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Case Number 530,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

OPENING BRIEF (CORRECTED) OF APPELLANT DELAWARE DEPARTMENT OF CORRECTION

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Jason W. Staib
Jason W. Staib (DE Bar No. 3779)
Deputy Attorney General
Delaware Department of Justice
820 North French Street
Wilmington, DE 19801
Phone: (302) 577-8304

Counsel for Appellant

Date: December 8, 2015

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NATURE OF THE PROCEEDINGS

This case involves and highlights the potential tension between the Superior Court's duty to ensure a criminal defendant receives a fair trial and the equally important and decidedly difficult duty of the Delaware Department of Correction (the "**Department**" or "**DOC**") to maintain order and safety in its prison facilities. At the heart of this case is the thorny question of whether the Superior Court can countermand the Department's classification and housing decisions for the ostensible purpose of safeguarding a pretrial detainee's Sixth Amendment right to assistance of counsel.

The Department appeals from an order of the Superior Court granting, without prior notice to the Department, pretrial detainee Isaiah McCoy's motion to be transferred out of the Secured Housing Unit ("**SHU**") at James T. Vaughn Correctional Center ("**JTVCC**") to general population based on alleged interference with McCoy's right to assistance of counsel. The Department also appeals the Superior Court's denial of the Department's urgent request for reconsideration based on, among other things, McCoy's violent criminal history, his prior escape attempt and his lengthy and disturbing disciplinary history.

The Superior Court, without jurisdiction or authority, granted the motion, and then refused to reconsider it, based not on legitimate attorney-access issues, but rather, on the Superior Court's apparent displeasure with the Department's

classification system and its use of restrictive housing for pretrial detainees, no matter how dangerous. The Department is very concerned by the Superior Court's willingness to transfer a high-risk, maximum-security detainee to general population, a minimum security setting, without giving any weight, much less appropriate deference, to the Department's professional judgment and correctional expertise, and despite the grave safety and security concerns raised by the Department.

SUMMARY OF THE ARGUMENTS

1. The Superior Court has neither jurisdiction nor authority over classification decisions and cannot simply house detainees as it sees fit. The Superior Court's reliance on 10 *Del. C.* § 542(a) was misplaced. That statute does nothing more than memorialize the Superior Court's general supervisory and contempt powers over inferior *judicial officers*. It does not empower the Superior Court to second guess, much less reject outright, the Department's classification and housing determinations – matters which, heretofore, have properly been left to the sound discretion of the Department.

2. Assuming, for the sake of argument, that the Superior Court has jurisdiction and at least some degree of authority over classification and housing, the Superior Court far exceeded the scope of any such authority in this case. The Superior Court improperly rejected the Department's objective risk assessment analysis in favor of its own personal classification philosophy, erroneously relied upon the presumption of innocence, made critical findings about McCoy's mental and physical health that have no support in the record, improperly granted relief in the nature of mandamus with respect to acts committed to the sound discretion of the Department and granted extraordinary and unprecedented relief that was not necessary to redress the alleged (and unproved) Sixth Amendment violation.

3. The Superior Court abused its discretion by denying the Department's request for expedited reconsideration. McCoy's failure to serve the Transfer Motion on the Department or its counsel substantially prejudiced the Department and unfairly limited its ability to respond. The Department, in its request for reconsideration, made a detailed proffer and requested the opportunity to prove that McCoy, contrary to what the Superior Court found, is a violent, dangerous detainee whose transfer to general population poses a grave and serious threat to safety and security. The Superior Court inexplicably refused to consider this critical evidence.

STATEMENT OF FACTS

On June 29, 2012, McCoy, after a jury trial in which he acted *pro se*, was found guilty and convicted of two counts of capital murder and other charges stemming from the May 4, 2010 shooting death of 30-year-old Jeffrey Mumford of Salisbury, Maryland.[1] On July 11, 2012, the jury identified three aggravating circumstances, *including a finding that McCoy was previously convicted of a felony involving the use or threat of force or violence upon another person*, and recommended the death penalty.[2] On October 11, 2012, the trial judge found that the aggravating circumstances outweighed the mitigating circumstances and sentenced McCoy to death.[3]

On January 20, 2015, this Court reversed McCoy's capital murder convictions and vacated the death sentence.[4] As a consequence, McCoy, again a pretrial detainee, was reclassified and reassigned to SHU, a maximum security setting.

On March 17, 2015, the Superior Court appointed counsel for McCoy's retrial, which is scheduled to commence in January 2017.[5] On July 2, 2015, defense counsel sent a letter to David Pierce, the Warden of JTVCC, "reminding"

[1] *McCoy v. State*, 112 A.3d 239, 245-247, 266 (Del. 2015).
[2] *Id*. at 244.
[3] *Id*. at 245.
[4] *Id*. at 271.
[5] App'x at A21, A24.

him of Judge Young's prior opinion in *State v. Sells*[6] and requesting that McCoy be transferred to general population.[7] Copies of that letter were sent only to the prosecutors handling pretrial matters in McCoy's retrial (the "**Prosecutors**").[8] Defense counsel did not copy the Commissioner or the Deputy Attorney General assigned to represent the Department.[9] In response, Warden Pierce called defense counsel and advised that McCoy was housed appropriately.[10]

In late July 2015, defense counsel filed a motion in the criminal case requesting the entry of an order "commanding the DOC to transfer [McCoy] into the general population" (the "**Transfer Motion**").[11] The Transfer Motion alleged violations of McCoy's Sixth Amendment right to assistance of counsel.[12] In terms of legal authority, the Transfer Motion cited only the Superior Court's prior decision in *Sells*.[13] Factually, the Transfer Motion was supported only by a single, conclusory factual allegation: "Defendant's detention in SHU has hindered his ability to participate in the preparation of his defense for him [sic] upcoming trial, by limiting his access to face to face meetings with counsel and his access to the

[6] 2013 WL 1143614, *3 (Del. Super.) (granting motion to relocate filed in criminal case and ordering detainee-defendant transferred from SHU to "a location affording reasonably facile access to counsel").
[7] App'x at A102.
[8] App'x at A103.
[9] *See id*.
[10] App'x at A82.
[11] App'x at A28-A30.
[12] App'x at A29.
[13] *Id*.

law library."[14] The Transfer Motion, like the letter to Warden Pierce, was not served on the Department or its counsel.[15]

On August 17, 2015, the Prosecutors responded to the Transfer Motion with a general denial of the legal and factual assertions contained in the Transfer Motion.[16] The Prosecutors did point out that the defendant in *Sells*, unlike McCoy, did not have "multiple disciplinary infractions documented by the Department."[17]

On August 18, 2015, the Superior Court issued an order (the "**Scheduling Order**") setting a hearing date of August 25, 2015 and directing the parties to address McCoy's Sixth Amendment claims, as well as the reasons for McCoy's placement in SHU.[18] The Scheduling Order was not served on the Commissioner, the Department or the Deputy Attorney General assigned to represent the Department.[19]

On August 25, 2015, the Superior Court convened the hearing on the Transfer Motion. Warden Pierce, at the request of a Prosecutor, attended the hearing to answer any questions the Superior Court had about attorney-access issues.[20] McCoy also was present.

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[14] *Id.*
[15] App'x at A36.
[16] App'x at A38-A39.
[17] App'x at A38.
[18] App'x at A42-A43.
[19] App'x at A76.
[20] Hr'g Tr. 2:10-2:15, App'x at A45.

The Superior Court's first question concerned the "status issue" – that is, whether there is "any reason for [] McCoy's placement in the SHU other than the indicted charges and the amount of the bond?"[21] In response, Warden Pierce explained that the Department, as part of the classification process, uses a risk assessment tool to identify those offenders who present serious risks to the safety, security and orderly operation of the Department's prison facilities.[22] Warden Pierce testified that relevant factors include not only the severity of the pending charges and bail status but also the offender's age, criminal history, disciplinary history and escape history.[23] Warden Pierce indicated that McCoy's classification was justified based on his age (3 points for being between the ages of 25 and 30),[24] escape history (3 points for escape after conviction),[25] and disciplinary history (5 points for having two or more major violations),[26] including possession of contraband (gang related materials and another inmate's legal work),[27] failure to obey orders,[28] and sexual misconduct.[29] Warden Pierce apparently did not point out that McCoy also received 6 points for his violent criminal history. Critically, those 6 points, combined with his age points, escape history points and disciplinary

[21] Hr'g Tr. 8:1-8:3, App'x at A51.
[22] Hr'g Tr. 9:6-9:8, App'x at A52.
[23] *Id*.
[24] Hr'g Tr. 9:18-10:7, App'x at A52-A53.
[25] Hr'g Tr. 10:15-10:22, App'x at A53.
[26] Hr'g Tr. 11:1-11:9, App'x at A54.
[27] Hr'g Tr. 11:15-11:18, 13:4-13:20, App'x at A54, A56.
[28] Hr'g Tr. 12:8-12:10, App'x at A55.
[29] Hr'g Tr. 11:12-11:13, App'x at A54.

points, were sufficient to warrant a maximum-security designation (17 or more points) regardless of McCoy's pending charges and bail status.

The Superior Court next inquired as to whether arrangements had been made for SHU detainees to have face-to-face meetings with counsel and the ability to exchange documents during those meetings.[30] Warden Pierce responded:

> Your Honor, since previous complaints related to counsel access, we have constructed two professional visitation rooms with face-to-face access with clients and the inmates that are housed in [SHU]. The policy was also changed to allow inmates to bring documents to that face-to-face interaction with their attorney, and to improve the attorney's ability to bring electronic media, such as laptops or other items, in order to show evidence to the defendant in preparation for trial.[31]

Warden Pierce also explained that defense counsel generally are required to schedule meetings on a weekday twenty-four hours in advance, subject to exceptions for a pending deadline, *etc*.[32] Warden Pierce pointed out that he had appointed an administrative specialist to coordinate and facilitate counsel visits.[33]

McCoy's counsel, reluctantly admitted to having been able to meet with McCoy but complained about an alleged lack of privacy during scheduled visits and McCoy's lack of direct access to the law library.[34]

Warden Pierce, in response, explained that, in constructing the new

[30] Hr'g Tr. 16:3-16:6, App'x at A59.
[31] Hr'g Tr. 16:7-16:17, App'x at A59.
[32] Hr'g Tr. 16:18-17:10, App'x at A59-A60.
[33] Hr'g Tr. 17:11-17:22, App'x at A60.
[34] Hr'g Tr. 22:2-22:11, App'x at A65.

visitation rooms in SHU, great care was taken to ensure privacy through the use of solid walls, ceilings and doors.[35] Warden Pierce acknowledged that a correctional officer must, for the safety of visiting attorneys, sit outside of the secure visitation rooms in a position enabling them to visually see (through the glass in the doors) events transpiring in the rooms.[36] Warden Pierce acknowledged that the rooms are not 100 percent sound proof, and that it may be possible for staff to hear something if voices get elevated.[37] Warden Pierce indicated that the use of glass doors and correctional officers to visually observe the visiting rooms is no different than in the compound (general population) at JTVCC.[38] Warden Pierce also clarified that detainees typically are limited to indirect "correspondence access" to the law library, and that McCoy's access was not unique to his classification status.[39]

McCoy, when asked by the Superior Court if he had anything to add, testified that he wanted out of SHU primarily so he could have contact visits with his daughter and the ability to play basketball.[40] Notably, McCoy did not testify or introduce any evidence in support of his Sixth Amendment interference claim.

The Superior Court also used the hearing as an opportunity to explore the

[35] Hr'g Tr. 28:9-28:13, App'x at A71.
[36] Hr'g Tr. 28:13-29:1, App'x at A71-A72.
[37] Hr'g Tr. 29:2-29:7, App'x at A72.
[38] Hr'g Tr. 29:7-29:15, App'x at A72.
[39] Hr'g Tr. 27:23-28:8, App'x at A70-A71.
[40] Hr'g Tr. 24:21-25:1, 25:14 – 25:16, App'x at A67-A68.

conditions of confinement in SHU.[41] Warden Pierce explained that conditions depend on whether a detainee or inmate is identified as having a mental illness.[42] Those with a serious mental illness are eligible for a new SHU program that affords increased out-of-cell time (1 hour per day, 7 days a week).[43] Warden Pierce assumed (correctly) that McCoy was not housed in the new mental health unit and expressed his belief that McCoy receives 3 hours per week out-of-cell time for recreation and showers, plus any time he is out for legal or medical appointments or meetings with counsel.[44]

At the conclusion of the hearing, the Superior Court acknowledged that the Department is entitled to "a lot of flexibility on how to handle things" but indicated that it found the "status issue" very troubling.[45]

On August 28, 2015, the Superior Court granted the Transfer Motion and entered an order (the "**Transfer Order**") directing the Department to relocate McCoy from SHU and immediately place him in "the general population of detainees awaiting trial."[46] The Superior Court did not directly address McCoy's

[41] Hr'g Tr. 18:2-18:4 ("And the actual circumstances in the SHU are essentially solitary confinement, is that right?"), 18:18-18:19 ("What is the confinement period in the single cell?"), App'x at A61.
[42] Hr'g Tr. 18:20-19:3, App'x at A61-A62.
[43] *Id*.
[44] Hr'g Tr. 19:8-19:15, App'x at A62.
[45] Hr'g Tr. 29:23-30:3, App'x at A72-A73; *see also* Hr'g Tr. 27:16-27:19 ("It's the issue of the placement [in SHU], which is extremely highly confined placement on the basis almost exclusively of status. And that troubles me a lot."), App'x at A70.
[46] Trans. Or. at 5. A copy of the Transfer Order is attached hereto as **Exhibit A**.

interference claim or the substantial changes made at SHU. Instead, the Superior Court, with no legal or factual support, simply declared:

> [G]iven the emotional and physical impact that prolonged, solitary placement has had on [McCoy's] Sixth Amendment right to assistance of counsel, the indisputable determination must be to require the immediate relocation of . . . McCoy from SHU to the general population of those individuals who are detained at [JTVCC] because of the inability to provide for a bond pending trial."[47]

In its analysis, the Superior Court utilized its own *ad hoc* classification system for pretrial detainees -- one that depends solely on a subjective assessment of a defendant's "conduct while incarcerated."[48] The Superior Court went on to discount completely McCoy's disturbing sexual misconduct and other serious disciplinary violations.[49] The Superior Court flatly rejected the Department's use of at least three risk assessment factors (age, charge severity and bail status),[50] and ignored altogether McCoy's status as a convicted violent felon and his prior escape attempt.

On September 1, 2015, the Department sought expedited reconsideration of the Transfer Order.[51] The Department stated its strongly held belief that McCoy is a serious threat to safety and security and urged the Superior Court to revisit the

[47] Trans. Or. at 4, Ex. A.
[48] Trans. Or. at 3, Ex. A.
[49] Trans. Or. at 3-4, Ex. A.
[50] Trans. Or. at 3, Ex. A.
[51] App'x at A75-A79.

Transfer Motion because: (a) it was procedurally defective and sought relief that may only be granted in a separate civil proceeding; (b) neither the Department nor its counsel was served with or provided an adequate opportunity to respond to the Transfer Motion; (c) the Transfer Motion was granted on an incomplete and incorrect factual record; and (d) the Transfer Motion presented legal issues concerning the Superior Court's authority that had not been briefed or otherwise adequately addressed.[52]

The Department informed the Superior Court that McCoy has a criminal history of the highest possible severity and a disciplinary record that is much more extensive and troubling than suggested by Warden Pierce and as reflected in the Transfer Order.[53] Specifically, the Department indicated that McCoy has been found guilty of 20 (now 21) rule violations, including 10 (now 11) serious Class 1 violations, since July 2010.[54] The Department further explained that 4 (now 5) of those Class 1 violations were for sexual misconduct involving repeated, intentional and disturbing acts perpetrated exclusively against female correctional officers and nursing staff.[55]

On September 14, 2015, the Superior Court summarily denied the

[52] App'x at A77-A78.
[53] App'x at A78.
[54] *Id*.
[55] *Id*.

Department's request for reconsideration.[56] The Superior Court ignored the Department's offer of proof and disregarded the lack of notice, apparently based on the notion that the "State" (*i.e.*, the prosecution) and the "Department" are synonymous for pleading and notice purposes. This appeal followed.

[56] A copy of the Superior Court's order denying the Department's request for expedited reconsideration is attached hereto as **Exhibit B**.

ARGUMENT

I. THE SUPERIOR COURT LACKS JURISDICTION AND AUTHORITY OVER CLASSIFICATION AND HOUSING.

A. Question Presented.

The threshold issue presented on appeal is whether the Superior Court had subject matter jurisdiction and authority to reclassify McCoy and transfer him to general population. The questions presented in this section of the Argument were alluded to in the Department's request for reconsideration.[57] Even if this issue was not fairly presented to the Superior Court, the questions presented cannot be waived and involve important, unsettled matters of public policy.[58] Critical questions concerning the Superior Court's jurisdiction and authority over classification and housing should be considered in the interest of justice.[59]

B. Scope of Review.

On questions of subject matter jurisdiction, the applicable standard of review by this Court is whether the trial court correctly formulated and applied legal principles.[60] The scope of review is *de novo*.[61]

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[57] App'x at A77 (noting that the Transfer Order "presents a number of critical legal issues that have not been briefed by the parties or addressed by the Court").
[58] *See Sternberg v. O'Neil*, 550 A.2d 1105, 1109 (Del. 1988); *Rickards v. State*, 77 A.2d 199, 202 (Del. 1950).
[59] *See* Supr. Ct. R. 8.
[60] *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).
[61] *Id*.

C. Merits of Argument.

By statute, the Department, not the Superior Court, has exclusive jurisdiction and authority over the classification and housing of individuals committed to the custody of the Department, whether a sentenced inmate or, as in this case, a pretrial detainee awaiting trial.[62]

The Department acknowledges that its jurisdiction and powers are expressly "subject to powers vested in the judicial and certain executive departments and officers of the State."[63] The "subject to" language reflects nothing more than the General Assembly's recognition of certain obvious limitations on the Department's powers.[64] For example, the Department is or arguably may be required to comply with bail release and sentence orders, judicial writs (*e.g.*, writs of habeas corpus or mandamus) and processes (*e.g.*, subpoenas and summonses), and routine orders or requests for transfers necessary for court appearances or competency evaluations. The "subject to" language does not contemplate or provide an independent basis for the type of expansive, unprecedented jurisdiction and authority exercised by the Superior Court in this case.

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[62] *See* 11 *Del. C.* §§ 6504(1), (2) (DOC has "exclusive jurisdiction over the care, charge, custody, control, management, administration and supervision of . . . [a]ll offenders and persons under the custody of the [DDOC]; and [] [a]ll institutions for the custody, correction and rehabilitation of persons committed to its care"); 11 *Del. C.* § 6502 (DOC is "completely responsible for the maintenance, supervision and administration of adult detention and correctional services and facilities of the State").

[63] 11 *Del. C.* § 6504.

[64] Examples of similar orders emanating from within the executive branch include clemency and parole orders.

With one very notable exception, the Superior Court has no statutory or other authority over classification and housing. The Superior Court does have the limited ability, as part of sentencing, to "direct that a certain portion of the term of imprisonment, not exceeding 3 months, shall be in solitary confinement."[65] The remaining universe of classification and housing authority has been vested solely in specialized statutory boards within the Department, the decisions of which are subject to review only by a facility's warden.

The General Assembly, by statute, directed the Department to "classify persons in the several institutions and facilities by the use of 2 separate and distinct classification boards."[66] The General Assembly created those boards -- the Institutional Classification Board (the "**ICB**") and the Institutional Release Classification Board -- and gave them specific duties and powers.[67]

At issue here is the ICB, which the General Assembly tasked with classifying detainees and inmates and promulgating regulations for the classification process.[68] Importantly, the General Assembly granted the Department's wardens, who have direct custody and oversight of detainees and inmates, ultimate classification authority and vested in them the "power to veto

[65] 11 *Del. C.* § 3902.
[66] 11 *Del. C.* § 6527(a).
[67] *See* 11 *Del. C.* §§ 6527(b), (c), 6529.
[68] *See* 11 *Del. C.* § 6529(a).

decisions of the ICB."[69]

The classification decisions of the ICB and facility wardens are guided by Bureau of Prisons Policy 3.3 ("**BOP Policy 3.3**"), a public document containing a system of checks and balances designed to ensure uniformity in decision making, equality in application and compliance with established standards for housing, movement of offenders and the planning and implementation of treatment services.[70] The overarching goal of the policy is to classify detainees and offenders to the least restrictive levels of security and custody needed to ensure the safety of employees, those committed to the Department's custody and the public.[71]

BOP Policy 3.3 directs classification officers and other DOC employees involved in the classification process to a lengthy, detailed instructional handbook.[72] As required by law, the handbook contains an objective, points-based risk assessment tool to assist in the classification and placement of detainees and inmates.[73] The decision-making process for sentenced offenders includes a committee/board structure with varying levels of authority (up to and including the ICB) and rights of appeal.[74] Pretrial detainees are classified using the same risk

[69] *See* 11 *Del. C.* § 6529(d).
[70] *See* BOP Policy 3.3, Art. VI, App'x at A122. BOP Policy 3.3 was not included in the record below but is provided to inmates upon request and has been included in the Appendix for proper context and the convenience of the Court.
[71] *See* BOP Policy 3.3, Art. V, App'x at A122.
[72] *See* BOP Policy 3.3, § III.A, App'x at A129.
[73] *See* 11 *Del. C.* § 6531(a).
[74] *See* BOP Policy 3.3, §§ III.A, III.A.5, App'x at A129, A136.

assessment tool but are classified pursuant to a more informal procedure and have no right of appeal.[75]

The Superior Court cited no statutory or other authority in the Transfer Order. The Superior Court appears to have erroneously relied upon its prior decision in *State v. Gibbs*.[76] That case, like this one, involved a detainee's request to be relocated to a less secure area via motion filed in capital murder proceedings. The defendant in that case asserted that the policies and rules pertaining to attorney-client visits within SHU violated his Sixth Amendment right to counsel.[77] The defendant requested relocation to the less restrictive Maximum Housing Unit ("**MHU**") as a solution.[78] The Superior Court, based on past attorney-access issues, granted the motion and ordered the Department to move the defendant from SHU to "housing that is no more restrictive than the MHU."[79]

The prosecutor who handled the motion in *Gibbs* properly challenged the Superior Court's jurisdiction and authority to make classification and housing decisions. The Superior Court rejected the prosecutor's argument after purporting

[75] *See* BOP Policy 3.3, § III.A.1.d, App'x at A130. Individuals lawfully committed to the custody of the DOC have no constitutional due process right in their classification status. *See Bagwell v. Prince*, 1996 WL 470723, *2 (Del. Supr.) ("It is well-established in Delaware that inmates have no state-created liberty interest in their classification status."); *see also Shockley v. Hosterman*, 2007 WL 1810480, at *3 (D. Del.) (observing that neither Delaware law nor DOC regulations create a liberty interest in an individual's classification within an institution).
[76] 2012 WL 6845687 (Del. Super.) (finding and asserting subject matter jurisdiction and authority over DOC's classification determination and ordering pretrial detainee transferred out of SHU).
[77] *Id.* at *2.
[78] *Id*.
[79] *Id*. at *5.

to find broad statutory power over the Department's classification and housing decisions.[80] The Superior Court cited as the source of that alleged power 10 *Del. C.* § 542(a), which provides:

> The Superior Court shall have full power and authority to examine, correct and punish the contempts, omissions, neglects, favors, corruptions and defaults of all justices of the peace, sheriffs, coroners, clerks and other officers, within this State.

Section 542(a) is a limited grant of jurisdiction and supervisory power over inferior courts and other *judicial branch officers*. The statute was "founded . . . in the idea that the mal practice of such inferior tribunals, acting under the supervision of that court, was a contempt of its authority, as the court having general supervision of the administration of justice."[81] Section 542(a) is not a grant of plenary jurisdiction and power over *executive branch officials* and, on its face, does not apply to agencies, much less an executive branch agency such as the Department.

Executive branch officials are not "other officers" within the meaning of Section 542(a). Section 542(a) has been invoked almost exclusively to address omissions and neglects of judicial officers.[82] Section 542(a) has been used to

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[80] *Id*. at *2.
[81] *Maryland & Olive Avenues Neighborhood Ass'n, Inc. v. Mayor & City Comm'rs of Rehoboth Beach,* 1995 WL 654082, at *6 (Del. Super.) (citing *King v. Reading*, 5 Del. 399, 400 (Del. Super. 1852)).
[82] *See, e.g., State v. Casto*, 375 A.2d 444, 450, n.6 (Del. 1977) (holding that § 542(a) did not apply absent "some charge" against the justice of the peace of contempt, neglect, or default);

challenge the actions of executive branch officials only few times. In two of those cases, one of which was affirmed by this Court, the courts refused to construe Section 542(a) as providing a basis for challenging executive branch officials' discretionary acts.[83]

Only one reported decision (other than the Superior Court's decision in *Gibbs*) has construed Section 542(a) as granting the Superior Court general supervisory authority over an executive branch official. In that case, *Maull v. Warren*, the court found that it had jurisdiction under Section 542(a) to review disciplinary action taken against a police officer by the Superintendent of the Delaware State Police, from which there was no right of appeal.[84] The precedential value of *Maull* is dubious, as the court's expansive construction and use of Section 542(a) has been examined thoroughly and appropriately rejected.[85]

State v. Insley, 141 A.2d 619, 623 (Del. 1958) ("On its face the first paragraph of this section appears to contemplate a direct proceeding against the offending [justice of the peace] designed to punish him for contempt of court or neglect or default in the performance of his duties."); *In re Tull*, 78 A. 299, 300 (Del. Super. 1910) (determining that the term "other officers" extended to the office of an alderman and sanctioning him with a fine of $5.00 for convicting a boy for an offense not embraced in town charter and without an orderly hearing or plea of guilty). *Cf. Vick v. Dep't of Correction*, 1986 WL 8003, at *1 (Del. Super.) (observing that § 542(a) "would appear to be a plenary grant of power" permitting Superior Court to appoint counsel in a criminal case).

[83] *See Smith v. Dep't of Pub. Safety*, 1999 WL 1225250, at *11 (Del. Super.) (holding that court lacks jurisdiction over and authority to review police disciplinary proceedings because police officials are not "other officers" under § 542(a)), *aff'd*, 765 A.2d 953 (Del. 2000); *Maryland & Olive*, 1995 WL 654082, at *6 (holding that § 542(a) does not provide Superior Court with subject matter jurisdiction or authority to review city manager's certification decision regarding a referendum on a parking permit ordinance).

[84] 1992 WL 114111, *3 (Del. Super.).

[85] *Smith*, 1999 WL 1225250, at *11.

The Superior Court's reliance on Section 542 was erroneous. The General Assembly could not have intended to grant the Superior Court such far-reaching powers over officers and agencies of co-equal branches of government.

II. THE SUPERIOR COURT COMMITTED LEGAL ERRORS, MADE IMPROPER FACTUAL FINDINGS AND ABUSED ITS DISCRETION IN RECLASSIFYING AND HOUSING McCOY.

A. Question Presented.

The second issue presented is whether the Superior Court, assuming it had requisite jurisdiction and authority, committed legal errors, made improper factual findings or otherwise abused its discretion in reclassifying McCoy and ordering him transferred to a minimum security setting. The questions presented in this section of the Argument were fairly presented to the Superior Court in the Department's request for reconsideration.[86] Even if the questions in this section were not fairly presented to the Superior Court, they implicate important safety and security issues and are matters of public policy that should be considered in the interest of justice.[87]

B. Scope of Review.

The scope of review of the Superior Court's decision to reclassify and transfer McCoy is not entirely clear due to the unusual procedural posture of this case. The order, which arose from motion practice in a criminal case, grants final relief in the nature of mandamus and should be construed as such.[88] On appeal in a mandamus action, the applicable standard of review is whether the Superior Court

[86] App'x at A77-A78.
[87] *See Rickards*, 77 A.2d at 202; Supr. Ct. R. 8.
[88] *Sanders v. Danberg*, 2009 WL 3531803, at *1 (Del. Super.) ("Although Petitioner has not used the term 'mandamus,' his action by the nature of the relief sought constitutes a petition for a writ of mandamus, and the Court deems it to be such.").

committed legal error or abused its discretion in the proceedings below.[89] The Superior Court's factual findings may be upheld only if they are "sufficiently supported by the record and are the product[s] of a logical and deductive process."[90]

C. Merits of Argument.

The Superior Court committed critical legal errors, made and relied upon factual findings lacking evidentiary support and abused any discretion it may have had with respect to McCoy's classification and housing. Specifically, the Superior Court: (1) improperly rejected the Department's objective risk assessment system and substituted its own classification methodology; (2) erroneously relied upon the presumption of innocence when reclassifying McCoy; (3) improperly made and relied upon conclusory findings about McCoy's mental and physical state that have no support in the record; (4) erred by granting mandamus relief with respect to acts committed to the sound discretion of the Department; and (5) abused its discretion by granting relief that was not needed to address the alleged Sixth Amendment violation. Each of these errors is addressed in detail below.

[89] *Biggins v. Carroll*, 2008 WL 4455555, *1 (Del. Supr.).
[90] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

1. The Superior Court erred by discarding the Department's risk assessment factors and substituting its own classification philosophy.

The Superior Court has taken issue with the Department's classification system and has expressed concerns with what it perceives as unfair housing of detainees in maximum security based solely on "status."[91] This theme echoes throughout the Superior Court's two prior detainee transfer decisions[92] and clearly was the primary driver of the Superior Court's decision with respect to McCoy. The Superior Court addressed its concern by disregarding completely the Department's objective risk assessment tool and adopting its own impromptu classification methodology.

The Superior Court failed to give appropriate deference to the Department's classification and housing authority and expertise. It is well settled that courts are required to afford significant deference to the judgment and expertise of correctional officials in the management of offenders and the administration of prisons.[93] The need for deference is at its zenith where, as here, classification and housing decisions are implicated.[94] Such decisions are at the very core of prison administrators' expertise and raise serious safety and security concerns.[95] Not

[91] Hr'g Tr. 27:16–27:19, App'x at A70.
[92] *See Sells*, 2013 WL 1143614, at *5; *Gibbs*, 2012 WL 6845687, at *5.
[93] *See, e.g., Jones v. N.C. Prisoners' Labor Union, Inc.,* 433 U.S. 119, 126 (1977); *Samans v. Dep't of Corr.*, 2015 WL 1421411, at *2 (Del. Supr.).
[94] *McKune v. Lile*, 536 U.S. 24, 39 (2002).
[95] *Id*.

surprisingly, with the exception of this case, and the Superior Court's similar decisions in *Sells* and *Gibbs*, Delaware courts, including this Court, *unanimously* have refused to second guess or interfere with the Department's classification and housing decisions.[96]

The Superior Court, against the full weight of legal authority, and with no factual basis, rejected outright the Department's use of age, charge severity and bail status as risk assessment factors. The Superior Court's rationale included its belief that the three factors "are items over which a defendant has no control."[97] Inexplicably, the Superior Court further explained that those three factors, while statistically valid, "cannot . . . indicate what is or will be the case with this particular defendant."[98] Additionally, the Superior Court gave little or no weight to McCoy's sexual misconduct and other serious disciplinary violations, and ignored altogether McCoy's violent criminal history and prior escape attempt. Instead, the Superior Court adopted its own classification system for pretrial detainees -- one that depends solely on the Superior Court's subjective evaluation of a defendant's

[96] *See, e.g., Bagwell*, 1996 WL 470723, at *2 (affirming dismissal of action under 42 U.S.C. § 1983 alleging constitutional and state law violations based on offender's classification to medium-high security); *Pinkston v. Delaware Dep't of Corr.*, 2013 WL 6439360, at *2 (Del. Super.) (dismissing mandamus petition challenging maximum security classification); *Phillips v. Dep't of Corr.*, 2004 WL 691769, at *2 (Del. Super.) (dismissing mandamus petition requesting classification to substance abuse program); *Foster v. O'Connell*, 2002 WL 480961, at *2 (Del. Super.) (dismissing mandamus petition requesting reclassification and transfer to new prison); *Robinson v. Taylor*, 1999 WL 459198, at *5 (Del. Super.) (denying mandamus petition for order compelling DOC to revise classification status); *McCoy v. Taylor*, 1998 WL 842322, at *3 (Del. Ch.) (dismissing complaint for injunctive relief against DOC for improper classification).
[97] Trans. Or. at 3, Ex. A.
[98] *Id*.

disciplinary history.

The Superior Court's rejection of the Department's classification system was arbitrary and contrary to law. The General Assembly specifically required the Department to implement and use, to the maximum extent possible, an "objective risk and needs assessment instrument" for the classification and housing of inmates.[99] The Department, as required by law, has developed an objective risk assessment tool that uses various detainee/prisoner attributes (risk factors) at the time of admission to determine the appropriate level of custody.

The Superior Court not only usurped the Department's exclusive statutory classification authority, it also adopted an untested, unproven and purely subjective risk analysis. The Superior Court's actions are troubling. This type of "unguided substitution of judicial judgment"[100] clearly is inappropriate, particularly given the stakes involved.

[99] 11 *Del. C.* § 6531(a).

[100] *Bell v. Wolfish*, 441 U.S. 520, 554 (1979) ("We think that the [courts below] have trenched too cavalierly into areas that are properly the concern of [prison] officials. It is plain from their opinions that the lower courts simply disagreed with the judgment of [prison] officials about the extent of the security interests affected and the means required to further those interests. But our decisions have time and again emphasized that this sort of unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this is inappropriate.").

2. The Superior Court erred by invoking and relying on the presumption of innocence when reclassifying and housing McCoy.

The Superior Court's decision to transfer McCoy from maximum security to general population was premised, in part, on the Superior Court's belief that McCoy should not be held in restrictive housing because McCoy is "presumed innocent while he awaits trials [sic]."[101] The Superior Court's reliance on the presumption of innocence cannot be reconciled with longstanding, unambiguous precedent from the U.S. Supreme Court.

In *Bell v. Wolfish*, the U.S. Supreme Court expressly held that the presumption of innocence is not relevant in determining the substantive rights of a pretrial detainee.[102] As the Court explained:

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. . . . Without question, the presumption of innocence plays an important role in our criminal justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.[103]

[101] Trans. Or. at 1, Ex. A.
[102] *Bell*, 441 U.S. at 533.
[103] *Id*.

Accordingly, the Superior Court's decision to reclassify and transfer McCoy was in error to the extent it was based improperly on the presumption of innocence.

3. The Superior Court's Sixth Amendment analysis and the Transfer Order hinged on factual findings that have no evidentiary support.

The Superior Court was not confronted with a situation where Department practices or policies actually interfered with a detainee's ability to meet or otherwise confer with defense counsel.[104] The Superior Court instead looked to McCoy's mental and physical health, which were not even at issue.

The Superior Court's Sixth Amendment analysis rests entirely on its determination that McCoy's time in SHU had a negative effect on his mental and physical health and hampered his ability to meet or otherwise confer with defense counsel.[105] This critical finding – indeed, the veritable *sine qua non* of the Transfer Order – has no support in the record and was not the product of a logical and deductive process.

The record contains no probative evidence that McCoy suffers from a mental or medical condition, much less one serious enough to render McCoy unable to consult with defense counsel. McCoy did not produce a witness competent to

[104] The Superior Court's two prior detainee transfer decisions, *Sells* and *Gibbs*, were, at least facially, cases dealing with legitimate concerns about the defendants' access to counsel, including difficulties in scheduling meetings, communication and document exchange problems associated with the glass barrier between the attorney and client and lack of privacy. *See Sells*, 2013 WL 1143614, at *1; *Gibbs*, 2012 WL 6845687, at *3-4.
[105] Trans. Or. at 4, Ex. A.

testify about his mental or physical health. Nor did he include his medical chart in the record. The only "evidence" even bearing on this issue is McCoy's self-serving statement that his "mental state has deteriorated" to a point where he is relying on his counsel to make "a lot of decisions."[106]

McCoy's own vague and conclusory statement would not withstand scrutiny at the pleading stage and certainly does not support the Superior Court's finding on the merits of McCoy's Sixth Amendment claim.

4. The Superior Court improperly granted mandamus relief concerning matters committed to the sound discretion of the Department.

The Superior Court's Transfer Order is, in reality, a writ of mandamus directing the Department to house McCoy in the security setting of the Superior Court's choosing. The Superior Court's authority in the context of a mandamus action is not boundless, but rather, is limited to compelling public officials and agencies to perform clear legal duties.[107] The Superior Court may not, of course, utilize the writ to compel an agency or official to perform a discretionary act.[108]

Because the Department's classification and housing determinations are quintessential discretionary decisions,[109] the Superior Court erred as a matter of law by compelling the Department to transfer McCoy to general population against

[106] Hr'g Tr. 4:15 – 4:20, App'x at A47.
[107] *See Clough v. State*, 686 A.2d 158, 159 (Del. 1996).
[108] *See Desmond v. Phelps*, 2012 WL 424891, *1 (Del. Supr.).
[109] *See Israel v. Coupe*, 2015 WL 3717872, *1 (Del. Supr.); *Shah v. Coupe*, 2015 WL 2058990, *2 (Del. Supr.); *Desmond*, 2012 WL 424891, *1.

its better judgment.

5. The Superior Court abused its discretion by granting extreme, unprecedented relief that was not needed to address attorney-access issues.

The Superior Court's decision to reclassify and transfer McCoy was an extreme remedy that went far beyond what was necessary to safeguard McCoy's right to assistance of counsel. The Superior Court could have addressed any legitimate Sixth Amendment concerns by utilizing other, more appropriate means.

This Court, in *Bailey v. State*,[110] addressed at length the process by which a trial court handled similar Sixth Amendment concerns. That case also involved a defendant housed in SHU pending retrial of first degree murder and gun charges.[111] The *Bailey* defendant, like McCoy, filed a motion to be transferred out of SHU based on interference with his right to assistance of counsel.[112] The trial court denied the motion and instead entered a detailed order permitting the defendant unlimited access to his attorney and "liberal telephone privileges."[113] After issues arose, the trial judge ordered JTVCC officials to comply with the prior order and warned that it would give serious consideration to the issuance of a contempt

[110] 521 A.2d 1069 (Del. 1987).
[111] *Id*. at 1072.
[112] *Id*. at 1083. In stark contrast to this case, the *Bailey* defendant actually proved interference – specifically, that prison officials interrupted his phone calls with his attorney and destroyed materials that the defendant had prepared in preparation for his retrial trial. *See id*.
[113] *Id*. at 1084.

citation if there were any more problems with attorney access.[114]

The defendant was again found guilty and appealed on the grounds that he was denied effective assistance of counsel.[115] In rejecting that argument, this Court reviewed in detail the actions taken by the trial court and found that the manner in which the judge handled the defendant's claim of interference, including the warnings about possible contempt, "was exemplary and a model for the consideration of similar claims in the future."[116]

The actions taken in this case were unprecedented and stand in stark contrast to the balanced, thoughtful approach utilized in *Bailey*. The extreme remedy imposed here was not needed to address attorney-access problems. The record below contains no proof of actual interference with McCoy's Sixth Amendment right to assistance of counsel. Even if McCoy had made some showing of interference, which he clearly did not, there was plenty of time (more than a year) to address attorney-access issues through a more rational approach (*à la Bailey*).

[114] *Id*. at 1085.
[115] *Id*. at 1083.
[116] *Id*. at 1085-1086.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION BY REFUSING TO RECONSIDER THE TRANSFER ORDER.

A. Question Presented.

The final issue presented is whether the Superior Court abused its discretion in denying the Department's request for expedited reconsideration of the Transfer Order.[117] The questions presented in this section of the Argument were fairly presented to the Superior Court in the Department's request for reconsideration.[118]

B. Scope of Review.

This Court reviews a trial court's denial of a motion for reargument for abuse of discretion.[119]

C. Merits of Argument.

The proper purpose of a motion for reargument is to request the trial court to reconsider whether it overlooked an applicable legal precedent or misapprehended the law or the facts in such a way as to affect the outcome of the case.[120] The Department made just such a request.

The Department sought reconsideration based on, among other things, McCoy's failure to seek mandamus relief and effect service in the manner required

[117] The motion was made pursuant to Super. Ct. Civ. R. 59(e), as applicable to criminal proceedings pursuant to Super. Ct. Crim. R. 57(d).
[118] App'x at A77-A78.
[119] *See Maddox v. Isaacs*, 2013 WL 4858989, *1 (Del. Supr.).
[120] *See id.*

by law and applicable rules.[121] The Department pointed out that these procedural infirmities, including McCoy's failure to serve the Transfer Motion on the Department or its counsel, substantially prejudiced the Department and unfairly limited its ability to respond.[122] The Department made a detailed proffer and requested the opportunity to prove that McCoy is a violent, dangerous detainee whose transfer to general population poses a grave and serious threat to safety and security.[123]

The Superior Court was unmoved, noting that it had "considered all of the evidence pertaining to the incarceration history of [McCoy], which the State and DOC elected to present at the . . . hearing."[124] The Superior Court also indicated that the hearing followed "ample notice of the entire issue to be heard,"[125] notwithstanding that the Superior Court itself failed to serve the Scheduling Order on the Department or its counsel.

The Superior Court's steadfast refusal to consider critical evidence bearing on safety and security issues clearly was an abuse of discretion and appears to be based, in part, on the erroneous proposition that the "State" (*i.e.*, the prosecution) and the Department are one and the same for pleading and notice purposes.

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[121] *See* 10 *Del. C.* § 564; Super. Ct. Civ. R. 3(a), 5(a), 7(a) and 81(a).
[122] App'x at A76-A77.
[123] The Department indicated that the evidence on reconsideration will show that McCoy has a criminal/escape history of the highest possible severity and a disciplinary history that is much, much more extensive and troubling than suggested in the Transfer Order.
[124] Ex. B.
[125] Ex. B.

CONCLUSION

For the reasons indicated above, the Department respectfully requests that the Transfer Order be reversed and the Superior Court instructed to dismiss the Transfer Motion as legally and factually deficient. Alternatively, the Department requests that the Superior Court's order refusing to reconsider the Transfer Order be reversed and the Superior Court instructed to hold a full and fair evidentiary hearing on the Transfer Motion, with notice of such hearing provided to the Department and its counsel.

STATE OF DELAWARE,
DEPARTMENT OF JUSTICE

/s/ *Jason W. Staib*
Jason W. Staib (Del. Bar No. 3779)
Deputy Attorney General
820 North French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8304

Counsel for Appellant

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