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Case Number 530,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
Plaintiff-Below, Appellant	)	**No. 530, 2015**
V.	)	
ISAIAH W. McCOY,	)	**On Appeal from the Superior Court of the State of Delaware in and for Kent County**
Defendant-Below, Appellee	)	**Cr. ID. NO. 1005008059**

CORRECTED ANSWERING BRIEF OF APPELLEE, ISAIAH W. McCOY

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NATURE OF THE PROCEEDINGS

The Defendant-Appellee Isaiah McCoy, ("Mr. McCoy"), is currently pending retrial in the Delaware Superior Court on capital murder and related charges. Mr. McCoy previously was convicted in the Superior Court of, *inter alia*, first degree murder and sentenced to death. He appealed. On January 20, 2015, this Court reversed, holding that the trial court committed reversible error during jury selection and that reversible error also occurred when the prosecutor impermissibly vouched for the credibility of a key State witness. This Court vacated Mr. McCoy's conviction and sentence and remanded Mr. McCoy's case to the Superior Court for a new trial. *McCoy v. State*, 112 A.3d 239 (2015). [Exhibit 1]

On July 28, 2015 this Court issued an opinion finding that the prosecutor at Mr. McCoy's trial had violated the Delaware Rules of Professional Conduct during that trial and ordered that the prosecutor be suspended from the practice of law. *In re Favata,* 119 A.3d 1283, 1284 (Del. 2015). [Exhibit 2]

After the case was remanded, the State continued to confine Mr. McCoy in solitary confinement in the Special Housing Unit (*hereinafter* "SHU") of the James T. Vaughn Correctional Institution, ("JTVCC"), where he had been detained for more than five years. On July 27, 2015, Mr. McCoy filed a Motion For Transfer Out of the SHU and Into the General Population. [A27]. On August 4, 2015, the

State filed its opposition to the motion [A116].[1] On August 18, 2015, the trial court issued an order scheduling a hearing on the motion and specified the subjects to be addressed at that hearing. [A97]. The hearing occurred on August 25, 2015. The Court heard testimony from the Warden of JTVCC and from Mr. McCoy. [A44-74].

On August 28, 2015 the trial court granted Mr. McCoy's Motion to Transfer. [the "Transfer Order" Exhibit 3]

On September 1, 2015, the State sent a letter to the trial court requesting reconsideration of the Transfer Order. [A75]. On September 16, 2015 Mr. McCoy filed his response to the State's request for reconsideration. The trial court denied the State's request for reconsideration on September 16, 2015. [Exhibit 4].

On September 30, 2015 the State, invoking the "collateral order doctrine," filed its Notice of Appeal from the Transfer Order and the September 16, 2015 Order denying reconsideration.

[1] Mr. McCoy was not served with and did not respond to the document the State has represented in its brief and appendix [A38] as its Opposition to Defendant's Motion to Transfer. The document that the State served on Mr. McCoy's counsel and to which Mr. McCoy's counsel responded, is in the State's Appendix as A116.

SUMMARY OF ARGUMENT

1. Denied that the collateral order doctrine applies. The appeal should be dismissed because the "collateral order doctrine" does not apply, and this case does not fit into any of the narrow exceptions for interlocutory appeal in criminal cases.

2. Denied. The State waived its challenge to the trial court's jurisdiction to protect the Sixth Amendment rights of a pre-trial capital murder defendant who had spent more than five [5] years in solitary confinement, by ordering that he be transferred into the general population, and in any event, the trial court possessed the jurisdiction and authority to do so.

3. Denied. The trial court did not err and acted well within its discretion in ensuring that Mr. McCoy was housed in a manner that facilitated his exercise of his Sixth Amendment right to counsel.

4. Denied. The trial court did not abuse its discretion in denying the State's letter request for re-argument because the State failed to assert that the trial court, in issuing the Transfer Order had overlooked precedent or a controlling legal principle or that the court misapprehended the law or the facts in a way that would have affected the outcome.

STATEMENT OF FACTS

On the evening of May 4, 2010, James Munford ("Munford") was fatally shot in the parking lot outside the Rodney Village Bowling Alley in Dover, Delaware. *McCoy v. State*, 112 A.3d 239, 245-46 (Del. 2015). Mr. McCoy was arrested on May 22, 2010, and charged with, *inter alia*, Munford's murder in the first degree. The State sought the death penalty. *Id.* at 244; A1.

Trial was held in June 2012, with Mr. McCoy appearing *pro se.* As this Court unanimously found, "the [trial] record reflects this was a close case premised primarily on accomplice testimony." *Id.* at 261. "There was no physical evidence linking McCoy to Munford's murder." *Id. See also id.* at 268 ("there was no physical evidence linking McCoy to the crime"). Specifically, neither *McCoy's* DNA nor his fingerprints were found in Munford's vehicle, where Munford was killed, the gun used in the shooting was never found and the gun the State claimed was the murder weapon was not shown to be the kind of gun used in the murder. *Id.* at 247. The State's case was "premised primarily on accomplice testimony," and "there were inconsistencies in the testimony of the two accomplice witnesses. *See also id.* at 268 ("the testimony of the State's witnesses differed from one another's in some instances."). Nevertheless, the jury found Mr. McCoy, guilty of, *inter alia*, first degree murder. After a capital murder penalty phase hearing, the trial court sentenced Mr. McCoy to death. *Id.* at 245.

Mr. McCoy appealed both his conviction and sentence of death, and this Court reversed both conviction and sentence.[2]

This Court found that the trial court had committed reversible error during jury selection, *id.* at 249-58, and also found reversible error in the prosecutor's improper vouching for one of the State's key witnesses. This Court found the impermissible vouching to be reversible error in part because "this was a close case, premised primarily on accomplice testimony." *Id.* at 261. In so finding, this Court also took into account "the insulting and disruptive conduct of the prosecutor throughout the trial." *Id.*

After discussing the prosecutor's litany of insulting, condescending, cynical, and unprofessional comments - both during the guilt and penalty phases, and in, and outside, the presence of the jury - this Court noted, "the prosecutor in this case seemed to work to prevent McCoy from defending himself properly." *Id.* at 263. This Court concluded:

> The record in this case reflects that the prosecutor's conduct was so demeaning and belligerent to McCoy, outside the presence of the jury, that it reasonably could have affected the effectiveness of McCoy's self-representation in front of the jury.
>
> The record reflects a pattern of unprofessional conduct by the prosecutor that impugns the integrity of the judicial process. Most of the sarcasm directed at McCoy related directly to his choice to

[2] Mr. McCoy, appearing *pro se,* preserved at least two reversible errors for his direct appeal.

> exercise his right to defend himself under both the Sixth Amendment to the United States Constitution and Article 1, Section 7 of the Delaware Constitution. Since McCoy will receive a new trial, we do not decide whether such conduct constitutes an independent basis for reversal. The prosecutor's unprofessional conduct in McCoy's case is the antithesis of the high standards that are the hallmark of Delaware lawyers and must not be repeated.

Id. at 266 (citation omitted).

In *In re Favata*, 119 A.3d 1283, 1284 (Del. 2015), this Court again discussed, and, with the assistance of a partially expanded record not available during Mr. McCoy's direct appeal, amplified its description of the prosecutor's pervasive misconduct during Mr. McCoy's trial.[3] This Court found that the prosecutor had committed seven [7] ethical violations and determined the appropriate sanction to be suspension of prosecutor Favata from the practice of law for six [6] months and one [1] day. This Court required that the prosecutor

[3] Among other things, this Court discussed the "Omerta Comment," an incident at trial in which the prosecutor threatened to falsely expose Mr. McCoy as an informant – which he was not -- so that he could bear the consequences when he returned to prison. When Mr. McCoy reported the threat to the judge, the prosecutor lied to the trial court and denied making the statements. *Id.* at 1287.

But for the courageous prothonotary who overheard the prosecutor's comments and denials and reported the prosecutor's mendacity to the trial judge, *id.*, this outrageous incident of misconduct would have gone unpunished. Besides Mr. McCoy and Ms. Lemieux, no one else who was present for this incident - including the prosecutor's co-counsel –called out the prosecutor for his misconduct or reported it to the court.

"establish his rehabilitation before he can be readmitted to practice law as a member of the [Delaware] Bar." *Id.* at 1293.

In response, the prosecutor had this to say:

> Well, suffice it to say the Supreme Court didn't like my "Law and Order" style of prosecuting this pro se drug-dealing, murdering street thug/gangster either, but then again most (if not all) of them never prosecuted one. I'm glad I'm retired, that's for sure.

[A100].[4]

After this Court reversed Mr. McCoy's conviction and death sentence and remanded the case to the trial court for a new trial, the trial court ordered that Mr. McCoy be held without bail. Thereafter, the State continued its solitary confinement of Mr. McCoy in the SHU at JTVCC.

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[4] This Court found that the prosecutor i) knowingly made false statements of fact to the trial judge; ii) threatened the *pro se* defendant; iii) vouched for the credibility of a state witness; iv) made inappropriate, condescending, and insulting comments to the defendant; and v) engaged in "conduct that involved deceit, dishonesty or misrepresentation," and "conduct prejudicial to the administration of justice."

All of this occurred in open court. One can only imagine what went on behind the scenes in this case.

This Court can and should draw the inference that the prosecution's egregious misconduct not only pervaded the guilt and innocence phases of the trial but also the State's decision to charge Mr. McCoy with murder, but not charging either of the two accomplices who admitted being present at the scene, as well as the State's decision to seek the death penalty in this drug-deal-gone-bad case, which this Court characterized as "close."

Mr. McCoy's capital murder re-trial was first set for April 16, 2016, and later moved to January 17, 2017.

On July 2, 2015, in an effort to cooperate with the Department of Corrections ("DOC" or the "Department") and avoid burdening the trial court, counsel for Mr. McCoy wrote to the Warden of JTVCC. Citing the Superior Court's decision in *State v. Sells*, 2013 WL 1143614, Mr. McCoy, who by this point was a pretrial detainee, requested that DOC transfer him to the general population. [A102].

After no relief was forthcoming, Mr. McCoy filed his Motion For Transfer out of SHU and Into the General Population (the "Transfer Motion). The Transfer Motion averred that the State was continuing to hold Mr. McCoy in solitary confinement in the SHU, and that this restrictive confinement was hindering Mr. McCoy's ability to cooperate with counsel and participate in his defense to prepare for his upcoming capital murder trial. Indeed, Mr. McCoy's request was squarely on "all fours" with *Sells*, where the Superior Court found that the pretrial detention of a defendant in the SHU was a violation of a pre-trial defendant's constitutional rights, and transferred the defendant out of the SHU and into the general population. [A28-30].

The State filed a response to the Transfer Motion. *See* n. 2, *supra; compare* A116, with A38. The trial court scheduled a hearing on the Transfer Motion, and

advised the parties of the subjects that the court wished to have addressed at that hearing. [A42].

At the August 25, 2015 hearing, Warden David Pierce appeared for the State and testified that the DOC uses a risk assessment scale utilizing various factors, (age, criminal history, conduct while incarcerated, etc.) when making decisions about placement in SHU. [A51-53]. Through Warden Pierce, the State presented its justification for continuing to hold Mr. McCoy in solitary confinement in the SHU, including unauthorized possession of television and radio [A56], possession of another inmate's paperwork [A56], masturbation [A57], possession of unknown dangerous contraband, [A58], and an attempted escape from Sussex Correctional Institution in 2009. [A53]. In his testimony, Warden Pierce admitted he did not know exactly where McCoy was being housed, but assumed he was in "in the cell f*ull time except for three hours a week…*" [A62 (emphasis added)].

Mr. McCoy himself, and through his counsel, advised the trial court that i) he had by that time been in the SHU for more than five [5] years, during which time he had been permitted only to leave his cell for 45 minutes at a time, and this only three [3] times per week; ii) that this confinement after the ordeal at his first capital murder trial had caused Mr. McCoy's mental state to deteriorate; and that iii) confinement in the SHU had interfered with Mr. McCoy's ability to have

meetings with his counsel, counsel's agents and to access the law library. [A64-66].

Mr. McCoy, who had represented himself at his first capital murder trial and had alternately invoked and revoked his right to do so again at his retrial, advised the court at the August 25, 2015 hearing that the unspecified contraband was simply a device that helps an inmate heat up water to warm his food which in the SHU was always served cold, and that he was cited for masturbation after a guarded peered in through his cell window which he was not permitted to cover to permit privacy. He also confessed to helping other inmates with legal work. [A66-67]. Mr. McCoy noted that he had not been aggressive either while incarcerated, nor during his multi-week capital murder trial – he had conducted himself appropriately, both in the trial court and during transport throughout the trial and penalty phase. [A67]. Indeed, his conduct during his first trial was far more appropriate than that of the State.

A few days after the August 25, 2015 hearing, the Court issued the Transfer Order. Notwithstanding its acknowledgement that the court "should not, and will not, interfere with the appropriate and necessary need for the Department of Corrections to place those individuals over whom the Department has custody as it deems proper," and even giving "great deference to the Department's decisions,"

Order at 2, the trial court nevertheless found that transferring Mr. McCoy was necessary under the circumstances and granted the motion.

The trial court found that for more than five [5] years, Mr. McCoy was detained "within the confines of essentially solitary confinement in SHU at Level V," and for the vast majority of that time had been assigned to SHU exclusively because of this status. *Id.* The trial court considered a number of factors used by the DOC in deciding to continue Mr. McCoy's solitary confinement in the SHU, and concluded that "the emergent picture is that Defendant has been in the SHU realistically because of the charges confronting him and little else." *Id.* at 4. In the end, the court held:

> In the case of Mr. McCoy … given the emotional and physical impact that prolonged, solitary placement has had on his Sixth Amendment right to assistance of counsel, the indisputable determination must be to require the immediate relocation of Defendant McCoy from SHU to the general population of those individuals who are detained at the Level V facility, because of the inability to provide for a bond pending trial.

Id. at 4.

Rather than immediately transfer Mr. McCoy, the State, on September 1, 2015, wrote a letter to the trial court seeking reconsideration of the Transfer Order. [A75]. In that letter, the State argued that i) the defendant had been convicted of first degree murder and sentenced to death; ii) the Transfer Motion had not been served on DOC; iii) the Transfer Motion was procedurally improper and the trial

court had inappropriately granted *mandamus* relief to the defendant; iv) the Transfer Order was not based on a complete or accurate factual record; and v) the Transfer Order presented a number of critical legal issues that had not been briefed by the parties or addressed by the court. [A77].

The trial court denied the State's request for reconsideration, finding: i) Mr. McCoy's posture with the DOC is that of an individual presumed innocent while he awaits trial; ii) the court had considered all the evidence pertaining to Mr. McCoy's incarceration history, the State and DOC had ample notice of the hearing, and were not limited in any way from presenting evidence at the hearing; and iii) there was no basis for reconsideration of the Transfer Order.

The State appealed.

ARGUMENT

I. THE STATE'S APPEAL SHOULD BE DISMISSED

A. Question Presented

Whether this appeal should be dismissed because the State's appeal does not fit into any of the narrow exceptions for interlocutory appeal in criminal cases and thus does not fit the contours of the "collateral order doctrine."

B. Scope of Review

Aside from a few narrow exceptions under the Delaware Constitution which are not applicable here, this Court does not have jurisdiction - even permissive jurisdiction - as it does in civil cases to entertain any interlocutory appeal in a criminal case. *Gottlieb v. State,* 697 A.2d 400, 401 (Del. 1997)(*citing* Del. Const. Art. IV, Section 11(b); *State v. Cooley*, 430 A.2d 789, 791 n. 2 (Del. 1981); *Rash v. State,* 318 A.2d 630, 604 (Del. 1974)).

C. Merits of Argument

The State's appeal should be dismissed.

The Delaware Constitution permits interlocutory appeals in criminal cases under only the narrowest of circumstances, none of which are applicable here, and the collateral order doctrine does not apply.

> This Court's jurisdiction to hear appeals is set forth in the Delaware Constitution. This Court does not have jurisdiction to hear an interlocutory appeal in a criminal case. Appeals of right are authorized in criminal cases only from final orders. Del. Const. art. IV, §

> 11(1)(b); *State v. Cooley,* Del.Supr., 430 A.2d 789 (1981). Adherence to this rule of finality has been particularly stringent in Delaware in criminal prosecutions because "the delays and disruptions attendant upon intermediate appeal," which the rule is designed to avoid, "are especially inimical to the effective and fair administration of the criminal law." *Di Bella v. United States,* 369 U.S. 121, 126, 82 S.Ct. 654, 658, 7 L.Ed.2d 614 (1962). *Accord, Cobbledick v. United States,* 309 U.S. 323, 324-26, 60 S.Ct. 540, 541-42, 84 L.Ed. 783 (1940).

Gannett Co. v. State, 565 A.2d 895, 899 (Del. 1989).

Implicitly conceding the inappropriateness of interlocutory appeal, the State, in its Notice of Appeal, invokes the "collateral order doctrine." [Notice of Appeal at 1 (citing *Gannett Co.*, at 900)]. The State did not brief the jurisdiction issue in its opening brief.

"In *Gannett,* this Court described the attributes of a collateral order comprising a final judgment: first, it determines a matter independent of the issues to be resolved in the original underlying proceeding; second, it binds a person who was not a party in the original underlying proceeding; and, third, it has a substantial effect on important rights." *Evans v. Justice of the Peace Court No. 19,* 652 A.2d 574, 577 (Del. 1995) (citing *Gannett* at 900).

Here, none of the three requirements is satisfied. First, the trial court found that the State's continued confinement of Mr. McCoy in solitary confinement at the SHU was interfering with his Sixth Amendment right to counsel in the underlying criminal proceeding - *to wit,* a capital murder trial. Thus, the Transfer Order, and the State's appeal from it, are one, and can hardly be deemed "independent of the

issues to be resolved in the original underlying proceeding." Second, the State of Delaware is a party in both the underlying proceeding and in this appeal. Finally, the State has never specified precisely what "substantial effect or important rights," it relies upon to justify its invocation of the collateral order doctrine. Surely in the context of this case – a capital defendant who was convicted and sentenced to death in a prior murder trial that was tainted by egregious and pervasive prosecutorial misconduct, and who has been held by the State in solitary confinement for over five [5] years, permitted to leave his cell for only 45 minutes, three times a week – in such a case, the only important rights "substantially effected" are Mr. McCoy's rights. The trial judge acted to protect those important rights with the Transfer Order. The collateral order doctrine does not permit an appeal from that order.[5]

For all these reasons, the State's reliance on *Gannett* and the collateral order doctrine is misplaced. The instant appeal is from an interlocutory order in a criminal case, a matter over which this Court does not have jurisdiction, and, therefore, the appeal must be dismissed.

[5] It is respectfully submitted that had Mr. McCoy's transfer motion been denied, this Court would not have entertained an appeal. *See e.g. Wyant v. State,* 935 A.2d 257 (Del. 2007).

II. THE SUPERIOR COURT POSSESSES THE JURISDICTION AND AUTHORITY TO ENSURE THAT THE STATE DOES NOT INTERFERE WITH A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL

A. Question Presented

Whether the Superior Court had jurisdiction to protect the Sixth Amendment rights of a capital murder pre-trial defendant who had spent more than five [5] years in solitary confinement, by ordering that he be transferred into the general population, and whether the State waived that claim by failing to raise it below.

B. Scope of Review

Had the State raised the issue of the trial court's jurisdiction below, and had the trial court had an opportunity to address that argument, this Court's review of the trial court's decision would be *de novo*. *Fenwick Waterman's, LLC v. Littleton*, 86 A.3d 1118 (Del. 2014). However, because the State did not raise this argument below, this Court should not review the issue at all. *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 25 (Del.2009).

C. Merits of Argument

The State did not challenge the trial court's jurisdiction below and hence has waived that claim on appeal. Even had it not been waived, the trial court had, and properly exercised, its jurisdiction to protect Mr. McCoy's constitutional rights.

1. The State Waived This Argument By Failing To Raise It Below.

This Court adheres to the well-settled rule which precludes a party from attacking a judgment on a theory that it has failed to advance before the trial judge. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013) (quoting *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 25 (Del.2009)). Under Supreme Court Rule 8, a party may not raise new arguments on appeal. *Id.*

The State's argument challenging the trial court's jurisdiction should be deemed waived, and this Court should not consider it on appeal.

2. The Trial Court Had Jurisdiction To Protect Mr. McCoy's Constitutional Rights By Ordering that The State Transfer Him Out of Solitary Confinement Into the General Population

According to the State, "the Department, not the Superior Court, has exclusive jurisdiction and authority over the classification and housing of all inmates. [State Br. at 16]. Notwithstanding its broad view of its own exclusive powers, the State does concede:

> The Department is or *arguably may be required* to comply with bail release and sentence orders, judicial writs (e.g., writs of habeas corpus or mandamus) and processes (e.g., subpoenas and summonses), and routine orders or requests for transfers necessary for court appearances or competency evaluations.

Id. (emphasis added) (citing 11 *Del. C.* §6504). The problem here, according to the State, is that the trial court exceeded its power when it

exercised "expansive, unprecedented jurisdiction and authority" in ordering that Mr. McCoy be transferred from the SHU into the general population. *Id.* The logical implication from the State's argument is that the DOC's powers are exempt from not only the Superior Court's jurisdiction and authority, but the jurisdiction and authority of the Delaware Supreme Court as well.

Tellingly, the State makes these arguments based entirely on its own interpretation of the statute and the Bureau of Prison's own regulations.[6]

The State's position should be rejected.

First, the trial court's order is hardly unprecedented. Both *State v. Gibbs*, 2012 WL 6845687, at *1 (Del. Super.) and *State v. Sells*, 2013 WL 1143614 (Del. Super.), are squarely in line with this case. In each of these cases, pre-trial defendants detained in solitary confinement in the SHU sought transfer to the general population because their confinement in the SHU was interfering with their Sixth Amendment rights to counsel.

The defendant in *Gibbs*, like Mr. McCoy, was charged with capital murder out of a "drug deal gone bad." *Gibbs at* *1. Like Mr. McCoy, Gibbs contended that his pre-trial confinement in the SHU interfered with his ability to cooperate with counsel in the preparation of his capital murder

[6] The State concedes these policies were not included in the record, nor considered by the trial court below. [State Br. at 18, n.70].

trial, in violation of the Sixth Amendment.[7] As here, the trial court in *Gibbs* acknowledged the deference given to the DOC's decisions, and balanced that deference against the pretrial detainee's constitutional rights:

> This Motion raises a variety of serious issues for the Court to address. Both state and federal law are highly deferential to the decisions made by correctional officials. The Court acknowledges this deference as well as the complex responsibilities with which DOC is tasked. Prison administrators must ensure the safety of prison officials, the prisoners themselves, visitors to the prison, and the general public. While the Court is sympathetic to the competing obligations of the DOC, the constitutional rights of an accused person cannot be overlooked, nor are they lost at the prison gate.

Gibbs, 2012 WL 6845687, at *2.

As the State concedes, contrary to this case, in *Gibbs* the State challenged the Superior Court's jurisdiction and authority to make classification and housing decisions, [State Br. at 19], and thus, unlike here, the trial court In *Gibbs* had the opportunity to consider the State's jurisdictional argument.

The trial court in *Gibbs* rejected the State's exclusive jurisdiction argument, finding first, that the DOC's statutory powers are expressly "subject to the 'powers

[7] Mr. McCoy's concerns about his five-plus years in solitary confinement are more than academic. The psychological trauma inflicted on inmates exposed to long periods of solitary confinement has been extensively researched and documented and must be accepted as fact. *See* discussion, *infra* at page 34.

vested in the judicial and certain executive departments,'" *Gibbs* at *2 (quoting 11 *Del. C.* §6504).[8]

Second, as *Gibbs* found, the Superior Court is statutorily granted with the jurisdiction and power to "examine, correct and punish … the contempts, omissions, neglects, favors, corruptions and defaults of all justices of the peace, sheriffs, coroners, clerks and other officers within this State," *Id.* (quoting 10 *Del. C.* § 542(a)).[9] This statute has been interpreted by the Superior Court not as a plenary grant of power, but rather, as conferring the Superior Court with authority over prisons, to be exercised when there is "an arbitrary and capricious abuse of

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[8] In pertinent part, the statute provides:

> The Department, subject only to powers vested in the judicial and certain executive departments and officers of the State, shall have the duties set forth in this chapter and the exclusive jurisdiction over the care, charge, custody, control, management, administration and supervision of:
>
> (1) All offenders and persons under the custody of the Department;
>
> (2) All institutions for the custody, correction and rehabilitation of persons committed to its care;
>
> ***
>
> 11 *Del. C.* § 6504.

[9] "The Superior Court shall have full power and authority to examine, correct and punish the contempts, omissions, neglects, favors, corruptions and defaults of all justices of the peace, sheriffs, coroners, clerks and other officers, within this State." 10 *Del. C.* § 542.

discretion by the prison authorities or where it is clearly shown that there has been a deprivation of constitutional rights of inmates." *Sells* at *2; *Vick v. Dep't of Correction,* 1986 WL 8003, at *1 (Del. Super.) (both quoting *State ex rel. Tate v. Cubbage*, 447, 210 A.2d 555, 565 (Del. Super. 1965)).[10]

Finally, 11 *Del. C.* § 6551 commands the DOC to "cooperate with the courts ... to assist it in attaining its purposes." *Gibbs* found that this language indicates the General Assembly's intention "that the Court and the DOC should work together to accomplish the resolution of problems that may arise." *Id.* at *3. In *Gibbs*, and in *Sells*, the trial court expressed its hope that the court and the DOC, consistent with the mandate of this statute, "reconcile the competing purposes of regulating prison administration and assuring constitutional rights to criminal defendants. "However, 'there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" *Sells*, 2013 WL 1143614, at *3 (quoting *Wolff v. McDonnell,* 418 U.S. 539, 556 (1975)).

> It is not the duty or goal of the judicial branch to "police" the DOC or regulate prison administration. However, when DOC policy impinges upon the constitutional rights of a criminal defendant, who is at this stage in the proceedings presumptively innocent, the Court's purposes cannot be met without intervention. "There must be mutual

[10] Here, as in *Sells* and *Gibbs*, it was clearly shown that the continued detention of Mr. McCoy in solitary confinement in the SHU deprived him of his Sixth Amendment rights to counsel. *See* discussion at ___, *infra*.

> accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

Gibbs, 2012 WL 6845687, at *5 (quoting *Wolff v. McDonnell*, 418 U.S. 539 at 556 (1975)).

In short, there is no statutory authority for the all-encompassing and exclusive authority and jurisdiction asserted by the State in this case.

As the trial court stated in *Gibbs*:

> The case at hand is thus definitively within this Court's jurisdiction, as it involves clear issues of the infringement of the constitutional rights of an inmate. … [I]in the unique situation where clear constitutional rights violations occur, the Court must administer oversight.

Gibbs at *3.

Delaware courts have not hesitated to regulate the DOC to prevent constitutional violations. *Id.* (citing *Biggins v. Dep't of Corr. of State,* 2000 WL 710093 (Del.Super.2000) (citing *State v. Stewart,* Cr. A. Nos. N96–12–1395–1398 (Del.Super.Jan.12, 1998) (prison inmates have constitutional right to meaningful access to the courts); *Ross v. Dep't of Corr.*, 722 A.2d 815 (Del.Super.1998)(holding that inmates were entitled to individual copies of disciplinary rules); *Johnson v. State*, 442 A.2d 1362 (Del.1982) (holding that a Delaware prisoner transferred to a federal facility outside the state had constitutional right to reasonable access to Delaware legal reference materials or a reasonable alternative thereto)); *State ex rel. Tate v. Cubbage,*

210 A.2d 555 (Del.Super.1965) (holding that prisoners' constitutionally guaranteed rights, including freedom of religion, must be protected, but balanced against effective prison administration).

Bailey v. State, 521 A.2d 1069 (Del.1987), is another example of the Superior Court exercising its authority to protect a pretrial detainee's Sixth Amendment rights to counsel. The defendant in *Bailey* alleged that confinement in the maximum security unit impeded his ability to prepare for trial, and filed a motion seeking to be transferred from the maximum security unit. The Superior Court denied that motion but instead entered a detailed order permitting the defendant unlimited access to his attorney, free access to writing and legal material necessary to assist his attorney and liberal telephone privileges for discussions with his attorney. *Id* at 284. This Court "not only upheld the actions of the trial judge, it commended his conduct as 'exemplary and a model for the consideration of similar claims in the future.'" *Id.* (quoting *Bailey* at 1085); *see also Sells* at *2 (same).

Gibbs concluded the court had jurisdiction and authority and ordered that Gibbs be relocated from SHU to the general population in order to protect Gibbs's Sixth Amendment rights to counsel.

The State did not appeal the trial court's decision in *Gibbs*.

Three months after *Gibbs*, the identical issue arose in *State v. Sells*, 2013 WL 1143614, at *2 (Del. Super.), when a pretrial defendant charged with attempted murder sought relocation, claiming that his incarceration in the SHU for more than a year and a half was interfering with his Sixth Amendment right to counsel. In *Sells*, the State did not challenge the trial court's jurisdiction or oppose the defendant's transfer motion. The trial court there found that the DOC's confinement of Sells to the SHU had such "gravely deleterious consequences, it results in a violation of the defendant's constitutional rights," and granted the defendant's motion to relocate. Again, in *Sells*, the State did not appeal.

It is respectfully submitted that, in the context of this case, where i) the issue is before this Court under the auspices of the collateral order doctrine; ii) the issue was not raised below; iii) egregious prosecutorial misconduct has been pervasive; iv) Mr. McCoy has spent more than five [5] years in solitary confinement, and v) the law unquestionably vests jurisdiction with the courts of this State to address the issues addressed in this case, the State's challenge to the trial court's jurisdiction should be summarily and emphatically rejected.

III. THE TRIAL COURT DID NOT ERR AND ACTED WELL WITHIN ITS DISCRETION IN ENSURING THAT MR. McCOY IS HOUSED IN A MANNER THAT FACILITATED HIS EXERCISE OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL

A. Question Presented

Whether the trial court committed legal error, made clearly erroneous factual findings, or abused its discretion in finding that the continued confinement of Mr. McCoy, a pretrial detainee, in solitary confinement in the SHU interfered with his Sixth Amendment rights to counsel and in ordering that he be transferred to the general population.

B. Scope of Review

"This Court will not disturb conclusions of fact made by the trial judge which are supported by competent evidence." *Albury v. State*, 551 A.2d 53, 60 (Del. 1988)(citations omitted). If those conclusions "are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint" this Court will accept those findings. *Levitt v. Bouvier,* 287 A.2d 671, 673 (Del. 1972). "It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact." *Id.*

C. Merits of Argument

By order dated August 8, 2015, the trial court notified the parties of its intention to hold a hearing on Mr. McCoy's transfer motion, and specified six [6]

subjects to be addressed at that hearing. [A42]. The State appeared at the hearing through its counsel. David Pierce, the Warden at JTVCC, testified about the risk assessment factors used by DOC in making housing decisions, and about Mr. McCoy's disciplinary infractions while incarcerated, (masturbation, possessing a device to heat water and possession of legal papers).

Mr. McCoy appeared with counsel and testified at the hearing. In particular, Mr. McCoy, who had appeared *pro se* in his capital murder trial, and had already written to the trial court and the State invoking his right to proceed *pro se* at his retrial on at least two occasions, told the court that his mental state had deteriorated due, in part, to where he was being held, and that he no longer felt fit to proceed *pro se*. [A47-49].

Through his counsel, Mr. McCoy explained that he had been housed on the SHU for almost six [6] years, during which time he was permitted to leave his cell only for 45 minutes at a time, and only three times each week. [A64]. Mr. McCoy's counsel advised the Court they had observed the severe impact such confinement had had on Mr. McCoy's mental state and on his ability to cooperate in the preparation of his defense. Counsel also noted that the manner in which Mr. McCoy was confined restricted counsel's ability to have private, face-to-face visits with Mr. McCoy, and that Mr. McCoy's access to the library was likewise restricted. [A65]. Mr. McCoy noted that he had not been aggressive in the SHU,

and had been through a *pro se* trial in the Superior Court without incident. [A67]. He also told the Court that other pre-trial inmates with no disciplinary history are detained in the SHU. *Id.* [A66-69].

Neither party was constrained in any way in submitting evidence to the trial court. [A72].

On August 28, the trial court issued its Transfer Order, granting Mr. McCoy's motion:

> Defendant's time in incarceration has been extensive from the original arrest and detention on charges including a capital murder offense, through the detention leading up to and completing a pro se trial; then as a convicted felon through the appellate process; on to a conviction reversal; back into detention awaiting trial. Again standing innocent until proven otherwise. This has encompassed over five years, the substantial part of which was as a presumed innocent individual. All of that time has been spent, as indicated within the confines of essentially solitary confinement in SHU at Level V.
>
> Except for the time between the prior conviction and the ensuing reversal, Defendant has been assigned SHU placement almost exclusively because of his status.
>
> Because of the difficulties such a placement imposes upon Defendant's access to counsel and other means of defending his charges, Defendant has asserted that the SHU placement improperly deprives Defendant of his Sixth Amendment right to the assistance of counsel, as a fundamental aspect to our system of justice.

Exhibit A at 2.

The trial court gave "great deference" to the DOC's placement decisions, including consideration of the "standardized risk assessment tools" utilized and

relied upon by DOC in making those decisions. These include the seriousness of the offence charged, the established bond assessment, and the defendant's age, criminal history and conduct while incarcerated. *Id.* at 2-3.

After considering these factors, the trial court held:

> [T]he emergent picture is that Defendant has been in the SHU realistically because of the charges confronting him and little else. That alone has significance, and justifies great placement concern on the part of the DOC. It also suggests that the Court owes DOC great deference in regard to placement decisions.
>
> In the case of Mr. McCoy, however, given the emotional and physical impact that prolonged, solitary placement has had on his Sixth Amendment right to assistance of counsel, the indisputable determination must be to require the immediate relocation of Defendant McCoy from SHU to the general population of those individuals who are detained at the Level V facility, because of the inability to provide for a bond pending trial.

Id. at 4. In so holding, the trial court relied upon and incorporated its reasoning in *State v. Sells, 2013 WL 1143614* (Del. Super.).[11] There, the court found that the pretrial detention of an inmate in the SHU violated his Sixth Amendment right to counsel and Fourteenth Amendment right to due process and granted the defendant's petition to be moved from the SHU into the general population pending trial. *Id.* at 4.

[11] In *Sells*, the trial court referenced its *Gibbs* decision stating, "in recent months, this Court has become all too familiar with the impact the SHU's policies regarding counsel visits have on criminal defendants confined pending trial." *Id. at *1* (citing *Gibbs*).

The trial court's order should be affirmed.

1. The Trial Court Fully Considered And Gave Deference To DOC's Risk Assessment Factors

According to the State, the trial court "has *taken issue* with the Department's classification system and has expressed concerns with what it perceives as unfair housing of detainees in maximum security based solely on status." [State Br. at 25 (emphasis added)]. The State also claims the trial court "rejected outright" DOC's classification factors. *Id.*

The trial court did nothing of the sort. Specifically, the trial court did not take issue with DOC's classification system or state any perception or finding that DOC's system is "unfair" in any way. Nor did the trial court's order address any inmate except for Mr. McCoy. As in *Sells*, the analysis of which the trial court incorporated in the Transfer Order, the court engaged in a "consideration of the specific facts and circumstances of the particular inmate at issue." 2013 WL 1143614, at *3.

To the contrary, the hearing transcript and the trial court's Transfer Order make clear that that court fully considered DOC's risk assessment system, and accorded it great deference. Indeed, the court assumed DOC's criteria "accurately reflect the likelihood of an individual's needing a particular level of supervision." [Order at 3 ("Undoubtedly, these placement factors are statistically valid")].

The court found, however, based on ample evidence, that the State's prolonged confinement of Mr. McCoy in solitary confinement in the SHU had an emotional and physical impact on his Sixth Amendment rights to the assistance of counsel. [Order at 4].

While the State's 96th footnote cites Delaware authorities in which the State claims Delaware courts have refused to second-guess DOC's classification and housing decisions, none of those authorities were cited to the trial court. Moreover, in none of those decisions was the trial court convinced – as the Court was here -- that more than five [5] years in solitary confinement had a profound, negative impact on a pretrial detainee's right to prepare for his capital murder trial. Footnote 96 omits discussion *Bailey v. State*, 521 A.2d 1069 (Del. 1987). *See* discussion *supra* at page 23.

In short, the trial court considered and deferred to DOC's factors, but ultimately decided to safeguard Mr. McCoy's rights to counsel, including his ability to assist his counsel as he prepared for his upcoming capital murder trial.

2. The Trial Court Properly Determined That Mr. McCoy, A Pretrial Detainee, Is Presumed Innocent.

Mr. McCoy was convicted of murder and sentenced to death in a trial at which he appeared pro se, and the prosecutor's misconduct was so egregious and pervasive that it warranted reversal of Mr. McCoy's conviction and sentence and the prosecutor's suspension from the practice of law. By the time that Mr. McCoy

filed his Motion to Transfer, the State had held Mr. McCoy in solitary confinement in the SHU for more than five [5] years.

Yet, the State asseverates that DOC should not consider Mr. McCoy a presumptively innocent pre-trial detainee, and the trial court erred in so doing. The State's argument should be rejected.

"[I]n every criminal prosecution the defendant is presumed to be innocent until his guilt is proved to the satisfaction of the jury beyond a reasonable doubt." *State v. Short*, 25 Del. 491, 82 A. 239, 243 (Del. O. & T. 1911), *see contra* [A116 at ¶4; A38, at ¶4]. Indeed:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law…. It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts of the several states.

Coffin v. United States, 156 U.S. 432, 453-54 (1895)(citations omitted).

The State appears to argue that, to the extent the trial court considered Mr. McCoy's presumptive innocence in ordering Mr. McCoy's transfer out of the SHU, that the court erred. This argument must be rejected.

First, it is clear that the trial court's order transferring Mr. McCoy from solitary confinement in the SHU to the general population was based on its finding that the "extensive" period of time Mr. McCoy spent in solitary confinement in the SHU was interfering with his ability to cooperate in his defense, and hence with his

Sixth Amendment rights to counsel, and not on the unassailable fact that Mr. McCoy, as a pre-trial detainee, is presumed innocent. The trial court's observation that Mr. McCoy is presumed innocent was a statement of fact made in direct response to the State's attempt to distinguish *Sells* on the ground that:

> In *Sells*, the defendant had NOT been convicted of any charges and none of his charges included capital murder. He did not murder anyone and his most serious charge was attempted murder.

[A116 at ¶4; A38, at ¶4 (*emphasis in original*).

In any event, nothing in the *Bell v. Wolfish*, 441 U.S. 520 (1979), dictum cited by the State, reflects that the trial court erred in transferring Mr. McCoy from solitary confinement in the SHU to the general population in order to protect Mr. McCoy's constitutional rights.

3. **The Trial Court Properly Found That The Continued Confinement Of Mr. McCoy In Solitary Confinement In The SHU Interfered With His Sixth Amendment Right To Counsel.**

> The Sixth Amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

Gibbs, 2012 WL 6845687, at *3 (quoting U.S. Const. amend. VI). This right is "fundamental to our system of justice and is meant to assure fairness in the adversary criminal process." *Id.* (quoting *Bailey*, 521 A.2d at 1069). "Denying a criminal defendant the assistance of counsel 'is a denial of due process of law, under both the federal and Delaware Constitution.'" *Id.*

Here, as in *Gibbs* and in *Sells*, DOC's confinement of Mr. McCoy prevented "meaningful meetings between attorney and client." *Gibbs* at *3 (citing *Bailey*; *Merritt. v. State*, 219 A.2d 258 (Del.1966)).

Moreover, Mr. McCoy represented himself at his previous trial and has, on more than one occasion suggested his inclination to proceed *pro se* at his retrial. Indeed, he withdrew his request to do so at the hearing on the Transfer Motion, telling the trial court, "my mental state has deteriorated to the point where I don't think I would be fit to proceed *pro se*." [A49]. While it is certainly Mr. McCoy's right to represent himself, the trial court just as certainly has discretion to ensure that Mr. McCoy's confinement does not interfere with his ability to prepare for trial, be it *pro se* or represented by counsel, or to make the critically important decision to waive his right to counsel.

The trial court also was justifiably concerned with the physical and emotional impact of prolonged solitary confinement on Mr. McCoy. In fact, Mr. McCoy - who had been in solitary confinement for more than five [5] years and had endured a lengthy *pro se* trial with an abusive, insulting, and condescending prosecutor seeking his execution - told the Court that his mental state had deteriorated as a result of his custodial situation. Moreover, Mr. McCoy's counsel advised the trial court that counsel had observed that negative impact in their representation of their client. [A65].

Indeed, the long-term, negative psychological consequences for prisoners in solitary confinement in lock-down units like the SHU are so well-documented they cannot be seriously disputed. More than one hundred and twenty-five years ago, the United States Supreme Court recognized that, even for prisoners sentenced to death, solitary confinement bears "a further terror and peculiar mark of infamy." *Davis v. Ayala*, 135 S. Ct. 2187, 2209, *reh'g denied*, 136 S. Ct. 14 (2015)(quoting *In re Medley*, 134 U.S. 160, 167–168 (1890)).[12]

[12] In 1890, the Supreme Court in *Medley* stated:

> Solitary confinement, as a punishment for crime, has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the American Encyclopedia, vol. 13, under the word 'Prison,' this history is given. In that article it is said that the first plan adopted, when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut-Street Penitentiary, in Philadelphia, in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland, and some of the other states. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

The same was true as recently as last summer, when that same Court reiterated: "Such prolonged solitary confinement produces numerous deleterious harms." *Glossip v. Gross*, 135 S. Ct. 2726, 2765, BREYER, J., dissenting (reh'g denied, 136 S. Ct. 20 (2015) (citing *In re Medley,* 134 U.S. 160, 167–168 (1890); *Davis v. Ayala*, 135 S.Ct. 2187, 2209 (2015) (KENNEDY, J., concurring); Haney, Mental Health Issues in Long–Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency 124, 130 (2003)("Haney"); Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash U. J. L. & Policy 325, 331 (2006)("Grassian").

The Haney article cited by Justice Breyer contains a catalogue of studies finding that solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations," among many other symptoms. Haney, 49 Crime & Delinquency at 130. According to Dr. Grassian, "[E]ven a few days of solitary confinement will predictably shift the [brain's] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium." Grassian, 22 Wash U. J. L. & Policy 325, 331.

"There is not a single published study of solitary or super-max like confinement in which nonvoluntary confinement lasting for longer than 10 days where participants were unable to terminate their isolation at will, that failed to

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Id., 134 U.S. at 167-68.

result in negative psychological effects." Haney, Crime and Delinquency, January 2003, at 132.

Such knowingly punitive confinement tactics, to the extent they are constitutional at all, are surely inappropriate for pre-trial detainees like Mr. McCoy and have been condemned by the ABA and the United Nations:

> [N]early all death penalty States keep death row inmates in isolation for 22 or more hours per day. American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report). This occurs even though the ABA has suggested that death row inmates be housed in conditions similar to the general population, and the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days. See *id.*, at 2, 4; ABA Standards for Criminal Justice: Treatment of Prisoners 6 (3d ed. 2011).

Glossip, 135 S. Ct. at 2765, Breyer, J., dissenting.

This is a capital case. "Capital cases inherently give rise to complexities and the highest stakes." With Mr. McCoy's life potentially in the balance, "it is exceedingly important to assure that his rights to counsel and due process of law are not violated." *Gibbs* at *5.

The trial court did not clearly err in its factual findings regarding the impact of five years of solitary confinement on Mr. McCoy. No basis exists for this Court to disturb those findings.

4. **The Trial Court Properly Granted Relief To Mr. McCoy**

The State next complains that the trial court improperly granted mandamus relief to Mr. McCoy. Mr. McCoy, however, did not seek and was not granted mandamus relief. He filed a motion requesting transfer from the SHU to the general population so that he could cooperate with and assist his counsel in preparing for his defense.

The State did not contend at the motion hearing that Mr. McCoy was in fact seeking mandamus relief. Hence, this issue should be deemed waived. Moreover, while the State, in its letter request for reconsideration, did argue that Mr. McCoy had improperly sought, and the trial court had improperly granted mandamus relief, the State reasoned that it was improper because DOC was not a party to Mr. McCoy's criminal case, and "arguably had no right of appeal." [A77].

Even in seeking reconsideration, the State provided the trial court with no authority for its assertion that Mr. McCoy was improperly seeking mandamus relief. Nor did the State address *Bailey, Gibbs* or *Sells,* each of which granted the same or similar relief sought by Mr. McCoy, and none of which implicated *mandamus.* Indeed, the State does not address those authorities now. The State also conceded, and argues on appeal as well, that

mandamus relief would, in any event have also been inappropriate. [A78; State Br. a 30]. This claim too should be rejected.

5. **The Relief Granted By The Superior Court Was Appropriate.**

The State, although conceding that Mr. McCoy has Sixth Amendment rights, nonetheless goes on to claim that the trial court's order that Mr. McCoy be transferred out of solitary confinement was an "extreme unprecedented" remedy that went far beyond what was necessary to safeguard his right to the assistance of counsel.

First, the record reflects Mr. McCoy's unsuccessful attempts to engage the State in a dialogue about Mr. McCoy's detention without even burdening the Court, and the State's flat rejection of counsel's efforts. [A81-82, 102].

Second, the State never suggested any alternative remedy to the trial court. Therefore, this Court should not entertain this argument on appeal. *See Scion Breckenridge Managing Member, LLC* 68 A.3d at 678; *Riedel* 968 A.2d at 25.

Third, the remedy employed by the Court – in the absence of an alternative proposed by the State – was not unprecedented. It was the same remedy used in *Gibbs* and *Sells.*

Finally, the trial judge was well-versed in this issue.[13] In *Gibbs,* the very same trial court considered remedies other than relocation, similar to the remedies in *Bailey,* which the State, for the first time, now advances on appeal. [State Br. at 31]. In *Gibbs,* the court stated that attempts at remedies similar to those used in *Bailey*, "have not led to the desired results." *Id.* at *5. "The system is evidently such that the prison guards tasked with meeting an order's requirements are unaware of it, or are unable to carry out the required measures. This should not be taken as criticism of the guards, as they are trying to do a very complicated job. This is simply a problem within the system."

[13] The trial court specifically incorporated the reasoning from its decision in *Sells* in its Order, [Exhibit at 4], and *Sells* likewise incorporated the reasoning from *Gibbs. Sells* at *2 ("This decision is made with the same understanding of potential implications and sensitivity to the complex nature of the relationship between the judiciary and DOC as applied in prior orders of this kind.")

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IV. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN DENYING THE STATE'S REQUEST FOR RECONSIDERATION

A. Question Presented

Whether the trial court abused its discretion in denying the State's letter-request for reconsideration, where the State did not assert that the trial court overlooked precedent or a controlling legal principle, or that the court misapprehended the law or the facts in a way that would have affected the outcome.

B. Scope of Review

A decision on a motion for reargument will be affirmed unless it involves an abuse of discretion. *McElroy v. Shell Petroleum, Inc.*, 618 A.2d 91 (Del. 1992)(citing *Daniel D. Rappa, Inc. v. Hanson*, Del.Supr., 209 A.2d 163, 166 (1965)).

C. Merits of Argument

Rather than comply with the trial court's Transfer Order, the State wrote the trial court a letter, asking the trial court to reconsider that Order on an expedited basis. [A75]. The State's request for reconsideration did not acknowledge or mention the trial court's rules governing reargument or the standard for reargument under those.[14]

[14] Reargument is governed by Superior Court Civil Rule 59(e), made applicable to criminal cases pursuant to Superior Court Criminal Rule 57(d). *Dickens v. State,*

Rather, the State, which was represented at the hearing by counsel and JTVCC Warden David Pierce, i) contended that DOC, "due to lack of notice and other procedural infirmities … was not provided with an adequate opportunity" to be heard; ii) argued that Mr. McCoy was convicted of capital murder and sentenced to death; iii) claimed for the first time that Mr. McCoy's transfer motion was procedurally defective because it sought mandamus relief; iv) claimed that the trial court had failed to consider the JTVCC classification system and the reasons why DOC housed Mr. McCoy in solitary confinement, and that the order was not based on a complete and accurate factual record. [A75-70].

"On a motion for reargument the only issue is whether the court overlooked something that would have changed the outcome of the underlying decision." *McElroy v. Shell Petroleum, Inc.,* 618 A.2d 91 (Del. 1992)(citation omitted). "A motion for reargument is not intended to rehash the arguments already decided by the court." *Id.*

The trial court found i) Mr. McCoy's conviction was of no significance in light of this Court's reversal of that verdict; ii) the State and DOC had "ample notice of the entire issue to be heard" and neither "was limited in any way from presenting … any and all evidence it chose to present regarding Defendant's SHU placement"; and iii) the State provided "no basis" for reargument under the trial

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2003 WL 22172737, at *1 (Del. Super. Sept. 16, 2003), *aff'd,* 852 A.2d 907 (Del. 2004).

court's rules.

The trial court did not abuse its discretion in denying the State's motion for reargument. There is nothing that the trial court overlooked that would have made a difference in the outcome of the underlying decision. The trial court's decision was consistent with the trial court's precedent in *Gibbs* and *Sells.* The State's letter for reargument sought to rehash the arguments already decided by the court. The State obviously had a full opportunity to be heard, and Mr. McCoy, as a pre-trial detainee obviously is due the presumption of innocence. The State's remaining arguments were waived or are meritless.

It was the State's burden to demonstrate newly discovered evidence, a change in the law or manifest injustice. *State v. Brooks*, 2008 WL 435085, at *1 (Del. Super. Feb. 12, 2008), *aff'd on other grounds*, 963 A.2d 138 (Del. 2008)(internal citations omitted). The State failed to carry its burden and the judgment of the trial court should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court should be affirmed.

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