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January 8, 2025

Honorable Chief Justice and
Associate Justices of the
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625

Re: State v. Gerald W. Butler
Docket No.
App. Div. Docket No. A-1275-22

Honorable Justices:

Please accept this letter, on behalf of defendant-petitioner Gerald Butler, in support of his petition for certification. Butler respectfully disagrees with the Appellate Division's decision from December 31, 2024, affirming his convictions. State v. Butler, unpublished opinion, Docket Number A-1275-22 (App. Div. Dec. 31, 2024) (Dpa 1-39).¹ In support of his petition, Butler respectfully relies upon the arguments made in his Appellate Division brief.

¹ Dpa = Petitioner's Petition for Certification appendix

In this letter, he primarily addresses the Appellate Division’s holdings that: 1) it did not constitute reversible prosecutorial misconduct to compare Butler’s case to The Wire and tell the jury the case was “about gun violence in the City of Millville”; and 2) it was not improper for the State to elicit testimony suggesting that Butler was involved in organized crime and was the target of a search warrant. (Dpa 18-23) The Appellate Division’s holdings communicate that prosecutorial misconduct has no bounds or consequences. This Court should grant certification to ensure that the State stays within the limits of appropriate commentary and evidence. See Rule 2:12-4.

This was a case where Gerald Butler was charged with possessing with intent to distribute contraband found in an apartment (apartment 16D), and selling drugs on one occasion to Joshua Phillips. Little evidence tied Butler to the items in the apartment or the sale, and the evidence regarding the apartment was particularly weak — the apartment was not leased to Butler, and no witness saw him possess the drugs or guns found inside. The State needed to overcome these obstacles and convince the jury that Butler was sufficiently connected to the items such that he possessed them with the intent

Db = Petitioner’s Appellate Division brief
Da = Petitioner’s Appellate Division appendix
Sb = State’s Appellate Division brief

to distribute. Rather than rely on admissible evidence, the State committed blatant prosecutorial misconduct that could have influenced the jury's verdict.

First, the prosecutor in opening compared this case to The Wire, a famous television show about gang violence and organized crime and drug-dealing in Baltimore. In State v. Williams, 244 N.J. 592 (2021), this Court reiterated that prosecutors must confine their commentary to the evidence, and focused on the particular problem of pop culture references. The Williams Court reversed the defendant's robbery conviction because of the prosecutor's prejudicial comparison between the defendant and Jack Nicholson's character in The Shining.

Here, likewise, the comparison of this case to The Wire was extremely improper and prejudicial. The Appellate Division held that the prosecutor's reference to The Wire served "to reasonably introduce [the jurors] to the concept of a wiretap, which was at the core of the State's case." (Dpa 21) The Appellate Division's holding flies in the face of Williams. If the prosecutor wanted to "reasonably" introduce the concept of a wiretap, the prosecutor was required to do so without comparing Butler's case to one of the most violent television series ever produced. The prosecutor put the image of a show about organized crime and drug-dealing before the jury at the very beginning of the case. As the jurors heard circumstantial evidence tying Butler to apartment

16D, they had this image in the back of their minds. The comparison clearly could have made the jury more likely to find that Butler used the apartment as part of some organized drug distribution scheme, as well as sold drugs to Phillips.

Moreover, the Appellate Division erroneously concluded that although the prosecutor's summation commentary that the case was about "gun violence in the City of Millville" was improper, it was not reversible error since the jury acquitted Butler of the gun charge. (Dpa 22) This rationale defies logic. The jury plainly could have found that although the evidence was insufficient to tie Butler to the gun in apartment 16D, his connection to "gun violence in the City of Millville" made him a bad person who was more likely to distribute drugs out of apartment 16D and to Phillips.

Second, and relatedly, the Appellate Division was incorrect to find no reversible error in the prosecutor's elicitation of testimony that the officers in Butler's case were part of the "Organized Crime Bureau," conducting a "large-scale" operation into "weapons trafficking" tied to "violence" and "shootings" in the community, which led them to focus their attention on Butler. (Dpa 22-23; Db 19-23) The Appellate Division reasoned that because the testifying officer "made clear the unsuccessful undercover gun purchase that brought defendant to the attention of police 'did not involve Mr. Butler' and was

related to another target,” the testimony “broadly described only the impetus for the investigation that led to defendant’s arrest.” (Dpa 22-23)

The Appellate Decision’s rationale is flawed in two respects. First, the testimony did far more than broadly describe the impetus behind investigating Butler. Rather, the testimony suggested that Butler was connected to a large-scale weapons trafficking operation. This testimony violated basic evidentiary principles, as it was far more prejudicial than probative. N.J.R.E. 403. It carried minimal probative value, as the officers could have simply testified that Butler became a target in the course of another investigation, and it was extremely prejudicial, because, as with The Wire comparison, it communicated to the jury that Butler was part of a much larger and more nefarious operation than the evidence would permit. Moreover, as with the prosecutor’s summation commentary, the fact that Butler was acquitted of the gun charge does not render the error harmless. The jury could have easily found that someone involved in organized crime and weapons trafficking was more likely to be involved in large-scale drug distribution.

Further, the Appellate Division failed to address Butler’s argument that he was denied a fair trial because the prosecutor elicited testimony that the search of apartment 16D was conducted pursuant to a search warrant and that Butler was listed as the target of that warrant. (Db 23) The Appellate Division

broadly characterized Butler's argument as challenging testimony that "there were search warrants for the apartment and the Nissan vehicles." (Dpa 23) But Butler specifically challenged the testimony that he was listed as the target of the search warrant. (Db 23) This testimony violates two cases, State v. Milton, 255 N.J. Super. 514 (App. Div. 1992) and State v. Alvarez, 318 N.J. Super. 137, 147-48 (App. Div. 1999). (Db 23)

In a more recent case, State v. McDonough, 337 N.J. Super. 27, 32-34 (App. Div. 2001), this Court acknowledged that sometimes testimony about a warrant is acceptable and found it acceptable there, but this Court distinguished Milton and Alvarez. This Court noted that the reason the warrant references were improper in Milton and Alvarez was because in both cases, the defendants were charged with contraband found in a house that they shared with others. Thus, references to search and arrest warrants targeting the defendants improperly suggested that extra evidence was presented to the warrant-issuing judge pointing to the defendants' guilt that was not shown to jury. McDonough, 337 N.J. Super. at 34 (citing State v. Bankston, 63 N.J. 263, 271, (1973)).

This case suffers from the same exact problem. Butler was charged with contraband found in a house leased to another and used by many. (Db 9-12) The evidence at trial did not explain why he was listed as the target of the

warrant, so the officer's testimony impermissibly suggested that the police had other evidence tying Butler to the contraband in apartment 16D. In a case where the critical fact for the State to prove was Butler's connection to the apartment, the officer's testimony was extremely prejudicial.

In sum, the prosecutor in this case made inflammatory comparisons in opening and summation and elicited entirely improper testimony in order to secure a conviction. Without the impermissible commentary and testimony, there is a significant likelihood the jury would have returned a different verdict. The Appellate Division decision in this case condones flagrant prosecutorial misconduct. This Court should grant certification in order to right that wrong and curb prosecutorial excesses.

Butler relies on his Appellate Division brief for Points II, III, and IV, which primarily relate to the alleged drug transaction between Butler and Phillips; however, Butler seeks to briefly address several of the Appellate Division errors on these points.

Beginning with Point II, Butler argued that Phillips's testimony that he bought drugs from Butler should have been excluded from trial because Phillips properly invoked his Fifth Amendment right not to testify. (Db 25-34) First, the Appellate Division was wrong that Phillips could not invoke his Fifth Amendment right to remain silent because he could not be charged with any

crimes arising out of the drug purchase. (Dpa 26) To the contrary, at the time of trial Phillips was serving a Recovery Court sentence for the crime about which he was being asked to provide testimony. A person serving a Recovery Court sentence can invoke their Fifth Amendment rights because they can be terminated from the program at any time and re-sentenced to a lengthy term of incarceration. (Db 25-30) Thus, Phillips had a right not to testify, and the court's order threatening incarceration and compelling Phillips to testify resulted in involuntarily coerced testimony.

The Appellate Division was also incorrect that Butler lacks standing to challenge Phillips's testimony. (Dpa 26) The Appellate Division cites State v. Baum, 199 N.J. 407, 417 (2009), but Baum is readily distinguishable. Baum holds that defendants cannot assert the Fifth Amendment right of another to obtain relief in their own cases. Baum, 199 N.J. at 417-18. Baum did not address a situation like this where a witness properly asserts his constitutional right not to testify at the defendant's trial, and the defendant is challenging the court's decision to compel that witness to testify on appeal. To the extent there is any ambiguity in the law regarding a defendant's standing in the instant circumstances, certification should be granted to resolve that issue.

The Appellate Division further erred in finding that the trial court's threat to hold Phillips in contempt was invited error. (Dpa 26) An error is

invited only when defense counsel leads the court into error and the court relies on the defense's erroneous position. State v. Jenkins, 178 N.J. 347, 358-59 (2004). That did not happen here. Defense counsel mistakenly stated that it was an option to hold Phillips in contempt, but counsel emphasized that his first choice would be to have Phillips consult with an attorney. (6T 134-5 to 135-14) The court independently decided to threaten to jail Phillips, resulting in Phillips's decision to testify. (6T 143-11 to 144-19, 210-12 to 23)

Turning to Point III, even if Phillips's testimony was admissible, reversal would still be required because the jury was not properly instructed on how to evaluate Phillips's inherently unreliable out-of-court identification of Butler as the seller. (Db 37-46) The Appellate Division's claim that "[t]he instructions the court provided accurately explained the manner in which the jury should consider both in-court and out-of-court identifications" runs contrary to State v. Henderson, 208 N.J. 208 (2012) and the model charge. (Dpa 27)

Finally, turning to point IV, without Phillips's testimony and identification, the only evidence connecting Butler to the drug sale came from the officer who testified, in direct violation of State v. McLean, 205 N.J. 438 (2011), that he observed a suspected narcotics transaction between the driver of a Trans Am (Phillips) and the driver of a Nissan (suspected to be Butler). (Db 34-37) The Appellate Division brushed off this error as harmless, noting

that Phillips's testimony and identification pointed to defendant. (Dpa 26-27) But for the reasons discussed above and in defendant's Appellate Division brief, Phillips's testimony was inadmissible.

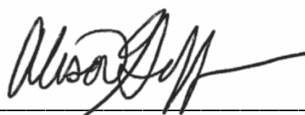
Put simply, had Phillips's testimony and the officer's opinion testimony been properly excluded, the evidence connecting Butler to the alleged drug sale with Phillips was extremely weak. These errors cannot be written off as harmless.

Thus, in addition to raising critical questions about prosecutorial misconduct, this Court should grant certification on points II, III, and IV because they raise important issues about standing in the Fifth Amendment context, instructional errors on identification, and opinion testimony.

Finally, even if this Court agrees with the Appellate Division that the errors raised by Butler do not individually require reversal, cumulatively they deprived him of a fair trial, and this case presents the opportunity to discuss the doctrine of cumulative error.

Respectfully submitted,

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CERTIFICATION

I certify that this petition is being filed in good faith, presents a substantial question, and is not filed for the purpose of delay.

Dated: January 8, 2025


ALISON GIFFORD

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