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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL CAPRIGLIONE, Respondent-below Appellant, v. STATE OF DELAWARE, ex rel. KATHLEEN JENNINGS, ATTORNEY GENERAL, Petitioner-below, Appellee.	: : : : : : : : : : : : : :	No.: 138, 2021

ON APPEAL FROM DECISION OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT, MICHAEL CAPRIGLIONE'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Case Name **Page**

Statutes, Rules and Other Authorities

NATURE OF PROCEEDINGS

In April 2021, the Town of Newport, Delaware held municipal elections, for four open seats on the 5-member Board of Commissioners. A total of 7 candidates, including Respondent, Michael Capriglione, had applied to run and were certified as candidates for these positions. (A-73-80). An election was held on April 5, 2021, and Mr. Capriglione was one of the winning candidates, being elected to a two-year term as Commissioner. (A-82-83). Per Town Charter[1] the Commissioners, once constituted, elect a Mayor and Vice-Mayor from among themselves. This took place at the swearing-in and reorganization meeting on April 15, 2021, however Mr. Capriglione was not sworn in with the other winning candidates on that date due to a stay issued by the Superior Court in this matter. (A-43-46; A-83).

The State, *ex rel.* Attorney General, Kathleen Jennings, on April 14, 2021, at 5:01 p.m., filed a "Petition for Writ of *Quo Warranto*." (A-6*ff*, "Petition"). Within that petition was a request that Mr. Capriglione's swearing-in as Town Commissioner—then set for the next day, April 15th--be stayed, pending the outcome of this matter. Following brief argument and written submissions, the Court, on April 15, 2021, approximately one hour before Mr. Capriglione's

1 *See* Charter of the Town of Newport, Article III, re: Mayor and Commissioners. Relevant portions of the Town Charter are attached hereto as Exhibit C.

swearing-in, issued an Order granting the stay, pending resolution of the Article II, §21 challenge. (A-43-46).

The parties submitted simultaneous briefing, as ordered by the court, on April 26, 2021, on the issue of whether Mr. Capriglione's plea to official misconduct, a misdemeanor, constitutes an "infamous crime" under Article II, §21. (A-48*ff*; A-85*ff*). Oral argument was held on April 27, 2021. The Court construed the parties' briefing as cross-motions for summary judgment (*see* Exhibit A at pp. 6-7) and, on May 4, 2021, issued an Opinion and Order granting Petitioner-below, State's, Motion for Summary Judgment, and denying Respondent Capriglione's Motion for Summary Judgment. The court held that Capriglione's plea to misdemeanor "Official Misconduct" constituted an "infamous crime" within the meaning of the Delaware Constitution, and that he was therefore barred from holding any "office of trust, honor or profit under this State." (Exhibit A, Opinion (Op.), at p. 20).

Respondent filed this appeal on May 6, 2021 (D.I. 1) and moved for Expedited Proceedings, pursuant to Supreme Court Rule 25(e). (D.I. 3). This Court granted Respondent's motion and ordered an expedited briefing schedule. (D.I. 5). This is Respondent Capriglione's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

1. The trial court erred as a matter of law by finding that Appellant, Michael Capriglione's guilty plea to official misconduct, a misdemeanor, constituted an "infamous crime" which disqualified him from holding public office pursuant to Article II, Section 21 of the Delaware Constitution, when all Delaware case law interpreting this provision has held that only certain felonies are potentially "infamous" crimes.

2. The trial court further erred by singling out one particular misdemeanor – official misconduct – for treatment as an "infamous" disqualifying crime. Such action would have to be a Legislative determination. In the absence of a clear statutory or constitutional bar, based on existing precedent, it is for the electorate to assess the merits of candidates for office and to determine whether any given candidate possesses the requisite "character" to serve as their representative.

STATEMENT OF FACTS[2]

Michael Capriglione became a police officer for the Town of Newport in December 1977. He was promoted to Police Chief in March 1981.[3] *See* A-53. He tendered his notice of retirement in February 2019. To the best of his recollection, Mr. Capriglione had no internal affairs sanctions or discipline of any significance during his approximately 41 years with the agency. (A-53).

On or about May 19, 2018, Mr. Capriglione's police vehicle, a Tahoe, suffered significant property damage to the rear of the vehicle which occurred, at least in part, due to his backing the vehicle into a pick-up truck in the PD parking lot. (A-53; A-92). The pickup truck suffered no visible damage. (A-53). The previous evening Mr. Capriglione's vehicle had also been parked unattended at several locations, including in the City of Wilmington, where Mr. Capriglione spent several hours visiting his mother in a nursing home after she had taken ill. *Id*. The accident in the PD parking lot had apparently been captured on a surveillance video camera. (A-

2 Because of the expedited proceedings below, there was no "discovery" or factual record developed for this case. Certain facts discussed here were presented to the trial court by counsel, to assist the court with background information, and do not purport to represent the entirety of the factual history between the Parties. *See* A-53-55. The underlying facts as to Mr. Capriglione's actions and plea are largely undisputed, although the parties draw different conclusions from those facts.

3 Pursuant to Town Charter, §10-1, the Police Chief is chosen from the ranks of police officers. The Department has always had approximately 7 officers. Mr. Capriglione did not have a written employment contract as Chief of Police. (A-53).

53; A-92). Mr. Capriglione never actually viewed the video prior to criminal charges being filed against him. (A-53; A-157).

The issue of "deletion" of the video came about because the agency had been having problems with the computer database hosting the Town's then-new video surveillance system, and the vendor gave the Police Department the option of "resetting" the system--in which case two weeks of data would be lost--or attempting to retrieve and retain the existing data. *See* A-120-121; A-157. Mr. Capriglione authorized the "reset" of the system. The State, did not dispute that it was the surveillance company (not Respondent personally or a subordinate officer) who deleted existing video footage, and that it was in the course of resetting the system. (A-10; A-119).

Very shortly after these events, the Attorney General sought and obtained a grand jury indictment against Mr. Capriglione. The indictment that issued, on or about June 4, 2018, charged four offenses (A-16-17):

> Count 1: Failure to Provide Information at the Scene of a Collision, 21 *Del.C.* §4201(b), a Misdemeanor;
> Count 2: Careless or Inattentive Driving, 21 *Del.C.* §4176, a Violation;
> Count 3: Tampering with Physical Evidence, 11 *Del.C.* §1269, a [Class G] Felony;
> Count 4: Official Misconduct, 11 *Del.C.* §1211, a Misdemeanor.

On or about February 8, 2019, the State (DAG Sonia Augusthy) and Mr. Capriglione and his counsel reached a Plea Agreement. (A-18). The State *nolle prossed* the

prosed felony count of "tampering with physical evidence," as well as the motor vehicle count of "failure to provide information." Mr. Capriglione pled guilty to the remaining counts of careless driving and "Official Misconduct" – a motor vehicle violation and misdemeanor, respectively. (A-18). Mr. Capriglione was sentenced to one-year probation. He also agreed to surrender his Council on Police Training certification and not to seek future certification, and agreed to pay restitution for the property damage. *Id*. That concluded the criminal matter.

Two years after this plea, Mr. Capriglione decided to run for the office of Town of Newport Commissioner. In February 2021, the Town issued a "NOTICE" for solicitation of candidates for the vacant Commissioner positions. (A-73-74). Mr. Capriglione submitted his name as a prospective candidate to the Town Manager on March 3, 2021, and his submission was acknowledged the same day. (A-76-77). On or about March 8, 2021, the Town issued a notice regarding the Town's election, to be held on April 5, 2021, which contained the names of all prospective candidates, including Mr. Capriglione. (A-78, 80). Mr. Capriglione filed the required campaign finance form with the Department of Elections and, upon information and belief, the Town complied with standard candidate reporting requirements to the State Department of Elections.

The election was held on April 5, 2021 and Mr. Capriglione was one of the four successful candidates, being elected to a 2-year term. (A-82). Mr. Capriglione

received more votes than any other candidate. (A-153). Election results were certified by the Board of Elections and posted on the Town's website. (A-82). No claims of any election irregularities were raised. The new Commissioners, with the exception of Mr. Capriglione (due to the stay) were sworn in and took the oath of office on April 15, 2021. (A-83). Officers were appointed, pursuant to Town Charter, from among the members sworn in on that date.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY HOLDING THAT A PLEA TO THE MISDEMEANOR CHARGE OF "OFFICIAL MISCONDUCT" WAS A BAR TO HOLDING PUBLIC OFFICE, PURSUANT TO DEL. CONST. ARTICLE II, SECTION 21, WHERE *ALL* DELAWARE PRECEDENT HAS EITHER EXPLICITLY HELD, OR PLAINLY INFERRED THAT MISDEMEANORS DO NOT RISE TO THE LEVEL OF "INFAMOUS CRIMES."

A. Questions Presented.

Whether the Superior Court erred, on the State's petition for *quo warranto,* following Respondent's election to the office of Commissioner for the Town of Newport, by holding that Mr. Capriglione's May 2019 plea to one misdemeanor count of Official Misconduct constituted an "infamous crime," and a constitutional bar from holding office, pursuant to Del. Const., Art. II, §21, when no court in Delaware has ever held that a misdemeanor may constitute an "infamous crime" under this section. This question was preserved by Respondent throughout the proceedings below, including specifically in Respondent's Brief (A-59-69), and at oral argument. (A-140-156; A-165-166).

B. Standard of Review.

In a *quo warranto* proceeding, "the scope of inquiry and decision is limited to a determination of the present right and title of the defendants to the offices they claim." *State ex rel. Craven v. Shaw*, 126 A.2d 542, 552 (Del. Super. 1956), *aff'd sub nom. State ex rel. Craven v. Schorr*, 131 A.2d 158 (1957). Construction of the

meaning of "infamous crimes" within the Delaware Constitution, Article II, §21 (the asserted basis for the *quo warranto*), is a question of law. This Court reviews questions of law *de novo*. *See Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000). This Court reviews issues of constitutional dimension *de novo*. *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996); *CML, V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011).

C. Merits of Argument.

1. The criminal conviction (plea) at issue.

It is undisputed that the only "criminal conviction" in Mr. Capriglione's history is one count of "Official Misconduct" – a misdemeanor. 11 *Del.C.* §1211. Mr. Capriglione pled guilty to that charge (and a moving violation) in a February 8, 2019 Plea Agreement. *See* A-18.

11 *Del.C.* §1211(1), as charged by the State in a June 4, 2018 indictment (A-18), provides:

> A public servant is guilty of official misconduct when, intending to obtain a personal benefit or to cause harm to another person:
>
> (1) The public servant commits an act constituting an unauthorized exercise of official functions, knowing that the act is unauthorized. . . .

In the warrant, at "Count IV. A Misdemeanor," (A-17) the Attorney General alleged—without factual details--that Mr. Capriglione "while being a public servant,

intending to obtain a personal benefit, committed an act, constituting an unauthorized exercise of official functions, knowing that the act is unauthorized."

2. Mr. Capriglione was certified as a candidate, and met all qualifications to serve as Town of Newport Commissioner, under the explicit terms of the Delaware Code and Municipal Charter.

The Delaware Code provides that, for municipal elections, "[c]andidate eligibility shall be established in the town charter." 15 *Del.C.* §7555(a). The Legislature further provides default qualifications, which apply unless otherwise specified in the town charter. As to criminal history, State Code requires that "[a] candidate for municipal government *shall not have been convicted of a felony*." §7555(c)(1) (emphasis added). The Charter of the Town of Newport provides specific "Qualifications for Mayor and Commissioners," including age, citizenship, residency, "qualified voter" status, and also that the candidate "has not been convicted of a felony as that crime is designated by the State of Delaware."[4] Town of Newport Charter, §3-05 (Ex. C). Mr. Capriglione met all of these requirements

[4] A review of the Charters of 58 other municipalities in the State of Delaware shows that "felony" is the standard criminal disqualification from holding office. *See e.g.* http://charters.delaware.gov/. Thirty (30) Municipal Charters are silent as to criminal disqualification (and would therefore default to the 15 *Del.C.* §7555(c)(1) "felony" bar); 20 Charters specifically bar "felons" from taking office; 6 Charters set felony and crimes of "moral turpitude" as a bar; and 2 municipalities have unique standards: Wyoming (felony, moral turpitude, crime of dishonesty, fraud, bribery and embezzlement) and Ellendale (any "crime or misdemeanor" other than a traffic offense). Ellendale appears to be the only Charter in the State that disqualifies from office for conviction of [any] "crime or misdemeanor."

and was thus qualified to run as a candidate for office under the criteria set forth in both State and Municipal codes.

Ample notice to the public and to the State of Mr. Capriglione's candidacy was provided. *See* A-78-81. Newport is required, by 15 *Del.C.* §7555(l) to "submit the names of candidates for each office up for election to the Department office conducting the municipality's election no later than 1 business day following the filing deadlines for the elected position." Mr. Capriglione also filed a Certificate of Intention, as required by 15 *Del.C.* §7555(d). The Town advertised Election information, including the names of candidates, in several locations. At no point during the election process was any issue raised by the Town, the State, the Department of Elections, or the Attorney General, as to Mr. Capriglione's eligibility or qualifications to stand for office as a Commissioner.

3. The trial court had no precedential foundation upon which to base its decision that Mr. Capriglione was constitutionally barred from office, and this determination was in conflict with the entire body of Delaware law which had previously interpreted Article II, Section 21. That caselaw establishes—without exception--that only felony-level crimes qualify for consideration as "infamous crimes" under the Constitutional provision.

The issue before the lower court, on the State's Petition for a writ of *quo warranto* was: "does Mr. Capriglione's plea to a misdemeanor offense of 'Official Misconduct' bar his right to hold public office as an 'infamous crime' under Del. Const. Art. II, §21?" *See* A-56. Only one conclusion can be reached under the well-

established body of caselaw that has considered this issue, and that answer is "no."

Delaware Constitution, Article II Section 21 provides that "[n]o person who shall be convicted of embezzlement of the public money, bribery, perjury or other infamous crime, shall be eligible to . . . hold[] any office of trust, honor or profit under this State."[5] "This section creates a 'disability of citizenship' for persons convicted of 'infamous crimes.'" Randy J. Holland, *The Delaware State Constitution, A Reference Guide,* p. 99 (Greenwood Press, 2002).

Mr. Capriglione has not been convicted of any of the enumerated crimes--"embezzlement of the public money, bribery, [or] perjury." Thus, the only question is whether his misdemeanor conviction for "Official Misconduct" constitutes an "infamous crime" under this section of the Delaware Constitution. Retired Delaware Supreme Court Justice and Constitutional scholar Randy J. Holland, in compiling authorities on Section 21, recognized that "[t]he Delaware Superior Court *has held* that *misdemeanors cannot be infamous crimes*." Holland, *The Delaware State Constitution, supra* at p.99 (emphasis added). Unsurprisingly, a review of Delaware caselaw (Superior and Supreme Court), both prior to and since Justice Holland's 2002 treatise, bears out his conclusion.

The trial court's contrary conclusion below, that the Delaware Superior Court

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5 It is not disputed that the office of Town Commissioner is such an office.

has not "held" that misdemeanors cannot be infamous crimes, but has only so stated in repeated "*obiter dicta*" is in error. *See* Ex. A (Op.) at pp. 9, 14.

The first, and perhaps the clearest, statement interpreting §21 occurred more than 50 years ago, from the Superior Court. In 1970, P.J. Stiftel issued the following as a Bench Opinion:

> *We decide* that an *infamous crime*, as that phrase is used in our Constitution (Art. 2, Sec. 21), *includes only felony convictions*, without deciding that all felony convictions are necessarily infamous.[6]

McLaughlin v. Dept. of Elections and Johnson, 1970 WL 104909, Stiftel P.J. and Christie, J. (Del. Super. 1970) [October 15, 1970] (attached hereto as Exhibit B). On its face, the *McLaughlin* court used the language of a "holding," ("We decide. . . "), not that of *dicta*. The trial court's decision below also states that *McLaughlin* was "reversed" (on other grounds) by this Court in *Fonville v. McLaughlin*, 270 A.2d 529 (Del. 1970). (Op. at fn. 37; p. 10). This also appears to be incorrect.[7]

This Court, in *Fonville*, stated that it was hearing "appeals from the Order of

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6 Respondent characterized this below (and continuing here) as essentially a "felony-plus" test.

7 The procedural history surrounding *McLaughlin* is somewhat confusing—with a number of proceedings occurring in quick succession in October 1970. This history is worth exploring, however, as virtually every subsequent case has built or relied on *McLaughlin/Fonville* in construing Art. II, §21, and creating a consistent body of case law in which some, but not all, felonies (and no misdemeanors) are "infamous crimes."

the Superior Court, dated October 21, 1970[8], holding that John Brice Johnson, a/k/a Johnnie B. Johnson, is entitled to have his name appear on the ballot" for the State General Assembly, apparently because the Superior Court had [on October 13, 1970] "stricken" a plea of guilty to felony grand larceny from 1951. 270 A.2d at 530. The October 21st holding that Johnson was entitled to be on the ballot, is the holding that *Fonville* "reversed" – on the basis that Superior Court's earlier "striking" of the guilty plea, following compliance with probation, did not obliterate "the fact of the conviction." Accordingly, *Fonville* held that "Johnson remains within the ban of Art. 2, s 21of the Delaware Constitution" and was therefore ineligible to hold office "because he stands convicted of an infamous crime." 270 A.2d at 531.

As to the primary question of interest here – "what constitutes an infamous crime?" – this Court in *Fonville* wrote that it "agree[d]" with the Superior Court's "rul[ing] that grand larceny, *a felony*, is an infamous crime within the meaning of Art. 2, s 21." *Id* at 530 (emphasis added). That this Court felt compelled to specifically note that the crime being deemed infamous was "a felony" is instructive and, while not directly affirming the *McLaughlin* bench ruling of October 15, 1970 (deciding that "an infamous crime, as that phrase is used in our Constitution (Art. 2,

8 Respondent has, to date, been unable to locate a copy of the Superior Court's "October 21, 1970" order or decision, but that decision, as described in *Fonville*, was clearly not the October 15, 1970 bench ruling "deciding" that §21's "infamous crime" bar to office encompasses "only felony conviction[s]." (Ex. B).

Sec. 21), includes only felony convictions"), *Fonville* is certainly harmonious with that ruling.

The case which "struck" Johnson's plea to felony grand larceny (under a former statute), is *State v. John Brice Johnson*, 270 A.2d 537 (Del. Super. Oct. 13, 1970) ("*Johnson*").[9] *Johnson* may also shed light on the short bench ruling in *McLaughlin*, 1970 WL 104909 (Ex. B), that issued two days later by the same Judges[10]. In *State v. Johnson*, the State, as part of its opposition to Johnson's motion to "strike" his felony conviction for grand larceny, noted that there was evidence showing that, several months after being placed on probation for grand larceny, Johnson pled guilty to another, unrelated, charge of "larceny" of a motor vehicle—possibly in another jurisdiction, as only an FBI record was available. 270 A.2d at 538. This additional "larceny" charge—addressed in the October 13, 1970 decision, did not affect the motion to strike, but, given the timing, it is possible that it was raised in the election proceedings as another potential bar to office. Assuming that "larceny" was or could be a misdemeanor in Delaware (grand larceny clearly being

9 This case was not located by Respondent's counsel during the lower court proceedings, due to *State v. Johnson* not being electronically linked in Westlaw, as history or otherwise related, to any of the election cases involving John Brice a/k/a "Johnnie" Johnson.

10 *State v. Johnson* was decided by President Judge Stiftel and Judge Christie on October 13, 1970. These same judges authored *McLaughlin v. Dept. of Elections and Johnson* in a civil proceeding on October 15, 1970.

a felony)[11], this could have prompted the Superior Court's ruling in *McLaughlin,* two days after *Johnson,* (which otherwise seems to be without context) to clarify that:

> . . . an infamous crime, as that phrase is used in our Constitution (Art. 2, Sec. 21), *includes only felony convictions*, without deciding that all felony convictions are necessarily infamous.

McLaughlin, *supra,* (October 15, 1970) (emphasis added).

The trial court in the instant case claimed, as evidence that *McLaughlin's* holding was only "*obiter dicta,"* that "a misdemeanor was not before the Court in *McLaughlin*." But the totality of the "Johnnie B. Johnson" decisions does not clearly establish that as a fact, and the Court's issuance of the October 15, 1970 ruling is indeed puzzling if it was only considering a single felony. Further, even if the *McLaughlin* ruling was *dicta,* it would be in the nature of judicial *dictum* and not *obiter dictum*. *Obiter dictum* essentially consists of a "by the way" type of comment in a case, and is not binding precedent. By contrast, judicial *dictum* is an "expression of opinion upon a point . . . deliberately passed upon…though not essential to the disposition of the case." *Wild Meadows MHC v. Weidman*, 2020 WL 3889057, *7

11 *See e.g. Brown v. State*, 233 A.2d 445, 447 (Del. 1967), where this Court noted—in 1967--that "[11 *Del.C.*] 3702 permits a verdict of guilty of petty larceny (a misdemeanor) upon an indictment for grand larceny (a felony) if warranted by the evidence, the only distinction between the two crimes being in the value of the property taken."

(Del. Super. 2020) (citing Humm v. Aetna Cas. And Sur. Co., 656 A.2d 712 (Del. 1995)). "Judicial *dictum* is *entitled to much weight and should be followed* unless it is erroneous." *Id* (emphasis added). It seems beyond dispute that the Oct. 15, 1970 *McLaughlin* "We decide…" ruling, regarding the scope of infamous crimes, was a point "deliberately passed upon" by that court.

From the trial court's – Respondent submits – erroneous characterization of the *McLaughlin* holding as *obiter dicta*, the court below goes on to suggest that subsequent Superior Court cases,[12] which clearly *held* that misdemeanors do not constitute infamous crimes, were decided on shaky ground and should not be followed, because of their reliance on *McLaughlin*. (Op. at 12-14). Respondent disagrees and will discuss these cases *infra*, but believes it is most helpful to the Court to procced with the caselaw analysis chronologically.

The next case which appears to have addressed §21's "infamous crime" provision is this Court's decision in *State ex rel. Wier, Jr., v. Peterson*, 369 A.2d 1076 (Del. 1976). *Peterson* involved a prospective candidate's ability to hold office when he had been previously convicted of "felonious sodomy" and other sexual/assault offenses in Pennsylvania. He was subsequently pardoned for "some

12 *Holloway v. State Dept. of Elections*, 1992 WL 149511 (Del. Super. 1992); *Dorcy v. City of Dover Board of Elections*, 1994 WL 146012 (Del. Super. 1994), *aff'd* 642 A.2d 836 (Del. 1994).

or all" of the offenses. 369 A.2d at 1078. Peterson's qualifications to hold county office were challenged by the Attorney General and the Department of Elections under Article II, §21. *Id* at 1077-78.

This Court in *Peterson* first addressed the question of whether the offenses were "infamous crimes" within the meaning of §21. The Court turned to *Fonville's* holding that "grand larceny, a 'felony'[13]" was an infamous crime. The Court went on to hold that

> [i]t does not follow from [*Fonville*] however, that *Every felony* is necessarily a crime of infamy; on the contrary, the totality of the circumstances in each case must be examined before a determination may be made that *a specific felony* is infamous.

369 A.2d at 1079 (emphasis added). In other words, all infamous crimes are felonies, but not all felonies are infamous crimes. In discussing and expanding on its prior holding in *Fonville*, this Court used the word "felony" (not "crime" or "offense" or "conviction") three times.[14] The Court also cited the language of the Pennsylvania offense, which included the word "feloniously." *Id*. The rest of the decision (pp. 1080*ff*) focused on issues not relevant to the instant case, such as

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13 The single quotes placed by the Court around the word 'felony' in *Peterson* were not found in the original *Fonville v. McLaughlin* decision. *See* 270 A.2d at 530.

14 The Superior Court below erroneously expands the holding in *Peterson,* by saying that it requires courts to examine the "context surrounding *a conviction.*" Ex. A, Op. at p. 17 (emphasis added).

whether a foreign conviction was a "conviction" under §21 (it is) and whether a pardon for the offense(s) restores the defendant's eligibility for office (it does not).

It was in *this* context – when was analyzing the effect of the pardon – that the Court set forth the language so heavily relied upon by the State and the lower court in this matter – that "in our view [Art. II, §21] is essentially a character provision." *Id*. at 1080-81.[15] In engaging in this discussion, the *Peterson* Court had *already* established that an "infamous crime" (felonious sodomy) existed. ***The Court was <u>not</u> setting up a "character test" as a criterion for evaluation of what constitutes an infamous crime. The Court was saying that conviction of an infamous crime is de facto evidence that the candidate does not hold the requisite character to serve in public office.***

The Superior Court below erroneously turned this around--finding that "most importantly, *Peterson's* more general statement about the purpose of §21 transcends the felony-misdemeanor distinction. It makes clear that courts must assess the relevant facts and the context surrounding [any] conviction. . . ." This cannot be gleaned from *Peterson's* holding.[16] *Peterson* applied the *Fonville/McLaughlin* "felony-plus"/totality of the circumstances test to determine whether "*a specific*

15 *Accord In re: Request of the Governor for an Advisory Opinion (Pepukayi)*, 950 A.2d 651 (Del. 2008)(drug offenses committed as a juvenile not "infamous crimes").
16 *See also, infra,* at p. 26 (discussing *Pepukayi*).

felony was infamous." 369 A.2d at 1079. Once it is determined than an infamous *felony* exists, *Peterson* holds that subsequent events such as pardons, "striking" a record of conviction, etc., are of no consequence to the constitutional disqualification, because it is the very fact of having committed an "infamous crime" which is *prima facie* evidence of a failure of character necessary to hold office.[17]

16 years after Peterson, Art. II, §21 was next considered by the Superior Court, in *Holloway v. State Dept. of Elections*, 1992 WL 149511 (Del. Super. 1992). In that case, a challenge was raised as to the qualifications of a candidate for State Representative, who had been previously convicted of multiple counts of personal income tax evasion, attempts to evade or defeat tax, and making false statements – all of which were misdemeanors.[18] The Department of Elections refused to certify Plaintiff's candidacy, citing §21. Plaintiff filed for declaratory relief as to whether his convictions constituted either "perjury" (an enumerated crime under §21) or "infamous crimes." The court answered those questions in the negative. First, the

17 It is, of course, true that any violation of the criminal laws constitutes some mark against character, but not all crimes are disqualifying. The clear consensus of *McLaughlin*, *Fonville*, *Peterson* and *Pepukayi* is that, to rise to the level of an "infamous crime", the offense must not only be a felony, but must be a felony which particularly offends the sensibilities and basic tenets of decency.

18 Mr. Holloway had also been pardoned for these offenses, but after concluding that the misdemeanors did not constitute infamous crimes, the court did not reach the issue of the pardon. It should be noted that *Peterson* had earlier ruled that a pardon did not negate an offense, for purposes of §21.

court rejected DOE's argument that convictions for "false statement", while not "perjury" *per se*, should be considered the equivalent, because they were crimes of "*crimen falsi* and moral turpitude." *Id* at *1. Without an actual conviction for "perjury", the explicit perjury bar of §21 does not apply. *Id*.

The Attorney General similarly argued below, in the instant case, that Mr. Capriglione "lied" to others about the accident[19]; that his actions were "dishonest"; that he potentially "would have . . . lie[d] further," and that restitution was ordered "for his deceitfulness."[20] (A-9-10; A-13; A-93, A-108-109). The State goes as far as to say that the "Delaware Constitution requires that the Court infer he will do it again." (A-109). Such subjective judgments about "deceitfulness"—which the AG admits are not part of the plea agreement (*see* A-137)—as in *Holloway*, do not transform unrelated crimes (or mere allegations) into the crime of "perjury," or into a crime of "infamy" for purposes of §21. *See also* A-139-142.

Holloway properly relied on *McLaughlin*, *Fonville* and *Peterson*, *supra*, in

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19 This claim was solely an argument of counsel, without citation to a factual record. Obviously, facts about the underlying events which Mr. Capriglione would have presented at trial in his defense were never aired, due to the plea agreement. There are also no elements in the Official Misconduct statute itself, including specifically 11 *Del.C.* §1211(1), as pled to in this case—which constitute a crime of "dishonesty."

20 Cash restitution is, of course, not ordered for "deceitfulness." It is compensatory in nature, and here was for value of property damage, which Capriglione agreed to reimburse as part of the plea.

holding that the phrase "infamous crimes" in §21 "includes *only* felony convictions," but that not all felonies are crimes of infamy. *Id* at *2 (emphasis added). *Holloway* therefore held that that "plaintiff's misdemeanor convictions [tax evasion and false statements] were not convictions for 'infamous crimes' as contemplated by the Delaware Constitution." *Id* at *2.

The decision below attempts to undermine the Holloway holding[21] by arguing that it was premised on the "shaky foundation" of the McLaughlin "dictum."[22] (Op. at p. 11-12). However, the trial court also acknowledged that *Holloway* explicitly relied on this Court's decision in *Peterson* for the legal proposition that only *felonies* could be considered and examined as to whether they were "infamous crimes." *See Holloway* at *2. The court below also focused on Holloway's language that "[u]nder the circumstances . . .it must be left to the voters to decide whether plaintiff is fit to govern," as suggesting that the holding is limited to Holloway's personal "circumstances." (Ex. A at p. 12). The court reads too much into this statement. *Holloway* merely appears to be saying that, because there is no constitutional bar, it is up to the voters to decide if Holloway is an appropriate representative, in spite of

21 In discussions at oral argument about the precedential value of the Superior Court cases, Respondent's counsel clearly maintained that at least *Holloway* and *Dorcy, infra*, constituted precedential *holdings* of the Superior Court. *See* A-141-142; 145.

22 *See* discussion of *McLaughlin* constituting a holding or judicial (not *obiter*) *dictum* at pp. 13-17, *supra*.

what we would all agree is a shortcoming of having any criminal background. In no way did the Superior Court in *Holloway* undertake, or advocate, a "totality of the circumstances" examination of the conduct involved in Holloway's misdemeanors or for other misdemeanors which might present themselves in future cases.

Not long after Holloway, the Superior Court again considered the "infamous crimes" provision in *Dorcy v. City of Dover Board of Elections*, 1994 WL 146012 (Del. Super. 1994), *aff'd* 642 A.2d 836 (Del. 1994)[23]. In *Dorcy*, the candidate for municipal office had been convicted in another state of attempted sexual offenses involving a five-year-old child. For unknown reasons, he was allowed to plead to the crime, which would normally be a felony in Ohio, as a misdemeanor. While clearly a morally reprehensible offense, the court did not simply declare the crime "infamous." Rather, the court first explored the limited discussion of Article II, §21 at the 1897 Constitutional debates, but found no clear answer there as to what the

23 For unknown reasons, the trial court opinion (Exhibit A), as well as the State's petition and brief in the proceedings below, does not acknowledge or discuss the fact that the Superior Court opinion in *Dorcy* was actually reviewed and affirmed, one month after its issuance, by the Delaware Supreme Court in *Dorcy v. City of Dover Bd. of Elections*, 642 A.2d 836 (Del. 1994). This Court rested its affirmance on the fact that Dorcy's crime would have constituted a *felony* in Delaware, and did not explicitly reach the Superior Court's exclusion of misdemeanors from the definition of "infamous crime," but had the Court found clear error with this point, particularly in the face of the lower court's expansive discussion of long-standing precedent, it may well have so noted.

delegates intended by the term "infamous crime."

Next, the court turned to the precedents discussed above, *McLaughlin*, *Fonville, Peterson* and *Holloway,* noting the prior cases' consensus that an infamous crime must be a felony, but that not all felonies were infamous crimes. *Dorcy* at *4-5. Specifically, with respect to *Holloway*, *Dorcy* noted that, because Holloway's convictions included falsifications[24], "this Court's prior holding that infamous crimes *do not include misdemeanors* is even more significant." *Dorcy* at *5 (emphasis added). *Dorcy* noted the "potential pitfall" of removing the distinction between felonies and misdemeanors, and attempting to parse whether a particular misdemeanor was a crime of "moral turpitude," and thereby potentially infamous. *Id*.

Ultimately, the *Dorcy* trial court found the candidate ineligible to hold office under §21, because his conduct would have constituted a felony had it been committed in Delaware, and was of such a nature (sexual offenses against a small child) that clearly constituted "moral turpitude". As to the questions of misdemeanors, however, the court held firm:

> In sum, at this time, this Court is unwilling to overturn decisional law in this State and hold that a misdemeanor can ever be an infamous crime barring a person from seeking public office. The *Holloway* holding remains good law.

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24 "*Crimen falsi"* were often historically considered infamous. Respondent here does not concede that his offense of "official misconduct" was, or involved an element of, *crimen falsi*. *See* A-63, fn. 9.

Id at *6.

As it did with *Holloway*, the trial court in this case declined to rely on, and minimized the impact of, *Dorcy* by arguing again that *Dorcy's* holding was *dicta* because it was not considering a misdemeanor.[25] That is incorrect, because initially the court was considering a misdemeanor – Dorcy's Pennsylvania conviction/plea. The court first noted *Holloway's* holding that misdemeanors could not be infamous crimes, but stated "[t]he analysis does not stop with that statement, however." *Dorcy* at *6. Knowing that a misdemeanor would not constitute a bar to office under the caselaw, the court next undertook the step of seeing whether this serious crime equated to a felony under Delaware law, which *could* potentially be disqualifying.[26] Contrary to the trial court's suggestion here, that this somehow undermined the viability of the *McLaughlin/Peterson/Holloway* line of holdings (that only (some) *felonies* could constitute infamous crimes), *Dorcy's* analysis actually reinforces it.

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25 As discussed above, even if the holdings in any of the earlier Superior Court cases were *dicta*, they are in the nature of judicial *dicta*, rather than *obiter dicta*. *See Wild Meadows, supra*, at *8 (use of judicial *dicta* to guide future courts in interpretation is "an exercise that is helpful, not harmful, to the administration of justice."

26 "This Court holds that if the conviction in the foreign jurisdiction, be it state or federal, would have been at the time of commission and conviction a *felony* under Delaware law, it would constitute a potentially disqualifying *felony* under Art. II, § 21." *Dorcy* at *7 (emphasis added). The court went on to again emphasize that "not all felonies" are infamous crimes. *Id*.

Finally, the most recent case that has addressed Art. II, §21 is *In re: Request of the Governor for an Advisory Opinion (Pepukayi)*, 950 A.2d 651 (Del. 2008). This was not an election case, but rather involved a request for advisory opinion on whether a judicial appointee was disqualified from office under Article II, §21. In that case, the appointee—although only 17 years old at the time the crimes were committed—was not arrested until just after he turned 18, and was "charged and convicted as an adult" for drug crimes constituting felonies. *See* 950 A.2d at 652. Citing *Peterson*, this Court went on to apply the "totality of the circumstances" test to these apparent felonies, but held ultimately held that they were not infamous, giving great weight to the fact of Pepukayi's minority at the time the crimes were committed.[27] In sum, *Pepukayi*, is consistent with *Peterson* and other cases discussed herein, and did not change or significantly add to the legal analysis of what constitutes an "infamous crime."

It bears noting that, while the body of Delaware case law which has thoughtfully interpreted Article II, §21 compels a clear answer that misdemeanors

27 *See Pepukayi* at footnote 9, noting *Dorcy's* focus on the status of the offenses at the time they were committed – with minority and the fact that crimes of minors are typically acts of delinquency – as mitigating factors. 950 A.2d at 656-657. The lower court's suggestion here that this Court applied the *Peterson* "totality" test to acts of delinquency is not correct. (Ex. A at p. 16). The *Pepukayi* Court had before it felonies, as adjudicated; however, it saw fit to note the fact that the crimes were committed while Pepukayi was a minor, and *would have been* acts of delinquency, but for the fortuity of his arrest just after he had turned 18. *Id*.

do *not* constitute infamous crimes, the topic of "infamy" has been addressed in other contexts—and, similarly, this designation has been reserved for only the most serious crimes. Interpreting the statutory provision regarding qualifications to serve as an estate administrator—specifically the ability to take an oath—the Court of Chancery has held that "for purposes of [12 *Del.C.*] §1508, the disqualifying crimes are 'infamous crimes,' *in other words, felonies."* *Estate of Trammell*, 2010 WL 692328, *1 (Del. Ch. 2010)(emphasis added), *aff'd sub nom Trammell v. Trammell*, 7 A.2d 485 (Del. 2010). *See also Wilson v. State*, 303 A.2d 638, 640 (Del. 1973) (". . . the crime of kidnapping, which carries a mandatory life sentence, is a crime *infamous in nature (malum in se)* and not merely a species of prohibited conduct (malum prohibitum)") (emphasis added).

4. Misdemeanor official misconduct not constituting an "infamous crime," under Article II, Section 21, any prohibition from public office for conviction of that specific offense would have to be a legislative determination. Absent such a determination, the qualifications and "character" of candidates for office are matters for the electorate to decide.

Intentionally or not, the trial court's holding below that "the purpose of §21 transcends the felony-misdemeanor distinction," and claim that the court "must assess . . . the context surrounding *a conviction*" (Ex. A at p. 17, emphasis added), essentially places *all crimes* (whether misdemeanor or felony) in the State of Delaware as potentially disqualifying offenses for the purpose of holding public

office[28]. This is surely not the plain meaning, purpose or intent of the Delaware Constitution.

Nor did the trial court have the authority to carve out only one misdemeanor from the criminal code for treatment as an "infamous crime." The Superior Court appears to have adopted the Attorney General's argument below that the misdemeanor of "Official Misconduct" is particularly egregious, and therefore should be disqualifying *per se*. (A-11; A-107). The State argued that official misconduct, despite only being a misdemeanor under the criminal code, "is *the* crime that ought to prevent one from holding public office . . . . It is *the* infamous crime. . . ." (A-11, emphasis in original). The Attorney General cited no legal authority for this proposition.

The trial court went even further by attaching additional culpability to the crime because the candidate (Capriglione here)—in the court's words--was "not *merely* a public servant" (Op. at p. 18, emphasis in original), but was a Chief of Police. This "enhancement by occupation" argument finds no support in the caselaw and was disputed by Respondent during questioning at oral argument. (A-145-147).

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28 *See also* Op. at p. 20 "*Peterson* [] provide[s] guidance as to the purpose of §21 and the analysis that the Court must engage in when determining whether a *crime* is 'infamous'" (emphasis added). *Peterson's* language, of course, did not subsume all "crimes", but required an examination of circumstances "before a determination may be made *that a specific felony* is infamous." 369 A.2d at 1079.

The court also appeared to revive a similar argument to that rejected by the Superior Court in *Holloway* – that the official misconduct in Capriglione's case was in the nature of "*crimen falsi"* – a statement Respondent disputes both as a matter of law and fact. While again, no full factual record exists, it appears undisputed that Capriglione authorized the deletion[29] – by a computer repair company – of two weeks of surveillance video, which contained (among a host of other data) video of him accidentally backing into another vehicle in the PD parking lot. Mr. Holloway committed four counts of tax evasion and making false statements. In the face of objectively more serious (and actually dishonest) crimes in *Holloway*, which were not found to be infamous, the trial court below attempts to distinguish this case as more severe because, it claims, Capriglione's conduct, "amounts to a breach of the public trust," again "by virtue of his position." (Op. at 18-19).

While subjective moral judgments may be made in any case, the fact remains that Official Misconduct is a misdemeanor. It applies equally to "public servants," regardless of their position. Police officers are included in the broad class of public servants, but not called out by the statute for any disparate treatment. Official

29 The trial court concedes that such an order (to have the company delete (a time period of) the Department's surveillance video) was an "authorized" act for a Chief, as administrative head of the Department, to undertake. (Ex. A at p. 18). There was never any allegation that Mr. Capriglione's conduct impacted a law enforcement function or the general public.

misconduct involves a public servant "intending to obtain a personal benefit" and "commit[ting] an act constituting an unauthorized exercise of official functions." 11 *Del.C.* §1211(1). The statutory language is broad for a reason—and that is because "official misconduct" can encompass a host of actions and a host of factual scenarios – from petty to serious wrongdoing. Official misconduct may, but need not, involve dishonesty. As conduct becomes more egregious, it may well implicate a separate felony crime and be prosecuted as such.[30] This is not to argue that any act of official misconduct is insignificant, or should be "excused," but it is to highlight the "pitfall" noted in *Dorcy* that removing the bright line between felonies and misdemeanors (which the court in that case declined to do) for the "infamous crime" analysis, would result in the difficult undertaking of parsing the circumstances of misdemeanor-level offenses for an element of "moral turpitude," something the court was "unwilling" to do. *Dorcy*, *supra* at *5.

The felony/misdemeanor distinction aside, Capriglione's conduct does not remotely approach the level of "moral turpitude" described in *Dorcy* (sexual offenses against a child) as constituting a crime of "infamy." The court described moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the

30 The State in this case chose to *nolle pros* a charge of "tampering with physical evidence" (a felony) which it originally charged.

accepted and customary rule of right and contrary to the accepted and customary rule of right and duty between man and man." *Dorcy* at *7-8 (citing cases involving sexual offenses such as *Matter of Christie,* 574 A.2d 845, 854 (Del. 1990), and *Warmouth v. State Bd. of Examiners, Optometry,* 514 A.2d 1119, 1122-23 (Del. Super. 1985)). Essentially, these are crimes that shock the conscience, or are *malum in se*. Like Mr. Holloway's tax evasion and false statements, which did not bar his election to the State Legislature, Mr. Capriglione's conduct, albeit wrongful, was an action personal to him and hardly rises to the level of crimes of "moral turpitude."

Moreover, even if it were generally accepted that "official misconduct" was, *per se*, "the" exceptional misdemeanor offense which should bar one from holding public office—a point not conceded here—such a determination and codification would lie solely with the Legislature. The Legislature has by statute, already set a criminal disqualification threshold for holding municipal office, and has classified only "felonies" as presumptive bars to public office.[31] We must presume that this Legislative enactment is constitutional and harmonious with Article II, §21 and, indeed, the statute harmonizes perfectly with the common law definition of (certain) felonies as "infamous crimes." "[T]he cardinal rule should be noted that every statute must be held valid and constitutional if there is any reasonable basis upon

31 15 *Del.C.* §7555(c)(1); *see also* footnote 4, *supra*, discussing municipal charters.

which to sustain it. . . . '[T]he legislative power is never to be supposed to intend to violate the constitutional restraints which are laid upon it. . . .'" *State ex rel. Craven v. Shaw*, *supra*, 126 A.2d at 552 (*citing Collison v. State ex rel. Green*, 2 A.2d 97, 107 (Del. 1938)).

If the Legislature had wanted to single out the misdemeanor of "official misconduct" as a bar to office, it could have done so in a number of ways – it could amend Article II, §21 to include official misconduct as an enumerated offense; it could amend 15 *Del.C.* §7555(c)(1) to include the offense; it could make official misconduct –or some aspects of it -- a felony, thereby allowing scrutiny of each individual offense for "infamy" under the *McLaughlin/Peterson/Holloway*/*Dorcy* line of analysis. However, at this point, none of these things has occurred. The determination of which candidates fail to meet the "demanding norm"[32] of qualification for office due to past criminal offenses should be made—if not by the electorate itself—then by their duly elected representatives. *See Pepukayi*, *supra*, 950 A.2d at 655 ("we give considerable thought to our General Assembly's enactments that direct us to the manner in which the people's representatives believe Article II, Section 21 should be interpreted today," and at fn. 16 ("we must be wholly cognizant of the legislature's expressions . . . .").

32 Ex. A, Op. at p. 19, citing *Peterson*.

On the record below, it is hard to avoid a conclusion that both Petitioner, and the trial court in granting the writ, imposed a subjective and moralistic judgment as to Mr. Capriglione's behavior and "character" *vis a vis* his entitlement to assume the municipal office to which he was elected by the voters. The State declares that the plea to official misconduct—despite being only a misdemeanor--"reflects character that falls far short of the 'demanding norm'" for public office," and that Mr. Capriglione's alleged "character deficiencies" should be a *de facto* bar to holding office (A-13). In no uncertain terms, the Attorney General declared that "Capriglione flunks our State's character test for public officeholders." *Id*. Failing to articulate exactly what "our State's character test" is,[33] it can only be surmised that the test Mr. Capriglione "flunks" is the Attorney General's subjective judgment of who is fit to hold office.

It should go without saying that allowing one government official – who is also an elected official– to serve as the subjective arbiter of "character and fitness" as to whether or not an elected individual – *not otherwise legally disqualified* – is fit to hold office, is a scenario ripe for potential abuses and inconsistencies. It also

33 No "test" has ever been articulated in the caselaw and, if one is to be inferred, it would be that the candidate not have been convicted of a *felony* involving moral turpitude.

implicates the fundamental right of the people to choose their own representatives.[34] Without a ***clear bar*** of disqualification (whether by Constitution or statute), it is up to the voters to decide if someone is worthy of serving as their representative. *See Holloway, supra*, at *2. That is what happened in Newport on April 5, 2021, and the voters chose Mr. Capriglione to be one of their Commissioners. The Attorney General does not hold a *parens patriae* status to second guess the wisdom of the electorate in the guise of protecting the "public interest." (A-9, Petition, ¶7).

The courts have opined that "[t]he right of a person to be a candidate for public office is a fundamental one that should be restricted only by clear constitutional or statutory language. '[A]ny question or doubts of eligibility of a candidate should be resolved in favor of the candidate.'" *Democratic Party of State v. Dep't of Elections for New Castle Cty.*, 1994 WL 555405, at *6 (Del. Super. 1994), *aff'd,* 650 A.2d 1305 (Del. 1994) (citations omitted). Even while disqualifying Mr. Dorcy for his egregious crime, this Court noted that it was "acutely aware of the fundamental right of citizens in this democracy to be able to seek and hold public office. That right must be jealously and carefully guarded." *Dorcy* at *8.

In addressing another statute regarding "incapacity" of a candidate (unrelated

34 "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

to §21), this Court described its prior holding in *Fonville,* 270 A.2d at 530, as having "constru[ed] the Delaware Constitution's prohibition on officeholders who have been convicted of infamous crimes narrowly because it creates a disability of citizenship," *i.e.* the right to stand for public office. *Sussex Cty. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 423, fn. 26 (Del. 2013).

Barring Mr. Capriglione from assuming the office to which he was rightfully elected by the voters, on the basis of a misdemeanor offense, was not authorized by *Del. Const.* Art. II, §21, nor by another other existing statutory or common law authority in the State of Delaware. As *Holloway* and *Pepukayi* demonstrate, not every candidate or appointee to office is perfect or has an unblemished record. But, that is not what our Constitution demands. The trial court did not have to "like" or approve Mr. Capriglione's conduct of May 2018, or his plea to misdemeanor official misconduct. However, neither the court's, nor the Attorney General's, "disapproval" or subjective censure of the conduct is of any legal import to an official's ability to hold public office, in the absence of a *clear* constitutional or statutory disqualification. That disqualification simply does not exist in this case as to Mr. Capriglione, and the trial court erred in granting Petitioner's writ and depriving Mr. Capriglione of his elected office.

CONCLUSION

For the foregoing reasons, the trial court's grant of the Attorney General's motion for summary judgment on Petition of *quo warranto,* holding that Mr. Capriglione's misdemeanor plea constituted an "infamous crime," under Article II, Section 21 of the Delaware Constitution, was in error. Appellant respectfully requests that this Court **REVERSE** the decision of the trial court and **ORDER** that Mr. Capriglione should be sworn into his elected office forthwith.

Respectfully submitted,

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