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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Certiorari to the Colorado Court of Appeals Case No. 12CA2502	
MICHAEL CLARK Petitioner v. THE PEOPLE OF THE STATE OF COLORADO Respondent	♦ COURT USE ONLY ♦
Douglas K. Wilson, Colorado State Public Defender JAMES S. HARDY, #38173 1300 Broadway, Suite 300 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 16SC908
MICHAEL CLARK'S PETITION FOR WRIT OF CERTIORARI	

Michael Clark respectfully requests that this Court grant a writ of certiorari to the Colorado Court of Appeals to review its decision. As grounds, Mr. Clark states:

ISSUES PRESENTED

I. Whether the wholly circumstantial evidence was of sufficient quality and quantity to support, beyond a reasonable doubt, Mr. Clark's conviction and life sentence for first-degree murder after deliberation.

II. A jailhouse informant was the sole witness to claim Mr. Clark made inculpatory statements. A lead detective's interrogation notes from the interview with the jailhouse informant stated that the informant might be a "psychopath" and he should have been subjected to a polygraph examination. Was the trial court required to allow the defense, upon its request, to inquire into the lead detective's interrogation notes to provide context for his interrogation tactics and investigative decisions under *Davis v. People*, 2013 CO 57, and *People v. Conyac*, 2014 COA 8M?

III. Whether *Davis v. People*, 2013 CO 57, applies to evidence proffered by the defense.

IV. A lead detective testified that Mr. Clark had not told the truth when he was interrogated about the murder weapon and refused to confess. The prosecution

used the detective's testimony to argue in rebuttal closing that everything Mr. Clark told the police was untrue. Did the Court of Appeals err in finding that this testimony did not seriously affect the fundamental fairness of the trial or cast doubt on the reliability of the conviction?

V. Whether repeated prosecutorial misconduct during the opening statement and rebuttal argument, acknowledged by the Court of Appeals, reversibly prejudiced Mr. Clark.

VI. Whether the Court of Appeals erroneously affirmed the trial court's orders, which failed to suppress Mr. Clark's statements from a deceptive custodial interrogation at the stationhouse on November 3, 1994, and a surprise, un-*Mirandized* interrogation by federal agents at Clark's workplace on April 15, 2011.

VII. Whether the Court of Appeals erroneously affirmed the trial court's order, which allowed admission of copious evidence of a past bad act as *res gestae*.

VIII. Whether the Court of Appeals erroneously affirmed the trial court's order, which prevented Mr. Clark from asking a detective about the police investigation of a green car spotted driving away from the crime scene around the time of the murder.

XI. Whether Colorado law supports giving a jury instruction in the initial charge, upon a party's request, that informs jurors they have a right to disagree during deliberations.

X. Whether the numerous errors and prosecutorial misconduct cumulatively prejudiced Mr. Clark, depriving him of a fair trial by an impartial jury.

XI. Whether this Court, for the first time in approximately thirty years, should address the standards of review and reversal and the substantive application of the doctrine of cumulative error, in light of the Court of Appeals' cursory analysis in Mr. Clark's case and the disagreement in the Court of Appeals concerning the cumulative error doctrine.

OPINION BELOW

The court of appeals' opinion is attached.

JURISDICTION

This Petition is timely filed under this Court's order extending the filing date to July 6, 2017. This Court's jurisdiction to conduct certiorari review is conferred by Article VI, Section 2 of the Colorado Constitution, section 13-4-108, C.R.S., and C.A.R. 49.

STATEMENT OF THE CASE

Michael Clark did not commit the murder for which he was convicted.

The prosecution against Mr. Clark was the result of a high profile, unsolved murder investigation in Boulder. Marty Grisham ("Grisham"), a Boulder city employee, was murdered on November 1, 1994. After initial investigation in November 1994 and some follow up in 1995, the case went cold. No one witnessed the perpetrator and the murder weapon has never been found.

In 1994, 19-year-old Michael Clark was investigated for the crime. Clark was a friend of Grisham's daughter, Kristen ("KG"), who was also a suspect in Grisham's death, as was KG's twin brother, Loren ("LG"). (P.Ex.59, 15:55-16:15, 1:52:15-1:55:50; CF, p13; 10/10/12(p.m.) part two, p472-73; 10/11/12, p603-04; 10/15/12, p768-71; 10/17/12(p.m.), p2003)[1]

On November 3, 1994, Clark was interrogated and police repeatedly accused him of being involved in Grisham's death. (P.Ex.59) Over and over again, Clark maintained his innocence. (*Id*.)

No one was charged in the crime and the police effectively discontinued active investigation in October 1995. (CF, p25; 10/17/12, p1205, 1211) The case

[1] The transcripts are cited by date and PDF page number, *i.e.*, (10/22/12, p1535-36). "CF" cites are to the PDF Court File and page number. The transcripts from the district court are not organized in chronological order within the single PDF file. For instance, morning and afternoon sessions for the same day often do not follow each other.

remained largely inactive until it was assigned to Detective Chuck Heidel, of Boulder's cold case unit, in October 2009. (10/17/12, p1177, 1205)

Heidel almost immediately focused on Clark and his 1994 interrogation. (*Id*., p1208) In 2010, Heidel began working on the case with the Boulder District Attorney who prosecuted Clark at trial. (10/17/12, p1228-29; CF, p25-26)

In April 2011, Clark was 36, married with three kids, a law-abiding citizen who was working at Ace Hardware in Silverthorne. (10/17/12, p1167, 1210; P.Ex.4(Mots.CD), 23:25-35) Law enforcement had not spoken with him about Grisham's murder since late 1994. (10/17/12, p1211)

On April 15, 2011, however, two federal agents working with the Boulder cold case unit paid Clark a surprise visit at work and questioned him for close to an hour, ostensibly about an investigation into a gun-trafficking ring and a former acquaintance of Clark's. (P.Ex.4(Mots.CD) Clark voluntarily participated in a second interview on April 20, 2011, with the federal agents. (10/17/12, p1168-69; P.Ex.6(Mots.CD))[2]

The agents attempted to get Clark to confess to Grisham's murder by lying to him about the ability of new forensic science to prove that a gun he owned in 1994 was the murder weapon. (10/17/12, p1174) They claimed, in fact, that they

[2] The prosecution did not introduce the April 20, 2011 interrogation or any of Clark's April 20, 2011 statements at trial.

knew Clark's gun had done the murder and they had narrowed the possibilities down to either Clark or KG as the shooter. (P.Ex.6(Mots.CD) Clark repeatedly maintained his innocence in the face of these deceptive allegations. (*Id*.)

Almost an hour into the interview, Heidel came into the room and changed its tone, accusing Clark in a pointed, confrontational manner of murdering Grisham. (10/17/12, p1173; 8/9/12, p1502; P.Ex.6(Mots.CD)) Clark yet again maintained his innocence. (P.Ex.6(Mots.CD))

Thus, the reopening of the investigation, which solely focused on Clark, did not result in a witness to the shooting, the murder weapon, or a confession. Nonetheless, on January 5, 2012, more than seventeen years after Grisham's death, a warrant was issued to arrest Clark. (CF, p12-31)

On January 11, 2012, the Boulder County District Attorney charged Clark with first-degree murder after deliberation.[3] (CF, p51-52) Clark pled not guilty and took his case to trial.

The case was tried over nine days. Due to the passage of time, almost every witness had substantial difficulties recalling events and statements made on November 1, 1994 and the surrounding days. Many witnesses stated their only recollections were the result of reviewing old interview transcripts. (*See, e.g*.,

[3] §18-3-102(1)(a), C.R.S.

10/15/12, p817-32 (testimony of Jamie Uhlir)) Both parties, especially the prosecution, made extensive use of witnesses' prior unsworn, out-of-court statements to refresh and impeach testimony. (Supp.Access, p548, jury inst. 12; *e.g.*, 10/10/12, p407, 418-19; 10/15/12, p816-46, 870-74, 879, 881; 10/17/12, p1290-94)

On October 22, 2012, after three days of deliberations, the jury found Clark guilty. (10.22.12, p1535-36) The court sentenced Clark to life in prison without possibility of parole. (10/22/12, p1538)

Mr. Clark appealed the judgment of conviction. The Court of Appeals affirmed in an unpublished opinion. Mr. Clark filed a petition for rehearing and a motion to publish the Court of Appeals' opinion. The Court of Appeals denied both.

STATEMENT OF FACTS

Because this case was exceptionally close and Mr. Clark's first issue presented is sufficiency of the evidence, this section discusses the facts in detail.

The case against Mr. Clark was wholly circumstantial. Slip op. at 4 ("Our review of the record shows that there was no direct evidence that linked [Mr. Clark] to the murder.").

No one saw the shooter, the police never found the murder weapon, and despite numerous confrontational and deceptive attempts, the police never extracted a confession.

Mr. Clark has been a devoted husband for 14 years and is the father of three young children. (*See* 10/17/12, p1167, 1210; P.Ex.4(Mots.CD), 23:25-35) He went through some rough times after high school, losing his financial aid for college in his second year and having to depend on friends in Boulder for housing. (P.Ex.81, 2:20-:30, 9:10-10:05; P.Ex.59, 1:06:50-1:07:10) He did some dumb things, which included committing check fraud against the victim in this case, Marty Grisham. (P.Ex.81, P.Ex.59, 4:05-7:30; P.Ex.59, 6:00-6:10)

Mr. Clark, however, stayed in Boulder after pleading guilty to the check fraud, successfully completed his probationary sentence, and put that time in his life behind him. (P.Ex.81, 6:10-:30; 10/17/12, p1208-10) After completing probation, in 2001 he moved to Oregon for nine years. (10/17/12, p1209-10) In 2010, he moved back to Colorado. (*Id*.) He has always maintained he had nothing to do with Grisham's murder.

On the evening of November 1, 1994, 19-year-old Clark, who was couch surfing in Gunbarrel after losing his financial aid for college, went to a playoff soccer match in Lakewood with his friend Jamie Uhlir ("Uhlir"). (P.Ex.59, 1:03-

1:07; P.Ex.81, 9:30-10:00; 10/15/12, p821-24, 841-45) The game started around 7p.m. and ended around 8:30-8:45p.m. (P.Ex.59, 1:03-1:07; 10/15/12, p821-24, 841-45)

Uhlir and Clark left the soccer match at the end of the game, which Uhlir said may have been as late as 8:45p.m. (*Id*.) Uhlir was on crutches due to an ACL injury, so they took their time leaving the stadium. (10/15/12, p821-24, 841-45) Clark drove Uhlir back to his apartment near Denver University. (*Id*.) It took 15 to 20 minutes, perhaps a bit longer because Uhlir was on crutches. (*Id*., p840)

According to Uhlir's review of his statements to police on November 7, 1994, not his independent recollection, Clark left between 8:50-9:00p.m., saying he had to go do something. (*Id*., p824-26) Uhlir testified this was "pretty typical of Mike," because, "if he was doing something, whether it was meeting a girl or something else, he would never really get into the minute details about it." (*Id*.)

Clark was not acting nervous or weird and did not leave in a hurry. (*Id*., p844-45) Uhlir saw Clark the next day and he seemed completely normal. (*Id*., p846-47) According to Uhlir, the drive from his apartment to Boulder in those

days took "anywhere from 20, 25 to probably 45, 50 minutes depending on traffic." (*Id*., p825)[4]

Clark later explained to police officers that he got a page from Allison Hackman ("Hackman") and wanted to drive home to call her back. (P.Ex.59, 1:04:05-30) Hackman visited Clark when he was in jail for the check forgery and they would begin dating shortly afterwards. (10/16/12, p1829-30, 1841-42)

Clark told the officers he drove back to Gunbarrel, watched the end of "Beavis and Butthead," which aired between 9 and 9:30p.m., and then talked to Hackman until about 10:15. (P.Ex.59, 1:04:45-1:05:15; D.Ex.N) Clark then talked to another girl, Kristin Baulsir ("Baulsir"), for a couple minutes. (*Id*., 1:05:15-:30)

Hackman told police in 1994 she received a call from Clark at either 9:45 or 10:00p.m. (10/16/12, p1838-45) She told the first officer she talked to that she was positive it was 9:45 because of homework, another phone call, and talking to her mother just before Clark called. (*Id*.)[5]

Hackman said Clark sounded calm, there was no background noise, and there was nothing unusual, such as lack of breath or nervousness, about Clark on

[4] The prosecution presented no evidence of the traffic conditions between Denver and Boulder on November 1, 1994.

[5] Hackman's mother testified that she thought she told police in 1994 that the call had come at 9:45p.m., but also that despite many efforts to refresh her recollection, she simply could not remember. (10/17/12, p1292-94)

the phone. (*Id*.) Baulsir testified that the first time police ever contacted her was in December 2009 and she could not recall whether she received a call from Clark on November 1, 1994, or much else for that matter. (*Id*., p1851-54)

Grisham and his new girlfriend, Barbara Burger ("Burger"), were supposed to have dinner with KG that night, but KG blew it off. (10/10/12(p.m. part one), p1650; 10/11/12, p583) Burger was finalizing her divorce from another man and Grisham was the first man she had dated since separating from her husband. (10/10/12(p.m. part two, p425)

KG left a voicemail on Grisham's home phone at 4p.m., when she knew Grisham would be at work, which surprised him. (10/10/12(p.m. part one), p1658) Grisham "was concerned that something was going on [with KG] that he didn't know about and just wondered what it was…." (*Id*.)

Around 9:30p.m., during dinner with Burger, Grisham responded to a knock at his front door. (10/10/12(p.m.) part two, p407) Grisham said, "That sounds like a Loren knock." (*Id*., 410) Grisham walked to the door and, in Burger's recounting, looked through the peephole, paused and looked at her, and then opened the door. (*Id*., p407, 411) Upon opening the door, Grisham was shot multiple times. (*Id*., p407-08) Burger called 911; 911 dispatch recorded the call beginning at 9:34p.m. (*Id*., p408, 452) Grisham died from the gunshot wounds.

(10/11/12, p536) No one saw the shooter and the murder weapon would never be found.

Around 9:45p.m., officers went to Louisville to notify KG and Grisham's ex-wife, Pam ("PG"), of the incident. (10/11/12, p613-15) Shortly thereafter, a Boulder detective arrived to inform KG and PG of Grisham's death. (*Id*., p617-18, 647)

Upon learning of Grisham's murder, KG laughed nervously and said, "He could be a jerk, but not that big of a jerk." (*Id*., p589-90, 602, 648) KG then went upstairs to call someone renting a room at the house, telling her "you will never believe what happened," laughing while she did so. (*Id*., p591, 620)

KG had a very difficult relationship with her father. (*Id*., p560) He was "horrible," "emotionally abusive," and "authoritarian" to her, LG, and PG. (*Id*., p560-61, 601-02) PG's divorce with Grisham was not amicable and she did not want anything to do with him. (10/11/12, p541, 551-52)

KG's relationship with Grisham at the time of his death "wasn't great, but [they] basically just didn't see much of each other." (*Id*., p561) KG told police in August 2011 that when she found out Grisham was dead, she thought he finally took it too far and pissed somebody completely off. (*Id*., p603)

Grisham himself told Burger, that he had been an "asshole" to his kids. (10/10/12(p.m.) part two, p434) Grisham was especially tough on LG and they did not get along at all when LG was growing up. (10/11/12, p540, 553-54) LG stole from Grisham multiple times. (*Id*., p540) He committed suicide in 2007. (*Id*., p539)

While there were no witnesses to the shooting, one apartment complex resident, Tanya Jerome ("Jerome"), walked past an unusually strange, scary man in the complex at approximately 9:15 to 9:30p.m., just before the murder. (10/17/12(p.m.), p1932, 1947)

Jerome said the experience was very unusual – it was the only time she remembered walking around Boulder and being scared of someone. (*Id*.) She said the man "set off [her] radar" when he came too close to her and he was walking faster than usual. (*Id*., p1948) It was quiet outside when she ran across him. (*Id*., p1934, 1948)

Jerome found out about the murder the next day, called the police, and went down to the station to help prepare a sketch. (*Id*., p1936-38, 1945; D.Ex.R) The sketch did not resemble Mr. Clark. (D.Ex.R.; P.Ex.44; 10/17/12(p.m.), p1956-57)

Jerome also examined a six-pack photo array including Clark's photo. (10/17/12(p.m.), p1938-41, 1989-92; D.Ex.Q) She did not recognize anyone – in

fact, when Clark's photo was published in the newspaper, she was surprised because when looking at the photo array she told police Clark was definitely not the man she saw. (10/17/12(p.m.), p1940-42) Jerome lived in the apartment complex for another eight months, but never saw the person again. (*Id*., p1945)[6]

Michael Clark was investigated for Grisham's murder in November 1994 because he had a relationship with KG and admitted to stealing and forging checks from Grisham's checkbook during the previous month. (P.Ex.59, 4:05-7:30) Clark also admitted to possessing a 9mm handgun in October 1994, but said he got rid of it before Grisham's death. (P.Ex.59) Clark took care of Grisham's cat the last weekend of September 1994, when both Grisham and KG were out of town, took the checks at that time, and subsequently wrote checks out to himself and cashed them. (*Id*., 1:38:55-1:39:40; 10/11/12, p573) He used the funds to help cover court costs related to being caught with a stolen motorcycle with KG onboard. (P.Ex.59, 17:40-18:00, 1:45:15-30) At trial, the prosecution argued this incident with the motorcycle over a month earlier was where the case began,

[6] The man may have been Mark Zondlo, an apartment complex resident who resembled the sketch and talked with police weeks after the murder. (10/17/12(p.m.), p1979-84) According to Zondlo, however, he arrived home that night after the shooting, and well after the 9:15-9:30p.m. window in which Jerome said she saw the scary man. (*Id.*, p1932, 1947, 1981-82) No other candidate emerged as the man Jerome saw and the police never considered Zondlo, who came down to the station on his own a few weeks after Grisham's death, a suspect in the murder. (CF, p16; 10/17/12, p1983-84)

allegedly setting Clark on the path to killing Grisham. (10/10/12(p.m.), p1604; 10/18/12, p2044)

Also, a jailhouse informant, cocaine addict, probation violator, and six-time felon on temporary release from California state prison named Walter Stackhouse ("Stackhouse"), claimed Clark made admissions, including nodding his head when Stackhouse asked if Clark had killed Grisham, while Clark was jailed for the forgery. (10/16/12, p1109-22, 1135-40; 10/16/12(p.m.), p1785-92) Stackhouse's prior crimes included false information to a police officer, fraud, forgery, and false reporting. (10/16/12, p1135-40; 10/16/12(p.m.), p1785-92) He admitted that in bringing his information to police, in exchange he requested release from jail to work release to prevent appliance stores he owned from "going under." (10/16/12, p1123; 10/16/12(p.m.), p1788-93)

Police also talked with a Marine recruiter who told them Clark showed him a 9mm handgun a week before the murder. (10/15/12, p870-72) And police interrogated Dion Moore ("Moore"), an acquaintance of Clark's, who was a multiple-time felon, drug user, and interstate trafficker in illegal guns between Colorado and Chicago. (10/15/12, p906-12, 957-59)

Moore, who in 1995 negotiated a deal to testify against Clark in exchange for dismissal of pending cases against him, said he procured two 9mm Bryco-

Jennings handguns, one for himself and one for Clark, in October 1994. (*Id*., p920-32, 947-49, 955-58; D.Ex.A) Both Moore and Stackhouse were released from incarceration in other states to testify. (10/15/12, p906-07; 938-42; 10/16/12, p1109) There is no indication in the record or in the 20-page warrant for Clark's arrest that Moore was ever investigated for Grisham's murder, despite keeping one of the two Bryco-Jennings 9mm handguns for himself.[7]

The police thoroughly investigated Clark, including consensual searches of his person, possessions at the Gunbarrel house, and his car – none of which produced any evidence – and conducted a lengthy interrogation while Clark was in custody at the stationhouse on November 3, 1994. (10/11/12, p720, 734; P.Ex.59) During the interrogation, the police repeatedly confronted Clark with their belief that he was involved in the murder. (P.Ex.59) They also had Clark participate in a pretextual gunshot residue ("GSR") test, telling him they would test to see if Clark's hands contained GSR. (10/17/12(p.m.), p1995-2003) Officers, knowing they would not test the GSR, talked up the importance and efficacy of the test, hoping Clark would tell them he was involved in the murder. (*Id*.) Clark maintained his innocence and his lack of any information. (*Id*.; P.Ex.59)

[7] Moore claimed he kept the smaller of the two guns, which was inconsistent with the ballistics evidence. However, neither gun was recovered by police, so only Moore's word evidenced which of the two Bryco-Jennings handguns he kept. (10/15/12, p920-22)

The officers also suggested that KG and LG had the strongest motive to kill Grisham because they would receive a lot of insurance money, KG did not seem upset about her father's death, and LG and Grisham had conflicts growing up. (P.Ex.59, 1:52:15-1:55:50; *see also* (CF, p522, affidavit for search warrant for buccal swab listing insurance and PERA proceeds allocated to KG, LG, and PG))[8] Clark steadfastly maintained his innocence, said he knew nothing about Grisham's murder, and knew nothing about KG or anyone else's involvement. (*Id*.) KG, LG, and Clark were investigated, but no one was charged.

In December 2009, Detective Heidel reopened the case. (10/17/12, p1180) This time, the police focused almost solely on Clark. (*Id*., p1208)

As part of the new investigation, a container of Carmex found in an inconspicuous spot underneath a stairwell outside Grisham's apartment the morning after the murder was tested for DNA and compared with Clark's.

[8] Indeed, Detective Trujillo volunteered at trial that KG took a polygraph test in connection with Grisham's murder, administered by "Jeff Janks"[sic]. (10/17/12(p.m.), p2003) The search warrant for Clark's DNA confirms that KG took a polygraph in 1994 in connection with Grisham's murder, administered by Jeff Jenks, and that in Jenks' opinion KG engaged in "purposeful non-cooperation" indicating that she wanted "to avoid detection of deception in one or more of the areas under investigation." (CF, p515, 521) LG also took a polygraph on the same date, following which the examiner opined that LG was not telling the truth when he denied planning with anyone to shoot Grisham. (CF, p522)

At trial, the prosecution quickly asked for a bench conference before Trujillo could volunteer any information about the results of KG's polygraph exam. (10/17/12(p.m.), p2003-04)

(10/11/12, p688; 10/12/12, p1722-70) The exterior of the Carmex produced a DNA sample, which could not be linked to Clark. (*Id*.) The interior produced an inhibited mixed sample, which when compared to Clark's DNA matched 4 out of 16 loci, meaning Clark's paternal lineage could not be excluded as the contributor. (*Id*.) The mixed sample, however, contained DNA from at least one other male, and could have contained DNA from more than two other males. (*Id*., p1761-62)

No one else's DNA was compared against the sample from the Carmex. (*Id*., p1770) Nor was there any evidence presented that the DNA was run through a law enforcement database of known offenders. Rather, the sample was tested against a database of only 4,100 people to come up with percentages of probability that the Y-STR DNA belonged to Clark's paternal lineage. (*Id*., p1763-65) And DNA analysis could not say anything about when the Carmex was deposited in the hallway, nor when the DNA was deposited on the inside of the container.[9] (*Id*., p1765)

On April 15, 2011, police employed federal agents from the FBI and ATF to visit Clark unannounced at his job at Ace Hardware in Silverthorne. (P.Ex.81) The federal agents approached Clark under false pretenses that they were investigating illegal gun trafficking out of a pawn shop in Aurora connected to

[9] Even if the DNA was Clark's, Clark had been at Grisham's apartment to take care of the cat and the Carmex was not in an obviously visible spot.

Moore, Russian organized crime, and "gangbangers" in Chicago. (*Id*.) They asked Clark to help them, in part by locating the gun Moore said he gave him 17 years earlier. (*Id*.) Clark told them he couldn't remember, but guessed he probably tossed the gun in a dumpster soon after he acquired it because he got nervous having it. (*Id*., 14:00-15, 20:45-21:05)

Soon thereafter, the federal agents and Boulder police officers conducted a second interrogation of Clark in Frisco. (10/17/12, 1168-74) The interrogation was confrontational and the law enforcement agents repeatedly accused Clark of committing the murder. (*Id*.) This time, the officers falsely claimed that forensic science had advanced to a point where they now knew the gun Clark possessed in October 1994 was the gun that killed Grisham. (*Id*.) Mr. Clark maintained his innocence.

Despite the fact that the murder weapon has never been found and there were no eyewitnesses, Michael Clark would eventually be charged with and convicted of the murder. Mr. Clark maintains his innocence.

REASONS FOR GRANTING THE WRIT

Michael Clark did not commit this murder.

The wholly circumstantial evidence was insufficient in quality and quantity to support the first-degree murder after deliberation conviction – and Michael

Clark's life sentence – beyond a reasonable doubt. The Court of Appeals' opinion finding evidence sufficient to sustain Mr. Clark's conviction sanctioned a lower court ruling, which "so far departed from the accepted and usual course of judicial proceedings…as to call for the exercise of [this Court's] power of supervision." *See* C.A.R. 49(a)(4). (**Issue I**)

Further, numerous errors and prosecutorial misconduct plagued Mr. Clark's trial, causing reversible prejudice discretely and cumulatively, and depriving him of a fair trial and an impartial jury.

This very close case was exceptionally sensitive to error. The prosecution's evidence against Michael Clark was entirely circumstantial and strongly disputed.

Mr. Clark, who has always and unconditionally maintained his innocence, argued the District Attorney correctly declined to file charges against him in 1994 and that inconsequential changes in the prosecution's evidence did not prove his guilt 18 years later. (10/18/12, p2070-72) No evidence was recovered in searches of Clark, the house where he was living, or his car when police arrested him for forgery two days after the murder. No one witnessed the shooter and the murder weapon has never been found.

Clark barely knew Grisham, having met him only once, years earlier, during high school. (P.Ex.81, 14:45-15:45) The prosecution's theory of Clark's alleged

motive – that he killed Grisham to avoid detection of the check forgery – did not make sense.

Clark did next to nothing to prevent detection of the forgery, having written all of the checks out to himself in handwriting a layperson could distinguish from Grisham's. (10/12/12, p1716-20; P.Ex.61) When confronted with the forgery, Clark immediately fessed up. (P.Ex.59, 4:05-7:30) Yet the prosecution argued this was the same person capable of planning and carrying out a homicide on the quick, establishing an alibi, leaving insufficient evidence for the District Attorney to even file charges for 17 years, and keeping that secret the entire time.

But even, *arguendo*, crediting the prosecution's theory of motive with some plausibility leaves gaping holes in the prosecution's evidence. Clark's whereabouts were known on November 1, 1994, and he would have had to have hewed to an extremely tight timeline, avoiding all traffic and hitting every green light, to even conceivably accomplish the murder, let alone do so without detection.

Meanwhile, a witness saw a scary man, demonstrably not Clark, at the apartment complex just before the murder. The witness lived at the complex, had never seen the scary man before, never saw him again in the eight months she continued living there, and had never been scared by an unknown person in

Boulder before or since. (10/17/12(p.m.), p1932, 1945, 1947) The apartment complex resident who resembled the police sketch was ruled out as a suspect without any investigation.

Other leads were similarly left unpursued. And the prosecution's best evidence against Clark came from the mouths of two career felons, both of whom had negotiated for benefits from the police in connection with their statements. Stackhouse's rap sheet included several crimes involving fraud and lying to police and was so long it was difficult to keep track of his previous convictions. (10/16/12, p1123, 1135-40; 10/16/12(p.m.), p1785-93) Moore had trafficked in illegal guns between Colorado and Chicago since turning 16. (10/15/12, p906-12, 957-59) He reached a deal with the District Attorney in 1995 to dismiss multiple charges against him to provide information in Clark's case. (*Id.*, p947-49, 955-58; D.Ex.A) Even in 2012, both men had to be released from incarceration in other states to testify at Clark's trial.

Given this evidence, the court's numerous errors and the prosecutorial misconduct reversibly prejudiced Mr. Clark.

The trial court erred when it prevented the defense from asking a lead detective about notes the detective took while interviewing Stackhouse, which conveyed the detective's contemporaneous perceptions of the informant's

credibility during the interview. This testimony was relevant and admissible under *Davis v. People*, 2013 CO 57, and *People v. Conyac*, 2014 COA 8. Its exclusion prevented the defense from inquiring into evidence that greatly undermined the prosecution's key witness, causing reversible prejudice

The Court of Appeals, in affirming the trial court's exclusion of the evidence, decided a question of substance in a way that is not in accord with applicable decisions of this Court (*Davis*) and which conflicts with the decisions of other divisions of the Court of Appeals (*Conyac*). *See* C.A.R. 49(a)(2)-(3). (**Issue II**)

The trial court's order and the Court of Appeals' opinion thereon raises an issue of first impression – namely, whether the rule this Court announced in *Davis* applies to evidence proffered by the defense. The district court decided a question of substance not heretofore determined by this Court. *See* C.A.R. 49(a)(1). (**Issue III**)

The trial court plainly erred under *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009), *Liggett v. People*, 135 P.3d 725 (Colo. 2006), and the long line of cases interpreting CRE 608(a), when it allowed a lead investigator to testify Mr. Clark was not telling the truth. After precluding the defense inquiry into the same officer's perceptions of the informant's truthfulness, the trial court allowed this

attack on Clark's truthfulness, which the prosecution used to claim Mr. Clark was not truthful about anything, including his refusal to confess.

The Court of Appeals acknowledged this error, but found it was not reversible, despite the thin, circumstantial evidence in the case. The Court of Appeals thereby decided a question of substance in a way that is not in accord with applicable decisions of this Court and which conflicts with the decisions of other divisions of the Court of Appeals. *See* C.A.R. 49(a)(2)-(3). (**Issue IV**)

The prosecution engaged in repeated, flagrant misconduct during the opening statement and rebuttal argument, acknowledged by the Court of Appeals, which reversibly prejudiced Clark. The Court of Appeals misapplied the relevant authority in finding Mr. Clark was not reversibly prejudiced. (**Issue V**)

The trial court erroneously admitted Mr. Clark's involuntary statements from one interrogation (November 3, 1994, P.Ex.59) and statements he made during a second custodial interrogation without *Miranda* warnings (April 15, 2011, P.Ex.81), causing reversible prejudice. The Court of Appeals misapplied the relevant authority to the facts in affirming the trial court's orders. (**Issue VI**)

The trial court reversibly erred when it admitted, as *res gestae*, evidence of Clark's arrest, six weeks before the murder, for possessing a stolen motorcycle. The incident was not relevant and not admissible under any evidentiary theory.

Even if, *arguendo*, the evidence possessed scant relevance, the danger of unfair prejudice far outweighed any probative value. The Court of Appeals misapplied the relevant authority in affirming the trial court's order. (**Issue VII**)

The trial court reversibly erred when it prevented Clark from asking a detective about the police investigation of a green car spotted driving away from the crime scene around the time of the murder. The evidence was not hearsay and the defense tendered it for the relevant and necessary purpose of resolving confusion caused by the prosecution's evidence. Even if, *arguendo*, the evidence would not have been admissible in a vacuum, the prosecution opened the door. The Court of Appeals misapplied the relevant authority in affirming the trial court's order. (**Issue VIII**)

The trial court reversibly erred in rejecting Clark's tendered jury instruction correctly stating that jurors have a right to disagree during deliberations. The jury was out for three days in this wholly circumstantial case, indicating likely disagreement in the jury room. Had the jury received the tendered instruction, the result likely would have been different. The district court's rejection of the tendered instruction decided a question of substance not heretofore determined by this Court. *See* C.A.R. 49(a)(1). (**Issue IX**)

These numerous errors and the prosecutorial misconduct both discretely and cumulatively prejudiced Clark, requiring reversal. Despite the thin, circumstantial evidence, the Court of Appeals performed a cursory cumulative error analysis, citing an inapplicable case. The Court of Appeals' cursory analysis reflects a conflict in the Court of Appeals over the proper standards and substantive law applicable to cumulative error claims, which this Court has not addressed in 30 years. *See* C.A.R. 49(a)(2)-(3). (**Issues X and XI**)

I. The Wholly Circumstantial Evidence was Insufficient in Quality and Quantity to Support the Conviction and Michael Clark's Life Sentence Beyond a Reasonable Doubt.

Due process prohibits the criminal conviction of any person except by proof beyond a reasonable doubt. U.S. Const. amends. V, XIV; Colo. Const. art. II, §25; *In re Winship*, 397 U.S. 358, 364 (1970); *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988). A sufficiency challenge requires the court to determine whether the evidence viewed as a whole and in a light most favorable to the prosecution is sufficient to support a conclusion by a reasonable factfinder that each of the essential elements of the crime has been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Kogan*, *supra*, 950.

Moreover, "verdicts in criminal cases may not be based on guessing, speculation, or conjecture." *People v. Duncan*, 109 P.3d 1044, 1046 (Colo. App.

2004) (citations and internal quotations omitted). A "modicum" of relevant evidence will not rationally support a conviction beyond a reasonable doubt. *Kogan*, *supra*, 950 (internal quotations omitted).

For a criminal conviction to survive challenge on appeal, the prosecution's evidence must be substantial and sufficient in *both* quantity and quality. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).

A. The Prosecution's Evidence was Insufficient to Prove Mr. Clark Committed First Degree Murder.

Here, the prosecution's evidence was lacking in substantial and sufficient quality and quantity to prove beyond a reasonable doubt that Mr. Clark was the person who committed the murder. The Court of Appeals erroneously found otherwise. Slip op. at 2-9.

The prosecution had to prove beyond a reasonable doubt:

> 1. That [Mr. Clark],
>
> 2. in the State of Colorado, at or about the date and place charged,
>
> 3. with intent,
>
> 4. to cause the death of a person other than himself, and
>
> 5. after deliberation,
>
> 6. caused the death of that person or another person.

(Supp.Access, p550, jury inst. 14); §18-3-102(1)(a), C.R.S. The entire dispute in the case was about whether Mr. Clark – or someone else – committed the act that killed Grisham.

There was no confession, no witness who saw the shooter, and no murder weapon.

Mr. Clark has been interrogated numerous times over the years. He has never once said he knows anything about Grisham's murder, let alone offered a confession.

The prosecution's case rested on a house of cards of circumstantial evidence and a theory of Mr. Clark's motive that defies credulity.

1. The prosecution's evidence did not establish that Mr. Clark was at the crime scene on November 1, 1994.

First, the prosecution had to put Clark at the scene. To do so, it offered the jailhouse informant's recollections from when he and Clark were jailed together:

> I asked him did you kill somebody. He just wouldn't say anything, you know. He kind of just nodded his head yes. I said well, did you. And he said the guy's dead. And then he kind of just hushed up after that….

(10/16/12, p1115) Stackhouse also told police that Clark told him about the motorcycle incident, a police sketch that did not look like him, that Clark would grab newspapers in the jail before other inmates could look at them, and that Clark

had gotten rid of the gun. (*Id*., p1118-21, 1126) Stackhouse bolstered his own statements by testifying that he had never testified against someone before, he feared what would happen if inmates in California knew he was testifying, and he felt he had a moral obligation to testify in Clark's case. (10/16/12(p.m.), p1122-23, 1810)

Stackhouse's claims must be considered incredible as a matter of law. They existed in full in 1994 and were insufficient for the DA to even bring charges.

The reasons why are apparent in the trial record. First, there is the thin ice of the supposed head nod, an ambiguous supposed admission if ever there was one.

Second, Stackhouse possessed zero loyalty to the truth and ample motive to lie. Stackhouse was a cocaine addict, probation violator, and at least a six-time felon testifying on temporary release from California state prison. (10/16/12, p1109-22, 1135-40; 10/16/12(p.m.), p1785-92) His prior crimes included false information to a police officer, false imprisonment, criminal threat, theft, possession of a Schedule I or Schedule II controlled substance, check fraud, fraud, forgery, and false reporting. (10/16/12, p1109-10, 1135-40; 10/16/12(p.m.), p1785-92) He admitted to diluting his urine while on probation to pass urine tests. (10/16/12(p.m.), p1791-92)

Stackhouse, in exchange for his information, requested work release to prevent his business from failing. (10/16/12, p1123; 10/16/12(p.m.), p1788-93) He understood from the police in 1994 that he could make things "look better" for his work release prospects. (10/16/12(p.m.), p1797-98)

Third, the jurors were erroneously precluded from hearing evidence assessing Stackhouse during his 1994 police interview. (*See* Issues II and III) The lead detective who interviewed Stackhouse in 1994 noted he appeared to be a "psychopath" and thought he should undergo a polygraph exam. (10/17/12(p.m.), p2009-10)

Here, as in *People v. Urso*, 269 P.2d 709 (Colo. 1954), "one thing was easy to determine, and that was, that the witness was a liar. When he lied or where he lied would be a hazardous guess, and verdicts in criminal cases should not be composed of guessing, speculation, or conjecture." *Id*., 711 (vacating conviction for insufficient evidence).

The prosecution also offered the Carmex container and Y-STR DNA analysis that Clark's parental lineage could not be excluded from a mixed sample inside the container. (10/12/12, p1722-70) But the Carmex was found outside the residence in an inconspicuous spot – indeed, it was not discovered by police searching the crime scene until the next morning. (10/11/12, p688)

No evidence established when the Carmex had been deposited or who deposited it. No fingerprints were recovered from the container. (10/16/12, p1054-55) The complex's building manager testified his duties included cleaning common areas "more or less as needed" and that he tried to do so daily, (10/10/12, p1640), but this hardly affirmatively established when the small container was left under the cover of the stairs. And Clark had been at Grisham's residence during the previous weeks to watch the cat.

Finally, the prosecution offered two officers' testimony about driving from Uhlir's apartment to Grisham's apartment complex on November 29, 1994, and then separate routes to the house in Gunbarrel. (10/12/12, p1686-93, 1699-1702; P.Ex58, P.Ex.65; 10/15/12, p784-88, 792-98) The officers, however, drove these routes only once, weeks later in contemporary vehicles, not Clark's 1960's Mustang. (10/12/12, p1687; 10/15/12, p795; 10/11/12, p718, P.Exs.53-55) And, as they testified, they drove the "most direct route," based simply on a hypothesis that Clark would have driven that route. (10/12/12, p1690; 10/15/12, p794)

There was no evidence presented about the traffic or weather that may have affected traffic on November 1, 1994. (10/15/12, p795) Meanwhile, the officers said they had a "pretty good flow" of traffic on November 29, 1994. (10/12/12, p1691) They did not track their speed. (10/12/12, p1702; 10/15/12, p794)

The officers also did not drive the route from the Lakewood soccer stadium to Uhlir's place. (10/12/12, p1700) And they did not measure the distance between the apartment complex parking lot and Grisham's front door or even estimate how much time it would have taken to walk there. (10/15/12, p788, 792-93) There was no evidence indicating they even got out of their cars or accounted for the estimated time it would take to walk to Grisham's door and back. (*Id*., p796-97)

The officers' driving exercise did not put Clark at the crime scene. Given all of these unaccounted-for variables and the absence of evidence of driving times and conditions on November 1, 1994, the officers' re-creation was inconclusive at best. It did not contradict Clark's own statements that he drove directly home the night of November 1, 1994.

Even in the light most favorable to the prosecution, this evidence was insufficient in quality and quantity to put Clark at the crime scene beyond a reasonable doubt.

2. The prosecution's evidence did not establish that Clark's gun, which the police never found, was the murder weapon, which the police also never found.

The murder weapon was never found. Clark admittedly possessed a 9mm handgun in October 1994. (P.Ex.59) That gun likewise has never been found.

Clark told police in 2011 that he did not remember what he had done with the gun, but he likely threw it in a dumpster. (*Id*.) When interrogated on November 3, 1994, Clark told the three interrogating detectives a different story about how he came into possession of and then disposed of a 9mm handgun in October 1994. (P.Ex.59)

There was testimony that a Bryco-Jennings brand gun is a mass-produced, inexpensive handgun. (10/16/12(p.m.), p1872) It was possible the bullets that killed Grisham came from a 9mm Bryco-Jennings model 59 handgun, but also possible it came from one of 90-92 other manufacturers' guns on an 11-page list admitted at trial, although some of the guns were not commonly found in Colorado or in existence in 1994. (10/16/12(p.m.), p1868-69, 1896-97; D.Ex.G)

Moore, the career felon and gunrunner, testified he bought a 9mm Bryco-Jennings handgun for Clark in October 1994. (10/15/12, p920-22) At the same time, Moore bought a 9mm Bryco-Jennings handgun for himself. (*Id*.) Moore (and only Moore) testified that Clark took the larger gun and he kept the compact one. (*Id*.) There was testimony that the larger Bryco-Jennings 9mm handgun is the model 59. (10/16/12(p.m.), p1875)

Weyer testified Clark showed him a small, cheap gun sometime in the week before November 1, 1994, and that Weyer checked to see if it was loaded.

(10/15/12, p870-73) Weyer could not say when exactly this occurred, either in 1994 or at trial, or remember any other details independently. (*Id*., p872-73, 883) During Clark's November 3, 1994 interrogation, Clark told officers he showed Weyer the gun to impress him and that Weyer took a round out of the gun and touched it, at which point Clark took the gun back from him and wiped down the bullet because he didn't want Weyer to have his fingerprints on a bullet. (P.Ex.59, 22:55-23:15, 25:45-26:40) Weyer said he could not remember telling the police that Clark's gun was loaded with 9mm full metal jacket rounds, but that if he told the police that, it would have been the truth. (10/15/12, p873)

Uhlir said that though he had no independent recollection, from reviewing his police interview from November 7, 1994, he remembered Clark showing him a 9mm gun on October 26, 1994. (10/15/12, p826-32) He said the gun was loaded with hollow point bullets. (*Id*., p827) The bullets that killed Grisham were full metal jacket rounds, not hollow points. (10/16/12, p1056-57)

Moore testified that Vanessa, a woman accompanying him on November 1, 1994, "freaked out," and that Moore believed it was because she saw a gun in Clark's car, although he did not recall seeing a gun himself. (10/15/12, p932-34, 975-76, 985-86) However, the police located Vanessa when they reopened the

investigation and spoke with her. (10/17/12, p1254, 1258) At trial, the prosecution did not produce Vanessa as a witness.

In the light most favorable to the prosecution, this evidence is enough to establish that Clark possessed a 9mm handgun, which Moore purchased for him, in the month before Grisham's death. However, the prosecution's evidence was not sufficient to prove beyond a reasonable doubt, even in the light most favorable, that Clark's 9mm gun committed the murder – let alone that Clark committed the murder with it. Or, for that matter, that one of the many other guns in existence that were possible sources of the bullets was the murder weapon.

There was no weapon to test against the recovered bullets. The prosecution's theory of the case depended on a host of suppositions that do not overcome reasonable doubt.

In other words, viewing the evidence in the light most favorable to the prosecution, the evidence was *not* sufficient in quality or quantity to establish (1) that a 9mm Bryco-Jennings model 59 handgun killed Grisham; or (2) that Clark's never-recovered 9mm handgun was a Bryco-Jennings model 59; or (3) that Clark's never-recovered 9mm gun was the murder weapon; or (4) that Clark possessed, let alone fired, the never-recovered murder weapon.

3. The prosecution's theory of Clark's alleged motive and deliberations defied credulity.

Motive is not an element of the crime of first-degree murder; however, because of the evidentiary shortcomings already discussed, the prosecution belabored its motive theory at trial. (10/10/12(p.m.), p1604-06, 1611-12; 10/18/12, p2043-44, 2059-63, 2093-95, 2098-99, 2105) But the alleged motive simply did not hold water.

The prosecution argued Clark murdered Grisham to avoid detection of the check forgery and preserve his chances of joining the Marines. (10/18/12, p2044-49, 2059-61, 2098-99) This did not square with the evidence.

Weyer testified Clark's chances at the Marines likely ended with the motorcycle incident, regardless of whether Clark picked up later charges. (10/15/12, p867-70, 882, 893) Clark, when arrested for the forgery, confessed immediately. (P.Ex.59, 4:05-7:30) Clark did not try to cover it up. Rather, he used his real name on every check. (10/12/12, p1716-20; P.Ex.61)

Clark told officers he figured from the beginning that he would get caught and he would have to deal with the consequences with Grisham and talk to him about it, so he was going to try to use only the money he really needed to use and not destroy Grisham's credit rating. (P.Ex.59, 1:40:45-1:42:20, 1:45:30) At some point, Clark realized he was going to get caught and that Grisham would go to KG,

which would lead to him and he would then talk to Grisham about it. (*Id*., 1:43:25-1:44:15) He said he just was not thinking straight about the situation and told the police directly that he did not see Grisham discovering the check fraud as an obstacle to getting into the Marines. (*Id*., 1:49:15-:30)

It is also impossible to square the prosecution's theory of the case that 19-year-old Michael Clark planned, executed, and evaded prosecution for the murder, including avoiding detection at the apartment complex and when fleeing, setting up a near-perfect alibi, and throwing police off his trail, with Clark's commission of the check fraud without even trying to evade detection. Likewise, the prosecution's theory of the case that Clark expertly planned the murder and evaded prosecution does not jibe with Mr. Clark's conduct in showing a 9mm gun around in the days and weeks before November 1, 1994, or the claim that he supposedly admitted the murder to Stackhouse.

Nor, finally, did the prosecution's theory of the crime rebut the facts that Clark successfully completed his probation in Colorado and even returned to the state later after successfully setting up a life with his family in Oregon. As the prosecution's reliance on facts not in evidence in opening statement and rebuttal argument demonstrated, *see* Issue V, *infra*, the prosecution simply created a

compelling narrative it could sell to the jury without evidence of sufficient substance and quality to support it.

B. The Conviction Must Be Vacated.

The question on a sufficiency challenge is *not* whether there is some evidence that can be interpreted as supporting the jury's verdict. *Jackson*, *supra*, 320. Proof beyond a reasonable doubt requires far more than a scintilla of evidence or even a preponderance. *See Jackson*, *supra; compare*, *e.g.*, *People v. Garcia,* 113 P.3d 775, 783-784 (Colo. 2005) (to present an affirmative defense, the defendant need only present "some credible evidence").

Application of the beyond-a-reasonable-doubt standard "is not irretrievably committed to jury discretion." Rather, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson, supra*, 317, 318, n.10.

That is what occurred here.

This Court should grant certiorari to determine whether the evidence, even in the light most favorable to the prosecution, is sufficient to permit a rational juror to "reach a subjective state of near certitude of the guilt of the accused." *Jackson, supra*, 315, 320 (the rule "protect[s] against misapplication" of the law by a given jury).

The case against Michael Clark was a house of cards built on insufficiently proven circumstances, Clark's inability to prove his gun was not the murder weapon (which, of course, should not have been his burden at trial), and the prosecution's storytelling about his supposed motive. Even in the light most favorable to the prosecution, the insufficient quality of this evidence makes the entire house of cards topple over.

The Court of Appeals' opinion finding the above-detailed evidence sufficient to sustain Mr. Clark's conviction sanctioned a lower court ruling which "so far departed from the accepted and usual course of judicial proceedings… as to call for the exercise of [this Court's] power of supervision." *See* C.A.R. 49(a)(4).

II. The Trial Court Precluded the Defense from Asking a Lead Detective About his Interrogation Notes and the Actions He Took Based on the Notes During an Interview with the Jailhouse Informant. In Affirming, the Court of Appeals Misapplied *Davis v. People*, 2013 CO 57 and its Opinion Conflicts with *People v. Conyac*, 2014 COA 8M.

A criminal defendant possesses due process rights to a fair trial and impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25; *see, e.g.*, *People v. Harlan*, 8 P.3d 448, 459 (Colo. 2000). A defendant also has the due process right to present evidence in support of a complete defense, which ultimately implicates the right to a fair trial. U.S. Const. VI, XIV; *see Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *Chambers v. Mississippi*, 410 U.S. 284

(1973); *People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989). And the rules of evidence strongly favor the admission of material evidence. *E.g.*, *People v. Quintana*, 882 P.2d 1366, 1371 (Colo. 1994).

Generally, comments by one witness about another witness's truthfulness are improper. *Davis v. People*, 2013 CO 57, ¶15; *accord People v. Conyac*, 2014 COA 8M, ¶60. However, a law enforcement officer may testify about his or her assessment of interviewee credibility when that testimony is offered to provide context for the officer's interrogation tactics and investigative decisions. *Davis*, ¶19; *Conyac*, ¶60. The testimony's admissibility hinges on the circumstances under which it is elicited and offered. *Id.*

Here, during the testimony of Detective Trujillo, who was the lead detective in the original 1994 investigation, the prosecution moved in limine to preclude Clark from asking about notes Trujillo took when interviewing Stackhouse "to the effect that perhaps a polygraph would be appropriate for this person." (10/17/12(p.m.), p2009) Defense counsel responded:

> Detective Trujillo put in his notes that he wanted – was thinking about polygraphing Stackhouse because he thought that he might be a psychopath. If Detective Trujillo has questions about Mr. Stackhouse's credibility and he is a lead investigator at the time, we're allowed to follow up on that and say, Did you ever do that and why did you write that.

(*Id*., p2010) The trial court granted the prosecution's motion, citing *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009), *Liggett v. People*, 135 P.3d 725 (Colo. 2006), and *People v. Cook*, 197 P.3d 269 (Colo. App. 2008). (*Id*.)

The trial court erred. As in *Davis* and *Conyac*, *supra*, inquiry into the detective's assessment of interviewee credibility was permissible because it "provide[d] context for the detective's interrogation tactics and investigative decisions." *Davis*, ¶19; *Conyac*, ¶60; *see also People v. Miranda*, 2014 COA 102, ¶20 n.3, *cert. granted in part on other grounds* No.14SC772 (Aug. 31, 2015), ("[I]nterviewer comments that provide context are generally admissible.") (citing *Davis*, ¶19); *People v. Bridges*, 2014 COA 65, ¶15 ("Testimony about the credibility of another witness is admissible if it explains or provides context for why the interviewer conducted an interview in a particular manner.") (citing *Davis*, ¶19).

The Court of Appeals, in affirming the trial court, misapplied *Davis* and its opinion conflicts with *Conyac*. Slip op. at 25-27; *see* C.A.R. 49(a)(2)-(3).

The officer's decision-making in the context of the interview process was admissible under *Davis* and *Conyac*. That is exactly what defense counsel wished to explore in asking Trujillo about his interview notes: "If Detective Trujillo has questions about Mr. Stackhouse's credibility and he is a lead investigator at the

time, we're allowed to follow up on that and say, Did you ever do that and why did you write that." (10/17/12(p.m.), p2010); slip op. at 24.

Despite this clear articulation from defense counsel of the proposed inquiry into Detective Trujillo's interrogation notes, the Court of Appeals found defense counsel had not preserved Mr. Clark's claim. Slip op. at 24. But a party need not use "talismanic language" to preserve an issue for appeal. *E.g.*, *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004). In finding the claim unpreserved, the Court of Appeals erred.

Inquiry into Trujillo's notes about Stackhouse treads the same ground as the interrogating officer's admissible testimony in *Conyac*, where the officer testified he "used all of the previously-noted tactics during his interview with defendant, which included confronting defendant when he felt defendant was being untruthful." 2014 COA 8M, ¶73. *Conyac*, in fact, involved an interrogating officer using an actual polygraph examination during the interrogation and testifying about those tactics. *Id*., ¶¶64-65.

Thus, there are "strong similarities" between the testimony permitted in *Davis* and *Conyac* and the questions and testimony the trial court prohibited here. *Conyac*, *supra*, ¶74. The Court of Appeals disagreed:

> The detective's skepticism about the informant's truthfulness – he noted that the informant might be a

> "psychopath" and wondered whether the informant should undergo a polygraph examination – did not explain *why* the detective proceeded to investigate the case in the manner that he chose to investigate it. In other words, the detective's opinion about the informant's credibility did not provide any context for why the detective took or did not take any subsequent investigative steps, *see Davis*, ¶ 19; *Miranda*, ¶ 20 n.3, particularly because the record does not contain any evidence to indicate that the detective made any investigative decisions based on his misgivings about the informant's credibility. (For example, the record contains no evidence that the detective asked the informant to submit to a polygraph examination.)

Slip op. at 26.

But Trujillo's assessment of Stackhouse's credibility and what he did in response to that assessment, whether it involved exploring a polygraph examination, challenging Stackhouse with his assessment that Stackhouse was a "psychopath," or the reasons Trujillo did not use these tactics, would certainly have explained the progression of the investigation – ***if defense counsel had been properly allowed to ask those questions***. *See Conyac*, ¶¶64-65, 71-75 (interrogating officer's testimony about the tactics and techniques he used in polygraph examination, including "confronting defendant when he felt defendant was being untruthful," properly admitted); *accord Davis*, ¶20 (trial court properly permitted prosecutor's questions "aimed to draw out the circumstances that surrounded the detectives' investigative tactics and decisions" and detectives'

testimony concerning "the detectives' assessments of the interviewees' credibility during the interviews conducted prior to trial.").

The Court of Appeals' opinion erroneously hides behind the trial court's ruling – which prevented defense counsel from asking the proffered questions and making a further record. The Court of Appeals used the lack of this record to affirm the trial court's ruling. Slip op. at 26.

Mr. Clark should have been permitted to ask Trujillo if he confronted Stackhouse with Trujillo's assessment of Stackhouse's credibility and whether he tested that assessment by challenging Stackhouse's credibility, by polygraph or otherwise. *Conyac*, ¶73; *accord Davis*, ¶20.

The trial court's error in excluding this line of inquiry was devastating to Mr. Clark's defense. Stackhouse was the prosecution's key witness in this entirely circumstantial case. *See* slip op. at 5 ("So it was up to the jury to decide whether it believed the informant's testimony that defendant had admitted that he had killed someone, and a rational jury might have found that it believed the informant, and it then might have found that the person whom defendant had killed was the victim.").

Stackhouse was the only person who testified that Clark, allegedly, made admissions about the homicide. The prosecution deemed Stackhouse's testimony

so critical to its case that it began its opening statement with Clark's alleged statement to Stackhouse that "[t]hey can't charge me because they'll never find the gun." (10/10/12(p.m.), p1598) The prosecutor referenced that alleged admission twice more in opening statement. (*Id*., p1608)

To enhance his credibility, the prosecution elicited self-bolstering testimony from Stackhouse, who claimed he had never testified before, feared what would happen if his fellow California inmates knew he testified, and claimed he felt morally obligated to testify. (10/16/12(p.m.), p1122-23, 1810)

In rebuttal argument, the prosecutor ***four times*** called Stackhouse's claim that he was testifying out of moral obligation, **"the most poignant moment"** in the entire trial. (10/18/12, p2103-04); *see also Domingo-Gomez v. People*, 125 P.3d 1043, 1052 (Colo. 2005) (rebuttal argument is the last time jurors hear from counsel and therefore foremost in their thoughts) (citing *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001)). Indications that even the lead, interrogating detective doubted Stackhouse's veracity and psychological makeup, and what Trujillo did to test his assessments, would have counterbalanced Stackhouse's claims to moral rectitude and civic duty.

Trujillo's interview notes and assessments of Stackhouse's credibility during the 1994 interview were also fresh and contemporaneous with Stackhouse's

disclosures, whereas by 2012, 18 years had passed for Stackhouse to practice and perfect his story. Trujillo's contemporaneous credibility assessment and what he did in reaction to that assessment were thus far better evidence than the stale, practiced testimony of Stackhouse and Trujillo at trial.[10]

This surely would not have been lost on the jurors, had they been properly permitted to consider Trujillo's interview notes and testimony inquiring about them. The jurors should have been permitted to consider these facts and Trujillo's conduct and decision-making in the interrogation in conducting their own credibility assessment of Stackhouse's testimony. *See Davis*, ¶21 (quoting *People v. Lopez*, 129 P.3d 1061, 1067 (Colo. App. 2005)).

Given the central significance of Stackhouse's testimony to the prosecution's case, there is *at least* a reasonable possibility the court's error affected the verdict, violating Clark's rights to a fair trial, an impartial jury, and a complete defense. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25.

The Courts of Appeals decided a question of substance in a way that is not in accord with applicable decisions of this Court (*Davis*) and which conflicts with the

[10] As noted above, this trial featured extensive use of witnesses' unsworn, out-of-court statements from the mid-90's to refresh and impeach their trial testimonies. (Supp.Access, p548, jury inst. 12; *e.g.*, 10/10/12, p407, 418-19; 10/15/12, p816-46, 870-74, 879, 881; 10/17/12, p1290-94)

decisions of other divisions of the Court of Appeals (*Conyac*). *See* C.A.R. 49(a)(2)-(3). This Court should grant certiorari review.

III. The District Court's Order and the Court of Appeals' Analysis of that Order Raises an Issue of First Impression for this Court: Whether the Rule of *Davis v. People,* 2013 CO 57 Applies to Evidence Proffered by the Defense.

The Court of Appeals' analysis of Mr. Clark's claim that the trial court erred under *Davis v. People*, 2013 CO 57 and *People v. Conyac*, 2014 COA 8M, presents an issue of first impression for this Court. *See* C.A.R. 49(a)(1).

The rule of *Davis* is that "a detective may testify about his or her assessments of interviewee credibility when that testimony is offered to provide context for the detective's interrogation tactics and investigative decisions." 2013 CO 57, ¶19. *Davis* and *Conyac* both found that where the prosecution proffers such evidence, as in those two respective cases, it is admissible. 2013 CO 57, ¶¶5-9, 20; 2014 COA 8M, ¶¶71-75; *see also People v. Cardman*, 2016 COA 135, ¶¶85-91, *cert. granted, judgment vacated*, No. 16SC789, 2017 WL 1369883 (Colo. Apr. 10, 2017) (finding detective's statements, that he disbelieved defendant and believed victim, in video offered by prosecution, admissible under *Davis*).

Here, the Court of Appeals determined that the lead detective's notes taken during the interrogation "did not explain *why* the detective proceeded to investigate the case in the manner he chose to investigate it." Slip op. at 26, ¶50 (emphasis in

original). Thus, the Court of Appeals affirmed the trial court's order excluding the defense-proffered evidence. *Id*.

The Court of Appeals' analysis turned on the lack of a further record made by defense counsel following the trial court's order barring the proposed line of inquiry. *Id*. (Finding the notes did not provide context for the detective's investigative decisions, "particularly because the record does not contain any evidence to indicate that the detective made any investigative decisions based on his misgivings about the informant's credibility. (For example, the record contains no evidence that the detective asked the informant to submit to a polygraph examination.)").

This analysis indicates that the outcome on appeal would have been different had trial counsel made an offer of proof concerning whether the detective proposed that the informant take a polygraph examination and whether a polygraph examination had actually occurred. *See id*. Had defense counsel proffered, in full detail, the prospective testimony the defense expected to elicit from the lead detective in response to questions about his interrogation notes – including what the detective did next, why he did it, and how the informant's presentation as a psychopath and a liar affected the course of the investigation – the Court of

Appeals' analysis suggests the defense may have established that the trial court's ruling was error. *See id*.

Of course, ***defense counsel did make a similar proffer***: "If Detective Trujillo has questions about Mr. Stackhouse's credibility and he is a lead investigator at the time, we're allowed to follow up on that and say, Did you ever do that and why did you write that." (10/17/12(p.m.), p2010); *see People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) ("talismanic language" not necessary to preserve an issue for appeal). Nonetheless, the Court of Appeals determined that the argument defense counsel made to support admissibility of the testimony did not preserve Mr. Clark's claim on appeal. Slip op. at 24, ¶45.

No published case applying the rule of *Davis* and *Conyac* (which extended *Davis* to interrogation tactics and investigative decisions in the context of a polygraph exam) has turned on the lack of record made by defense counsel at trial. In both *Davis* and *Conyac*, the trial court admitted the testimony, proffered by the prosecution, in the first instance. *See also Cardman*, *supra*. Those rulings were then upheld on appellate review.

Here, by contrast, the testimony, proffered by the defense, was never admitted in the first place.

Accordingly, the district court's ruling decided a question of substance not heretofore determined by this Court. *See* C.A.R. 49(a)(1). This Court should grant certiorari review.

IV. The Prosecutor Elicited Trujillo's Testimony that Mr. Clark Had Not Told the Truth During Clark's Interrogation. The Prosecutor's Questions Implied Mr. Clark Lied when He Refused to Confess. The Prosecution Used Trujillo's Testimony to Argue in Rebuttal Closing that Everything Mr. Clark Told the Police was Untrue. The Court of Appeals Erred in Finding that this Testimony – and the Prosecution's Exploitation of it – Did Not Seriously Affect the Fundamental Fairness of the Trial or Cast Doubt on the Reliability of the Conviction.

This exchange concerning Detective Trujillo's 1994 interrogation of Mr. Clark occurred during the prosecutor's cross-examination of Trujillo in the defense case:

> Q. And I think earlier, if I remember correctly, [defense counsel] asked you if [Clark] – after you did [the fake GSR test] if [Clark] had confessed and you said no?
>
> A. Correct.
>
> Q. Now throughout the course of the interview, did you and Detective Weiler and Weinheimer repeatedly ask him to tell you the truth?
>
> A. Yes, we did.

> Q. And I know [defense counsel] said [Clark] didn't confess, but you asked him repeatedly to tell you the truth?[11]
>
> A. Yes.
>
> Q. Did he tell you the truth about where he got the gun?
>
> A. He did not.
>
> Q. Did he tell you the truth about what he did with the gun?
>
> A. I don't believe so.

(10/17/12(p.m.), p2023-24)

Under CRE 608(a), neither lay nor expert witnesses may opine that another witness told the truth on a specific occasion. *E.g.*, *Wittrein*, *supra*, 1081; *Liggett*, *supra*, 732 ("Credibility determinations are to be made by the fact-finder, not by the prosecutor or a testifying witness."); *Cook*, *supra*, 276 (admission of officer's opinion about child witness's credibility constituted plain error); *see also United States v. Hill*, 749 F.3d 1250 (10th Cir. 2014) (admission of expert's opinion as to defendant's credibility constituted plain error warranting reversal).

[11] The Court of Appeals did not include this question or Trujillo's response in its excerpt of the testimony or in its analysis. Slip op. at 28. Nor did it include it in its analysis of the error or the prejudice. *Id*. at 29-30.

As the Court of Appeals observed, Trujillo's testimony violated this well-established rule. Slip op. at 29-30. Unlike *Davis* and *Conyac*, *supra*, the exchange was not couched in investigative decision-making or interview techniques. Slip op. at 29.

The error was obvious and substantial – the trial court had cited *Wittrein*, *Liggett*, and *Cook* only moments earlier in prohibiting defense counsel from inquiring of Trujillo concerning his interview with Stackhouse. *See* Issue II; slip op. at 30 (assuming error was obvious and substantial under plain error review). While the Court of Appeals agreed, it erred in finding Trujillo's testimony did not seriously affect the fundamental fairness of the trial or cast doubt on the reliability of the conviction. Slip op. at 30.

The Court of Appeals erred for three reasons.

First, the prosecutor implied Mr. Clark was lying when he did not confess ("I know [defense counsel] said he didn't confess, but you asked him repeatedly to tell you the truth?"). The prejudice of this implication is obvious and egregious. *See, e.g.*, *Wend v. People*, 235 P.3d 1089, 1098 (Colo. 2010) (prosecutor's personal attacks on defendant's veracity represent a heightened degree of prejudice, calling into question fundamental fairness of jury's verdict). The Court of Appeals,

however, failed to even consider this portion of Trujillo's erroneous testimony. *See* footnote 11, *supra*; slip op. at 28-30.

Second, the disposition of Clark's gun and the prosecution's theory that it was the murder weapon were key disputed facts. The personal commentary of one of the lead detectives that Clark lied about the gun damaged Clark's defense. Based on this exchange, the prosecution argued in closing argument that Clark "fabricated" what he told police about obtaining the gun.[12] (10/18/12, p2045)

Third, in rebuttal closing, the prosecutor argued: "***everything*** he said [to the detectives in 1994] was untrue. ***Everything*** he said was misleading, ***everything*** [he] said was designed to steer the police away from his gun, the gun that he purchased." (*Id*., p2096-97) (emphasis added). Addressing Clark's explanation of what he did with the gun, the prosecutor said, "we know that's not true." (*Id*., p2097)

The Court of Appeals determined that because Mr. Clark gave different versions of what he had done with the gun in 1994 and 2011, "the detective's

[12] A "fabrication" is akin to a lie. *See* https://www.merriam-webster.com/dictionary/fabricate, last viewed 6/29/17, ("(1)(b): to make up for the purpose of deception – accused of *fabricating* evidence"); *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005) ("a prosecutor cannot communicate her opinion on the truth or falsity of witness testimony during final argument").

testimony did not interject a question about defendant's veracity into the case that was not already there." Slip op. at 30. The Court of Appeals erred.

It is certainly true that Mr. Clark's two accounts – 17 years apart – about what he did with his gun diverged. But it was not for Detective Trujillo or the prosecutor to decide for the jurors which version they should believe. *See* CRE 608(a); *Liggett*, *supra*, 732 ("Credibility determinations are to be made by the fact-finder, not by the prosecutor or a testifying witness.").

Nor, critically, does the Court of Appeals' rationale explain away the prosecutor's strong implications that Mr. Clark's refusal to confess was not truthful, let alone the prosecutor's direct arguments to the jury that "everything" Mr. Clark said to the police was untrue and misleading. Indeed, in cases lacking in direct evidence and hinging on circumstantial evidence and credibility determinations, this Court and the Court of Appeals have found error of this kind particularly prejudicial. *See*, *e.g.*, *Venalonzo v. People*, 2017 CO 9; *People v. Snook*, 745 P.2d 647 (Colo. 1987); *People v. Cernazanu*, 2015 COA 122; *People v. Bridges*, 2014 COA 65; *People v. Cook*, 197 P.3d 269 (Colo. App. 2008); *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986).

Accordingly, the Court of Appeals decided a question of substance in a way that is not in accord with applicable decisions of this Court, which conflicts with

the decisions of other divisions of the Court of Appeals, and which departed from the accepted and usual course of judicial proceedings. *See* C.A.R. 49(a)(2)-(4). This Court should grant certiorari review.

V. The Prosecution Committed Egregious, Prejudicial Misconduct in Opening Statement and Rebuttal Argument.

The prosecution committed egregious misconduct. The Court of Appeals recognized some of it, but found it non-prejudicial. Slip op. at 39-48. The Court of Appeals erred.

Prosecutors must refrain from improper methods calculated to produce a wrongful conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935); *Harris v. People*, 888 P.2d 259, 263 (Colo. 1995). This duty is derived from a defendant's constitutional rights to a fair trial and impartial jury. *Harris*, *supra*, 263; *People v. Oliver*, 745 P.2d 222, 228 (Colo. 1987) ("Prosecutorial misconduct may influence a jury and deny an accused a fair trial."); *see* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25. Improper prosecutorial remarks threaten these constitutional rights because they carry "the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985).

The prosecutor must "refrain from argument which would divert the jury from its duty to decide the case on the evidence." *Harris*, *supra*, 265 (quoting 1

ABA, *Standards for Criminal Justice*, §3-5.8(d) (3d ed. 1993)). Statements "that evidence personal opinion, personal knowledge, or inflame the passions of the jury are improper." *Domingo-Gomez v. People*, 125 P.3d 1043, 1050 (Colo. 2005); *accord Oliver*, *supra*, 228.

1. The prosecutor misstated the evidence and raised an improper character inference about Clark in opening statement.

In opening statement, the prosecutor said this about Clark:

> And people that come to this trial will describe him as a guy who had a chip on his shoulder, a guy who had a chip on his shoulder because some people had more than him, some of his classmates, some of his friends were the haves, and he was a have not.

(10/10/12(p.m.), p1604)

No witness testified that Clark "had a chip on his shoulder," or even that he had something against "people who had more than him." The prosecutor introduced these concepts without evidentiary support. In fact, there was substantial evidence supporting the *opposite* conclusion.

Second, the statement introduced improper character evidence. CRE 404(a) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.").

The prosecution also falsely exaggerated evidence of Clark's interest in the Marine Corps:

> In fact, you'll hear from witness after witness in this trial that Michael Clark wanted to join the Marine Corps so badly he would wear a Marine T-shirt all the time, that he had [a] Marine Corps sticker on his old Jeep, even kept his hair in a high and tight.

(10/10/12(p.m.), p1604)

No witness, let alone "witness after witness," testified that Clark wore a Marine T-shirt or had a Marine Corps sticker on his old Jeep. While there was a photo of Clark at 19 with a crew cut introduced into evidence, no witness testified that he "kept his hair in a high and tight," because of his desire to join the Marines.

The prosecution used this rhetoric to exaggerate Clark's fixation on the Marines, improperly bolstering their theory of motive. The prosecution returned to this unsupported argument in rebuttal: "He has the T-shirt and the stickers and he tells all of his friends that's his dream." (10/18/12, p2098)

It is well-established that in opening statement the prosecutor must not misrepresent the evidence to come. *See, e.g., Archina v. People*, 135 Colo. 8, 37, 307 P.2d 1083, 1098 (1957) (part of prosecutor's opening statement "was highly improper, it proved factually untrue, and untrue statements should not be made to jurors and certainly should not be repeated").

Likewise, it is long-settled that the prosecutor must not misstate the evidence in closing argument. *People v. DeHerrera*, 697 P.2d 734, 743 (Colo. 1985); *accord Domingo-Gomez*, *supra*, 1049 (citing ABA Standards). The bar against character evidence is similarly longstanding and unambiguous. *E.g.*, CRE 404; *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959).

This irrelevant slandering of Clark's character served no purpose other than to taint him in the jury's eyes even before the first witness. *People v. Spoto*, 795 P.2d 1314, 1320 (Colo. 1990) (bad character evidence injects "collateral issues into the case which [were] not unlikely to confuse and lead astray the jury."). The repeated invocation of Marine t-shirts and stickers served to bolster, without supporting evidence, the prosecution's theory that Clark was overly fixated on joining the Marine Corps.

2. The prosecutor conveyed his personal opinion during rebuttal argument.

At the beginning of rebuttal, the prosecutor argued Clark's defense relied on speculation, setting up this riposte:

> I don't know if on any other occasion Mike Clark knew how to handle a gun, but I knew from – but I know from [one] to [two] feet away he was able to hit Marty Grisham four times. That's what I know and that's what this evidence shows. And that's not me speculating, that's not me saying what might have been.

(10/18/12, p2091-92)

The prosecutor here told the jury, "I know from [one] to [two] feet away [Clark] was able to hit Marty Grisham four times. That's what I know…" This conveyed the prosecutor's personal opinion of Clark's guilt.

Moreover, the prosecutor said he was not "speculating" or "saying what might have been." In other words, the prosecutor improperly told the jury he *personally knew* Clark was guilty. *See Young*, *supra*, 18-19; *Domingo-Gomez*, *supra*, 1050.

3. The prosecutor improperly aligned himself with the court's authority.

Shortly thereafter, the prosecutor launched this soliloquy:

> Now, ladies and gentlemen…you come into this courtroom where all of the lines are clean and they make sense and they all come together, that's not the way real life is. I wish, ladies and gentlemen, in this building where things are so serious and so grave, so ugly, that something could be easy, but a murder trial is not easy. A murder investigation is not easy. I wish things could be clean and pristine and as orderly as things are in this courtroom. I wish that life could always have a man like Judge Mulvahill.
>
> [Defense Counsel]: Objection, Judge.
>
> [Court]: Sustained.

> [Prosecutor]: But it's not. This case is not like that, the evidence is not like that, because the evidence is born in the real world and it comes to us from the real world.

(10/18/12, p2092-93)

Prosecutorial arguments "wrapped in the cloak of state authority" are impermissible. *See People v. Rodriguez*, 794 P.2d 965, 976-77 (Colo. 1990) (quoting *Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985)) (improper to read to jury from legal authority in capital sentencing). It is likewise improper for a prosecutor to invoke the State's authority to ratify the defendant's guilt. *See Domingo-Gomez*, *supra*, 1052-53 (prosecutor's reference to governmental "screening process" was improper).

While the objection was sustained, the prosecutor's foray into the cloak of state authority was particularly problematic here, moments after the prosecutor told the jurors "I know from [one] to [two] feet away [Clark] was able to hit Marty Grisham four times." (10/18/12, p2091)

This misconduct conveyed a personal belief in Clark's guilt and the State's imprimatur thereon. *Young*, *supra*, 18; *Domingo-Gomez*, *supra*, 1050-53; *Estep*, *supra*.

4. The prosecutor improperly commented on Clark's truthfulness.

Later, addressing Clark's November 1994 interrogation, the prosecutor opined:

> ...[E]verything he said was untrue. Everything he said was misleading, everything was said was designed to steer the police away from his gun, the gun that he purchased. And they told him, We want to clear you or we want to exclude you and we want to give you an opportunity to explain it.
>
> …
>
> The Defendant wasn't telling the truth about when he had it, where he got it and what he did with it, his story was ridiculous, but that's the same old Mike.

(10/18/12, p2096-97) (*See* Issue IV, *supra*)

Prosecutors are prohibited from communicating a personal belief in a witness's veracity to the jury. *Domingo-Gomez*, *supra*, 1049 (citations omitted). Because credibility determinations are solely the jury's province, opining on witness veracity is particularly inappropriate. *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987). Counsel may not "throw onto the scales of credibility the weight of his own personal opinion." *Id*. (quoting *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984)).

Here, improperly opining on Clark's veracity was exactly what the prosecutor did.

5. The prosecutor improperly appealed to community sentiment and jurors' passions.

The prosecutor also appealed to jurors' passions:

> The most poignant moment is Stackhouse saying despite what this means to him and despite the lack of benefit, despite the harm coming here to testify is going to do to him, if someone did this to my family –
>
> [Defense Counsel]: Objection, Judge, completely improper.
>
> [Court]: Overruled.
>
> [Prosecutor]: If someone did this to my family, this is his – these are his words not mine, If someone did this to my family, I would want someone to step forward.

(10/18/12, p2104)

A prosecutor may not use arguments or introduce evidence intended to inflame the passions of the jury. *Domingo-Gomez*, *supra*, 1049; *Oliver*, *supra*, 228; *People v. Mason*, 643 P.2d 745, 752 (Colo. 1982); I *ABA Standards for Criminal Justice* Standard §3-5.8(c) (2d ed. 1980). It is further improper to appeal to jurors to consider the wishes of the community. *Rodriguez*, *supra*, 977; *Wilson, supra*; *see People v. Fernandez*, 687 P.2d 502, 506 (Colo. App. 1984) (commentary in closing argument on effect of victim's death on her family and

community is improper); *see also Lee v. State*, 950 A.2d 125 (Md. App. 2008) (argument to jury that jury should protect their community and clean up streets invoked prohibited "golden rule" argument).

The trial court overruled Clark's objection, leaving the impression in jurors' minds, contrary to the cases just cited, that sympathy for Grisham's family was an appropriate ground for decision.

6. The prosecutor improperly urged the jury to "Do justice" for the victim, to do its "hard work" and to "Do justice and make sure that the right thing happens."

In closing argument, one prosecutor concluded by asking the jurors to "do justice to Marty Grisham." (10/18/12, p2069) Later, concluding rebuttal, the other prosecutor commended the "hard work" the jurors were about to do:

> …I wish that there was a way to just put it all in a hopper and press a button and get an answer, but it's never easy, it's never pretty, it's never beautiful, it's never majestic, it is hard work. It is hard work.
>
> …
>
> Be proud of the work you are going to do in this case, as hard as it is, as heartbreaking as it may be to hear this evidence and to do what you have to do, be proud, do justice and make sure that the right thing happens. Thank you.

(*Id*., p2105-06)

"Prosecutors may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim." *McBride*, *supra*, 223; *see also Domingo-Gomez*, *supra*, 1049 (prosecutor may not opine on defendant's guilt). A prosecutor's comment that the jury's role is to "do justice" is flagrantly improper. *See*, *e.g.*, *Young*, *supra*, 18 (prosecutor's exhortation to jury to "do its job" was erroneous because "that kind of pressure…has no place in the administration of criminal justice"); *State v. Acker*, 627 A.2d 170, 172-73 (N.J. Super. App. Div. 1993) (prosecutor committed "egregious" misconduct in telling jury to "give them some justice folks," referring to alleged victims; warning jury about not doing its job is one of most egregious forms of prosecutorial misconduct, which alone can deprive defendant of fair trial).

The prosecutor's misconduct here was obvious, egregious, and prohibited by published cases in this jurisdiction.

7. The misconduct constituted reversible, cumulative error.

Mr. Clark's jury deliberated for three days over the single charge. Even assuming, *arguendo*, the evidence was constitutionally sufficient, this was an exceptionally close case, as the discussion of the Facts and Issue I, *supra*, demonstrate. *Any* error presented an unacceptable risk of an improperly rendered verdict.

Far from incidental, the prosecutorial misconduct here was pervasive and flagrant. Even those errors to which the court sustained an objection must be considered in the cumulative prejudice analysis.[13] *Domingo-Gomez*, *supra*, 1053 (looking to cumulative prejudice of prosecutor's misconduct where trial court sustained its own objection at trial). And the improprieties were exacerbated by their prominent place during rebuttal and in opening statement. *See id.*, 1052 (prosecutorial impropriety is exacerbated during rebuttal because it is the last time jurors hear from counsel and therefore foremost in their thoughts) (citing *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001)); *Archina*, *supra* (reversing in part due to prosecutor's "factually untrue" opening statement).

Indeed, the prosecutor's misconduct here built up to a final, repeated crescendo, improperly urging the jurors to "do justice and make sure that the right thing happens" by convicting Clark. (10/18/12, p2106)

The Court of Appeals found that part of the opening statement and the repeated salvos to "do justice" to Grisham were improper. Slip op. at 43-44, 47-48. Nonetheless, the Court of Appeals took the view that the improprieties "were not so prejudicial that we should reverse defendant's conviction." Slip op. at 37.

[13] The Court of Appeals failed to do this. Slip op. at 39.

As to the improper opening statement, the Court of Appeals found Mr. Clark had not demonstrated the prosecutor's bad faith or "manifest prejudice." Slip op. at 43-44. But the bad faith of asserting facts never presented is obvious on its face. Moreover, the prosecutor returned to these facts not in evidence in rebuttal argument. (10/18/12, p2098) And the manifest prejudice was the prosecution's use of the facts not in evidence to gin up its incredible motive theory. *See* Issue I, *supra*.

As to the repeated "do justice" argument, the Court of Appeals found the error was not plain. But multiple published decisions of the Court of Appeals prohibit the "do justice" argument. *Conyac*, *supra*, ¶¶146-150*; McBride*, *supra*, 223; *accord People v. Marko*, 2015 COA 139, ¶221. Moreover, the United States Supreme Court long ago found exhorting a jury to "do its job" improper because "that kind of pressure…has no place in the administration of criminal justice." *Young*, *supra*, 18.

Further, the plain error analyses in *McBride* and *Conyac* are not transferable to this case. In *McBride*, the division did not examine the prejudice prong because it found plain error throughout other aspects of the closing argument. 228 P.3d at 223. In *Conyac*, the division assumed the error obvious, but found it was not plain

because the defendant confessed and the victim's testimony at trial tracked that confession. 2014 COA 8M, ¶144-149.

Here, however, the evidence was extremely close and any impropriety could have tipped the balance. The prosecution's repeated, improper "do justice" argument was more than enough to do so, even without considering the other improprieties discussed above.

But the other improprieties discussed above occurred. Contrary to the Court of Appeals' analysis, slip op. at 39-48, the prosecution's misconduct was egregious and prejudicial to Mr. Clark. Even assuming, *arguendo*, that no single instance mandates reversal, the cumulative effect of the prosecutorial misconduct constituted reversible error under any standard of review. *See, e.g.*, U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25; *Wilson*, *supra*, 419-21; *McBride*, *supra*, 221.

This Court should grant certiorari review.

VI. The Trial Court Erroneously Failed to Suppress Mr. Clark's Statements from Interrogations on November 3, 1994, and April 15, 2011.

A. Mr. Clark's statements during the November 3, 1994 interrogation were rendered involuntary by Clark's youth, fearful mental state, the length of the interrogation, an implied promise of leniency, and extensive police deception.

Admission of involuntary statements violates the defendant's constitutional rights to due process and against self-incrimination. U.S. Const. amend. V, XIV; Colo. Const., art. II, §18; *People v. Medina*, 25 P.3d 1216, 1221 (Colo. 2001). A "statement is voluntary if it is the product of rational intellect and a free will unaffected by improper influence, coercion, threats or promises." *Medina*, *supra*, 1222 (quoting *People v. McIntyre*, 789 P.2d 1108, 1112 (Colo. 1990) (Rovira, J., dissenting)). Statements are rendered involuntary where coercive governmental conduct plays a significant role in inducing the statements. *People v. Humphrey*, 132 P.3d 352, 360 (Colo. 2006).

Coercive police conduct includes subtle forms of psychological coercion. *People v. Gennings*, 808 P.2d 839, 843-44 (Colo. 1991) (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). When subject to questioning by police, the "deliberate exploitation of a person's weakness by psychological intimidation can under some circumstances constitute a form of governmental coercion that renders a statement involuntary." *Id.*, 844.

Here, the Court of Appeals agreed with the trial court's findings that because Clark was *Mirandized*, the interrogation was "conversational," he was afforded a bathroom break mid-interrogation, and because the police did not threaten him, his statements were voluntary. Slip op. at 12-13. The Court of Appeals rejected Clark's claims that his youth and extensive police deception rendered his statements involuntary. *Id.* at 12-15.

But evidence at the motions hearing painted a different story. The "conversational" interrogation was actually three hours of deception and accusations. (P.Ex.2(Mots.CD)) Clark had just been arrested at gunpoint for check forgery, pushed up against his car, and handcuffed about an hour-and-a-half before the interrogation began. (p1348-53, 1366-67)[14] He was in custody with police present for approximately five-and-a-half to six hours. (p1346-58)

At the stationhouse, Clark was taken handcuffed to a closed 8x13 interrogation room and interrogated by Detectives Trujillo, Weinheimer, and Weiler, all of whom had guns, sitting around a small table. (p1354-56, 1377-78) The interrogation room was windowless with a single small door and lacked two-way glass or a video camera. (p1356, 1407) Weiler testified: "That's why I think

[14] Unless otherwise noted, Issue VI page cites are to the 8/9/12 motions hearing.

that we went a little bit heavier on people in there, because we knew that this was probably our single chance to have that interview." (*Id*.)

The interrogation was accusatory, Weiler and Trujillo admitted, saying they "pushed" Clark to get more information. (p1358, 1379-80, 1411) Clark admitted right away to the check forgery – the detectives spent the entire three hours interrogating him with targeted questions about Grisham's murder. (p1380-83)

Clark told the officers that he was "scared" and "shaken up" 40 minutes into the interrogation. (P.Ex.2(Mots.CD)/Tape 1/Side 2, 10:10-10:25) Five minutes later, he said he was "scared out of his mind." (*Id*., 14:38-45)

Clark said he was not 100 percent there because he nearly "pissed [his] pants" when confronted by Weiler, and had been shaken up since the arrest. (*Id*., 28:35-52) Clark admitted that police made him "queasy and uneasy," his pulse was racing the whole interrogation, and interaction with police made him nervous easily. (*Id*., Tape 2/Side 1, 20:50-21:25) He said he was not even aware Grisham had been killed until after he was arrested and, again, he was "shaken up" over it. (*Id*., Tape 3/Side 1, 9:25-35)

The officers employed deceptive tactics, conveying they possessed non-existent evidence. Weiler testified to using an interrogation tool to "put maybe

some doubt in [Clark's] mind" about how much information the police had. (p1359)

The three officers implied to Clark that his fingerprints could be found on Grisham's doorknob and that a sketch artist was drawing a picture that could identify him. (*Id*., Tape 2/Side 1, 10:20-12:45) They implied they had shoeprints from the crime scene they thought would match Clark's shoes. (*Id*., Tape 2/Side 2, 27:20-28:50) They told him "we can keep going with this cat and mouse game all night…we can ask stupid questions, you can give us these answers that don't make a whole lot of sense to anybody, or we can figure out what the hell we're doing here." (*Id*., Tape 2/Side 1, 19:56-20:21)

Further, the officers employed what Trujillo called "a psychological tool," a pretextual GSR kit. (*Id*., Tape 2/Side 2, 29:00); p1310-12; 1412) Knowing the test had no evidentiary value and with no intent to actually test the particles retrieved from Clark, the officers told Clark they could look at electrons under a microscope and tell whether Clark had fired any sort of gun – specifically, that they could tell if Clark fired the gun used to kill Grisham. (p1310-13, 1320, 1324-26, 1412) The officers claimed the GSR kit would pick up particles from several days previous and determine the type of gunpowder used or even the gun's manufacturer. (P.Ex.2(Mots.CD), Tape 3/Side 1, 00:05-55)

The supposed test was an attempt at tricking Clark. Indeed, the test was never entered into property or evidence at the police station and Trujillo said he did not recall what happened to it. (p1313-15, 1331-32)[15]

Then, after attempting to impress Clark with the breadth of evidence they had collected, the officers told him they could get a district attorney down there right away because the person who talks first is usually the one police believe and usually the one who gets the best deal. (P.Ex.2(Mots.CD), Tape 3/Side 1, 11:00-13:10) At minimum, this suggested Clark would receive a better plea bargain if he disclosed information to the officers. *See Medina*, *supra*, 1222 ("The statement must not be the product of any direct or implied promises, nor obtained by exerting an improper influence."); *Gennings*, *supra*, 843; *People v. Quintana*, 198 Colo. 461, 463, 601 P.2d 350, 351 (1979) (holding confession involuntary where the defendant was encouraged to give a statement, because it would be easier on his family if he did so).

Police officers' false representations regarding the extent of their knowledge and claims to evidence they did not possess, while not necessarily sufficient on their own, can contribute to the coerciveness of an interrogation. *People v.*

[15] At trial, contrary to his motions hearing testimony, Trujillo for the first time admitted he immediately threw the phony GSR kit away. (10/17/12(p.m.), p1999-2000)

Freeman, 668 P.2d 1371, 1380 (Colo. 1983); *see also People v. Lytle*, 704 P.2d 331, 332 (Colo. App. 1985) (trial court erred in finding defendant's confession voluntary when, relying on fact defendant did not confess to everything he was accused of, it found defendant's will was not overcome by officers' promises, threats, and misrepresentation of the applicable penalty for defendant's acts).

Moreover, courts and social science have acknowledged that juveniles are particularly susceptible to police interrogation tactics and that such susceptibility exists on a spectrum that runs through early adulthood. In other words, the qualities that distinguish adolescents from adults do not disappear when an individual turns 18. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

Indeed, studies show that a person's brain continues to develop through young adulthood and into his twenties. *See*, *e.g.*, Office of Research and Statistics Div. of Crim. Justice, *Crime and Justice in Colorado* 137 (Mar. 2011). And "[j]uveniles may be especially vulnerable to the pressures of interrogation, which can cause them to give involuntary or even false confessions." International Association of Chiefs of Police and Office of Juvenile Justice and Delinquency Prevention, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* 3 (Sept. 2012).

Sensitive techniques must be employed in juvenile interrogations and this remains true even when the interviewee is an older teenager. *Id*., p7. The use of deception should be avoided, particularly the implication that police possess evidence they don't truly have. *Id*., p8.

Here, Clark was only months past nineteen. (p1385) He had minimal prior involvement with police, having been contacted once previously in connection with the stolen motorcycle and arrested once for shoplifting. (p1385, 1390) During the interrogation, Clark indicated he was scared and really nervous, having never been interrogated like that before. (p1385-86)

His youth, combined with the lengthy and confrontational nature of the interrogation, and multiple instances of police deception, misrepresentations, and implied promises, rendered his statements involuntary in their entirety.

The Court of Appeals erred in affirming the trial court's order, which allowed Clark's statements into evidence at trial through admission of the recorded interrogation, violating Clark's constitutional rights. *See* U.S. Const. amend. V, XIV; Colo. Const., art. II, §18; *Medina, supra*.

B. Mr. Clark's statements during the federal agents' surprise April 15, 2011 interrogation at his workplace were the product of unwarned custodial interrogation.

The United States and Colorado Constitutions guarantee the privilege against self-incrimination and the right to counsel during custodial interrogation. *See* U.S. Const. amends. V, VI; Colo. Const. art. II, §§18, 25; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

In *Miranda*, the Supreme Court established guidelines to safeguard a suspect's due process rights during custodial interrogation. A defendant's statements made during custodial interrogation and absent *Miranda* advisements must be suppressed to protect a defendant's due process rights. *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002).

An individual is "in custody" not only when formally arrested, but when "under the totality of the circumstances, a reasonable person in the defendant's position would consider himself to be deprived of his freedom of action to the degree associated with a formal arrest." *Matheny*, *supra*, 468.

Here, the trial court erred when it found Clark was not in custody during the surprise April 15, 2011 interrogation at Ace Hardware, Clark's workplace, during which he was not *Mirandized* at any point. The Court of Appeals affirmed the trial court's error. Slip op. at 17-20.

The motions hearing revealed that two armed federal agents, identified by Ace employees as "Uh-oh, guys in black shirts," arrived unannounced at Clark's workplace. (p1415-18, 1440-43, 1471; P.Ex.4(Mots.CD), 3:50-55) It was during work hours and multiple employees had contact with the agents as they entered the store. (p1419; P.Ex.4(Mots.CD), 2:20-5:00)

The interrogation occurred in the backroom with the door closed and lasted for an hour. (p1419-21) The agents decided to interrogate Clark at his workplace because they thought Clark would talk more, and in the backroom "because we didn't think that anyone around should hear the nature of our conversation." (p1419)

This Court has observed, "there can be few places more intimidating or potentially coercive to an individual than one's place of employment." *People v. LaFrankie*, 858 P.2d 702, 707 n.5 (Colo. 1993) *abrogated on other grounds by Matheny*, *supra*. This is all the more true when confronted in the presence of other employees and escorted to a back office to be interrogated. *See id*. (citing *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989) (bank employee questioned by police in bank president's office was subjected to custodial interrogation); *United States v. Nash*, 563 F.2d 1166 (5th Cir. 1977) (interrogation custodial where suspect taken to workplace security office by supervisor, interrogated by FBI agent

for 45 minutes with office door closed, and not informed he had right to leave); *United States v. Phelps,* 443 F.2d 246 (5th Cir. 1971) (interrogation custodial where police questioned suspect at place of business); *see also United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002) (noting "critical distinction" between police asking suspect to come to station and police confronting suspect at place of business and finding store co-owner was in custody when interrogated inside her deli); *cf. United States v. Dockery*, 736 F.2d 1232 (8th Cir. 1984) (police questioning at place of employment not custodial where defendant initiated interview and was told she did not have to answer questions, was not under arrest, and was free to leave at any time).

Here, the agents purposely surprised Clark at his workplace. By their own terms, they "figured it'd catch [him] off guard." (P.Ex.4(Mots.CD), 5:40-45) They immediately began the interrogation – they did not tell Clark he was free to leave and not under arrest, that he did not have to talk with them, or that he could end the encounter at any time.

Both the trial court and the Court of Appeals overlooked the fact that the agents designed the interaction to purposely deceive Clark. (p1439-40, 1444-46) They devised a plan to engage Clark with a supposed investigation of Russian gangsters and Chicago "gangbangers." (P.Ex.4(Mots.CD), 6:00-10:00, 19:00-

19:05, 21:55-22:20) The federal agents wanted Clark to believe they were investigating Moore, with the hope that they could elicit incriminating information. (*Id*.)

Indeed, the agents used the ploy of FBI and ATF involvement to make the deception more convincing. (p1469-70) Early in the interrogation, they impressed upon Clark that federal investigations were more sophisticated than local ones and cited specific Russians they were looking into, claiming Moore was involved with the Russians in the 1990's. (*E.g.*, P.Ex.4(Mots.CD), 8:55-9:20) They told Clark that making false statements to federal agents was not like doing the same to local police; rather, lying to a grand jury, "you get popped and you spend jail time. It's actually a year of prison time." (*Id*., 10:55-11:05)

A reasonable person at his workplace during regular business hours, confronted out-of-the-blue, by unknown federal agents dressed in black, led to the backroom and immediately interrogated concerning Russian and Chicago gangsters and gunrunners would consider himself deprived of his freedom to act to a degree associated with formal arrest. *See Matheny*, *supra*.

The Court of Appeals erred in affirming the trial court's order finding Clark was not in custody, which violated Clark's constitutional rights. U.S. Const. amend. V, VI; Colo. Const., art. II, §§18, 25; *Miranda*, *supra*.

Due to the Court of Appeals' erroneous analysis affirming the trial court's admission of the two interrogation recordings, this Court should grant certiorari review.

VII. The Trial Court Reversibly Erred by Allowing the Motorcycle Incident into Evidence as *Res Gestae*, Leading to Numerous Mentions of an Irrelevant Past Bad Act Without a Limiting Instruction.

A defendant possesses due process rights to a fair trial and impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25; *People v. Harlan*, 8 P.3d 448, 459 (Colo. 2000). Those rights require a "fair verdict, free from the influence or poison of evidence which should never have been admitted, and the admission of which arouses the passions and prejudices which tend to destroy the fairness and impartiality of the jury." *Oaks v. People*, 150 Colo. 64, 68, 371 P.2d 443, 447 (1962). Evidence demonstrating a defendant's bad character or propensity to commit crimes is generally inadmissible. *E.g.*, CRE 404; *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959).

"*Res gestae* is a theory of relevance which recognizes that certain evidence is relevant because of its unique relationship to the charged crime." *People v. Thomeczek*, 284 P.3d 110, 114 (Colo. App. 2011) (internal quotations and citations omitted). However, *res gestae* evidence must be both "relevant" and its relevance must "not be outweighed by the danger of unfair prejudice." *Id.* Admission of

prior misconduct always has a substantial potential for unfair prejudice. *People v. Nuanez*, 973 P.2d 1260, 1263 (Colo. 1999).

Here, the prosecution moved pretrial for admission of Clark's arrest on a stolen motorcycle and other facts surrounding the arrest as *res gestae* or, alternatively, under CRE 404(b). (CF, p571-77; 9/5/12, p2208-12, 2218-22) Clark objected to admission under either theory. (9/5/12, p2212-17)

The prosecutor argued the motorcycle case was necessary to explain "[Clark's] sort of downward spiral" and to explain his Marine Corps eligibility. (*Id*., p2208) The trial court ruled the motorcycle incident, specifically the charge against Clark and its disposition, could come in at trial to explain the prosecution's theory that Clark's desire to avoid further criminal charges caused him to shoot Grisham in reaction to impending discovery of the check forgery. (9/5/12, p2225-27)

The court erred. In Colorado,[16] evidence of prior bad acts may be admitted as *res gestae*, not subject to the procedural limitations of CRE 404(b), but only if the evidence is "'incidental to the main fact and explanatory of it, including acts

[16] The *res gestae* doctrine has been abandoned by the Federal Rules of Evidence and condemned in numerous jurisdictions. FRE 803(1),(2); *see, e.g.*, *Stephens v. Miller*, 13 F.3d 998, 1003 (7th Cir. 1994); *State v. Rose*, 19 A.3d 985, 1010 (N.J. 2011); *State v. Fetelee*, 175 P.3d 709 (Haw. 2008); *State v. Gunby*, 144 P.3d 647, 663 (Kan. 2006).

and words which are so closely connected therewith as to constitute a part of the transaction, and without knowledge of which the main fact might not be properly understood.'" *People v. Rollins*, 892 P.2d 866, 872-73 (Colo. 1995) (quoting *Woertman v. People*, 804 P.2d 188, 190 n.3 (Colo. 1991)).

The motorcycle theft charge and disposition were not *res gestae* – the incident was not "linked in time and circumstances to the charged crime." *Thomeczek*, *supra*, 114. The incident occurred on September 22, 1994, nearly six weeks before the homicide. (CF, p573) There was no "unique relationship" between the motorcycle incident and Grisham's murder. Nor was there any need to explain the homicide through the motorcycle incident – except in the prosecution's tortured explanation of how the arrest allegedly sent Clark on a "downward spiral" from a theft charge to homicide in less than six weeks. (9/5/12, p2208)

The trial court's error is clear by its ruling's terms, which found the incident relevant to show Clark's "intent" and "motive" to kill. (9/5/12, p2226; CF, p582) This demonstrated that the proffered evidence was admitted for CRE 404(b) purposes. CRE 404(b); *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). The court, however, did not perform a 404(b) analysis.

The prosecution's theory of motive was that Clark committed the murder to prevent discovery of the check forgery, which, the prosecution claimed, would have barred Clark from joining the Marines. But the motorcycle incident was not intrinsic to that alleged motive and evidence of the incident was unnecessary to explain Clark's involvement in the forgery or desire to avoid being caught.

Moreover, the trial evidence bore out that Clark was likely disqualified from the Marines before the forgery even occurred. (10/15/12, p882, 893) Given Clark was already ineligible for the Marines, the theory that he intended to cover up the check forgery to preserve his Marine eligibility made no logical sense. Accordingly, there was no proper independent purpose for the evidence under CRE 404(b).

Indeed, the prosecution's true, improper purpose for the evidence was revealed in arguing admission was "necessary to explain "[Clark's] sort of downward spiral." (9/5/12, p2208) In other words, the prosecution wanted to convey that Clark acted in conformity with a bad character.

Admitted as *res gestae*, the evidence came in for the prosecution unfettered by any limiting instruction, allowing jurors to consider it for any purpose whatsoever, including propensity. *See*, *e.g.*, *People v. Miller*, 890 P.2d 84 (Colo. 1995) (trial court must give limiting instruction to jury when evidence is

introduced and again with final instructions because of highly prejudicial nature of CRE 404(b) evidence). In *Spoto*, *supra*, the trial court's failure to instruct the jury *carefully enough* to reduce the probability of prejudice to the defendant constituted reversible error. 795 P.2d at 1321. Here, there was no cautionary instruction at all.

The prosecution prominently noted the motorcycle incident in both opening statement and closing argument, (10/10/12(p.m.), p1604; 10/18/12, p2044), and elicited it over and over again at trial. (10/11/12, p568, 651; P.Ex.59, 17:40-18:05, 35:15-30; 10/15/12, p768-69, 772, 867-70, 882, 893; 10/16/12, p1117-18; 10/16/12(p.m.), p1817, 1846; 10/17/12, p1195, 1277)

The inherent prejudice of this evidence was illustrated in voir dire where a juror was dismissed due to familiarity with Daily Camera newspaper stories about the motorcycle theft and Grisham's request the afternoon of the murder to change his locks after discovering his checks were missing. (10/9/12, p226) The juror opined, "it sounded like [the two incidents] were inadmissible in court." (*Id*.)

Moreover, the juror took from reading and "thinking about those two pieces of information, especially the motorcycle theft, where it goes in my mind is Mr. Clark was on the verge of being apprehended for a crime and acted in a desperate manner…." (*Id*., p228) At this point, the court cut the juror off and told him he was free to go. (*Id*.)

The court's erroneous admission of the irrelevant and highly prejudicial prior crime served no purpose other than to inject "collateral issues into the case which [were] not unlikely to confuse and lead astray the jury." *Spoto*, *supra*, 1320. The prior incident cast Clark as a repeat criminal offender, even before any alleged involvement in the homicide.

The Court of Appeals merely agreed with the trial court's erroneous analysis. *See* slip op. at 22-23. This Court should grant certiorari review.

VIII. The Trial Court Reversibly Erred when it Precluded Clark from Inquiring about Police Investigation of a Green Car Spotted Near the Crime Scene Contemporaneous with the Homicide.

A defendant possesses due process rights to a fair trial and impartial jury, which include the right to present evidence to support a complete defense. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25; *see Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989).

During the prosecution's case, several witnesses testified that Clark owned a car painted partially green and partially silver. The trial court erroneously prevented Clark from presenting evidence explaining the prosecution's otherwise confusing elicitation of evidence about Clark's car and its coloring.

Detective Weiler testified about photos of Clark's car, an old Mustang. (10/11/12, p718; P.Exs.53-55) The prosecutor asked Weiler to describe the Mustang's "coloring." (10/11/12, p718) Weiler testified it was painted with "primer gray," and "portions of it where some green kind of shows through. And obviously that piece there is probably one of the better examples of the green showing through on the paint job." (*Id*.)

Uhlir testified Clark had an old Mustang. (10/15/12, p815) The prosecutor asked about its color. (*Id*.) Uhlir said it had a "flat silver" primer and "[g]reen like a – not like a flat – like an old green. Not really no shimmer, just kind of that flat, dull green." (*Id*.) On cross-examination, Uhlir said the car had green spots, but was "more primer than anything else." (*Id*., p846-47)

The prosecutor asked Stackhouse if he remembered talking to Clark about a car. Stackhouse said Clark told him he had a silver and green 1974 Ford LTD, but the police were looking for a Chrysler. (10/16/12, p1119)

While cross-examining Detective Heidel, defense counsel showed Heidel a November 4, 1994, Daily Camera newspaper article about Grisham's murder that mentioned "a large green two-door older model 1970s Chrysler with silver trim around the bottom." (10/17/12(a.m.), p1238-40) The article was admitted for the

purpose of how it "impacted the statements of Walter Stackhouse or another witness." (*Id*., p1244)

During the defense case, the prosecution objected, on hearsay grounds, to prospective testimony from a detective who spoke with a gas station attendant who had seen a green Chrysler Regal leaving the apartment complex the night of the murder between 9-9:30p.m. (10/17/12(p.m.), p1918-19) The defense attempted to locate the witness for trial, but discovered he had died. (*Id*., p1919)

Defense counsel explained the detective would testify that police searched for the Green Chrysler, which was consistent with the information published in the newspaper. (*Id*., p1921) It was relevant, not for the truth of the matter asserted, but to demonstrate why the police were looking for a green car and clear up any confusion in the testimony about Clark's car. (*Id*., p1921-22) Counsel argued the prosecution had opened the door to clarifying questions about why police searched for the green car. (*Id*., p1922-24)

The trial court granted the prosecution's motion in limine, finding the evidence irrelevant and that there was no confusion to clear up. (*Id*., p1924-25) The Court of Appeals simply affirmed the trial court's ruling. Slip op. at 32-34.

The trial court erred in excluding this relevant, nonhearsay evidence.

First, the proposed testimony was not hearsay. CRE 801(c) (hearsay is "a statement other than one made by the declarant…offered in evidence to prove the truth of the matter asserted"); *see People v. Tenorio,* 590 P.2d 952, 958 (Colo. 1979) (statement offered to explain police officer's actions or investigation is not offered for truth of matter asserted); *People v. Robinson*, 226 P.3d 1145, 1152 (Colo. App. 2009).

Rather, the testimony was offered for the "nonhearsay purpose of showing [its] effect on the listening officers." *Robinson, supra*, 1152. "It is the purpose for which statements are offered, and not the details reflected therein, that determines whether the statements are hearsay." *Id.*; *see also United States v. Mendez,* 514 F.3d 1035, 1046 (10th Cir. 2008) (officer's testimony about reason search warrant issued was not hearsay); *United States v. Reifler*, 446 F.3d 65,92 (2nd Cir. 2006) ("Background evidence may be admitted to…furnish an explanation of the understanding or intent with which certain acts were performed").

Second, the testimony was relevant and necessary both to clear up the confusion created by the prosecution's inquiries into the color of Clark's car and, more significantly, to rebut implications in the prosecution's case that Clark's car may have been sighted driving away from the crime scene.

The prosecution opened the door by asking multiple witnesses about the green coloring of parts of Clark's Mustang. (10/11/12, p718; 10/15/12, p815; 10/16/12, p1119) Testimony from Weiler, Uhlir, and Stackhouse left the impression that a green car was spotted near the crime scene around the time of the murder.

The evidence was also relevant to Clark's defense that the police focused on him to the exclusion of other investigative leads and possibilities. (*See, e.g.*, 10/10/12(p.m.), 1612-13, 1618-19; 10/18/12, p2088-91) The testimony, initially and largely elicited by the prosecution, created ambiguity about Clark's car and whether the police were searching for a car with the same features as Clark's car.

Mr. Clark's defense was erroneously prejudiced by the trial court's ruling. Given the State's thin, circumstantial evidence, the unresolved and incorrect implication that police may have linked Clark's car to the crime scene likely affected the jurors' deliberations, violating Clark's rights to a fair trial, an impartial jury, and a complete defense. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25.

This Court should grant certiorari review.

IX. The Court of Appeals Erroneously Affirmed the Trial Court's Rejection of the Defense-Tendered Jury Instruction Correctly Stating that Jurors Have a Right to Disagree During Deliberations.

This issue is one of first impression for this Court. *See* C.A.R. 49(a)(1).

Due process protects an accused against conviction except by proof beyond a reasonable doubt and guarantees a fair trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 23, 25; *In re Winship*, 397 U.S. 358, 364 (1970); *Oaks v. People*, 371 P.2d 443, 447 (Colo. 1962).

In Colorado, a criminal defendant has the right to a unanimous jury verdict. *E.g*., §16-10-108, C.R.S.; *People v. Phillips*, 91 P.3d 476, 479 (Colo. App. 2004). "Unanimity requires a free and untrammeled deliberative process that expresses the conscientious conviction of each individual juror." *People v. Lewis*, 676 P.2d 682, 686 (Colo. 1984).

"A court cannot sanction a verdict 'which is reached by some members of the jury sacrificing their conscientious opinions merely for the sake of reaching an agreement.'" *People v. Schwartz*, 678 P.2d 1000, 1012 (Colo. 1984); (quoting *Lowe v. People*, 175 Colo. 491, 494, 488 P.2d 559, 561 (1971)).

Here, Clark tendered a jury instruction based on *United States v. Rey*, 811 F.2d 1453 (11th Cir. 1987), which read:

> While it is true that in a criminal case, any jury verdict must be unanimous, the justice system recognizes that, in

> some cases, a unanimous verdict is simply not possible. Jurors are never faulted for failing to reach a unanimous decision. One of the safeguards in our system, to make sure that innocent people are not wrongly convicted, is to allow a jury to be hung if all of its members do not agree on a verdict. A hung jury is every bit as much a part of our legal system as is a unanimous verdict.

(Supp.Access, p35; 10/17/12(FTR transcript), p1563-64)

The trial court ruled it might read the tendered instruction if the jury reached an impasse, but rejected giving it up front. (10/17/12(FTR transcript), p1565)

The Court of Appeals' analysis, affirming the trial court, noted that no Colorado authority *requires* giving the instruction. Slip op. at 35-36, ¶74.

By the same token, however, no Colorado authority bars the tendered instruction. Rather, Clark's instruction was both an accurate statement of law and permissible under Colorado law. The trial court erred in rejecting the defense request.

A criminal case may, of course, terminate with the failure to reach a verdict. *See, e.g., United States v. McElhiney*, 275 F.3d 928, 935 (10th Cir. 2001). "Indeed, a mistrial is as much a part of the jury system as a unanimous verdict." *Williams v. United States*, 338 F.2d 530, 533 (D.C. Cir. 1964); *accord United States v. Ayeni*, 374 F.3d 1313, 1324 (D.C. Cir. 2004) ("a mistrial…plays an important and healthy role in our criminal justice system").

Lay jurors, however, cannot be presumed to know about the possibility of discharge without a unanimous verdict. *Huffman v. United States*, 297 F.2d 754,758 (5th Cir. 1962) (Brown, J., dissenting in part) (it is "a basic misapprehension[ ] that a criminal trial must end with (1) a verdict of guilty or (2) a verdict of not guilty"); *see McElhiney*, *supra*, 935 (quoting Judge Brown's partial dissent in *Huffman*).

Jurors turn to the instructions for guidance. *E.g.*, *People v. McKeel*, 246 P.3d 638, 641 (Colo. 2010) ("We presume that jurors follow the instructions that they receive.") But Colorado's pattern instruction, used here, does not contemplate a result other than unanimity. (Supp.Access, p552, jury inst. 16); COLJI-Crim. 38:04 (1993); *accord* COLJI-Crim. E:23 (2017).

On the contrary, the instruction communicates that only a unanimous verdict is permitted:

> The bailiff will now escort you to the jury room. Upon reaching the jury room, you are to select one of your members to be the foreman of the jury. Your foreman will preside over your deliberations *and shall sign whatever verdict you reach*.
>
> The verdict must represent the considered judgment of each juror. *In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous*.

(Supp.Access, p552, jury inst. 16) (emphasis added).

The instruction told the jurors that the foreman *shall* sign the verdict they reach and that the verdict *must* be unanimous. *See, e.g., Lehnert v. People*, 244 P.3d 1180, 1186 (Colo. 2010) (generally accepted and familiar meaning of "shall" indicates mandatory task). Under this instruction, jurors would reasonably believe a verdict *must* be reached and deliberations *shall* continue indefinitely until such time. *See, e.g., People v. Dunlap*, 975 P.2d 723,743 (Colo. 1999) (an appellate court presumes jury understands and heeds instructions as written).

In *Gibbons v. People*, 2014 CO 67, and its two companion cases, *Martin v. People*, 2014 CO 68, and *Fain v. People*, 2014 CO 69, this Court found that under some circumstances it is appropriate to inform jurors they do not need to reach a decision:

> The trial court has discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is given, the instruction will not have a coercive effect on the jury. The court should consider exercising its discretion in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations.

Gibbons, *supra*, ¶33.

In the three *Gibbons* cases, no request was made by the defendant or otherwise for an instruction that informed the jury about the possibility of a

mistrial. *Id*., ¶12; *Fain*, *supra*, ¶17; *Martin*, *supra*, ¶14. Here, Clark tendered a specific instruction informing jurors of their right not to agree.

Several federal circuits expressly permit instructions in the initial charge to the jury emphasizing the jury's right to conscientiously disagree. For example, the First Circuit employs a final instruction on "Reaching Agreement," that instructs:

> It is important that you attempt to return a verdict, but, of course, only if each of you can do so after having made your own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

Pattern Criminal Jury Instructions for the District Courts of the First Circuit (1998), Instruction 6:03.

The Seventh Circuit provides a final charge instruction entitled "Unanimity/Disagreement Among Jurors," that includes this language: "But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors just so that there can be a unanimous verdict." Pattern Criminal Jury Instructions of the Seventh Circuit (2012), Instruction 7.03; *see also United States v. Brown*, 634 F.2d 1069, 1070 (7th Cir. 1980) ("A deadlock instruction given along with other instructions before there is a minority of jurors to feel pressured, has less danger of being coercive than a deadlock instruction first given when deadlock occurs."). The Eighth Circuit also

prefers instructing the jurors on their duties to deliberate, including the right not to surrender conscientious convictions, in the initial charge. Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2013), Instruction 3.12.

Accordingly, the trial court's concern with the timing of the instruction was an insufficient reason to reject it, constituting error.

Clark's jury deliberated for three days, with a break for the weekend in the middle. This evidences a strong likelihood of disagreement. The jurors, however, were not properly instructed that they had the right to disagree.

In this close case hinging on circumstantial evidence, there is at least a reasonable possibility had the court given Clark's instruction, the result would have been different. *See Leonardo v. People*, 728 P.2d 1252, 1257 (Colo. 1986) (citing *Chapman v. California*, 386 U.S. 18, 23-24 (1967)).

The district court decided a question of substance not heretofore determined by this Court. *See* C.A.R. 49(a)(1). This Court should grant certiorari review.

X. Cumulative Error Deprived Mr. Clark of a Fair Trial and an Impartial Jury.

"Numerous irregularities, each of which standing alone is insignificant, may, when taken together, so affect the substantial rights of a defendant as to require reversal." *People v. Gibson*, 203 P.3d 571, 578 (Colo. App. 2008); *see United*

States v. Rivera, 900 F.2d 1462, 1469-70 (10th Cir. 1990) (cumulative error analysis aggregates all trial errors to determine if reversal is required; "The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."). Mr. Clark's fair trial rights were violated by erroneous admission and exclusion of evidence, prosecutorial misconduct, and the rejection of his tendered jury instruction.

The case against Clark was entirely circumstantial. No one saw the shooter, the police never found the murder weapon, and the police had other suspects from the outset. Even assuming the prosecution's timeline, there was an extremely narrow window in which Clark could have conceivably committed the crime. No evidence was recovered in searches of Clark, the house where he was staying, or his car when the police arrested him.

The key evidence against Clark came from the mouths of a jailhouse informant, a six-time felon and cocaine addict with strong personal motivation in 1994 to offer evidence to the police, and another multiple-time felon who, in 1995, had been offered a plea deal to dismiss any pending cases against him. (10/16/12, p1109-23, 1135-40; 10/16/12(p.m.), p1785-93; 10/15/12, p906-12, 920-32, 947-48, 955-58; D.Ex.A) Even in 2012, both witnesses had to be temporarily released

from incarceration in other states to testify at Clark's trial. (10/15/12, p906-07; 938-42; 10/16/12, p1109)

Stackhouse, the convicted false reporter to police (among many other crimes), was the only witness who testified that Clark made admissions about the homicide – and even in Stackhouse's version, the admissions were ambiguous at best. Moore, the other multiple-time felon and a veteran gun trafficker, was critical to the prosecution's narrative linking Clark to a handgun, also never located, which was a theoretical – but hardly definitive – source of the bullets that killed Grisham. Moore also was the only witness whose testimony implied – again, only by inference, not an eyewitness account, and far from definitively – that Clark had a handgun on the day of the homicide. (10/15/12, p932-34, 975-76, 985-86)

The prosecution's case rested largely upon its theory of Clark's motive, as the prosecutors argued in opening, closing, and rebuttal. (10/10/12(p.m.), p1604-06, 1611-12; 10/18/12, p2043-44, 2059-63, 2093-95, 2098-99, 2105) But the prosecution's theory of motive relied on inadmissible and non-existent evidence, discussed above, and made no sense. Clark could not cover up the check forgery – he used his real name on every check. (10/12/12, p1716-20; P.Ex.61) And

Sergeant Weyer testified Clark's chances at the Marines likely ended with the motorcycle incident. (10/15/12, p867-70, 882, 893)

Meanwhile, a witness saw a scary man, who was not Clark, at the apartment complex just before the murder. (10/17/12(p.m.), p1932, 1947) The witness lived at the complex and had never seen the man before and never saw him again. (*Id*., 1926-33, 1945)

The court's numerous errors and the prosecution's misconduct improperly tipped the scales against Mr. Clark. *See, e.g., Walker v. Engle*, 703 F.2d 959 (6th Cir. 1983) (cumulative effect of numerous errors aroused prejudice against defendant to such an extent he was denied fundamental fairness). Even if, *arguendo*, no single error merits reversal, the aggregate effect of the numerous errors cumulatively denied Clark his due process rights to a fair trial and an impartial jury. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§16, 23, 25; *Rivera*, *supra*; *Gibson, supra*.

The Court of Appeals denied Mr. Clark's cumulative error claim in two sentences. Slip op. at 48. In doing so, the Court of Appeals sanctioned proceedings by a lower court that so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. *See* C.A.R. 49(a)(4).

This Court should grant certiorari review.

XI. This Court has not Addressed a Cumulative Error Case in Many Years. Mr. Clark's Case is an Ideal Vehicle in Which to Address the Standards of Review and Reversal and the Proper Substantive Analysis under the Cumulative Error Doctrine.

Cumulative error analysis – particularly where numerous errors occurred, as here – requires parsing of the entire trial record, including all of the trial evidence and analysis of how the case was litigated. *See*, *e.g.*, *People v. Estes*, 2012 COA 41, ¶48 (Rothenberg, J., dissenting) (cumulative error analysis requires "viewing the errors in the context of the trial as a whole and the strength of the prosecution's evidence").

The Court of Appeals, however, merely gave cumulative error a passing glance, failing even to distinguish between the analysis of each discrete error and the cumulative error doctrine. Slip op. at 48. The Court of Appeals disposed of Mr. Clark's cumulative error claim in a cursory two sentences, citing *People v. Conyac*, 2014 COA 8M.

But *Conyac* was a case in which the defendant confessed and the victim testified at trial to suffering the very things the defendant confessed to. 2014 COA 8M, ¶149. Given those facts, perhaps a cursory cumulative error analysis was appropriate there.

Not so here, where there was no direct evidence of guilt, the jury deliberated for three days, and numerous errors occurred. Indeed, while the Court of Appeals affirmed, as discussed above it found at least three errors occurred at Mr. Clark's trial. Slip op. at 30, 39-48. The Court of Appeals thereby erred in its cursory cumulative error analysis. *Id*. at 48.

In contrast to Mr. Clark's case, another division of the Court of Appeals recently discussed the cumulative error doctrine in substantive fashion. *People v. Howard-Walker*, 2017 COA 81, ¶¶109-19. That division observed: "Few Colorado cases provide meaningful guidance as to when multiple errors rise to the level of reversible cumulative error." *Id*., ¶113 (citing *People v. Roy*, 723 P.2d 1345 (Colo. 1986); *People v. Scheidt*, 513 P.2d 446, 452 (Colo. 1973); *People v. Reynolds*, 575 P.2d 1286 (Colo. 1978); and *People v. Oaks*, 371 P.2d 443, 446 (Colo. 1962)).

Thus, rather than turning to precedent from this Court, *Howard-Walker* adopted the Tenth Circuit's "protocol" to determine whether there was cumulative error warranting reversal when finding both preserved and unpreserved errors. *Id*., ¶111; *see United States v. Caraway*, 534 F.3d 1290, 1302 (10th Cir. 2008). Further, the division turned to the Eleventh and Ninth Circuits in seeking "guidance" in determining how to weigh multiple errors in cumulative error

analysis. *Howard-Walker*, ¶114-115 (citing *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005) and *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011)).

The most recent opinion from this Court substantively discussing cumulative error was in dissent. *Townsend v. People*, 252 P.3d 1108, 1117 (Colo. 2011) (Bender, C.J., dissenting) (the combined effect of "erroneous jury instructions, testimony, and closing argument, taken together, failed to adequately apprise the jury of the law, improperly broadened the offense of escape, and, thereby, lowered the prosecution's burden of proof" requiring reversal as cumulative error, applying *Oaks*, *supra*, 371 P.2d at 446); *see also Estes*, *supra*, 2012 COA 41, ¶¶47-79 (Rothenberg, J., dissenting on cumulative error grounds).

It does not appear that this Court has reversed a conviction on cumulative errors grounds since 1988. *See Kogan v. People*, 756 P.2d 945, 961 (Colo. 1988); *see also People v. Botham*, 629 P.2d 589, 603 (Colo. 1981) *superseded by rule noted in People v. Garner*, 806 P.2d 366 (Colo. 1991); *People v. Reynolds*, 575 P.2d 1286, 1291–94 (Colo. 1978).

In contrast, in recent years the Tenth Circuit has addressed cumulative error more often and more substantively. *See Grant v. Trammell*, 727 F.3d 1006, 1025-27 (10th Cir. 2013) (discussing confusing and difficult application of cumulative

error doctrine and what it means to "accumulate" error); *Caraway*, *supra*, 1302-03 (discussing "inherent problems" in cumulating preserved and unpreserved error); *United States v. Rivera*, 900 F.2d 1462, 1469–77 (10th Cir. 1990) (applying in-depth analysis of cumulative error doctrine, distinguishing errors and non-errors).

It appears that this Court's relative silence on the cumulative error doctrine has led the Court of Appeals to either (1) adopt the standards and substantive analyses of various federal circuits, as the division did in *Howard-Walker*, *supra*, or (2) treat cumulative error analysis indifferently and cumulative error claims as mere restatements of the underlying discrete claims of error, as the Court of Appeals did here. *See also People v. Douglas*, 2012 COA 57, ¶71 (cursory cumulative error analysis); *People v. Gallegos*, 260 P.3d 15, 29 (Colo. App. 2010) (same).

The proper standards for cumulative error have not been addressed by this Court in many years. And divisions of the Court of Appeals are taking various, scattershot approaches to cumulative error claims. *See* C.A.R. 49(a)(3).

Finally, as discussed above, Mr. Clark was cumulatively prejudiced by the numerous errors during his trial.

For these reasons, Mr. Clark's case is an ideal vehicle for this Court to address Colorado's standards of review and reversal and the substantive law

underpinning the doctrine of cumulative error. This Court should grant certiorari review. *See* C.A.R. 49(a)(2)-(4).

CONCLUSION

Michael Clark requests that this Court grant his Petition.

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CERTIFICATE OF SERVICE

I certify that, on July 6, 2017, a copy of this Petition for Writ of Certiorari was electronically served through ICCES on Katharine Gillespie of the Attorney General's Office.