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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS SIERRA, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))))	No. 21, 2020

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

APPELLANT'S AMENDED OPENING BRIEF

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DATED: March 17, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

NATURE OF THE PROCEEDINGS

An August 2, 2010 indictment charged Mr. Sierra with the following: two counts of Murder First Degree; one count of Robbery First Degree; three counts of Possession of a Firearm During the Commission of a Felony; one count of Conspiracy Second degree; and one count Possession of a Firearm by a Person Prohibited. [1] The PFBPP charge was severed on April 5, 2011,[2] and Mr. Sierra's case was severed from his co-defendants' cases on June 10, 2011.[3] Trial began on January 18, 2012.[4] The jury returned a verdict on January 27, 2012, finding Mr. Sierra guilty on all counts,[5] ultimately imposing a life sentence.[6] Mr. Sierra was sentenced on October 15, 2012.[7]

This Court affirmed the convictions on March 7, 2014[8]; the Mandate was filed March 28, 2014.[9]

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[1] A047.

[2] A009.

[3] A013.

[4] A028.

[5] A028.

[6] A034.

[7] A368.

[8] *Sierra v. State*, 2014 WL 1003576 (Del. March 7, 2014).

[9] A037.

Mr. Sierra retained Joseph Hurley, Esquire, who filed a Motion for Postconviction relief on March 26, 2015.[10] On May 15, 2015, Mr. Hurley supplemented the motion, and filed a contemporaneous motion requesting that counsel be appointed.[11] Undersigned counsel was appointed on or about May 11, 2016.[12]

Mr. Sierra's Amended Motion for Postconviction Relief was filed on August 21, 2017.[13] Affidavits from trial counsel were filed on November 29, 2017 and December 1, 2017.[14] Following a stay, Mr. Sierra filed a Supplemental Claim on July 15, 2019.[15] The State responded to the Supplement on September 10, 2019 and the Amended Motion on November 13, 2019.[16] Mr. Sierra filed a Reply on December 2, 2019.[17] The Superior Court denied postconviction relief on

[10] A038.

[11] A038.

[12] A040.

[13] A400.

[14] A464, A469.

[15] A474.

[16] A510, A520.

[17] A546.

December 20, 2020.[18] Mr. Sierra timely filed a Notice of Appeal. This is Mr. Sierra's Opening Brief.

[18] Exhibit A.

SUMMARY OF ARGUMENT

1. The trial court committed reversible error in denying postconviction relief to Mr. Sierra. The court erred both in its denial of individually meritorious claims, and in its failure to evaluate the collective effect of those errors with the error created by Carl Rone's testimony. Thus, the Superior Court's decision is inconsistent with this Court's holding in *Fowler v. State*.

Mr. Sierra articulated claims of ineffective assistance and specific prejudice under *Strickland* relating to 1.) trial counsels' failure to call available fact and expert witnesses, with record evidence demonstrating how they would have undermined the theory of the State's case and credibility of its witnesses; 2.) trial counsels' failure to object to prejudicial testimony, such as Mr. Sierra had "no remorse"; and 3.) unchallenged misconduct by the prosecutor throughout closing summations, both in argument and corresponding slides, such as repeating that Mr. Sierra has "no remorse" and is guilty.

The trial court also abused its discretion in failing to evaluate the effect of the above deficiencies with Rone's testimony supporting the account of the State's star codefendant witness.

STATEMENT OF FACTS

Trial

At trial, the State's theory was that Luis Sierra, Tywaan Johnson, and Gregory Napier participated in a robbery resulting in the murder of Anthony Bing during a drug transaction in Wilmington, Delaware on June 12, 2010.[19] The State contended that Mr. Sierra shot Bing three times, killing him.[20] Napier testified for the State, claiming that Mr. Sierra and Johnson both had guns, but Sierra was the shooter.[21] Carl Rone's testimony supported the theory.[22]

Christopher Plunkett testified for the State that he drove Bing to Allen's Alley after they picked up drugs and was present for the murder. Napier's fingerprints were on Plunkett's car.[23] Napier was arrested and interviewed by the police. He eventually admitted he was present, but gave police Mr. Sierra's name,

[19] A122-123.

[20] A123.

[21] A235-236.

[22] A192-194.

[23] A184.

claiming he was the shooter.[24] Shortly thereafter, Napier signed a plea agreement in exchange for his testimony against his codefendants.[25]

The State called two witnesses – Kevin Fayson and David Succarotte – who claimed to have talked to Mr. Sierra while incarcerated together.[26] Both men contacted the State offering to provide information that Mr. Sierra had admitted to killing Bing.[27] Both were willing to testify against Mr. Sierra in exchange for a benefit from the State.[28]

As part of its defense, trial counsel called Mr. Sierra's previous attorney to testify that he sent Rule 16 discovery materials to the prison, and that the names of Napier, Plunkett, Sierra, and Johnson were not redacted.[29] The purpose was to show that the prison witnesses likely read Mr. Sierra's discovery materials in order to obtain a benefit from testifying against Mr. Sierra, rather than receiving purported confessions from Mr. Sierra.

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[24] A317.

[25] A651.

[26] A270, A281.

[27] A275, A281.

[28] A275, A284.

[29] A334-335.

Carl Rone

At the time of Mr. Sierra's trial, Carl Rone was employed by the Delaware State Police as a forensic firearms examiner.[30] Rone was responsible for the forensic examination of firearms for the "entire State of Delaware."[31] As he testified: "It [didn't] matter what agency collect[ed] the evidence, it was brought in and processed by [Rone]."[32] Rone prepared a report and testified at trial to support State's theory of the case through two significant findings: (1) All three bullets were fired from the same gun; and (2) The gun used was a revolver.[33]

In 2018, the State arrested Rone for Theft by False Pretense and Falsifying Business Records.[34] He later pled guilty to both charges.

[30] A189.

[31] A189.

[32] A189.

[33] A194.

[34] *Fowler v. State*, 194 A. 3d 16, 17 (Del. 2018); A669.

ARGUMENT

CLAIM I. THE TRIAL COURT ERRED IN DENYING POSCONVICTION RELIEF, WHERE EACH CLAIM INDEPENDENTLY ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL AND PREJUDICE AND WHERE THE CLAIMS CUMULATIVELY ESTABLISHED THAT THE RELIABILITY OF THE VERDICT WAS COMPROMISED, THUS REQUIRING RELIEF CONSISTENT WITH *FOWLER*.

A. Question Presented

Whether the Superior Court abused its discretion in denying postconviction relief where prejudice resulted from trial counsels' failure to call defense witnesses and failure to object to repetitive prosecutorial misconduct; and whether the Court abused its discretion in denying relief without considering the cumulative effect of those errors with the error created by Rone's testimony. Mr. Sierra preserved this issue in the filing of his Amended Motion and Supplement.[35]

B. Standard and Scope of Review

The standard this Court applies to a review of the trial court's denial of postconviction relief is abuse of discretion.[36] The Court reviews questions of law *de novo*.[37]

C. Merits of Argument

[35] A418, A426, A448, A480.

[36] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del 2010).

[37] *Id*.

The Superior Court erred in denying Mr. Sierra's meritorious claims establishing that trial counsel was ineffective and prejudice resulted. The Court also erred in denying Mr. Sierra's supplemental claim necessitated by Carl Rone's criminal convictions, which this Court in *Fowler v. State*,[38] required that the trial court to consider cumulatively with other trial errors.

Introduction

This brief will first discuss *Fowler* and its applicability to the instant case. It will then articulate additional errors, each independently warranting relief. Lastly, the brief will demonstrate that the errors in Mr. Sierra's trial must be considered collectively and that such analysis warrants reversal of the Superior Court.

Fowler v. State

In *Fowler*, this Court evaluated the effect of Rone's criminal charges on a pending postconviction motion in which an additional claim of error was raised, determining that Mr. Fowler was entitled to a new trial under Rule 61.[39]

Fowler was convicted of crimes involving two separate shooting incidents.[40] Fowler was admittedly present at both incidents. The State's theory was that

[38] 194 A. 3d 16 (Del. 2018).

[39] *Id.*

[40] *Id* at 17.

Fowler was the shooter in both, using the same firearm.[41] In the first incident, the shots were fired at a porch from Fowler's car.[42] In the second, the State claimed Fowler and another shooter fired at the side of a house.[43] The evidence against Fowler consisted primarily of eye-witness testimony and Rone's corroborating conclusion that the same gun was used in both shootings.[44]

The Superior Court denied Fowler's motion for postconviction relief, finding that although the State committed a *Jencks* violation, it was harmless.[45] While Fowler's appeal was pending, Rone was arrested for Theft by False Pretense and Falsifying Business Records to Make or Cause False Entry.[46] Fowler sought leave from this Court to supplement his postconviction motion with argument as to why Rone's compromised credibility entitled him to a new trial.[47] This Court granted Fowler's request, determining it was necessary to evaluate "the

[41] *Id* at 18.

[42] *Id*.

[43] *Id*.

[44] *Id* at 19-20.

[45] *Id* at 21-22.

[46] *Id* at 22.

[47] *Id* at 22-23.

confidence-undermining nature of the State's decision to indict its own expert" in conjunction with prejudice caused by the *Jencks* violations.[48]

Fowler's defense strategy at the joint trial of both shootings was to undermine the credibility of the ballistics evidence and suggest that the State's main eye-witness to both shootings "either was the shooter or was not credible because he implicated Fowler for the shooting to avoid prosecution for being the shooter."[49] Given the Rone issue, this Court found that the withheld *Jencks* statements – once corroborated by the ballistics evidence – could no longer constitute harmless error.[50] Similarly, the Rone issue could not be considered harmless beyond a reasonable doubt given the State's reliance on the witness testimony.[51]

Fowler established two principles that are instructive here. The first is that testimony from Rone supporting the State's theory of the case constitutes a cognizable error at trial.[52] The second is that in order to evaluate the effect of that error, the reviewing court must consider it in conjunction with other claims of error

[48] *Id* at 23.

[49] *Id* at 19-20.

[50] *Id* at 26-27.

[51] *Id* at *22-23*.

[52] *Id* at 23.

in the case.[53] In other words, the error created by Rone's testimony cannot be considered in a vacuum.

Fowler Applies to the Present Case.

Rone's conclusions were central to the State's case against Mr. Sierra and further undermined by Frederick Wentling, an expert in firearms examination.

The State claimed Mr. Sierra and Johnson had the guns and Napier did not.[54] The State alleged Mr. Sierra, wielding a revolver, was the shooter, while Johnson had a semiautomatic weapon and did not shoot.[55] Rone's testimony supported this theory.[56]

Rone testified that all three bullets were fired from the same revolver.[57] Rone explained the difference between revolvers and semiautomatics, concluding his direct testimony as follows:

> Prosecutor: Now, Mr. Rone, hearken back to all this with your report and your findings; is it your opinion, to a reasonable degree of certainty in the area of ballistics and forensic firearms, that the three items that you received were fired from the same gun?

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[53] *Id.*

[54] A235-236.

[55] A237, A360.

[56] A360.

[57] A194.

Rone: Yes, they were.

Prosecutor: And is it your opinion, to a reasonable degree of forensic, scientific, ballistic certainty that the firearm used would have been a revolver?

Rone: It's consistent with – yes, it's consistent with it having been a revolver, yes sir.

Prosecutor: And is that because of the caliber of the items that you reviewed?

Rone: Yes.

Prosecutor: Which, again, for the record, would be what?

Rone: Items one, two and three, which were three copper-jacketed .38 special of .357 magnum bullets.

Prosecutor: Can a .38 special or .375 magnum be fired from a semiautomatic firearm?

Rone: It would be a desert eagle would be the first thing you'd think of, but A, you wouldn't get an ejected case, and the rifling in there is polygonal, it's not conventional, like these.

Prosecutor: So, not likely.

Rone: Correct.[58]

On cross-examination, Rone confirmed he was certain all the bullets came from the same firearm.[59] The State argued in closing that the ballistics evidence supported its theory.[60]

The *Fowler* Court's holding is applicable:

> Rone presented evidence critical to the State's theory of the case. The State's indictment of Rone for Theft by False Pretenses and Falsifying Business Records to Make or Cause False Entry goes to both Rone's professional reliability and honesty. It also raises questions about whether Rone did the work he says he did or whether he would just testify to the result he knew the State wanted[61]

Rone's credibility and findings in the present case are undermined by Frederick Wentling, a firearms examination expert retained in postconviction.[62] Wentling reviewed the evidence and Rone's testimony. He challenged Rone's ability to have identified the bullets as discharged from a revolver.[63] Wentling opined:

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[58] A195-196.

[59] A196.

[60] A360.

[61] *Fowler*, 194 A. 3d at 26.

[62] A676.

[63] A685.

1.) Items 1,2 and 3 of FFSU Report No. 100251 are discharged and mutilated metal jacketed bullets of the .38/.357/9 mm caliber class

2.) Items 1,2 and 3 of FFSU Report No. 100251 are heavily striated with indistinct rifling characteristic, direction of twist is left and there appear to be six (6) lands and grooves.

3.) Items 1,2 and 3 of FFSU Report No. 100251 were examined microscopically using a comparison microscope. Given the class characteristics, Items 1, 2 and 3 could have been discharged from the same unknown firearm.

4.) I cannot determine the type of firearm Items 1,2 and 3 of FFSU Report No. 100251 were discharged from. This opinion is based on a lack of certain marks characteristic to a revolver which are not visible given the condition of the bullets.[64]

In other words, Wentling only found that the bullets *could* have been fired from the same gun, not that they were. Also, he was unable to conclude they were discharged from a revolver. This Court found Rone's indictment sufficient to cast doubt on his credibility, the substance of his conclusions, and the fundamental fairness of the trial.[65] Here, Wentling's findings further undermine Rone's testimony.

[64] A685.

[65] *Fowler*, 194 A. 3d at 26.

Collective deficiencies throughout Mr. Sierra's trial undermine the reliability of the conviction; the Superior Court committed reversible error in denying relief.

"The Constitutions of the State of Delaware and United States protect defendants from abuse and prejudice in the trial process."[66] Accordingly, "[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."[67] "Some trials are so inundated with errors that the only recourse is to begin anew."[68] This Court's analysis in *Fowler* is consistent with these prevailing principles and requires courts to consider Rone's convictions in conjunction with other errors.[69]

This Court also determined in *Fowler* that Rone's testimony constitutes error when central to the State's case.[70] The question here is whether the State can meet its burden to prove beyond a reasonable doubt that Rone's testimony amounts

[66] *State v. Savage*, 2002 WL 187510 at *1, (Del. Super. Jan. 25, 2002).

[67] *Michael v. State*, 529 A. 2d 752 (Del. 1987)(abrogated on other grounds by *Stevens v. State*, 129 A. 3d 206 (Del. 2015). (*see, Wright v. State*, 91 A. 3d 972 (Del. 2014)(The Delaware Supreme Court reversed defendant's convictions by granting a successive Rule 61 motion. The Court held that while a previously raised *Brady* claim was insufficient to warrant relief, its effect, now considered cumulatively with additional *Brady* errors, warranted reversal in the interests of justice.).

[68] *Savage*, 2002 WL 187510 at *8.

[69] *Fowler*, 194 A. 3d at 23.

[70] *Id* at 22-23.

harmless error.[71] As the *Fowler* Court explained, the standard is an "exacting" one that "cannot be satisfied if the Court is left with a reasonable fear that an injustice has occurred that might have influenced the outcome of the trial."[72] Here, the Rone error, when evaluated collectively with other errors pled by Mr. Sierra in postconviction, was not harmless.[73]

The instant case is analogous to *Fowler* in significant ways. First, like in *Fowler*, Rone's testimony provided an independent strain of evidence supporting the State's theory as to who the shooter was. In *Fowler*, that meant Rone supported the State's contention that Fowler was the shooter in both incidents. Here, Rone supported the contention that Mr. Sierra was the shooter, despite that two guns were alleged to have been used and none were recovered. Wentling further undermined Rone's findings.

Second, like in *Fowler*, the primary eye-witness, Napier, was similarly implicated in the crime, and had every incentive to shift culpability to the defendant in order to avoid punishment or receive a lesser one. In *Fowler*, Chatman was present at both shootings, suspected and arrested before Fowler, and cooperated with police to implicate Fowler, ultimately serving as a star witness for

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[71] *Id* at 23.

[72] *Id.* (internal citations omitted).

[73] Mr. Sierra maintains that individually pled claims warrant relief.

the State at trial to support a theory corroborated by Rone.[74] The same happened here.

Napier was located first because his fingerprints were found at the scene, and he was identified by a witness as involved in the crime.[75] The police interviewed Napier. He initially denied involvement, then, understanding the police had evidence against him, admitted he was present. He claimed he did not participate in the crimes and shifted culpability by identifying Mr. Sierra as the shooter.[76] Napier first implicated Mr. Sierra.[77] Like Chatman in *Fowler*, Napier was the State's star witness, advancing a theory corroborated by Rone. Napier was also charged with the murder. In exchange for his testimony, he accepted a plea to Manslaughter, Robbery First, PFDCF, and Conspiracy Second. He received ten years Level 5 incarceration, with the possibility of reduction for continued cooperation.[78]

Third, in both *Fowler* and here, additional errors call the strength of the State's testimonial strains of evidence into question and undermine the reliability

[74] *Fowler*, 194 A. 3d at 19-20.

[75] A315-316.

[76] A315-318.

[77] A317.

[78] A651.

of the trial. In *Fowler*, the error was withheld *Jencks* material which, if disclosed to the defense, could have been used to impeach witnesses at trial.[79] In the present case, the errors were ineffective assistance and repetitive prosecutorial misconduct. As such, the Rone issue cannot be considered harmless and the Superior Court abused its discretion in denying relief.

Claims warranting relief independently and cumulatively with the Rone error

Law Applicable to Claims of Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are evaluated under a two-pronged test established in *Strickland v. Washington.*[80] To establish such a claim, a petitioner must show: (a) counsel's deficient performance, *i.e*., that defense counsel's performance fell below "an objective standard of reasonableness,"[81] and (b) prejudice, *i.e.*, that confidence in the result of the original proceeding is undermined due to defense counsel's deficiencies.[82] In this context, prejudice has been defined as a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different.[83]

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[79] *Fowler,* 194 A. 3d at 21.

[80] 466 U.S. 668 (1984).

[81] *Id*. at 694.

[82] *Id*.

[83] *Id.* at 688.

"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[84] This basic principle permeates through counsel's entire representation of a client and warrants certain duties that are owed to a criminal defendant.[85]

The basic building blocks of an attorney's responsibilities are competence, diligence, and zealous representation.[86] These duties are embodied in the Delaware Rules of Professional Conduct and are specifically expressed in *Strickland*: "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[87] Counsel also has the duty to assert all possible legal claims and to preserve any potential issues for review.[88] Counsel is expected to have full knowledge of relevant legal issues.[89] When these crucial duties are not

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[84] *Cooke v. State*, 977 A.2d 803, 843 (Del. 2009) (citing *United States* v. *Cronic*, 466 U.S. 648, 656(1984)).

[85] *See Cooke*, 977 A.2d at 841.

[86] *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 353 (2009) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law…") (internal citations omitted); *In re Reardon*, 759 A.2d 568 (Del. 2000) (sanctioning an attorney for violating the duty of diligence); *Matter of Tos*, 576 A.2d 607, 610 (Del. 1990) ("A lawyer shall provide competent representation to a client").

[87] *Strickland*, 466 U.S. at 688.

[88] *Sacher v. United States*, 343 U.S. 1, 9 (1952); *See also Maness v. Meyers*, 419 U.S. 449, 459 (1975) ("An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling.") (internal citations omitted).

[89] ABA Standards for Criminal Justice Defense Function R. 4-5.1 cmt. (3d ed. 1993) ("The lawyer's duty to be informed on the law is . . . important; although the client may sometimes be capable of assisting in the fact investigation, the client is not likely to be educated in or familiar with the controlling law").

performed or are performed in a deficient manner, a complete breakdown of the adversarial process contemplated by the Sixth Amendment has occurred. The right to counsel is the right to advocacy.[90] If counsel is not acting in the role of a zealous advocate, there can be no effective assistance.

Trial counsel failed to call available expert and fact witnesses

Trial counsel retained Dr. Hameli, an expert in forensic pathology, to undermine Napier's account of the shooting that Mr. Sierra stood over Bing to fire the second two of the three shots. At a December 8, 2011 office conference, though the deadline for experts had lapsed, the defense sought to call an expert, representing they would supply the report in two weeks.[91] The Court ordered trial counsel to advise the State by December 16, 2011 whether an expert would be called, providing any report.[92]

At a December 28, 2011 office conference, the State argued the supplied report was too vague to give notice as to how the expert's opinion was formed.[93] Trial counsel conceded, representing they would provide a report compliant with the

[90] *Cronic*, 466 U.S. at 656.

[91] A064.

[92] A064.

[93] A080-081.

requirements.[94] However, on January 9, 2011, the State indicated, "we have nothing."[95]

Trial counsel responded:

> It's me, your Honor, I think I've been handling that issue. You know, I drove to Dr. Hameli's house on Thursday to drop off a list of things that he had reviewed in this case so he could – what he does is handwrite his reports and I type them up. He indicated that the earliest he would be able to have it is yesterday afternoon that he would fax it to me. And as of 4:30 pm yesterday, I had not received it.[96]

The Court directed trial counsel to "get the report as promptly as possible."[97]

Dr. Hameli did not testify. However, his hand-written report dated January 8, 2012 would have assisted the defense.[98] The report contains the following:

1. Considering the specific pathway directions of bullets 2 and 3 within the body, the assailant could not have been standing over the top of Mr. Bing's body while he was lying on his back on the ground, firing his gun and striking Mr. Bing's body.[99]

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[94]A084.

[95]A111.

[96]A111.

[97] A111.

[98]A660.

[99]A662.

Napier testified Mr. Sierra shot Bing once, then stood over Bing's body, shooting him twice more.[100] In his report, Dr. Hameli opined that would not have been possible.[101] If Dr. Hameli testified, he would have significantly undermined Napier's testimony. Failure to call him was ineffective.

In its denial of postconviction relief, the Superior Court determined evidence offered by Dr. Hameli "could [have been] used to argue about the accuracy of Napier's account rather than his credibility."[102] Such assertion, however, represents a distinction without a difference. Moreover, trial counsel conceded in his affidavit that he failed to effectively present this evidence and that had he done so, it likely would have impacted the outcome in favor of his client.[103] Yet, the Superior Court ignored trial counsel's concession.

Trial counsel also failed to call fact witnesses. Napier testified that he met up with Mr. Sierra shortly after 5:30-6:00 pm.[104] Napier testified that his friend Jamal gave him a ride, but left before the shooting.[105] Napier testified that he, Mr. Sierra,

[100]A236.

[101]A662.

[102] Exhibit A at 14.

[103] A466.

[104]A230.

[105] A231, A257.

and Johnson, ended up in Allen's Alley to engage in a drug transaction with the victim.[106] During cross examination, Napier admitted he told police that he received a ride from Jamal after flight from the scene.[107] Napier estimated the time was approximately 7:30 pm when they met Bing, as arranged by Johnson. [108]

David Succarotte and Kevin Fayson were inmates who contacted prosecutors, attempting to receive sentence reductions in exchange for providing the State with information that Mr. Sierra confessed to killing Bing. Both received or hoped to receive a benefit for their testimony.[109]

Trial counsels' files reveal investigative reports detailing witnesses whose testimony would have undermined the State's witnesses.

Damarius Turnage, incarcerated with Napier, told the investigator that Napier said Mr. Sierra was not there when Bing was shot and identified "Jamal" as the shooter.[110] Napier admitted that it was Jamal who accompanied Napier to Johnson's house that evening, and on the way, Jamal showed him two guns.[111]

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[106]A31.

[107] A257-258.

[108]A234

[109]A275-277, A284.

[110] A653.

[111] A653.

Napier explained to Turnage that Jamal suggested robbing Bing, and accompanied Napier and Johnson to execute this plan.[112] Napier told him Jamal had guns, and Napier approached Bing and asked, "Do you want to die over this?"[113] Jamal then shot Bing three times, killing him.[114] Turnage was told that after they fled, Jamal threated Napier with a gun, directed him not to tell anyone he shot Bing, but to implicate Mr. Sierra, because they look alike.[115]Jamal purportedly threatened to kill people in Napier's family if he identified him as the shooter.[116] Turnage did not know Mr. Sierra prior to hearing this information.[117] Turnage was not called as a witness.

Mark Purnell corroborated Turnage's information as Napier also told him that Jamal was the shooter and admitted to lying to police.[118] Purnell also did not know Mr. Sierra.[119] Purnell was not called a witness.

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[112] A653.

[113] A653.

[114] A653

[115] A653

[116] A653

[117] A653.

[118]A654.

[119]A654.

Shannon Moore was an alibi witness interviewed by the defense investigator prior to trial.[120] Moore could have testified to Mr. Sierra's presence at "Flip's" barbeque beginning around 5:00-6:00 pm on the night Bing was shot.[121] This evidence provides an alibi to Mr. Sierra, and other witnesses provided corroborating information.

Fatima Ali was also interviewed by the defense prior to trial.[122] She could have testified that on the day Bing was shot, she attended a party for Napier's daughter at Brandywine Park before going to Flip's barbeque.[123] She arrived at the barbeque around 4:15 or 4:30; Mr. Sierra was there when she arrived, and he left before she did.[124]

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[120] A657.

[121] A657.

[122] A659.

[123] A659.

[124] A659.

Jay Michael Ringgold was interviewed by the defense team prior to trial.[125] Like Moore and Ali, Ringgold could have provided an alibi for Mr. Sierra as he knew Mr. Sierra was at the barbeque.[126]

Flip Osborn was interviewed by the defense team prior to trial.[127] Osborn could have testified that he hosted a barbeque at his residence on June 12, 2010, the day Bing was shot.[128] He indicated that Mr. Sierra was in attendance at the barbeque from about 3:00-4:00 p.m. until about 7:30-8:00 p.m. thereby providing an alibi for Mr. Sierra.[129]

Bryheen Mitchell was also interviewed and confirmed that Mr. Sierra was at the barbeque and left around 7:30 pm.[130]

Napier had credibility issues. In addition to receiving a benefit for his testimony, there were inconsistencies between his statement to police and testimony.[131] Dr. Hameli would have testified Napier's account of the shooting was

[125] A655.

[126] A655.

[127] A658.

[128]A658.

[129] A658.

[130] A565.

[131]A258-260.

impossible, thereby undermining Napier's credibility as a whole. The fact witnesses provided an alibi for Mr. Sierra and would have shown that Mr. Sierra could not have committed the offenses because he was at a barbeque.

In its denial of postconviction relief, the Superior Court determined the fact witnesses would have not affected the trial's outcome because they did not testify to Mr. Sierra's whereabouts at the exact time of the murder.[132] However, Mr. Sierra, without any evidentiary hearing, has demonstrated that these witnesses would have undermined the state's case and should have been presented to the jury for consideration.

Trial counsel failed to object to improper testimony

Succarotte was in prison and wrote to the prosecutors about Mr. Sierra. His motivations for contacting the prosecution were at issue. The prosecution asked Succarotte about such motivations. He responded: "…you look me in my eyes, tell me you took a man's life, with no sympathy, no remorse, or anything, and I can't live with that on my conscious. That's why I wrote the letter."[133] Trial counsel did not object. Such testimony was inadmissible and highly prejudicial.

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[132] Exhibit A at

[133] A278.

The prosecutor also elicited prejudicial testimony from Napier, that Mr. Sierra was "praising what he'd done" stating, "I mean, I guess he liked what he had done."[134] Napier testified it was Mr. Sierra's "first one…referring to, I guess, murder."[135] Trial counsel failed to object. Thus, the jury was permitted to consider inadmissible evidence, namely that Mr. Sierra was responsible for other murders. While trial counsel's affidavit claimed that failure to object was strategic, such decision was wholly unreasonable.

Prosecutorial misconduct pervaded the trial and undermined the reliability of the conviction; trial counsel did not object

Applicable law

Prosecutors "represent all the people, including the defendant"[136] and must "seek justice, not merely convictions."[137] To ensure that justice is done, prosecutors must exercise their special duty to avoid improper argument to the jury.[138] This is especially important, as "[a]rguments delivered while wrapped in the cloak of state

[134]A239.

[135]A240.

[136] *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960).

[137] *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979); *see also Berger v. United States*, 295 U.S. 78, 88 (1935); *and* ABA Standards for Criminal Justice Prosecution Function R. 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

[138] *See, e.g., DeAngelis v. Harrison*, 628 A.2d 77, 80-81 (Del. 1993).

authority have a heightened impact on the jury."[139] Because prosecutors are officers of the court and representatives of the State, "[m]embers of the jury are likely to assume that prosecutors will satisfy their heightened obligations of impartiality."[140] Consequently, improper arguments "are apt to carry much weight against the accused when they should properly carry none."[141]

This Court has consistently admonished prosecutors to refrain from prosecutorial misconduct, and defense counsel to raise timely objections in the event misconduct occurs.[142] "Timely objections to prosecutorial misconduct give the trial prosecutor an opportunity to respond to the allegation of misconduct in the first instance, and more importantly, give the trial judge an opportunity to consider whether misconduct in fact occurred and if so, what, if anything, should be done to remedy it."[143]

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[139] *Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985).

[140] *Baker v. State*, 906 A.2d 139, 152 (Del. 2006).

[141] *Berger*, 295 U.S. at 88; *see also* ABA Standards for Criminal Justice Prosecution Function R. 3-5.8 cmt. (3d ed. 1993) ("Prosecutorial conduct in argument is a matter of special concern because 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 available to the office.").

[142] *Baker*, 906 A.2d at 141.

[143] *Id.*

In *Spence v. State*[144], this Court examined "the use of PowerPoint presentations and their acceptable boundaries in criminal prosecutions."[145] In *Spence*, the State's PowerPoint presentation during closing summations included a slide with "MURDER" in red lettering and a picture of the victim.[146] The Court conducted a review of prior decisions on this issue,[147] affirming "that prosecutors represent the people of the State and must act impartially in the pursuit of justice."[148] Accordingly, it held "[a] slide that achieves no end but to inflame the passions of the jury is improper."[149] Indeed, "[f]anning the flames of a jury's collective emotions through the use of improper PowerPoint slides to obtain a conviction does not serve the interest of justice."[150] In *Spence*, the State's use of a

[144] 129 A. 3d. 212 (Del. 2015).

[145] *Id* at 220.

[146] *Id* at 219.

[147] *Id* at 220-224 (see *In re Glassman* 286 P.3d 673 (Wash. 2012); *State v. Walker* 314 P.3d 976 (Wash. 2015); *Lopez-Bonilla v. State* 2015 WL 1797303 (Nev. April 15, 2015); *Watters v. State* 313 P.3d 243 (Nev. 2013).; *State v. Kalmio* 846 N.W. 752 (N.D. 2014); *State v. Rivera*, 437 N.J. Super. 434 (App. Div. 2014))

[148] *Id* at 223-224.

[149] *Id* at 223.

[150] *Id.*

slide reading "MURDER" was improper, and "served no purpose other than to attempt to inflame the jury."[151]

Spence further held that "[a] powerpoint may not be used to make an argument visually that could not be made orally."[152] The Court opined that determining whether a slide constitutes misconduct is a "highly contextualized and fact-specific analysis."[153]

Analysis of a prosecutorial misconduct claim

A timely objection during trial affords the defendant harmless error review - the court conducts a *de novo* review to determine whether the prosecutor's actions were improper.[154] If the court finds misconduct, it proceeds to the second step of the analysis - "whether the misconduct prejudicially affected the defendant."[155] In *Hughes v. State*, this Court identified three factors a reviewing court must apply in determining whether a defendant's rights have been substantially violated: 1) the

[151] *Id* at 224.

[152] *Id* at 223.

[153] *Id*.

[154] *Kirkley v. State*, 41 A. 2d 372, 376 (Del. 2012).

[155] *Id*.

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 [156]

If, under *Hughes,* the court finds defendant's rights have not been prejudicially affected, it must turn to the test set forth in *Hunter v. State*[157] to evaluate "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[158]

The Prosecutor mischaracterized Mr. Sierra's purported statements.

It is well settled in Delaware that improper vouching constitutes prosecutorial misconduct.[159] A prosecutor engages in improper vouching when he "implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness testified truthfully."[160] Consequently, a prosecutor cannot imply personal knowledge that the witness's testimony is accurate. A prosecutor is also prohibited from mischaracterizing the record during closing arguments. [161]

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[156] 437 A. 2d 559 (Del. 1981).

[157] 815 A. 2d 730 (Del. 2002).

[158] *Id* at 733.

[159] *See Kirkley v. State*, 41 A.3d 372 (Del. 2012).

[160] *White v. State*, 816 A.2d 776, 779 (Del. 2003).

[161] *Morris v. State*, 795 A.2d 653, 659 (Del. 2002); *see also Hughes*, 437 A.2d at 567 ("It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.").

During closing argument, the prosecutor explained to the jury: "Persons who told you what happened: Chris Plunkett, Gregory Napier, Richard Bartley, *and Luis Sierra through what he told Kevin Fayson and David Succarotte."*[162] Here, the prosecutor undermined the constitutional right of Mr. Sierra not to testify which he invoked during his trial, implicating his 5th amendment rights.[163] The jury did not hear from Mr. Sierra. The jury heard from Kevin Fayson and David Succarotte, both self-interested witnesses with substantial credibility issues. A determination as to their credibility should have remained within the exclusive purview of the jury. Thus, the prosecutor argued to the jury that Mr. Sierra told them what happened, when he invoked his right not to testify. Mr. Sierra also invoked his 5th Amendment right to remain silent as he gave no statement to the police.

The effect of this mischaracterization was compounded by the corresponding slides the prosecutor used during closing summation. First, the prosecutor displayed a slide with the heading, "Persons who told you what happened."[164] The slide listed four names: "Chris Plunket – drove Bing to Allen's Alley; Gregory Napier – codefendant; Richard Bartley – witness on the balcony; *Luis Sierra* –

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[162] A374.(emphasis added).

[163] *See, Jackson v. State,* 643 A. 2d 1360 (Del. 1994).

[164] A375.

through Kevin Fayson and David Succarotte."[165] The slides demonstrate that the misconduct was repetitive and deliberate.

Later during his closing argument, while explaining the content of the Fayson and Succarrotte testimony, the prosecutor again presented Mr. Sierra's purported admissions as testimony:

> Then we get to what Luis Sierra said about the crime to David Succarotte…
>
> Sierra told Succarotte while they were in adjoining rec yards with a fence between them, but they were talking about they had known each other for years, that "G" was testifying against him, that he would never have gotten caught but "G" left his fingerprint on the car, that they went to rob a quarter pound of marijuana, exotic marijuana. 'Reality was the other guy. You don't know him. He was older. 'G' didn't know it was going to be a robbery. 'G' was the only one without a gun. I shot him to do what's best for me. I shot him two more times to make sure he was dead.
>
> That's what Luis Sierra said about this crime to his friend, David Succarotte. He was worried because the police found the shirt that he wrapped around his head. He threw it in a trash can; the shirt was found in the trash can.
>
> David Succarotte told you Mr. Sierra had no sympathy, no remorse.[166]

The jury never heard from Mr. Sierra. Rather, they only heard from jail-house snitches as to what Mr. Sierra may have said. The State argued those statements as

[165]A375.

[166]A358.

testimony from Mr. Sierra when he had the right not to testify or give statements to the police.

Later in the PowerPoint presentation, the State presented a series of slides in which the State summarized comments Mr. Sierra purportedly made to Succarotte and Fayson.[167] Especially troubling are two slides featuring a boldface type heading reading, "Luis Sierra's Account"[168] As this Court has made clear: An argument that cannot be made orally, can similarly not be made visually.[169] Here, the prosecutor employed tactics that constitute misconduct.

Trial counsel did not object to the improper comments or Powerpoint slides.

The prosecutor argued an improper statement on accomplice testimony to the jury.

The Court appropriately gave a jury instruction on accomplice testimony because of the testimony offered by Napier. The Court's instruction read:

> …For obvious reasons, evidence relating to the activities of an admitted participant should be examined by you with suspicion and great caution. The fact that Gregory Napier has entered a guilty plea to various offenses in this case, or had an agreement with the prosecution, is not evidence of guilt of any other person, including the defendant, Luis Sierra.
>
> This rule about accomplice testimony becomes particularly important if there is nothing in the evidence, direct or circumstantial, to

[167] A636-A640.

[168] A636, A639.

[169] *Spence,* 129 A. 3d at 223.

> corroborate the alleged accomplice's accusation of the defendant's participation in the alleged acts. Without such corroboration, you should not find the defendant guilty unless, after careful examination of the accomplice testimony, you are satisfied beyond a reasonable doubt that it is true and you safely rely upon it.[170] …

During the state's closing argument, the prosecutor mischaracterized the instruction by telling the jury:

> The judge will instruct you, in relationship to Gregory Napier, that when a co-defendant testifies, his testimony should be examined with suspicion and great caution. That's because Napier has pled guilty and got a lesser sentence and agreed to testify. And the judge will tell you to that great caution is important, especially if there is nothing to corroborate the testimony of Gregory Napier. That's because the law does not want people to just come in and get out of trouble by saying, "oh that guy did it," and you have to believe him. *If that all the state has, you have to use great care and great caution in evaluating the testimony.*[171]

This is an improper explanation of the instruction as "great care and caution" is not just when the only evidence is a jailhouse snitch. The State's misconduct diluted the Court's instruction.

Here again, trial counsel did not object.

The prosecutor made improper and inflammatory comments that Mr. Sierra had "no remorse."

During closing argument the State represented four times that Mr. Sierra had no sympathy for the murder he was accused of committing. First, after

[170]A358.

[171]A359.

characterizing Succarotte's testimony as an unqualified admission, the prosecutor said, "David Succarotte told you that Luis Sierra has no sympathy, no remorse."[172] Still talking to the jury about Sucarotte's testimony, the prosecutor reminded the jury that Sucarotte testified that part of the reason he wrote to the State about Mr. Sierra was because Mr. Sierra had "no sympathy, no remorse."[173] While arguing corroboration between witnesses, told the jury two additional times that Mr. Sierra lacked any sympathy or remorse:

> That's what Greg Napier told you. That *Sierra expressed no regret* about killing Bing, and that what Greg Napier told you. When they met up to split the drugs, he was shook. Reality appeared shaken. Sierra said, "It was something I had to do."
>
> No sympathy, no remorse.[174]

The State also presented two slides asserting that Mr. Sierra expressed no remorse for the crimes he was alleged to have committed. The first came on a slide entitled, "Sierra told Succarotte."[175] There were only three bullet points on the slide and the final one was "Sierra had, 'no sympathy, no remorse.'"[176] The second

[172]A358.

[173]A359.

[174]A359.

[175]A580.

[176]A638.

slide referencing Mr. Sierra's lack of remorse was again related to Succarotte. This time, the heading on the slide read, "corroborating testimony." One of the bullet points was, "Sierra expressed no regret about killing Bing."[177]

Trial counsel, again, did not object.

The prosecutor asserted improper and unqualified assertions pronouncing Mr. Sierra's guilt

This Court has consistently held that is it improper for a prosecutor to express his personal belief or opinion as to the guilt of the defendant.[178] It is improper for the prosecutor to make a plain statement that the defendant is guilty.[179] "Such comments, when made without qualification, risk denying a defendant's right to a fair trial by 'emasculat[ing] the constitutionality guaranteed presumption of innocence.'"[180] Arguments that undermine the "objective detachment with should separate a lawyer from the cause which he argues" are "easily avoided by insisting that lawyers restrict themselves to statements which take the form of "the evidence shows."[181]

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[177] A638.

[178] See eg, *Spence v. State* 129 A.3d at 229, *Brokenbrough v. State* 522 A. 2d 851 (Del. 1987).; *Kirkley v. State*, 41 A. 3d 372,378 (Del. 2012); *Morales v. State* 133 A.3d 527 (Del. 2016).

[179] *Spence*,129 A.3d at 227.

[180] *Morales*, 133 A.2d at 530 (quoting *Kirkley*, 41 A. 3d at 378).

[181] *Brokenbrough* at 859,(citing ABA Standard 5.7, prosecution and defense function).

Nevertheless, throughout opening and closing arguments, the prosecutors repeatedly said without qualification that Mr. Sierra was guilty. While explaining the conspiracy charge to the jury, the prosecutor said, "Here, we have much more than an overt act. It's not that they just walked up with the intent to commit the robbery, they actually committed it and they committed it together."[182]

The State used a power point presentation in its opening statement that included a slide featuring a picture of Mr. Sierra with "GUILTY" in red lettering.[183] Later, on day 4 of trial, trial counsel raised the issue of the slide presentation to the Court, indicating he had intended to object earlier.[184] Trial counsel represented that he was unsure of what remedy to seek, and sought none at that time.[185] In its response, the Court said:

> Mr. Grubb, I guess I've been aware of this matter, but not hearing any request for any kind of relief from the defendant. But I'll nevertheless hear the State's comment on the defendant's *observation*."[186]

[182]A353.

[183]A350, A580.

[184]A350.

[185] A350.

[186]A251. (emphasis added).

Trial counsel then clarified that he was merely requesting that the State not be permitted to use the "GUILTY" slide during its closing argument. Consequently, the court reserved the discussion until immediately before closing arguments.[187]

Immediately prior to closing arguments, the Court asked for counsel's position on the power point slide.[188] The following exchange occurred:

The Court:	I remember during the opening statement by Mr. Grubb, there was an issue raised about the word "guilty" on a red background. Mr. Barber, you said that you might be raising that issue again in closing argument. Is there any issue there or are there no applications?
Trial counsel:	No. Well, I'm maintaining my objection to the State presenting that to the jury in closing.
The Court:	All right. Mr. Downs?
Prosecutor:	Your Honor, this is argument. The state's argument shows that the defendant is guilty and we will say so.
The Court:	I think it's an acceptable demonstrative slide to parallel what the State says, but objection is noted.[189]

[187] A251.

[188]A350.

[189]A350.

Following that exchange, an examination of the power point presentation the State intended to use during its closing argument revealed that there was not a slide with "Guilty" in red lettering over Mr. Sierra's face. Trial counsel failed to request relief or raise this issue on appeal.

During closing argument, the prosecutor essentially testified saying: "…Luis Sierra is a key participant in the robbery and murder of Anthony Bing. He's present at the car. He had a gun. He's telling Bing, "Where's it at? He held the gun on Bing. He shot Bing. He stood over Bing and shot him two times."[190] There was no objection by trial counsel.

The last words of the State's closing were as follows:

> Luis Sierra is guilty of the crimes for which he has been charged. He intentionally caused the death of Anthony Bing, so you should find him guilty of murder first degree, the intentional murder. He used a gun to do it, and so you should him guilty of the possession of the firearm. He recklessly caused the death of Anthony Bing during the commission of a robbery, so you should find him guilty of murder first, felony murder. He did that with a gun, so he is guilty of that possession of a firearm. He took the property of Anthony Bing by displaying a weapon, so he is guilty of robbery first. He actually had a gun while doing this with his coconspirators, and so he is guilty of the firearm charge. And he agreed with Johnson, and at the last minute, Gregory napier, to commit this crime, and so he is guilty of that conspiracy.[191]

[190] A357.

[191] A359.

In rebuttal, the prosecutor's last words to the jury again amounted to unqualified statements on Mr. Sierra's guilt:

> He shot him. He walked over top of him and he shot him two more times to make sure he was dead. Ladies and gentleman, convict him.[192]

Here again, trial counsel did not object.

Prosecutorial misconduct prejudicially affected Mr. Sierra's substantial rights.

Analysis under Hughes v. State.

The *Hughes* factors are: (1) the closeness of the case, (2) the centrality of the issue affected by the prosecutor's error, and (3) the steps taken to mitigate the effects of his misconduct.[193] If this Court determines that the misconduct prejudicially affected Mr. Sierra's rights, the analysis ends and Mr. Sierra's conviction must be reversed.[194]

1. *The closeness of the case*[195]

[192] A373.

[193] *Hughes*, 437 A.2d at 571.

[194] *Baker*, 906 A.2d at 149.

[195] Trial counsel's ineffectiveness in one aspect of trial should not serve to mitigate the effect of his ineffectiveness in another; yet, that would be the result here if the court conducted an analysis as to the "closeness of the case" without considering the available witnesses trial counsel neglected to call in Mr. Sierra's defense.

Mr. Sierra's case was close. There was no physical evidence in this case connecting Mr. Sierra to the murder. The fingerprints at the scene were Napier's. The State's theory was offered primarily by Napier, who benefited from testifying and whose story was inconsistent. Sucarrotte and Fayson, the inmates to whom Mr. Sierra purportedly made admissions, also testified to receive a benefit from the State. The jury would have to find the State's witnesses reliable in order to convict Mr. Sierra.

2. *The centrality of the issues affected by the prosecutors misconduct*

The prosecutor's misconduct related to the ultimate issue – whether Mr. Sierra was guilty. The prosecutor repeatedly, and independent from any reference to the evidence, improperly asserted that Mr. Sierra was guilty. Also central to the case was the issue of whether the jury found Succarrotte and Fayson reliable enough to believe Mr. Sierra made the statements they claimed he did. The prosecutor bolstered their testimony by undermining their obligation to give "great care and caution" to their testimony.

3. *The steps taken to mitigate the misconduct*

Since trial counsel failed to object to any of the prosecutorial misconduct, the Court did not fashion a remedy to mitigate its effect.

Reversal is warranted under Hughes.

Application of the *Hughes* factors to the facts of this case overwhelmingly supports reversal of Mr. Sierra's conviction. The case was close. The prosecutor's misconduct infected credibility determinations, as well as the ultimate question of guilt, the most central issue in the case. The conduct of the prosecutors, Mr. Grubb and Mr. Downs, substantially affected Mr. Sierra's fundamental constitutional rights, namely his right not to testify. Finally, no steps were taken to mitigate the effects of the State's misconduct. Even if the *Hughes* factors were conjunctive, reversal would be warranted. However, as the factors are disjunctive and one factor alone may be determinative[196], reversal is required as all three factors weigh so heavily in Mr. Sierra's favor.

Reversal is warranted under Hunter v. State

If this Court finds that the misconduct fails the *Hughes* test, then the Court must then apply the test enunciated in *Hunter*,[197] which requires a reviewing court consider whether the "prosecutor's statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial

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[196] *Kirkley*, 41 A.3d at 376.

[197] *Hunter v. State*, 815 A.2d 730 (Del. 2002); *see also Kirkley*, 41 A.3d at 376.

process."[198] In the instant case, the prosecutor's improper comments during closing summations were repetitive and pervasive. Each improper argument was made at least twice – in argument and via corresponding slide. Since the prosecutor's statements and misconduct are repetitive errors, *Hunter* dictates that reversal is required because such errors cast doubt on the integrity of the judicial process.

Moreover, these two prosecutors were admonished by this Court for their misconduct in *State v. Robinson*,[199] when they deliberately invaded attorney/client privilege and obtained defense strategy, committed discovery violations, demonstrated a lack of candor to the court, and failed to comply with Orders during the related proceedings.[200] As this Court determined, these prosecutors demonstrated "a seeming indifference to the serious constitutional issues at stake," and exhibited a "persistent refusal to accept responsibility for improper conduct."[201] Thus, this Court cannot consider the prosecutorial misconduct by these two prosecutors in a vacuum.

[198] *Justice*, 947 A.2d at 1101 (citing *Baker*, 906 A.2d at 149).

[199] 209 A. 3d 25 (Del. 2019).

[200] *Id* at 54.

[201] *Id.*

The trial court erred in denying postconviction relief for the repeated and pervasive misconduct by the prosecution.

In its denial of relief, the Superior Court did not hold that the prosecutor's conduct was proper.[202] Rather, the court merely held that there was no indication that a "proper objection would likely have produced a different result."[203] However, Mr. Sierra has demonstrated that meritorious claims of prosecutorial misconduct were available to him. There was no strategic reason not to object. One of his trial counsel acknowledged error in failing to object as objections would have been consistent with what "[Delaware] courts have taught"[204] Mr. Sierra's other trial counsel did not claim strategy, simply that he did not identify the misconduct.[205]

Prejudice resulted because if trial counsel had objected, the Court could have fashioned a number remedies to cure the prejudice. First, trial counsel could have requested a mistrial, which may have been granted as the prosecutor's misconduct pervaded the entirety of the State's closing and rebuttal arguments – the last thing the jury heard. The improper vouching, mischaracterization of evidence, and

[202] Exhibit A at 13.

[203] Id

[204] A465.

[205] A473.

undermining of Mr. Sierra's right not to testify constituted repetitive errors which directly related to the jury's most important determinations in this case: 1.) whether the State's inmate fact witnesses were credible; and 2.) whether Mr. Sierra was guilty of crimes of which he was accused.

Second, an objection would have permitted trial counsel to request a curative instruction and/or the Court to direct the prosecutor to cease his improper remarks during closing argument so as to avoid any additional prejudice. By failing to make any objection whatsoever, trial counsel gave the prosecutor an unfettered opportunity to make improper remarks to the jury that substantially impacted the fairness of the trial and could only have been appealed under a plain error standard.

The trial court's failure to consider the other trial errors cumulatively with the Rone error was an abuse of discretion warranting reversal.

The trial court's failure to examine the errors cumulatively warrants reversal. Consistent with *Fowler*, given the other constitutional deficiencies in Mr. Sierra's trial, the State cannot satisfy the exacting standard that the Rone error is harmless beyond a reasonable doubt. Accordingly, Mr. Sierra is entitled to relief in the form of a new trial.

The Superior Court reached its conclusions through a misapplication of *Fowler* and misplaced reliance on subsequent decisions relating to *Fowler*. In

denying this postconviction claim, the Superior Court relied on a decision in *State v. Pierce*[206] wherein the Court denied Pierce's Motion *in Limine:*

> [T]he Court does not find the same motivation to be present when submitting records seeking extra pay that was not earned, compared to submitting allegedly false evidence logs and testing documentation when handling evidence. There is a significant dissimilarity between these two types of business records. Likewise, the two types of duties at issue regarding Mr. Rone's payroll submissions versus his expert testing and evidence processes have significant differences.[207]

In the present case, the Superior Court concluded that "these differences or dissimilarities between these two types of business records exist and thus do not undermine the reliability of Rhone's[sic] testimony or the Defendant's conviction."[208] This reasoning ignored *Fowler's* holding and substituted the application of a case inapposite to Mr. Sierra's.

The trial court's reliance on *Pierce* is erroneous. *Pierce* was a decision on a pretrial defense Motion *in Limine* to exclude the testimony of the State's new firearms expert at Pierce's yet-to-occur trial.[209] The State was only offering Rone's testimony in connection with a chain-of-custody proceeding, where breaks

[206] 2018 WL 4771787 (Del. Super. Oct. 1, 2018).

[207] Exhibit A at 15 citing *Pierce*, 2018 WL 4771787 at *4.

[208] Exhibit A at 15.

[209] *Pierce*, 2018 WL 4771787 at *1.

in the chain go to weight, not admissibility.[210] The *Pierce* language relied upon by the Superior Court in the present case only related to that chain of custody issue. In that case, the Court expressly distinguished the chain-of-custody issue from a postconviction proceeding challenging Rone's trial testimony:[211] "[i]n contrast to the postconviction issue in *Fowler*, for the purposes of this chain of custody hearing, Mr. Pierce had full opportunity to subpoena evidence regarding Mr. Rone's conduct and to cross-examine Mr. Rone."[212] Moreover, in Pierce, the court was careful to indicate that its decision was a "limited finding for the purposes of this hearing."[213]

The Court also rested its reasoning on *State v. Romeo,* denying postconviction relief because Mr. Sierra "failed to demonstrate how the new issues of Rone's credibility h[ave] created a significant change in the factual circumstances of his case."[214] However, Mr. Sierra is postured as Mr. Fowler was, collaterally attacking the reliability of his conviction after Rone's criminal charges coupled with additional material errors compromised the fundamental fairness of

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[210] *Id.* at *3.

[211] *Id.*

[212] *Id* at *4

[213] *Id.*

[214] Exhibit A at 15, citing *Romeo v. State,* 2019 WL 918578 at *29 (Del. Super. Feb. 21, 2019)(*aff'd by Romeo v. State*, 219 A. 3d 996 Del. 2019).

his trial. The *Romeo* language cited by the Superior Court in the present case related to Romeo's inability to overcome procedural bars.[215] Mr. Sierra, however, is not barred.

The trial court's denial also erroneously relied on the distinction that there was no *Jencks* issue in the present case, as there was in *Fowler*.[216] However, the holding in *Fowler* did not rely on the specific error. Rather, this Court held that the errors must be evaluated together.[217] The fact that pervasive prosecutorial misconduct and repeated instances of ineffective assistance of counsel, rather than a *Jencks* violation, compromised the trial is not dispositive. In *Fowler*, the *Jencks* issue was insufficient on its own to warrant reversal, but when cumulated with the Rone error, it was. Here, like in Fowler, the cumulative effect warrants relief.

Simply put, *Fowler* makes clear that the Rone issue cannot be simply excised from other claimed errors and considered in a vacuum. Consistent with this Court's decision in *Fowler*, the relevant question is whether the State can demonstrate the error was harmless.[218] In this case, the pervasive prosecutorial misconduct, the repeated instances of ineffective assistance of counsel make clear

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[215] *Id.*

[216] Exhibit A at 16.

[217] *Fowler*, 194 A. 3d at 17.

[218] *Id* at 23 (citing *Hansley v. State*, 104 A. 3d 833, 837 (Del. 2014), as corrected (Nov. 4, 2014)).

that that the error was not harmless. This "exacting standard cannot be satisfied if the Court is left with a reasonable fear that an injustice has occurred that might have influenced the outcome of the trial."[219] The cumulative effect of errors changed the landscape of Mr. Sierra's trial to the extent that the verdict is unreliable. As such, reversal of the trial court's denial of postconviction relief is warranted.

[219] *Id.*

CONCLUSION

For the reasons stated herein, Mr. Sierra respectfully requests that this Honorable Court reverse the trial court's decision denying postconviction relief.

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