EFiled: Sep 03 2024 01:09PM EDT
Filing ID 74214184
Case Number 12,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DESHAN FREEMAN,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 12, 2024
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On August 24, 2020, Dashan Freeman, ("Freeman"), was indicted on two counts of Murder First, one count each of Burglary First and Assault First, and multiple weapons charges.[1] He filed several pre-trial motions, including: a motion to suppress and/or exclude his Department of Correction Communications due to a Fourth Amendment violation and a discovery violation; and a motion to dismiss for prosecutorial misconduct due to an egregious discovery violation. The judge denied both motions.[2] The State's case against Freeman rested entirely on the credibility of the surviving victim-Deona Bethea. The discovery at issue was used to attack the credibility of her testimony which retracted her initial allegation that Freeman was the shooter.

During trial, the State elicited testimony from Bethea that the prosecutor knew to be false. Then, in closing, he relied on that testimony to support the State's theory that Freeman pressured Bethea into swearing an affidavit and testifying that she was mistaken when she first identified Freeman as the shooter. Freeman was convicted of all counts. The judge denied Freeman's subsequent Motion for New Trial filed due to the prosecutor's reliance on false testimony.[3]

The judge later sentenced Freeman to life plus 19 years in prison followed by probation.[4] This is Freeman's Opening Brief in support of a timely-filed appeal.

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[1] A20.
[2] See *State v. Freeman*, 2023 WL 2854771 (April 10, 2023), Ex. A; *State v. Freeman* 2023 WL 2879321 (April 10, 2023), Ex. B.
[3] *See State v. Freeman*, 2023 WL 6299437 (Sept. 27, 2023), Ex.C.
[4] December 15, 2023 Sentence Order, Ex. D.

SUMMARY OF THE ARGUMENT

1.The State's decision not to provide the defense, until trial, prison phone calls and text messages between Freeman and Bethea in 2022 amounted to willful discovery violations prejudicing Freeman's right to due process. The State had the text messages in its possession for 14 months and it had the phone calls in its possession without disclosing their existence when it denied Freeman's reasonable request for a one-week extension to consider his plea offer in this 3-year-old case. Accordingly, the State committed prosecutorial misconduct and required the case to be dismissed. Alternatively, the discovery violations required the discovery to be excluded.

2. The State violated Freeman's Fourth Amendment right to be free from unreasonable searches and seizures when it obtained his prison communications through the use of an unreasonable subpoena which did not further an important governmental interest. The State's hope that there may be some evidence of witness tampering based solely upon receiving a sworn affidavit by a witness recanting an earlier statement does not rise to the level of reasonableness.

3. The State conceded below that it elicited false testimony from Bethea and that it knew the testimony was false. This is misconduct which violates due process. The prosecutor's failure to correct and subsequent reliance on false testimony was "so clearly prejudicial" to Freeman's substantial rights that it "jeopardized the fairness and integrity" of his trial. Thus, the State's misconduct constitutes plain and reversible error.

STATEMENT OF FACTS

On May 31, 2020, Deona Bethea, ("Bethea"), ended her 3-year intimate relationship with Dashan Freeman, ("Freeman"). In doing so, she blocked his calls and texts on her iPhone.[5] She then began a new relationship with another man, Vincent Flowers, ("Flowers").[6]

The Invitation.

About three weeks later, Bethea, who was still involved with Flowers, decided she wanted to contact Freeman on his birthday. So, on June 24, 2020, she unblocked him on her phone and, at about 11:53 a.m., she texted him, "Happy Birthday."[7] Naturally, Freeman responded as he was excited to hear from her.[8] Bethea told him she had gifts for him. He inquired how he would get them as she did not want to see him. Close to 8:00 p.m., she told him to let her know when he wanted to pick up the presents. She said that she was at home and not doing anything.[9] At Freeman's request, Bethea resent him a photo of herself. He then expressed regret for "let[ting] somebody else touch [his] baby[.]" Bethea told him to "chill out."[10] She then stopped texting with him.

Throughout that same day, Bethea was also communicating with Flowers. According to her, Flowers "really wanted to come over" to her house. She told Detective

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[5] A293.
[6] A295-296.
[7] A296-298.
[8] A297, A321; State's Trial Exhibit 92.
[9] A298.
[10] A299.

Kane in a hospital interview that she initially refused Flowers' visit because she did not want both men at the house at the same time.[11] But, she eventually relented and around 11:00 p.m., she allowed Flowers to come over. She claimed that she no longer expected Freeman to stop by the house.[12] Yet, after Flowers arrived, Bethea made him move his car that he parked in front of her house.[13]

Meanwhile, Freeman had received no texts or other communication from Bethea since around 8:00 p.m. So, at 12:24 a.m. on June 25, 2020, he sent her a final text stating, "[y]ou blocked me."[14] At about the same time, he also made unanswered calls to her. At trial, Bethea testified that she puts her phone away when she has company.[15]

The Shooting.

As the night went on, Bethea and Flowers went up to her bedroom.[16] The gifts and balloon she had invited Freeman to pick up sat on the nightstand next to the bed where Bethea and Flowers then had sex.[17] Bethea later told police that it was after 1:00 a.m. when someone came into her house and shot the couple.[18] At this point she called

[11]Court Ex. #1, Bethea's Redacted June 25, 2020 Statement.
[12]A301-302, 323.
[13] A301-302.
[14] A300.
[15] A303.
[16] A265-266.
[17] A235.
[18] A229, 282.

911[19] and reported that she had been shot by her boyfriend, Dashan Freeman.[20] When asked, she said that she did not know what the shooter was wearing.[21]

Police Response and Investigation.

When police arrived, they had difficulty entering the front door as Flowers' body was blocking it on the inside. He was on his knees, naked, bleeding, and drifting in and out of consciousness.[22] Police and other emergency responders rendered medical assistance at the scene. Flowers was then taken to the hospital and, unfortunately, he was later pronounced dead. According to the medical examiner, he died from multiple gunshot wounds.[23]

Meanwhile, police found Bethea upstairs laying on her back on the right side of the bed in her room. She was not wearing any clothes from the waist down. As it was later discovered, she was shot in the left side of her chest and her right thumb.[24]

Bethea told police at the scene that she and Flowers were shot by her "boyfriend, Dashan Freeman." She explained, "[t]oday is his birthday."[25] She claimed he walked in and started shooting.[26] Bethea purportedly told police, "I'm not even going to lie, I got caught fucking. I got caught mid-fuck by my boyfriend. He caught me in the act."[27]

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[19] *Id.*
[20] A25-26.
[21] A27.
[22] A230-233, 244, 251-252, 254-262.
[23] A267.
[24] A245, 258-262, 283-284.
[25] A253, 260, 263-264.
[26] A260-261.
[27] A246-247, 263-264.

Later, at the hospital, Bethea told Detective Kane that Flowers was near a fan in the back of the room[28] while she was headed from her bedroom to the bathroom at the time of the shooting. She was at the bedroom door, when she was able to see a white t-shirt in the hallway.[29] The light was not on in the bathroom or bedroom so it was dark.[30] She ran back in the bedroom. She believes that is when the individual in the hall shot her. She screamed, "I'm hit" and Flowers turned around.

According to Bethea's statement to Kane, Flowers began pleading with the shooter "not to do it" and telling him he was "sorry." Flowers then walked toward the shooter as if to grab him. Flowers was shot twice, fell, and got back up. Meanwhile, Bethea was laying on the bed. She did not see what happened next because her vision was blurry. However, she did hear Flowers head down the stairs. She told Kane that she "believed" Freeman was the shooter. However, she noted that "it was dark."[31] Kane testified that Bethea identified an individual in a photo line up as being Freeman.

During the investigation, no physical or forensic evidence was found linking Freeman to the scene, much less the actual shooting. Police found two 9 mm casings in the hallway, one inside the bedroom doorway and another inside the bedroom.[32] Police also found one projectile on the bed and one in front of the dresser.[33] Finally, one

[28] A318, 320; Court Ex. #1, Bethea's Redacted June 25, 2020 Statement.
[29] Court Ex. #1, Bethea's Redacted June 25, 2020 Statement.
[30] *Id*; A318-320.
[31] Court Ex. #1, Bethea's Redacted June 25, 2020 Statement.
[32] A236-237.
[33] A237-238.

projectile was recovered from Flowers' body during the autopsy.[34] However, no DNA or fingerprints were recovered from those items or any other location. Nor did police recover a gun.[35]

Bethea's Communications With Freeman Before His Arrest.

Despite efforts to find him, police were unable to locate Freeman for the next 3 months. He was arrested on September 23, 2020. Police unlawfully took his phone that contained, among other things, 56 texts providing evidence "of Bethea and Freeman messaging in August and early September, 2020[.]"[36] Thus, the State was aware "that after the shooting, before Freeman was arrested, Bethea and Freeman had been texting one another[.]"[37] The texts were suppressed from introduction at trial.

Bethea's 2022 Sworn Statement That Freeman Was Not The Shooter.

Close to a year and a half later, in February 2022, Bethea provided the Department of Justice, ("DOJ"), with a notarized affidavit swearing that she made a mistake in identifying Freeman as the shooter. She explained that she "did not get a good opportunity to see the suspect's face due to the suspect wearing a mask."[38] She asserted that it was dark, she was scared, she was focused on the gun and the

[34] A239-241.
[35] A234, 242-243, 248-50, 266.
[36] A191-193.
[37] A58.
[38] A71, 305.

interaction only lasted a few moments. She also stated that she had been under police pressure when she initially spoke with them.[39] She no longer wanted to be part of the prosecution of an innocent man.

Bethea's Voluntarily Maintained A Relationship With Freeman While He Was Incarcerated.

Because the State was not happy with Bethea's affidavit, it issued a subpoena to the Department of Correction, (DOC), on February 22, 2022 "for telephone, visiting room and iPad records for Dashan Freeman from January 1, 2022 to February 22, 2022."[40] It became clear that Bethea voluntarily maintained a relationship with Freeman through various means while he was incarcerated.[41] In fact, Bethea chose to use an alias, when communicating with Freeman so as not to be discovered.[42] While the relationship appeared rocky, there was no evidence that neither Freeman nor anyone else pressured her to submit the affidavit.[43]

Bethea's Consistent 2023 Statement That She Could Not Identify Freeman As The Shooter.

Over a year later, and less than a month before trial, Bethea met with DOJ. She told the prosecutors that she would not attend trial as she stood by her affidavit.[44] So, despite this consistent statement, the State again issued subpoenas to DOC to capture

[39] A71.
[40] A73.
[41] A89.
[42] A306.
[43] A268-276, 305-308; State's Trial Exhibit 85.
[44] A279, 324.

other communications between her and Freeman.[45] This time the State asked not only for information on more recent calls, messages and visits, it also requested information from the time prior to the affidavit to track calls between Bethea and other inmates PIN numbers.

In response to these subpoenas, the State discovered two phone calls made in January 2022 by Freeman from another inmate's personal identification number to Bethea just prior to the affidavit.[46] The State believed these two calls made oblique reference to the affidavit. In one call, made January 4, 2022,[47] Freeman discussed a "war that has to be won." Bethea explained at trial that he was referring to their love."[48] In the other call, made January 18, 2022, Freeman mentioned a "blueprint."[49] Bethea acknowledged that he could have been referring to the affidavit. But, she explained that the affidavit was her idea. She told Freeman about it and he gave her the blueprint for how to get it completed. Thus, she testified, it was a purely voluntary endeavor.[50]

Bethea's Arrest To Compel Her Testimony.

Even though the 2023 subpoenas yielded nothing regarding pressure on Bethea by Freeman or anyone else leading up to trial, the State decided to lock her up. Bethea was arrested in Pennsylvania and then incarcerated in Delaware for 17 days before

[45] A75-81.
[46] A83.
[47] A277; State Trial Exhibit 91.
[48] A308.
[49] A309.
[50] A305, 309-310, 325-326, 332; State Trial Exhibit 90.

she was released with a GPS monitor.[51] A condition of her release was that she meet with prosecutor's immediately.[52] Ultimately, the State told her that it would not prosecute her for filing what it claimed to be a false affidavit if she testified at trial.[53] Bethea accepted the deal and testified. However, she testified consistent with her February 2022 affidavit and her March 2023 statement to prosecutors.[54]

Bethea's Testimony That She Could Not Identify Freeman As The Shooter.

At trial, Bethea acknowledged that when she called 911, she felt like Freeman may have been the shooter.[55] But, she explained, she "actually didn't even see anyone. It was really dark. I just assumed that it was [Freeman] because we weren't talking. I don't have enemies."[56] This was consistent with her 2022 affidavit and her statement to prosecutors a month before trial. In fact, at the hospital on the day of the shooting, she had told Kane that she "believed" Freeman was the shooter but noted that it was dark.

Bethea also explained to the jury that the 911 operator never asked her if the shooter was wearing a mask.[57] She also noted that she was unaware of whether or to what extent Flowers had any enemies. Further, she did not recall talking to the

[51] A280-282, 324.
[52] A324.
[53] A278, 325; Defense Trial Exhibit 1.
[54] A317, 326.
[55] A322.
[56] A306, 317, 328-329, 333.
[57] A311.

officers who were on scene.[58] Nor did she remember talking to Kane at the hospital or even looking at a photo lineup.[59] However, she did not dispute that the initials purportedly identifying Freeman on the photo belonged to her.[60] Bethea explained that she came to the realization that Freeman was not the shooter when she got "a clear conscience" about a month later when she "start[ed] to get back to [her]self." [61]

Finally, upon questioning by the prosecutor, she falsely told the jury, that she had no contact with Freeman between June 24, 2020 and the day he was arrested, September 23, 2020. While the prosecutor knew this to be false, he failed to correct her testimony and, instead relied upon it during his closing argument.

[58] A283, 330-331.
[59] A284-286, 289-290, 313-317.
[60] A312.
[61] A306.

I. THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT WHEN IT WILLFULLY VIOLATED THE RULES OF DISCOVERY IN A MANNER THAT VIOLATED FREEMAN'S SUBSTANTIAL RIGHT TO DUE PROCESS.

Question Presented

Whether the State's decision not to provide the defense, until trial, prison phone calls and text messages between Freeman and Bethea in 2022 when the record reveals the State had the text messages in its possession for 14 months and the State had the phone calls in its possession without disclosing their existence when it denied Freeman's reasonable request for a one-week extension to consider his plea offer in this 3-year-old case amounted to willful discovery violations prejudicing Freeman's right to due process.[62]

Standard and Scope of Review

This Court reviews "a trial judge's interpretation of the Superior Court Rules of Criminal Procedure relating to discovery *de novo*[.]"[63] It "review[s] the trial judge's application of those Rules under an abuse of discretion standard."[64] The Court also "engage[s] in a *de novo* review to determine whether the prosecutor's actions rise to the level of misconduct." If they do, the Court proceeds to a "a harmless error analysis."[65]

[62] A44, 125.
[63] *Patterson v. State*, 276 A.3d 1055, 1059 (Del. 2022).
[64] *Id.*
[65] *Saavedra v. State*, 225 A.3d 364, 372 (Del. 2020).

Argument

Defense counsel made a Rule 16 discovery request in this 3-year-old case on October 21, 2020.[66] On February 2, 2022, Bethea provided the DOJ with a notarized affidavit swearing that she made a mistake in identifying Freeman as the shooter and that she no longer wanted to be part of prosecuting him.[67] In "hope[s] that it might obtain potential evidence" of witness tampering,[68] the State issued a subpoena to the DOC on February 22, 2022 requesting "telephone, visiting room and iPad records for Dashan Freeman from January 1, 2022 to February 22, 2022."[69] As a result, the State obtained in February 2022 tablet messages that revealed that Bethea had been voluntarily maintaining a relationship with Freeman while he was incarcerated.[70] However, it was clear that the relationship was rocky at best. While the State received these communications between Freeman and the surviving victim in early 2022, it did not provide them to the defense at that time.

Well over a year later, and less than a month before trial, Bethea met with prosecutors on March 13, 2023. She told prosecutors that she stood by her affidavit and that she would not attend trial.[71] This prompted the State to issue 5 additional subpoenas to DOC to capture other communications between her and Freeman.

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[66] A179.
[67] A71, 305.
[68] *State v. Johnson*, 2011 WL 4908637, at *7 (Del. Super. Ct. Oct. 5, 2011).
[69] A73.
[70] A89.
[71] A279, 324.

Three of these subpoenas requested information on more recent calls, messages and visits.[72] However, two of the subpoenas requested all information for calls to Bethea's number from any inmate in January 2022, before the affidavit was submitted.[73]

On March 17, 2023, the State provided defense counsel volumes of discovery. This included DOC communications that took place in 2023, Bethea's cell phone contents, and medical records.[74] This, coincidentally, was the same day the State extended a plea offer to Freeman for the first time in this 3-year-old case.[75] The offer expired on March 27, 2023.

During that 10-days in which the plea offer was extended, the State received information from DOC regarding two phone calls made in January 2022 by Freeman from another inmate's personal identification number to Bethea.[76] The State believed these two calls made oblique reference to the affidavit. In one call, made January 4, 2022,[77] Freeman discussed a "war that has to be won."[78] Bethea explained at trial that he was referring to their love."[79] In the other call, made January 18, 2022, Freeman mentioned a "blueprint."[80] Bethea acknowledged at trial that he could have

[72] A75, 77, 80.
[73] A78-79.
[74] A179.
[75] A34.
[76] A160.
[77] A268; State Trial Exhibit 91.
[78] A83.
[79] A308.
[80] A83, 309; State Trial Exhibit 90.

been referring to the affidavit. But, she explained that the affidavit was her idea. She told Freeman about it and he gave her the blueprint for how to get it completed. Thus, she testified, it was a purely voluntary endeavor.[81]

The State chose not to mention these calls to the defense while the plea offer was open. Nor had the State provided defense with the prison messages it had in its possession since February 2022.

A final case review was held on March 27, 2023 where defense counsel explained to the judge that he had requested of the State, "after consultation with [the] client[,]" for "one additional week [to consider the plea offer] so that this could be put on for next Monday without disturbing the jury selection or the trial date."[82] The reason for the request was that the client had "not had an opportunity to discuss this important decision with family and other important people close to him."[83] However, the "State indicated that they would be unwilling to extend the plea offer, to keep it open, and that the decision would be to either accept the plea today or that the plea would be off of the table."[84] As a result, Freeman rejected the offer.

On April 3, 2023, the date that the requested extension would have expired had the State consented, the State's investigator actually transcribed the two calls.[85] That same day, prosecutors mentioned to defense counsel that the State would use two

[81] A305, 309-310, 326-327, 332.
[82] A35-36.
[83] A35.
[84] A36.
[85] A87.

prison calls from January 4, 2022 and January 18, 2022 where the conversation seemed to be about the affidavit that was done in February 2022. Later on that same day, the State finally provided the 14-month-old tablet messages.[86] Jury selection began on April 6, 2023. The State provided the calls to defense counsel the following day.[87] The State used the two phone calls obtained from a 2023 subpoena and a series of texts from the 2022 subpoena to attack the credibility of Bethea's testimony that she was mistaken in identifying Freeman as the perpetrator.

Discovery Violation.

The trial court abused its discretion when it failed to recognize that Freeman's prison tablet messages from January 2022 that were not provided to the defense until April 3, 2023, had been in the State's possession since February 2022 and not only since March 2023 as the record makes clear. Thus, the trial court's conclusion that there was no discovery violation based on its erroneous finding that the State came into possession of at least this portion of the prison records less than a month before trial is erroneous and the result of an abuse of discretion.[88]

While the State might ordinarily be excused in a delay in producing the 2022 phone calls as they were obtained by the State on March 23, 2023, the circumstances surrounding the delay require a finding of a discovery violation. The State was aware of the calls, it knew the calls had yet to be transcribed, and yet it denied Freeman's

[86] A160.
[87] A154.
[88] Ex. B *3.

reasonable request for a one-week extension to consider the plea as he had not yet had an opportunity to discuss it with his family.

In fact, the State did commit a "Rule 16" discovery violations with respect to the prison communications. Superior Court Criminal Rule 16(a)(1)(C) requires the State to permit the defendant to examine "books, papers, documents, photographs, tangible objects, buildings or places," provided that they "are within the possession, custody or control of the [S]tate" and are either (1) "material to the preparation of the defense," (2) "intended for use by the [S]tate as evidence in chief at the trial," or (3) "were obtained from or belong to the defendant."[94] Under this rule, the State has an obligation to look for discoverable evidence and a continuing responsibility to disclose the existence of such evidence. Rule 16(d)(3)(B) requires the State to respond to a discovery request served upon it within twenty days after service of the request unless some other time is ordered by the Court.[89] Here, the initial discovery request was sent on October 21, 2020.[90] Accordingly, the State had a continuing responsibility to disclose the existence of "Rule 16" evidence.

The 33 pages of texts from January 2022 were "within the possession, custody or control of the [S]tate" once they received them in response to the February 22, 2022 subpoena. The communications were between Freeman and one of the alleged victims. The messages were both "material to the preparation of the defense," and "intended for

[89] Ex.B at *2.
[90] A138.

use by the [S]tate as evidence in chief at the trial[.]" The State introduced the texts into evidence in an effort to show the nature of the couple's relationship just prior to Bethea submitting the affidavit. The State sought to create a picture that she would submit to Freeman's request, demand or pressure to compose and sign a retraction of her claim that Freeman was the shooter.

While the phone calls were only in the State's possession for less than a month before trial, the State received them during the 10 days in which Freeman had to consider the plea offer. It is clear from the record that, even if the State was not fully aware of the details of the calls, it was aware there were calls and that they were in the State's possession. Thus, denying the reasonable request for a one-week extension in considering the plea offer is, in a sense, a knowing denial of providing discovery. Access to all of the prison communications that were eventually used at trial would simultaneously be material to preparation of Freeman's defense and critical to his consideration of the plea offer. Therefore, there was a discovery violation.

Because the judge erroneously concluded there was no discovery violation, she failed to conduct the proper inquiry to determine the proper sanction to be imposed.[91] The proper inquiry requires the court to consider: "(1) the centrality of the [discovery violations] to the case; (2) the closeness of the case; and (3) the steps taken to mitigate the results of the error."[92]

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[91] *Wharton v. State*, 246 A.3d 110, 116 (Del. 2021); *Wright v. State*, 25 A.3d 747, 753 (Del. 2011).
[92] *Oliver v. State*, 60 A.3d 1093, 1096-97 (Del. 2013).

The discovery violations were central to this case. The communications are between Freeman and Bethea, the only surviving witness. As the trial judge noted, this was a close case, Bethea was a key witness and her testimony was central.[93] Further, "there is no DNA evidence, no fingerprint evidence, no confession, no firearm, and no cell site location data."[94] Thus, any effort by the State to attack the credibility of her affidavit and subsequent testimony that Freeman was not the shooter or that she could no longer be sure he was the shooter was pivotal.

The State took no steps to mitigate the error. Instead, as the court noted, in part, the State "dump[ed] tens of thousands of pages of a cell phone approximately three weeks prior to trial"[95] along with additional prison communications, medical records and other discovery.[96] Yet, it held back the actual prison communications it intended to use until April 3rd (tablet communications) and April 7th, after jury selection, (phone calls).[97] Accordingly, the only appropriate remedy for the State's discovery violation was the exclusion of all of the January 2022 prison communications.[98]

Prosecutorial Misconduct.

The trial court also committed legal error in its handling of Freeman's

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[93] Ex.A*12.
[94] *Id.*
[95] *Id.*
[96] A151, 195, 199.
[97] A87, 154.
[98] *McGuinness v. State*, 2022 WL 1580601*3 (Del. Super. Ct. 2022) ("The Court cannot condone the failure of the State to provide these materials timely and finds that the State has no justifiable reason for waiting six months to deliver a large file of unreviewed documents to the defendants" less than two months before trial.)

prosecutorial misconduct argument. The court stated that Freeman's issue was best analyzed as a motion for a discovery violation seemingly because the court was "unable to locate a case where a defendant made a motion for prosecutorial misconduct *prior* to trial." [99] However, in a footnote, the court states that, it "is not to say that a motion for prosecutorial misconduct can never be brought pre-trial, but the Court finds that the State has not committed prosecutorial misconduct based on the facts of this case."[100] So, it is not clear whether the court chose not to recognize a prosecutorial misconduct claim or simply concluded there was no prosecutorial misconduct without conducting any analysis. In either event, the court committed legal error and/or an abuse of discretion.

In fact, Freeman did argue that there was a discovery violation. He argued that, in this case, the discovery violation amounted to prosecutorial misconduct because the actions violated his right to due process. [101] The totality of the circumstances allows for an inference that the State's actions were deliberate. It produced thousands of pages of discovery on the day it offered Freeman a plea. A large amount of that was from Bethea's cell phone and subsequently excluded. But, before the defense counsel knew the judge would exclude it, they were required to review it. That discovery also included all DOC communications *except* the ones the State intended to use at trial. Thus, during the time that it is most critical for defense counsel to understand and relay to the client

[99] Ex. B at n.12.
[100] Ex. B at *2.
[101] A125.

the strength of the State's case, they were reviewing many documents that were ultimately of now value.

Further support the discovery violations were willful and prejudicial to Freeman is the State's refusal of his reasonable request for an additional week to consider the plea so that Freeman could consult with close family members about his plea, the State said refused. Nothing in the record explains the State's denial. On the other hand, the record reveals that the State obtained the phone calls on March 23, 2023, even if the State was not fully aware of the details of the calls, it was aware there were calls and that they were in the State's possession. Thus, denying the reasonable request for a one-week extension in considering the plea offer is, in a sense, a knowing denial of providing discovery. As defense counsel noted, the additional week for consideration would not have postponed the trial in this 3-year-old case.

It is the State's duty is not to simply convict the guilty, it is to ensure the defendant receives a fair process.[102] The discovery process in criminal proceedings allows the defendant a fair "opportunity to prepare in advance of trial and avoid surprise, thus extending to him fundamental fairness which the adversary system aims to provide."[103] "Where the state has failed to respond promptly and fully to the defendant's disclosure request, the question is whether the failure has resulted in *fundamental unfairness or*

[102] *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn.2006).
[103] *State ex rel. Jackson Cnty. Prosecuting Att'y v. Prokes*, 363 S.W.3d 71, 76 (Mo. Ct. App. 2011) *(quoting State v. Scott,* 647 S.W.2d 601, 606 (Mo.App. W.D.1983)).

prejudice to the defendant."[104] Compliance with the rules of discovery "foster[s] informed pleas, expedited trials, a minimum of surprise, and the opportunity for effective cross-examination," and the State's failure to comply with the applicable discovery rules "serve[s] only to thwart these goals."[105] The State must not use discovery as a tool to "gain some tactical advantage"[106] over the defendant. This Court should not ignore a blatant violation of the prosecutor's "obligation ... to guard the rights of the accused as well as to enforce the rights of the public."[107]

As a result of prosecutorial misconduct, Freeman's case should have been dismissed. Alternatively, the discovery violation required the State to be sanctioned by excluding the January 2022 calls and/or January 2022 tablet messages. Because the trial court failed to provide any relief, this Court must vacate Freeman's convictions.

[104] *Prokes*, 363 S.W.3d at 76.
[105] *Id (quoting State v. Wells,* 639 S.W.2d 563, 566 (Mo. banc 1982)).
[106] *United States v. Marion*, 404 U.S. 307, 325 (1971).
[107] *State v. Whitcup*, 2015 WL 4994398, at *4 (Minn. Ct. App. Aug. 24, 2015)

II. THE STATE VIOLATED FREEMAN'S FOURTH AMENDMENT RIGHT TO BE FREE FROM ILLEGAL SEARCHES AND SEIZURES WHEN IT OBTAINED FREEMAN'S PRISON COMMUNICATIONS WITH BETHEA THROUGH THE USE OF AN UNREASONABLE ATTORNEY GENERAL'S SUBPOENA.

Question Presented

Whether the trial court should have suppressed the introduction of Freeman's prison communications with Bethea as the State unlawfully seized them through the use of an unreasonable Attorney General's subpoena.[108]

Standard of Review

The Court reviews constitutional violations *de novo*.[109]

Argument

The State issued a total of 6 Attorney General subpoenas to DOC ordering information of various forms of prison communication between Freeman and Bethea based solely on the "hop[e] that it might obtain potential evidence" of witness tampering.[110] The State issued its first subpoena in February 2022, after Bethea provided the DOJ with a notarized affidavit swearing that she made a mistake in identifying Freeman as the shooter. She explained that she "did not get a good opportunity to see the suspect's face due to the suspect wearing a mask."[111] She asserted that it was dark, she was scared, she was focused on the gun and the interaction only

[108] Ex. A.
[109] *Morris v. State*, 2019 WL 2123563 at *5 (Del. May 13, 2019).
[110] *State v. Whitcup*, 2015 WL 4994398, at *4 (Minn. Ct. App. Aug. 24, 2015).
[111] A71, 305.

lasted a few moments. She also stated that she had been under police pressure when she initially spoke with them.

In the February 2022 subpoena, the State requested DOC to produce, "[all] telephone, visiting room and iPad records for Dashan Freeman from January 1, 2022 to February 22, 2022"[112] There was no evidence in the DOC's response to the subpoena that Bethea had been asked, pressured or threatened to submit the affidavit.[113] However, there were tablet communications between Bethea and Freeman in the month of January 2022 revealing that the two still had feelings for each other but that they had a rocky relationship. The State used these texts at trial to paint a picture that Bethea would do what Freeman asked or told her to do.[114]

Five additional subpoenas were issued over a year later, and less than a month before trial. On March 13, 2023, Bethea met with the prosecutors in response to a subpoena. She told prosecutors that she stood by her affidavit and that she did not intend to be at trial.[115] Because the State was increasingly unhappy and more frustrated with Bethea's consistent position, it issued the additional subpoenas to DOC to capture other communications between her and Freeman. Again, the State hoped to find evidence of witness tampering. Three of the subpoenas requested information for communications in 2023.[116] However, two of the subpoenas requested information

[112] A73.
[113] A268-269; State Trial Exhibit 85.
[114] A305-308.
[115] A279, 324.
[116] A75-77, 80.

regarding phone calls to her number from any inmate PIN during the time before the affidavit was submitted. One subpoena, issued March 17, 2023, requested "any and all phone calls and inmate information for calls that have been placed to phone number: (484) 860-5151 from 01/01/2022 through 03/31/2022." [117] And, the other subpoena, issued March 23, 2023, requested "any and all phone calls and inmate information for calls that have been placed to phone number: (484) 860-5151 from 01/01/2022 through 03/17/2023."[118]

In response to the subpoenas that reached back to the time before the affidavit was submitted, the State discovered two phone calls made in January 2022 by Freeman from another inmate's personal identification number to Bethea.[119] The State believed these two calls made oblique reference to the affidavit. In one call, made January 4, 2022,[120] Freeman discussed a "war that has to be won." Bethea later explained at trial that he was referring to "their love."[121] In the other call, made January 18, 2022, Freeman mentioned a "blueprint."[122] At trial, Bethea acknowledged that he could have been referring to the affidavit. But, she explained that the affidavit was her idea. She told Freeman about it and he gave her the blueprint for how to get it completed. Thus, she testified, it was a purely voluntary endeavor.[123]

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[117] A78.
[118] A79.
[119] A83.
[120] A277; State Trial Exhibit 91.
[121] A308.
[122] A309.
[123] A305, 309-310, 326-327, 332; State Trial Exhibit 90.

The State used the two phone calls as evidence that Freeman pressured Bethea to submit the affidavit to DOJ.

The State's February 22, 2022, March 17, 2023 and March 23, 2023 Subpoenas Were Not Reasonable Under the Fourth Amendment

The Attorney General's authority to seize evidence pursuant to a subpoena is provided by 29 *Del.* C. § 2504 (4) and it allows the Attorney General to compel evidence in connection with its duty to investigate matters involving the public peace, safety, and justice.[124] However, this authority is "always subject to control by the court."[125] But, most significantly, the Fourth Amendment of the United States Constitution requires the Attorney General subpoena to be "reasonable"[126] in that it must further an important government interest and not be greater than necessary for the protection of that interest.[127]

Due to the lower standard, Attorney General subpoenas are generally used to obtain prison records. Since prisoners have a diminished expectation of privacy in their communications, "reasonableness" and not "probable cause" is required for Fourth Amendment purposes.[128] Accordingly, so long as the subpoena is reasonable, it is a proper method of obtaining a prisoner's communications.

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[124] *Johnson v. State*, 983 A.2d 904, 919 (Del. 2009).
[125] *In re Henry* C. *Eastburn & Son, Inc.*, 147 A.2d 921, 925 (Del. 1959).
[126] *Whitehurst v. State,* 83 A.3d 362, 367 (Del. 2013).
[127] *Id.*
[128] *Id.*

In *Johnson v. State,*[129] and even more recently, this Court has held that to be reasonable in furthering the governmental interest under the Fourth Amendment, the subpoena must (1) "specify the materials to be produced with reasonable particularity," (2) "require the production only of materials relevant to the investigation," and (3) "not cover an unreasonable amount of time."[130]

The subpoenas in this case did specify which materials were sought and covered a relatively reasonable period of time. However, there was no reasonable basis to subpoena the communications. Nor did the production of the materials to the State further an important governmental interest. The subpoenas contained only boilerplate language and give no clue to the reason for which they were issued. The State's later claims for admissibility fare no better.

The State claimed it was concerned, based solely upon receiving a sworn affidavit by a witness recanting an earlier statement, that there may have been witness tampering by Freeman. However, the record provides no evidence that any effort was ever made to discuss the affidavit with Bethea or to question her about her reason for submitting the affidavit. Neither she nor any other individual told prosecutors that Freeman or anyone else persuaded her to write the affidavit.[131]

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[129] 983 A.2d 904.

[130] *Morris*, 2019 WL 2123563 at *5 (citing *Johnson*, 983 A.2d at 921).

[131] *See, e.g., Whitehurst,* 83 A.3d at 366 (defendant's girlfriend told an investigator during trial preparation that the defendant tried to persuade her not to go to court); *Johnson*, 983 A.2d at 911 (defendant's girlfriend told investigator that defendant was trying to persuade a key witness not to appear at court); *Morris*, 2019 WL 2123563

Additionally, it would not be shocking for the State to receive such an affidavit from Bethea as they were away as early as Freeman's arrest that the two were already communicating and on good terms.[132] In fact, the State acknowledged that, from the beginning, Bethea never sought assistance from victim's services.[133] Merely because a witness who was recalcitrant from the beginning remains recalcitrant throughout the process is no reasonable basis to obtain and admit prison communications.

The State's subsequent actions, or lack thereof, also speaks to the questionable basis of the subpoena. Even after discovering communications between Freeman and Bethea, the State allowed them to continue for well over another year without any further concern. It was only after Bethea told the State that she stood by her affidavit submitted a year earlier that the State submitted additional subpoenas again hoping for evidence of witness tampering. Again, nothing in the record suggests the State made any effort to discuss the situation with Bethea before it hastily issued the subpoenas. No communications in 2023 were obtained that revealed any pressure being exerted on Bethea by Freeman or anyone else.

The State failed to articulate "an important or substantial government interest" in the DOC communications.[134] Nor did the State demonstrate that these actions were "no

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at *3 (victim reported that the defendant had made two calls to her in violation of the no contact order); *Johnson v. State*, 2012 WL 3893524 (Del. Sep. 7, 2012) (defendant's girlfriend told police that he had asked her to provide him with an alibi).

[132] A59.

[133] A59.

[134] *Whitehurst*, 83 A.3d at 367.

greater than necessary for the protection of that interest."[135] There was no evidence prior to the issuance of the subpoenas that Freeman or anyone else attempted to persuade Bethea to not go to court, attempted to persuade her to "drop the charges," or persuaded her to swear out the affidavit. In essence, the record below reflects no such showing of any independent evidence of witness tampering needed for to establish the reasonableness of the subpoenas.

The issuing subpoenas were entirely devoid of an articulation of the need by the government for these records. Instead, the subpoena relies on boilerplate language to claim that the "request is specific and has been limited in scope to the extent reasonably practicable in light of the facts and circumstances."[136]

Accordingly, Freeman's prison communications were seized and improperly admitted into evidence in violation of his right under the Fourth Amendment against unreasonable searches and seizures, and in violation of 29 *Del.* C. § 2504 (4). As such, his convictions must be reversed and remanded for a new trial.

[135] *Id.*
[136] *Id.*

III. IN THIS CREDIBILITY CASE, THE PROSECUTOR'S ELICITATION OF AND KNOWING RELIANCE ON FALSE TESTIMONY WAS IMPROPER AND JEOPARDIZED THE FAIRNESS AND INTEGRITY OF FREEMAN'S TRIAL.

Question Presented

Whether the trial court erred in denying Freeman's motion for a new trial when the prosecutor elicited testimony he knew to be false, failed to correct that testimony, then relied on that testimony as part of the State's credibility attack on the testimony of the only eyewitness at trial.[137]

Standard of Review

"Generally, the grant or denial of a motion for a new trial is within the discretion of the trial court and may be overturned only when a trial judge abuses his discretion."[138] This Court has "held, however, that the failure of defense counsel to raise a contemporaneous objection to allegedly improper arguments constitutes a waiver of the right to raise the claim on appeal."[139] In those cases, the Court reviews the claim under a plain error standard. The Court also reviews constitutional violations *de novo*.

Argument

On September 23, 2020, police arrested Freeman as part of an unrelated investigation. When he was arrested, he denied any involvement in the shooting in this case and the police seized his red iPhone. Extracted from the phone were

[137] A204.
[138] *Burroughs v. State*, 988 A.2d 445, 448–49 (Del. 2010).
[139] *Id.*

several text messages, about 56, that were exchanged between Freeman and Bethea shortly after the shooting and before Freeman's arrest.[140] Prior to trial, however, the trial court granted defendant's motion to suppress the contents of Freeman's phone as it was seized illegally.[141] Accordingly, none of the contents of that phone would be introduced into evidence.

In February 2022, Bethea provided the DOJ with an affidavit recanting her initial identification of Freeman as the shooter. She stood by that affidavit in a later statement to prosecutors and at trial. She was the only person who saw the suspect. Bethea testified that she could not see who the shooter was and that she did not see the shooter. Bethea did not identify Freeman as the shooter from the witness stand. To attack the credibility of Bethea's testimony, the State introduced prison communications between her and Freeman from January 2022.

With respect to any pre arrest communications, the prosecutor asked Bethea the following:

> Q. After you were shot, did you stay in the hospital – you said, five days?
> A. Yeah, about five days.
> Q. Did you and Dashan Freeman talk?
> A. No.
> Q. Did he text you?
> A. No.
> Q. Did he get in contact with you at any time?
> A. No.
> Q. Now, you're aware that Dashan was arrested for this on

[140] *Id.*
[141] Ex. A at *6.

September 23, 2020?
A. Yes.
Q. Did Dashan Freeman contact you then?
A. Yes.
Q. How did he do that?
A. Through phone, via phone.[142]

Subsequently, during the State's closing argument, the prosecutor stated in part, "Deona Bethea *from the stand* said she didn't hear from Freeman until he got arrested, but after he got arrested, they started talking.... Wherever he is, according to Deona Bethea, he's not calling her. He's having no contact with her until he gets arrested."[143] The prosecutor hammered the point that Freeman could not be found during this period of time. The prosecutor went on to rely on this testimony to support the argument that police were unable to find Freeman before he was arrested and then when he was arrested and no longer able to evade police, he began to contact her to pressure her to explain why her version of events changed and why she was not identifying Freeman as the shooter.

In a timely motion for a new trial under Rule 33, Freeman gave the trial court the opportunity to order a new trial as "required in the interest of justice."[144]

[142] A303-304.
[143] A350.
[144] "The words 'in the interest of justice' allude to the constitutional due process protections all defendants enjoy. The Constitutions of the State of Delaware and United States protect defendants from abuse and prejudice in the trial process." *State v. Savage*, 2002 WL 187510, at *1 (Del. Super. Ct. Jan. 25, 2002). A motion for a new trial is addressed within the sound discretion of the court. *Johnson v. State*, 1993 WL 245374, at *1 (Del. 1993).

Freeman's motion was based on the prosecutor's reliance on testimony he elicited and knew to be false. However, the trial court denied the motion based on a finding that the prosecutor did not violate her order suppressing the text messages.

LEGAL ANALYSIS

Again, the trial court abused its discretion by failing to address the issue presented to it. The question is not whether the prosecutor violated the court's order to exclude the texts, it is whether he engaged prosecutorial misconduct by eliciting testimony he knew to be false and knowingly relied on that testimony to make an argument. *Baker v. State* instructs that, on a claim of prosecutorial misconduct, this Court must first conduct "a *de novo* review of the record to determine whether misconduct actually occurred."[145] If misconduct did occur, then, where there was no objection or intervention by the court below, this Court will reverse where the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[146] If the Court does not find plain error, the matter is not ended, however. "Under the *Hunter* test, [this Court] *can* reverse, but need not do so, notwithstanding that the prosecutorial misconduct would not warrant reversal"[147] if it determines the prosecutor's comments

[145] *Baker v. State*, 906 A.2d 139, 148, 150 (Del. 2006).
[146] *Id.* at 150 (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1982)).
[147] *Id.* at 149 (citing *Hunter v. State*, 815 A.2d 730 (Del. 2002)).

"are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.[148]

A. Knowingly Relying on False Testimony Is Prosecutorial Misconduct.

"[T]he prosecutor represents all people including the defendant[.]"[149] "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[150] The State's closing and rebuttal arguments play an important role in ensuring the right to a fair trial. "[151][C]losing argument is an aspect of a fair trial which is implicit in the due process clause of the Fourteenth Amendment by which the States are bound."[152]

A prosecutor engages in misconduct when he knowingly elicits false testimony, fails to correct it and, more egregiously, relies upon it. This Court has stated that such conduct violates due process."[153] **"**In the event that the State knowingly uses false or perjured testimony to obtain a conviction, the United State Supreme Court has held that the conviction 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'"[154] In fact, over fifty years ago, this Court stated that "if the prosecutor actually knew that the testimony he adduced

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[148] *Id.*
[149] *Hunter*, 815 A.2d at 735 (*quoting Sexton v. State*, 397 A.2d 540, 544 (Del. 1979)).
[150] ABA Standard 3-1.2 Functions and Duties of the Prosecutor (b).
[151] *Savage*, 2002 WL 187510, at *4 (internal quotations omitted).
[152] *Id.*
[153] *Romeo v. State*, 21 A.3d 597 (Del. 2011).
[154] *Romeo v. State*, 21 A.3d 597 (Del. 2011) (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976)).

from [a witness] was false and perjury, and made no effort to correct it, he would be, in our view, guilty of conduct unprofessional and censorable." [155]

In the State's response below, it did not deny that Bethea's testimony was false or that the prosecutor as aware it was false. It defended itself by claiming there was no misconduct because the witness, not the prosecutor made the false statement and the prosecutor's argument relied solely on her "testimony on the stand."[156] This response reflects a deep misunderstand of the State's duty as such conduct is still improper.

The State pointed out that "Deona Bethea's direct testimony was that she did not communicate with Dashan Freeman from the time of the shooting until he contacted her after he was arrested."[157] It then points to defense "failure" to cross examine her on this issue- which would have opened the door to the introduction of the suppressed items. The State then disputes that it engaged in misconduct because it accurately commented on the evidence that was presented at trial."[158]

Delaware Rule of Professional Conduct 3.3 (a) (3) makes clear that "[a] lawyer shall not knowingly…offer evidence that the lawyer knows to be false." Even if the lawyer does not knowingly offer the false evidence, if the witness called by that lawyer offers false testimony, he "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." These duties "continue to the conclusion of the

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[155] *O'Neal v. State*, 247 A.2d 207, 210 (Del. 1968)(*quoting Napue v. Illinois*, 360 U.S. 264 (1959)).
[156] A220-221.
[157] A216.
[158] A216.

proceeding[.]" Similarly, in denouncing prosecutorial misconduct, this Court has cited to the ABA standards, which provide:

> ***The prosecutor should not*** make a statement of fact or law, or ***offer evidence, that the prosecutor does not reasonably believe to be true***, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or ***to avoid misleading a judge or factfinder***.[159]

As soon as Bethea responded that she had no contact with Freeman during the three months between the shooting and arrest, the prosecutor had a duty to correct the record as he was aware that the answer was false. Assuming her testimony was not intentionally false, the prosecutor could have done so by refreshing her recollection or impeaching her without bringing in the content of the 2020 text messages. Even if one were to consider introduction of the false testimony was innocuous, the prosecutor's subsequent knowing use of that false testimony to support its argument designed to undercut her credibility was egregious.

Prosecutor's Knowing Reliance on False Testimony Requires Reversal

The error in telling the jury that Freeman never contacted Bethea until he was incarcerated necessitates a new trial in the interest of justice.[160] The issue of identity

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[159] ABA Standard 3-1.4(b) The Prosecutor's Heightened Duty of Candor.

[160] *State v. Matthews*, 2018 WL 6498694 (granting new trial where State misstated evidence in closing argument in identification case, concluding "while the Court

was critical in this case. Bethea was the only witness with respect to identification. She initially identified Freeman as the shooter. However, she swore out an affidavit to the contrary. Her affidavit was consistent with her March 2023 statement and with her testimony that she was not sure that Freeman was the shooter. The State responded with a theory that Freeman pressured Bethea to recant her identification of him as the shooter. Despite knowing there was contact between Bethea and Freeman from even before his arrest, the State knowingly relied on her false testimony to the contrary to imply Freeman made sudden contact later in order to get the affidavit. The prosecutor knew that for defense counsel to cross examine Bethea and correct her answer, they would have to open the door to the texts which they successfully had suppressed.

This becomes more problematic since the prison communications the State presented to the jury were made in 2022, 1 ½ years after arrest and right before the affidavit. Thus, a picture was falsely painted that there was no contact from the time of the shooting until the month before the affidavit was made.

The prosecutor's failure to correct and subsequent reliance on false testimony was "so clearly prejudicial" to Freeman's substantial rights that it "jeopardized the fairness and integrity of the trial process."[161] Both the State and the jury relied heavily

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agrees with the State that the statement was not intentionally misrepresented, it was nevertheless improper"); *State v. Savage*, 2002 WL 187510 (granting a new trial where the State's comments in closing argument which were not supported by the record were inappropriate, and the State argued evidence that the Court had previously ruled inadmissible).

[161] *Wainwright*, 504 A.2d at 1100.

on Bethea's testimony and out of court statements. Thus, whether the jury believed the State's theory that Freeman pressured her was central. Accordingly, the State's misconduct constitutes plain and reversible error.[162]

Assuming, *arguendo*, this Court does not find plain error, it should still reverse under *Hunter* because this is not "a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."[163] The improper conduct began during Bethea's questioning when the prosecutor failed to correct her false answer. It continued throughout the trial as the prosecutor had a continuing obligation to correct the false statement. Then, by expanding on that statement to use as a basis of the State's theory during closing argument. Reversal is required because the totality of these errors "cast doubt on the integrity of the *judicial* process."[164]

[162] *Richardson v. State*, 43 A.3d 906, 910 (Del. 2012).
[163] *Berger v. United States*, 295 U.S. 78, 89 (1935).
[164] *Baker*, 906 A.2d at 150 (*citing Hunter*, 815 A.2d 730).

CONCLUSION

For the reasons and upon the authorities cited herein, Freeman's convictions must be vacated.

Respectfully submitted,

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DATED: September 3, 2024