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SUPREME COURT OF NEW JERSEY
DOCKET NO. 090237

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Certification Granted from a Final Judgment of the Superior
v.	:	Court of New Jersey, Appellate Division.
GERALD W. BUTLER,	:	
Defendant-Petitioner.	:	Ind. No. 18-03-266
	:	Sat Below:
	:	Hon. Allison E. Accurso, P.J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Katie A. Gummer, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-PETITIONER

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May 9, 2025

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

While prosecutors are tasked with obtaining convictions, they also have a duty to refrain from inflammatory or unethical advocacy. In Gerald Butler's case, the prosecutor violated that duty.

Butler was charged with several offenses, including possessing contraband found in an apartment, conspiring to distribute drugs, and distributing drugs on one occasion. Butler was not charged with any gang-related or violent offenses. The evidence against Butler was circumstantial and depended largely on his tenuous connection to the apartment.

Knowing that Butler's case suffered from major evidentiary holes, the State compared his case to The Wire – a well-known drama series about drug trafficking, gangs, and street-level violence; made comments and elicited testimony that Butler's case was about organized crime, gun violence, and large-scale narcotics and weapons trafficking; and repeatedly referred to Butler as the target of the search warrant for the apartment.

These errors communicated to the jury that Butler was a criminal gang member and that the State had evidence outside the record connecting Butler to the charged crimes. Thus, these errors, individually and cumulatively, risked conviction based on improper grounds. This Court's intervention is necessary to reign in prosecutorial misconduct and ensure that prosecutors confine their commentary and questioning to the evidence.

PROCEDURAL HISTORY

On March 28, 2018, a Cumberland Grand Jury returned Ind. No. 18-03-266 charging defendant-appellant Gerald Butler with: second-degree conspiracy to possess a controlled dangerous substance (CDS) with the intent to distribute, N.J.S.A. 2C:5-2a(1), (2) and N.J.S.A. 2C:35-5b(2) (Count 1); third-degree conspiracy to distribute CDS, N.J.S.A. 2C:5-2a(1) and N.J.S.A. 2C:35-5b(3) (Count 2); third-degree distribution of CDS, N.J.S.A. 2C:35-5b(3) (Count 3); two counts of third-degree possession of CDS, N.J.S.A. 2C:35-10a(1) (Count 4 and 7); second-degree possession of CDS with the intent to distribute, N.J.S.A. 2C:35-5b(2) (Count 5); second-degree possession of a weapon while committing a CDS offense, N.J.S.A. 2C:39-4.1 (Count 6); and possession of a weapon by a convicted person, N.J.S.A. 2C:39-7b(1) (Count 8). (Da 39-41)[1]

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[1] Dsa = Appendix to Defendant's supplemental brief
Dpa = Appendix to Defendant's petition for certification
Db = Defendant's appellate brief
Da = Appendix to Defendant's appellate brief
Sb = State's appellate brief
PSR = Presentence Report
1T – September 10, 2018 (motion)
2T – February 22, 2022 (motion)
3T – May 24, 2022 (motion)
4T – June 10, 2022 (trial)
5T – June 14, 2022 (trial)
6T – June 15, 2022 (trial)
7T – June 28, 2022 (trial)

The State had indicted Butler twice prior to this indictment, but those charges were ultimately dismissed. (Da 1-15, 27-29, 35-38)

Prior to trial, defense counsel submitted several motions in limine.[2] In a memorandum dated March 25, 2022, defense counsel made the following argument:

> In prior testimony in the within matter detectives have testified that, at the time of the within investigation they were assigned to "the gangs, guns and drugs" unit of their respective agency or they were assigned to the "organized crime" unit of their agency. The use of the terms "organized crime" and/or "gang unit" has specific negative connotations and misleads the jury into believing that Mr. Butler was being investigated as a "gang member." There are no gang member charges in the within matter. Therefore, the unit to which a particular officer is assigned has little or no probative value. To the extent that there may be any probative value, it is substantially outweighed by undue prejudice, confusion of issues and/or misleading the jury. Defendant respectfully requests that the officers be limited to telling the jury their rank and department of affiliation and be instructed not to mention the unit to which they were assigned.
>
> [(Dsa 6)]

8T – June 29, 2022 (trial)
9T – August 29, 2022 (motion)
10T – October 3, 2022 (sentencing)
11T – November 7, 2022 (sentencing)

[2] Two of these briefs are included in defendant's supplemental appendix to demonstrate that an issue was raised in the trial court. R. 2:6-1(a)(2).

In that same memorandum, counsel requested that witnesses be prohibited from testifying about search warrants because "[t]he fact that probable cause was found by a Superior Court Judge is prejudicial and confusing because the jury is not permitted to use the Court's finding to presume or infer guilt on the charges." (Dsa 7) Similarly, in a brief filed March 24, 2022, counsel asked the court to prohibit testimony referring to Mr. Butler as the "target" of the investigation, arguing that such testimony was inadmissible under Rule 403. (Dsa 15)

On May 24, 2022, the trial court held a hearing on several pretrial motions. (3T) Regarding the detectives' testimony that they worked for the "Organized Crime Bureau," the court agreed with the prosecutor that "they can call themselves what they call themselves." (3T 27-20 to 28-11) Defense counsel responded, "[M]y concern is actually with the term 'organized crime.' I mean, it makes it sound like La Cosa Nostra kind of thing." (3T 28-12 to 15) The court noted that it could provide the jury with a limiting instruction, and defense counsel asked for some time to think about "[w]hether or not [a limiting instruction] highlights it more than I would want it to be." (3T 28-16 to 29-11) The court issued an order several days later denying the defense motion "to prohibit members of the Organized Crime Bureau . . . from

referencing the name of their unit," but noting that it would consider a proposed limiting instruction. (Da 46)

Regarding any reference to a search warrant, counsel reiterated his objection to "any testimony with respect to a search warrant." (3T 14-19 to 15-8) All parties agreed that the search could be referred to as a "lawful search" (3T 25-23 to 26-21), and the court's order reflected this agreement. (Da 46)

A bifurcated trial was held concerning Counts 1 through 7 on June 10, 14, 15, 28, and 29, 2022. (4T-8T) On June 29, 2022, the jury acquitted Butler of Count 6, charging possession of a weapon while committing a CDS offense, and found him guilty of the remaining counts. (Da 146-148) In light of the jury's acquittal, the judge dismissed the certain persons charge. (Da 151)

Butler was sentenced to an extended term of 15 years imprisonment with 7.5 years of parole ineligibility for second-degree possession of CDS with intent to distribute (Count 5), and a concurrent sentence of 5 years imprisonment with 2.5 years of parole ineligibility for third-degree distribution of CDS (Count 3). The remaining convictions merged. (Da 152-155)

Butler appealed (Da 156-159), raising seven points in his Appellate Division brief. (Db i-iv) On December 31, 2024, the Appellate Division reversed Butler's conviction for third-degree conspiracy to distribute CDS but

affirmed his remaining convictions. (Dpa 2, 27-28, 39) The Appellate Division also remanded for resentencing. (Dpa 2, 32-29)

Butler petitioned for certification, and on April 1, 2025, this Court granted certification, "limited to the issues identified as Point 1 in defendant's letter petition . . . including generally (i) defendant's challenges to statements by the State referencing the television show The Wire; testimony elicited by the State that defendant was the subject of a search warrant; and references to the 'Organized Crime Unit,' gun violence, and trafficking in the City of Millville; and (ii) whether the cumulative effect of the purported errors deprived defendant of a fair trial." (Dsa 1)

This brief follows.

STATEMENT OF FACTS

Much of the testimony at trial focused on a large-scale drug and weapons trafficking investigation conducted by the police in 2016, with several law enforcement officers testifying that the investigation was conducted by the "Organized Crime Bureau" of the Cumberland County Prosecutor's Office.

Sergeant Ryan Breslin testified that in 2016, he was working for the Organized Crime Bureau, serving as the lead agent on a "large scale weapons trafficking and narcotics investigation out of Millville." (4T 101-5, 104-18 to 24) The investigation was called "Operation That's All Folks." (4T 104-25 to 105-4) Breslin explained that the Organized Crime Bureau "conducted narcotics and weapons-related investigations" and that "one of [their] primary objectives was to conduct proactive investigations into narcotic trafficking within the county." (4T 104-2 to 18) Four additional officers who testified against Butler stated that they were working for the "Organized Crime Bureau" on "Operation That's All Folks" in 2016. (5T 60-18 to 63-2) (Lieutenant Steven J. O'Neill, Jr.); (6T 16-25 to 18-22) (Lieutenant Joseph P. Hoydis, Jr.); (7T 11-22 to 14-3) (Sergeant Chris Rodriguez); (7T 29-21 to 31-18) (Detective Lynn Wehling).

Breslin testified in detail about Operation That's All Folks, telling the jury that the operation "target[ed] individuals that had been involved in violence in the city of Millville, as well as weapons trafficking throughout the county." (4T 105-5 to 9) When asked how the investigation began, Breslin testified that the police received information about several shootings being conducted within the city of Millville. (4T 106-8 to 10) Breslin testified that as the investigation progressed, they "were able to identify an individual selling firearms in the county," and they "targeted that individual as well as the other group that [they] believed to be involved in these shootings." (4T 107-10 to 14) The police obtained wiretaps and began intercepting phone calls on three different lines as part of this investigation, intercepting hundreds of sessions. (4T 109-6 to 15, 114-5 to 8) Butler was not one of the initially targeted individuals. (4T 109-6 to 15, 103-23 to 109-5)

In late August or early September of 2016, the police attempted to conduct a firearm purchase using an undercover officer with one of the targets of the investigation. (4T 108-1 to 109-5) Though this purchase was not completed, the suspected seller called another number, 856-392-3763, on September 6, 2016, asking "when can I go get that from old boy?" (4T 109-16 to 22, 117-18 to 118-4, 119-14 to 25; Da 47-48) The police did not know who this number belonged to, so Breslin searched the phone number on Facebook,

which linked to a profile with the name "Fast Life Blizzy Ho." (4T 117-24 to 118-1, 124-21 to 125-10) Breslin and another officer testified that Butler was depicted in the profile photos. (4T 125-11 to 128-25; 5T 74-7 to 10)

The police obtained authorization to intercept this line, which became another target of the investigation. (4T 120-21 to 122-17) Several intercepted calls and texts were admitted into evidence, many of which contained missing words and were indiscernible. (4T 129-17 to 151-3; 5T 4-20 to 22-20; Da 47-144) The State presented an expert in CDS distribution and networks, who testified to his understanding of the meaning of the "coded language" in the calls and texts. (4T 51-21, 61-1 to 80-4) The State alleged that the intercepted conversations used slang terms relating to drugs and reflected individual buyers seeking to purchase drugs from Butler. (4T 20-19 to 21-22; 8T 39-21 to 56-23) Two of the calls mention "the Gardens" or "Delsea Gardens." (4T 135-7 to 136-1; Da 58, 72)

On the transcript of the calls and text messages, the officers transcribed who they believed the writer of the message was or who they believed the voices belonged to. (5T 44-18 to 45-9; Da 47-144) On one call, a participant responds "yes" when asked if he was "Mr. Butler." (Da 53)

Lieutenant O'Neill listened to a call made on September 12, 2016, and identified the voice heard as belonging to Butler. (5T 60-18, 61-19 to 23, 63-

17 to 66-4) He maintained that he was familiar with Butler's voice because six years prior, in 2010, he had a 35-minute conversation with him, during which Butler said his nickname was Blaze. (5T 64-20 to 65-13, 67-25) O'Neill acknowledged, however, that he had not had any contact with Butler since that time. (5T 68-12 to 13) Prior to making the identification, O'Neill was aware that the police believed that the phone belonged to Butler and had seen the Facebook profile. (5T 71-17 to 19, 73-25 to 75-16) He did not prepare a report documenting his identification until 2020. (5T 72-21 to 73-3, 75-1 to 10)

During the weeks of September 11 and 18 of 2016, Breslin conducted surveillance of the Delsea Gardens apartment complex during which he twice observed Butler entering apartment 16D. (5T 22-21 to 24-16) He also saw Butler driving a Nissan Maxima. (5T 24-7 to 16, 28-23 to 29-16, 30-25) The vehicle was not registered to Butler. (5T 29-22 to 25)

On September 23, 2016, Lieutenant Hoydis, Jr,. conducted surveillance of Delsea Gardens. (6T 16-25, 18-8 to 22, 20-8 to 15) From 100 yards away, Hoydis observed a driver of a Trans Am approach a driver of a Nissan in the parking lot. (6T 21-6 to 22-9, 46-4 to 7) He never saw the person in the Nissan, did not see any money or drugs, and could not see anybody's hands. (6T 46-21 to 47-17, 49-1 to 10) Nonetheless, Hoydis testified multiple times

that he observed "what I believed to be a narcotics transaction[.]" (6T 20-23 to 25, 21-22 to 23, 22-5 to 6)

Sergeant Rodriguez conducted a motor vehicle stop of the Trans Am. (7T 11-22, 17-7 to 19) He arrested the driver, Joshua Phillips, who was in possession of two wax bags containing suspected heroin and one colored rock substance suspected to be cocaine. (7T 18-13 to 22-19) One of the seized items was later tested and determined to be heroin. (6T 204-18 to 22)

When arrested, Phillips, who was "on a lot of drugs" and high at the time, told the police he bought narcotics from a person he knew as "B." (7T 91-8 to 92-13, 96-1 to 13, 102-21 to 103-9) A year and a half later, he made an out-of-court identification of the seller as a person in the Facebook page found by Breslin. (7T 92-1 to 16; Da 145)[3] He could not remember if the police showed him this single photograph or an array. (7T 94-6 to 8) He explained: "they brought me in there, they showed me that photograph, asked me to sign it, brought up some names of some people and that was it. I was high enough to not care and just get the hell out of there." (7T 94-11 to 15) The police mentioned "Gerald, or Gerald Butler" and "then just kind of eluded to the fact that that's who Blaze was." (7T 95-22 to 24) At trial, he thus testified he bought drugs from a person named Blaze and made an in-court identification

[3] This identification was apparently not recorded.

of Butler as the seller, stating that he "may or may not have been him," and explaining that he only "vaguely" remembered that day (7T 86-4 to 87-15)

"Operation That's All Folks" concluded on September 28, 2016, with "arrests made" and "searches . . . conducted" of multiple locations and vehicles. (5T 31-20 to 32-7; 7T 52-10 to 53-2, 58-1 to 4)

As part of this takedown, the police searched apartment 16D. (5T 31-20 to 32-3) Despite the court's pretrial ruling, multiple officers testified about the existence of a search warrant, and they specified that Butler was the target of the search. The prosecutor asked Breslin, "And who was the target of the search for Apartment 16D?", and Breslin responded, "Mr. Butler." (5T 32-11 to 13) During Hoydis's testimony, the prosecutor asked, "For your search did you have a name in terms of a person?" (6T 26-7 to 8) Hoydis responded, "I know it was Rafael Gonzalez' apartment. As far as who was on the actual search warrant, I don't recall." (6T 26-13 to 15)[4] After confirming that he had seen the search warrant, Hoydis looked at his police report and testified that Butler was the target of the search. (6T 26-11 to 27-21) Likewise, the prosecutor asked Wehling if the police had a target for the search of 16D. (7T 35-11) Wehling responded that she "believe[s] that there were several people involved with that apartment," and that she "can't recall specifically whose

[4] The apartment was leased to Gonzalez. (6T 37-3 to 20)

name was on the search warrant but the investigation did involve Mr. Butler." (7T 35-24 to 36-3) Butler was not seen at the apartment on the day of the search. (6T 60-12 to 17)

Upon arrival at 16D, the officers found Adam Yurdock sitting on a chair in the living room next to a sofa where a child was laying. (6T 51-18 to 53-5; 7T 34-16 to 35-1) A .38 caliber gun was found shoved in between the cushions of that sofa couch. (6T 52-12 to 53-5) The police also found bags of suspected heroin and cocaine, wax folds, various caliber bullets, a comb, and three spent .38 cartridges. (6T 38-24 to 39-17; 7T 37-6 to 38-23) Several of these items, as well as other contraband, were found upstairs in Gonzalez's personal bedroom, including: a bag containing a brown substance in the air conditioning vent; a bag containing suspected heroin; numerous empty blue wax folds; and a .22 caliber gun in the closet along with paperwork addressed to Gonzalez and bags of suspected crack cocaine. (6T 53-6 to 55-18, 61-12 to 14, 71-22 to 73-16; 7T 70-20 to 73-21) Other bags of suspected cocaine were found in a kitchen cabinet along with two scales. (6T 60-18 to 61-11; 7T 79-7 to 16) Of the suspected drugs found, two bags cumulatively weighing 14.676 grams were tested and determined to contain heroin; two other bags cumulatively weighing 20.362 grams were tested and determined to contain cocaine. (6T 30-22 to 35-8, 203-13 to 22, 204-3 to 8)

Yurdock testified that he had slept on the couch the night before the search and that Butler had also stayed over. (6T 149-14 to 150-2, 158-9 to 161-18, 164-1 to 169-21) He explained that it was very common for friends to gather at Gonzalez's apartment to "watch[] sports, play[] sports . . . stuff of that nature." (6T 167-21 to 168-11) Yurdock claimed that he did not know about any of the contraband found in the house and that he did not remember being charged with anything arising from the search. (6T 152-6 to 7, 157-2 to 4, 161-20 to 162-11)[5]

Gonzalez testified that on September 16, he received a phone call that his house was "being raided." (6T 67-11 to 18) He returned home and was told that it was a raid for Butler. (6T 68-2 to 7, 120-10 to 15) Upon arrest, Gonzalez gave a statement implying that Butler possessed one of the guns and some of the drugs in his home, telling the police that Butler was living there at the time, slept on the couch, and kept items in the kitchen cabinet. (6T 79-16 to 80-2, 116-10 to 119-7)[6]

At trial, Gonzalez recanted his police statement, stating that he did not know who the drugs belonged to and that he had never seen Butler with a gun.

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[5] Yurdock received Pretrial Intervention. (Da 34)

[6] Gonzalez admitted ownership of the .22 caliber gun found in his bedroom and was convicted in 2016 of possessing that weapon while committing a CDS offense. (6T 68-14 to 69-4, 71-2 to 11, 123-24 to 124-4; Da 30-33)

(6T 70-8 to 23, 79-6 to 7) Gonzalez testified that at the time of his police statement, he was taking drugs and "in the wrong state of mind." (6T 72-2 to 13) Gonzalez explained that he "put the blame" on Butler because he was so angry that Butler got his house raided, and he was worried about losing his home and custody of his children. (6T 79-16 to 80-2, 120-2 to 121-3, 122-1 to 14)

Gonzalez explained that he, Yurdock, and Butler were friends and that Butler stayed at his house a few times but never lived there. (6T 66-5 to 67-23, 70-1 to 7, 76-3 to 25, 77-13 to 20) Contrary to Yurdock, Gonzalez testified that Butler did not stay at his house the night before the search. (6T 70-24 to 71-1) Gonzelez also testified that there were "a lot of people sleeping and coming in and out of" his house. (6T 70-1 to 7, 76-3 to 25)

On the same day that 16D was searched, Sergeant Raymond Cavagnaro located a Nissan Maxima parked outside a doctor's office. (5T 78-6, 81-2 to 82-22) Butler and a pregnant woman – later identified as Tiffany Parker – exited the office, entered the Nissan, and drove away. (5T 82-19 to 84-8, 87-11 to 21) The officers stopped the vehicle at 1:40 p.m. and arrested Butler, who was the passenger in the car, pursuant to an arrest warrant. (5T 84-16 to 85-19) A search of Butler revealed $875. (5T 86-8 to 14)

The vehicle was searched pursuant to a search warrant. (5T 88-3 to 17; 7T 33-9 to 17, 49-19 to 22) Two phones were found in the vehicle: an LG and a Cricket phone. (5T 124-6 to 21; 7T 42-8 to 15) The car contained a t-shirt with the words "Fast Life," as well as Butler's identification documents. (7T 47-17 to 49-13) The police seized a total of $25. (7T 42-12 to 18) No drugs, drug paraphernalia, or weapons were found on Butler, Parker, or in the car. (7T 55-16 to 56-10)

Detective Nicholas Barber conducted extractions on the phones found in the vehicle. (5T 94-1, 98-16 to 99-1) On the LG phone were messages from September 28, 2016, saying "they behind your house with dog and gun" and "they just raided 16D." (5T 110-3 to 24) A message from the day before reads: "bro, this my new number….Blaze." (5T 111-12 to 15) The Facebook messenger account on the phone was for the username Fast Life Blizzy Ho. (5T 114-16 to 25) Breslin testified that the cell tower data for this phone indicated that, at some point, it had been close to the Delsea Gardens apartment complex. (5T 127-25 to 128-22) The Cricket phone belonged to Parker and contained messages with a person named "Blaze." (5T 116-19 to 118-19) "Fast Life Blizzy Ho" was listed as a contact. (5T 118-20 to 119-3) Parker engaged in a Facebook message with Fast Life Blizzy Ho on September

27th during which she asked: "Are you coming to the doctor's tomorrow?" (5T119-4 to 14)

Butler was acquitted of possessing the weapons found in apartment 16D, but he was convicted of possessing with intent to distribute the narcotics found in the very same apartment, conspiracy, and the single distribution to Phillips. No officer ever saw Butler possess any narcotics. No fingerprints or DNA linked Butler to any of the contraband found in Gonzalez's apartment or seized from Phillips upon his arrest.

LEGAL ARGUMENT

POINT I

THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT IN OPENING BY COMPARING BUTLER'S CASE TO THE TELEVISION SHOW THE WIRE. (4T 32-22 to 34-2)

This case involved the discovery of narcotics and weapons in an apartment, and several alleged drug sales during September of 2016. It did not involve allegations of violent or gang-related crimes. Yet, the prosecutor introduced Butler's case to the jury by comparing it to the widely popular and controversial television show The Wire, which depicts ruthless drug-dealing gangs in Baltimore. Less than five years ago, in State v. Williams, 244 N.J. 592 (2021), this Court warned prosecutors against making prejudicial comparisons of a criminal defendant to someone commonly associated with violence or guilt, as they run contrary to prosecutors' mandate to obtain convictions based on the evidence. The prosecutor in this case failed to heed this Court's warning, and in so doing, deprived Butler of a fair trial. Reversal is warranted to respect Butler's constitutional rights and reign in prosecutorial misconduct. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 1, 10.

A prosecutor's discretion during opening and closing arguments is not without bounds. While prosecutors are permitted to make "vigorous and forceful" arguments, they must "refrain from improper methods" and "use

legitimate means to bring about a just conviction." State v. Smith, 167 N.J. 158, 177 (2001) (citations omitted). This is because "the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done." Ibid. (quoting State v. Frost, 158 N.J. 76, 83 (1999)). Because "[a prosecutor's] comments during opening and closing carry the full authority of the State," courts "cannot sit idly by and condone prosecutorial excesses" that occur during these phases of trial. State v. Spano, 64 N.J. 566, 568 (1974).

When it comes to opening and closing arguments, prosecutors commit misconduct when they fail to "confine their comments to evidence . . . and reasonable inferences to be drawn from that evidence." Smith, 167 N.J. at 178; see also State v. Rose, 112 N.J. 454, 520-21 (1988) ("[A] prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.") (citation omitted); State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008) ("[P]rosecutors must limit their remarks to the evidence, and refrain from unfairly inflaming the jury.") (citations omitted). When prosecutors stray from the evidence, they risk "imply[ing] that facts or circumstances exist beyond what has been presented to the jury and encroach[ing] upon a defendant's right to a fair trial." State v. Williams, 244 N.J. 592, 613 (2021).

Here, the prosecutor began her opening statement by comparing the investigation against Butler to the television show The Wire. (4T 18-14 to 19-12) Specifically, the prosecutor told the jury:

> 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 bit bigger than that, because all those guns and drugs go together. This is also a case about a phone intercept, that'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.
>
> [(4T 18-14 to 20-2)]

The prosecutor went on to tell the jury that the police overheard drug sales and gun sales on the targeted lines. (4T 20-3 to 10) The prosecutor alleged that one of the targeted lines led them to wiretap another number purportedly belonged to Butler. (4T 20-10 to 21-3) The prosecutor returned to The Wire at the end of her opening, stating, "I end with this. That very much like the show The Wire, sometimes the targets tell on themselves." (4T 32-15 to 17)

Defense counsel objected, calling the references to pop culture "over the top." (4T 33-21 to 33-12) The court overruled the objection, concluding that the reference was not "overly prejudicial." (4T 33-16 to 18)

To understand how wrong the trial court was, it is essential to provide some background on The Wire. The show aired on HBO from 2002 to 2008 and takes place in Baltimore during that time. See Eric Deggans, "Why the Wire Is the Greatest TV Series of the 21st Century," BBC (Oct. 19, 2021)[7]

[7] Available at https://www.bbc.com/culture/article/20211015-why-the-wire-is-the-greatest-tv-series-of-the-21st-century (last accessed May 9, 2025).

From 2003 to 2009, Baltimore was one of the most dangerous cities in the country. Danielle Kurtzleben, "The Eleven Most Dangerous U.S. Cities," U.S. News & World Report (Jan. 24, 2011).[8] The show depicts the "crack down on the illegal drug trade, known as 'the War on Drugs'." Deggans, "Why the Wire Is the Greatest TV Series of the 21st Century."

The show portrays Detective McNulty, who "manipulates the police department into going after a particularly efficient and ruthless crew of drug dealers in West Baltimore – eventually using the listening devices that give the show its name." Ibid. The State's Appellate Division brief describes some of the show's key characters: Stringer Bell, "the criminal mastermind"; Avon Barksdale, "the ruthless and violent drug kingpin"; and Omar Little, "the shotgun-wielding outlaw." (Sb 21) The show is primarily situated in a housing project, where "Barksdale's gang controlled the heroin distribution." Ron Cassie, "'The Wire' Twenty Years Later," Baltimore Magazine (June 2022).[9]

One need only search for the word "murder" on The Wire's Wikipedia page to understand how pervasive this type of violence was over the course of

[8] Available at https://www.usnews.com/news/cities/slideshows/the-11-most-dangerous-us-cities?onepage (last accessed May 9, 2025).

[9] Available at https://www.baltimoremagazine.com/section/artsentertainment/the-wire-twenty-years-later/ (last accessed May 9, 2025).

five seasons. Wikipedia, "The Wire."[10] In fact, murder is present from the very first scene, which depicts a "young Black man . . . blankly staring at his just-murdered buddy." Cassie, "'The Wire' Twenty Years Later." The man was murdered by his peers for stealing marijuana. Ibid.

The prosecutor's opening encouraged the jury to associate Butler with the "ruthless crew of drug dealers in West Baltimore." Deggans, "Why the Wire Is the Greatest TV Series of the 21st Century." The prosecutor opened her case by telling the jury that in The Wire, there was "a rash of crime" happening in Baltimore, which "seemed very organized," and required a wiretap to find out "how the guns and drugs were flowing in the community." (4T 18-20 to 19-11) The prosecutor then said "[t]hat's similar to this case," and described the "rash of violence that was happening throughout Millville and throughout the summer of 2016," which required the "Organized Crime Unit" to "get on a wire." (4T 19-12 to 22) While Butler was not the original target of the investigation, the original targets led the police to wiretap a phone number allegedly belonging to Butler. The prosecutor's opening plainly implied that Butler was at the center of a criminal enterprise like the one depicted in The Wire.

[10] Available at https://en.wikipedia.org/wiki/The_Wire (last accessed May 9, 2025).

The comparison between Butler's case and The Wire was wholly improper, as the show was obviously outside the evidence and the comparison was far from a fair comment on the evidence. Butler was not charged with murder, narcotics trafficking, or any gang-related offenses. Yet, the prosecutor strayed from the evidence and drew a parallel between Butler and the violent, drug-dealing gang members of The Wire.

This Court recently addressed a similar example of prosecutorial misconduct in State v. Williams, 244 N.J. 592 (2021). In Williams, the defendant was on trial for bank robbery. Id. at 599. The evidence showed that the defendant passed the teller a note saying, "Please, all the money, 100, 50, 20, 10. Thank you." Ibid. He did not verbally threaten the teller or display a weapon. Ibid. "The central issue at trial was whether defendant committed second-degree robbery -- theft using force or the threat of force -- or third-degree theft[.]" Ibid. To convince the jury that the defendant's actions made him guilty of robbery despite the polite wording of the note, the prosecutor focused on the theme "actions speak louder than words." Id. at 600. In summation, the prosecutor showed the jury a still photograph from the movie The Shining. Id. at 599-600. The photograph "depicted Jack Nicholson in his role as a violent psychopath [using] an ax to break through a door while attempting to kill his family," as he says the innocuous words "Here's

Johnny!" Id. at 600. The slide stated, "ACTIONS SPEAK LOUDER THAN WORDS." Ibid.

This Court found reversible error in the prosecutor's actions. Id. at 615-16. This Court reiterated that "comments by a prosecutor . . . that stray beyond the evidence and the reasonable inferences therefrom are inappropriate and improper" and found that "[t]he prosecutor here, in an attempt to establish that [the teller] feared for her wellbeing because of defendant's conduct, went far beyond the evidence at trial to draw a parallel between defendant's conduct and that of a horror-movie villain." Id. at 615 (citation omitted). This Court warned that that "[p]rosecutors 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." Id. at 617.

Despite this clear admonition, the prosecutor here made a near identical error by associating Butler with the violent, drug-dealing criminals in The Wire. Like The Shining, The Wire is a widely popular piece of media, and it is almost certain that some members of the jury would have seen the show. The prosecutor's comments encouraged the jurors to discuss the show during deliberations and draw both conscious and subconscious connections between The Wire and Butler's case. In other words, the prosecutor's behavior tainted

the lens through which the jurors evaluated the actual evidence against Butler. This is textbook misconduct. Williams, 244 N.J. at 607, 615.

As in Williams, the comparison was so prejudicial that reversal of Butler's convictions is warranted. In deciding whether prosecutorial misconduct deprived the defendant of a fair trial, our courts consider: "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Williams, 244 N.J. at 608 (citation omitted). Trial counsel in this case promptly objected, but the trial court improperly overruled the objection and gave no instruction. (4T 33-16 to 18)

The question then becomes whether the prosecutorial misconduct was harmless. An error is not harmless if there is a "some possibility" that it "led the jury to a result it otherwise might not have reached." Williams, 244 N.J. at 608-09. Here, the prosecutor's comparison of Butler's case to The Wire could have impacted the jury's verdict because it communicated that Butler was a violent, drug-dealing gang member with a propensity to commit crimes in a case where the evidence was far from overwhelming.

When a prosecutor makes an extra-evidentiary comment that associates the defendant with violence or guilt, the risks are twofold. First, the prosecutor

risks "imply[ing] that facts or circumstances exist beyond what has been presented to the jury." Williams, 244 N.J. at 613; see also State v. Feaster, 156 N.J. 1, 59 (1998) ("A prosecutor is guilty of misconduct if he implies to the jury that he possesses knowledge beyond that contained in the evidence presented, or if he reveals that knowledge to the jury."). The prosecutor's comparison of Butler's case to The Wire plainly implied personal knowledge that Butler was involved in organized drug-dealing and other crimes, when the prosecutor's commentary – and the jury's verdict – were required to be based on the evidence alone. State v. Wakefield, 190 N.J. 397, 437 (2007) ("[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge [by the prosecutor] are apt to carry much weight against the accused when they should properly carry none.") (citation omitted)).

Second, the prosecutor creates the risk that the jury will conclude the defendant is responsible for other crimes and is therefore guilty of the crimes he is on trial for, i.e., the same risks associated with Rule 404(b) evidence. Rule 404(b) sharply limits the admission of other crimes and wrongs.[11] This is

[11] Rule 404(b) states that "evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition," except that "[such] evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." The admissibility of other-crimes evidence is governed by the four-

because prior-conduct evidence "has the effect of suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is more probable that he committed the crime for which he is on trial." State v. Willis, 225 N.J. 85, 97 (2016) (internal quotation marks and citation omitted); see also State v. Blakney, 189 N.J. 88, 93 (2006) (recognizing "the danger that other-crimes evidence may indelibly brand the defendant as a bad person and blind the jury from a careful consideration of the elements of the charged offense").

Thus, our courts have explicitly told prosecutors not to imply that the defendant is guilty of other crimes. See, e.g., Williams, 244 N.J. at 600, 615-16 (reversible misconduct to compare a defendant on trial for nonviolent robbery to movie character who uses an ax to break through a door while attempting to kill his family); State v. Pennington, 119 N.J. 547, 572, 575 (1990) (holding that it was "clearly inappropriate" for a prosecutor to refer to a defendant as a "professional," "for whom robbery was a way of life," because it "implied that [the] defendant had committed other robberies" that were not in evidence); State v. Van Atzinger, 81 N.J. Super. 509, 515-17 (App. Div. 1963) (holding that the prosecutor committed reversible error by calling the defendant a "bum", "hood", and "punk" in summation, as these terms are

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part test in State v. Cofield, 127 N.J. 328, 338 (1992). Even if such evidence is relevant, it must be excluded unless "its probative value outweighs its prejudicial impact." Id. at 336.

"plainly associated" with "habitual lawbreaker[s]" and "obviously . . . invited [the jury] to consider [defendant's] past criminal record as evidence of his criminal character and consequently indication not only of present guilt but also of his likelihood to go out and commit fresh crimes if not convicted").

As with the cases above, the prosecutor's comparison of Butler's case to The Wire, which implied gang membership, invited the jury to speculate about Butler's responsibility for crimes outside of those charged in the indictment. See State v. Goodman, 415 N.J. Super 210, 227-28 (App. Div. 2010) ("The mere fact, or even allegation, of gang membership carries a strong taint of criminality.") (citation omitted). As with evidence of actual criminality, the prosecutor's statements in this case implied criminality and thus "risk[ed] conviction because the jury [] conclude[d] defendant is a bad person with a propensity to commit crimes." State v. Herbert, 457 N.J. Super. 490, 494-95, 508-12 (App. Div. 2019) (citing State v. Skinner, 218 N.J. 496, 514 (2014); State v. Rose, 206 N.J. 141, 180 (2011)). The risk that the jury used The Wire comparison for propensity purposes was particularly high in this case, where improper testimony and commentary throughout trial likewise implied Butler was a criminal gang member. See infra, Point II.

The prejudicial nature of the prosecutor's comments warrant reversal because Butler's guilt was a "close call." Williams, 244 N.J. at 616. The jury's

verdict turned on whether it found that Butler possessed with intent to distribute the contraband in 16D, distributed drugs on one occasion to Joshua Phillips, and conspired with others to commit the charged crimes. (Da 39-41)

The evidence tying Butler to the contraband in 16D was weak – he was not there when the apartment was searched (6T 60-12 to 17); the apartment was leased to Gonzalez (6T 37-3 to 20); and much of the contraband was found in Gonzalez's personal bedroom. (6T 53-6 to 55-18, 61-12 to 14, 71-22 to 73-16; 7T 70-20 to 73-21) No witnesses testified that they saw Butler possess the contraband. Gonzalez – who implied Butler possessed the contraband in his police statement – recanted this statement at trial. (6T 70-8 to 72-13, 79-3 to 80-2, 116-10 to 119-7, 120-2 to 122-14)

While Sergeant Breslin testified that he twice observed Butler entering apartment 16D (5T 22-21 to 24-16), and some of the phone evidence mentions the Gardens or the apartment (4T 135-7 to 136-1; 5T 110-3 to 24; Da 58, 72), this is not surprising given that Butler was part of a friend group that would often gather at Gonzalez's home. (6T 65-17 to 21, 77-13 to 20, 162-17 to 163-19, 167-21 to 168-11) The fact that the jurors acquitted Butler of the gun charge shows that they saw holes in the State's case linking Butler to the contraband. (Da 148)

The State's evidence of conspiracy depended on Butler's tenuous connection to 16D and the intercepted calls and texts, which were hard to understand. (4T 129-17 to 151-3; 5T 4-20 to 22-20) To the extent these messages showed buyers agreeing to purchases drugs from Butler, "a simple agreement to buy drugs is insufficient to establish a conspiracy between the seller and the buyer." State v. Roldan, 314 N.J. Super. 173, 182 (App. Div. 1998). In fact, the Appellate Division reversed one of the conspiracy counts, finding the evidence "legally insufficient to demonstrate [Butler] had conspired with Phillips." (Dpa 27) While the Appellate Division found the evidence sufficient to sustain the remaining conspiracy conviction, it suffered from the same weakness as the reversed count, i.e., it failed to show more than a mere agreement between a buyer and a seller. (Db 46-50)

Regarding the suspected drug exchange with Phillips, the surveilling officer could not see the seller, or any money or drugs exchange hands. (6T 46-21 to 47-17, 49-1 to 10) Phillips's out-of-court identification of Butler as the seller was suggestive (Db 37-44), and his testimony at trial that Butler "may or may not have been" the seller was weak at best. (7T 86-4 to 87-15)

Against this backdrop, the prosecutor's insinuation that Butler was part of a large-scale and violent drug-dealing network could have tipped the scales in the State's favor as the jury considered whether Butler possessed with intent

to distribute the CDS in 16D, conspired with others to distribute CDS, and distributed drugs to Phillips. Reversal is warranted.

As a final note, the Appellate Division did not dismiss the prosecutor's statements as harmless error, but rather, the court found no error at all, concluding that the prosecutor relied on The Wire "to reasonably introduce [the jurors] to the concept of a wiretap, which was at the core of the State's case." (Dpa 21) The law does not permit the use of inflammatory, extra-evidentiary content to make a point. See, e.g., Williams, 244 N.J. at 599-600, 615-16 (holding it was reversible misconduct for the prosecutor to show The Shining photograph to illustrate the point "actions speak louder than words"); State v. Holmes, 255 N.J. Super. 248, 249, 251-52 (App. Div. 1992) (holding it was reversible misconduct for the prosecutor to tell jurors that the testifying officers in a simple drug possession case had no reason to lie because of "the particular drug problem that we have in this country, particularly Newark" and "the war on drugs"). The prosecutor here was required to introduce the well-known and straightforward concept of wiretap without discussing a prejudicial television show.

Clearly, despite this Court's holding in Williams, prosecutors and lower courts are failing to recognize the line between proper and improper commentary. Butler respectfully requests that this Court right the Appellate

Division's wrong both to protect his constitutional rights and curb prosecutorial misconduct. State v. Trinidad, 241 N.J. 425, 463 (2020) (Albin, J., dissenting) ("[P]rosecutors and courts must know that when they commit egregious errors that mortally cut into the fair-trial rights of a defendant, there will be real consequences.").

POINT II

REVERSAL IS REQUIRED BECAUSE THE TRIAL WAS FILLED WITH IMPROPER OFFICER TESTIMONY AND PROSECUTOR COMMENTARY SUGGESTING THAT BUTLER WAS A CRIMINAL GANG MEMBER. (PARTIALLY RAISED BELOW)[12]

The jury was repeatedly told that Butler was being investigated by the "Organized Crime Bureau" as part of large investigation into narcotics, gun trafficking, and violence in Millville. This testimony was entirely irrelevant to Butler's case. The prosecutor echoed the improper testimony in opening and summation, telling the jury that the investigation by "the Organized Crime Bureau" was about "a rash of violence" and "gun violence in the City of Millville." (4T 19-12 to 20; 8T 56-24 to 57-8) These statements were highly

[12] Defendant's pretrial motion to preclude testimony by the officers that they were part of the "Organized Crime Bureau" was denied. (Da 45-46) His objection to Breslin's testimony that the investigation began because the police "received information about several shootings being conducted within the city of Millville" was overruled. (4T 106-8 to 107-14) The remaining errors alleged on appeal were not objected to at trial.

prejudicial – as with The Wire comparison, they suggested that Butler was involved in organized drug-dealing and other violent crimes. Reversal is required. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 1, 10.

"'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Even if relevant, evidence must be excluded "if its probative value is substantially outweighed the risk of undue prejudice, confusion of issues, or misleading the jury." N.J.R.E. 403(a).

In Butler's case, ample testimony was admitted that fails this basic relevance test. First, five officers testified that they were working for the "Organized Crime Bureau" on an investigation called "Operation That's All Folks," which ultimately led to Butler's arrest. See (4T 102-23 to 105-4) (Breslin); (5T 60-18 to 63-2) (O'Neill, Jr.); (6T 16-25 to 18-22) (Hoydis, Jr.); (7T 11-22 to 13-21) (Rodriguez); (7T 29-21 to 31-18) (Wehling); see also (4T 19-12 to 20) (prosecutor discussing "Organized Crime Bureau" in opening).

The name of the unit investigating Butler was wholly irrelevant to his case and highly prejudicial. As defense counsel argued, the term "organized crime" "has specific negative connotations and misleads the jury into believing that Mr. Butler was being investigated as a 'gang member.'" (Dsa 6); see also (3T 28-12 to 15) (defense counsel highlighting his "concern" with the term

"organized crime," as "it makes it sound like La Cosa Nostra kind of thing"). Counsel noted that there were no gang charges against Butler and requested that the officers "be limited to telling the jury their rank and department of affiliation." (Dsa 6) Counsel's request was denied. (3T 27-20 to 28-11; Da 46) The trial court reasoned that "they're in a specialized unit. They receive some specialized training. Doesn't necessarily mean the defendant's guilty." (3T 28-7 to 9)

This was an abuse of discretion. The officers plainly could have testified about their specialized training without mentioning the name of their unit. To the extent the name of the unit had any probative value, it was substantially outweighed by the risk of undue prejudice. (Dsa 6) As trial counsel aptly argued, the testimony implied that Butler was a gang member and carried the same risks. See Goodman, 415 N.J. Super at 226-28 (holding that evidence of gang membership should be analyzed under the heightened standard of Rule 404(b), as "the average juror would likely conclude that a gang member has engaged in criminal activity," and accordingly, "[s]uch evidence has the potential to 'taint' a defendant in much the same way as evidence of actual criminal conduct"); see also Herbert, 457 N.J. Super. at 499, 508-12 (App. Div. 2019) (reversing the defendant's convictions based on the detective's testimony "tarr[ing] defendant as a gang member" because the testimony

risked conviction based on the "conclu[sion] defendant is a bad person with a propensity to commit crimes").[13]

Moreover, numerous officers provided irrelevant and prejudicial testimony about the size, substance, and background of the investigation leading to Butler's arrest. Breslin testified that the Organized Crime Bureau conducted "proactive investigations into narcotic trafficking within the county," and that "Operation That's All Folks" was a "large-scale weapons trafficking and narcotics investigation," which "target[ed] individuals that had been involved in violence in the city of Millville, as well as weapons trafficking throughout the county." (4T 104-14 to 105-9); see also (7T 13-18 to 14-19) (Sergeant Rodriguez testimony that "it was a very large operation"). When asked how the investigation began, Breslin testified that the police "received information about several shootings being conducted within the city of Millville," and that they targeted the individuals they believed to be involved in these shootings. (4T 106-8 to 107-14) Breslin and Detective Wehling testified that "Operation That's All Folks" concluded on September

[13] While the trial court offered to provide a limiting instruction regarding the "Organized Crime Bureau" testimony, counsel expressed concern that such an instruction might "highlight[] [the testimony] more than I would want it to be." (3T 28-16 to 29-11) This was a reasonable strategic decision and does not undermine Butler's argument on appeal. See e.g., Williams, 244 N.J. at 603-04, 616 (in which trial court did not give a curative instruction because trial court and defense counsel agreed it would underscore the improper argument).

28, 2016, with "arrests made" and "searches . . . conducted" of multiple locations and vehicles. (5T 31-20 to 32-7; 7T 52-10 to 53-2, 58-1 to 4)

None of this information was relevant. It did not bear on whether Butler possessed with intent to distribute the contraband in 16D, distributed drugs on one occasion to Joshua Phillips, or conspired to commit those crimes. Instead, it encouraged the jury to speculate that the State had outside knowledge connecting Butler to the charged crimes and other crimes. Like a prosecutor, "a police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." State v. Branch, 182 N.J. 338, 351 (2005); see also State v. Tilghman, 345 N.J. Super. 571, 573, 578-79 (App. Div. 2001) (finding officer's testimony that he included the defendant's picture in a photographic array "because he knew [the defendant]" improper, as it permitted the clear inference the defendant had prior contact with police). Here, the officers' testimony that the investigation involving Butler targeted "narcotic trafficking," "weapons trafficking," "individuals . . . involved in violence," and "several shootings" plainly suggested that the officers had additional information connecting Butler to organized drug-dealing and other violent crimes.

The prejudicial nature of the officers' testimony was exacerbated by improper statements in opening and summation. In opening, the prosecutor

told jurors that the investigation leading to Butler's arrest began in response to "a rash of violence that was happening throughout Millville." (4T 19-12 to 20) In summation, the prosecutor told the jury that the case involved "a huge, wide-scale operation," which was about "gun violence in the City of Millville." (8T 56-24 to 57-8) As with the officers' testimony, the prosecutor's commentary suggested that Butler was responsible for "a rash of violence" and "gun violence in the City of Millville." Again, Butler was not charged with any shootings or violent crimes, and the prosecutor's commentary served only to make Butler seem more guilty than the evidence would permit and inflame the jury. See, e.g., Holmes, 255 N.J. Super. at 251-52 (finding plain error in a prosecutor's reference to "the particular drug problem that we have in this country, particularly Newark" and referring to "the war on drugs," as such references "were only a thinly-veiled attempt to inflame the jurors by identifying defendant with matters of public notoriety as to which no evidence was or could have been ever introduced").

While the errors above must be analyzed under a combination of plain and harmless error, together they deprived Butler of a fair trial. The Appellate Division agreed it was improper for the State to suggest that Butler was involved in shootings and other crimes, but found reversal was not warranted because the jury acquitted Butler of the gun charge. (Dpa 22-23) This

reasoning was flawed. First, the improper statements were not just about guns – they were also about organized crime and a large narcotics investigation, which go directly to the crimes of conviction. Second, the jury plainly could have found that someone involved in shootings, violence, and weapons trafficking was more likely to be involved in drug distribution. As discussed in Point I, the case was a close call. And as in Point I, the errors risked conviction based on a belief that Butler was a violent, drug-dealing gang member, as opposed to the evidence. Reversal is warranted.

POINT III

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR ELICITED REPEATED TESTIMONY THAT BUTLER WAS THE TARGET OF THE SEARCH OF APARTMENT 16D, WHICH PERMITTED THE JURY TO SPECULATE ABOUT INCRIMINATING EVIDENCE NOT PRESENTED AT TRIAL AND BOLSTERED THE STATE'S CASE AGAINST BUTLER. (Da 46; Dsa 15; 6T 26-7 to 27-5; 7T 35-11 to 23)

The biggest weakness in the State's case was the lack of evidence connecting Butler to the contraband in apartment 16D. In misguided attempts to meet its burden of proof, the prosecutor elicited improper testimony and made impermissible comments about Butler being the target of a search warrant for 16D. The prosecutor also elicited testimony about an arrest warrant for Butler and a search warrant for his vehicle. These warrant references

pervaded the trial, and they implied both that there was evidence outside the record incriminating Butler and that a warrant-issuing judge found the State's evidence credible. Because the prejudice from the impermissible warrant references could have impacted the jury's verdict, reversal of his convictions is warranted. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 1, 10.

There is over 30 years of New Jersey case law outlining the proper scope of testimony about a warrant. These cases show that while the State may offer evidence of a warrant to show that the police acted properly, they may not provide warrant details suggesting the existence of incriminating evidence outside the record. In State v. Milton, the defendant was charged with drug offenses based on evidence obtained in a search of a house he occupied with his parents and two brothers. 255 N.J. Super. 514, 516-19 (App. Div. 1992). The defense was that the drugs found in the search belonged to one of the defendant's brothers. Id. at 518-19. The Appellate Division found that while the reference to the search warrant for the defendant's house was unobjectionable, testimony and commentary concerning a warrant to search the defendant's person was unacceptable and warranted reversal. Id. at 519-21. The Appellate Division concluded that such testimony was not relevant to the State's case, and even if relevant, its prejudicial nature required exclusion, as "[t]he natural inference from the mention of the warrant itself . . . was that

sufficient independent proof had been presented to a neutral judge to believe that defendant would be found in possession of drugs." Id. at 520-21.

Similarly, in State v. Alvarez, the Appellate Division found that details regarding a search and arrest warrant required reversal of the defendant's convictions. 318 N.J. Super. 137, 145-48 (App. Div. 1999) There, the defendant was convicted of various weapons offenses based on evidence obtained in a search of a home where he lived with others. Id. at 140-43. The defense was that the weapons were not found in the defendant's bedroom and could have belonged to one of the other residents. Id.at 143. The Appellate Division found that evidence regarding the execution of the search warrant and the existence of an arrest warrant required reversal. Id. at 145-48. The court rejected the State's argument that the testimony was appropriate because it referred to a search warrant for the house as opposed to defendant's room, as "the jury heard again and again . . . [that the] defendant's room was the sole focus of police interest; it was the only room secured and the only room searched." Id. at 147-48. Coupled with "repetitive references to the arrest warrant for defendant," reversal was required because there was "no reason why either of these warrants needed to be injected into this case," and the references "suggest[ed] that a judicial officer with knowledge of the law and

the facts believed that evidence of criminality would be found in defendant's room." Id. at 148.

In State v. McDonough, the Appellate Division fleshed out just what made the warrant evidence so prejudicial in Milton and Alvarez. 337 N.J. Super. 27, 32-34 (App. Div. 2001). The court noted that in those cases, "the evidence of the warrants . . . not only indicated that a judge had found sufficient basis to justify their issuance, but also implied that the State had presented evidence to the judge that was not introduced at trial which indicated that the defendant was likely to be in possession of contraband." Id. at 34. Thus, "the evidence of the warrants . . . had the same capacity for prejudicing the defendant as the hearsay evidence of an informer's tip that the [New Jersey Supreme] Court found to constitute reversible error in State v. Bankston, 63 N.J. 263, 271 (1973), that is, that 'a non-testifying witness has given the police evidence of the accused's guilt.'" Ibid. The McDonough Court held that, unlike in Milton and Alvarez, the "passing reference[s]" to warrants in the defendant's capital murder case "did not imply that the State had presented any evidence to the issuing judge that was not also heard by the jury," as the jury heard "extensive evidence" that preceded the issuance of the warrants. Id. at 34-35; see also State v. Marshall, 148 N.J. 89, 239-40 (1997) (holding that "the fact that a warrant was issued might necessarily be put before a jury in

order to establish that the police acted properly" and distinguishing Milton, in which "a prosecutor's reference to a search warrant [] had the capacity to mislead the jury").

Moreover, a prosecutor "may not repeatedly mention that a search warrant was issued by a judge if doing so creates the likelihood that a jury may draw an impermissible inference of guilt." State v. Cain, 224 N.J. 410, 435 (2016). In Cain, this Court held that repeated references to a search warrant by the prosecutor in opening, questioning, and summation "went well beyond what was necessary to inform the jury that the officers were acting with lawful authority," "had little probative value," and "ha[d] the capacity to lead the jury to draw an impermissible inference that the court issuing the warrant found the State's evidence credible." Id. at 436 (citing N.J.R.E. 403). This Court declined to conduct a plain-error analysis of the search-warrant references since the convictions were reversed on other grounds. Ibid.

The discussion of the warrants in this case created the same prejudice as the warrant references in Milton, Alvarez, and Cain. As in Milton and Alvarez, Butler was charged with contraband found in a home that he stayed at with others. (6T 66-12 to 13, 70-1 to 7, 76-3 to 8) (Gonzalez testimony that Butler "stayed at [his] house a few times" and that there were "a lot of people sleeping and coming in and out of" his house). And as in those cases, Butler's

defense was that the contraband belonged to someone else. (4T 39-11 to 40-8; 8T 7-3 to 23-23)

The prosecutor's elicitation of testimony that Butler was the target of the search – which was conducted pursuant to a warrant – was thus wholly improper. The prosecutor asked three different officers if they had a target for their search of 16D. See (5T 32-11 to 12) (prosecutor asking Breslin, "And who was the target of the search for Apartment 16D?"); (6T 26-7 to 8) (prosecutor asking Hoydis, "For your search did you have a name in terms of a person?"); (7T 35-11) (prosecutor asking Wehling, "For the search, did you have a target?). Breslin responded "Mr. Butler." (5T 32-13) Hoydis responded that he could not recall "who was on the actual search warrant," but after refreshing his recollection from his police report, he testified that "Gerald Butler" was the target. (6T 26-11 to 27-21) Wehling responded that she "can't recall specifically whose name was on the search warrant but the investigation did involve Mr. Butler." (7T 35-24 to 36-3); see also (6T 200-18 to 23) (forensic scientist Dianna Casner testimony that "a search warrant [was] executed" on "16D").

Sergeant Cavagnaro also testified that Butler was pulled over and arrested the same day as the apartment search pursuant to an arrest warrant. (5T 84-16 to 85-19) And Detective Wehling twice testified that Butler's

vehicle was searched pursuant to a search warrant. (7T 33-9 to 17, 49-19 to 22) Then, in summation, the prosecutor stated, "[Y]ou learned about the search, September 28th, 2016, the day the entire job went down. And you know that Mr. Butler was a target of that search, as well as his Nissan." (8T 60-19 to 22) Defense counsel objected to nearly all of this testimony, but the objections were overruled.[14]

As in Milton and Alvarez, the above testimony and commentary suggested that a warrant-issuing judge received information about Butler's connection to the contraband in 16D that was not presented at trial. The only evidence the jury heard about what the police knew before entering 16D was that Butler was twice seen entering the apartment during the weeks of

[14] Despite the court's pretrial ruling directing the State to refer to search warrants as "lawful searches" (Da 46), the witnesses repeatedly mentioned search warrants. Pretrial, counsel objected to any reference to Butler as the "target" of the investigation on relevance grounds, but his objection was not addressed pretrial. (Dsa 15) At trial, defense counsel objected on relevance grounds when the prosecutor asked Hoydis and Wehling who the target of the search of 16D was, but the objections were overruled. (6T 26-7 to 27-5; 7T 35-11 to 23)

On appeal, the Appellate Division failed to address Butler's challenge to testimony that he was the target of the search of 16D. 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 most prejudicial testimony implying that he "was listed as the target of that [search] warrant." (Db 23)

September 11 and 18 (5T 22-21 to 24-16); that he was suspected of selling drugs on one occasion in the parking lot of Delsea Gardens apartment complex where 16D was located (6T 16-25 to 22-9); and that two intercepted calls mentioned "the Garden" or "Delsea Gardens." (4T 135-7 to 136-1; Da 58, 72) This evidence was far from overwhelming. Thus, testimony and commentary that Butler was the "target" of the search risked jury speculation that a warrant-issuing judge had additional evidence that Butler stored contraband in 16D.[15] Cf. McDonough, 337 N.J. Super. at 34-35 ("passing references" to search and arrest warrants not improper where "jury heard a wealth of compelling evidence against defendant and the codefendant which obviously

[15] This is true even though the State said that Butler was the "target" of the search, as opposed to explicitly saying he was listed on the search warrant. As the Milton and Alvarez courts both held, it is not necessary for the jury to hear that the defendant was listed on the search warrant if the evidence as a whole suggests that the defendant was the target of the search. See Milton, 255 N.J. Super. at 519-21 (defendant was not listed on search warrant, but existence of search warrant in conjunction with testimony that there was a warrant to search defendant's person improperly communicated that a judge believed defendant would be found in possession of drugs); Alvarez, 318 N.J. Super. at 147-48 (defendant was not listed on search warrant, but existence of search warrant plus testimony revealing that "[the] defendant's room was the sole focus of police interest" and "repetitive references to the arrest warrant for defendant" suggested that a judge "believed that evidence of criminality would be found in defendant's room"). Here, the State explicitly told the jury that Butler was the target of the search, in addition to mentioning search and arrest warrants, making his case even more problematic than Milton and Alvarez.

had been obtained before the warrants were issued"). The jury should have been told only that there was a lawful search of 16D. (Da 46)

Moreover, as in Cain, the pervasiveness of the prosecutor's improper questioning and commentary bolstered the State's case against Butler. 224 N.J. at 435-36. Between the testimony that Butler was the target of the search of 16D, testimony about the warrant to arrest Butler and search his car, and the prosecutor's comment in summation, the jury heard that the State had legal authority to pursue Butler at least eight times. As in Cain, these references "went well beyond what was necessary to inform the jury that the officers were acting with lawful authority," "had little probative value," and "ha[d] the capacity to lead the jury to draw an impermissible inference that the court issuing the warrant[s] found the State's evidence credible." 224 N.J. at 436.[16]

The improper references require reversal of Butler's convictions because they filled a major evidentiary hole in the State's case. A strong connection between Butler and the contraband in 16D was necessary for the State to obtain a conviction on all counts against Butler. It was of course necessary to

[16] While defense counsel elicited testimony from Gonzalez that it was a search targeting Butler (6T 67-16 to 68-7, 120-2 to 15), this testimony was elicited after counsel's objection to testimony referring to Butler as the target of a search warrant was overruled. (6T 26-7 to 27-5). It was reasonable for counsel to use this fact to his advantage once it was admitted – i.e., to show why Gonzalez lied and placed the blame on Butler.

prove that Butler possessed the contraband, but it was also critical in proving that Butler distributed drugs to Phillips in the Delsea Gardens parking lot and that he conspired to distribute drugs throughout September. If the jury found that Butler possessed the contraband in 16D, they were more likely to conclude that he distributed drugs as well. Thus, the improper testimony and statements implying that a warrant-issuing judge had additional evidence tying Butler to 16D and found the evidence against Butler credible placed a heavy thumb on the scale in favor of the State, warranting reversal.

POINT IV

THE CUMULATIVE IMPACT OF THE ERRORS DENIED BUTLER DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

"Even if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) (citing State v. Jenewicz, 193 N.J. 440, 473 (2008)). Each of the errors in Points I through III is sufficient to require reversal. If, however, this Court disagrees, Butler submits that the cumulative effect of these errors requires reversal. Id.

The prosecutor in opening framed the case by comparing it to a television show about organized drug-dealing and gang violence. Then, throughout trial, the prosecutor elicited testimony and made statements that the

case was about organized crime, gun violence, and large-scale narcotics and weapons trafficking. The irrelevant commentary and testimony suggested that the State had outside evidence that Butler was involved in organized drug-dealing and other crimes. Finally, references to Butler as the target of the search warrant for 16D – in conjunction with testimony about an arrest warrant and search warrant for his car – likewise suggested that the State possessed incriminating evidence not presented at trial, and that a warrant-issuing judge found the State's evidence credible.

Together, these errors created the real risk that the jurors convicted Butler not based on the evidence but on the belief that the State had additional evidence tying Butler to the charged crimes and other crimes. This is not a sound basis for a criminal conviction, and reversal is warranted.

CONCLUSION

For the foregoing reasons, this Court should reverse Gerald Butler's convictions.

Respectfully submitted,

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