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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES MACCOLL, Defendant-Below, Appellant, v. **STATE OF DELAWARE,** Plaintiff-Below, Appellee.	**No. 129, 2023** **ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE** **No. 2103011110**

APPELLEE STATE OF DELAWARE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Zoe Plerhoples (ID# 5415)
Deputy Attorney General
Division of Civil Rights and Public Trust
820 North French St.
Wilmington, DE 19801
302-577-8400

Dated: August 31, 2023

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NATURE OF THE PROCEEDINGS

On March 22, 2021, a New Castle County grand jury indicted James MacColl ("MacColl"), a former Wilmington Police Department ("WPD") Officer, for Providing a False Statement to Law Enforcement (11 *Del. C.* § 1245A), Tampering with Physical Evidence (11 *Del. C.* § 1269), and Official Misconduct (11 *Del. C.* § 1211(1)).[1] In the indictment, the State alleged that MacColl altered his department-issued firearm both prior to and after his shooting of a carjacking suspect on February 2, 2019 – and thereafter lied about his actions in a criminal investigation and an internal disciplinary investigation conducted by the WPD Office of Professional Standards ("OPS").[2]

Prior to trial, MacColl filed a Motion to Dismiss the Indictment and a Motion in Limine to Exclude Evidence, both premised on the argument that his statements to OPS were inadmissible in a criminal prosecution under the precedent established by *Garrity v. New Jersey*[3] and Delaware's Law Enforcement Officer's Bill of Rights ("LEOBOR").[4] The State's response to Defendant's motion was filed on February 18, 2022.[5] A hearing was held on May 2, 2022,[6] and on July 1,

[1] Pursuant to Supreme Court Rule 14(e), citations to the Appellant's Appendix will be noted as A#. A1 at D.I. 1.
[2] Exhibit A.
[3] 385 U.S. 493 (1967).
[4] A2 at D.I. 10 and 11 (Certified Docket of No. 2103011110), and 11 *Del. C.* § 9200 et seq.
[5] Exhibit B.

2022, the Superior Court issued a memorandum opinion denying both of MacColl's motions.[7] The case proceeded to trial on February 28, 2023 and concluded on March 3, 2023.[8] The jury found MacColl guilty of Providing a False Statement to Law Enforcement and Official Misconduct, and acquitted him of the remaining Tampering with Physical Evidence charge. MacColl has appealed. This is the State's Answering Brief.

[6] A3 at D.I. 20.
[7] *State v. MacColl*, 2022 WL 2388397 (Del. Super. Ct. July 1, 2022), and A3 at D.I. 22 (Certified Docket of No. 2103011110).
[8] A5 at D.I. 35.

SUMMARY OF THE ARGUMENT

Appellant's argument is denied. The Superior Court did not abuse its discretion or otherwise err in denying MacColl's motions to dismiss the indictment and to exclude evidence. *Garrity* and its progeny do not protect false statements made during internal investigations from subsequent criminal prosecutions for the specific and distinct offenses of making a false statement, tampering with evidence or official misconduct. MacColl lacks standing to claim confidentiality of internal affairs files under LEOBOR, and there is no statutory remedy for a claimed violation of the LEOBOR confidentiality provision that confers jurisdiction on a reviewing Court in this case. The admission of his false statements to OPS in a prosecution for false statements did not deprive MacColl of his right to a fair trial.

STATEMENT OF FACTS

In the early morning hours of February 2, 2019, MacColl, who at the time was employed as a Master Corporal with the WPD, and other officers responded to a dispatch for an armed carjacking in progress.[9] MacColl pursued the stolen car in his vehicle to West 27th Street, and when the driver, Yahim Harris ("Harris"), stopped the car and exited the vehicle, MacColl followed him.[10] Believing that Harris was holding a gun, MacColl shot at Harris four times with his service weapon, striking him twice.[11] Additional WPD officers arrived and secured the scene.[12] MacColl's service weapon remained in his possession as he was transported back to the WPD station.[13] Harris was arrested and charged with carjacking.[14]

Per WPD policy, officers involved in a shooting are removed from the scene as soon as practicable, provided with a support or companion officer, and then referred to a member of the WPD Critical Incident Stress Management Team

[9] A75 at 5-20.
[10] A50 at 16-22.
[11] The handgun Harris or his co-defendant possessed at the time of the carjacking was located by WPD Officers under the stolen vehicle, somewhere between the front door and the back door on the passenger side. A102 at 9-22, A103 at 1, A315 at 2-19.
[12] A111.
[13] A112 – 114 at 1-6, A117.
[14] A15 at 5-6.

("CISM") to deal with any stress or trauma from the incident.[15] On February 2, 2019, after the shooting, WPD Sergeant Pete Leccia ("Leccia") provided initial support to MacColl at the scene.[16] Sergeant Leccia transported MacColl from the scene of the shooting back to WPD headquarters.[17] At some point after he arrived at WPD headquarters, MacColl went to the locker room area with his service weapon in his possession and remained, unmonitored, in that area for 15 – 20 minutes.[18]

MacColl then went to WPD Officer Gary Tabor's office to turn over his service weapon involved in the shooting for ballistics analysis and to obtain a replacement weapon.[19] At trial, the State alleged that prior to turning in his service weapon, MacColl swapped the barrel out to replace an after-market barrel he had placed on the weapon in 2017.[20] On that same date of February 2, 2019, MacColl's service weapon was retained by WPD Forensic Services Unit ("FSU") Officer Gerald Nagowski.[21] On February 8, 2019, the service weapon was transported to the Delaware State Police Forensic Firearms Services Unit ("DSP FFSU") for

[15] A118.
[16] A119 at 11-17.
[17] A453 at 4-10.
[18] A455, A462 at 6-11.
[19] A120 – 121. Officer Tabor noted during his testimony that after this case, WPD changed their policy so that an officer is not unobserved from the time they return to WPD HQ and the time they turn in their weapon, and they are not able to access their locker following an officer-involved shooting. A135 – 136.
[20] A55 at 18-23, A56 at 1-7
[21] A127 at 13-23, A128, A402.

testing.[22] At the time the firearm was taken by FSU, WPD was not aware of the after-market barrel or any discrepancy between the firearm and the projectiles at the shooting scene.[23] The DSP FFSU examiner noticed discrepancies evidencing that the projectiles tested were not fired from the barrel of the service weapon that was submitted.[24]

On February 19, 2019, WPD Segeant Detective Thomas Curley ("Detective Curley") questioned MacColl regarding the shooting as part of an internal affairs investigation into the use of force.[25] Detective Curley specifically asked MacColl whether MacColl had altered the barrel of his firearm after the shooting, and MacColl answered in the negative.[26] MacColl told Detective Curley that Harris stated "Why did you shoot me, I didn't have the gun anymore."[27] The then Office of Civil Rights and Public Trust ("OCRPT"), now known as the Division of Civil Rights and Public Trust ("DCRPT"), issued a report in November 2019, opining that the shooting of Harris was legally justified, but the discrepancy in the ballistics

[22] A142 - 143.
[23] A402.
[24] A148 – 151, A183 (Deady's testimony). On or around February 19, 2019, when CID Sergeant Thomas Curley learned of the discrepancy, he responded to the scene of the shooting to personally recover an additional projectile and submitted that projectile for testing. The later submitted projectile was also not fired from the barrel of the weapon MacColl turned over to WPD Officer Tabor. A284 – 285. The WPD investigators determined that no other weapon had been fired in the shooting involving MacColl and Harris on February 2, 2019. A297 at 16-23, A298 at 1-7.
[25] A290 at 16-23, A291.
[26] A364.
[27] A298 - 299.

report loomed over Harris' carjacking prosecution.[28] When initially questioned by a prosecutor from the Delaware Department of Justice ("DOJ"), MacColl denied switching the barrel.[29]

On May 30, 2019, MacColl made a statement to OPS denying any alteration to his service weapon.[30] In January 2020, MacColl made a second statement to OPS officer Sergeant Scott Chaffin ("Sergeant Chaffin"), admitting that he had altered his service weapon with an after market barrel, which he claimed was to improve his accuracy.[31] MacColl never submitted a formal request to alter his departmentally issued service weapon.[32] He also produced a firearm barrel to Sergeant Chaffin, claiming that it was the original barrel for his departmentally issued firearm, but claimed he did not alter the weapon after the shooting.[33] At the time he made the statements, MacColl signed a form entitled "Rights of Police Officer Under Investigation."[34] Item 5 on that form notes that an officer has "an obligation to truthfully answer all questions asked" and that the officer acknowledges that their "statements or responses constitute an official police

[28] A351 – 353, A365.
[29] A354, A369.
[30] A493, A354, A369.
[31] A502.
[32] A489.
[33] A502.
[34] D.I. 14, Exhibit B (Op. Brf.).

report."[35] WPD produced the statements he made to Internal Affairs ("IA"), without objection, after the DOJ issued a subpoena.[36]

DOJ prosecutors reviewed the internal affairs and OPS statements and determined that MacColl would not be called as a witness in the carjacking case against Harris due to concerns over his credibility.[37] The charges against Harris were subsequently dismissed, as MacColl was a crucial witness.[38] MacColl was subsequently terminated from his employment with WPD, and on March 22, 2021,

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[35] D.I. 14, Exhibit B

[36] A489 - 491. The DOJ Criminal Prosecution team originally received MacColl's statements directly from WPD leadership after an unknown tipster from WPD alerted the DOJ to MacColl's untruthful statement regarding his firearm. A15 - 19. The newly formed Division of Civil Rights and Public Trust issued a subpoena for the IA file and entered into an agreement with WPD with the understanding that the material would be reviewed by a filter team. After review by a filter team, the materials were given to DCRPT. A19 – 21.

[37] A431 – 432: DAG Timothy Maguire noted in his trial testimony: "Whenever we're evaluating a case, we have to evaluate the credibility of all witnesses, including police officers, and my evaluation of that case was that the officer involved, James MacColl, was not a credible witness that I could put on the witness stand and that's important in a trial and for any witness. And when we got the statement and found out about the switching of the barrel and his lack of candor about that throughout the process, I could not put him on the stand."

[38] A29, A365: The first prosecutor on the case, former DAG Phil Casale, was questioned on this point by defense counsel. He stated as follows: "The information from Officer MacColl about the barrel and the ballistics report has no bearing on whether Mr. Harris did or did not commit a carjacking…Yes, as a prosecutor, I'm actively trying to resolve cases, but there was nothing about Officer MacColl's statement that made Yahim Harris innocent of a carjacking. *It certainly impacted my ability to prove he did it, but it didn't impact his innocence."*(emphasis added).
The case was dismissed in March 2020 by his successor, Timothy Maguire, who reviewed the statements from IA and OPS. A430.

he was indicted for Felony False Statement, Tampering with Evidence and Official Misconduct.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR IN DENYING MACCOLL'S MOTIONS TO DISMISS THE INDICTMENT AND EXCLUDE EVIDENCE OF HIS FALSE STATEMENTS.

A. QUESTION PRESENTED

Whether the trial court abused its discretion or otherwise erred in denying MacColl's motion to exclude evidence of the false statements that he provided to OPS investigators.

B. STANDARD OF REVIEW

"Generally, [this Court] review[s] a trial court's denial of a motion to dismiss counts of an indictment for abuse of discretion."[39] The Superior Court's denial of a motion to exclude evidence is likewise reviewed for an abuse of discretion.[40] However, a trial court's legal conclusions and a defendant's claim of an infringement of a constitutional right are reviewed *de novo*.[41]

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[39] *Wilson v. State*, 2017 WL 1535147, at *2 (Del. Apr. 27, 2017).
[40] *Mize v. State*, 2017 WL 3391761, at *4 (Del. Aug. 7, 2017) (citing *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015)).
[41] *Wilson*, 2017 WL 1535147, at *2 (Del. Apr. 27, 2017) (quoting *Ridgeway v. State*, 2013 WL 2297078, *2 (Del. May 23, 2013) (internal quotation marks omitted).

C. MERITS OF THE ARGUMENT

1. *Garrity* does not protect false statements and does not provide immunity for false statements that are independent criminal offenses.

Principally relying on *Garrity v. New Jersey*, MacColl argues that his false statements to OPS investigators were inadmissible in his trial for the charge of Providing a False Statement to Law Enforcement. He is wrong and his reliance on *Garrity* is misplaced. As the Superior Court correctly found, *Garrity* protects officers from being prosecuted for truthful statements pertaining to past conduct – not falsehoods that constitute disctinct crimes, as was the case here. Unlike MacColl, the police officers in *Garrity* chose to make truthful confessions.[42] And, contrary to MacColl's assertion, *Garrity* is not a license to lie, and does not immunize officers from subsequent prosecutions for false statements. McColl's statements were not admissions or confessions, but self-serving falsehoods designed to avoid incrimination. *Garrity* stands for the proposition that the State cannot "use the threat of discharge to secure incriminatory evidence against an employee"; put another way, that public employees cannot be coerced to tell incriminating truths under threat of termination.[43] It does not confer blanket immunity on an employee against a subsequent prosecution for false statements made during an investigation.

[42] *Garrity*, 385 U.S. 493, 495 (1967).
[43] *Id.* at 499.

Garrity offers protection to officers and other public employees who make truthful, self-incriminating admissions during internal investigations under the threat of discharge.[44] It is not meant to hobble investigations or encourage lies.[45] In denying MacColl's motion to dismiss and his motion to exclude the evidence of the OPS statements, the Superior Court noted as follows:

> One might rashly conclude that *Garrity* is an "inflexible, *per se* rule." But the rule is not absolute. *Garrity* "conceded" that there may be "situations where" an officer " 'volunteers the information[ ]' " later used against him. In other words, *Garrity* left open the possibility that some statements made by police officers under penalty of termination will not be protected from subsequent prosecution. False statements close that circle. Post-*Garrity* decisions make clear that neither the Fifth Amendment nor *Garrity* itself protects false statements, even when the statements are made under penalty of termination.[46]

Garrity immunizes only *truthful* statements made by police officers under penalty of termination, not falsehoods that constitute independent criminal acts.[47] In other words, one may not commit a crime to avoid a crime and expect no

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[44] *US v. Veal,* 153 F.3d. 1233, 1242-3 (1998), overruled on other grounds by *United States v. Chafin,* 808 F.3d 1263 (11th Cir. 2015).

[45] *Veal* at 1241: "Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function." *Brogan v. United States,* 522 U.S. 398, - - - -, 118 S.Ct. 805, 809, 139 L.Ed.2d 830 (1998).

[46] *MacColl,* 2022 WL 2388397, at *3-4 (citations omitted).

[47] *Veal* at 1241, 1242.

prosecution. The overhwhelming weight of federal and state case law applying *Garrity* has held as much.[48]

In *U.S. v. Veal*, the 11th Circuit held that *Garrity* and the Fifth Amendment do not protect false statements from subsequent prosecutions for such crimes as perjury and obstruction of justice.[49] The *Veal* Court stated, "[w]e agree with the circuits that have addressed this issue before us and have determined that *Garrity*-insulated statements regarding *past* events under investigation must be *truthful* to avoid *future* prosecution for *such crimes as perjury and obstruction of justice*. *Garrity* protection is not a license to lie or to commit perjury."[50] The Court noted:

> In determining whether the government may use *Garrity* statements in a subsequent federal, criminal prosecution, we note that the Supreme Court has been resolute in holding that the Fifth Amendment does not shield perjured or false statements. Concerning false testimony before a grand jury, the Court spoke clearly and strongly:
>
> In this constitutional process of securing a witness' testimony, *perjury simply has no place whatsoever*. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings.... Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties....
> ....

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[48] *See, e.g. U.S. ex rel. Annunziato v. Deegan,* 440 F.2d 304 (2d Cir.1971);*United States v. Devitt,* 499 F.2d 135, 142 (7th Cir. 1974); *United States v. Pacente,* 503 F.2d 543 (7th Cir. 1974) (en banc); *United States v. Nickels,* 502 F.2d 1173 (7th Cir. 1974); *United States v. French,* 216 F.Supp.3d 771, 778 (W.D. Texas 2016); *Herek v. Police & Fire Com'n Village of Menomonee Falls,* 226 Wis.2d 504, 515 – 516 (Wis. 1999).

[49] *Veal,* 153 F.3d 1233 (11th Cir. 1998).

[50] *Id.* at 1243 (emphasis added).

> [A] witness sworn to tell the truth before a duly constituted grand jury will not be heard to call for suppression of false statements made to that jury, any more than would be the case with false testimony before a petit jury or other duly constituted tribunal.[51]

In *US ex rel. Annuziato v. Deegan*, the 2nd Circuit directly addressed the interplay between *Garrity* and prosecutions for false statements when it upheld a public employee's conviction for perjury based on testimony obtained under threat of discharge, stating:

> [A]ppellant was not prosecuted for *past* criminal activity based on what he was forced to reveal about himself; he was prosecuted for the *commission of a crime while testifying,* i.e., perjury. In short, while a public employee may not be put to the Hobson's Choice of self-incrimination or unemployment, he is not privileged to resort to the third alternative, i.e., lying.[52]

In *United States v. Devitt*, the 7th Circuit upheld the convictions of a Chicago police officer who testified falsely before a grand jury when he refused to admit to extortion, despite his reliance on *Garrity*, stating:

> We believe defendant's reliance upon the aforementioned decisions is misplaced. *Had defendant admitted extorting money from tavern owners, neither his testimony nor the fruits thereof could have been used against him* in a subsequent prosecution. *Garrity v. New Jersey*, supra. Had he exercised his Fifth Amendment privilege, he could have attacked the legality of any subsequent disciplinary action against him...
>
> *Garrity* and its progeny do not proscribe the use, in a criminal prosecution under 18 U.S.C. § 1621 or § 1623, of a defendant's allegedly perjurious statements.... *Garrity* provides the witness with adequate protection against the government's use, in subsequent criminal proceedings, of information

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[51] *Id.* at 1240, citing *United States v. Mandujano,* 425 U.S. 564, 576, 582 (1976).
[52] *Annunziato*, 440 F.2d at 306, citing *United States v. Knox,* 396 U.S. 77, 82 (1969) (emphasis added).

> obtained as a result of his testimony, where his refusal to testify would form the basis for disciplinary action against him. *Gardner [v. Broderick,* 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968),] and *[Uniformed] Sanitation Men [Ass'n v. Commissioner of Sanitation,* 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968),] provide the witness with a shield against such disciplinary action based upon his refusal to testify, in cases in which he refuses to do so, believing that his testimony or the fruits thereof can be used against him in subsequent criminal proceedings.
>
> Together, these decisions provide adequate protection of the witness's Fifth Amendment rights. *We find no reason or justification for extending this umbrella of protection to shield a witness against prosecution for knowingly giving false testimony.*[53]

The same reasononing applies here. Had MacColl told the truth, he could have availed himself of *Garrity's* protections. But because he lied, he could not.

MacColl attempts to distinguish the authority interpreting *Garrity* by arguing that the officers in the those cases were "informed that they could be subject to prosecution for providing a false statement."[54] In support of his argument, MacColl cites *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia.* That case, however, is readily distinguishable. It did not involve a criminal prosecution for an independent crime of false statement. The issue addressed was whether a questionnaire that officers answered to obtain a promotion to a specialized unit was coercive in violation of the 5th Amendment if there was no explicit waiver

[53] *Devitt,* 499 F.2d 135, 142 (7th Cir.1974) (emphasis added)

[54] D.I. 14 (Op. Brf.) at 9. To the extent that MacColl implicitly claims some sort of detrimental reliance on the form he signed, his argument still fails; as is discussed below, that document directed him to answer truthfully.

provision.[55] The *Fraternal Order of Police* ("*FOP")* Court did not rule on the issue of a subsequent prosecution, instead noting that other appellate courts have found the following:

> [B]efore subjecting a public employee to discharge for declining to answer questions relating to their official duties, an employer must not merely desist from requiring a waiver of the employee's right not to provide self-incriminating information, but must affirmatively advise the employee that the answers that he or she provides may not be used against him or her in a criminal proceeding, *except one for prosecution for answering falsely under the applicable law*.[56]

The *FOP* Court also stated "[t]here can be no question, for instance, that the police department may prosecute officers for lying on the questionnaire in violation of Pennsylvania law. The fifth amendment does not protect a citizen against the consequences of committing perjury."[57]

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[55] *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 859 F.2d 276, 282 (3d. Cir. 1988).

[56] *Id.* at 282 (emphasis added) (citing *Benjamin v. City of Montgomery*, 785 F.2d 959 (11th Cir. 1986); *United States v. Devitt*, 499 F.2d 135, 141 (7th Cir. 1974), 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466 (1975); *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir.1973); *Rochford v. Confederation of Police*, 416 U.S. 956, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); *Kalkines v. U.S.*, 473 F.2d 1391, 200 Ct.Cl. 570 (1973); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619 (2d Cir.1970), *cert. denied*, 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349 (1972) (*Uniformed Sanitation II*).

[57] *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, at 281. *United States v. Wong*, 431 U.S. 174, 178, 97 S.Ct. 1823, 1825, 52 L.Ed.2d 231 (1977) (regarding false, grand jury testimony about bribing undercover police officers, the Court emphasized that "the Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it 'does not endow the person who testifies with a license to commit perjury.'

MacColl's other argument, that his false statements were not "sworn testimony" is also unavailing, as the 5th Amendment privilege does not afford an individual immunity from a separate charge of false statement for lying during an investigation into an unrelated criminal act, whether they are on the stand or in an interrogation room.[58] Whether sworn or not, the 5th Amendment does not protect false statements.[59]

MacColl was prosecuted for the specific criminal acts of false statements and tampering with evidence during an investigation, not for any crimes he may have committed during the use of force employed against a criminal suspect. While his shooting and the carjacking were under investigation, MacColl denied altering

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")(quoting *Glickstein v. United States*, 222 U.S. 139, 142, 32 S.Ct. 71, 73, 56 L.Ed. 128 (1911)); *see also United States v. Knox*, 396 U.S. 77, 82, 90 S.Ct. 363, 366, 24 L.Ed.2d 275 (1969) (explaining that the predicament of having to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury or answering falsely. In a case involving filing a false tax return, the Court concluded that the defendant took "a course that the Fifth Amendment gave him no privilege to take"). Using this authority, our Court declined to suppress false grand jury testimony and upheld a conviction under 18 U.S.C. § 1623 for perjury. *See United States v. Olmeda*, 839 F.2d 1433, 1435–37 (11th Cir. 1988); *see also LaChance v. Erickson*, 522 U.S. 262, ——, 118 S.Ct. 753, 756, 139 L.Ed.2d 695 (1998) ("It is well established that a criminal defendant's right to testify does not include the right to commit perjury.")

[58] *Veal, supra*, at 1241: "Like false testimony before a grand jury, the Court has not excluded from criminal liability false statements made to government agents or agencies, whether or not those statements were made under oath."

[59] *Bryson v. United States*, 396 U.S. 64, 72, 90 S.Ct. 355, 360, 24 L.Ed.2d 264 (1969) "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."

his firearm. In a subsequent interview to OPS investigators, MacColl, for the first time, admitted to making unauthorized changes to his firearm *prior to* the shooting, but still denied making any changes thereafter, despite the inconsistent ballistics evidence. In the same interview, MacColl presented to investigators what he claimed was the original department-issued barrel for his firearm, which he had switched out without approval. That barrel still did not match the tested projectiles located at the scene of the shooting. MacColl also admitted to investigators that he had access to his firearm after the February 2, 2019 shooting when he used the restroom twice, unsupervised, but provided no explanation as to how his firearm's barrel could have been switched between when he fired it and when it was tested.

The Superior Court correctly concluded MacColl did not make any "admissions" during his OPS interviews, because he did not admit to any criminal conduct, nor the gravamen of the criminal offenses that he was eventually charged with. Instead, he chose to lie to investigators and submit a false piece of equipment. In parsing out the semantics of MacColl's arguments, the Court noted as follows:

> An "admission" is a "statement in which someone admits that something is true or that he or she has done something wrong[.]" In contrast, a "statement" is merely a "verbal assertion[.]" So an admission necessarily is a statement, but a statement is not necessarily an admission. Indeed, the Form itself adopted this logic. It used the words "admissions" and "statements" separately, not interchangeably.

> MacColl's statements are not admissions. He never said that he committed a crime or violated WPD policy. Admissions acknowledge truth (internal citations omitted).[60]

The form MacColl signed at each OPS interview is also instructive on this point. As noted above, the "Rights of Officers Under Investigation" form specifically states that the officer has been advised that "[they] have an obligation to truthfully answer all questions asked of [them]." MaColl did not abide by that obligation. As in the case of *U.S. v. Devitt,* supra, MacColl would have been protected from adverse employment action had he told the truth – and it follows logically that had he told the truth, he would not have been prosecuted for a crime of false statement.

MacColl's self-serving dishonest statements were admissible in a prosecution centered on allegations of dishonesty. His OPS material and IA statements were properly obtained first as part of a diligent review by the prosecutors in the carjacking case, and then by way of a subpoena and Filter Review in a criminal investigation. And, consistent with post-*Garrity* precedent, MacColl did not have a license to lie.[61] When it comes to the 5th Amendment, "A citizen may decline to answer the question, or answer it honestly, but he cannot

[60] *MacColl,* 2022 WL 2388397, at *6.

[61] See eg, *Annunziato, supra,* at 306: "In short, while a public employee may not be put to the Hobson's Choice of self-incrimination or unemployment, he is not privileged to resort to the third alternative, i.e., lying."

with impunity knowingly and willfully answer with a falsehood."[62] Or at least, he cannot answer with a falsehood in an official proceeding and claim to be free from any consequence.

The precedent interpreting *Garrity* is clear; it does not protect a public servant from the consequences of dishonesty, whether sworn testimony or not. The purpose of *Garrity* is to incentivize truth telling while protecting a property interest, not to allow officers to lie with impunity, secure in the notion that they are given protections above and beyond those of any other citizen.

2. MacColl does not have standing to assert confidentiality under LEOBOR and LEOBOR does not offer any redress for a claimed violation of confidentiality.

MacColl claims he has standing under LEOBOR and that the statute's confidentiality provision is a mechanism for seeking redress. He misapprehends LEOBOR.

LEOBOR is primarily a statute offering employment protections to sworn law enforcement officers. MacColl is not currently and was not a sworn law enforcement officer at the time of his trial, thus he does not have standing to enforce any portion of LEOBOR.[63] Even assuming that he could claim LEOBOR's

[62] *Bryson v. United States* at 72.
[63] *See generally* 11 Del. C. § 9200(b) defining "law enforcement officer." *See also Haden v. Bethany Beach Police Department*, 2014 WL 2964081 at *2 (Del. Super. Ct June 30, 2014) "Chapter 92 of Title 11 of the Delaware Code, called the Law–Enforcement Officers' Bill of Rights ("LEOBOR"), grants law-enforcement

protections at the time he was interviewed by OPS, and thus at a later phase in his criminal trial, LEOBOR's provisions and restrictions apply to disciplinary actions by law enforcement agencies.[64] Neither LEOBOR nor any other statute grant jurisdiction for appellate review to a Court.[65] In any event, LEOBOR does not offer any redress for a claimed violation of confidentiality in a criminal prosecution by a 3rd party, as it textually and explicitly applies to law enforcement agency disciplinary matters.[66]

Standing is a threshold question for a court to determine in order to consider a claim.[67] A claimant asserting standing under a statute bears the burden of showing "an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute."[68] The

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officers charged with misconduct the right to a hearing before an impartial trial board (the "Board") of officers before departmental discipline is imposed."

[64] 11 *Del. C.* § 9206: 9209: The chapter shall apply to all law-enforcement disciplinary proceedings throughout the State, conducted by the law-enforcement agencies specified in § 9200(b) of this title.

[65] See *Haden* at *2 "Moreover, this Court has clearly held in prior precedent that it does not have jurisdiction over appeals from decisions rendered pursuant to LEOBOR." *Smith v. Dep't of Pub. Safety of the State of Del.*, 1999 WL 1225250, at *11 (Del. Super. Oct. 29, 1999), *aff'd*, 2000 WL 1780781 (Del. Nov. 30, 2000) and *Wescott v. City of Milford Police*, 1995 WL 465188, at *4 (Del. Super. July 31, 1995).

[66] 11 Del. C. § 9209.

[67] *Stuart Kingson, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

[68] Oceanport Indus., Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892, 904 (Del. 1994).

injury must be "concrete and particularized."[69] The claimant must also show that their injury is redressable, in that it is likely that the requested relief will remedy the alleged violation.[70]

When the Superior Court considered MacColl's standing argument below, it determined:

> Judicial limitations on the scope of LEOBOR review reflect the scope of LEOBOR itself. LEOBOR rights apply in "law enforcement disciplinary proceedings." In other words, LEOBOR exclusively affords due process-based rights to challenge police agency action that results in wrongful terminations. That is why terminated officers typically use federal civil rights statutes and analogous theories to sue police agencies—not the State —for procedural violations. Otherwise, Delaware courts have found only mandamus relief available for LEOBOR violations that result in terminations. Any other claim for a "failure to follow" LEOBOR's "procedural requirements" (*e.g.*, Section 9200(c)(12)) is unreviewable in this Court.[71]

The Court correctly concluded that even if the State had violated the confidentiality provision of LEOBOR, MacColl's purported injury was not redressable:

> Section 9200(c)(12), however, does not specify any remedies for a violation. In fact, LEOBOR "does not contain any remedy provisions" that authorize relief in a Delaware court. It does not even "make any provision for judicial ... review[.]" Administrative law does not either.
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> * * * *

[69] *Lujan v. Defs. Of Wildlife,* 504 U.S. 555, 560 (1992).
[70] *Id.* at 561.
[71] *MacColl,* 2022 WL 2388397, at *8 (citations omitted).

> MacColl's claim is unreviewable. Notably, he did not sue WPD for wrongful termination or for violating LEOBOR's disciplinary procedures. Nor has he sought a writ of mandamus. He did not even move to suppress or allege that the State committed a discovery violation. Instead, he has sought Section 9200(c)(12) relief against the State through dispositive criminal motions. LEOBOR's plain language does not support this approach. Neither does its fundamental purpose. To the contrary, LEOBOR was enacted to address "inconsistencies between departmental procedures" governing officers' disciplinary rights. A ruling that excludes evidence or dismisses an indictment in a criminal case due to a LEOBOR violation would grant a law enforcement officer immunities afforded no other class of citizens anywhere. That treatment also would contradict the legislature's goal of procedural harmony and improperly widen this Court's narrow review of LEOBOR claims.
>
> In short, MacColl attacked the wrong party—the State, rather than WPD. LEOBOR created due process rights enforceable against police agencies only. Assuming the State violated Section 9200(c)(12), MacColl's has no relief under LEOBOR. The Court cannot redress an injury that it cannot review.[72]

The court did not abuse its discretion or otherwise err when it denied this claim.

As noted above, LEOBOR is a statute defining the procedural and substantive rights of officers subject to internal disciplinary proceedings, and applies to protect the rights of officers in those proceedings from encroachment by their agencies.[73] The statute defines a "law-enforcement officer," in pertinent part, as a "police officer who is a sworn member" of one of the several law enforcement

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[72] *Id.* at *8–9.

[73] *Brittingham v. Town of Georgetown,* 113 A.3d 519, 525 (Del. 2015) "LEOBOR was passed in 1985 to provide uniform procedural rights to officers under investigation by their own departments." (citing *Alexander v. Town of Cheswold*, 2007 WL 1849089, *3 (Del. Super. June 27, 2007)).

agencies in the State.[74] It clearly states that the terms and procedures apply to officers who are "under investigation or is subjected to questioning for any reason which could lead to disciplinary action, demotion or dismissal."[75] The applicability provision of LEOBOR reads as follows; "The chapter shall apply to all law-enforcement disciplinary proceedings throughout the State, conducted by the law-enforcement agencies specified in § 9200(b) of this title."[76] LEOBOR does not contemplate enforcement against 3rd party entities, be they State or private actors, and offers no redress for a claimed violation by such 3rd parties.[77]

The confidentiality provision MacColl cites reads as follows: "All records compiled as a result of any investigation *subject to the provisions of this chapter and/or a contractual disciplinary grievance procedure* shall be and remain confidential and shall not be released to the public."[78] The statute is silent as to any redress or remedy. LEOBOR does not contain any provision that would prohibit a law enforcement agency from complying with a lawfully issued Attorney General's subpoena under 29 *Del. C.* § 2504(4), as was the case here. To

[74] 11 *Del. C.* § 9200(b). See also *Miller v. State*, 2010 WL 2861851 at *5 (Del. Super. July 16, 2010): "There remains one potential complicating issue. It is that some of the persons named appear to be or were DSP *civilian* employees. They would not, therefore, be law enforcement persons within the meaning of LEBOR [sic]."
[75] 11 *Del. C.* § 9200(c).
[76] 11 *Del. C.* § 9209.
[77] *Brittingham*, 113 A.3d 519, 525 (Del. 2015)
[78] 11 *Del. C.* § 9200(c)(12) (emphasis added).

the extent that LEOBOR addresses criminal prosecutions, it states as follows: "[i]f the law-enforcement officer under interrogation is under arrest or may reasonably be placed under arrest as a result of the investigation, the officer shall be informed of the officer's rights, including the reasonable possibility of the officer's arrest prior to the commencement of the interrogation."[79]

MacColl was terminated from his position as a sworn law enforcement officer prior to the trial in this case, and thus was not covered by the provisions of LEOBOR in any subsequent criminal prosecution. LEOBOR would give him standing to challenge any procedural or substantive aspect of the law enforcement agency decision to terminate his employment, but not to claim its protections (substantive or procedureal) in an unrelated criminal proceeding initiated by the DOJ.

MacColl seeks to enforce the provisions of LEOBOR against the State without use of any legal authority, statutory provision or recognized principle of law. The agency holding his disciplinary investigation records, WPD, complied with a subpoena issued by the Attorney General's office and provided those records without legal objection. MacColl's claimed "injury" in this case was the State's use of those records in a criminal proceeding and his subsequent conviction based on those statements. The cause of his injury is that WPD violated the

[79] 11 *Del. C.* § 9200(c)(8)

confidentiality provision of LEOBOR; ergo, the proper party to sue for enforcement is WPD, not the State.[80] The State is not bound by LEOBOR nor subject to its procedural or substantive restrictions.[81]

Finally, MacColl argues, in tautological fashion, that the redressibility component of the standing requirement can be established by creating a remedy not contemplated by the statute that would confer standing. This is not so. LEOBOR does not contain remedial provisions, except that improperly obtained evidence cannot be used by a tribunal for a disciplinary action.[82] There is no

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[80] LEOBOR contains one administrative remedial provision excluding the use of improperly obtained evidence in a *disciplinary action* in front of an *agency tribunal. See* 11 *Del. C.* § 9206. It does not contain any provision specifying that evidence obtained, improperly or not, cannot be used by another party.

[81] Although not a direct factual analogue, at least one Court has considered and rejected the use of an law enforcement administrative agency statute to confer standing for a private cause of action. In *Dautovic v. Bradshaw*, 2011 WL 1005432, 800 N.W.2d at *2 -3 (Iowa Ct. App. March 21, 2011): "Under the principle of *expressio unius est exclusio alterius*, because the legislature expressly authorized officers to raise "Bill of Rights" violations in grievance and administrative proceedings, it did not mean to authorize them to raise such violations in direct court actions as well. *See Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) (recognizing and applying the canon *expressio unius est exclusio alterius* to legislative enactments).
Moreover, layered on top of the familiar rule of *expressio unius* is another principle: " '[W]hen a statute grants a new right and creates a corresponding liability unknown at common law, and at the same time points to a specific method for enforcement of the new right, this method must be pursued exclusively.'" *Walthart v. Bd. of Dirs. of Edgewood–Colesburg Cmty. Sch. Dist.*, 667 N.W.2d 873, 878 (Iowa 2003) (quoting *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 155 (Iowa 1996))."

[82] *Mock v. Division of State Police, Department of Safety and Homeland Security*, 2022 WL 1744439, at *4 -5 (Del. Ch. May 31, 2022), citing *Burge v. City of*

provision for judicial appellate review or review under the Delaware Administrative procedures Act (the "APA").[83] This statute is not a vehicle for the suppression of evidence in a criminal trial, but if any course of action was available to MacColl, it would have been the request for a writ of mandamus or injunction to prohibit WPD from engaging in the conduct that caused his claimed injury, i.e., the release of records to the DOJ.[84] MacColl did not avail himself of the available

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Dover, 1987 WL 12311, at *7 (Del. Ch. June 8, 1987) ("The Law-Enforcement Officers' Bill of Rights itself does not contain any remedy provisions, and I need not at this time intimate any view as to what remedies are authorized or appropriate for a good faith violation of its terms, since it is clear that [42 U.S.C. §] 1983 does authorize the ultimate remedy of reinstatement and the award of back pay." (citing *Harkless v. Sweeny Indep. Sch. Dist.*, 427 F.2d 319 (5th Cir. 1970), and *Vega v. Civil Serv. Comm'n*, 385 F.Supp. 1376 (S.D.N.Y. 1974)).

[83] *Mock* at *4, citing 29 *Del. C.* § 10161; *Haden v. Bethany Beach Police Dep't*, 2014 WL 2964081, at *2 (Del. Super. June 30, 2014) ("Moreover, this Court has clearly held in prior precedent that it does not have jurisdiction over appeals from decisions rendered pursuant to LEOBOR. Neither LEOBOR nor the [APA] renders appellate rights to law enforcement officers under LEOBOR's purview." (citations omitted)); *Smith v. Dep't of Pub. Safety of State*, 1999 WL 1225250, at *11 (Del. Super. Oct. 26, 1999) ("This Court has previously held that it does not have jurisdiction to hear appeals from decisions rendered by an appeal panel pursuant to LEOBOR because such jurisdiction has not been conferred by either the Constitution or statutes of this State. Moreover, neither of the parties have presented any authority for the existence of an appeal to this Court from decisions rendered pursuant to the Divisional Manual." (citing *Wescott v. City of Milford Police*, 1995 WL 465188, at *4 (Del. Super. July 31, 1995), *as revised* (Jan. 26, 1996))), *aff'd*, 765 A.2d 953 (Del. 2000); *id.* at *11 n.15 ("The Divisional Manual provides for an appeal from the hearing or Appeal Board to the Secretary of Public Safety, but only in cases where suspension exceeds five days." (citing Divisional Manual at p. VII–5–13)).

[84] Delaware Courts have been hesitant to read additional remedies into the provisions of LEOBOR as within the scope of a mandamus action. *See* eg *Brittingham* at *529: "The majority of states have held that "mandamus is not the

procedural vehicles and he cannot ascribe that error to the Court and claim abuse of discretion for failing to create a remedy where none existed.

3. Admission of MacColl's false statements in a prosecution for false statements did not deprive him of his right to fair trial.

MacColl's final claim, that the admission of his false statements to OPS "exceeded the bounds of reason," and thereby denied him his right to a fair trial is simply a retread of his earlier arguments. MacColl does not advance any new basis for making this claim, but asserts without further explanation that the admission of the statements caused him unfair prejudice. His false statements to OPS were relevant to the indicted charges and admissible at trial, and their admission was not unfairly prejudicial.

As noted supra, this Court reviews "a trial court's decision on the admissibility of evidence under an abuse of discretion standard."[85] 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."[86]

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proper remedy to compel the undoing of acts already done or the correction of errors or wrongs already perpetrated...." citing 55 C.J.S. Mandamus § 62.

[85] *Hines v. State*, 248 A.3d 92, 99 (Del. 2021) (citing *Rivers v. State*, 183 A.3d 1240, 1243 (Del. 2018)).

[86] *McCrary v. State*, 290 A.3d 442, 454 (Del. 2023) (citing *Thompson v. State*, 205 A.3d 827, 834 (Del. 2019)).

It is axiomatic that evidence must be relevant to be admissible at trial.[87] The court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[88] Determinations of relevancy and unfair prejudice are "matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion."[89] Unfair prejudice is defined as evidence that has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[90] Excluding relevant evidence under D.R.E. 403 is an "'extraordinary measure' that should be used sparingly.'"[91]

The false statements here were obviously highly probative to the charge of false statement. Most evidence advanced by one party in any adversarial proceeding will be prejudicial to the other party; It does not follow that the

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[87] *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009) (citing D.R.E. 402 (2009)).
[88] D.R.E. 403
[89] *Gallaway v. State*, 65 A.3d 564, 569 (Del. 2013) (quoting *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1366 (Del. 1991)).
[90] *Biddle v. State,* 2023 WL 4876018 at *11 (Del. July 31, 2023) citing *Paikin v. Vigilant Ins. Co.*, 2013 WL 5488454, at *3 n.7 (Del. Super. Oct. 1, 2013) (quoting Advisory Committee's Note, Fed. R. Evid. 403).
[91] *Paikin* at *3, citing *United States v. Meester,* 762 F.2d 867, 875 (11th Cir. 1985), *cert. denied*, 474 U.S. 1024 (1985).

contested evidence is automatically inadmissible.[92] There is no suggestion that the admission of the statements allowed the jury to make a decision on an improper basis. The statements were not cumulative, misleading or confusing. The fact that MacColl's own words were used to convict him does not amount to unfair prejudice. The Court properly admitted the statements, and their admission did not deprive MacColl of a false trial.

[92] *State v. Sullins*, 2007 WL 2083657, at *6 n.26 (Del. Super. July 18, 2007) ("Virtually all evidence is prejudicial-if the truth be told, that is almost always why the proponent seeks to introduce it-but it is only *unfair* prejudice against which the law protects.") (quoting *United States v. Pitrone*, 115 F.3d 1, 8 (1st Cir. 1997)), *aff'd*, 945 A.2d 1168, 2008 WL 880166, at *2 (Del. Apr. 2, 2008) (TABLE).

CONCLUSION

For the foregoing reasons, MacColl's argument that false statements are protected under *Garrity* fails, and the Court did not err in denying his motions for dismissal of the indictment or exclusion of evidence. The Superior Court also correctly held that MacColl had no standing under LEOBOR to assert a violation of confidentiality of OPS files, and the admission of the false statements did not deny MacColl his right to a fair trial. The State respectfully requests that this Court **AFFIRM** the Superior Court's decision.

Respectfully submitted,

/s/ Zoe Plerhoples
Zoe Plerhoples (ID # 5415)
Deputy Attorney General
Division of Civil Rights and Public Trust
Delaware Department of Justice
820 North French St.
Wilmington, DE 19801
302-577-8400

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