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# THE STANDARD OF REVIEW FOR PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

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## INTRODUCTION

Following years of uncertainty, the Illinois Supreme Court has the opportunity to clarify whether the abuse of discretion standard or de novo review applies when reviewing alleged prosecutorial misconduct during closing argument. The court should resolve this ambiguity given the importance of the issue to criminal defendants and the division of authority within the appellate court.

## THE LAW GOVERNING CLOSING ARGUMENTS

The purpose of closing argument is to give the parties a final opportunity to review the evidence, apply the law to that evidence, and argue why the evidence and law compel a favorable verdict.<sup>1</sup> “During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences from that evidence, respond to comments made by defense counsel that invite a response, and comment on the credibility of witnesses.”<sup>2</sup> However, the purpose of closing argument cannot be used to inflame the passions or prejudices of the jury.<sup>3</sup> Further, a prosecutor cannot misstate the law, misstate the evidence, or argue facts not in evidence.<sup>4</sup>

Improper closing argument is reversible error only when it causes substantial prejudice to the defendant.<sup>5</sup> Substantial prejudice occurs when the improper statements were a material factor in the defendant’s conviction.<sup>6</sup> Improper statements are a material factor when (1) the jury could have reached a contrary verdict had the improper comments not been made or (2) the court cannot say that

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1. *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674, 685 (2005).

2. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25, 986 N.E.2d 1249.

3. *Nicholas*, 218 Ill. 2d at 121.

4. *People v. Moody*, 2016 IL App (1st) 130071, ¶¶ 60, 68, 54 N.E.3d 183.

5. *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 79, 997 N.E.2d 681 (citing *People v. Wheeler*, 226 Ill. 2d 92, 123, 871 N.E.2d 728, 745 (2007)).

6. *Id.*

the prosecutor's improper remarks did not contribute to the defendant's conviction.<sup>7</sup> Whether closing argument caused substantial prejudice is evaluated according to the language used, its relationship to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial.<sup>8</sup> A prosecutor's closing argument must be viewed in its entirety, and the complained of comments must be viewed in the proper context.<sup>9</sup>

To preserve a claim of prosecutorial misconduct for review, a defendant must object to the offending statements at trial and in a written post-trial motion.<sup>10</sup> If the reviewing court concludes that an error occurred, it would then apply the harmless error doctrine to determine whether a new trial is warranted.<sup>11</sup> Under the harmless error doctrine, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict obtained at trial.<sup>12</sup> For example, in *People v. Johnson*, the state supreme court held that "any error in closing argument, or rebuttal closing argument, was harmless error in light of all evidence beyond a reasonable doubt."<sup>13</sup>

Alternatively, if the defendant did not preserve the issue for appeal, the alleged prosecutorial misconduct would be analyzed under the plain error doctrine.<sup>14</sup> A defendant will prevail under the plain error doctrine when he demonstrates that (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence.<sup>15</sup> For example, in *People v. Adams*, the Illinois Supreme Court concluded that the prosecutor's comments "were impermissible speculation" but ultimately found that the evidence was not closely balanced and the error was not serious.<sup>16</sup>

#### CONFLICTING CASE LAW FROM THE ILLINOIS SUPREME COURT

Traditionally, the trial court's determination regarding the propriety of the State's closing argument was subject to an abuse of discretion standard.<sup>17</sup> For example, in *People v. Blue*, the Illinois Supreme Court held that "[t]he regulation of the substance and style of the closing argument is within the trial court's discretion, and the trial court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion."<sup>18</sup> The court adopted this

7. *People v. Harris*, 2017 IL App (1st) 140777, ¶ 60, 74 N.E.3d 1.

8. *People v. Hampton*, 387 Ill. App. 3d 206, 220, 899 N.E.2d 532, 544 (2008).

9. *Id.* at 546.

10. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 33, 974 N.E.2d 855.

11. *People v. Carter*, 389 Ill. App. 3d 175, 180, 905 N.E.2d 874, 880 (2009).

12. *People v. Nitz*, 219 Ill. 2d 400, 410, 848 N.E.2d 982, 989 (2006).

13. *People v. Johnson*, 149 Ill. 2d 118, 146, 594 N.E.2d 253, 267 (1992).

14. *See Jackson*, 2012 IL 124112, ¶ 83.

15. *People v. Seby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675.

16. *People v. Adams*, 2012 IL 111168, ¶¶ 20-24, 962 N.E.2d 410.

17. *See, e.g., People v. Caffey*, 205 Ill. 2d 52, 128, 792 N.E.2d 1163, 1210 (2001); *People v. Williams*, 192 Ill. 2d 548, 583, 736 N.E.2d 1001, 1020 (2000); *People v. Armstrong*, 183 Ill. 2d 130, 145, 700 N.E.2d 960, 966 (1998); *People v. Pasch*, 152 Ill. 2d 133, 184, 604 N.E.2d 294, 315 (1992); *People v. Thompkins*, 121 Ill. 2d 401, 445, 521 N.E.2d 38, 57 (1988); *People v. Smothers*, 55 Ill. 2d 172, 176, 302 N.E.2d 324, 327 (1973).

18. *People v. Blue*, 189 Ill. 2d 99, 128, 724 N.E.2d 920, 935 (2000) (quoting *People v. Byron*, 164 Ill.2d 279, 295, 207 Ill.Dec. 453, 647 N.E.2d 946 (1995)).

deferential standard because “the general atmosphere of the trial is observed by the trial court, and cannot be reproduced in the record on appeal. The trial court is, therefore, in a better position than a reviewing court to determine the prejudicial effect, if any, of a remark made during argument.”<sup>19</sup>

However, in *People v. Wheeler*, the Illinois Supreme Court held that “[w]hether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*.”<sup>20</sup> Nevertheless, the *Wheeler* court failed to distinguish *Blue* and the body of case law holding that abuse of discretion was the proper standard.<sup>21</sup> Adding further confusion, the *Wheeler* court cited *Blue* with approval for areas of law other than the standard of review.<sup>22</sup>

Recently, in *People v. Jackson*, the state supreme court held that:

[T]he standard of review applied to a prosecutor’s closing argument is similar to the standard used in deciding whether a prosecutor committed plain error. A reviewing court will find reversible error only if the defendant demonstrates that the remarks were improper and that they were so prejudicial that real justice was denied or the verdict resulted from the error.<sup>23</sup>

#### SPLIT OF AUTHORITY IN THE ILLINOIS APPELLATE COURT

Following *Wheeler*, the Illinois Appellate Court has been conflicted about the appropriate standard of review.<sup>24</sup> Some courts, relying upon *Blue*, have held that an abuse of discretion standard is still applicable.<sup>25</sup> For example, in *People v. Phagan*, the appellate court reasoned as follows:

We conclude that *Blue*, applying an abuse of discretion standard to claims of prosecutorial misconduct in closing argument, properly invoked over a century of Illinois Supreme Court precedent. *Wheeler*, applying a *de novo* standard of review, imported that standard with no explanation from cases that are either unclear or that analyze dissimilar claims. We follow *Blue* and review claims of prosecutorial misconduct in closing arguments under the abuse of discretion standard.<sup>26</sup>

19. *Smothers*, 55 Ill. 2d at 176 (cleaned up).

20. *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007).

21. *See generally id.*

22. *See id.* at 121, 122, 130.

23. *People v. Jackson*, 2020 IL 124112, ¶ 83, 162 N.E.3d 223 (cleaned up).

24. *See* Ryan T. Harding, *Division in the Illinois Appellate Court: What Is the Appropriate Standard of Review for Alleged Prosecutorial Misconduct During Closing Argument?*, 38 N. Ill. U. L. Rev. 504, 508–512 (2018).

25. *People v. Cornejo*, 2020 IL App (1st) 180199, ¶ 128; *People v. Miller*, 2020 IL App (1st) 163304, ¶ 46.

26. *People v. Phagan*, 2019 IL App (1st) 153031, ¶ 54, 130 N.E.3d 396.

Relying upon *Wheeler*, other courts have applied de novo review.<sup>27</sup> Some courts have tried to read *Wheeler* and *Blue* in harmony and engage in a two-step process where (1) the abuse of discretion standard applies to the trial court's determination of whether prosecutorial conduct occurred and (2) the de novo standard applies to whether the improper statements were prejudicial.<sup>28</sup> Other courts have declined to address the division because the defendant's argument failed under either standard of review.<sup>29</sup>

No clear consensus has emerged and the appellate court remains deeply divided as to the appropriate standard of review. This issue is of critical importance to defendants because the likelihood of their success on appeal could turn on which standard of review is applied.<sup>30</sup>

#### LEAVE TO APPEAL GRANTED IN *MUDD* AND *WILLIAMS*

On March 24, 2021, the Illinois Supreme Court granted leave to appeal in *People v. Mudd* and *People v. Williams*.<sup>31</sup> Both of these cases involve alleged prosecutorial misconduct during closing argument, which gives the Illinois Supreme Court a unique opportunity to resolve the split of authority within the appellate court.<sup>32</sup>

#### WHAT STANDARD OF REVIEW SHOULD APPLY?

The Illinois Supreme Court must clarify whether de novo review or abuse of discretion review applies to the issue of prosecutorial misconduct during closing argument.

“‘Abuse of discretion’ is the most deferential standard of review—next to no review at all—and is therefore traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial.”<sup>33</sup> “An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.”<sup>34</sup> However, de novo review still applies

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27. *People v. Cook*, 2018 IL App (1st) 142134, ¶ 62, 99 N.E.3d 73; *People v. Vargas*, 409 Ill. App. 3d 790, 797, 949 N.E.2d 238, 245 (2011); *People v. McCoy*, 378 Ill. App. 3d 954, 964, 881 N.E.2d 621, 631 (2008); *People v. Palmer*, 382 Ill. App. 3d 1151, 1160, 889 N.E.2d 244, 251 (2008).

28. *See People v. Taylor*, 2019 IL App (3d) 160708, ¶ 30, 130 N.E.3d 83; *People v. Rudd*, 2020 IL App (1st) 182037, ¶ 83.

29. *See, e.g., People v. Williams*, 2020 IL App (1st) 163417, ¶ 42, 158 N.E.3d 1143; *People v. Ali*, 2019 IL App (2d) 161016, ¶ 13, 137 N.E.3d 827; *People v. Bustos*, 2020 IL App (2d) 170497, ¶ 117, 163 N.E.3d 819.

30. *See Timothy J. Storm, The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, S. ILL. U. L.J. 21, 103 (2009).

31. *Petition for Leave to Appeal Dispositions*, ILL. CTS., <https://www.illinoiscourts.gov/courts/supreme-court/leave-to-appeal/> (last visited Aug. 10, 2021) [<https://perma.cc/3E5J-Q3YF>].

32. *See People v. Williams*, 2020 IL App (3d) 170848, ¶ 16; *People v. Mudd*, 2020 IL App (1st) 190252-U, ¶ 12.

33. *In re D.T.*, 212 Ill. 2d 347, 356, 818 N.E.2d 1214, 1222 (2004) (quoting *People v. Coleman*, 183 Ill.2d 366, 387, 233 Ill.Dec. 789, 710 N.E.2d 1063 (1998)).

34. *People v. Patrick*, 233 Ill. 2d 62, 68, 908 N.E.2d 1, 5 (2009) (quoting *People v. Hall*, 195 Ill.2d 1, 20, 252 Ill.Dec 552, 743 N.E.2d 126 (2000)).

“where a trial court’s exercise of discretion has been frustrated by an erroneous rule of law.”<sup>35</sup> Prior to *Wheeler*, the abuse of discretion standard was the traditional standard for reviewing the propriety of closing argument.<sup>36</sup> The abuse of discretion standard is arguably appropriate because “[t]he general atmosphere of the trial is observed by the trial court, and cannot be reproduced in the record on appeal.”<sup>37</sup> As such, the trial court is in a better position to observe (1) the tone and demeanor of the prosecutor; (2) the context of the challenged statement; (3) how the jury reacted to the closing argument; and (4) whether closing argument was improper or prejudicial based upon the evidence presented at trial.<sup>38</sup>

“In contrast, *de novo* review does not require the reviewing court to defer to the trial court’s judgment or reasoning; it is completely independent of the trial court’s decision. Under the *de novo* standard, the reviewing court performs the same analysis that the trial court would perform.”<sup>39</sup> As a matter of policy, perhaps *de novo* review is appropriate so that a defendant is ensured his right to a fair trial. Namely, as emphasized in *Wheeler*, “pervasive prosecutorial misconduct deliberately undermines the process by which we determine a defendant’s guilt or innocence.”<sup>40</sup> Moreover, “the duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict.”<sup>41</sup> If the court explicitly adopts *de novo* review, then prosecutors would be deterred from making potentially improper closing arguments.<sup>42</sup> Adopting *de novo* review would help ensure that convictions are secured without improper appeals to passion or prejudice.

#### CONCLUSION

Whether *de novo* or abuse of discretion review should apply is ultimately a question of policy best reserved for the Illinois Supreme Court. Nevertheless, the court should clarify the standard of review and resolve the division of authority within the appellate court.

35. *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001) (quoting *People v. Williams*, 188 Ill. 2d 365, 369, 721 N.E. 539 (1999) (cleaned up)).

36. *See id.* at 128; *People v. Williams*, 192 Ill. 2d 548, 583, 736 N.E.2d 1001, 1020 (2000); *People v. Armstrong*, 183 Ill. 2d 130, 145, 700 N.E.2d 960, 966 (1998); *People v. Pasch*, 152 Ill. 2d 133, 184, 604 N.E.2d 294, 315 (1992); *People v. Thompkins*, 121 Ill. 2d 401, 445, 521 N.E.2d 38, 57 (1988); *People v. Smothers*, 55 Ill. 2d 172, 176, 302 N.E.2d 324, 327 (1973); *People v. Phagan*, 2019 IL App (1st) 153031, ¶ 54, 130 N.E.3d 396.

37. *Smothers*, 55 Ill. 2d at 176.

38. *See id.*

39. *People v. McDonald*, 2016 IL 118882, ¶ 32, 77 N.E.3d 26.

40. *People v. Wheeler*, 226 Ill. 2d 92, 121–22, 871 N.E.2d 728, 744 (2007) (cleaned up).

41. *People v. Simpson*, 204 Ill. 2d 536, 569, 792 N.E.2d 265, 287 (2001) (quoting Ill. S. Ct. R. 3.8).

42. *See Wheeler*, 226 Ill. 2d at 122 (“[A] criminal defendant, regardless of guilt or innocence, is entitled to a fair, orderly, and impartial trial.”); *see also* Paul J. Speigelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 117 (1999) (“The volume of reported appellate cases of misconduct in argument remains high; there are frequent findings of improper argument, but only occasional reversals; and the volume of scholarly criticism is, if anything, increasing.”).