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Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-47-24 *State of New Jersey v. Gerald W. Butler* (090237)
Appellate Division Docket No.: A-001275-22

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule 2:6-2(b)*, kindly accept this letter brief in the above-captioned case on behalf of amicus curiae the American Civil Liberties Union of New Jersey (“ACLU-NJ”).

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PRELIMINARY STATEMENT

Amicus American Civil Liberties Union of New Jersey submits this short brief to focus attention on one aspect of this appeal: the particular opportunity for prejudice to a defendant's right to a fair trial caused by a prosecutor's needlessly going beyond the evidence in an opening statement by analogizing the case to a work of popular culture fiction.

Prosecutors are not ordinary attorneys. Their special role in our criminal justice system demands that they subordinate their desire to obtain convictions to a higher duty of ensuring that justice is done. To that end, they must be especially careful to avoid statements or arguments that could wrongfully influence the jury.

Of all the opportunities that any lawyer has to influence how a jury will think about the lawyer's case, the opening statement is near the top of the list. Some authorities and many attorneys believe that a case can be won or lost at opening statement. Others may disagree. But no one disputes the importance of opening statements in providing jurors with a prism through which to view the evidence that will unfold at trial. For some jurors, the perspective gleaned from a prosecutor's opening may be inalterable.

Accordingly, this Court has placed strict limits on what prosecutors may say in their opening statements, circumscribing them to the evidence they

expect to present. In this case, the prosecutor, by analogizing Mr. Butler's case to the television series *The Wire*, exceeded those limitations. The motivations, intentions, actions, and crimes of the fictional characters in *The Wire* could not be and were not to be placed in evidence. But the very first thing that the jurors heard from the prosecutor in this case was that Mr. Butler's case was "similar" to the violence-laden, gangland world of *The Wire*. The clear implication of this comparison was that Mr. Butler was a centerpiece of gang-related, drug-connected violence that was terrorizing the Millville community.

There is no way of knowing how that picture affected the jurors' perception of the evidence and led to their convicting Mr. Butler. The trial court apparently agreed that the references to *The Wire* were "prejudicial," but felt that they were not "overly" so. The prejudicial impact of these references, however, did not recede during trial, but were buttressed by the repeated and unnecessary references by police officers to their investigation being under the rubric of the "Organized Crime Unit" and to the "rash of violence" in the city.

The Appellate Division panel apparently did not perceive the references as prejudicial, but simply a way for the prosecutor to explain why the State obtained a wire in this case. Surely that explanation could have been given without importing the facts of a fictional television show that focused on gang violence, painting Mr. Butler as part of that "similar" environment, before even

discussing a shred of evidence that the prosecutor actually intended to present at trial.

In short, the State did not need to resort to references to popular culture fiction to explain the evidence in this case. That it did so in a case where actual evidence linking Mr. Butler to the alleged crimes was far from robust raises a reasonable doubt as to whether the ultimate verdict was influenced by this improper argument.

This is so, amicus emphasizes, whether or not the prosecutor acted in good faith. Amicus suggests that this Court use this case to remind prosecutors of their special role in our criminal justice system, and to advise them to exercise extreme caution before resorting to extra-evidential analogies to works of popular culture and fiction that risk prejudicing defendants and denying them a fair trial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus American Civil Liberties Union of New Jersey accepts the statement of facts and procedural history as set forth in the unpublished Appellate Division opinion in this matter. *State v. Butler*, No. A-1275-22 (App. Div. Dec. 31, 2024).

ARGUMENT

I. The Prosecutor's Opening Statement Was Prejudicial and Denied Mr. Butler a Fair Trial.

A prosecutor's fundamental obligation to the criminal justice system is not to obtain convictions, but "to see that justice is done." *State v. Smith*, 167 N.J. 158, 177 (2001); *State v. Frost*, 158 N.J. 76, 83 (1999); *State v. Goode*, 278 N.J. Super. 85, 91-92 (App. Div. 1994). After all, "[i]f fairness and justice are forgotten in the pursuit of a guilty verdict, the integrity and authority of our criminal justice system is challenged." *Goode*, 278 N.J. Super. at 91-92.

Because of this special role played by prosecutors, our courts have understandably held them to high standards in their direct comments to juries, particularly in their opening and closing statements. *See, e.g., State v. Williams*, 244 N.J. 592, 600, 615-16 (2021) (closing arguments); *State v. Greene*, 242 N.J. 530, 548 (2020) (opening statements); *Smith*, 167 N.J. at 177 (closing arguments); *State v. Rose*, 112 N.J. 454, 520-21 (1988) (closing arguments).

What prosecutors tell juries in their opening statements are of special concern to the conducting of a fair trial, because of the outsize influence of opening statements on jury verdicts. *See State v. Land*, 435 N.J. Super. 249, 272 n.16 (App. Div. 2014) (compiling academic research on issue of influence of opening statements on jurors). One trial advocacy manual had touted

research “that as many as 80 to 90 percent of all jurors have reached their ultimate verdict during or immediately after opening statements.” Donald Vinson, *The Psychology of Winning Strategy* 171 (1986) (cited in *Land*, 435 N.J. Super. at 272 n.16). While the support for this claim has been questioned, see Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. Crim. L. & Criminology 17, 27 (1996), even that critical scholar does not dispute the significant influence that opening statements have on jurors:

Both lawyer lore and social science theory anticipate an influential role for opening statements. Although some scholars have taken issue with this claim and judges regularly admonish jurors to avoid becoming committed to a position before hearing all of the evidence and the judicial instructions, a long history of research reveals the crucial role played by first impressions in organizing and influencing later information-processing and judgments. Opening statements can create thematic frameworks, or schemata, that guide jurors during the trial and deliberations in their observation, organization, and retrieval of evidence.

[Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 Buff. L. Rev. 717, 742 (2006).]

A psychologist specializing in jury psychology agrees, but – of particular significance in this case – emphasizes the importance of when in the opening information is presented:

At trial, jurors perceive information presented early in an opening statement *as more valuable and meaningful*

than information presented in the middle or at the end. This not only enhances jurors' memory encoding related to that information, but it also (positively or negatively) affects processing of subsequent information presented to jurors during the opening.

[Bill Kanasky, Jr., *The Primacy and Recency Effects: The Secret Weapons of Opening Statements*, 33 No. 3 Trial Advoc. Q. 26, 26 (2014).]

In this context, our courts have set strict boundaries on what a prosecutor may say in oral argument. *See State v. Greene*, 242 N.J. 530, 548 (2020).

Specifically, a prosecutor's opening statement is limited to a recital of what the State expects in good faith to prove by competent evidence. *Id.*; *State v. Wakefield*, 190 N.J. 397, 442 (2007). The opening is intended as a "roadmap" of the evidence, and should not anticipate the closing argument. *Greene*, 242 N.J. at 548. Prosecutors who exceed these limitations do so "at [their] peril." *Id.* "In the end, 'the court must patrol the boundaries of propriety [of a prosecutor's opening statement] to ensure that [a] defendant's right to a fair trial is not compromised.'" *Id.* (quoting *State v. Timmendequas*, 161 N.J. 515, 577 (1999)).

Here, the Appellate Division surmised that the prosecutor's reference to *The Wire* in her opening was "to reasonably introduce [the jurors] to the concept of a wiretap, which was at the core of the State's case [,] . . . to explain that 'sometimes the targets tell on themselves' and that the jurors 'should focus

on what defendant' is . . . telling you what about what he's doing.' ” (Dpa 21). Even were that so, there was no reason for the prosecutor to resort to a popular culture and fictional reference, with all the potential for extra-evidence implications inherent in such reference, in order to explain these simple and self-evident concepts. *Williams*, 244 N.J. at 617 (reversing conviction where prosecutor in summations showed jury photo of Jack Nicholson in *The Shining* in order to demonstrate that seemingly innocuous words may carry dangerous meaning).

Even accepting the accuracy of the Appellate Division's assumptions, why does the prosecutor have to reference a work of fiction that will not be in evidence to have jurors understand that sometimes people “tell on themselves” or that listening in on a telephone conversation with someone might tell you “what he's doing?” That fictional characters might “tell on themselves” for whatever reasons that might fictionally happen or say what they are fictionally “doing” has absolutely no connection to the evidence that will be elicited at trial. For that reason alone, the references to *The Wire* in the prosecutor's opening statement were suspect.

The complete opening statement of the prosecutor belies even that limited, but suspect, purpose. The prosecutor placed her discussion of *The Wire* within a larger context of gang crime, with Mr. Butler at its epicenter. This was

not, in the prosecutor's telling, a case merely about whether the defendant possessed a gun and possessed or sold drugs. Indeed, it was not simply a case about guns or drugs, the prosecutor told the jury in the very beginning of her opening: ". . . [I]t's a little bigger than that, because all those guns and drugs go together." (4T 18-15 to 18-17).

Immediately following informing the jury that the case was about "all those guns and drugs," the prosecutor turned to *The Wire*, its depiction of "a rash of crime" in the community, "very organized," that people were part of a "hierarchy," following "someone's orders," that the police realized "that there was a person they needed to focus on" by getting a wire to "find out how the guns and drugs were flowing in the community." (4T 18-20 to 19-11). This case, the prosecutor said in the very opening paragraphs of her statement to the jury, was "similar" to *The Wire* (4T 19-12), and then doubled down at the very conclusion of her statement, saying that "very much like the show *The Wire*, sometimes the targets tell on themselves." (4T 32-15 to 32-20).

Maybe the prosecutor did make these statements for the innocent reasons ascribed to her by the Appellate Division. Even if the prosecutor acts in good faith in making an improper statement, however, the defendant "should not bear the consequences of the prosecutor's poor judgment" *State v. Land*, 435 N.J. Super. at 270.

Here, the trial court apparently found that the references to *The Wire* in the opening statement were “prejudicial,” albeit not “overly” so. (4T 33-16 to 33-19).¹ But the impact of an improper statement in opening “on the jury’s consideration of the issues should be resolved in favor of the accused if our dedication to the right to a fair trial is to have any meaning.” *Land*, 435 N.J. Super. at 270. Here, it is highly likely that at least one juror had seen *The Wire*, particularly in 2022, as it had been repeatedly recognized as one of the best television series of all time and viewership increased exponentially during the pandemic.²

¹ The discussion of the objection to the prosecutor’s opening and the trial court’s ruling is largely “inaudible.” (4T 33-7 to 33-25).

² *The Wire* has been named one of the best television shows of all time by *Time* magazine (2007), *TV Guide* (2013), *Entertainment Weekly* (2013), and *Rolling Stone* (2016). Wikipedia, *The Wire*, https://en.wikipedia.org/wiki/The_Wire (last visited June 6, 2025). Although, when it first aired on HBO between 2002 and 2008, it “received only average ratings. . . .,” *id.*, still somewhere between one million and four million viewers watched one or more of its five seasons. Mark Donaldson, *Why The Wire's Ratings Were So Low (Despite Being So Popular)*, Screenrant (Mar. 7, 2023), <https://screenrant.com/why-the-wire-viewership-low-popular/>. After its initial run on HBO, BET aired the show, and, beginning in 2014, a remastered version was shown on HBO Signature and HBO GO, continuing to this day on Max, and the entire series was released on DVD beginning in 2004. Wikipedia, *The Wire*, https://en.wikipedia.org/wiki/The_Wire (last visited June 6, 2025). During the beginning of the pandemic, HBO’s parent company, WarnerMedia, reported that viewership of *The Wire* had tripled on its streaming service. Yohana Desta, *Coronavirus Hits, and Finally Everyone Is Watching The Wire*, Vanity Fair (Mar. 25, 2020), https://www.vanityfair.com/hollywood/2020/03/coronavirus-the-wire-hbo?srsIltid=AfmBOopW5C_YX1eK1z6wq0410cl1ozwBrNGoz5CltrRmpWh

That Mr. Butler was acquitted of the weapons charge does not negate the probability of the opening statement's improper influence on the jury. As in *State v. Land*, "the entire tenor of the trial was skewed" by the State's implying that Mr. Butler was a central figure in city-wide gang and drug-connected violence – if not the "someone" whose orders were being followed in the gang "hierarchy." 435 N.J. Super. at 271; 4T 18-24 to 18-25. This is particularly so where, as here, the prejudice in the prosecutor's implying that Mr. Butler was part of city-wide gang violence was the first thing the jurors heard and was then buttressed by the needless and repeated references throughout trial that the investigation leading to his arrest was led by the "Organized Crime Bureau" (5T 60-18 to 63-2) (Lt. Steven O'Neill, Jr.); (6T 16-25 to 18-22) (Lt. Joseph P. Hoydis, Jr.); 7T 11-22 to 14-3 (Sgt. Chris Rodriguez); 7T 29-21 to 21-18 (Det. Lynn Wehling), the similarly unnecessary and prejudicial testimony about the "large-scale weapons trafficking and narcotics investigation" (4T 104-2 to 104-18) (Ryan Breslin), and the concluding references in the State's closing to "gun violence" in Millville. (8T 56-24 to

L9phlJrz. One analyst has estimated that the audience demand for *The Wire* is 23.7 times the demand of the average TV series in the United States over the last 30 days. Only 2.7% of all shows in this market have this level of demand. Parrot Analytics, *United States Entertainment Analytics for The Wire*, <https://tv.parrotanalytics.com/US/the-wire-hbo> (last visited June 6, 2025).

57-8). (See additional similar testimony and statements in Def.'s Suppl. Br., May 9, 2025, at 33-38.)³

Because of this prejudice, reversal of Mr. Butler's conviction is required. It is "enough that the opening statement could have contributed to the verdict to warrant a new trial where . . . the evidence of guilt was far from overwhelming." *Greene*, 242 N.J. at 550 (quoting with approval *Land*, 435 N.J. Super. at 271). That is the situation here. As set forth by Mr. Butler in his supplemental brief, there was absolutely no evidence actually connecting him to the drugs he was convicted of possessing. The apartment where the drugs were found was not his, and he was not there at the time. No one testified to seeing Mr. Butler possessing that contraband. Similarly, the testimony as to the alleged drug exchange with Mr. Phillips was bereft of any actual sighting of an exchange of drugs or money and, at best, an equivocal identification of Mr. Butler by Mr. Phillips. (Def.'s Suppl. Br., May 9, 2025, at 30-31). And the conspiracy count was based on nothing more than the legally insufficient evidence of an agreement to buy drugs. *See State v. Roldan*, 314 N.J. Super. 173, 182 (App. Div. 1998). Clearly, this record does not support that "the

³ Mr. Butler has raised these points as separate and cumulative errors, some of which are raised as plain error. Whether or not the Court finds that these points rise to the level of reversible error in themselves, they provide additional support for this Court to rule that the references to *The Wire* in the prosecutor's opening statement constituted prejudicial error.

prosecutor's opening remarks were harmless beyond a reasonable doubt," *Greene*, 242 N.J. at 554 (internal quotation marks omitted), and provides abundant reason to conclude otherwise. The prosecutor's comments were therefore "clearly capable of producing an unjust result," *R.* 2:10-2, and the conviction must be reversed.

II. This Court Should Caution Prosecutors Not to Tell Juries That the Case Before Them Is Analogous to Other Cases, Particularly Works of Fiction and in Popular Culture.

By definition, when a prosecutor tells jurors that the case before them is "similar" to some other case, particularly a work in the popular culture – be it a movie, play, book, or TV show, including pure fiction, documentaries, docudramas, or reality shows – the prosecutor is going beyond the evidence in the case. This is so whether it is telling jurors in closing that they should use the example of ultimately axe-wielding Jack Nicholson in *The Shining* to understand that people saying seemingly innocent things (like "Here's Johnny") may hide more sinister meanings, *State v. Williams*, 244 N.J. at 599, or telling jurors in opening that a case against a single defendant not charged with gang-related crimes is "the same as" the violent gang-ridden world of *The Wire*. Whatever was dramatized in that fictional work necessarily is not evidential at trial. More important, the chance for prejudice is great, as the jurors are likely to view the evidence through the prism of the fictional work –

indeed, that is precisely what the prosecutor is asking them to do. The same is true for other works in the popular culture such as “true crime” documentaries or docudramas, or “reality shows.”

Perhaps most important, it is difficult to conceive of any circumstance where it is necessary for a prosecutor to tell jurors that the case before the jury is analogous to a case that is not before the jury – particularly a work of fiction or other work in the popular culture. There is therefore no reason for this Court to allow prosecutors to risk prejudice to the accused caused by these unnecessary references.

Amicus respectfully suggests that the Court take the opportunity presented by this case to warn prosecutors to exercise extreme caution before using analogies to works of fiction or other works in the popular culture to make a point, either in opening or closing. It is an easy standard to meet, as there is no ambiguity in its application. Prosecutors must simply stick to the evidence.

CONCLUSION

Prosecutors are prohibited from referring in their opening statements to any facts other than those they intend to present by way of evidence. Telling jurors that the case before them is similar to a television show, by definition, goes beyond the evidence in the case and risks influencing jurors

impermissibly. That is what happened in this case. Accordingly, the Court should reverse the decision of the Appellate Division and remand for a new trial, and should caution prosecutors strongly to avoid bringing in extra-evidence information by way of analogizing to works of popular culture in their opening statements and closing arguments.

Respectfully submitted,



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