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## NATURE OF PROCEEDINGS

On February 15, 2022, Yony A. Morales-Garcia (“Morales-Garcia”) was jointly indicted with his brother, Emner Morales-Garcia (“Emner”), for two counts of Murder First Degree, seven counts of Possession of a Firearm During the Commission of a Felony, Robbery First Degree, three counts of Reckless Endangering First Degree, Aggravated Menacing, Carrying a Concealed Deadly Weapon, Wearing a Disguise During the Commission of a Felony, and Conspiracy First Degree. (D.I. 3 at A1; A25-31).<sup>1</sup>

On January 6, 2023, the court severed the trials of Morales-Garcia and his brother Emner. (D.I. 38 at A6; A61, 63).

On December 11, 2023, Morales-Garcia’s case went to a jury trial. (D.I. 61 at A8-9). On the fourth day, the judge declared a mistrial because of a hung jury. (D.I. 61 at A8-9; D.I. 63 A9-10).

On January 8, 2024, the State decided to retry the case. (D.I. 65 at A10; A104). The case went to a second jury trial on May 13, 2024. (D.I. 83 at A12). On the second day, Morales-Garcia moved for a mistrial and to exclude an enhanced video that the State provided to Morales-Garcia after the trial had started. (D.I. 83 at A12). The court denied the motion for a mistrial but granted the motion to

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<sup>1</sup> “D.I. \_\_\_” refers to the Superior Court docket item numbers in *State v. Yony A. Morales Garcia*, ID No. 2201010642.

exclude. (D.I. 86-87 at A12; A421-22). On the third day, Morales-Garcia moved for a judgment of acquittal, which the court denied. (D.I. 83 at A12; D.I. 89 at A12). On May 16, 2024, the jury found Morales-Garcia guilty on all charges. (D.I. 93 at A13; A902-05).

On July 19, 2024, the court sentenced Morales-Garcia to life in prison on each Murder First Degree conviction, plus 97 years of unsuspended Level V time for the remaining charges. (A984-90; Ex. A).

On August 5, 2024, Morales-Garcia filed a timely notice of appeal followed by an opening brief. This is the State's answering brief.

## SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. As an initial matter, there is no plain error here because trial counsel most likely made a strategic decision not to object to the introduction of Emner's prior statements. In addition, there was no prosecutorial misconduct here because the prosecutor did not use Emner's guilty plea for an improper purpose. The issue in the case was the identity of the shooter, not whether a robbery occurred. The prosecutor utilized Emner's guilty plea for reasons other than as substantive evidence of Morales-Garcia's guilt and did not use the guilty plea to bolster or vouch for the veracity of Emner. And, Emner testified at trial as a defense witness. Therefore, his credibility and bias were issues in the trial. Moreover, there was no persistent pattern of prosecutorial misconduct by the prosecutor. Furthermore, there is no plain error from the Superior Court's failure to issue an instruction *sua sponte* because Emner testified about the facts underlying his conviction. The State had a strong case against Morales-Garcia and would have proven its case even without referring to Emner's guilty plea.



## STATEMENT OF FACTS

On January 22, 2022, Aroldo Figuero Perez (“Aroldo”) went with his stepson Andy Velasquez (“Andy”) to the El Nopalito Restaurant in Georgetown where they met Honorio Velasquez (“Honorio”), Seferion “Frank” Garza (“Frank”), Chris Ramirez, Armando Chilel Lopez (“Armando”), and an unnamed man.<sup>2</sup> (A226, 228, 365, 379-80, 452, 454-57, 488, 533-35). Seated at a different nearby table were Jose Ortiz Perez (“Jose”) and three to six other men. (A371, 381, 382, 396, 460-61, 535, 561, 583-84, 641-43). Jose, his brother Feliciano “Ely” Ortiz Perez (“Ely”), and two friends named Juan Perez and “Cholo” had been eating lunch and drinking alcohol, and Jose was drunk.<sup>3</sup> (A383, 436-38, 446, 579, 581, 655-56).

At some point, Jose, Ely, and friends started looking at the other group of men that included Aroldo, Andy, Frank, Armando, and Chris Ramirez. (A333, 488). The men with Jose also started making gestures to the other group, swearing, and threatening the other group. (A345-46, 348-49, 351, 356, 401, 464, 489-92, 562, 643-47, 668).

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<sup>2</sup> Honorio, who was the second murder victim, joined the Aroldo group later in the afternoon. (A373, 466-67, 542-43, 560, 572).

<sup>3</sup> Estela Mejia Velasquez said that the four men ordered only tacos and sodas, but Selvin Morales Ortiz and Frank said that the men were drunk, and Jose admitted that he was drunk. (Compare A383 to A404, 431, 461-63, 437-38, 445, 465).

After about 15 to 20 minutes,<sup>4</sup> Jose went up to the other table and said that he had a problem with Andy and the other men with him. (A370-71, 383-84, 464-65, 537-38, 563-65, 572, 585). Jose then went back to his table to sit with Ely and their two friends, and then Jose became loud. (A371, 385, 644).

In response, the group of men with Aroldo complained to the waitress, Estela Mejia Velasquez (“Estela”). (A333, 346, 396, 566-67). Estela relayed the complaint to her brother Eugenio Velasquez (“Eugenio”), the owner of the restaurant. (A333, 396, 401). Eugenio told Jose Ely, and friends to leave immediately,<sup>5</sup> and they did so. (A371, 385, 397, 465-66, 492, 539, 568, 586-88, 591-92, 647-49, 655). After Jose, Ely, and their friends left, Eugenio locked the door to the restaurant for a few minutes. (A432-33, 493-94, 570-71, 651-52).

After leaving El Nopalito, Ely called Morales-Garcia.<sup>6</sup> (A592, 662). Ely told Morales-Garcia that he, his brother, and their friends had been in an altercation with a group of people, that Ely and his group had been kicked out of the restaurant, that

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<sup>4</sup> According to Andy, Jose approached Andy immediately after he entered the restaurant. (A537, 567).

<sup>5</sup> Eugenio and Estela said that Eugenio told Jose and his friends to stop looking at the other group while they were eating and to finish their meal and then leave; however, Aroldo, Frank, Andy, and Ely disagreed with these facts. (*Compare* A333-34, 396, 401, and 465, *with* A385, 465, 492, 539, 568, 586-87, 591-92, 647-48).

<sup>6</sup> Emner testified that Ely called him that night. (A711-12, 726, 759, 766).

Andy was at the restaurant, and that Ely needed backup. (A592, 595-96, 602-03, 663).

Ely drove Jose and his two friends in Jose's gray Ford 250 Super Duty pickup truck to Liquor Plus and purchased beer. (A285-87; 579; 588-90; 627; 640; 656-57; State's Ex. 14). Subsequently, Ely drove the men to the Shell gas station near El Nopalito and parked. (A592; 628; State's Ex. 41 – Surveillance 1909\_1934 - Truck). Ely then went into the Alpha y Omega store and purchased a beverage. (A598-99; 624; 627; 665; 671-72; State's Ex. 39 - Alfa\_Y\_Omega\_Surveillance\_Timeline\_R).

Shortly thereafter, Morales-Garcia called Ely back and told Ely that he and Emner were at the restaurant. (A597, 629-30). Ely met the brothers at the front of the restaurant. (A597, 600-01, 631, 675, 709, 712-14, 721, 728, 730). Ely got into the driver's seat of the black Kia SUV that Morales-Garcia had been driving. (A625, 632-33, 676-78, 690). Either Morales-Garcia or his brother Emner was pacing outside the restaurant. (A426-28, 603). Morales-Garcia told Ely to move the vehicle to the side of the restaurant. (A603-04). According to Emner, Ely offered to pay Emner to go into El Nopalito and rip Frank's gold necklace from his neck. (A709-10). Emner took a mask from Ely and exited the truck. (A709-10).

Emner and another man (whom the jury determined to be Morales-Garcia) then entered the restaurant while wearing masks and caps.<sup>7</sup> (A397, 404, 427-28, 471, 480, 573-74, 604-06, 691, 710, 715, 729, 731, 733). Morales-Garcia pointed a gun at Estela and told her not to move. (A397, 399, 405). Suddenly, Emner, who was wearing a black jacket with a hoodie or a hat, approached Frank. (A373-74, 545, 734). Emner grabbed Frank's chain from his neck, turned to run, and then stumbled over a chair that was next to Aroldo. (A374, 387, 389, 428, 468-70, 473-77, 495, 543-44, 546-47, 573, 710, 715-16, 730, 735, 760). As Emner fell, his hoodie or hat fell off so that Aroldo could see his face. (A374). Emner had a mark on his eyebrows, like someone had styled them, and Aroldo saw that mark. (A376, 472-73, 695). Emner got up and ran towards the front door. (A374, 387, 474, 546, 710). Morales-Garcia, who was described as having big black hair, was standing by the front door and fired a gun. (A376, 391-92, 399, 428, 476-77, 545). Morales-Garcia aimed his gun at Chilel Lopez first, then shot into the restaurant. (A547-49). Four to five gunshots rang out, and Frank told everyone to get on the floor. (A374-75, 387, 389, 429, 476, 481, 496). All the glass from the front doors fell to the floor.

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<sup>7</sup> Morales-Garcia denied going into the restaurant that night and denied shooting anyone. (A773-74).

(A376-77, 390). Both masked men exited the restaurant.<sup>8</sup> (A391, 482). Armando and Honorio were both shot, and both later died. (A376-78, 390, 550, 552).

After exiting the restaurant, Morales-Garcia and Emner got into the vehicle that Ely was driving. (A607-10, 633-34, 682, 710).<sup>9</sup> Ely could see that Morales-Garcia was holding in his hands an object that was reflective in the light and was small enough to fit inside his hoodie. (A610). Ely also saw that Emner had a gold chain in his hand. (A609, 611). Ely drove Morales-Garcia and Emner to the EMS station in Georgetown and exited the vehicle. (A612-13, 684). Morales-Garcia and Emner then drove away without Ely. (A612-13).

At approximately 7:28 p.m., a call was placed to 911 to report the shooting of two men. (A227-28; State's Ex. 1).

Trooper Frist Class Kenny Haynes was in the area and responded to the dispatch call. (A229-31, 234). As he drove to the restaurant's parking lot, he observed what he called a gray Ford 150 pickup truck pulling out of the nearby Shell gas station parking lot. (A236, 250, 284-85, 306-07). Trooper Haynes arrived at the crime scene after Sergeant Rogers. (A229-30, 232, 253). Trooper Haynes found the first victim (Armando) approximately eight to ten feet inside the restaurant's

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<sup>8</sup> Ely said there was a group of people following Morales-Garcia and his brother Emner when they exited the restaurant. (A607-08).

<sup>9</sup> Morales-Garcia and Emner said that Morales-Garcia was driving the car. (A710, 716, 725, 759-60, 769).

doorway. (A230-31). Trooper Haynes assessed Armando and found that he had a bullet wound just below his belly button, but he was still breathing and had a pulse. (A231). Then Trooper Haynes went to Honorio who was approximately 20 to 25 feet from the doorway. (A230-31). Honorio had a bullet wound on the right side of his stomach and an exit wound on the other side. (A332-33). Honorio was initially breathing when the Trooper assessed him, but then his breathing and his pulse stopped. (A232). Trooper Haynes began compressions for CPR until EMS personnel took over the task. (A233, 242-43).

The next day, Ely met with Morales-Garcia and his brother Emner. (A617, 619, 688). Morales-Garcia and Emner told Ely not to say anything. (A617, 722, 744).

Doctor Gary Collins, Chief Medical Examiner, conducted the autopsies of Honorio and Armando. (A266). Dr. Collins determined that a bullet went through Honorio's diaphragm, aorta, and liver, then exited his body. (A268). The bullet caused a lot of internal bleeding that was rapid and fatal. (A269). Dr. Collins also determined that a bullet went into Armando's lower back and struck a vertebra. (A270). The bullet that struck Armando caused massive internal bleeding in his abdominal cavity which was fatal. (A272). Dr. Collins opined that the manner of death for both Honorio and Armando was homicide. (A273).

Detective Daniel Grassi led the homicide investigation. (A277-78, 300, 501). Detective Grassi and Detective Takisha Williams-Snipes collected video surveillance from Alfa y Omega, Shore Auto Sales, and Liquor Plus. (A284-85, 522-24, 526-28). Other officers found a fired cartridge casing near one of the victims and the doorway of the restaurant, and others retrieved a projectile from the wall of the restaurant and another from the body of Armando. (A244-45, A281-82, 694). Based on his investigation, Detective Grassi arrested Morales-Garcia and his brother Emner. (A287).

When Emner spoke with Detective Grassi, he admitted that he had taken a gold chain from Frank. (A289, 731-32). Emner also said that officers could find the gold chain that he had taken as well as the clothing that he had worn during the robbery-turned-homicide in a bag that was buried in the back of the property of his residence. (A289, 721, 743-44, 746-47). Officers later found the gold chain and clothing that Emner had described. (A289-92).

On February 19, 2022, officers recovered the gun used in the robbery-homicide from Jason Bamaca during a traffic stop. (A294-95, 310). The casings, but not the projectiles, matched those found in the robbery-homicide that had taken place on January 22, 2022, at El Nopalito. (A298-99, 302).

During her opening statement at the second trial, the prosecutor stated the following:

Why are we here? We are here because two people died on the night of January 22, 2022. Those people were Honorio Velasquez and Armando Chilel Lopez. There's no dispute about their identities or how they died. They were killed—they were both killed by gunshot wounds to the torso that were fired El Nopalito Restaurant that night. The State expects that the question for you to decide is who fired those fatal shots. That's why we're here. The State is going to present evidence that two males came into that restaurant that night in masks. You're going to hear evidence that the first man was a man by the name of Emner Morales-Garcia, the defendant's brother. He went up to a man by the name of Serifina, or Frank as he's know [sic] to his friends, Garza, and ripped a chain that he was wearing around his neck. He ripped it off and started to head back out of the restaurant. And he tripped. And when he tripped, the defendant opened fire in the direction toward his brother to protect his brother. Emner has actually admitted to this crime already and has pled guilty to the robbery of that chain. He also told Detective Grassi where to find the chain and some of the items of clothing that he was wearing that night. You'll see those items. He walked up to Frank and ripped the chain, as I said, and as he tripped his brother, the defendant, was nervous that the guys that he just stole from were going to attack him, so he opened fire. You're also going to hear from other witnesses who were there that night. They are going to tell you about the robbery and the shooting. They are not going to be able to tell you who fired the shots because, again, the two men were in masks and couldn't see anything but their eyes.

(A209-11).

In addition, during the redirect of Detective Grassi, the following exchange occurred:

[PROSECUTOR]: And did you have another opportunity to actually speak with Emner after that night?

[DETECTIVE GRASSI]: Yes, on January 30th.

[PROSECUTOR]: Okay. And has Emner resolved his charges in this case?



[DETECTIVE GRASSI]: Yes.

[PROSECUTOR]: Are you aware of what the result of those—of that was?

[DETECTIVE GRASSI]: He pled guilty with the lead charge being robbery first.

....

[PROSECUTOR]: You indicated Mr. Emner Morales Garcia pled to the lead charge of robbery first degree. Are you aware if he pled to any additional charges?

[DETECTIVE GRASSI]: He did plead to another charge. I just don't have it in front of me. I don't know what the additional charge was.

[PROSECUTOR]: And --

[DETECTIVE GRASSI]: I believe—I'm sorry. I believe it was conspiracy, but again, I don't have the sheet in front of me.

[PROSECUTOR]: Okay. Thank you.

(A696, 698).

Emner testified for the Defense at Morales-Garcia's trial. During the State's cross-examination of Emner, the following exchange occurred:

[PROSECUTOR]: You were ultimately arrested on criminal charges, correct?

[EMNER ORTIZ PEREZ]: Yes.

....

[PROSECUTOR]: And you pled guilty to robbery for stealing Mr. [Frank] Garza's necklace, correct?

[EMNER MORALES-GARCIA]: I wasn't going to take a plea. You guys had offered manslaughter, robbery, and conspiracy plea. My lawyer came back and he told me that you guys had offered that and that was your last offer. And I told him: Well, you know, I want to go to trial and at least prove my innocence on the part that those two individuals that were shot I had nothing to do with that.

.....

[PROSECUTOR]: The question was: You pled guilty to robbery, correct?

[EMNER MORALES-GARCIA]: So after you guys came back with--

THE COURT: Sir, you need to answer that question.

[EMNER MORALES-GARCIA]: I mean, she's trying to make me look like I just came and took a plea. I can't--

THE COURT: You need to answer the question. If you want to explain, you can.

[EMNER MORALES-GARCIA]: Sir, you just said I can explain.

THE COURT: But answer the question first.

[EMNER MORALES-GARCIA]: Yes, I took the plea because after my lawyer came back with the plea that you guys had offered—the manslaughter plea—I told him no. I didn't want to take no plea. I wanted to go to trial. And a couple weeks before the trial, he came back and he told me that you guys offered another plea, which was robbery, and he told me that there was no point in going to trial because, at the end of the trial even if I prove my innocence on the murder charge, I was still going to have to do the time for the robbery charge because I confessed into taking the chain. So, yes, I did take the robbery charge for that reason.

[PROSECUTION]: It was that robbery that you pled to that led to a double murder, correct?

[EMNER MORALES-GARCIA]: Yes.

[PROSECUTOR]: You also pled guilty to conspiracy in the second degree, correct?

[EMNER MORALES-GARCIA]: Yes.

(A756-58).

When Morales-Garcia testified, his trial counsel asked him about his brother Emner's plea agreement:

[DEFENSE COUNSEL]: Now your brother pled to robbery in this because he took the guy's chain?

[MORALES-GARCIA]: From my understanding, yes.

(A774).

## ARGUMENT

### I. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT AND THE SUPERIOR COURT DID NOT ERR BY NOT ISSUING A *SUA SPONTE* CAUTIONARY INSTRUCTION TO THE JURY REGARDING THE PURPOSE OF THE EVIDENCE OF EMNER'S GUILTY PLEA.

#### Question Presented

Whether the prosecution committed prosecutorial misconduct by referring to Emner's guilty plea in opening statements (A210) and while questioning one of the State's witnesses (Detective Grassi) (A696, 698); and whether the Superior Court erred by not *sua sponte* issuing a cautionary instruction to the jury regarding the purpose of the evidence of Emner's guilty plea.

#### Standard and Scope of Review

When trial counsel fails to raise a timely and pertinent objection below, this Court will review claims of prosecutorial misconduct only for plain error.<sup>10</sup> The Court first reviews the record *de novo* to determine whether the conduct was improper or prejudicial.<sup>11</sup> If no misconduct occurred, then the analysis ends.<sup>12</sup>

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<sup>10</sup> *Baker v. State*, 906 A.2d 139, 148, 151 (Del. 2006); *Saavedra v. State*, 225 A.3d 364, 372 (Del. 2006); Supr. Ct. R. 8.

<sup>11</sup> *Baker*, 906 A.2d at 150; *Saavedra*, 225 A.3d at 372; *Kurzmann v. State*, 903 A.2d 702, 709 (Del. 2006); *Flonnory v. State*, 893 A.2d 507, 538 (Del. 2006).

<sup>12</sup> *Reyes v. State*, 315 A.3d 475, 487 (Del. 2024); *Baker*, 906 A.2d at 150.

If this Court finds misconduct occurred, it considers whether the error is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process” (the “*Wainwright* standard”).<sup>13</sup> This review is limited to material defects that (1) “are apparent on the face of the record;” (2) “are basic, serious[,] and fundamental in their character;” and (3) “clearly deprive an accused of a substantial right” or “clearly show manifest injustice.”<sup>14</sup> To qualify as plain error, “the alleged error must affect substantial rights, generally meaning that it must have affected the outcome of [the defendant’s] trial.”<sup>15</sup> The defendant bears the burden of persuasion to demonstrate that the a forfeited error is prejudicial.<sup>16</sup>

If reversal is not compelled under the *Wainwright* standard, this Court considers whether reversal is required nonetheless because the misconduct entails a

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<sup>13</sup> *Saavedra*, 225 A.3d at 372 (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986), *cert. denied*, 479 U.S. 869 (1986)).

<sup>14</sup> *Saavedra*, 225 A.3d at 372; *Wainwright*, 504 A.2d at 1100.

<sup>15</sup> *Brown v. State*, 897 A.2d 748, 753 (Del. 2006). See *United States v. Olano*, 507 U.S. 725, 734 (1993) (“[T]he error must have been prejudicial: It must have affected the outcome of the district court proceedings”); *Wainwright*, 504 A.2d at 1100.

<sup>16</sup> *Brown*, 897 A.2d at 753 n.22; *Olano*, 507 U.S. at 734 (federal plain error rule). See also *Stevenson v. State*, 709 A.2d 619, 633 (Del. 1998) (holding that the defendant has the burden of showing that the improper arguments by the prosecutor not only created the possibility of prejudice, but that the errors worked to his actual substantial disadvantage) (citations omitted).

persistent pattern of prosecutorial misconduct over different trials such that failure to reverse would comprise the integrity of the judicial process.<sup>17</sup>

### **Merits of Argument**

For the first time on appeal, Morales-Garcia argues that the State committed prosecutorial misconduct by referencing Emmer's guilty plea in its opening statement and by questioning Detective Grassi about Emmer's guilty plea in its case-in-chief. Opening Br. 38-40. Although Morales-Garcia admits that there could be proper purposes for the admission of Emmer's guilty plea, he contends that none applied here. Opening Br. 40. Morales-Garcia then argues that the State's reference to Emmer's guilty plea was so clearly prejudicial to Morales-Garcia's substantial rights that it jeopardized the integrity of the trial process. Opening Br. 40. Morales-Garcia also asserts that because the State referenced Emmer's guilty plea three times during the trial, this was repetitive enough to "cast doubt on the integrity of the judicial process." Opening Br. 41. Finally, Morales-Garcia maintains that even though he did not request a cautionary instruction to the jury, the Superior Court was required to give a cautionary instruction regarding the limited purpose of the plea evidence. Opening Br. 42-43. He also asserts that the court's failure to give such an instruction deprived him of his right to a fair trial. Opening Br. 44-45.

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<sup>17</sup> *Saavedra*, 225 A.3d at 373; *Hunter v. State*, 815 A.2d 730 (Del. 2002).

Morales-Garcia's claims fail. There was no prosecutorial misconduct here because the State did not use Emner's guilty plea as substantive evidence of Morales-Garcia's guilt. Regardless, Morales-Garcia cannot show plain error under these facts.

**A. Trial Counsel's Strategic Decision Not To Object To Emner's Prior Statements Constituted a Waiver.**

Morales-Garcia has waived this Court's appellate review of whether it was improper for the prosecutor to reference Emner's guilty plea. This Court has "explained that '[t]he plain error standard of appellate review is predicated upon the assumption of oversight.'"<sup>18</sup> It is "reserved for claims that were not brought to the trial court's attention by oversight, not conscious strategic decision of counsel."<sup>19</sup> When defense counsel makes a conscious decision that constitutes a true waiver, plain error appellate review is precluded.<sup>20</sup> Such was the case here.

Detective Grassi testified that after officers took Emner into custody, Emner spoke with the Detective. (A288). Detective Grassi testified that Emner admitted he had taken a gold chain from Frank during a robbery-turned-homicide and had

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<sup>18</sup> *Williams v. State*, 98 A.3d 917, 921 (Del. 2014).

<sup>19</sup> *Bowersox v. State*, 2013 WL 1198083, at \*2 (Del. Mar. 25, 2013).

<sup>20</sup> *Id.*; *Robinson v. State*, 3 A.3d 257, 261 (Del. 2010) ("We have repeatedly held that strategic trial decisions by defense counsel will not be reviewed in a direct appeal for plain error.").

buried the clothes that he had been wearing in a bag in his backyard. (A289). Trial counsel did not object to Emner’s prior statements as hearsay. (A289). Nor did trial counsel object when the Detective further testified that officers recovered the clothing that Emner indicated he had been wearing during the night of the shooting. (A292). At that point, the following exchange occurred:

THE COURT: [Defense attorney], I want to direct this to you. There's been some hearsay that's been elicited about what Emner Morales-Garcia said. I assume that your failure to object is a tactical decision.

[DEFENSE ATTORNEY: I have him listed as a witness. I plan on calling him as a witness.

THE COURT: All right. Very good.

(Whereupon, counsel returned to the trial table and the following proceedings were had:)

THE COURT: All right, Counsel. You may proceed.

Trial counsel chose to call Emner as a defense witness as part of his trial strategy—to try to convince the jury that Morales-Garcia did not have a gun and did not accompany him into the restaurant. (A711, A717-19). Morales-Garcia’s decision to call Emner as a witness meant that the prosecutor would be permitted to cross examine him about his credibility, which included asking him questions about his guilty plea and the agreement between him and the State.<sup>21</sup> Trial counsel made

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<sup>21</sup> *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness’



a deliberate tactical decision not to object when Detective Grassi provided hearsay evidence about what Emner told him because he knew that Emner would be testifying and would admit to those statements. (A293). His trial counsel's failure to object to the mention of Emner's plea in the prosecutor's opening statement and during Detective Grassi's examination was likely part of the same tactic. Because trial counsel knew that Emner's guilty plea agreement would be permissible evidence on cross examination, he evidently chose not to emphasize that plea by lodging an objection that may have been overruled. In any event, such an objection would have called further attention to Emner's guilty plea.<sup>22</sup> Indeed, when he called Emner as a witness, trial counsel elicited testimony from Emner admitting that he committed the robbery of Frank's necklace. (A715). Thus, Morales-Garcia appears to have deliberately chosen to try to present Emner as a credible witness by having him admit to his wrongdoing, but to deny accusations that he considered false.

By not objecting to the prosecutor's mention of Emner's guilty plea in her opening statement and for a few questions in her case-in-chief, trial counsel waived

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character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness.”).

<sup>22</sup> The State did not call Emner as a witness even though it entered into a plea agreement with him, which leads to questions about the veracity of Emner's version of the events.

appellate review of the issue of the prosecutor's conduct and whether plain error exists.

**B. The Prosecutor's References (Either Made or Elicited) to Emner's Guilty Plea Did Not Constitute Misconduct.**

No prosecutorial misconduct occurred in this case. The prosecutor argued in her opening statement that a witness who would be testifying (Emner) had already pled guilty to robbery, and she elicited the same information about Emner's guilty plea from Detective Grassi. (A210, A696, 698; *see also* A293). The record does not indicate that the prosecutor introduced this information for an improper purpose.

Generally speaking, "a co-defendant's plea agreement may not be used as substantive evidence of a defendant's guilt, to bolster the testimony of a co-defendant, or to directly or indirectly vouch for the veracity of another co-defendant who pled guilty and then testified against his or her fellow accused."<sup>23</sup> In this case,

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<sup>23</sup> *Allen v. State*, 878 A.2d 447, 450 (Del. 2005) (citing *State v. Swims*, 212 W.Va. 263, 569 S.E.2d 784, 793 (2002) (collecting cases and other secondary authority showing the limitations on the prosecution's ability to introduce a co-defendant's plea agreement), and *Potts v. State*, 458 A.2d 1165, 1169 (Del. 1983) (finding that the exclusion of the co-defendants' guilty pleas was not considered a denial of due process where the co-defendants did not confess to exclusive possession of the drugs and finding that the trial court properly exercised its discretion in refusing to admit into evidence the co-defendants' guilty pleas as such could be misconstrued by the jury absent a complete examination into the plea bargaining and the charges)); *see also United States v. Rodriguez*, 205 F. Supp. 2d 411, 414 (E.D. Pa. 2002); *United States v. Jones*, 468 F.3d 704 (10th Cir. 2006) ("In any trial with multiple defendants, it is imperative that a co-defendant's guilty plea not be used as substantive evidence of a defendant's guilt."); *United States v. Radomski*, 473 F.3d 728, 730 (7th Cir. 2007) (finding that a coconspirator's guilty plea is not and cannot be evidence in

the State did not intend to call, and did not call, Emner as a witness for its case. (B1). Rather, the Defense introduced his testimony, and all parties were aware that it would.<sup>24</sup> Thus, there is no basis to conclude that the State, either in its opening statement or its direct examination of the detective, was using Emner's guilty plea to bolster or directly or indirectly vouch for his testimony.

The State also was not using Emner's guilty plea as substantive evidence of Morales-Garcia's guilt. A prosecutor may use a codefendant's guilty plea to show the witness's firsthand knowledge based on acknowledgment of participation by the codefendant,<sup>25</sup> to impeach the credibility of the codefendant,<sup>26</sup> and to aid the jury in

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another conspirator's case "because to allow a coconspirator's guilty plea in evidence might make the jury think the trial a formality, since if one coconspirator is guilty, so must the others be.").

<sup>24</sup> The court pointed out that the prosecutor had elicited from Detective Grassi some hearsay about what Emner had said and stated, "I assume that your failure to object is a tactical decision." In response, trial counsel stated that Emner was on his witness list and that he intended to call Emner as a witness. (A293).

<sup>25</sup> *People v. Davis*, 296 P.3d 219, 233 (Colo. App. 2012), *cert. denied*, 2013 WL 142467 (Colo. 2013); *People v. Montalvo-Lopez*, 215 P.3d 1139 (Colo. App. 2008) (finding if accomplice testifies, evidence of accomplice's guilty plea may be admissible for other purposes, such as to show acknowledgment by the accomplice of participation in the offense); *United States v. Jones*, 24 Fed. Appx. 968 (10th Cir. 2001) (finding that government may use a codefendant's guilty plea to establish the witness' claim to firsthand knowledge based on his or her admitted participation); *People v. Brunner*, 797 P.2d 788, 789 (Colo. App. 1990) (citing *United States v. Davis*, 838 F.2d 909 (7th Cir. 1988)).

<sup>26</sup> *Davis*, 296 P.3d at 233; *Brunner*, 797 P.2d at 789.

its assessment of the codefendant or coconspirator's credibility.<sup>27</sup> Referring to Emner's guilty plea in the opening statement and direct examination, knowing that the Defense would call him as a witness, was permissible because Emner's credibility and bias would be issues in the trial.<sup>28</sup> Indeed, the Defense recognized the same and likewise addressed the import of Emner's guilty plea when Morales-Garcia took the stand:<sup>29</sup>

[DEFENSE COUNSEL]: Now your brother pled to robbery in this because he took the guy's chain?

[MORALES-GARCIA]: From my understanding, yes.

(A774). In sum, both parties knew that Emner would testify and understood the importance of his credibility. The prosecutor did not commit prosecutorial misconduct by anticipating as much.

### **C. Even If Misconduct Occurred, There is No Plain Error.**

Morales-Garcia concedes that he failed to raise his prosecutorial misconduct claim below. Opening Br. 7. As noted above, if that failure was intentional, any

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<sup>27</sup> *United States v. Nickl*, 427 F.3d 1286 (10th Cir. 2005).

<sup>28</sup> *But see United States v. Halbert*, 640 F.2d 1000, 1005 (9th Cir.1981) (“The fact a witness has formally admitted personal responsibility enhances the circumstances adding up to that witness’ believability.”).

<sup>29</sup> *See, e.g., U.S. v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998) (finding that defendant opened the door to prosecutor’s comment on co-defendant’s guilty plea by referring to plea in opening remarks and on direct examination of co-defendant).

objection to introduction of Emner's guilty plea was waived. If the failure was instead an oversight, the objection was waived on appeal unless Morales-Garcia can show plain error. "Plain error is error so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the proceedings."<sup>30</sup> There is none here. The State had overwhelming evidence of Morales-Garcia's guilt and would have proven it even without referring to Emner's guilty plea.

The State had to show at trial that the homicides occurred during the course of a felony, which was Emner's robbery of Frank's gold necklace. But that robbery, and the sequence of events that led to the homicides, were not disputed by anyone. Morales-Garcia admitted that Emner pled guilty because he took Frank's gold chain. (A778). Emner confessed to stealing the gold necklace both when he was interviewed by officers (A289, 731-32) and when he testified at trial (A715). Emner even told the police officers where he had stashed the stolen chain. (A289; A 721; A746-47). And, none of the witnesses who testified about what led to the homicides contradicted the evidence of the robbery. (A374, 387, 389, 428-29, 468-70, 473-77, 495, 543-47, 573).

Morales-Garcia's defense in this case was *not* that a robbery had not occurred or that the homicides that had occurred were not committed during the robbery;

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<sup>30</sup> *Wilson v. State*, 2019 WL 318447, at \*2 (Del. Jan. 22, 2019); *Roy v. State*, 62 A.3d 1183, 1191 (Del. 2012).

rather, it was that someone else<sup>31</sup> had fired the shots that killed Armando and Honorio. (A216-220; Opening Br. 28; 33). The evidence against Morales-Garcia was the same with or without the evidence of Emner's guilty plea, and Emner's guilty plea to the robbery did not impact Morales-Garcia's defense that he was not the second person involved in the robbery and shooting. Mentioning that Emner had pled guilty to the robbery (to which he admitted in any event) did not in any way alleviate the State's burden to convince the jury that Morales-Garcia was the shooter.

In addition, the State did not present any evidence that Emner's guilty plea to Conspiracy Second Degree in any way related to Morales-Garcia. The State did not enter Emner's plea-agreement documents into evidence, and Detective Grassi stated in his testimony only that Emner had pled guilty to Conspiracy Second Degree—not that Emner pled guilty to conspiring with Morales-Garcia. (A698). The jury had no indication that Emner said in his plea agreement that his co-conspirator was Morales-Garcia. In fact, the only suggestion in the record about who was Emner's co-conspirator came from Emner himself, and he identified Ely. (A758). Thus, the State's reference to Emner's guilty plea for conspiracy in Detective Grassi's testimony did not prejudicially affect the issue of the identification of the shooter.

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<sup>31</sup> Morales-Garcia suggested that Ely had committed the murders. (A721-22, 758).

Moreover, ample evidence demonstrated that Morales-Garcia was the person who fired the fatal shots. Both Morales-Garcia and Emner admitted on direct examination that they he went to the restaurant based on a phone call from Ely. (A709, 711-12, 728, 766-67). Morales-Garcia admitted that, following the phone call, he drove Emner to meet Ely. (A771-72). Emner also admitted that he entered El Nopalito and snatched Frank's necklace, then fell on a chair when he tried to run away. (A710, 715, 733, 735, 739). Several other witnesses confirmed this account; none contradicted it. (A374, 387, 389, 391-92, 399, 428, 468, 473-77, 495, 543-44, 546-47, 573). At that point, Emner said that he heard gunshots in the restaurant. (A710, 716, 736). Emner got up and ran from the restaurant. (A710). After exiting the restaurant, Emner got into Morales-Garcia's SUV with his brother (Morales-Garcia) and Ely. (A710, 716-18, 741). Morales-Garcia and Emner admitted that the three men drove away from the restaurant together. (A710, 716-17, 769-70, 741). Emner later told Ely not to mention his involvement with the incident at the restaurant. (A720, 722).

Ely testified that he was not the shooter and that he remained in the Kia SUV parked near the restaurant while Emner and Morales-Garcia went into the restaurant. (A603). Video surveillance evidence supports Ely's version of what happened that day. Ely testified that he entered the driver's side of Morales-Garcia's car and waited while Morales-Garcia and Emner entered El Nopalito. (A603-06). Ely also testified

that Morales-Garcia and Emmer exited the restaurant, got into Morales-Garcia's black Kia SUV where Ely was waiting, and Ely drove away from the restaurant with the Morales-Garcia brothers. (A604-05, 607-12). Before Morales-Garcia entered the SUV, Ely saw a reflective object in his hand—something small enough to conceal that could have been a gun. (A610).

The video surveillance shows that Ely entered Morales-Garcia's SUV and did not exit the car while Emner and another man went into the restaurant. (State's Ex. 41 - Surveillance 1909\_1934 - Truck). The video surveillance also shows that Emner and another man exited the restaurant together, got into the waiting SUV, and then drove off together. (State's Ex. 41 - Surveillance 1909\_1934 - Truck).

Based on the factual issue in this case (whether Morales-Garcia was the shooter, *not* whether a robbery occurred) and the substantial evidence of Morales-Garcia's guilt, there is no plain error here.<sup>32</sup>

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<sup>32</sup> See, e.g., *Commonwealth v. Thomas*, 443 Pa. 234, 279 A.2d 20 (1971) (finding that any possible error committed by trial court in admitting evidence of co-conspirator's conviction was not prejudicial in light of overwhelming evidence of defendant's guilt); *Woods v. Diguglielmo*, 514 Fed. App'x 225, 227–28 (3d Cir. 2013) (finding that alleged misconduct of prosecutor using co-defendant's guilty plea only to impeach the co-defendant's credibility did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process” despite a missing jury instruction that would have told the jury not to use the co-defendant's guilty plea as substantive evidence of the defendant).



**D. Reversal is Not Warranted Under *Hunter*.**

*Hunter* does not apply to allegations of repetitive errors within a single trial.<sup>33</sup>

In *Hunter*, this Court “identified a persistent pattern of misconduct because the prosecutor’s improper comments covered several of the specific categories of comment that have been prohibited *in past decisions*.”<sup>34</sup> The rule in *Hunter* targets the repetition of the same errors over multiple trials because it “reflects a disregard of [this Court’s] prior admonitions and thus impugns the integrity of the judicial process.”<sup>35</sup>

Morales-Garcia’s argument under *Hunter* is limited to allegations contained within his own trial. He does not cite any prior admonishment of the same misconduct he charges to the State. “Because [Morales-Garcia] has not described this type of pattern or repetition, his argument under *Hunter* fails.”<sup>36</sup>

**E. There Is No Plain Error from the Superior Court’s Failure to *Sua Sponte* Issue a Cautionary Jury Instruction Regarding the Purpose of the Evidence of Emner’s Guilty Plea.**

In this case, the Superior Court’s failure not to *sua sponte* give a limiting instruction regarding the purpose for which the jury could consider Emner’s guilty

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<sup>33</sup> *Saavedra v. State*, 225 A.3d 364, 382–83 (Del. 2020).

<sup>34</sup> *Id.* (cleaned up) (emphasis in original).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

plea was not plain error. “A guilty plea entered by a codefendant can be especially prejudicial if the plea is made in connection with a conspiracy to which the remaining defendants are charged.”<sup>37</sup> Nevertheless, when the pleading co-defendant testifies regarding the specific facts underlying the crimes at issue, the potential for this type of prejudice is negated.<sup>38</sup> It is reasonable to assume that “the jury uses the testimony regarding the facts to convict the codefendants and the testimony regarding the guilty plea to assess the witness’ credibility.”<sup>39</sup> Thus, when trial counsel fails to request a cautionary instruction, the court’s failure to give the instruction *sua sponte* is not plain error.<sup>40</sup>

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<sup>37</sup> *United States v. DeLucca*, 630 F.2d 294, 298 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981).

<sup>38</sup> *Cf. State v. Brown*, 67 N.C. App. 223, 313 S.E.2d 183 (1984) (finding that admission of alleged co-conspirator’s testimony that he had been convicted of crime committed as part of conspiracy was error, but no prejudice resulted because co-conspirator testified about his participation in the crime and jury was therefore fully apprised of his guilt).

<sup>39</sup> *United States v. Christian*, 786 F.2d 203, 214 (6th Cir. 1986).

<sup>40</sup> *Id.*; *Johnson v. State*, 477 So. 2d 196 (Miss. 1985) (finding in murder prosecution that because defendant had not objected at the time or made a pre-trial request that a guilty plea not be mentioned during trial, the defendant could not complain about the state using in its case-in-chief the fact that the witness who was accomplice had pled guilty and had been sentenced to 25 years); *United States v. Ojukwa*, 712 F.2d 1192, 1194 (7th Cir. 1983); *United States v. DeLucca*, 630 F.2d 294, 299 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981).

*Allen v. State*<sup>41</sup> is distinguishable here and does not require reversal. In *Allen*, the prosecutor moved into evidence the plea agreement of a non-testifying co-defendant just after another co-defendant had testified. In that case, this Court held that the guilty plea of a non-testifying co-defendant could not be used as substantive evidence of the defendant's guilt, to bolster the testimony of a co-defendant, or to directly or indirectly vouch for the veracity of another co-defendant who pled guilty and then testified against his or her fellow accused.<sup>42</sup> This Court explained that if the prosecution directly examines the co-defendant, the prosecutor may elicit testimony about that co-defendant's plea agreement and may introduce the agreement into evidence.<sup>43</sup>

Here, the co-defendant testified for the defense, and he testified to the facts underlying his convictions. The State did not use the guilty plea as evidence of Morales-Garcia's guilt, nor did the State use Emner's guilty plea to bolster or vouch for another co-defendant's testimony. In fact, the State did not offer Emner's testimony at all. Given that Emner testified for the Defense about the same facts for which he pled guilty, there was no plain error when the Superior Court did not

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<sup>41</sup> 878 A.2d 447 (Del. 2005).

<sup>42</sup> *Id.* at 450.

<sup>43</sup> *Id.* at 450-51.

provide a jury instruction on the purpose of why the State alluded to Emner's guilty plea.<sup>44</sup>

The holding in *Charbonneau v. State*<sup>45</sup> also does not control the result for this case. In *Charbonneau*, this Court held that it was error for the trial court to refuse to admit into evidence a non-testifying co-defendant's plea and proffer.<sup>46</sup> There, the court endorsed one co-defendant's proffered version of the criminal events over a different co-defendant's version of the events and removed the credibility determination from the jury, thus denying the defendant a fair trial.<sup>47</sup> In contrast, Emner's robbery was not in dispute, and Morales-Garcia did not object to the admission of the evidence about Emner's guilty plea to robbery and co-conspiracy. And, Emner was a testifying witness for the defense and was therefore subject to the State's cross examination. Moreover, the State used Emner's guilty plea to call into

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<sup>44</sup> See *United States v. Halbert*, 640 F.2d 1000, 1005 (9th Cir.1981) ("As a result of plea bargaining, it is often the prosecution which produces a codefendant and elicits testimony tending to show the substantive guilt of the defendant. This is, of course, admissible. . . . The prosecutor may also wish to place the plea before the jury so as to blunt defense efforts at impeachment and dispel the suggestion that the government or its witness has something to hide. Or, and we engage in no delusions about prosecutorial altruism, the prosecution may simply want the jury to recognize who the witness is, take the testimony as it is, and give a fair evaluation, blemishes and all.").

<sup>45</sup> 904 A.2d 295 (Del. 2006).

<sup>46</sup> *Id.* at 304-05.

<sup>47</sup> *Id.* at 305.

question his credibility and not to establish contested facts or to otherwise provide substantive evidence of Morales-Garcia's guilt. Hence, *Charbonneau* does not apply here.<sup>48</sup>

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<sup>48</sup> The State notes that *Charbonneau* stated the proffer should have been admitted for impeachment purposes "with a limiting instruction." *Id.* at 320 n.68.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: March 31, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

YONI MORALES-GARCIA,	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 311,2024
	§	
v.	§	On appeal from the Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains **7,368** words, which were counted by Microsoft Word.

Date: March 31, 2025

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