right to a fair trial under the Due Process Clause of the United States Constitution and Art. I §7 of the Delaware Constitution. A new trial is warranted.

[97] *Whittle v. State*, 77 A.3d 239 (Del. 2013), *as corrected* (October 8, 2013) (citing A.B.A. Standards for CRIM. JUST. §3–5.8 (1993)).

CONCLUSION

Based on the facts and legal authorities set forth above, Appellant Jose Moreta respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

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