EFiled: Jun 02 2023 12:00PM EDT
Filing ID 70129924
Case Number 438,2022

THE SUPREME COURT OF THE STATE OF DELAWARE

KATHLEEN MCGUINESS,	:	REDACTED - PUBLIC VERSION FILED JUNE 2, 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 REPLY BRIEF

Dated: May 22, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Rules

Constitutional Provisions

Other Authorities

INTRODUCTION

In its Answering Brief, the State of Delaware ("State") distorts and ignores the arguments made by Kathleen McGuiness ("McGuiness") in her Opening Brief. The State's Statement of Facts is replete with assertions that relate only to charges for which McGuiness was acquitted. The State's arguments rely heavily upon half-truths not supported by either citations to the record or the record itself, while contrary facts are simply ignored. The State also ignores applicable authorities and prior rulings against it by the trial court. Like the trial itself, the State's Answering Brief is fundamentally unfair.

ARGUMENT IN REPLY

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.

Brady imposes an obligation on the prosecution to learn of exculpatory evidence in its possession and to disclose that information to the defense in a timely fashion. *Wright v. State*, 91 A.3d 972, 988 (Del. 2014) (prosecution has a duty "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). This case marks this Court's first opportunity to address the unique challenges faced by defendants confronting a huge amount of electronically stored information ("ESI") containing exculpatory material. A failure to condemn the State's conduct here by reversal may tacitly encourage similar behavior in the future.

The State's Answering Brief completely ignores the fact that the trial court found that the State had ***never*** reviewed the seized ESI to determine whether it contained *Brady* material. Exhibit G at 5. The State actually concedes that the prosecutors assigned to this case did not have the opportunity to review the seized ESI for *Brady* material until "weeks" ***after*** the ESI was provided to McGuiness. AB at 15. There is no doubt that the State failed to meet its *Brady* obligation.

The State ***also*** ignores the trial court's finding that it failed to meet its obligations under Criminal Rule 16 and the trial court's Scheduling Order to

produce the seized ESI in December 2021. A5. The trial court found that the State's failure to timely provide the seized ESI violated Rule 16, and in so doing observed that "the Court 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 [McGuiness]." Exhibit G at 8. The State's failure to comply with Rule 16 is of critical import, as it means that the State failed to meet both its *Brady* obligation to search the seized ESI for exculpatory material ***and*** its Rule 16 obligation to provide the seized ESI to McGuiness in a timely fashion—regardless of whether it ***ever*** searched the material for exculpatory evidence. Had the State simply complied with Rule 16, McGuiness may not have suffered such severe prejudice.

The State's Answering Brief contains not a scintilla of contrition for these violations. "There are three components of a *Brady* violation: (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." *Wright*, 91 A.3d at 987-88. The State's argument that McGuiness cannot establish any of these components strains credulity beyond the breaking point.

First, the State argues that the ESI did not contain any exculpatory material. AB at 21. This argument is troubling, as it suggests that the State does not

understand the meaning of "exculpatory." "[E]xculpatory evidence is any evidence that is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Wright*, 91 A.3d at 989. *Brady* itself defines such evidence as that which is "favorable to an accused." 373 U.S. 83, 87 (1963). Evidence is "material" within the meaning of *Brady* when, had the evidence been disclosed, "the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." *Smith v. Cain*, 565 U.S. 73, 75 (2012). These authorities are ignored by the State, as its Answering Brief does not cite any case in support of its argument. AB at 21-22. Here, there can be no doubt that had the seized ESI been disclosed, a different result would have been likely.

Even a cursory analysis of the seized ESI in light of the State's contentions makes it clear that thousands of exculpatory documents were suppressed. For instance, the State implies that McGuiness's Daughter did little to no work while receiving financial benefits not afforded to other casual-seasonal employees. AB at 35-38. That being so, it inexorably follows that documents that tend to refute those allegations are exculpatory. When the seized ESI was searched, it was found to contain approximately 2,485 documents responsive to search terms using McGuiness's Daughter's name and more than 24,000 additional files for which Daughter was listed as "file custodian." A1491. In a case involving the conditions of McGuiness's Daughter's employment, and in the face of insinuations that

Daughter "earned an extra salary while ostensibly doing no work," AB at 37, the argument that the "cumulative effect" of thousands of work-related documents bearing Daughter's name was not exculpatory is simply not credible, *see Wright*, 91 A.3d at 988 ("The State's obligation under *Brady* to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government.").

Similarly unbelievable is the State's assertion that documents describing the identity and financial benefits afforded to other casual-seasonal employees are not exculpatory. For example, in addition to the sole List of Authorized Position Report ("LAP") report introduced by the State at trial (which related to a singular day in May 2020), the suppressed ESI contained 11 LAP Reports for 11 dates in 2019, 2020, and 2021. A1486-A1487. These reports revealed five additional casual-seasonal employees not otherwise described in the trial evidence who were paid ***more*** per hour than McGuiness's Daughter. The State makes much of the fact that McGuiness's Daughter was paid more than two other casual-seasonal employees. AB at 34. If that fact is relevant, the exculpatory nature of evidence showing that McGuiness's Daughter made the same as ***or less*** than most of the other casual-seasonal employees is obvious.

Second, the State denies that it suppressed any exculpatory material because it eventually produced 511,266 files less than two months before the scheduled

start of trial. The State completely ignores this Court's teachings that late-disclosed evidence is deemed suppressed if the late disclosure prevents the defendant from "effectively presenting the evidence at trial or from conducting a necessary investigation." *Dickens v. State*, 437 A.2d 159, 161 (Del. 1981). When assessing a *Brady* claim under these circumstances, this Court "consider[s] any adverse effect from nondisclosure on the preparation or presentation of the defendant's case." *Wright*, 91 A.3d at 987-88. Remarkably, the State does not cite any opinion of this Court—or ***any*** other court—to support its argument against suppression. ***And the State never mentions the trial court's finding that, given the timing of the belated disclosure of the seized ESI, "even experienced counsel would have difficulty searching, reviewing, and reasonably considering [the materials'] implications."*** Exhibit G at 8.

The State attempts to explain its failure to comply with its *Brady* and Rule 16 obligations in a timely fashion by repeatedly implying that its "Filter Team" protocols somehow excuse its failures. AB at 18, 23. This Court must reject the State's attempts to hide behind its Filter Team. The Filter Team exists solely to protect a defendant's constitutional rights to counsel by denying prosecutors access to certain privileged evidence. *State v. Robinson*, 209 A.3d 25, 30, n.16 (Del. 2019). To accept that use of a Filter Team somehow lessens the State's *Brady*

obligation and justifies denying defendants access to evidence in a timely fashion would be to turn the purpose of the Filter Team on its head.

The timeline reveals that the State did ***nothing*** with the seized ESI for most of the relevant time period:

- September 29, 2021: State seizes 511,266 digital files during a search warrant execution at McGuiness's office. Exhibit G at 2.
- November 30, 2021: McGuiness serves a discovery and *Brady* request for, *inter alia*, all material seized during the search, material to her defense, or exculpatory. A183.
- December 17, 2021: deadline for Rule 16 discovery responses. A5.
- January 2022: Delaware State Police realizes that it is unable to search the seized ESI. Exhibit G at 4.
- February 2022: State provides the seized ESI to its e-discovery vendor. Exhibit G at 4.
- March 2022: seized ESI delivered to State's Filter Team. Exhibit G at 4.
- April 6, 2022: seized ESI, consisting of 511,266 individual files, provided to McGuiness. Exhibit G at 4.

The State waited at least ***three months*** before it did ***anything*** to analyze the seized ESI. When it realized that it was unable to do so, it waited another month before

doing ***anything else***. Then, after the seized ESI was in the custody of the State's e-discovery vendor, the State waited ***another*** two months to produce the ESI. The State has ***never*** explained the torpid pace of its handling of the seized ESI, nor its decision not to clone the seized drives that contained the ESI and provide them to McGuiness in December 2021 in compliance with Rule 16.

The State also completely ignores the furious pace of pre-trial litigation in April and May 2022. There were more than ***sixty*** docketed events occurring between April 6, 2022 (when the ESI was finally produced) and the start of trial. A11-A20. This flurry of activity occurred because of the State's belated reindictment and production of the seized ESI. In addition to all of the docketed events occurring after production, McGuiness's counsel were analyzing 51 un-transcribed audio recording of witness interviews that the State provided in discovery on March 31, 2022, in addition to some 18,000 documents already provided in discovery. A382, A390.

When a defendant is confronted with delayed disclosure of *Brady* material, reversal will be granted if the defendant was denied the opportunity to use the material effectively. *Goode v. State*, 136 A.3d 303, 313 (Del. 2016). Here, McGuiness was obviously prevented from effectively using the belatedly produced ESI. There was not enough time for trial counsel to review hundreds of thousands of documents, investigate the facts that they contained, and adjust trial strategy

accordingly. The State's suggestion that it committed no foul because the ESI was produced in a searchable format, AB at 20, misses the point entirely. It is not enough to do a word search that merely ***identifies*** thousands of documents. Effective use of the documents requires that ***after they are identified as potentially relevant***, they are read and their implications are understood and incorporated into trial strategy. *See Risper v. State*, 250 A.3d 76, 91 (Del. 2021) (*Brady* guarantees the "opportunity for a responsible lawyer to use the information with some degree of calculation and forethought").

Finally, McGuiness was clearly prejudiced by the unjustifiably belated disclosure. The State's suggestion that a continuance could have cured any prejudice ignores the reality that the State indicted McGuiness, an elected official, less than a year before she would have to stand for re-election. It is unfair for the State to time McGuiness's indictment as such, ignore Rule 16 discovery deadlines and its *Brady* obligation, and then force her to bear the consequences of its malfeasance.

Moreover, the State ignores the fact that McGuiness asked the trial court to impose an alternative sanction short of a dismissal that would not have required a continuance. McGuiness requested that the State be required to defray the costs of an expedited document review as an alternative sanction. A394-A395. The State objected, and the trial court declined to so order. The requested remedy likely

could have cured the prejudice caused by the late disclosure of 511,216 digital files without the need for a continuance.

In arguing against prejudice, the State contends that McGuiness had access to the suppressed evidence through alternate sources. AB at 25. This ignores precedent from this Court and the Third Circuit holding that the extent of a defendant's due diligence is ***irrelevant*** under *Brady*. AB at 14. In *Wright*, this Court reversed a conviction because of suppressed information pertaining to a State witness's cooperation agreement that was available in a public Superior Court file and the facts of a robbery that were reported in a newspaper. 91 A.3d 972. The State utterly ignores *Wright*. The State also ignores that the seized ESI was contained on various storage devices, including McGuiness's computer, that were not made available to her until April 22, 2022, about six weeks before the start of trial. Thus, the information was not readily accessible to her for most of the pre-trial preparation period.

The guilty verdicts in this case turned on the question of whether McGuiness's Daughter received financial benefits as a consequence of her employment that were not available to other OAOA casual-seasonal employees. The suppressed ESI included information about at least ten casual-seasonal employees, the majority of whom were paid the same as McGuiness's Daughter, or more. Those documents and employees would have been powerful evidence to

rebut the State's case, which was essentially based on only ***two*** OAOA casual-seasonal employees. Moreover, the documents disclosed the identity of three casual-seasonal employees who worked remotely while at college, in direct contravention of the State's false argument that only McGuiness's Daughter was afforded this benefit. A1490.

The fact that the information contained in the seized ESI was suppressed, exculpatory, and material undermines confidence in the outcome of the trial and requires remand for a new trial.

II. *BRADY* ENTITLES MCGUINESS TO THE DETAILS OF THE STATE'S *FRANKS* VIOLATION.

The State's response to McGuiness's second argument is incoherent at best and intentionally misleading at worst. McGuiness does not argue that she should have been acquitted under the doctrines of selective prosecution or vindictive prosecution. Her argument is that she could not gather the evidence that she needed to mount those defenses because the State had suppressed the names of the individuals responsible for including false statements in a search warrant in violation of *Franks v. Delaware*. That suppression violated *Brady*. McGuiness preserved this argument by raising it during trial and in her Motion for New Trial. A1494-A1500; A4541-A4545. Accordingly, contrary to the State's assertion, the standard of review is *de novo*. *Wright,* 91 A.3d at 982.

The issue before the Court is simple: when a trial court finds, as it did here, that the State included false sworn statements in a search warrant affidavit in violation of *Franks*, do *Brady* and its progeny provide a due process right to information in the State's possession pertaining to the identity of the drafters of the false statements and the circumstances surrounding the drafting of the false statements? The State ignores this question, the answer to which must be "yes."

The State portrays McGuiness's attempt to discover some record evidence as a "fishing expedition that is not supported by the Superior Court Criminal Rules." AB at 29. This ignores that *Brady* is grounded in the Fourteenth Amendment's

guarantee to a fair trial, not a court rule. *Wright*, 91 A.3d at 977. Setting that aside, this was no fishing expedition—the trial court had already found that McGuiness had a "colorable basis" for further discovery on this very topic. Exhibit B at 5. The State completely ignores that finding.

Despite McGuiness's specific request for the information, the State did not produce the names of the individuals responsible for including false statements or the circumstances surrounding their drafting. The evidence would have undermined "the thoroughness and even the good faith of the investigation," *see Kyles v. Whitley*, 514 U.S. 419, 445 (1995), and might have supported McGuiness's already-colorable selective prosecution defense, *see United States v. Cessa*, 861 F.3d 121, 131 (5th Cir. 2017).

The State also complains about the "grueling detail" of the Chief Investigator's cross-examination, AB at 28, but it does not and cannot contest that McGuiness was never provided with the requested *Brady* information. And the State ignores the fact that the information might have led McGuiness to discover the identity of additional trial witnesses who might have been called if only for the purpose of impeaching them under D.R.E. 607, thereby further discrediting the State's investigation. What matters is that McGuiness made a particularized request for very specific *Brady* information, and the State withheld that information. "When the prosecutor receives a specific and relevant request, the

failure to make any response is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976), *as modified by United States v. Bagley*, 473 U.S. 667 (1985).

Finally, without citation to any authority, the State suggests that it was not required to disclose the requested names because they are protected by the work product doctrine. AB at 32. The State's argument is contrary to the relevant authorities. "[I]nternal materials possibly constituting work product may not automatically be exempt from *Brady* requirements." *Mincey v. Head*, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000); *see United States v. Armstrong*, 517 U.S. 456, 475 (1996) (Breyer, J., concurring in part and concurring in judgment) ("Because *Brady* is based on the Constitution, it overrides court-made rules of procedure. Thus the work-product immunity for discovery in Rule 16(a)(2) prohibits discovery under Rule 16 but it does not alter the prosecutor's duty to disclose material that is within *Brady*." (quoting 2 Charles Alan Wright & Arthur D. Miller, Federal Practice and Procedure § 254 & n.60 (2d ed.))); *accord* 2 Charles Alan Wright & Arthur D. Miller, Federal Practice and Procedure § 256 & n.61 (4th ed.).

Moreover, "[e]ven if the prosecutor wrongly believed the statements contained some protected attorney opinion, he should have known that the duty lay with the trial judge, not the prosecutor, to weigh the need for confidentiality against the defendant's need to use the material to obtain a fair trial." *Dickson v.*

Quarterman, 462 F.3d 470, 479-80 (5th Cir. 2006). The State ignored the trial court's offer to do exactly that. A4559:12-15. For these reasons, this Court should remand for a new trial.

III. THE *STATE'S* ANSWERING BRIEF INACCURATELY DEFINES MCGUINESS'S DAUGHTER'S CLASS OF COMPARATORS UNDER 29 *DEL. C.* § 5805 AND STILL FAILS TO OTHERWISE POINT TO EVIDENCE IN SUPPORT OF COUNT ONE.

The State misses the point of McGuiness's argument that there was insufficient evidence that her Daughter received a financial benefit not available to other persons of the same group.

The State needed to prove beyond a reasonable doubt that McGuiness's Daughter received a financial benefit not available to others "of the same class or group of persons." A1073. The State complains that "the [Conflict of Interest] statute does not require the State to present comparator evidence of McGuiness' choosing." AB at 36. But it is the State that is focusing on just a handful of the OAOA's casual-seasonal employees while ignoring evidence in the trial record as to the other casual-seasonal employees. OB at 29-32. The State never explains how that small subset of casual-seasonal employees might reasonably meet the requirements of the statute, or by what logic such a small subset should be selected. The State ignores McGuiness's detailed comparison of her Daughter's financial benefits with the benefits of ***all*** of the members of "the same class or group of persons," which, if properly defined, would include ***all*** OAOA casual-seasonal employees working at the relevant time.

The State also puts forth a citation-free laundry list of ways in which it believes McGuiness's Daughter received a financial benefit not available to others

of the same class or group. However, ***each of the State's assertions are contradicted by the trial record***.

- **Formal Interview (AB at 34).** There is no evidence that ***any*** casual-seasonal employee received a formal interview before being hired. A4746:4-14; A4812:8-12; A4849:18-19.
- **Wage (AB at 34).** McGuiness's Daughter did receive a higher hourly wage than the OAOA's two casual-seasonal front desk receptionists. A5159-A6163; A2779:14; A2780:3-4; A2781:1-7. However, the four casual-seasonal employees that filled the same role as McGuiness's Daughter received an identical hourly wage as Daughter. A5159-A6163; A3779:10-12; A3807:15-23; A3808:13-17; A4812:23-A4813:6; A4851:11-13. Others were paid ***more***, A5159-A6163; A4746:17-A4747:11, and there are at least four additional casual-seasonal employees whose salaries are unknown because the State never introduced any evidence about it, OB at 29.
- **Banking Hours (AB at 35).** McGuiness's Daughter "banked" hours that she worked at the Delaware State Fair in order to be paid for the accurate amount of time that she worked for OAOA. A3782:4-A3783:6, A3783:18-A3784:8. Bateman, Marshall, and August all did the same. A3098:23-A400:23; A4829:17-A4830:23; A4856:9-4857:18.

- **Paychecks (AB at 35).** McGuiness's Daughter received two state paychecks in September 2020 while enrolled in college for the hours that she had already worked and accrued during the summer of 2020, particularly at the State Fair. A3800:12-16. ***McGuiness's Daughter did not submit hours or receive a paycheck for any time between September 29, 2020 through December 11, 2020***. AR1-AR7; A3826:18-A3827:20.
- **In Office (AB at 35).** McGuiness's Daughter did not access the OAOA office from August 17, 2020 through December 11, 2020 because she was attending college. A3776:6-19. She did not need to be in the office to complete her OAOA tasks. A3785:18-A3786:3. She did not need to use her office email because she communicated using her personal Gmail account or text. A3830:21-A3831:15.
- **VPN (AB at 35).** McGuiness's Daughter never used the State's VPN to work remotely in 2020 because she did not have access at that time and did not need it to work. A3788:17-22; A3815:5-A3817:5. Other casual-seasonal employees also did the same type of tasks without using the State's VPN. A3059:13-17; A3088:12-A3089:7; A4814:1-15; A4849:23-A4850:11; A4854:13-18.
- **Bank Account (AB at 35).** The fact that McGuiness's name was on the bank account that Daughter's paychecks were deposited into is irrelevant as

to whether Daughter received a financial benefit, and the State's chief investigator testified there was "zero evidence" that McGuiness accessed the account. A4607:17-A4609:5.

- **Complaints (AB at 35).** The State ignores that McGuiness addressed complaints on behalf of multiple OAOA employees in addition to her Daughter. AR8-AR14. Regardless, this has no relevance to whether McGuiness's Daughter received a ***financial*** benefit not available to other employees of the same class.
- **Remote Work (AB at 35, 38).** The State argues that only McGuiness's Daughter was permitted to work remotely while away at college, but it never proved that this was so. The State never asked Bateman or Marshall at trial if they ***wanted*** to work remotely while at college, and the evidence showed McGuiness intended to ask Bateman to work remotely. A5150, OB at 32.

In tacit recognition of the fact that the evidence failed to show that McGuiness's Daughter received a financial benefit not available to any other casual-seasonal employees, the State puts forth a new theory that, should McGuiness's Daughter be compared to all of the casual-seasonal employees, there would still be sufficient evidence to support Count One because no other casual-seasonal employee received the same "cumulative favors" as she did. AB at 37.

The State cites no support for this theory and interpretation, which runs contrary to the language of 29 *Del. C.* § 5805 and the jury instructions. A1073.

When the evidence introduced at trial is properly considered, and when McGuiness's Daughter's work conditions are compared with those of "the same class or group of persons"—*i.e.*, ***all*** of the OAOA's casual-seasonal employees—it is clear that the State failed to prove beyond a reasonable doubt that McGuiness's Daughter received a financial benefit. No rational jury could conclude otherwise.

IV. THE STATE STILL FAILS TO EXPLAIN THE RELEVANCE THAT ANY OF THE EVIDENCE IT PRESENTED PRE-DATING MCGUINESS'S KNOWLEDGE OF THE INVESTIGATION AGAINST HER HAD TO COUNT FIVE.

During pre-trial litigation, and repeatedly during trial, McGuiness argued that evidence offered by the State in support of Count Five was inadmissible pursuant to D.R.E. 402, 403, or 404. Then, as now, the State is unable to offer a logical explanation as to how any evidence relating to McGuiness's alleged "harassment or intimidation" of employees that occurred before she knew she was under investigation was relevant to Count Five. Indeed, some of the objected-to evidence admitted related to incidents that occurred before McGuiness was under investigation ***at all***. The State has never explained how those incidents were relevant to Count Five. The State ignores nearly all of the irrelevant evidence outlined in McGuiness's Opening Brief, choosing only to address email monitoring.

The State admits that email monitoring of certain OAOA employees was already occurring ***before its investigation began***. AB at 5. But to this day, the State refuses to explain how evidence of events that occurred before McGuiness finally knew about the investigation could logically be relevant to Count Five as defined by law. And because the trial court repeatedly denied McGuiness's request that the State make an offer of proof as to the relevancy of the evidence, the trial record is equally bereft of an explanation.

Nearly all of the State's evidence supporting Count Five relates to events occurring before the evidence showed that McGuiness knew that there was an investigation against her. While the State attempted to argue McGuiness knew of the investigation before then, it concedes that it only presented evidence—at best—that she may have known of some type of investigation by June 15, 2021. AB at 39. Therefore, at a minimum, no actions before June 15, 2021 could be connected to Count Five. Accordingly, all of the alleged evidence in support of Count Five pre-dating, at a minimum, June 15, 2021 was irrelevant and thus inadmissible. *See* D.R.E. 402.

Assuming *arguendo* that the evidence was minimally relevant, Rule 403 still speaks of unfair prejudice, and minimally relevant evidence carries a much greater risk of unfair prejudice than would otherwise be the case. *See United States v. Zhong*, 26 F.4th 536, 544 (2d Cir. 2022) (reversing conviction based in part on "minimally relevant" and "highly prejudicial" evidence); *United States v. Wiggan*, 700 F.3d 1204, 1213 (9th Cir. 2012) ("Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury.").

Evidence of unfair prejudice is shown by the jury's guilty verdict on Count Three. The trial court later acquitted McGuiness of that Count, concluding ***no***

rational jury could have convicted her. Exhibit K at 15. This suggests that the jury was unfairly prejudiced by the irrelevant evidence.

V. THE TRIAL COURT'S DELAY IN DISMISSING COUNT THREE SIGNIFICANTLY PREJUDICED MCGUINESS.

The State completely ignores McGuiness's argument about the trial court's delay in dismissing Count Three, which led to the erroneous admission of otherwise prejudicial evidence. Instead, it clings to its failed theory that 29 *Del. C.* § 6903 criminalizes the structuring of payments under a contract. AB at 41-42. The trial court rejected that theory. Exhibit K at 10-15. That being so, McGuiness's argument for dismissal should have been accepted when it was raised before trial. A301-A371. Unfortunately, the trial court waited to accept McGuiness's argument until after the jury had heard three days' worth of highly prejudicial evidence relevant only to Count Three and instructions that Count Three could serve as a basis for a guilty verdict on Count Four. The trial court's delay prejudiced McGuiness on Count One (as evidenced by the guilty verdict without a sufficient evidentiary basis) and Count Four (as evidenced by the guilty verdict following intermingled jury instructions).

The State's throwaway argument that evidence of structuring was relevant to Count Four, yet Count Four was not dependent on Count Three, *see* AB at 43, is foreclosed by the jury instructions. The jury was instructed that to convict McGuiness on Count Four, it "must unanimously agree that one or both of these allegations," Count One or Count Three, "have been established by the State."

A1082-A1083. The State conceded this point at the prayer conference. A4955:19-23.

The State's final contention, that "precise jury instructions... cured the potential for any prejudicial spillover," is untenable. AB at 41-44. For support, the State cites *Skinner v. State*, which concerned a joint trial of multiple defendants. AB at 43 & n.151 (citing 575 A.2d 1108, 1120 (Del. 1990)). *Skinner* held that because "[t]he jury was told to consider the liability of ***each defendant*** separately and that evidence admitted against ***one defendant*** was not to be used in determining the guilt of the ***other defendants***," the "instructions were sufficient to eliminate the potential 'spillover' effect resulting from the joint trial." 575 A.2d at 1120 (emphasis added). Here, in this single-defendant trial, the State chose to charge Count Four as ***dependent on*** Counts One and Three. Exhibit K at 15-16. The State has no support for its jury-instructions-cure-all position with respect to this situation. Accordingly, this Court should remand for a new trial.

VI. THE STATE, LIKE THE TRIAL COURT, MISUNDERSTANDS MULTIPLICITY.

Just as it did below, the State misapprehends multiplicity. A2145-A2151. First, this is not an evidentiary issue subject to abuse-of-discretion review, but a constitutional and statutory issue reviewed *de novo*. *See Hoennicke v. State*, 13 A.3d 744, 746 (Del. 2010). Second, the State confuses the third multiplicity protection, which is not at issue here, with the second protection, which is. *See Williams v. State*, 796 A.2d 1281, 1285 (Del. 2002). Third, the State's confusion has led it to concede the first half of a multiplicity violation (*i.e.*, Count Four required proof of a fact which the other statutes did not). AB at 46. The second half, self-evident from the jury instructions, is that neither Count One nor Count Three required proof of something more than was necessary to prove Count Four. A1082-A1083. This error warrants reversal or at least a new trial. *See Brown v. Ohio*, 432 U.S. 161, 166 (1977).

VII. THE JURY SHOULD HAVE BEEN PERMITTED TO CONSIDER THE TESTIMONY OF THE STATE'S CHIEF INVESTIGATOR WITHOUT THE TRIAL COURT'S INTERFERENCE.

The State mischaracterizes the facts and the law applicable to the Article IV, Section 19 issue. The State's Chief Investigator admitted that he made an intentionally false statement to several witnesses that he was investigating casual-seasonal employees "throughout state government" when in reality he was investigating only McGuiness and her Daughter. A4890-A4892. This Court has previously defined lie as "an untrue statement with intent to deceive." *Williams v. State*, 803 A.2d 927, 930 (Del. 2002) (quoting *Webster's Third New International Dictionary* 1305 (unabr. 1993)), *modified on other grounds by Baker v. State*, 906 A.2d 139 (Del. 2006). The Court *sua sponte* determined that the statement was not a lie and it told the jury so. The Delaware Constitution prohibits a trial court from doing ***exactly*** that.

The State's reliance upon *Taylor v. State* misses the point. *Taylor* discusses whether police falsehoods during interrogation render a custodial statement involuntary. AB at 48 & n.158 (quoting 23 A.3d 851, 854 (Del. 2011)). McGuiness does not contend that any witness's response to the Chief Investigator was involuntary. *Taylor* does not say that such falsehoods are true because they are uttered by the police, and it does not permit a trial judge to tell a jury that they are.

That is why the trial court's comment was so prejudicial: McGuiness's trial strategy was to sow distrust of the State's investigation based on its false statements and half-truths. Article IV, Section 19, prohibits a trial court from expressing its estimation of the truth, falsity, or weight of the Chief Investigator's testimony. *See Herring v. State*, 805 A.2d 872, 876 (Del. 2002). The trial court's comment unconstitutionally undermined the heart of McGuiness's defense. This Court therefore should remand for a new trial.

VIII. THE TRIAL COURT AND THE STATE ERRED BY FAILING TO RECOGNIZE THE DISCRETIONARY ASPECT OF 10 *DEL. C.* § 3925.

The State completely mischaracterizes McGuiness's argument. The State claims that McGuiness argued that the trial court was required to appoint private counsel. AB at 53. This is false, as McGuiness ***never*** made that argument. McGuiness's argument is simply that the trial court erred when it held that its ***only*** option was to appoint an attorney from ODS to represent her. Instead, had the trial court properly interpreted the statute in conjunction with Supreme Court Rule 68, it would have recognized that it had discretion to appoint private counsel and proceeded to at least consider such appointment.

McGuiness ***never*** argued that the trial court was ***required*** to appoint private counsel and only requests a remand to have hearing on the merits.

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: May 22, 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 2nd day of June, 2023, a true and correct copy of the **Redacted – Public Version of Appellant's Reply Brief** was served via File & ServeXpress on the following counsel of record:

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

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