

SUPREME COURT OF NEW JERSEY
DOCKET NO. 090237

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GERALD W. BUTLER,

Defendant-Petitioner.

CRIMINAL ACTION

Petition for Certification from a
Judgment of the Superior Court of New
Jersey, Appellate Division,
Docket No. A-001275-22

Sat Below:

Hon. Allison E. Accurso, J.A.D.
Hon. Francis J. Vernoia, J.A.D.
Hon. Katie A. Gummer, J.A.D.

**BRIEF ON BEHALF OF *AMICUS CURIAE* ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS OF NEW JERSEY**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Proposed *amicus curiae* Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey to, among other purposes, “protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good.” Founded in 1985, ACDL-NJ has more than 500 members across New Jersey. Our Courts have found that ACDL-NJ has the special interest and expertise to serve as an *amicus curiae* per *Rule* 1:13-9 in numerous cases throughout the years. *See, e.g., State v. Ramirez*, 246 N.J. 61 (2021); *State v. Garcia*, 245 N.J. 412 (2021); *State v. Williams*, 244 N.J. 327 (2020); *State v. Andrews*, 243 N.J. 447 (2020); *State v. Greene*, 242 N.J. 530 (2020).

Thus, ACDL-NJ has the requisite interest to participate as *amicus curiae* and its participation will be helpful to this Court. Accordingly, ACDL-NJ asks that its motion for leave to participate as *amicus curiae* be granted.

PRELIMINARY STATEMENT

Defendant was charged and convicted by a jury of five of the six counts in the indictment against him. The charges included second- and third-degree conspiracies to distribute a controlled dangerous substance (CDS) (Counts One and Two); third-degree distribution of CDS (Count Three); two counts of third-degree possession of CDS (Counts Four and Seven); second-degree possession of CDS with intent to distribute (Count Five); second-degree possession of a weapon while committing a CDS offense (Count Six); and possession of a weapon by a convicted person (Count Eight), the only Count of which he was acquitted. *State v. Butler*, Docket No. A-1275-22 (App. Div. Dec. 31, 2024) (slip op. at 2-3).

The State's effort to convict Defendant of those charges was complicated by evidentiary issues, especially on the two conspiracy counts. Count two, alleging third-degree conspiracy to distribute CDS, was based solely on a sale by Defendant to Joshua Phillips, and the Appellate Division reversed that conspiracy conviction (Count Two) based on the insufficiency of the State's evidence, relying on *State v. Roldan*, 314 N.J. Super. 173, 182 (App. Div. 1998). In *Roldan*, the Appellate Division panel cited the general rule, known as Wharton's Rule, which states that

where an agreement between two parties is inevitably incident to the commission of a crime, such as a sale of contraband, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. *Iannelli v. U.S.*, 420 U.S. 770 (1975) (quoting 2 F. Wharton, *Criminal Law*, § 1604, p. 1862 (12th ed. 1932)).

[*Roldan*, 314 N.J. Super. at 182.]

The Appellate Division in this case, however, applying plain error review, upheld Defendant’s conspiracy conviction under Count One based solely on evidence of a “pattern of frequent and repeated transactions between the participants,” *Butler*, slip op. at 31 (quoting *U.S. v. Edwards*, 36 F. 3d 639, 643 (7th Cir. 1998)). The necessity of the State’s reliance on unreliable and indirect evidence to prove its charges prompted the prosecutor to attempt to overcome the deficiencies in the State’s proofs by reference to a popular television (TV) show called *The Wire*, widely known for its depiction of violence and gang-related crimes in the City of Baltimore, Maryland. In addition, the prosecutor characterized the case against Defendant as being about “gun violence in the City of Millville,” and elicited testimony to the effect that the officers in the case were part of the “Organized Crime Bureau” that was conducting a “large scale” operation into “weapons trafficking” tied to “violence” and “shootings” in the community.

Those highly prejudicial comments by the prosecutor, combined with testimony characterizing the investigation in such inflammatory and prejudicial terms, severely prejudiced Defendant by attempting to characterize the circumstances underlying the charges against him in terms suggestive of violent and threatening activities intimating the involvement of organized crime. The highly prejudicial comments were made in a manner clearly designed to persuade the jury to convict Defendant not on the basis of the evidence at trial, but improperly on the basis of deliberately induced testimony and prosecutorial comments intended to convince the jury of its civic duty to convict Defendant because of the allegedly dangerous and harmful circumstances that led to his prosecution.

STATEMENT OF FACTS

Amicus adopts and relies on the Statement of Facts set forth in Appellate Division Brief on behalf of Defendant-Appellant filed by the Office of the Public Defender.

ARGUMENT

POINT I

THE STATE’S CASE WAS FATALLY INFECTED BY SERIOUS AND DELIBERATE PROSECUTORIAL MISCONDUCT, BY FRAMING DEFENDANT’S OFFENSES AS COMPARABLE TO THOSE PORTRAYED ON THE HIGHLY POPULAR HBO TV SHOW *THE WIRE* AND BY DELIBERATELY ELICITING PREJUDICIAL TESTIMONY CHARACTERIZING THE RELATED INVESTIGATION AS ONE BY THE MILLVILLE “ORGANIZED CRIME BUREAU” THAT WAS A “LARGE SCALE” OPERATION INTO “WEAPONS TRAFFICKING” TIED TO “VIOLENCE” AND “SHOOTINGS” IN THE COMMUNITY.

A. References by the Prosecutor to the widely viewed HBO show called *The Wire* constituted flagrant prosecutorial misconduct, constituting a highly improper effort by the Prosecutor to prejudice Defendant by comparing him to the violent and ruthless drug dealers portrayed in *The Wire*.

During the Prosecutor’s opening statement to the jury, and before the jury heard any of the trial evidence, the Prosecutor told the jury that the prosecution of Defendant was “similar” to the events depicted in *The Wire*:

You heard a little bit from the Judge about what this case was about. You heard about drugs. You heard about guns. But it’s a little bigger than that, because all those guns and drugs go together. This is also a case about a phone intercept, what’s also known as a wire.

And there was a few years ago, many years ago now, that show on tv called *The Wire*. And in that show there was in Baltimore a rash of crime happening within the community. It seemed very organized. People were always at certain locations. They seemed to be following a hierarchy, or someone’s orders. And they

were trying to figure out how guns and drugs were coming into their community. And while they were trying to surveil all these different locations, they used all of the investigative means that they had available to them, they still weren't able to really crack down.

But they were eventually able to realize that there was a person they needed to focus on. The only way to really find out how the guns and drugs were flowing in the community was to get on that person's phone. So they got an intercept known as the wire.

That's similar to this case. Back in August to September in 2016, in the City of Millville, the county prosecutor's office, specifically the Organized Crime Unit, got their own wire. And they did this because there was a rash of violence that was happening throughout Millville and throughout the summer of 2016. And they wanted to know what was the emphasis of that, what was the origin? Where was it coming from? Who was involved? And so much was happening that they finally decided they needed to get on a wire. So as they narrowed down their investigation, they narrowed it down to four individuals. And the names of those individuals are not important to you because none of them are Mr. Butler.

But do understand that that's how the investigation began. So they go on each of these individuals' phones. And they're listening, and the officers are picking up gun sales, where to meet, what kinds of guns, where it's coming from. There's also discussions about drugs, how much to sell them for, where to meet in person.

[4T18-14 to 20-8.]¹

¹ As set forth by the parties, 4T = June 10, 2022 (trial); 6T = June 15, 2022 (trial); 7T = June 28, 2022 (trial) *Amicus* has added paragraph breaks for ease of reading (as the Appellate Division also did in its opinion).

And ladies and gentlemen, I want to thank you for your participation, for your attention. It's important. We were listening, we were watching, taking our notes, not to pry into your lives, but to be able to understand that this was a case that you would be able to fairly and impartially render your verdict. I end with this. That very much like the show *The Wire*, sometimes the targets tell on themselves. So as you're listening to all of the other witnesses, and you're going to listen to the calls, you're going to hear the texts and also listen to the calls, what is he telling you about what he's doing? Thank you very much.

[4T32-9 to 21.]

The prosecutor, in comparing Defendant's prosecution for possession and distribution of CDS to the TV show *The Wire*, was justifiably confident that most of the jurors were familiar with the show. *The Wire* is described by *The Guardian* as

"the greatest ever television drama" that "tackled the pointlessness of the war on drugs, the bureaucracy and corruption that infest both the police force and drug dealing gangs . . . It's the greatest ever cop show that isn't actually a cop show. We spend as much time with the junkies, the pimps, the murderers and the frightened street kids as we do with the law."

[Jon Wilde, *The Wire is Unmissable Television*, *The Guardian* (July 20, 2007, 7:03 PM EDT), <https://www.theguardian.com/culture/tvandradioblog/2007/jul/21/thewireisunmissabletelevis.>]

The prosecutor's selection of *The Wire* to serve as a comparison to the criminality and drug dealing in Millville, allegedly typified by the case at bar, undoubtedly was motivated by the violence and lawlessness portrayed consistently in episodes of *The Wire*. As graphically described in Wikipedia, *The Wire* was notorious for its portrayal of organized crime, murders and intimidation, all of which was materially prejudicial to the jury's ability to evaluate objectively the relatively minor charges against Defendant.

Avon (Barksdale) ran the organization as a hierarchy with himself at the top and Stringer (Bell) directly below him. Stringer oversees the entire drug operation and advises Avon on all matters. They were both isolated from the drugs, handling only money. **Avon had a number of enforcers (soldiers) who served him through protection, contract killings, and intimidation work ... Avon himself kept an extremely low profile, eschewing overt displays of wealth so as not to attract attention, avoiding being photographed, not having a driver's license, and owning nothing in his name.**

Each crew is headed by a lieutenant who is responsible for trade in a certain area, with some receiving a percentage of the revenue of the narcotics they sell. The lieutenants contact their superiors to refill inventory and to kick up the proceeds from the drug sales. Lieutenants did none of the legwork in the drug transaction. They had to monitor their crew and make sure everything ran smoothly, only periodically collecting the proceeds from the drug sales and making sure everything adds up at the end of the day.

Beneath the lieutenants there are several drug dealers usually referred to as “hoppers.” Typically there is a second-in-command who would handle the money, “touts” were responsible for attracting customers; “runners” would hand over drugs to the customer; “look-outs” were responsible for watching for police or stick-up gangs approaching, while others would watch over the main drug stash. Each dealer would receive a weekly cash payment for their work from the lieutenant above them based on hours worked.

Every member of the organization was subject to strict rules designed to thwart police investigations. The dealers were not allowed to carry cell phones (initially) or use drugs. They were all aware of how to deal with police interrogation and knew that the organization would protect them if they did not say anything to the police. Lieutenants and enforcers carried pagers so that they could be contacted (they later used disposable cell phones). They were subject to the same rules as the dealers, but also knew not to talk business in cars, public places or with anyone outside of the organization. (Emphasis in original).

[*Barksdale Organization, Wikipedia*,
https://en.wikipedia.org/wiki/Barksdale_Organization
(last visited April 28, 2025) (emphasis added).]

B. The prosecutor deliberately and improperly elicited testimony that was prejudicial, stating that Defendant's charged offense had been investigated by the County's Organized Crime Bureau based on reports of "several shootings" in the City of Millville, and informing the jury that police had obtained search and arrest warrants targeting Defendant. That testimony was irrelevant to Defendant's charged offenses and obviously was intended to prejudice the jury against Defendant.

During the State's direct case, Sergeant Ryan Breslin of the Cumberland County Prosecutor's Office testified as a State witness. In response to questioning by the prosecutor, Sergeant Breslin stated that he previously had been assigned to the Office's Organized Crime Bureau and that he currently served as a sergeant in the Office's Major Crime Unit. He testified that the Major Crime Unit responds to "shootings, and homicides, and suspicious deaths, and conduct[s] other investigations such as frauds," and that the Organized Crime Bureau, to which he previously was assigned, emphasized investigations into narcotics trafficking in the County. (4T104-1 to -2). He acknowledged that he was the lead agent on a "large scale weapons trafficking and narcotics investigation out of Millville in 2016." (4T104-21 to -22). He added that that investigation was "to target individuals that had been involved in violence in the city of Millville, as well as weapons trafficking throughout the county." (4T105-7 to -9).

C. In a criminal case, a prosecutor’s obligation is to prove a Defendant’s guilt by introducing evidence establishing the commission of the charged offense, and not by comments in openings or summations improperly analogizing Defendant’s conduct to that of characters on TV or in popular culture. Nor is it proper to characterize the charged offense as being related to a more comprehensive crime siege involving violence and weapons trafficking in an effort to prejudice the jury in advance against a Defendant.

This Court’s thoughtful opinion in *State v. Williams*, 244 N.J. 592 (2021), illustrates the clear impropriety of a prosecutor using a still photograph in a PowerPoint presentation depicting a character in a well-known movie called *The Shining* to bolster the State’s contention that the defendant, in a prosecution for second-degree robbery of a bank, used force or the threat of force in perpetrating the robbery. In the course of the robbery, the defendant, Williams, neither displayed a weapon nor made a verbal threat. He simply passed a note to the teller that read: “Please, all the money, 100, 50, 20, 20. Thank you.” *Id.* at 599.

The key issue at trial was whether the defendant was guilty of second-degree robbery – theft using force or the threat of force – or third-degree theft – exercising unlawful control over the movable property of another. The jury convicted the defendant of second-degree robbery. On appeal, the defendant complained that the prosecutor’s reliance on material from the movie constituted prejudicial misconduct.

This Court's opinion explained that

the prosecutor showed the jury a PowerPoint presentation in her closing that contained a still photograph from the movie *The Shining* and commented, 'if you have ever seen the movie *The Shining*, you know how his face gets through the door.' The PowerPoint slide depicted Jack Nicholson in his role as a violent psychopath who used an ax to break through a door while attempting to kill his family. The photograph contained the words spoken by Nicholson in the movie scene as he stuck his head through the broken door – 'Here's Johnny!' The slide also bore the heading 'ACTIONS SPEAK LOUDER THAN WORDS,' a theme used by the State throughout the trial to suggest to the jury that defendant's conduct in the moments leading up to and following defendant's passing the note to the teller supported a finding of robbery when viewed in context. The photograph was not previously shown to the court or defense counsel and had not been used at trial or offered or admitted into evidence.

[*Williams*, 244 N.J. at 600.]

In its opinion reversing the defendant's conviction because of prosecutorial misconduct, the Court noted the dual obligation of prosecutors "to represent vigorously the state's interest in law enforcement and at the same time assure that the accused is treated fairly, and that justice is done." *Id.* at 607 (quoting *State v. McNeil-Thomas*, 238 N.J. 256, 274 (2019)). The duty of the prosecutor "is as much . . . to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring

about a just one.” *Id.* (quoting *State v. Smith*, 212 N.J. 365, 403 (2012)). Prosecutors therefore “may strike hard blows, [but] not . . . foul ones.” *Id.* (quoting *State v. Feaster*, 156 N.J. 1, 59 (1998)).

This Court reversed the defendant’s conviction of second-degree robbery, stating:

Nevertheless, “we remind prosecutors that they have a ‘unique role and responsibility in the administration of criminal justice,’” [*State v. Frost*, 158 N.J. 76, 89 (1999) (quoting *In re Rachmiel*, 90 N.J. 646, 656 (1982)), and therefore must ensure their strategy and commentary fall within “the boundaries of permissibly forceful advocacy,” [*State v.*] *Marshall*, 123 N.J. [1], 161 [(1991)].. Prosecutors must walk a fine line when making comparisons, whether implicit or explicit, between a defendant and an individual whom the jury associates with violence or guilt. The use of a sensational and provocative image in service of such a comparison, even when purportedly metaphorical, heightens the risk of an improper prejudicial effect on the jury. Such a risk was borne out here.

[*Williams*, 244 N.J. at 617.]

In *State v. Rose*, 112 N.J. 454 (1988), an appeal from a capital murder conviction at a time when New Jersey’s death penalty statute was still in effect. This Court affirmed the defendant’s conviction for murder of a police officer, but reversed his death sentence on several grounds, including prosecutorial misconduct during opening and closing arguments, during the penalty phase and

during the cross-examination of the defendant's expert witnesses. As in this case, aspects of the prosecutor's misconduct concerned statements made by the prosecutor to the jury that were totally unsupported by evidence in the record.

During the penalty phase of the trial, defense counsel called two expert witnesses to testify about the applicability of certain of the statutory mitigating factors in death penalty prosecutions: first, that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired by mental disease or intoxication; and second, that he acted under the influence of extreme mental or emotional disturbance. The defense witnesses were Dr. Leah Blumberg Lapidus, a professor of clinical psychology at Columbia University, and Dr. Robert A. Fox, Jr., a professor of clinical psychiatry at N.Y.U. Medical Center.

During his summation, the prosecutor improperly attacked the defense experts with outside the record comments about their reliability and assertions about the State's ability to produce experts with contrary opinions:

He knew at the time he was interviewed by these doctors what his defense was, what the law was, what he faced. The doctors knew that. *They were explained the law by the lawyers, as to what he's being charged with, what he faced and how he could beat the penalty that the law provides for him* and they came in here and they as counsel said uncontradicted gave an opinion. Well, the Judge will charge you their opinion in only as

good as the facts upon which they base their opinion and some of the facts were wrong and some of the facts were non-existent.

. . .

Shall I parade experts in here to contradict them? I would consider that an insult to your intelligence. I believe that you can cope with the weight to be given to these expert witnesses. Why should we have to get into a battle of the experts, a battle of the psychiatrists? They might have been able to bring in ten more to say the same thing, find them somewhere. *I could bring ten in to say the opposite* where we come back to you people, we come right back to you people.

[*Rose*, 112 N.J. at 518 (emphasis in original).]

The Court concluded that those comments by the prosecutor constituted misconduct and were grounds for reversal of the defendant's death sentence.

The Court observed:

The prosecutor's comments were clearly improper in two respects. First, in suggesting that the experts were told by the lawyers 'how he could beat the penalty that the law provides for him and they came in here and . . . gave an opinion,' the prosecutor implied that the experts' testimony was fabricated or contrived, with the assistance of defense counsel. There was no support in the record for the prosecutor's innuendo. The experts were both qualified, and they carefully explained the basis for their opinions. The jury accepted their testimony at least in part, finding that one of the two mitigating factors their testimony supported had been proved. Without an adequate foundation in the record, the prosecutor's implication that the expert testimony

was contrived was totally unwarranted. (citation omitted)

Moreover, the prosecutor's statement that he could have produced 'ten' experts to testify differently from the defense experts was also improper. It suggested to the jury that it could assume that there were other qualified experts, known to the prosecutor but not produced as witnesses, that would contradict the opinion of defendant's experts. *See ABA Standards [for Criminal Justice]*, §3-5.8(a) [(2d ed. 1980)]. ('It is unprofessional conduct for the prosecutor intentionally . . . to mislead the jury as to the inferences it may draw.'), and §3-5.8(b) ('It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony of the defendant.')

[*Rose*, 112 N.J. at 519.]

Similarly, in *State v. Frost*, 158 N.J. 76, this Court reversed the defendant's convictions on indictments for numerous counts of possession and distribution of cocaine in a school zone because of prosecutorial misconduct. During summation, the prosecutor made several comments that the Appellate Division deemed inappropriate but harmless.

Responding to defense counsel's argument that the State had failed to produce the "buy money," the prosecutor told the jury that "[t]he State is not allowed to bring the money in. It's confiscated." *Id.* at 81.

In addition, in an attempt to bolster the credibility of the investigating police officers, the prosecutor's summation included these comments:

I would submit to you, ladies and gentlemen, there is absolutely no evidence in this case that shows wrongdoing by the officers. There's no evidence that locks are cut. There's no evidence that doors were smashed. No evidence of any wrongdoing whatsoever. I'd submit this to you, ladies and gentlemen, *do you know the magnitude of the charges that could be brought against officers for such actions.*

[*Frost*, 158 N.J. at 81 (emphasis in original).]

Finally, the prosecutor disparaged defense counsel by suggesting that the jurors disregard defense counsel's arguments as "lawyer talk":

Look at the evidence, ladies and gentlemen, the Judge will tell you that. Look at the evidence before you, look at the counts before you, *don't be distracted by lawyer talk.* I'd ask you this. When you go into the jury room and an individual starts talking about, what about the lock – time out, time out. *That's lawyer talk.*

[*Id.*]

This Court reversed defendant's multiple convictions because of the clear impropriety of the prosecutor's comments during summation:

We disagree with the Appellate Division's conclusion that although many of the prosecutor's comments were improper, because the 'evidence of defendant's [sic] guilt was overwhelming' a reversal was not warranted. Credibility was the critical issue in the case. All of the prosecutor's improper remarks related to the credibility

of the officers' testimony. The State's entire case rested on the testimony of the officers. When a jury must choose which of two opposing versions to credit, it simply cannot be said that the evidence is overwhelming. Here, the jury's determination hinged completely on whether the jurors believed the officers' testimony or defendant Barry Frost's testimony.

[*Id.* at 87.]

This Court added:

Today we do not adopt a *per se* rule that requires reversal of every conviction whenever there is evidence of egregious prosecutorial misconduct during trial. We stress, nonetheless, 'that prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in improper expressions of personal or official opinion as to the guilt of the defendant, or [otherwise engage] in collateral improprieties of any type, lest they imperil otherwise sound convictions.' *State v. Thornton*, 38 N.J. 380, 400 (1962), *cert. denied sub nom., Thornton v. New Jersey*, 374 U.S. 816 (1963).

[*Frost*, 158 N.J. at 88.]

POINT II

THE PROSECUTOR WRONGFULLY AND PREJUDICIALLY ELICITED TESTIMONY THAT DEFENDANT WAS THE TARGET OF THE SEARCH WARRANT OBTAINED FOR APARTMENT 16D.

As explained in the Defendant's brief below (Db23)², during the trial the prosecutor improperly elicited testimony that his office had obtained a search warrant to search Apartment 16D in the Delsea Gardens apartment complex, and that Defendant was listed as the target of that warrant. (6T26-13 to 27-21; 7T59-8 to -24). That testimony was clearly improper and prejudicial, because it conveyed to the jury that a judge had been persuaded that probable cause existed to search premises believed to be occupied by Defendant.

In *State v. Milton*, 255 N.J. Super. 514 (App. Div. 1992), the defendant was convicted of possession of cocaine and possession of cocaine with intent to distribute. On appeal, the defendant contended that the trial court committed prejudicial error in permitting the prosecutor, both in his opening statement and through testimony elicited at trial, to inform the jury that the defendant was the subject of a search warrant to search the home of the defendant's mother. During that search, cocaine was found in bedrooms occupied by the defendant and his co-defendant.

² Db = Defendant's May 25, 2023 Appellate Division Brief

During the trial, the prosecutor, in his opening statement, referred to the issuance of the search warrant naming the defendant and then elicited evidence of its issuance through testimony of the State's investigator. Defense counsel objected and moved for a mistrial. The Appellate Division held that the prosecutor's reference to a search warrant naming the defendant in his opening statement and through trial testimony was severely prejudicial, and reversed the defendant's convictions.

The court observed:

As noted in the State's brief, '[t]he prosecutor further asserted that the jury could not reasonably infer defendant's guilt from the mere mention that warrants had been issued.' This is not so. Rather, the defendant was unquestionably prejudiced by the mention of the existence of a warrant to search his person. The natural inference from the mention of the warrant itself, confirmed by the cautionary instruction of the trial judge, was that sufficient independent proof had been presented to a neutral judge to believe that defendant would be found in possession of drugs. The trial judge's explanation to the jury that the burden of proof for a search warrant was less than that required for conviction at trial served to support this prejudicial inference.

We are convinced that there was no materiality or relevance between the existence of a warrant to search the person of the defendant and the case which the State was required to present under its indictment. The State's argument that it was essential for it to prove that the officers were not acting arbitrarily is entitled to no

weight since presentation to the jury of the fact that a search warrant for the premises had been issued fully satisfied the State's needs.

The State argues 'that defendant cannot control the State's presentation of its case to the jury.' While that may be true, the court must control such presentation. Even if the evidence were material and relevant, here, *Evid. R. 4* required the exclusion of the evidence because of its potential to so severely prejudice the defendant's right to a fair trial. Defendant was by the State's action denied his right to a fair trial, and, if for no other reason, his conviction would have to be reversed.

[*Id.* at 520-21.]

In *State v. Alvarez*, 318 N.J. Super. 137, 148, 155 (App. Div. 1999), the court reversed the defendant's convictions of weapons possession offenses, because of the prejudicial testimony elicited by the prosecutor that the weapons were found at premises occupied by the defendant after a police search of the premises pursuant to an arrest warrant for the defendant and a search warrant for the defendant's residence. On appeal, the defendant argued that the State's numerous references to the search warrant during trial constituted prejudicial error. The Appellate Division agreed, reversing the defendant's convictions and noting:

We see no reason why either of these warrants needed to be injected into this case. This is not a case like *State v. Battle*, 256 N.J. Super. 268 (App. Div.), *certif.*

denied, 130 N.J. 393 (1992), in which the credibility of the officers' account was in issue thus warranting revelation of the information. The trial judge could have acceded to defendant's request that the police testify that they were at 101 Coleman Avenue to 'serve legal papers.' He also could have advised the jurors that the police were lawfully at the premises or that they should not be concerned as to why the police were there. Any one of these alternatives would have laid the issue of police presence to rest without referring to an arrest warrant. Likewise, after defendant was arrested, all that needed to be said was that his room was searched. There was absolutely no need to refer to a search warrant at all. In short, the references to the arrest warrant (which were challenged below) and to the search warrant (which were not raised below) violated [*State v. Milton*, 255 N.J. Super. 514 (1992)] and were clearly capable of producing an unjust result. R. 2:10-2. As a consequence, defendant did not receive a fair trial.

[*Id.* at 148.]

Accordingly, the prosecutor's clearly prejudicial references during opening statements and trial testimony to the search warrant naming Defendant constituted reversible error and requires reversal of Defendant's convictions.

CONCLUSION

Even by comparison to the prosecutorial misconduct described in *State v. Williams*, 244 N.J. 592, *State v. Rose*, 112 N.J. 454, and *State v. Frost*, 158 N.J. 76, the misconduct in this case was far more egregious. Defendant was charged with relatively low level CDS crimes, including only one count of distribution,

two counts of conspiracy to distribute – one of which was dismissed – and two counts of possession of CDS. Defendant was acquitted of a charge of weapons possession by a convicted felon.

In a disproportionate and excessively inflammatory effort to assure that Defendant was convicted of the charges against him, the prosecutor prejudicially exaggerated the severity of the charges against Defendant by telling the jury that the case against Defendant was similar to the crimes described in the television drama called *The Wire*, a long-running highly popular TV show about narcotics distribution in Baltimore. The TV show featured violence, contract killings, intimidation and a vast network of narcotics distribution bearing no relationship whatsoever to the low-level and isolated offenses of which Defendant was accused. Even the Appellate Division acknowledged that *The Wire* may have been “one of the most violent television series ever produced, and one that depicted brutal murders, gang violence and sexual assault.” *Butler*, slip op. at 21.

That direct comparison that the prosecutor made by describing the case against Defendant as “similar” to *The Wire* was utterly outrageous and overwhelmingly misleading. The only overlap between the TV show and the investigation of Defendant is that a wiretap was featured in the TV show, and

one was used by investigators in Defendant's case. But that one small similarity hardly justified the analogy which was falsely presented to the jury by the prosecutor. This Court simply cannot, and should not, tolerate or sanction such a clear instance of prosecutorial misconduct.

Similarly, the flagrantly improper testimony elicited by the prosecutor from Sergeant Breslin that the Cumberland County Prosecutor's Office had a Major Crime Unit to which he was assigned, that the Unit investigates "shootings, homicides and suspicious deaths," and that he currently was "the lead agent on a large scale weapons trafficking and narcotics investigation out of Millville in 2016," was obviously intended to mislead the jury into believing that the relatively minor charges against Defendant were connected to a much broader and more serious investigation into narcotics and weapons trafficking in Millville. That testimony was outrageously unfair and bore a striking resemblance to inadmissible "other crime" evidence. Combined with the prosecutor's bizarre comparison of Defendant's investigation to *The Wire* TV show, the unfairness and prejudice to Defendant had to be overwhelmingly prejudicial.

Moreover, the State's clearly improper references at trial to the search warrant naming defendant Butler was highly prejudicial and constituted an independent ground for reversal of defendant's convictions.

Because of that clear and unjustifiable prejudice to Defendant, this Court should reverse his convictions and remand for a new trial.

Respectfully submitted,

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