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Certiorari to the Colorado Court of Appeals Case No. 07CA1283	
JENNIFER LEE-RENEE WEND, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	▲ COURT USE ONLY ▲
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PETITIONER'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 9,029 words.

The brief complies with C.A.R. 28(k). It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on.

Lisa Weisz

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Attorney for Jennifer Lee-Renee Wend.

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STATEMENT OF THE ISSUE

Whether prosecutorial misconduct warrants reversal.

STATEMENT OF THE CASE

Defendant was acquitted of first-degree murder (F1), convicted of second-degree murder (F2), and on November 17, 2003 sentenced to 36 years. Defendant appealed, claiming *inter alia* a faulty provocation instruction. The court of appeals vacated the F2 conviction and ordered a remand for the prosecutor to choose either retrial or the entry of a verdict for second-degree murder by provocation (F3). The court of appeals left unresolved appellate claims that might become moot if the prosecutor chose retrial. The prosecutor declined to retry defendant, and on May 23, 2007 the trial court entered judgment on the F3 and sentenced defendant to 28 years. This is a direct appeal of the F3 conviction.

STATEMENT OF THE FACTS

Decedent was a methamphetamine manufacturer, dealer, and user with a history of domestic violence against women. (v12, p14-17;Exh.91@6:39) Decedent's ex-wife told police they had "physical arguments." (v12,p93) Once Decedent grabbed his then-wife by the hair, repeatedly punched her head, and threatened to burn her with a cigarette; he pled guilty to harassment. (v12,p29,55-60)

In late 2002 decedent's drug use escalated; he became depressed and reclusive; he had drug-induced hallucinations and attempted suicide. (v9,p68-70,p172-74;v8,p244-48,253) He developed unrequited obsession for housemate Jennifer Wend, who lived in his spare bedroom with her dog. (v8,p198-99;v9,p172;v10,p131) Jenny was petite, 125 pounds at 5'5." (v1,p3)

Decedent exhibited controlling behaviors like taking away Jenny's telephone and turning off the heat in the winter. (v11,p76) He spied on Jenny by installing surveillance equipment in her bedroom and throughout the house. (v8,p196-97;v11,p75-76;v12,p119-20) He bought two guns, gave one to defendant and told people that "either one or the other would go to jail for murder," and "if I'm lucky, she'll shoot herself." (v12,p38;v8,p256)

Jenny sought help from friends and said she feared for her life because decedent was threatening, hurting, and spying on her. (v8,p99-100,196-98,204; v11,p70-81;v12,p97-99,119-20; Exh.91@6:37-38,6:52-53,7:05-06 env#1,p464-71) Neighbors often heard them arguing. (v8,p242,253-54,271-72;v9,p22)

On December 12, 2002, decedent held a gun to Jenny's head and threatened to kill her. Jenny dialed 911 and allowed the dispatcher to listen to her argue with decedent about him threatening to shoot her. (Exh.A) Jenny told the dispatcher that officers need not respond—she mistrusted local police. The house was full of

methamphetamine precursors, and Jenny had been a vocal critic of the exoneration of Officer David Kelley for the fatal 2001 shooting of Jenny's friend "Detroit." The 911 call so angered decedent that he broke Jenny's telephone. (Exh.91@6:37-6:40,6:59-7:00,7:10; v11,p41,51)[1]

About two weeks later Jenny stayed out until 5 or 6 a.m. Decedent was angry Jenny would not have sex with him. (Exh.91;env.#1,p452;v10,p131) They argued while high on methamphetamine. (Exh.91;env.#1,p467-68;v9,p267) Jenny retreated to her bedroom's southeast corner. (v8,p112,114-16;Exh.42) Decedent pursued her and stood inside her bedroom doorway. (v8,p116) He pointed a gun at her, saying he would put her out of her misery, that she was "a piece of shit and deserved to die . . . . deserved to be eliminated," and she "didn't have any family who would give a fuck." The look in his eyes made Jenny believe decedent would really shoot this time. Jenny's dog growled; when decedent moved his gun at the dog Jenny shot decedent once. Decedent walked to his room, collapsed, and died within two minutes. (Exh.91@6:43-7:21; env#1,p466-69; v11,p84-85; v9,p260,268,275)

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[1] Jenny's statement, "I knew what was gonna happen if the cops came in there [with] hypo everywhere," refers to hypophosphorus acid—an ingredient of methamphetamine. United States v. Talamantes, 101 Fed. Appx. 310 (10th Cir. 2004) (unpublished).

Jenny moved out and vagrants rummaged through the house taking things. (v12,p65,47-51) Codefendant Randy Anderson stole decedent's methamphetamine laboratory. (v8,p130) Anderson realized his presence in the home might be captured on decedent's surveillance system, and feared being charged with murder; so he stole the surveillance equipment and moved decedent's body to a remote location. (v8,p118-19,122-24,130,174,207-10) The body was discovered and Anderson implicated Jenny.

Jenny initially denied involvement but eventually told police she acted in self-defense and provided the gun decedent was holding. Jenny told police "I didn't want to shoot him" and "I don't even know where I shot him." (Exh.91@7:21;v10,p125) Jenny had made the same self-defense claim to codefendant Anderson privately before the body was discovered and before her arrest, when she had no motive to curry favor with police. (v8,p110-116)

The physical evidence supported Jenny's story. Jenny's description that decedent was shot inside her doorway then walked into his room where he fell, was consistent with the coroner's opinion that decedent would have been able to walk a certain distance after the shot; consistent with the coroner's testimony about where blood might be found; consistent with the locations that blood was actually located by the police; consistent with the ballistics evidence that the shot was fired from a

distance greater than three or four feet; and consistent with the 10'x10' dimensions of Jenny's bedroom.[2]

The coroner testified decedent had consumed beyond-lethal doses of methamphetamine and amphetamine that would have caused psychosis, paranoia, hallucinations, aggression, extraordinary strength, and a complete lack of judgment. (v9,p267,270-74)

The State theorized Jenny deliberately killed decedent to steal his belongings and customers, but police searches of Jenny's possessions revealed nothing belonging to decedent. (v9,p228-29;v11,p101)

SUMMARY OF THE ARGUMENT

Fifteen times during opening statement and initial closing argument the prosecutor used the prohibited word "lie." In addition to those remarks, the prosecutor used euphemisms for the word "lie" such as "crocodile tears."

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[2] The cause of death was a single gunshot wound to the chest. (v9,p269) The firearms examiner testified the shot was fired from a distance greater than 3 to 4 feet. (v10,p103-05) Jenny's bedroom measured roughly 10 feet by 10 feet. (v10,p74;Exh.42) The coroner testified that after decedent was shot he would have been able to move ten feet without bleeding on his path of travel. (v9,p278-79) The hallway between Jenny's bedroom and decedent's bedroom was 3-4 feet wide. (v10,p24) There was blood on decedent's bedroom floor about two feet in from his doorway. (v9,p196,213-14,227;v10,p24) The police didn't find decedent's blood anywhere else. (v9,p227;v10,p89-90) The police thoroughly searched the scene with luminal, which detects blood even after cleaning. (v9,p197,201)

During witness examinations, the prosecutor asked four different witnesses including a police detective to improperly opine whether the defendant was telling the truth on specific occasions. Consequently, the jury heard extensive evidence that defendant lied or was untruthful on various subjects including her claim of self-defense.

The prosecutor also urged a conviction based on speculation about future criminality, denigrated the defense, and used speaking objections as an opportunity to encourage jury speculation about facts not in evidence.

Some of this conduct was accompanied by a defense objection. The prejudice was great and the evidence of guilt was not overwhelming. Defendant was denied Due Process and a Fair Trial by an impartial jury under the State and Federal Constitutions, and a new trial is appropriate.

PROSECUTORIAL MISCONDUCT WARRANTS REVERSAL

I. Standard of Review.

Commentary on matters that are extraneous to the case and prejudicial to the accused can undermine the fairness of a trial in violation of the state and federal right to Due Process and a Fair Trial by an impartial jury. Reversible error exists if there are grounds to believe that prosecutorial misconduct prejudiced these rights. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; C.R.E. 401,

402, 403; Harris v. People, 888 P.2d 259, 263-64 (Colo. 1995); People v. Jones, 832 P.2d 1036, 1040 (Colo. App. 1991).

Preserved constitutional errors require reversal unless harmless beyond a reasonable doubt. People v. Rodriguez, 914 P.2d 230, 278 (Colo. 1996). Unpreserved constitutional errors are reviewed for plain error—whether the error so undermined the fundamental fairness of a trial as to cast doubt on the reliability of the conviction. Liggett v. People, 135 P.3d 725, 733 (Colo. 2006).

Subsection IV and V fully addresses the preservation and constitutionality of the issues. In summary, sub-issues (A)-(D) were preserved at v8, p100 and at v9, p84-85, 139-40, and should be reviewed for constitutional harmless error; if this Court determines otherwise then defendant requests review for plain error. Sub-issues (E)-(G) are unpreserved and subject to plain error review.

II. Legal Principles.

The Constitution guarantees an accused the right to Due Process and a Fair Trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; Irvin v. Dowd, 366 U.S. 717, 722 (1961). The prosecutor has a duty to safeguard those rights. United States v. Young, 470 U.S. 1, 7-8 (1985); Berger v. United States, 295 U.S. 78, 88 (1935). "A prosecutor, while free to strike hard blows, 'is not at liberty to strike foul ones.'" Wilson v. People, 743 P.2d 415, 418

(Colo. 1987) (quoting Berger, 295 U.S. at 88). An accused is denied due process when the prosecutor manipulates evidence likely to have an important effect on the jury's determination. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

A prosecutor may not inflame a jury's passions or appeal to prejudice and sympathy. Viereck v. United States, 318 U.S. 236, 247 (1943); Harris, 888 P.2d at 264-65; ABA Standards for Criminal Justice, the Prosecution Function § 3-5.8(c),(d) (3d ed. 1993) (hereinafter "ABA Standards"); C.R.E. 401, 402, 403.

Opening statement should be confined to a statement of the issues and the evidence the prosecutor intends to offer. ABA Standards § 3-5.5.

A prosecutor who fails to confine his arguments to the evidence admitted at trial and reasonable inferences therefrom jeopardizes the validity of the ensuing conviction. People v. DeHerrera, 697 P.2d 734, 743 (Colo. 1985); ABA Standards § 3-5.8.

A prosecutor should not knowingly ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury. ABA Standards § 3-5.6.

A prosecutor may not express a personal belief as to the truth or falsity of any evidence or witness testimony, or as to defendant's guilt. Young, 470 U.S. at

19; Domingo-Gomez v. People, 125 P.3d 1043, 1049 (Colo. 2005); Wilson, 743 P.2d at 419; C.R.P.C. 3.4(e); ABA Standards § 3-5.8(b).

Prosecutors may not use the word "lie" to describe evidence; it is a strong expression that necessarily reflects the personal opinion of the speaker. Domingo-Gomez, 125 P.3d at 1050. "When spoken by the State's representative in the courtroom, the word 'lie' has the dangerous potential of swaying the jury from their duty to determine the accused's guilt or innocence on the evidence properly presented at trial." Id. at 1050-51.

Euphemisms for "lie" such as "made up," lack the same degree of rhetorical power but may nevertheless expose the prosecutor's opinion, depending on:

> the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction. The context in which the challenged prosecutorial remarks are made is significant, including the nature of the alleged offenses and the asserted defenses, the issues to be determined, the evidence in the case, and the point in the proceedings at which the remarks were made. Id. at 1050.

A prosecutor may not ask a witness whether another witness or defendant told the truth on a specific occasion. People v. Newbrough, 803 P.2d 155, 163 (Colo. 1990); Liggett, 135 P.3d at 730-32; People v. Lafferty, 9 P.3d 1132, 1135 (Colo. App. 1999); People v. Koon, 713 P.2d 410 (Colo. App. 1985); People v. Fields, 697 P.2d 749,760 (Colo. App. 1984) (credibility is sole province of jury).

Such improper opinions may not be admitted under the guise of demeanor. People v. Eppens, 979 P.2d 14, 18 (Colo. 1999).

A prosecutor may not denigrate defense counsel, assert that opposing counsel's motives are suspect, or suggest that the defense is not being asserted in good faith. Young, 470 U.S. at 5-6,16-18; People v. Coria, 937 P.2d 386, 391 (Colo. 1997); People v. Perea, 126 P.3d 241, 247 (Colo. App. 2005); People v. Jones, 832 P.2d 1036, 1038-39 (Colo. App.1991).

A prosecutor may not argue that the jury has an obligation to the community to convict an accused, or predict the effect of acquittal on lawlessness in the community. Viereck, 318 U.S. at 247; Harris, 888 P.2d at 265; Wilson, 743 P.2d at 420 n.8; People v. Clemons, 89 P.3d 479, 483 (Colo. App. 2003); People v. Fernandez, 687 P.2d 502, 506 (Colo. App. 1984); People v. Salazar, 648 P.2d 157, 159 (Colo. App. 1981).

Each of the foregoing principles were violated here, relative to the crucial issue of defendant's credibility, warranting reversal when viewed individually or cumulatively. Taylor v. Kentucky, 436 U.S. 478, 487-88 & nn.14 & 15 (1978); People v. Snook, 745 P.2d 647, 649 (Colo.1987). The challenged events are described below.

III. Prosecutorial Misconduct.

A. Codefendant Randy Anderson.

The first witness to testify in this trial was Randy Anderson. He met Jenny for dinner at a restaurant in November of 2002. Jenny was upset. She said decedent had threatened her with a gun, and might be spying on her with surveillance equipment. She asked to borrow Anderson's radio frequency detector to search for bugs and cameras, and to borrow Anderson's gun for protection. The prosecutor asked Anderson if he had "suspicions" about Jenny's statement:

Q: Her wanting to borrow a gun, did that cause any suspicion on your part?
A: Well, she had expressed to me that she was threatened with a gun. For her own protection I believe.
Q: What were your suspicions though?
Def: Objection, relevancy.
Ct: Overruled.
A: I really didn't know. I don't know. (v8, p100)

Asking Anderson about his "suspicions" necessarily implied that Anderson disbelieved some aspect of Jenny's story. The prosecutor was essentially asking Anderson what part of Jenny's story he disbelieved, and why. In doing so, the prosecutor improperly asked the witness for a personal opinion about whether defendant was telling the truth on a specific occasion.

Although this witness ultimately did not offer an opinion, this colloquy is important for two reasons. First, it is part of a pattern of impropriety—the

prosecutor repeatedly solicited witness opinions on defendant's veracity. Second, by objecting to this line of questioning, the defense preserved a relevancy objection to all similar types of evidence. See infra Subsection H.

B. Deborah Van Tassel

On the second day of trial, the prosecutor presented testimony from Debbie Van Tassel, who was decedent's "dope-runner." (v12,p49) The prosecutor also asked Van Tassel about her "suspicions."

Van Tassel testified that she was unable to contact decedent around Christmas, and she asked Jenny about it. Jenny claimed that decedent had left the house after an argument on either December 24 or 25 in which decedent put a gun to Jenny's head and threatened to shoot Jenny's dog. After describing Jenny's statements, Van Tassel spontaneously added, "I didn't believe it" and, " I didn't believe Mike would do something like that." Defense counsel twice objected because "the jury determines the credibility." The trial court sustained the objection but provided no curative instruction.[3] (v9,p84-85,88-89)

Van Tassel then agreed with the prosecutor's characterizations that Jenny was not telling "the truth" but was "trying to convince" Van Tassel:

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[3] The court of appeals' statement that the trial court "instructed the jury to disregard the witness' remark" is unsupported by the record. (CA op. at 24-25; v9,p84-85,88-89)

Q: [D]id you find out later that all the stuff she was telling you was not the truth?
A: I'm sorry, what?
Q: Did you find out later that all the stuff she was telling you about where Mike had gone and all that stuff was not the truth?
A: Yes. (v9,p89) . . . .
Q: Did it appear to you that her [Jenny's] worry about where he had gone was a genuine type of worry?
Def: Objection, speculation.
Ct.: Sustained. Don't answer that, Miss Van Tassel.
Q: Did you feel that she was trying to convince you that she didn't know where he had gone?
A: Yeah. (v9,p89,106)

At the prosecutor's prompting Van Tassel testified, "I suspected something was wrong," and "I was getting worried, and I just—I don't know, I felt something was wrong. Something was telling me that something was wrong." (v9,p98-99,108).

On cross, defense counsel asked one question about these "suspicions":

Q: [Y]ou're asking Miss Wend what happened . . . Did you push for more specifics?
A: No. I was just listening to her. . . . I did ask [about] him leaving and where and in what—what vehicle.
Q: So at that point are you suspicious of anything?
A: I felt something was wrong.
Q: Okay. (v9,p118-19)

The purpose for this question was to establish that Van Tassel formed her opinions about Jenny's story before Van Tassel knew of any unusual circumstances. Hence, Van Tassel's opinions were likely based on other factors that defense counsel proceeded to explore on cross—Van Tassel's dislike of Jenny,

Van Tassel's desire to be close to the increasingly distant decedent, and the fact that Van Tassel was not as close to decedent as she had portrayed.

On redirect, over a renewed defense objection the prosecutor continued to press Van Tassel about her "suspicions":

Q: And was it at that point in time that you became suspicious?
A: Well, more suspicious.
Q: Why were you suspicious then? You say you got more suspicious—
Ct: Let her answer. Let her answer.
A: I can't explain it. I just had a feeling inside that something was wrong, and I don't know how to explain that, but something was wrong.
Q: Well, when she's telling you that [decedent] had threatened her with a gun and threatened her dog with a gun, did that raise your suspicions?
A: I didn't believe her.
Q: Did that—
Def: Your Honor, same objection.
Ct: Overruled. She's already answered.
Q: Why did that raise your suspicions?
A: 'Cause I thought she did something to him." (v9,p139-40)

It was highly improper for this witness to testify to her opinion that Jenny had harmed decedent in the absence of any threats to herself or her dog. This opinion went to the heart of the self-defense claim and was deliberately elicited. The only possible answer to these questions was an improper one. The prosecutor referred the witness back to the context of her previous improper testimony and repeatedly inquired about her "suspicions" until, predictably, the witness repeated her previous improper remark that, "I didn't believe her," and further opined that

Jenny had hurt decedent maliciously. People v. Reynolds, 575 P.2d 1286,1292 (Colo. 1978) (prosecutor committed misconduct during examination; preceding testimony should have alerted prosecutor that further open-ended questioning would invite improper comments).

Van Tassel's speculations about the truth and suspicions about Jenny's veracity were improper. Even those statements that were volunteered are important to understand the pattern here. The prosecutor wasn't surprised by the volunteered statements, and pushed hard to elicit the same opinions, and more.

Whether or not it was true that decedent had voluntarily left the house, does not change the rule that a witness is not permitted to give an opinion that another individual was lying on a particular occasion. Regardless, Van Tassel's opinions went well beyond decedent's whereabouts; Van Tassel opined that Jenny and her dog were never threatened, directly undercutting the truth of the self-defense claim.

Van Tassel was a close observer of these events and a star prosecution witness. Her repeated expression of disbelief in defendant's story was damaging. Snook, 745 P.2d at 649 (improper opinion about truthfulness on a specific occasion required reversal when credibility was a focal issue).

The trial court had sustained an objection to similar testimony on direct examination. When defense counsel renewed his objection on redirect, the trial

court erred by overruling it. The fact that the witness had "already answered" did not render the court powerless or undermine the force of the objection. People v. Abbott, 690 P.2d 1263,1269 (Colo. 1984) (when accused is prejudiced by an unresponsive answer, he must *either* object, move to strike, or request a curative instruction). The trial court should have sustained the objection, told the jury to disregard, and admonished the prosecutor to refrain from such questioning.

Even as to the objection that was sustained, this Court may "look to any potential cumulative prejudice from that remark." Domingo-Gomez, 125 P.3d 1043,1053 (Colo.2005); Berger, 295 U.S. at 85 ("It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.").

The court of appeals ruled that defense counsel's *single question* about "suspicions" on cross-examination, opened the door to the testimony on redirect. Yet this question was an effort by the defense to mitigate the impact of the improper opinions introduced during direct. The direct examination placed repeated emphasis on Van Tassel's "suspicions." The overarching theme of direct was that Jenny's story was suspicious and false. It would have been derelict not to respond on cross with at least *one* question challenging that evidence.

Defendant's attempt to reduce the impact of erroneously admitted evidence did not invite the impropriety on redirect. Blades v. Dafoe, 704 P.2d 317, 323 (Colo. 1985) (anomalous to penalize party for participating in procedure which may ameliorate prejudice); Frasco v. People, 165 P.3d 701,707 (Colo. 2007) (concurrence) (no penalty for arguing evidence admitted over objection).

C. Detective Derek Graham

On the third and fourth days of trial, the prosecution presented testimony from a detective who interrogated Jenny. During the detective's testimony the prosecutor played the interrogation videotapes for the jury. The tapes were originally 5 ½ hours long and had been edited down for trial to approximately 2½ or 3½ hours. (v2,p28;v9,p286;v11,p117) The prosecutor described the videotapes as perhaps the most critical evidence in the case. (v8,p90)

Instead of playing the videotape continuously, the prosecutor periodically stopped the video and asked the detective whether Jenny was lying at specific points during the interrogation:

A: I didn't think she was telling me the truth . . . . I've done thousands of interviews . . . for the last five years, and I just didn't feel comfortable with what she was telling me. Some of it didn't make any sense to me. . . . I just got a sense that something's not right here. (v10,p141-42) . . . .

Q: So was this the truth that she was telling you there? A: No. (v11,p12) . . . .

Q: Now, what has she told you here about whether or not she's being honest with you? A: She's still being honest with me about everything she's told me up to this point. (v11,p14)

Q: [W]hen you say, "You've always been very honest with me," is that a true statement . . .? A: That's a technique. I mean, she's been lying to me, but I was doing some rapport building. (v11,p30-31) . . . .

A: I got the impression that she was gonna go with that theme or that story [that Anderson was the shooter]. (v11,p33-34) . . . .

A: So what she was telling me was a lie. (v11,p37) . . . .

Q: And does she also tell him the truth? A: No. (v11,p39) . . . .

A: I was just seeing how forthcoming she was as far as whether she was telling me the truth or not. That was a lie. (v11,p40). . . .

Q: [D]id she try to insinuate to you or try to get you to think that she was being honest with you? A: Oh, lots. . . . I was telling her, you know, "You did this. You know, I need to know why," and again a lie." (v11,p105) . . . .

Q: How many murder suspects have you interviewed?

A: In my eight years I've been in homicide, I've worked on approximately a hundred homicides. I've interviewed thousands of people. Suspects, probably about 40 to 50. . . . .

Q: Have you ever had anyone that was trying to be more convincing than she was about what the truth was?

A: Oh, she was right up there. I mean, I've had people that tried to convince me that they didn't do something where they ultimately confess to doing it, but she tried very hard to lead me to believe that she was being truthful with me and not lying to me. (v11,p106).

Some statements that the detective characterized as lies were actually true or the subject of an evidentiary dispute.[4]

The defense theory was that Jenny was basically an honest person who withheld one fact—the shooting—out of fear. The prosecutor's theory was that Jenny lied about everything. Because Jenny didn't testify, the videotaped interrogation was the jury's only opportunity to hear Jenny speak and assess her credibility for themselves. People v. Matheny, 46 P.3d 453, 458 (Colo. 2002) ("whether true or false, the videotaped confession is probative of Defendant's credibility"). The detective's opinions infringed upon the province of the fact-finder, foreclosed alternative explanations for these evidentiary discrepancies, were

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[4] For example, Jenny told police the shooting occurred 12/25 when she returned from Wal-Mart. The detective testified Jenny lied, because Wal-Mart was closed. (v11,p37) But another interpretation is that Jenny was mistaken and the shooting occurred 12/24. At the time of the shooting Jenny hadn't slept for three or four days, and afterwards slept 24 hours. (v10,p132; env.#1,p325-26) A neighbor heard a gunshot on 12/24. (v9,p21) Jenny told others that the altercation occurred on 12/24. (Randy v8,p110-111; Debbie v9,p86; Marion v12,p35-37) The prosecutor admitted in opening that he was "not really sure" when the shooting occurred, but "it's pretty close to around Christmas Day." (v8,p84)

Another example is the detective's testimony that Jenny "lied" when she said Randy Anderson never photographed her, because Anderson's camera had contained a picture of Jenny—fully clothed. (v11,p40; People's Exhibit 84) What Jenny said is that Randy had never taken *naked* pictures of her. (Exh.91@5:59; env.#1,p457) This was an important issue, because the prosecution argued that Jenny seduced and exploited decedent and Anderson. (v12,p155-56;153,180)

irrelevant, and primarily served to "simply make the defendant look bad." Liggett, 135 P.3d at 731-32.

The impropriety was compounded since the detective was a member of the prosecution's team, who expressed his opinions as if they were irrefutable facts, and who bolstered his opinions by comparing Jenny to the "thousands" of other people he had interviewed—characterizing Jenny as among the most deceitful in this group. Wilson, 743 P.2d at 418-19; Young, 470 U.S. at 18-19; Domingo-Gomez, 125 P.3d at 1052 (improper for prosecutor to reveal that case underwent screening process); State v. Cordova, 51 P.3d 449, 455 (Idaho App. 2002) (officer who accused defendant of lying had an "aura of superior knowledge" by virtue of training and experience).

Police opinions regarding a defendant's credibility are so prejudicial, that some jurisdictions disallow them even when they appear *in* the video as an interrogation technique, thus any segments where the interrogator accuses the defendant of lying must be redacted. State v. Elnicki, 105 P.3d 1222, 1225-1230 (Kan. 2005) (compiling cases). Here, the issue is not a mere interrogation technique. Detective Graham swore under oath before a jury that Jenny was lying.

The court of appeals issued no ruling regarding the detective's testimony despite the filing of a petition for rehearing requesting a ruling on this claim. (PR

at 7) By arbitrarily refusing to resolve that claim, the court of appeals violated defendant's right to Due Process. § 13-4-106 (court of appeals shall decide all matters before it); U.S. Const. amends. V,XIV; Colo. Const. art. II, § 25; Evitts v. Lucey, 469 U.S. 387,393 (1985) (if state creates appellate process it must comport with Due Process); Peterson v. People, 113 P.3d 706, 708 (Colo.2005).

D. Marion McNary

On the fifth day of trial, the prosecutor presented testimony from the decedent's ex-wife Marion McNary. The prosecutor invited McNary to comment on Jenny's truthfulness on a specific occasion:

Q: If [Jenny] ever told anyone that you told her that he [decedent] used to beat you—
A: That would be a lie. (v12,p29)

Such "were they lying" questions are prohibited. Liggett, 135 P.3d at 729-32. It was improper for the prosecutor to elicit an opinion about defendant's truthfulness on a specific occasion. McNary's testimony, along with that of Anderson, Van Tassel, and Graham, is part of the pattern of the prosecutor deliberately eliciting witness opinions about Jenny's veracity. The court of appeals deemed this colloquy error but not reversible.

E. Prosecutor's opinion that defendant lied and defense lacked merit.

During opening statements and initial closing argument, the prosecutor repeatedly used the prohibited word "lie" and euphemisms for "lie" to express his

personal opinion that Jenny lied and that the self-defense claim was meritless. The opening statement included:

> [Y]ou'll hear ***lie after lie after lie after lie*** from Jennifer Wend about what happened. (v8,p86) . . . . For about the first half part of it ***same lies, same lies***. . . . . you all decide at the very, very end of this case whether or not self-defense even holds any water at all. And at the close of the case ***we're*** gonna give you reasons why ***we don't feel that it does***. (v8,p89-91)

Initial closing argument included:

> "I'm the one who shot him." January the 17th, 2003, the defendant tells that to Detective Derek Graham after ***weeks of games***, calling back and forth, of ***lies and lies and lies and lies***. You could hardly keep count of ***all the lies*** . . . and then ***all the lies*** in the second interview. . . . Not just to the police, but to a few other folks . . . . They heard ***these lies***, too. . . . she couldn't ***keep lying***. . . . ***she took Derek Graham's bait***. "Why?" "I shot him." "Why did he make me do it?" ***Crocodile tears***. . . . . The defendant figured ***they're buying this self-defense story***. . . . Is that ***another lie***, too? (v12,p148,154-56)

The prosecutor used the prohibited word, "lie," as well as euphemisms for "lie" such as 'crocodile tears." The sweeping nature of these arguments misleadingly suggests that all of Jenny's statements were false. In fact, the interrogating detective acknowledged that much of the information provided by Jenny was *true*, and consistent with her other statements and the physical evidence. (v11,p69-103)

It was inappropriate for the prosecutor to state in opening that "we" would provide the jury with reasons why "we" don't feel that the self defense claim holds

water. (v8,p90-91) The word "we" apparently referred to the prosecutors individually, or collectively to the prosecutors, police, prosecution witnesses, and other representatives of the State who had contributed to this prosecution. Domingo-Gomez, 125 P.3d at 1052-53 (comments expressing the prosecution's personal knowledge constitute misconduct). In this context, the prosecutor's accusations that Jenny was a liar, were expressions of personal opinion that crossed the line into misconduct.

Because these remarks occurred in opening statement and initial closing argument, they could not have been precipitated by any subsequent arguments by the defense. Defendant's opening and closing did concede that Jenny initially lied about *one* thing—what happened to decedent. (v8,p92;v12, p171). This single, brief concession was a necessary response to the prosecution's accusations, and in no way justifies the prosecutor's sweeping accusation in its *opening statement*, that defendant told "lie after lie after lie after lie."

In addition to opening and closing, the prosecutor conveyed personal opinions about Jenny's veracity when he played the videotaped interrogation for the jury. In the video Jenny explains why she never obtained police intervention

from decedent's violence.[5] Because the prosecution relied on Jenny's inaction to prove *mens rea*, her explanation was crucial. But every time this explanation appears on the tape, the prosecutor stops the tape and asks the detective on the stand, "what is she rambling on about right here," (v11, p12) and "explain to us what she's going on about" (v11,p41). By downplaying Jenny's explanation as "rambling" or "going on," the prosecutor conveyed to the jury his personal belief that Jenny's explanation on this important point, was meritless.[6]

Defense counsel didn't object to the prosecutor's expressions of personal opinion regarding the merits of the defense or defendant's credibility. Yet these remarks were so frequent, so misleading, and so inflammatory, particularly as part of a pattern, that they warrant reversal. Domingo-Gomez, 125 P.3d at 1052 (prosecutorial remarks of personal knowledge, combined with the power and prestige of the office, are an improper but extremely persuasive force with juries).

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[5] Jenny explains she would have requested protection if she could have trusted the police; but she mistrusted the local police as she had been a vocal critic of the police shooting of her friend Detroit and exoneration of the shooter. (v11,p41,52) She also emphasizes that she *did* call the police when decedent threatened to shoot her on December 12—she just didn't want police to come to the home because it was full of hypophosphorus acid. See supra footnote 1.

[6] The prosecutor in rebuttal also called *Randy Anderson*'s testimony "bung": "He didn't want to get paid for this. He did this out of the gratitude of his heart. Bung. Bung. Randy Anderson is not Santa Claus." (v12,p180)

The court of appeals found no plain error; so long as the prosecutor didn't exactly say, "the self-defense claim is a lie," the prosecutor could characterize all of Jenny's other statements to the police and other individuals as "lies." The problem with this logic is that (1) a prosecutor's use of the word "lie" is categorically improper; (2) Jenny's *overall* credibility was crucial in the jury's assessment of the self-defense claim; and (3) many statements the prosecutor characterized as "lies" were integral to self-defense. For example, Jenny told police early on that decedent was spying on her, subjecting her to violence, and had threatened to shoot her. (env.#1,p324-25,326) She made similar remarks to Randy Anderson (v8,p98), Deborah Van Tassell (v9,p84), Marion McNary (v12,p60), Keith Hemenway (v12,p97), and Shawn Davis (v12,p119). By characterizing defendant's early reports as "lies," the prosecutor conveyed his belief that decedent wasn't violent—a crucial component of self-defense. (v12,p148,154;v8,p86,89-90)

The court of appeals cited Domingo-Gomez for the proposition that a prosecutor may use the word "lie" in argument to the jury if it is a "fair comment on defendant's credibility," "not designed to inflame the passions of the jury," and does not "suggest the prosecutor had personal knowledge of the truth or falsity of defendant's statements." (CA op. at 19-20). That is not what Domingo-Gomez

held. Under Domingo-Gomez, the word "lie" is never a fair comment, but inherently inflammatory and necessarily indicative of the speaker's opinion. The court of appeals applied the old test from People v. Dashner, 77 P.3d 787,792 (Colo. App. 2003) and People v. Kerber, 64 P.3d 930,934 (Colo. App. 2002). Those cases were expressly overruled in Domingo-Gomez.

The court of appeals emphasized that defendant "does not now contend that *all* of her statements during the police interviews were truthful." (CA op. at 18, emphasis added.) But defendant's concession that she was untruthful on one point—made after and in response to the prosecutor's use of the word "lie"—doesn't give the prosecutor license to characterize other, contested facts as "lies." There is no requirement that a defendant must be completely truthful on every subject for Domingo-Gomez to apply. The scope of proper advocacy has its underpinnings in the state and federal requirements of Due Process and a Fair Trial by an impartial jury—those rules apply across the board.

Similarly, the court of appeals ruled that the prosecutor's use of euphemisms like "crocodile tears" were proper in light of defendant's "admissions that her two previous stories were untruthful." In other words, because defendant lied before it was appropriate to say defendant was lying now. This circular logic ignores the fact that many of defendant's early statements were true or contested.

The prosecutor's improper characterization of defendant's early statements as "lies" doesn't justify similar characterizations for defendant's later statements.

The court of appeals failed to analyze whether the euphemisms amounted to personal opinions. Application of the correct test from Domingo-Gomez, 125 P.3d at 1050, demonstrates that the remarks were improper. The prosecutor's remarks were sarcastic, derogatory, and directed at Jenny's credibility and the truth of her self-defense claim. His use of the word "we" communicated that his personal opinions were shared by other representatives of the state who might possess additional inculpatory evidence. Id. at 1052-53. The prejudice was particularly high here, because the self-defense claim was strong.

Specifically, the self-defense claim was consistent with the physical, medical, and ballistics evidence. Jenny is not a doctor, criminalist, or firearms expert. She has a seventh-grade education. She could not anticipate what those experts would conclude. Yet their conclusions are precisely consistent with her layperson's account of the shooting that she gave to police before those experts became involved. The blood, body, and gunshot residue are all as they should have been if her story is true. By contrast, there was no evidence supporting the prosecution's theory that this shooting was motivated by a desire to steal

decedent's property. None of decedent's property was found in Jenny's possession.

F. Future dangerousness and needs of community.

The prosecutor argued in closing that if defendant hadn't been arrested, she "would be on the streets . . . dealing drugs." (v12,p179) Defense counsel didn't object. This argument improperly appealed to the passions and prejudices of the jury by inviting the jury to convict defendant not because of the shooting, but to protect the community from drug dealing she might commit were she released. People v. Adams, 708 P.2d 813, 815-16 (Colo. App. 1985); Domingo-Gomez, 125 P.3d at 1052-53 (prosecution's personal opinion/knowledge and inflammatory remarks can tip scales toward unjust conviction). Wilson, 743 P.2d at 420 n.8; People v. Ferrell, 613 P.2d 324, 326 (1980). The prosecutor appealed to the jury's passions and prejudices and invited a conviction based on irrelevant speculation about future lawlessness in the community. Moreover, defendant can hold legitimate jobs. (v1,p110-111)

G. Impropriety surrounding police report.

The defense introduced a police report describing how decedent grabbed ex-wife Marion by the hair and punched her head. The prosecutor conveyed his opinion that the police report was inaccurate by (1) emphasizing on redirect that

decedent didn't plead guilty to assault but had only pled guilty to "this harassment" thing; (2) asking the ex-wife to be "keeping that in mind" when describing the incident; (3) unsuccessfully requesting judicial notice that "if there was any pain involved, he would have been charged with Third Degree Assault"; and (4) unsuccessfully requesting judicial notice that "Third Degree Assault requires pain." (v12,p68-69) The jury heard all of this and received no explanation regarding third degree assault, prosecutorial discretion in charging, plea bargaining, or judicial notice.

The prosecutor's aggressive attempts to inform the jury that no pain occurred, implied the prosecutor possessed special knowledge that no hair-pulling or punching occurred; and that the judge had unfairly withheld evidence forcing the prosecutor to communicate it by innuendo.

Immediately thereafter, the prosecutor called a detective to the stand and asked about the report:

Q: Detective, do you have the—the brief report from the court file in 96M504 in front of you?
A: I do.
Q: And that is, in fact, the short report that was ***bandied about here*** with [the ex-wife] a few minutes ago by Defense Counsel, right?
A: Yes. (v12,p70)

"Bandied about" means a careless, inappropriate exchange; it conveyed the prosecutor's opinion that defense counsel in bad faith had misled the jury regarding the report's significance.

These improper opinions denigrated defense counsel and the defense. The court of appeals mentioned the facts underlying this claim but never ruled on the merits, despite the filing of a petition for rehearing requesting a ruling on this issue. (PR at 8-9) The court of appeals' arbitrary refusal to rule on this claim violated defendant's right to Due Process. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; Evitts, 469 U.S. at 393; Peterson, 113 P.3d at 708.

IV. Preservation of the Issues.

On the first day of trial defense counsel objected to the question about codefendant Randy Anderson's "suspicions" on the basis of relevancy. This relevancy objection preserved the issue of prosecutorial misconduct relative to this witness.

The court of appeals ruled, without citing authority, that the objection to relevancy did not preserve a claim of prosecutorial misconduct. (CA Op. 23) This ruling conflicts with Colorado precedent. Liggett, 135 P.3d at 728,733 ("argumentative" objection preserved prosecutorial misconduct claim); People v. Darbe, 62 P.3d 1006, 1012 (Colo. App. 2002) (relevance objection would preserve

prosecutorial misconduct claim); Harris, 888 P.2d 264 (danger of prosecutorial misconduct is that it interjects *irrelevant* considerations). Even if the objection was "couched in general terms, the issue is still preserved for appeal because the proffered evidence was obviously inadmissible for any purpose." Padilla v. Southern Pac. Transp. Co., 642 P.2d 878, 880 (Ariz. App. 1982) (cited in People v. Pratt, 759 P.2d 676,686&n.5 (Colo. 1988)).[7]

The relevancy objection lodged during Randy Anderson's testimony preserved an objection to subsequent witness opinions regarding defendant's veracity. "[A]n objection overruled will suffice to preserve the point as to all subsequently offered evidence of the same type," even if the subsequent evidence is offered through a different witness. Pratt, 759 P.2d at 686 & n.5. "[T]he objector is entitled to assume that the judge will continue to make the same ruling and that he need not repeat the objection." Id. (quoting McCormick on Evidence § 52, at 118 (3d ed. 1984) (requiring repetitious objections makes objector appear contentious, wastes time, and frays patience)).

Pratt also cited United States v. Brown, 555 F.2d 407, 422 & n.32 (5th Cir. 1977) (fifty prosecution witnesses testified to hearsay and numerous acts of

[7] Requiring counsel to state, "objection prosecutorial misconduct" in open court presents ethical problems. See Young, 470 U.S. at 9 (defense may not denigrate prosecutor); C.R.P.C. 3.4(e) (exposing jury to inadmissible information).

uncharged misconduct spanning twenty years prior to the charged offense; because defendant objected "early in trial," it was unnecessary to object every time such evidence was introduced); and Padilla, 642 P.2d at 880 (one witness was permitted to answer, over objection, whether other employees had been injured by equipment; no objection required when same question was asked of subsequent witnesses because, "[w]here an objection to a certain class of evidence is distinctly made and overruled, objection need not be repeated to the same class of evidence subsequently received, although the evidence is given by, or the questions asked of, another witness."). This rule has existed in Colorado for over 100 years. Thomas v. Carey, 58 P. 1093, 1096 (Colo. 1899).

On the second day of trial, defense counsel dispelled any doubt as to his position on this issue by objecting *twice* to Debbie Van Tassel's "suspicions" on the grounds that "*the jury determines the credibility.*" The first objection was sustained and the second objection was overruled. For two days in a row defense counsel had objected to the prosecutor eliciting witness opinions of disbelief in the truth of Jenny's story. Both days those objections were overruled. At this point defense counsel had adequately alerted the trial court to this problem. People v. Pahl, 169 P.3d 169, 183 (Colo. App. 2006) (purpose of contemporary objection rule is to alert court to the error so the court has an opportunity to correct it). The

overruled objections as to witnesses Anderson and Van Tassel, preserved an objection to subsequent witness opinions regarding defendant's veracity. Pratt, 759 P.2d at 686 & n.5. Continued objections would have made defense counsel appear contentious, wasted time, and frayed patience. Id.

On the third and fourth day of trial, defendant didn't contemporaneously object to the detective's opinions about defendant's veracity. On the fifth day of trial, defendant didn't contemporaneously object to the ex-wife's testimony. However, defense counsel's previous objections to the prosecutor's attempt to elicit similar opinions from other witnesses—Randy Anderson and Deborah Van Tassel—is adequate to preserve those issues. Even if the objection was not preserved as to the detective and the ex-wife, reversal is appropriate under a plain error standard particularly when the errors are viewed cumulatively.

Defendant requests did not object to sub-issues (E)-(G) and requests plain error review for those errors.

V. Error of Constitutional Magnitude.

Because reversal is appropriate under even a plain error standard, it is unnecessary for this Court to decide whether the prosecutorial misconduct in this case amounts to a constitutional violation. In the event that this Court elects to examine this issue, it is addressed here.

Prosecutorial misconduct is an issue of constitutional magnitude. The United States Supreme Court has recognized that misconduct can implicate constitutional rights in at least two ways. Prosecutorial misconduct can infringe upon a specific guarantee of the Bill of Rights, such as the right to counsel; or the misconduct can infect the trial with unfairness so that the ensuing conviction is a denial of Due Process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Cases addressing the latter principle include Donnelly, 416 U.S. at 643 (prosecutor vouched for credibility and denigrated defense; no due process violation because remarks were isolated, invited or stricken, and made in context of a lengthy closing); Darden v. Wainwright, 477 U.S. 168, 178-84 (1986) (prosecutor called defendant an animal who needed a leash; no due process violation because comments were invited and the evidence was overwhelming); Berger v. United States, 295 U.S. 78, 84-88 (1935) (prosecutor bullied witnesses, misstated facts, assumed facts not in evidence; reversal required because indecorous conduct and misleading arguments were calculated to bring about a wrongful conviction); Dye v. Hofbauer, 546 U.S. 1, 3-4 (2005) (violation of "due process rights in the context of prosecutorial misconduct" is a federal constitutional claim); see also Cone v. Bell, 129 S. Ct. 1769, 1772 (2009) ("The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment,

imposes on States certain duties consistent with their sovereign obligation to ensure 'that justice shall be done' in all criminal prosecutions.") (quoting Berger, 295 U.S. at 88).

The Tenth Circuit routinely characterizes prosecutorial misconduct as an error of constitutional dimension. Such claims are analyzed through a two-step process. First, the court examines whether the prosecutor's conduct was improper. If so, the court determines whether the government has met its burden of proving that the error was harmless beyond a reasonable doubt. To determine whether prosecutorial misconduct is harmless, the court looks to the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case as a whole. United States v. Pulido-Jacobo, 377 F.3d 1124, 1134 (10th Cir. 2004) (prosecutor asked fingerprint expert if defense could request testing); accord United States v. Rogers, 556 F.3d 1130, 1141 (10th Cir. 2009) (prosecutor's closing invoked religious support for conviction).

Colorado precedent has for decades analyzed prosecutorial misconduct as a constitutional claim, including instances in which the issue is framed as a violation of the right to due process. E.g., Harris, 888 P.2d 259, 263 (Colo. 1995) (discussing constitutional underpinnings of the prohibition against prosecutorial misconduct); People v. Wright, 511 P.2d 460, 463 (Colo. 1973) (prosecutor's

argument that witnesses "told the truth" impaired conduct of fair trial); Archina v. People, 307 P.2d 1083, 1098 (Colo. 1957) (juries rendered unfair by prosecutors' appeals to passion and prejudice).

Recently, in Crider v. People, 186 P.3d 39, 42 (Colo. 2008), this Court implied that prosecutorial misconduct is *only* a constitutional claim when the prosecutor comments on a defendant's exercise of a specific constitutional right, reasoning that such ethical boundaries are "well-defined." According to Crider, it is "broadly accepted" that a prosecutor's inflammatory comments or expressions of personal opinions do not implicate constitutional rights, because they involve "less well-defined" ethical boundaries.

This language in Crider is problematic for several reasons. First, Crider itself emphasizes that broad categories of error can not be readily characterized as having or lacking constitutional magnitude, because this is a fact specific inquiry that turns on the circumstances of each case. Id.

Second, a prosecutor's inflammatory comments or expressions of personal opinions *do* involve "well-defined" ethical boundaries. Harris, 888 P.2d at 264 ("To prevent prosecutorial misconduct, we have developed standards defining the limits of proper prosecutorial advocacy."). These rules are not rendered "less well-

defined" simply because their application turns on the facts; the rules that Crider characterized as "well-defined" also require such an analysis.[8]

Third, the language from Crider conflicts with the precedent cited above from the United States Supreme Court, the Tenth Circuit, and this Court. The Supreme Court's decisions on federal law are binding on this Court. People v. Barber, 799 P.2d 936, 939-40 (Colo. 1990). The Tenth Circuit's decisions, while not conclusive, are persuasive and important. The federal courts are next in line to review this case from a federal constitutional standpoint, and the Tenth Circuit's decisions recognize this issue as a constitutional one. E.g., Pulido-Jacobo, 377 F.3d at 1134. And—as the Crider dissent correctly observed—regardless of the case law in other jurisdictions, inflammatory prosecutorial comments *do* implicate constitutional rights under Colorado precedent. Crider, 186 P.3d at 45 (dissent).

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[8] For example, one "well-defined" rule according to Crider is that a prosecutor many not comment on a defendant's post-arrest silence. The rule is certainly well-established; but a determination of whether the rule was violated examines a multitude of fluid factors that often present a close question, including whether the defendant was in custody or advised, whether the alleged impropriety was used as substantive evidence or impeachment, whether the comment was invited; and the overall context of the comment. People v. Taylor, 159 P.3d 730 (Colo. App. 2006), cited in Crider, 186 P.3d at 42; see also People v. Welsh, 80 P.3d 296 (Colo. 2003); People v. Richardson, 58 P.3d 1039,1046-47 (Colo. App. 2002).

VI. Reversal is Appropriate.

Jennifer Wend shot the decedent; this fact was uncontested. The only issue was whether the jury believed her explanation for why she fired the shot. Throughout this trial the prosecutor repeatedly attempted to discredit her through the force of his own opinions, the opinions of the police, and the opinions of the lay witnesses. The prosecutor violated numerous other limits on the scope of proper advocacy. People v. Mason, 643 P.2d 745, 752 (Colo. 1982) (prosecutorial misconduct was "either a misplaced zeal to win the case or an ignorance of the elemental principles of trial protocol").

The impropriety was not minor or fleeting. It pervaded the proceedings and focused on the key issue of credibility. It diverted the jury from its independent review of the evidence and left them with a prejudicial and inflammatory slant in approaching their deliberations. As this Court has repeatedly acknowledged, the opinions of government representatives possess tremendous force with juries. The evidence was not overwhelming and the self-defense claim was strong.

The prejudicial impact of prosecutorial misconduct "must be evaluated in the totality of the circumstances, on a case-by-case basis. Crider, 186 P.3d at 43. In Gill v. People, 339 P.2d 1000,1008 (Colo. 1959), this Court vacated defendant's conviction on other grounds but observed *sua sponte* that a prosecution witness's

five volunteered comments about the defendant's guilt and bad character cumulatively produced an "atmosphere of unfairness and prejudice" and an "atmosphere of guilt . . . incompatible with a fair and impartial trial." The prosecutor here created a similar atmosphere deliberately. It rendered the trial fundamentally unfair and affected the outcome.

The right to a fair trial is "the most fundamental guarantee of our justice system." People v. Ortega, 597 P.2d 1034, 1036 (Colo. 1979). Where, as here, prosecutorial misconduct undermines that right, reversal is required. U.S. Const. amend. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; Darden, 477 U.S. at 178-83.

Defendant requests that all of the errors be reviewed individually and cumulatively. Numerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial and violate the due process guarantee of fundamental fairness. Taylor, 436 U.S. at 487-88 & nn.14 & 15; United States v. Barrett, 496 F.3d 1079, 1121 (10th Cir. 2007); United State v. Rivera, 900 F.2d 1462, 1471 & n.8, 1477 (10th Cir. 1990); Snook, 745 P.2d at 649.

CONCLUSION

Jennifer Wend asks this Court to order a new trial, or remand this case to the court of appeals for a ruling on issues left unresolved by that Court.

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CERTIFICATE OF SERVICE

I certify that on January 27, 2010, a copy of this Opening Brief was mailed to:

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