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Case Number 438,2022

THE SUPREME COURT OF THE STATE OF DELAWARE

KATHLEEN MCGUINESS,	:	REDACTED - PUBLIC VERSION FILED MARCH 29, 2023
Defendant-Below, Appellant,	:	No. 438, 2022
v.	:	On Appeal from the Superior Court of the State of Delaware
STATE OF DELAWARE,	:	
Appellee.	:	ID No. 2206000799

APPELLANT'S OPENING BRIEF

Dated: March 14, 2023

Steven P. Wood (#2309)
Chelsea A. Botsch (#6715)
McCarter & English, LLP
Renaissance Centre
405 N. King Street, 8th Floor
Wilmington, Delaware 19801
(302) 984-6300

Attorneys for Defendant-Below, Appellant Kathleen McGuiness

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GLOSSARY

OAOA	Office of Auditor of Accounts
Appellant or McGuiness	Kathleen McGuiness
Daughter	Kathleen McGuiness's daughter
The State	Office of the Attorney General or Department of Justice
Motion to Dismiss Count Five	Defendant's Motion to Dismiss Count Five of the Indictment
Motion to Dismiss Count Three	Defendant's Motion to Dismiss Count Three of the Indictment for Unnecessary Delay and Failure to Adequately Describe an Offense
Motion to Dismiss or Sanction	Defendant's Motion to Dismiss Indictment or Alternatively Sanction the State for Discovery Violations
ODS	Office of Defense Services
Petition	Petition for Appointment of Private Counsel for a State Officer
The court below	President Judge Jan R. Jurden

NATURE OF PROCEEDINGS

This case presents the question of whether Kathleen McGuiness ("McGuiness"), the first incumbent statewide-elected official to be charged and convicted of a crime based upon the hiring of a close relative while in office, received a fair trial. The answer is a resounding "no."

The Delaware Department of Justice (the "State") in this case disregarded its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and committed what is surely the largest *Brady* violation in the history of Delaware by waiting six weeks before trial to disclose 511,266 digital files that were in its possession for more than six months, none of which it bothered to search for exculpatory material. Its Chief Investigator, Frank Robinson, swore to a demonstrably false probable cause affidavit, the authors of which may have included senior prosecutors and administrators at the Department of Justice, resulting in a rare loss pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). At seemingly every turn, the trial court overlooked well-settled constitutional, statutory, and rule-based precedent. Its errors permitted the State to strike not just "hard blows," but "foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935).

McGuiness appeals from the culmination of the trial court's errors and the State's constitutional violations—her convictions and her October 19, 2022 sentence.

SUMMARY OF ARGUMENT

The trial court erred by holding that:

1. The State did not violate *Brady v. Maryland* by suppressing 511,266 material exculpatory files that had been in its possession for more than six months prior to producing them to McGuiness six weeks before trial.

2. McGuiness was not entitled under *Brady v. Maryland* to material exculpatory evidence about who among the highest levels of the Delaware Department of Justice had written demonstrably false statements in a probable cause affidavit in violation of *Franks v. Delaware*.

3. There was sufficient evidence to support the jury's finding of guilt on Count One.

4. The failure to dismiss Count Five in a timely fashion did not result in the admission of highly prejudicial character evidence.

5. The Indictments charged an offense under Count Three, resulting in prejudicial spillover.

6. Counts One and Four were not multiplicitous.

7. Its comments on the credibility of the State's Chief Investigator were not violative of the Delaware Constitution.

8. McGuiness was not entitled under 10 *Del. C.* § 3925 to the appointment of private counsel.

STATEMENT OF FACTS

On September 29, 2021, the State executed a search warrant at the Office of Auditor of Accounts ("OAOA"), which was authorized by the Superior Court in reliance upon an affidavit of probable cause attested to by Robinson. A324-A334. The affidavit was riddled with half-truths and misleading statements. Robinson would eventually admit under oath that certain assertions in Paragraphs 23 and 24 of the affidavit were false. A2479:36; A2514-A2517. Three laptops and six other digital storage devices were seized during the search. A380. Only one of the devices (a laptop) belonged to McGuiness. *Id.*; Exhibit G at 2. A total of 511,266 digital files were contained on the seized devices. Exhibit G at 4.

On October 11, 2021, the State indicted McGuiness for five Counts: (1) Conflict of Interest, (2) Felony Theft, (3) Non-Compliance with Procurement Law, (4) Official Misconduct, and (5) Act of Intimidation. A31-A41 ("Original Indictment"). Paragraphs 31 and 32 of the Original Indictment contained the same factually false allegations that were alleged in Paragraphs 23 and 24 of the affidavit. A37.

McGuiness chose to be represented by undersigned counsel. A2. Because McGuiness was a public servant of the State and the charges related to her service in office, counsel filed a timely motion requesting appointment of private counsel with payment by public funds. A42-A49. The trial court denied the motion after

concluding that, under 10 *Del. C.* § 3925, it had no discretion to permit McGuiness to hire private counsel at public expense. Exhibit A.

On November 30, 2021, McGuiness filed a discovery request pursuant to Superior Court Criminal Rule 16 which requested production, *inter alia*, of all seized materials and any evidence in the State possession material to her defense, as well as production of all materials disclosable pursuant to *Brady*. A183-A186. The parties and trial court agreed to a schedule which established a discovery deadline would be December 17, 2021, and a deadline of January 31, 2022 for all discovery and suppression motions. A5.

On December 17, 2021, the State provided McGuiness with what it deemed relevant discovery. A5. After review of the provided discovery, McGuiness filed a Motion to Compel Discovery on January 31, 2022, asking that the State provide the requested materials that it refused to produce. A156-A194.

Shortly thereafter, on February 25, 2022, McGuiness filed a Motion to Dismiss Count Five of the Original Indictment, arguing it was deficient because it failed to charge an offense. A228-A251.

On March 28, 2022, the State obtained another indictment (the "Superseding Indictment"). A347-A363. The Superseding Indictment made significant changes to Counts Three and Five. A347-A363.

On March 31, 2022, approximately six weeks before trial was then scheduled to begin, the State produced 51 un-transcribed witness interview audio files. A382, A390. That same day, the State advised that it would "soon" produce electronically stored information ("ESI") seized by the State during the September 29 search warrant execution. A424-A425. The State further advised that "no member of the Prosecution Team has been provided access to the data DSP delivered to Parcels." A422.

On April 5, 2022, McGuiness filed a Motion to Dismiss Count Three of the Indictment for Unnecessary Delay and Failure to Adequately Describe an Offense. A301-A371. Meanwhile, the trial court granted in part and denied in part the Motion to Compel and denied the Motion to Dismiss Count Five. A156-A194; A228-A251. As to the latter motion, the trial court held that proof of Count Five required the State to prove, *inter alia*, that McGuiness was aware that her conduct was direct towards a person whom she believed was a witness in an inquiry or proceeding. Exhibit D at 5-6. It also urged the State to focus its proof on acts occurring after September 11, 2021 (when the State told McGuiness that she was a target of a criminal investigation). Exhibits B, C, and D.

On April 8, 2022, the State produced the seized ESI, which consisted of 511,266 documents and other files. A383. The seized ESI had been in the State's possession since September 29, 2021. *Id.* In response, on April 21, 2022,

McGuiness filed a Motion to Dismiss the Indictment or Alternatively Sanction the State for Discovery Violations. A378-A423.

The trial court denied the Motion to Dismiss Count Three, Exhibit E, and granted and denied in part the Motion to Dismiss or Sanction, Exhibit G. In denying the Motion to Dismiss or Sanction, the trial court determined that the State never searched the seized ESI for exculpatory material. Exhibit G at 5. It further wrote that it could not "condone the failure of the State to provide these materials timely," and there was "no justifiable reason for waiting six months to deliver a large file of unreviewed documents to [McGuiness]." *Id.* at 8. The trial court further found that at the time the seized ESI was produced, "trial was less than two months away and even experienced counsel would have difficulty searching, reviewing, and reasonably considering their implications." *Id.* The trial court imposed no meaningful sanction for the State's *Brady* violation. *Id.* at 8-9.

One motion remained: McGuiness's Motion to Suppress and Request for a *Franks* Hearing based on false allegations in the search warrant affidavit and subsequent indictments. A699-A758. During the *Franks* hearing, Robinson agreed that he included facts in the affidavit of probable cause supporting the search warrant that he knew or should have known were false. A2514-A2518. Robinson never intimated that anyone else was responsible for drafting the affidavit. *Id.* In light of Robinson's testimony, the trial court suppressed the seized ESI. A2529.

McGuiness then filed a motion *in limine* requesting the State be precluded from introducing evidence of events occurring prior to September 11, 2021 under the guise of Count Five, as that was the earliest date upon which she could have been aware of the existence of an inquiry or proceeding against her. A530-A534. The trial court denied the motion. A2557-A2558.

On June 1, 2022, the State entered a *nolle prosequi* without prejudice in ID No. 2110001942 after realizing it had likely improperly alleged venue in New Castle County. A768. On June 6, 2022, McGuiness was re-indicted in Kent County, ID No. 2206000799. A769-A783. The trial court ordered that all pleadings and rulings made in ID No. 2110001942 were to be transferred to ID No. 2206000799 as the law of the case. A1066-A1067.

Finally, trial began. During the State's presentation of 26 witnesses, McGuiness made multiple objections and motions to exclude testimony as irrelevant and unfairly prejudicial because it related to incidents that occurred before McGuiness knew she was under investigation or could have known who the witnesses against her might be. A2685-A3734. Most of the objections were overruled, and the trial court repeatedly refused to order the State to make an offer of proof, the trial court allowed the witnesses to testify. A2843-A2856; A2939-A2941; A2954-A2964; A3335-A3351.

At the close of the State's case, and again after the evidence was closed, McGuiness moved for judgment of acquittal on all Counts pursuant to Rule 29(a). A4695-A4733; A4968-A4969. The trial court reserved its decision on each motion. A4732-A4733; A4969.

On July 1, 2022, the jury found McGuiness not guilty of Counts Two and Five and guilty of Counts One, Three, and Four. A5115-A5116.

On July 20, 2022, McGuiness filed post-trial motions pursuant to Rules 29(c) and 33. A2107; A2127. The trial court granted McGuiness's Rule 29(c) motion on Count Three while denying the remainder of her motions. Exhibit K.

On October 19, 2022, McGuiness was sentenced to, *inter alia*, pay a $10,000 fine, serve one year in custody at supervision Level 5, suspended for one year at supervision Level 1, and perform 500 hours of community service. Exhibit L.

McGuiness filed a Notice of Appeal on November 18, 2022. This Opening Brief now follows.

ARGUMENT

I. THE STATE VIOLATED *BRADY* BY FAILING TO DISCLOSE EXCULPATORY MATERIAL IN ITS POSSESSION AND BY SUPPRESSING IT SUCH THAT MCGUINESS COULD NOT MAKE EFFECTIVE USE OF IT.

A. Question Presented

Whether, under *Brady v. Maryland*, the State violated its duty to search by failing to review the 511,266 files that had been in its possession for over six months before producing them to McGuiness six weeks before trial, thereby suppressing material exculpatory evidence. A379-A423; A1477-A1500.

B. Standard of Review

Claims that the State failed to meet its obligations under *Brady* are reviewed *de novo*. *Wright v. State*, 91 A.3d 972, 982 (Del. 2014) (*en banc*) (remanding for new trial).

C. Merits of the Argument

On September 29, 2021, the State seized digital storage devices from OAOA. On November 30, 2021, McGuiness made a *Brady* request for "[a]ll information and materials in the possession of the State which fall within the ambit of *Brady*," including "[a]ny information that is known to or reasonably accessible to the State that is exculpatory or impeaching," as well as a discovery request pursuant to Rule 16(a)(1)(C) for "[a]ny books, papers, documents, photographs,

[or] tangible objects… which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or which were obtained from or belong to the defendant." A183-A186.

Both Rule 16(d)(3)(B) and the trial court's scheduling order established a discovery deadline of December 17, 2021. However, not until April 8, 2022—six months later and six weeks before the scheduled trial date—did the State produce approximately ***511,266 files*** from the seized digital storage devices. Thousands of these files related to the focal point of Counts One and Four: McGuiness's daughter ("Daughter"), and in particular the conditions of her employment and the identities and terms of employment of OAOA's other casual-seasonal employees. According to the State, the seized ESI was not examined for the presence of exculpatory material prior to its production. A422-A423.

The trial court found that the State never reviewed the seized ESI for the purpose of finding *Brady* material. Exhibit G at 5. The trial court also determined that the State had "no justifiable reason for waiting six months to deliver a large file of unreviewed documents to [McGuiness]" and that "even experienced counsel would have difficulty searching, reviewing, and reasonably considering their implications," yet it imposed no meaningful sanction at all for what is undoubtedly the largest *Brady* violation in Delaware's history, measured by the number of suppressed files. *Id.* at 8. Because this suppression undermines confidence in

McGuiness's conviction—and to also make it clear that the State cannot ignore its obligations under *Brady* by shifting them to the accused—a new trial is required.

It is axiomatic that the State has a constitutional obligation to disclose exculpatory evidence within its possession to the defense when that evidence might be material to the outcome of the case. *Risper v. State*, 250 A.3d 76, 90 (Del. 2021) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). *Brady* is "based on the requirement of due process" and, as such, is grounded in principles of fairness—"not punishment of society for misdeeds of a prosecutor but an avoidance of an unfair trial of the accused." *Id.*

To comply with *Brady*, the State "must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense." *Wright*, 91 A.3d at 988. "That entails a duty on the part of the individual prosecutor 'to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)); *see also Ray v. State*, 280 A.3d 627, 646 (Del. 2022) (same); *Maynard v. Gov't of V.I.*, 392 F. App'x 105, 113 (3d Cir. 2010) ("Under *Brady*, the government must take the minimal steps necessary to acquire information of which the prosecution should be aware, even if it lacks knowledge of the material at the time the defendant requests disclosure."); *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 898 (D.C. Cir. 1999)

("The government concedes that it never conducted a full-fledged *Brady* search.... that failure constituted a breach of the government's 'duty to search' for *Brady* information.").

Here, the trial court found that the State did ***nothing*** to analyze the seized files for the presence of material exculpatory evidence during the entire six-month period that the evidence was in its sole possession. Exhibit G at 5. Nor did the State simply produce the files—*Brady* material or not—to McGuiness "within 20 days after service of [her] request" on November 30, 2021, pursuant to Rule 16 or the trial court's scheduling order. *Id.* at 8-10. The State simply did ***nothing***. This alone warrants setting aside the convictions. *See Skinner v. State,* 575 A.2d 1108, 1126 (Del. 1990).

The trial court tried to explain away the State's deficiencies by erroneously holding that "the State has no obligation to look through hundreds of thousands of documents, one by one, and decide if a *Brady* disclosure obligation is warranted as to that document." Exhibit K at 22. The trial court cited no authority in support of this new rule. And, it overlooked its own finding that the State not only failed to review ***every*** file, it failed to review ***any of the files***. Instead, the trial court flatly pronounced a more lenient *Brady* standard for white-collar cases:

> For a routine robbery or drug case, it generally is not unreasonable to require the State to thoroughly review documents and statements to comply with its *Brady* obligation. However, in a complex white-collar criminal matter that often involves hundreds of thousands of documents, such a standard is simply unrealistic, unmanageable and will lead to endless claims of *Brady* violations as has occurred here.

Exhibit K at 23. The trial court failed to cite any authority in support of this new rule, which is fundamentally irreconcilable with *Brady*'s mandate. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

As the foundation for the *Brady* doctrine, *see Wright*, 91 A.3d at 977, the Fourteenth Amendment permits no such distinction based on either the types of charges brought or the difficulty the State might have in finding exculpatory information among evidence in its possession, *see* Const. amend. XIV. A white-collar defendant does not have less of a claim to *Brady* than any other defendant, and the State cannot claim difficulty or expense as a reason for shirking its *Brady* obligations. *Brady* is intended to protect a defendant from the State, and not the State from hard work. *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (holding that the availability of information to the prosecution for *Brady* purposes "is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state"),

abrogated on other grounds by Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263 (3d Cir. 2016) (en banc).

The trial court also erred when it held that "the government is not obliged under *Brady* to furnish a defendant with information which [s]he already has or, with reasonable diligence, she can obtain for [her]self." Exhibit G at 11. The only authority cited by the trial court for this proposition was a Third Circuit case that was ***overruled in 2016 by the Third Circuit itself***. *See Dennis*, 834 F.3d at 293 ("To the extent that we have considered defense counsel's purported obligation to exercise due diligence to excuse the government's non-disclosure of material exculpatory evidence, we reject that concept as an unwarranted dilution of *Brady*'s clear mandate."); *see also Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 289–90 (3d Cir. 2021) (recognizing that *Dennis* "decisively rejected" the line of cases embracing a "due diligence" exception to the prosecutor's *Brady* obligations, stating that "[A]ny inquiry into the defendant's ability to discover that evidence [is] beside the point"); *accord State v. Wright*, 67 A.3d 319, 327 (Del. 2013) (Ridgely, J., dissenting) ("This due diligence rule has been criticized as inconsistent with Brady."), *as amended* (May 28, 2013).

Given all of this, the State's failure to search the seized ESI in its possession for *Brady* material and produce it in a timely fashion cannot be countenanced. It is

reversible error, and a contrary holding will not deter the State from future slothfulness in its *Brady* obligations.

This Court has held that a *Brady* violation constitutes reversible error when "(1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant." *Risper*, 250 A.3d at 90 (quoting *Starling v. State*, 882 A.2d 747, 756 (Del. 2005)). Here, all three criteria are easily met.

1. The Evidence Was Favorable to McGuiness.

There can be no doubt that the seized files were favorable to McGuiness. The critical fact that the State needed to prove to convict McGuiness of both Counts One and Four was that Daughter received a financial benefit "to a greater extent than such benefit would accrue to others who are members of the same class or group of persons." A1072-A1074, A1081-A1083. The belatedly disclosed files contained thousands of files bearing on this very question. A1491.

Among the 511,266 files that it produced six weeks before the scheduled trial date were 11 "List of Authorized Positions" ("LAP") reports for the relevant period. A1486-A1487. These reports included, *inter alia*, a list of all OAOA employees at a given time, along with their names, whether or not they were casual-seasonal workers, and their rate of pay. *See id.* In other words, these LAP reports defined the universe of OAOA employees to whom Daughter would be

compared to determine whether she received a financial benefit not afforded to other similarly situated employees. *See id.*; A1072-A1074; A1081-A1083. The State knew that LAP reports were important, as it introduced one into evidence as State Exhibit 2. A5159-A5163. The State could have easily found that these multiple exculpatory LAP reports existed within the seized ESI as those reports contained substantially the same searchable text with just a few minor differences for dates and names.[1]

Had the State bothered to look, it would have learned that between March 2020 and September 2021 (the relevant period as alleged in the Indictments), OAOA employed at least five casual-seasonal employees who were paid ***more*** per hour than Daughter, and one whose hours were capped at 37.5 hours per week, the same as Daughter. A1486-A1487. These facts are patently exculpatory, as they belie the State's attempt to prove that Daughter received a higher salary and could work more hours than other casual-seasonal employees. A4978-A4979.

Even more importantly, these suppressed LAP reports contained the names of other casual-seasonal OAOA employees whom the State never bothered to interview or call as trial witnesses. Similarly, the State knew or should have known that several of those other casual-seasonal employees received the ***same*** wages and

[1] In her Motion to Dismiss or Sanction, McGuiness requested that the trial court at least order the State to certify that it had searched the 511,266 files for *Brady* material, but the trial court declined, and the State never so certified. A378-A423.

treatment as Daughter. *See, e.g*, A4811-A4833:23, A4834-A4835:7 (Kyra Marshall); A1489-A1490 (Colin Donnelly, Connor Perry, and Margo Gordon). ***Three of these suppressed casual-seasonal employees attended college out-of-state and were paid to work remotely for OAOA while doing so***, directly contradicting the State's argument that only Daughter did so. A5072:14-17; A1490-A1491.

The centrality of this fact to the verdict and the profoundly exculpatory nature of the suppressed evidence cannot be exaggerated. The ***only*** fact cited by the trial court in denying McGuiness's Rule 29(c) motion on Count One was that Daughter "was allowed to continue to work after she left Delaware to attend college in Charleston, South Carolina and received payments during those months." Exhibit K at 9. "This extra salary earned while away at school" was the ***only*** "financial benefit" credited by the trial court in denying McGuiness's motion. *Id.* The exculpatory nature of this evidence is clear. The State's argument at trial and the trial court's finding that "only [Daughter]" was allowed to work remotely while at college is ***false***, as the suppressed LAP reports identify three other OAOA casual-seasonal employees who worked remotely while attending college. A1490-A1491.

2. The State Suppressed the Favorable Evidence.

By failing to produce this *Brady* material timely, the State suppressed it such that McGuiness could not make effective use of it. To establish "suppression" in this context, a defendant must show: "(1) that the State was constitutionally required to disclose the evidence to him; (2) that the State did not disclose the evidence to him until just prior to or during trial; and (3) that such late disclosure prevented him from effectively presenting the evidence at trial or from conducting a necessary investigation." *Dickens v. State*, 437 A.2d 159, 161 (Del. 1981). All three of these criteria are easily met.

First, for the reasons set forth *supra* Section I.C.1., the State was constitutionally required to disclose the seized files, as they were relevant to an essential element that the State needed to prove to convict McGuiness of both Counts One and Four.

Second, the State suppressed the seized ESI by waiting until to disclose it until six weeks before trial was scheduled to begin. The trial court even sanctioned the State under Rule 16 (only) for that reason, explaining that it "cannot condone the failure of the State to provide these materials timely and finds that the State has ***no justifiable reason*** for waiting six months to deliver a large file of unreviewed documents to the Defendant." Exhibit G at 8 (emphasis added); *see also United States v. Kirk Tang Yuk*, 885 F.3d 57, 86 (2d Cir. 2018) ("Some courts have

reasonably suggested that burying exculpatory material within a production of a voluminous, undifferentiated open case file might violate the government's obligations."); *People v. Bueno*, 409 P.3d 320, 328 (Colo. 2018) (holding the State does not satisfy its *Brady* obligations by affording a defendant the opportunity to search for "a needle in a haystack").

Third, the State's late disclosure prevented McGuiness from investigating and effectively presenting this exculpatory evidence. "The opportunity for use under *Brady* includes the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought." *Risper*, 250 A.3d at 91. Here, the trial court found that "[a]t the time these documents were produced, trial was less than two months away and ***even experienced counsel would have difficulty searching, reviewing, and reasonably considering their implications***." Exhibit G at 8 (emphasis added).

The trial court actually understated the problem. When the State finally produced the seized ESI, it was only a week after it disclosed the un-transcribed audio recordings of 51 witness statements, and after the State had already provided some 18,000 documents is discovery. A382, A390. McGuiness had also been newly confronted with the Superseding Indictment that redrafted Counts Three and Five, A270-A282, and a long list of witnesses who would attack her character under the guise of Count Five, A434-A436.

Here, the State's suppression had a debilitating effect "on the preparation [and] presentation of [McGuiness's] case" with respect to all Counts, but particularly Counts One and Four. *See Wright*, 91 A.3d at 987–88, 992 & n.70 (remanding where limited disclosure prevented defense counsel from adequately using *Brady* material and conducting any meaningful investigation). Its delayed disclosure made effective use of the suppressed ESI ***impossible***. Anything less than a reversal will tacitly encourage the State to behave similarly in the future. *See Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001) ("If the defendant was unable to use the evidence effectively because of delayed disclosure, a new trial is warranted.").

3. The Suppressed Favorable Evidence Was Material.

Finally, the suppressed favorable evidence was clearly material. "Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 577 U.S. 385, 392 (2016). The question of materiality "is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [s]he received a fair trial resulting in a verdict worthy of confidence." *Risper*, 250 A.3d at 92. The State's suppression of exculpatory LAP reports and the existence of similarly situated (and similarly treated) casual-seasonal employees undermines confidence in the convictions on Counts One and Four. This evidence goes to the

very heart of those Counts—whether Daughter received a financial benefit "to a greater extent than such benefit would accrue to others who are members of the same class or group of persons." A1072-A1074; A1081-A1083. Had the suppressed favorable evidence concerning the identity of three casual-seasonal employees who attended college out-of-state and were paid to work remotely for OAOA while doing so been found and produced consistent with *Brady* and Rule 16, there is a "reasonable likelihood it could have affected the judgment of the jury." *See Wearry*, 577 U.S. at 392.

The State's *Brady* violations are such that that this was not a "fair trial resulting in a verdict worthy of confidence." *See Risper*, 250 A.3d at 9. Indeed, in denying McGuiness's Motion to Dismiss or Sanction, the trial court recognized that the State had suppressed "***potential critical documents***," yet it declined to find a *Brady* violation, ruling that "[w]hile the State['s] justification reflects their failure to use a commonsense management… there is ***nothing to suggest they did so in bad faith or to obtain a litigation advantage***. As such, dismissal of the Indictment as requested by the Defendant is not justified." Exhibit G at 9 (emphasis added).

Once again, the trial court's *Brady* analysis was directly contrary to existing case law. A prosecutor's obligation to provide a defendant with exculpatory material exists "irrespective of the good faith or bad faith of the prosecution."

Cone v. Bell, 556 U.S. 449, 451 (2009). *Brady* itself holds that a due process violation may exist "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see Wright*, 91 A.3d at 987 (quoting *Brady*, 373 U.S. at 87).

Against this backdrop, the trial court's error is pellucid. Despite the State's repeated violations of *Brady*, the trial court fundamentally misunderstood the requirements of the doctrine, and it failed to ensure a fair trial, "undermin[ing] confidence in the outcome of the trial." *See Wright*, 91 A.3d at 988 (quoting *Kyles*, 514 U.S. at 434). Because the resulting verdict is unworthy of confidence, based as it is on a false factual premise, this Court should remand for a new trial. *See Risper*, 250 A.3d at 92.

II. THE TRIAL COURT'S FAILURE TO ENFORCE *BRADY* DESPITE FINDING THAT THE STATE HAD VIOLATED *FRANKS* STYMIED MCGUINESS'S INVESTIGATION OF POSSIBLE AFFIRMATIVE DEFENSES.

A. Question Presented

Whether a defendant who has established a "colorable basis" for a selective prosecution defense and who makes a specific request for the names of the individuals who wrote materially false statements in a probable cause affidavit in violation of *Franks v. Delaware*, 438 U.S. 154 (1978), is entitled to that information under *Brady*. A1494-A1500.

B. Standard of Review

Claims of *Brady* violations present constitutional questions of law reviewed *de novo*. *Wright*, 91 A.3d at 982.

C. Merits of the Argument

The State has ***never*** prosecuted anyone under 29 *Del. C.* § 5805 (first enacted in 1974) or 29 *Del. C.* § 6903 (first enacted in 1996)—until now. McGuiness had the right to know why she was the first. On this basis, the trial court recognized that McGuiness had a "colorable basis" for a selective prosecution defense. Exhibit B at 5. Nevertheless, the trial court's erroneous *Brady* rulings stymied her investigation of that defense and a possible vindictive prosecution defense, leaving her with no factual basis to request a jury instruction

on either. Because these errors culminated in an unfair trial, this Court should remand for a new trial.

Under *Brady*, evidence undermining "the thoroughness and even the good faith of the investigation" must be disclosed. *Kyles*, 514 U.S. at 445. "A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." *Id.* (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)); *see Dennis*, 834 F.3d at 313 (granting writ of *habeas corpus* due to suppressed *Brady* material that defense counsel could have used to "discredit the Commonwealth's primary witness" and "highlight the shoddiness of the Commonwealth's investigation")

"A defendant's decision to pursue or disclaim an affirmative defense instruction is not made in a vacuum; defendants must evaluate the evidence available to them and determine whether seeking the instruction is likely to help or harm their cause." *United States v. Cessa*, 861 F.3d 121, 131 (5th Cir. 2017). "Denying defendants access to evidence they are entitled to under *Brady* can significantly change this risk calculus. For this reason, courts routinely find that evidence supporting an affirmative defense is exculpatory and, therefore, favorable under *Brady*." *Id.*

At a *Franks* hearing that resulted in a rare loss for the State, Robinson admitted that he wrote false statements in a probable cause affidavit. A2515:9-A2517:5. At trial, Robinson attributed authorship of the affidavit for the first time generally to an "investigative team" comprised of "multiple lawyers." A4481:21-A4496:22. Consequently, McGuiness propounded a *Brady* request for

> all communications between Robinson and any lawyer or investigator in the Attorney General's office pertaining to the drafting of the affidavit of probable cause and the sharing of information pertaining to the topics discussed and the facts alleged in the affidavit between and among the 'investigative team' (as described by Robinson).

A1989. The next day, McGuiness renewed her request *in camera*. A4541-A4545. The State then revealed that the "investigative team" generally involved in drafting the probable cause affidavit included lead trial counsel for the State as well as the Chief Deputy Attorney General and other high-ranking Department of Justice attorneys. A4554:22-A4555:2. When McGuiness pressed to know who wrote the false statements specifically, the trial court refused to order the State to respond. A4559.

Back in front of the jury, when McGuiness asked Robinson, "[w]ho are the human beings that wrote the words that are in the search warrant?" the State objected, and the trial court sustained the objection. A4561:17-A4564:3. The record is thus silent as to who actually wrote the false statements in the probable cause affidavit.

McGuiness was entitled to know who wrote the false statements that were made under oath in the probable cause affidavit for at least three reasons. The evidence was clearly exculpatory and material because it was evidence that further undermined "the thoroughness and even the good faith of the investigation" against her. *See Kyles*, 514 U.S. at 445. This was a central pillar of McGuiness's defense, and she argued repeatedly to the jury that it could not find her guilty beyond a reasonable doubt because of the falsehoods, mistakes, and myopic focus that characterized the State's investigation. A2629-A2678; A5006-A5050. The trial court's refusal to order the State to provide the evidence, and its stifling of McGuiness's questions designed to identify the false statements' author(s), cannot be countenanced under *Brady* and its progeny. For this reason alone, the trial court's decision constitutes reversible error. *See Kyles*, 514 U.S. at 445; *Cessa*, 861 F.3d at 131.

The evidence was also potentially supportive of her already-colorable selective prosecution defense, *see Cessa*, 861 F.3d at 131, and valuable to her inquiry into a vindictive prosecution defense, which she identified for the trial court, *see* A4547. The trial court's error was compounded by the State's failure to avail itself of the trial court's offer to review the requested material *in camera*. A4559:12-15.

Neither McGuiness nor this Court should be required to take the good motives of the investigative team as an article of faith in this unprecedented prosecution, yet that is what the trial court's ruling forced her to do. For these reasons, the trial court's refusal to order the State to comply with McGuiness's request for evidence regarding who wrote the false statements specifically violated *Brady*. This Court therefore should remand for a new trial.

III. THE TRIAL COURT FAILED TO RECOGNIZE THE LACK OF EVIDENCE SUPPORTING COUNT ONE (CONFLICT OF INTEREST).

A. Question Presented

Whether the trial court erroneously denied McGuiness's Motion for Judgment of Acquittal by failing, as the State did, to properly define the class of comparators as required by 29 *Del. C.* § 5805 and by failing to recognize the lack of evidence presented by the State in support of Count One. A1106-A1116.

B. Standard of Review

This Court reviews the denial of a motion for judgment of acquittal *de novo*. *Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006).

C. Merits of Argument

Count One charged McGuiness with Conflict of Interest under 29 *Del. C.* § 5805. To convict McGuiness of Count One, the State had to prove that, *inter alia*, McGuiness had a "personal or private interest" in the hiring of Daughter. 29 *Del. C.* § 5805. The trial court instructed the jury—correctly—that this element required proof that Daughter received a financial benefit not available to others of the "same class or group of persons." A1073. The State attempted to prove this element by myopically defining the relevant "same class" of OAOA casual-seasonal employees as one which consisted of a small and dissimilar subset of OAOA casual-seasonal employees, as opposed to all of the OAOA's casual-

seasonal employees. This narrative, and the evidence presented in support thereof, failed to prove this necessary element of Conflict of Interest.

Daughter was an OAOA casual-seasonal employee. Logic, and the plain meaning of the phrase "same class or group of persons," compels an inquiry into the other OAOA casual-seasonal employees' employment conditions, but the State failed to present sufficient evidence of such at trial. The law does not permit the State to arbitrarily define a small subset of OAOA's casual-seasonal employees as relevant comparators.

The evidence at trial identified a total of 10 OAOA casual-seasonal employees in addition to Daughter. Five were identified only by name: Colin Donnelly, Connor Perry, Quinn Ludwicki, John Repass, and Grandville Brown. A1157-A1208, A4659, A4662-A4663. None of these employees testified at trial. The only evidence pertaining to them showed that Quinn Ludwicki was paid ***more*** per hour than Daughter. A5156. There is ***nothing*** at all about the working conditions or financial benefits afforded to the other four.

And there is ***nothing*** in the record about any other possible OAOA casual-seasonal employees who may have worked at OAOA, such as even their names, wages, or privileges. Yet the State was required to prove that Daughter received better financial treatment than "others who are members of the same class or group of persons." A1068-A1103. The absence of any evidence of such must result in a

simple (rational) conclusion: the State failed to prove beyond a reasonable doubt that Daughter received a benefit not equally available to the other five casual-seasonal employees mentioned at trial by name only. Therefore, no rational jury could convict on that basis.

Instead, the jury was left only with evidence pertaining to the five OAOA casual-seasonal employees who testified at trial: Rooslie Maurice, Lizbethmary Vargas, Lydia August, Kyra Marshall, and Virginia Bateman.

Maurice and Vargas were not in the same group of persons as Daughter. They were OAOA's front-desk receptionists. A2779:14, A2780:3-4. They had to be in the office to greet visitors, answer telephone calls, and complete other in-office administrative tasks. A2781:1-7. August, Marshall, and Bateman were Daughter's true comparators. They all worked on communications, graphics, and outreach. A3785-A3786. This work could be done remotely, which Daughter did—***alongside Marshall and Bateman***. A3062; A4817-A4818.

Importantly, Daughter did ***not*** receive financial benefits beyond those afforded to August, Marshall, and Bateman. The evidence showed:

- All four earned the same wages. A5159: A5157; A3779:10-12 (Daughter); A3807:15-23, A3808:13-17 (Bateman); A4812:23-A4813:6 (Marshall); A4851:11-13 (August).

- All four had a 29.5-hours-per-week working limit. A1316-1317 (Bateman); A1287-A1288 (Daughter); A1338 (Marshall); A1354-A1355 (August). In fact, August actually worked ***more*** than anyone else on two occasions. A5149-A5159 (August payroll records); A1267-A1268. August worked over the casual-seasonal hour maximum and worked more hours in a pay period than Daughter ever did.
- All four "banked hours" if they worked more than 29.5 hours in a week. A3098:23-A3100:23 (Bateman); A3782:4-A3783:6, A3783:18:3784:8 (Daughter); A4829:17-A4830:23 (Marshall); A4856:9-A4857:18 (August).
- Their work consisted of the same tasks. A3059:13-17 (Bateman); A3785:18-A3786:3 (Daughter); A4814:1-15 (Marshall); A4849:23-A4850:11 (August).
- All four drove McGuiness to work events, either in her personal or Fleet Services car. A3084:1-A3088:5 (Bateman); A3787:12-A3788:1, A3089:21-A3812:12, A3812:23-A3814:13 (Daughter); A4831:12-A4833:18 (Marshall); A4852:4-5, A4852:21-A4853:13 (August).

Furthermore, some of the "benefits" the State alleged were not financial in nature. For example, the State alleged Daughter received a financial benefit because of a "paper authorization" allowing her to work up to 37.5 hours per week.

That authorization was a clerical error, and the State showed no evidence that McGuiness or Daughter authorized or knew about it.

Worse yet, an OAOA LAP report from June 8, 2019 showed that August had her hours capped at 37.5 hours per week. A1486-1487. The State argued to the jury that only Daughter's hours were capped at 37.5 per week. A4978. That argument was ***false***. And, importantly there is no evidence Daughter was ever ***paid*** for more than 29.5 hours per week, and she testified that she thought, as a casual-seasonal employee, she could only be paid for 29.5 hours per week. A3780:17-A3781:3. Hence the need to "bank" hours.

The State argued that Daughter received some kind of unique financial benefit because she was allowed to work remotely while at college. But that argument is wholly speculative, because the State ***never*** asked Bateman or Marshall (or any other witness) whether they ***wanted*** to work remotely while at college. To the contrary, the evidence suggests McGuiness planned to offer Bateman the opportunity to work remotely and may have done so. A5150. Similarly, the record says nothing as to whether the five casual-seasonal OAOA employees identified by name only worked remotely while in college.[2]

[2] In fact, three of those employees worked remotely for OAOA while in college. The State's argument to the contrary is ***false***. *See* Section I, *supra*.

Speculation cannot form the basis for the jury's verdict. *Derrickson v. State*, 321 A.2d 497, 502 (Del. 1974).

When McGuiness raised the above issues in her Rule 29(c) motion, the trial court failed to define the appropriate "same class or group of persons." It assumed that, for purposes of Count One, a "class or group" could be a small, cherry-picked subset of casual-seasonal OAOA employees as defined by the State. That misreads and misapplies the law. Section 5805(a)(2)a. requires a comparison between financial benefits conferred to Daughter with those available to the "same class or group" ***as a whole***. It was not enough to prove that Daughter may have received a benefit not available to a small ***subset*** of the class.

The trial court then failed to address how Daughter was treated preferentially other than the ability to work remotely while at college. Exhibit K at 9 ("[T]he bottom line, which is undisputed, is that Daughter was allowed to continue to work after she left Delaware to attend college in Charleston, South Carolina and received payments during those months.").

The trial court's analysis was deeply flawed, leading to its erroneous denial of the Rule 29(c) motion as to Count One. This Court should therefore reverse McGuiness's convictions.

IV. THE TRIAL COURT'S FAILURE TO DISMISS COUNT FIVE OR EXCLUDE EVIDENCE IRRELEVANT TO ITS PROOF RESULTED IN UNFAIR PREJUDICE TO MCGUINESS.

A. Question Presented

Whether the trial court abused its discretion by admitting evidence that was logically irrelevant to Count Five, unfairly prejudicial, and amounted to inadmissible character evidence. A228-A251; A530-A534; A535-A547; A1500-A1517.

B. Standard of Review

This Court reviews evidentiary rulings for abuse of discretion. *Houston v. State*, 251 A.3d 102, 108 (Del. 2021).

C. Merits of Argument

1. The Trial Court's Failure to Dismiss Count Five or Exclude Evidence.

On February 25, 2022, McGuiness filed her Motion to Dismiss Count Five based on the Original Indictment's failure to (1) provide her with notice of the specific conduct she was being prosecuted for; (2) protect her from unfair surprise; and (3) preclude subsequent prosecution for the same offense. A228-A251. The motion argued that this failure stemmed from the Original Indictment's failure to allege facts supporting several of the essential elements of Count Five, particularly any facts suggesting McGuiness possessed the requisite *mens rea* required by 11

Del. C. § 3532. Specifically, it failed to allege McGuiness knew she was under investigation until the time of the State's grand jury subpoena on September 11, 2021 and that she knew who the witnesses against her might be.

In tacit recognition of the Original Indictment's deficiencies, the State re-indicted McGuiness. A270-A282. The Superseding Indictment added allegations of acts taking place in 2022, ***after*** McGuiness received the grand jury subpoena, but still failed to properly allege the crime.

The trial court agreed with McGuiness that the statute required proof of her awareness of a trial, proceeding, or inquiry against her and the identities of the witnesses against her. Exhibit D at 4-6. It nonetheless held that the Superseding Indictment sufficiently pled Count Five, but warned the State that proving acts of intimidation occurred before September 11, 2021, would be difficult. *Id.* at 7.

McGuiness filed a motion *in limine* on May 13, 2022 requesting that the State be precluded from presenting any evidence in support of Count Five occurring before September 11, 2021 because there was no evidence that she knew of an investigation before that date. A530-A534.

The trial court denied the motion, explaining it would consider such evidence on a case-by-case basis. It once again warned the State that evidence of acts occurring prior to September 11, 2021, seemed problematic. *See* A2560:5–18; A2561:8–10; A2565:6-11 ("But if I was in your position, if you had good

intimidation after September 11th, I wouldn't mess up the record as to what are things that could reasonably be interpreted to be managing an office, perhaps not in a way that people like, but managing an office.").

McGuiness repeatedly renewed her objections during trial to the testimony of State witnesses purportedly called to support Count Five as irrelevant, unfairly prejudicial, and inadmissible character evidence. A2846:23-A2847:4; *see* D.R.E. 402, 403, 404(a). The State continued to represent that the witnesses' testimonies were somehow relevant to Count Five. McGuiness countered each time that the alleged acts occurred in either 2019, 2020, or early 2021—well before she could have had any awareness of an investigation, and well before the individuals in question were "witnesses" as defined by 11 *Del. C.* § 3531(3). These objections were overruled. A2843-A2856; A2939-A2941; A2954-A2964; A3335-A3351.

McGuiness also repeatedly asked the trial court to order the State to provide an offer of proof explaining the relevance of acts occurring prior to September 11, 2021. The trial court denied each of these requests. A2843-A2856; A2939-A2941; A2954-A2964; A3335-A3351.

Instead, the trial court relied upon the State's assurances that the evidence was relevant. On several occasions, it remarked its intent to let the State "try its case." The trial court further promised that if the evidence was not relevant, it would "make the hard call" at the end of the State's case. A2941. It never did so.

Ultimately, the State never lived up to its representations. It never presented ***any*** evidence suggesting McGuiness knew she was under investigation or who the witnesses against her might be. Thus, ***none*** of the evidence relating to uncharged acts occurring before September 11, 2021 was relevant to Count Five. The evidence was thus inadmissible and unfairly prejudicial and compromised every aspect of McGuiness's trial.

2. The Admitted Evidence Amounted to Inadmissible Character Evidence.

The erroneous admission of character evidence is well established as a high danger to a defendant's right to a fair trial. *Baumann v. State*, 891 A.2d 146, 149 (Del. 2005) ("A jury may not hear about a person's bad character, else they might punish him for his bad character rather than the issues at trial."); Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 1.3 (2022 ed.) ("Evidence of a criminal defendant's uncharged misconduct creates a risk that the jury will penalize a defendant for his or her bad character.").

At trial, prior to the testimony of State witness Jonathan Purdy, McGuiness objected to evidence of e-Record requests to access the State email accounts of certain OAOA employees made prior to the date of her knowledge. A2843-2858. Eight e-Record requests were admitted, however, only for Purdy to testify that none of the subjects of the requests were aware of the requests being made.

A2929-A2930. The evidence was therefore logically irrelevant to proof of Count Five. McGuiness moved to strike the testimony relating to the e-Record requests, but the trial court denied the motion. A2939-A2041.

McGuiness objected further to the testimony of various State witnesses. Each objection argued that their testimony would be irrelevant, unfairly prejudicial, and impermissible character evidence. A3335-A3351. The trial court allowed nearly all of their testimonies. Andrena Burd, Elizabeth Vasilikos, and Kelsey Thomas all were allowed to testify about events that took place before September 2021—some dating back to ***2019***, long before the investigation began. A3533-A3534; A3883; A4114. Thomas also admitted that she told no one at OAOA that she took her complaints about McGuiness to the State. A4160-A4161. Melissa Schenck and Dawn Haw-Young complained generally about workplace conditions, and nothing in the evidence suggested that McGuiness knew they were witnesses against her. A3352-A3371. Dan Hamilton testified that he did not become a witness until ***after*** the events he described in his testimony took place. A3433.

None of the evidence was relevant. The trial court abused its discretion by admitting so much irrelevant and prejudicial character evidence. *See Thompson v. State*, 205 A.3d 827, 834 (Del. 2019) ("An abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored

recognized rules of law or practice so as to produce injustice." (quoting *McNair v. State*, 990 A.2d 398, 401 (Del. 2010))).

3. The Trial Court Failed to Properly Analyze What Amounted to Inadmissible Character Evidence.

The trial court also abused its discretion by admitting the uncharged evidence without analyzing it as character evidence. The State is forbidden from offering evidence of uncharged misconduct for the purpose of creating a general inference of bad character. D.R.E. 404(b); *Getz v. State*, 538 A.2d 726, 730 (Del. 1988); *DeShields v. State*, 706 A.2d 502 (Del. 1998). This Court has established guidelines for the admission of evidence under D.R.E. 404(b). *Getz*, 583 A.2d at 734. The trial court failed to apply the *Getz* and *DeShields* factors.

The erroneous admission of irrelevant and unfairly prejudicial character evidence inevitably prejudiced the jury's consideration of Counts One, Three, and Four. McGuiness expressed concern about "death by a thousand cuts" and the inadequacy of dismissing Count Five at the end of trial. A3894; A4145-A4146; A4286. Each time, the trial court waited to see whether the State would ever present any evidence supporting Count Five. *E.g.*, A2940-A2941; A3513; A4288.

However, when the time came for the trial court to make good on its promise, it did nothing. A4731-A4733. The trial court then compounded its error by denying McGuiness's request that the jury be instructed to disregard evidence

of events occurring before June 15, 2021, unless it related to one of the other charged Counts. A4729.

The trial court's indecision prejudiced McGuiness's right to a fair trial. The inadmissible character evidence allowed the State to portray McGuiness as an individual who poorly supervised her employees. *See, e.g.*, A5000 ("audacity to question what does this confidentiality mean"); A5003 ("the monitoring is now taken up a level"); A5004 ("Look at how she reacted to key events and key people. Though the evidence itself, ***the defendant's conduct tells you that she's guilty. That is consciousness of guilt***."); A5005 ("intimidating employees who had the courage to confront her or question her misconduct"); A5073 ("overwhelming pattern of [e-Record] surveillance against key people who knew key things and the time in which they knew it"). This forced McGuiness's counsel to describe her as a "bad," "mean," or "creepy" boss to clarify that such characteristics, while not desirable, are not crimes. A2641; A5033.

The trial court acquitted McGuiness of Count Three, concluding no rational jury could have convicted her. Exhibit K at 15. This suggests the jury's consideration of the other Counts was prejudiced by the inadmissible character evidence.

The admission of this inadmissible character evidence can be cured only by a new trial. *See Waters v. State*, 242 A.3d 778, 783 (Del. 2020) (admitted trial

evidence later determined to be inadmissible and prejudicial can be cured by a new trial). There is no question that the admission of character evidence prejudiced McGuiness.

V. THE FAILURE TO DISMISS OR ACQUIT ON COUNT THREE PRIOR TO SUBMISSION TO THE JURY PREJUDICIALLY SPILLED OVER INTO THE OTHER COUNTS.

A. Question Presented

Whether the failure to dismiss, or acquit, McGuiness of Count Three led to the admission of otherwise inadmissible evidence and improper jury instruction that prejudiced the jury's consideration of other Counts. A301-A371; A458-A571; A1116-A1125.

B. Standard of Review

Claims of prejudicial spillover are subject to plenary review. *United States v. Fattah*, 914 F.3d 112, 186 (3d Cir. 2019).

C. Merits of Argument

Though neither the facts nor the law changed between when McGuiness filed her pretrial Motion to Dismiss Count Three and her post-trial Rule 29(c) motion, the trial court only finally adopted her reasoning when overturning the Count Three guilty verdict. This delay led to the admission of highly prejudicial evidence and instruction, which spilled over to the remaining Counts.

Under the doctrine of prejudicial spillover, a conviction on one charge may be tainted by evidence admitted in support of another, later-overturned charge. *United States v. Wright*, 665 F.3d 560, 575 (3d Cir. 2012), *as amended* (Feb. 7, 2012). Spillover also occurs "when evidence of one offense is used by the jury to

infer bad character, leading to a conviction on the other offense based on this assessment of the defendant and not the evidence supporting the criminal charge." *United States v. Lane*, 791 F.2d 935 (6th Cir. 1986). The remedy for prejudicial spillover is a new trial on the "'tainted' count." *Wright*, 665 F.3d at 575; *see United States v. Pelullo*, 14 F.3d 881, 900 (3d Cir. 1994) (remanding where "the jury ***may have been*** influenced" by prejudicial spillover and recognizing that although "a single factor separately considered may not ... produce[] sufficient prejudice to influence the jury ... all the factors combined caused a strong cumulative effect which resulted in the conviction" on the tainted charge (emphasis added)).

The State ***never*** had a sound legal foundation for Count Three. A301-A371. On April 4, 2022, McGuiness moved pursuant to Rule 12(b)(2) to dismiss Count Three because it failed to charge an offense. *Id.* On May 13, 2022, the trial court rejected that argument. Exhibit E. The matter then proceeded to trial, where the jury heard three days' worth of evidence relevant only to Count Three. *See*, *e.g.*, A2995-A3047, A3210-A3281; A3604-A3769. At the close of the State's case, McGuiness moved pursuant to Rule 29(a) for judgment of acquittal on Count Three based on the ***same legal argument*** raised in her motion to dismiss. A4695-A4733. The trial court reserved decision on the motion pursuant to Rule 29(b). A4732-A4733. McGuiness then presented her case and thereafter renewed her

Rule 29(a) motion based on the ***same legal argument*** raised in her motion to dismiss and original Rule 29(a) motion. A4968-A4969. The trial court again reserved its decision. A4969. The jury was then instructed that Count Three could serve as a basis for a guilty verdict on Count Four. A1078-A1080. The jury subsequently found McGuiness guilty on Counts One, Three, and Four. A5115-A5116. McGuiness once more moved for judgment of acquittal, this time pursuant to Rule 29(c), based on the ***same legal argument*** raised in her motion to dismiss and Rule 29(a) motions. A5116-A5117; A1116-A1125. Finally, the trial court agreed with McGuiness's argument all along and entered judgment of acquittal on Count Three. Exhibit K at 10-15.

None of this ***ever*** should have happened. In its August 30, 2022, Opinion, the trial court adopted ***in full*** the very same legal argument McGuiness made since April 4, 2022. Every fact necessary to reach this conclusion was known before trial began, and none of those facts were in dispute. *Compare* A301-A371, *with* A1116-A1125, *and* Exhibit K at 10-15. There is no doubt McGuiness was profoundly prejudiced by the trial court's failure to dismiss or enter a Rule 29(a) judgment of acquittal on Count Three. The convictions of Counts One and Four are evidence thereof.

Count Three spilled into Count Four because they were intertwined by definition. The trial court instructed the jury that Count Three could serve as a

basis for liability under Count Four. A1078-A1080. A new trial without such "intermingled" jury instructions is necessary. *See Wright*, 665 F.3d at 577 (remanding where "the jury instructions on that Count intermingled the two theories").

Count Three spilled into Count One because, as described in Section III *supra*, the evidence was plainly insufficient to support a conviction on Count One. That conviction is proof the jury's passions were inflamed by the State's rhetoric and otherwise inadmissible evidence.

The trial court's indecision permitted the State to arouse the jury with language that would otherwise have had no place in this trial:

- "Delaware's Auditor of Accounts, the public official designed to ensure that others follow the State's fiscal rules, was instead, the one breaking those rules." A2607.

- "You will hear of that fraud. You will hear that she structured what's called a no-bid contract to her former political consultant and arranged payments to willfully avoid compliance with Delaware law." A2608.

- "I told you she arranged a no-bid contract with State money for a company called My Campaign Group owned by one of her former campaign consultants, and she arranged payments to that company in a way designed to avoid compliance with the procurement rules." A4975.

- "Kathy McGuiness knew just how to play the system, and she did." A4991.

The "cumulative effect" of these statements "likely left an impression with the jury that [McGuiness] routinely engaged in corrupt and illegal activities and thus might have had the propensity" to abuse her office, *i.e.*, Counts One and Four. *See United States v. Murphy*, 323 F.3d 102, 122 (3d Cir. 2003).

Accordingly, the trial court's decision to let the jury hear evidence and instruction regarding a legally indefensible charge was erroneous. This Court therefore should remand for a new trial.

VI. COUNTS ONE AND FOUR WERE UNCONSTITUTIONALLY MULTIPLICITOUS.

A. Question Presented

Whether Counts One and Four were unconstitutionally multiplicitous. A1132-1141.

B. Standard of Review

This Court's review is *de novo*. *Hoennicke v. State*, 13 A.3d 744, 746 (Del. 2010).

C. Merits of Argument

Multiplicity prohibits "multiple charges under separate statutes…." *White v. State*, 243 A.3d 381, 397 (Del. 2020). "[T]he question is whether, both sections being violated by the same act, the accused committed two offenses or only one[,] for which the inquiry is whether each provision requires proof of a fact which the other does not.'" *Id.*; 11 *Del. C.* § 206 (a defendant cannot "be convicted of more than 1 offense if… [o]ne offense is… established by the proof of the same or less than all the facts required to establish the commission of the offense charged").

Here, the jury instructions were as follows:

> The State alleges that the Defendant ***committed Official Misconduct either by*** (1) "hir[ing] her daughter and her daughter's friend into state employment, affording her daughter benefits not available to other state employees," or (2) by "structuring payments in a no-bid contract to a political campaign consulting company."

> In order to find the Defendant ***guilty of Official Misconduct***, you must unanimously agree that ***one or both of these allegations have been established*** by the State.

A1082-A1083.

Consequently, a conviction on Count Four required proof of either Count One, Three, or both, ***plus*** proof that McGuiness "intended to obtain a personal benefit…." *Id.* Thus, Counts One and Three were "included in another" (Count Four) because they were "established by the proof of… less than all the facts required to establish" Count Four, *see* 11 *Del. C.* § 206, and neither Count One nor Count Three "required proof of a fact which" Count Four did not. *See White*, 243 A.3d at 397.

Accordingly, this Court should reverse McGuiness's convictions. *See Brown v. Ohio*, 432 U.S. 161, 166 (1977).

VII. THE TRIAL COURT VIOLATED THE DELAWARE CONSTITUTION BY COMMENTING ON THE CREDIBILITY OF A STATE WITNESS.

A. Question Presented

Whether the trial court violated Article IV, Section 19 of the Delaware Constitution by commenting upon the credibility of a State witness. A1524-A1528

B. Scope of Review

This Court reviews constitutional claims *de novo*. *Norwood v. State*, 991 A.2d 18 (Del. 2010).

C. Merits of Argument

During trial, the trial court defended Robinson's use of false statements as an "investigative technique" and proclaimed in the jury's presence that Robinson was not lying. The trial court's comments violated Article IV, Section 19 of the Delaware Constitution.

Article IV, Section 19 prevents trial judges from commenting upon the credibility of witnesses. *E.g.*, *Herring v. State*, 805 A.2d 872, 876 (Del. 2002); *Brown v. State*, 105 A.2d 646, 652 (Del. 1954) (Tunnell, J., dissenting) ("Article 4, Sec. 19, of the constitution forbids judges in jury trials to comment on the weight or credibility of the evidence…"). "This prohibition applies equally to the judge's instructions to the jury and to ***comments made by the judge in the course of the trial***." *Wright v. State*, 405 A.2d 685, 689 (Del. 1979) (emphasis added); *see also*

Randy J. Holland, *The Delaware Constitution: A Reference Guide* 149–51 (2002) (a comment prohibited by Article IV, Section 19 "is an expression made directly or indirectly by the court that conveys to the jury the court's estimation of the truth, falsity, or weight of testimony").

At trial, defense counsel examined Robinson about the statements he made in May and June 2021 in which he told various witnesses he was allegedly "contacting a bunch of people.… ***throughout state government***" to investigate casual-seasonal employees whose employment ended or began during the pandemic. A4890-A4892. Counsel intended to show that the witnesses would therefore not have known the State was investigating McGuiness, and so could not have informed McGuiness she was under investigation. Robinson admitted to counsel that he only contacted employees of OAOA, but refused to concede that representing he contacted people "throughout state government" was false. *Id.*

When counsel pressed Robinson on the falsity, the State objected, arguing the question had been "asked and answered." A4892. The trial court sustained the objection on different grounds, declaring in the presence of the jury:

> THE COURT: If you want to pursue this, we all know what it is. It's an investigative technique used by the officer. You want to ask him that, that's fine. But to imply that because this is false, he is lying. That's simply unfair, Mr. Wood. So you can ask him about investigation techniques if you'd like. But to imply it otherwise is not acceptable.

MR. WOOD: I think I was trying --

THE COURT: Move on.[3]

A4892-A4893. The trial court's comments violated the Delaware Constitution.

While a trial court may have discretion to "exercise reasonable control over the mode and order" of a witness interrogation, D.R.E. 611, that discretion does ***not*** permit "an expression by the court, directly or indirectly, that conveys to the jury the court's estimation of the truth, falsity or weight of testimony in relation to a matter at issue." *Herring*, 805 A.2d at 876. The trial court's comments violated that well-settled prohibition.

Nor was it appropriate for the trial court to inform the jury of its view that false statements made within an "investigative technique" were not actually "false" statements—a view endorsing the witness's refusal to admit the statements were false. That also conveyed to the jury that falsehoods are somehow acceptable when uttered by police. Neither the law nor the dictionary definition of "false" provides such a distinction,[4] and Article IV, Section 19 provides that whether the

[3] The first of the word "lie" during Robinson's testimony was by the trial court. Defense counsel carefully avoided use of the word. The trial court was not similarly circumspect.

[4] Black's Law Dictionary (11th ed. 2019) defines "false" as "1. Untrue; 2. Deceitful; lying; 3. Not genuine; inauthentic; 4. Wrong; erroneous." Thus, the Court's comment was erroneous because Robinson's comment was, by definition, "false."

utterance of an intentional falsehood should be considered a mark against a witness's credibility is a decision reserved for the jury and forbidden to the trial court.

The trial court's error was not anodyne. McGuiness's trial strategy was to show the State's investigation was unfair—and thus, not to be trusted—because of the State's false statements and half-truths made throughout the investigation and case. Yet despite the obvious importance of the issue, the trial court proceeded to unconstitutionally indicate its disapproval of the strategy in front of the jury.

Accordingly, this Court should reverse and remand for a new trial—one without the trial court's biases prejudicing the jury's opinion.

VIII. THE TRIAL COURT MISINTERPRETED 10 *DEL. C.* § 3925 AND ERRONEOUSLY DENIED MCGUINESS APPOINTMENT OF PRIVATE COUNSEL.

A. Question Presented

Whether the trial court misinterpreted 10 *Del. C.* § 3925 in its October 28, 2021, Order denying McGuiness's Petition for Appointment of Private Counsel. A42-A49.

B. Standard of Review

Questions involving statutory interpretation are reviewed *de novo*. *Freeman v. X-Ray Associates, P.A.*, 3 A.3d 224, 227 (Del. 2010).

C. Merits of Argument

McGuiness filed a petition requesting the appointment and compensation of undersigned counsel as private counsel in the matter. A42-A49. Pursuant to Delaware Supreme Court Rule 68, McGuiness argued that as a State officer with charges against her related to acts arising from her role as State officer, she should be appointed private counsel due to the State's conflict in this criminal matter. A42-A49. McGuiness also argued she should be indemnified for the costs of such representation. *Id.*

The State acknowledged a conflict of interest prevented their representation of McGuiness, but otherwise opposed the Petition. A98-A106. Its opposition was based largely upon 10 *Del. C.* § 3925, which provides that

> [a]ny public officer or employee, in a criminal or civil action against the person arising from state employment, shall be entitled to petition the court for a court-appointed attorney to represent the person's interests in the matter. If the judge, after consideration of the petition, examination of the petitioner and receipt of such further evidence as the judge may require, determines that the petition has merit, the judge shall appoint an attorney to represent the interests of such public officer or employee… If the court determines that the Department [of Justice] is unable to represent such public officer or employee, the court ***may*** appoint an attorney from the Office of Defense Services in criminal actions only, and in civil actions may appoint an attorney licensed in this State…

A100 (emphasis added).

The President Judge[5] denied the Petition without a hearing or further argument. The court below did find merit in the Petition, Exhibit A at 4-5, which required it to appoint an attorney to represent McGuiness. *See* 10 *Del. C.* § 3925 ("If the judge… determines that the petition has merit, the judge ***shall*** appoint an attorney to represent the interests of such public officer or employee.") (emphasis added). However, because the court below erred in its interpretation of the statute, it then further erred by not considering appointment of counsel from the private bar at public expense as permitted by Rule 68.

Specifically, the court below reasoned that § 3925's language was "clear and unambiguous," and so its "plain meaning" controlled. Exhibit A at 3. It explained

[5] The President Judge handled the decision on the Petition. From this point on, she will be referred to as "the court below."

the statute contained a "simple process" wherein a State officer criminally charged with conduct stemming from her State employment is first entitled to a defense provided by the State, however, should there be a conflict of interest preventing it from representing the State officer, then ***only*** an Office of Defense Services ("ODS") attorney may be appointed to represent the State officer instead. *Id.* It therefore concluded that, notwithstanding the plain, contrary language of Rule 68, § 3925 barred appointment of private counsel at public expense. *Id.* at 4. That interpretation is erroneous, as it ignores the statute's permissive language.

"The most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113 (Del. 2020). "The court must 'give the statutory words their commonly understood meanings.'" *Id.* (quoting *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 230 (Del. 1982)). The court's role is therefore "to determine and give effect to the legislature's intent." *Wild Meadows MHC, LLC v. Weidman*, 250 A.3d 751, 756 (Del. 2021) (citing *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007)).

This Court must therefore interpret 10 *Del. C.* § 3925 based on the words the legislature actually used in writing it. The language from § 3925 most relevant here is this:

> If the court determines that the Department is unable to represent such public officer or employee, the court ***may*** appoint an attorney from the Office of Defense Services in criminal actions only, and in civil actions may appoint an attorney licensed in this State.…

10 *Del. C.* § 3925 (emphasis added).

The court below's reading of this language that ***only*** an attorney from ODS may represent a State officer where there is a conflict of interest with the State ignores the plain and ordinary meaning of the word "may." Simply put, "may" does not mean "shall."

When construing a statute, "may" is to be read as permissive, and not mandatory. *Manti Holdings, LLC v. Authentix Acquisition Co.*, Inc., 261 A.3d 1199, 1219 (Del. 2021); *see also Mason v. State*, 963 A.2d 139 (Del. 2009) (when construing a statute, "the word 'may' generally is permissive, not mandatory"). Mandatory words impose a duty; permissive words grant discretion. Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 112 (2012).

Here, the General Assembly could have required appointment of counsel only from ODS by substituting "shall" for "may" in the statute—it did not do so. This Court must therefore assume that the General Assembly meant to permit appointment of ODS when otherwise obliged to appoint counsel for a public officer, but did not intend to ***require*** them to do so. When § 3925 is properly read,

there is no conflict between its provisions and Rule 68, as Rule 68 permits appointment of a member of the private bar to represent a State official accused of a crime at public expense. The court below's refusal to recognize this option under Rule 68 was plainly erroneous.

Further support for this interpretation of § 3925 is to be found in the statute's legislative history. When first enacted in 1976, (60 Del. Laws, c. 474, § 1), § 3925 was substantively identical to the statute's current version with one exception: the phrase "Office of the Public Defender" was used in place of the modern statute's designation of ODS. When § 3925 was first enacted, the trial court would appoint a member of the private bar to serve as conflict counsel at public expense when a conflict prevented the Public Defender from representing a defendant. The Sixth Amendment Center, *Delaware's Right to Counsel Deficiencies Exposed* (Feb. 8, 2014) https://sixthamendment.org/delawares-right-to-counsel-deficiencies-exposed/. The statute was amended in 2015 only to replace "Office of the Public Defender" with "ODS."

If the court below's reading of § 3925 was correct, it would have been ***prohibited*** from appointing counsel at public expense if the Public Defender's Office had a conflict preventing their representation, including cases where two public officials were charged together with a crime. Consequently, one would have the benefit of publicly-funded counsel while the co-defendant would not.

That result would be absurd (if not unconstitutional). Absurd results must be avoided by a court tasked with interpreting a statute. *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1071 (Del. 2011); *see Hazout v. Tsang Mun Ting*, 134 A.3d 274, 286 (Del. 2016) (courts should avoid interpretations that would render a statute unconstitutional).

The court below's erroneous interpretation of § 3925 and McGuiness's distrust of other State agencies due to the nature of her case forced McGuiness to hire her own private counsel for trial and, now, this appeal. To correct this error, McGuiness requests this Court vacate the trial court's October 28, 2021, Order and order a hearing on remand to determine the extent of McGuiness's expenditures in hiring private counsel and order reimbursement by the State for those expenses. *See* Del. Supr. Ct. R. 68(e)(1)–(3) (providing for fees and costs of appointed private counsel to be paid by the State).

CONCLUSION

For the foregoing reasons, this Court should reverse McGuiness's convictions and enter a judgment of acquittal or remand for a new trial.

Dated: March 14, 2023

McCARTER & ENGLISH, LLP

/s/ Steven P. Wood

Steven P. Wood (#2309)
Chelsea A. Botsch (#6715)
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, Delaware 19801
Tel.: (302) 984-6300

Attorneys for Defendant-Below, Appellant Kathleen McGuiness

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2023, a true and correct copy of the **Redacted – Public Version of Appellant's Opening Brief** was served via File & ServeXpress on the following counsel of record:

Mark A. Denney, Jr.
Nicole M. Mozee
Sean P. Lugg
Deputy Attorneys General
Delaware Department of Justice
900 N. King Street, 4th Floor
Wilmington, DE 19801

/s/ Steven P. Wood
Steven P. Wood (#2309)