



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THEOPALIS K. GREGORY

**Defendant Below,
Appellant,**

v.

STATE OF DELAWARE

**Plaintiff Below,
Appellees.**

No. 85, 2022

**APPEAL FROM THE OPINION
DATED JANUARY 12, 2022 OF
THE NEW CASTLE COUNTY
SUPERIOR COURT IN ID NO.
1909016095**

APPELLANT'S OPENING BRIEF

E. CALVIN HARMON, JR., ESQ.

/s/ E. Calvin Harmon, Jr., Esq.
E. Calvin Harmon, Jr., Esq. ID No.2598
2201-A N. Market St.
Wilmington, DE 19802
(302) 351-4333 telephone
Attorney for Defendant/Appellant.

Dated: June 21, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv-v

NATURE OF THE PROCEEDINGS.....vi

SUMMARY OF THE ARGUMENT.....1

STATEMENT OF FACTS.....3

ARGUMENT.....10

 I. The Superior Court Incorrectly Interpreted the Statutory
 Definition of “Official Functions” in 11 Del. C. § 1211(3)10

 A. Question Presented.....10

 B. Standard of Review.....10

 C. Merits of the Argument.....11

 1. The Superior Court Improperly Defined “Official
 Functions” in a Manner Consistent with
 the Common Law.....13

 2. The Superior Court Failed to Property Resolve
 the Ambiguity in 11 Del. C. §1211(3).....21

 II. The Superior Court Incorrectly Denied Gregory’s Motion
 for Judgment of Acquittal Based on the Sufficiency of the Evidence.....26

 A. Question Presented.....26

 B. Standard of Review.....26

 C. Merits of the Argument.....26

1. The Superior Court Did Not Properly Define “Official Functions” Based on the State’s Evidence.....28

2. The Superior Court Did Not Limit “Official Functions” to an Appropriate Time Based on the State’s Evidence.....30

3. The Superior Court Did Not Satisfy the Burden of Proof for “Official Functions” Based on the State’s Evidence.....32

CONCLUSION.....37

EXHIBIT A – Superior Court’s Order dated January 12, 2022

EXHIBIT B – Superior Court Sentencing Order dated February 11, 2022

TABLE OF AUTHORITIES

Cases

<i>Brown v. State</i> , 967 A.2d 1250 (Del. 2009).....	10, 26
<i>Castro v. State</i> , 266 A.3d 201 (Del. 2021).....	26, 27
<i>Del Tech. & Cmty. College v. State Human Rels. Comm’n</i> , 2017 Del. Super. LEXIS 238 (Del. Super. May 17, 2017).....	21
<i>Doroshov, Pasquale, Krawitz, & Bhaya v. Nanticoke Mem. Hosp., Inc.</i> , 36 A.3d 336 (Del. 2011).....	21
<i>Dowling v. Board of Professional Counselors of Mental Health</i> , 1996 Del. Super. LEXIS 339 (Del. Super. Aug. 13, 1996).....	23
<i>Fasciana v. Elec. Data Sys. Corp.</i> , 829 A.2d 160 (Del. Ch. Feb. 27, 2003).....	13, 17
<i>Howell v. State</i> , 421 A.2d 892 (Del. 1980).....	17, 22, 25
<i>People v. Groskin</i> , 505 N.Y.S.2d 475 (N.Y. App. Div. 1986).....	14, 15
<i>People v. Lucarelli</i> , 737 N.Y.S.2d 247 (N.Y. App. Div. 2002).....	14
<i>People v. Rossi</i> , 415 N.Y.S.2d 21 (N.Y. App. Div. 1979).....	14
<i>Pot-Nets Coveside Homeowners Ass’n v. Tunnell</i> , 2015 Del. Super. LEXIS 256 (Del. Super. May 26, 2015).....	13
<i>Priest v. State</i> , 879 A.2d 575 (Del. 2005).....	10, 26
<i>Smith v. City of Milford Police</i> , 1996 Del. Super. LEXIS 586 (Del. Super. Dec. 19, 1996).....	17, 18
<i>State ex rel. Jennings v. Capriglione</i> , 2021 Del. Super. LEXIS 383 (Del. Super. May 4, 2021).....	17
<i>State v. DeLeo</i> , 356 So. 2d. 306 (Fla. 1978).....	18, 19

<i>State v. Green</i> , 376 A.2d 424 (Del. Super. Jul. 13, 1997).....	24, 25
<i>State v. Keuny</i> , 986 A.2d 703 (N.J. Super. 2010).....	16
<i>State v. Roseman</i> , 2011 N.J. Super. Unpub. LEXIS 2353 (N.J. Super. Sept. 1, 2011).....	15, 16, 32
<i>State v. Schenkolewski</i> , 693 A.2d 1173 (N.J. Super 1997).....	15, 32
<i>Sussex County Dep’t of Elections v. Sussex County Republican Comm.</i> , 2013 Del. LEXIS 29 (Del. 2013).....	10

Statutes

1 Del. C. § 303.....	13, 16, 17, 19
11 Del. C. § 1211.....	1, 2, 6, 7, 8, 10, 11, 13, 17, 18, 19, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 37
NY CLS Penal § 195.00.....	14
<i>Wilmington, Delaware Code of Ordinances</i> § 2-201.....	29
<i>Wilmington, Delaware Code of Ordinances</i> § 2-300.....	28, 29, 33
<i>Wilmington, Delaware Code of Ordinances</i> , Sec. 2-340.....	6

Rules

Del. Super. Ct. Crim. R. 29(a).....	27
-------------------------------------	----

Secondary Authority

63C Am. Jur. 2d <i>Public Officers and Employees</i> § 221 (2022).....	28
63C Am. Jur. 2d <i>Public Officers and Employees</i> § 358 (2022).....	18, 32

NATURE OF THE PROCEEDINGS

On or about September 30, 2019, Appellant Theopolis Gregory (“Gregory” or “Appellant”) was indicted by the State of Delaware for three charges; (1) profiteering, (2) official misconduct under 12 Del. C. § 1211(2), and official misconduct under 12 Del. C. § 1211(3). (A001). Trial was held on November 9, 2021 and concluded on November 15, 2021. (A006). During the trial, the Court granted Gregory’s Motion for Judgment of Acquittal on the profiteering charge. (A006). Gregory moved for a directed verdict on the two misconduct charges, but both were denied. (A006). On or about November 15, 2021, the jury returned a verdict of not guilty for Official Misconduct pursuant to 11 Del. C. § 1211(2) and guilty for Official Misconduct pursuant to 11 Del. C. § 1211(3). (A006).

Following the verdict on November 24, 2021, Gregory filed a Motion for Judgment of Acquittal, on grounds that a reasonable jury could not have found Gregory performed “official functions” under the applicable standard. (A007, A338-43). On or about December 8, 2021, the State filed a response. (A007-A334-50). On or about January 12, 2022, the Superior Court denied Gregory’s motion. (A007, A351-59).

SUMMARY OF THE ARGUMENT

1. The Superior Court committed reversible error by misinterpreting the term “official functions” in 11 Del. C. §1211(3). The Superior Court’s definition of “official functions” was inconsistent with Delaware’s rules of statutory interpretation and is contrary to the interpretation of “official functions” found within the common law of Delaware and other persuasive jurisdictions. To the extent that the Court does not adopt Gregory’s definition of “official functions”, the Superior Court still committed reversible error by failing to identify and resolve the ambiguity in the statutory language of §1211(3) and §1211 as a whole. Within that analysis, the only reasonable interpretation of “official functions” requires a narrower interpretation of the term which is limited to the public officer’s actual and apparent authority, which the Superior Court failed to apply in its final order.
2. The Superior Court committed reversible error in denying Gregory’s Motion for Judgment of Acquittal because the evidence on record does not establish that Gregory performed “official functions” in connection with the correct interpretation of 11 Del. C. §1211(3). Using the applicable standard for “official functions” as stated in this brief, the State did not proffer evidence that Gregory acted with the actual or apparent authority of his office under the Wilmington City Code, thus failing to prove “official functions” as a

matter of law. In denying Gregory's Motion for Judgment of Acquittal, the Superior Court failed to apply the correct interpretation of "official functions" and relied on evidence that was not present in the record. Accordingly, no reasonable jury could have found Gregory guilty of 11 Del. C. §1211(3) and Gregory's Motion for Judgment of Acquittal should have been granted.

STATEMENT OF FACTS

In 2016, Appellant Theopolis K. Gregory (hereinafter “Gregory” or “Appellant”) served as City Council President of the City of Wilmington. (A219). Gregory served as President from 2013 through 2017. (A219-20). Gregory’s service as City Council President followed a long history of public service throughout the City of Wilmington, including non-profit work for the community at large. (A215-227).

Gregory’s non-profit work included the establishment and operation of the Students Disabilities Advocate, Inc. (hereinafter “the SDA”). (A227). This organization, which provided pro bono legal representation for students with disabilities, was established in 1996 and operated until 1998. (A227-230, A352). The SDA was dormant from 1998 until 2016, when Gregory revived the Certificate of Operation with the State of Delaware. (A352). At that time, Gregory was identified within the document as the SDA’s President. (A352).

At the time the SDA Certificate was being revived, Gregory was completing his term as City Council President. (A352). Gregory did not seek re-election for City Council President in 2016; and therefore, Gregory’s term ended on January 3, 2017. (A352). Following the conclusion of Gregory’s term, Hanifa Shabazz (hereinafter “Shabazz”) was the incoming City Council President. (A352). Gregory

and Shabazz were familiar with each other prior to 2016, and Shabazz described Gregory as a “mentor”. (A94).

Per the Wilmington City Code, the City Council is responsible for the appropriation of the City’s budget. During the 2016-2017 fiscal year, the City gave the Council President the discretion to award money from the \$250,000.00 Discretionary Grant Fund (hereinafter “the Fund”) to qualified 501(c)(3) non-profits. (A052-54, A352). As of November 10, 2016, Gregory had committed \$206,400.00 of the Fund. (A054, A097, A352). Once Gregory left office on January 3, 2017, approximately \$43,000.00 was left to Shabazz’s sole discretion as the incoming City Council President. (A054, A097, A352).

THE SDA GRANT

On or about October 18, 2016, Gregory sent an email to the City’s Chief Financial Officer Marchelle Basnight (hereinafter “Basnight”) which contained the corporation information for the SDA. (A054-56). This included the annual franchise tax report and the filing with the Division of Corporation for the entity. (A056). Basnight testified at trial that she believed the email was sent as part of the application process for SDA to receive an appropriation from the Fund once Shabazz took office. (A059). At the time this email was sent, Gregory was still serving as City Council President. (A059).

On or about November 10, 2017, Gregory sent an email to Basnight, and carbon-copied Shabazz. (A063). Within that email, Gregory stated that “\$40,000 of the remaining \$250,000.00 is earmarked for SDA”. (A064). Basnight testified that the email itself or the term “earmarking” had no official meaning, effect or influence on Shabazz’s decision concerning the SDA appropriation. (A078). Shabazz also stated that she received the email, but that the email and the term “earmarking” had no official effect, authority, or influence over her decision. (A98, A108, A131-32).

On or about December 29, 2017, Gregory sent an email to Basnight which contained a draft grant application for SDA. (A067). The application was not complete, and did not contain a specific amount that SDA would receive. (A070). Within that application, the President of the SDA was listed as a third party, and not Gregory. (A071). The application was also intended to be approved by Shabazz once she took office as City Council President. (A071). Basnight also testified that the official application for the SDA was not approved until Gregory left office. (A071).

In January of 2017, an appropriation was approved by Shabazz to the Police Athletic League (hereinafter “the PAL”), who partnered with SDA so that SDA could receive the appropriation. (A120, A140-41). The appropriation passed through the PAL because the SDA’s 501(c)(3) application was still pending. (A120,

A353). After the appropriation was received by the PAL, Gregory received a \$15,000.00 in salary over five months through the SDA. (A353).

Following the grant to the SDA, it was reported through media outlets that Gregory received a personal benefit through the SDA. (A078-79). In response to the report, the Wilmington Ethics Committee brought charges against Gregory for abuse of office. (A165-166). Gregory plead guilty to a violation pursuant to *Wilmington, Delaware Code of Ordinances, Sec. 2-340(f)(3)*, which states that “[n]o elected official, appointed official or city employee shall utilize the influence of his or her office or position for personal pecuniary gain, or to unduly influence the behavior of others, or to avoid the legal consequences of his or her personal conduct”. (A167, A174). Gregory stipulated to a set of facts supporting the charge and received a public reprimand from the Commission. (A167-174).

THE TRIAL

On or about September 30, 2019, Gregory was indicted by the State of Delaware for three charges; (1) profiteering, (2) official misconduct under 12 Del. C. §1211(2), and official misconduct under 12 Del. C. §1211(3). (A006). Trial was held on November 9, 2021 and concluded on November 15, 2021. (A006). During the trial, the Court granted Gregory’s Motion for Judgment of Acquittal on the

profiteering charge. Gregory moved for a directed verdict on the two misconduct charges, but both were denied. (A006).

One of the remaining charges was official misconduct pursuant to 11 Del. C. §1211(3), which states in pertinent part:

A public servant is guilty of official misconduct when, intending to obtain a person benefit or to cause harm to another person...[t]he public servant performs official functions in a way intended to benefit the public servant's own property or financial interests under circumstances in which the public servant's actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions

To support a finding of "official functions" under this statute, the State presented evidence that Basnight had an incomplete draft application for the SDA grant while Gregory was City Council President, which included the emails referenced above to Basnight. (A067-71). The State also presented evidence that Gregory sent an email that \$40,000.00 of the Fund was "earmarked" for the SDA. (A063-78). Finally, the State entered into the record the stipulated facts from the City Ethics Commission, which included a statement that Gregory exerted "a constant push" on Shabazz to approve the grant. (A167-174).

In response, Gregory presented evidence that none of his actions officially reserved the funds for the SDA as outgoing City Council President, and that the evidence presented by the State failed to show Gregory had actual or apparent authority over Shabazz as sitting City Council President. Shabazz testified that the outgoing City Council President could not “ earmark” funds for the incoming President, and that none of Gregory’s actions coerced Shabazz into approving the grant for the SDA. (A98, A108, A131-32). Shabazz further stated that only the President has the authority to disburse funds through the Fund and that Gregory lacked any and all authority to approve grants once he left office. (A113-14, A124). Former City Council Member Michael Brown also testified that the sitting President retained sole discretion to approve grants from the Fund, and that Gregory had no authority to approve or reserve funds for the SDA. (A186-187). Finally, Gregory also testified on his own behalf that there was no official policy for “ earmarking” funds and that he did not intend the email to coerce Shabazz into approving the grant. (A242-244).

THE VERDICT

At the conclusion of evidence, the evidence was submitted to the jury for a verdict. (A006). The Superior Court did not provide any specific instructions regarding the meaning of “ official functions” pursuant to 11 Del. C. §1211(3). (A320-336). On or about November 15, 2021, the jury returned a verdict of not

guilty for Official Misconduct pursuant to 11 Del. C. §1211(2) and guilty for Official Misconduct pursuant to 11 Del. C. §1211(3). (A006).

Following the verdict on November 24, 2021, Gregory filed a Motion for Judgment of Acquittal, on grounds that a reasonable jury could not have found Gregory performed “official functions” under the applicable standard. (A007, A339-43). On or about December 8, 2021, the State filed a response. (A007, A334-40). On or about January 12, 2022, the Superior Court denied Gregory’s motion. (A007, A351-59).

ARGUMENT

I. The Superior Court Incorrectly Interpreted the Statutory Definition of “Official Functions” in 11 Del. C. § 1211(3).

A. Question Presented

Did the Superior Court err as a matter of law by misinterpreting a Delaware statute? This question was preserved at A338-343, and addressed by the Court in its written comments entering the Final Order and Judgment.

B. Standard of Review

This question presents a question of law in connection with the Superior Court’s interpretation of Delaware statutes. A trial court’s interpretation of a statute is a question of law, which an appellate court reviews de novo. *Sussex County Dep’t of Elections v. Sussex County Republican Comm.*, 2013 Del. LEXIS 29, at *4-5 (Del. 2013). The Court reviews the denial of a motion for acquittal under a de novo standard, and the standard of review is “whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of the crime”. *Priest v. State*, 879 A.2d 575, 577 (Del. 2005); *Brown v. State*, 967 A.2d 1250, 1252 (Del. 2009).

C. Merits of the Argument

The Superior Court committed reversible error by misinterpreting the term “official functions” in 11 Del. C. §1211(3). The statute in question, 11 Del. C. §1121(3) states in pertinent part:

A public servant is guilty of official misconduct when, intending to obtain a person benefit or to cause harm to another person...[t]he public servant performs official functions in a way intended to benefit the public servant’s own property or financial interests under circumstances in which the public servant’s actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions

11 Del. C. §1211(3). The Superior Court’s definition of “official functions” was inconsistent with Delaware’s rules of statutory interpretation, and is contrary to the interpretation of “official functions” found within the common law of Delaware and other persuasive jurisdictions. To the extent that the Court does not adopt Gregory’s definition of “official functions”, the Superior Court still committed reversible error by failing to identify and resolve the ambiguity in the statutory language of §1211(3) and §1211 as a whole. In interpreting this ambiguity, the only reasonable interpretation of “official functions” requires a narrower interpretation of the term

which is limited to the public officer's actual and apparent authority, which the Superior Court failed to apply in its final order. Accordingly, the Superior Court's final order must be reversed and remanded with direction to grant Gregory's Motion for Acquittal.

1. The Superior Court Improperly Defined “Official Functions” in a Manner Consistent with the Common Law.

The Superior Court committed reversible error by defining “official functions” in a manner that was inconsistent with Delaware’s rules for statutory interpretation and contrary to the interpretation of “official functions” in the common law of Delaware and other persuasive jurisdictions. When interpreting statutory language, the Court must first obtain the meaning of the words in question. *Pot-Nets Coveside Homeowners Ass’n v. Tunnell*, 2015 Del. Super. LEXIS 256, at *9 (Del. Super. May 26, 2015). Although words and phrases are to be construed according to the common and approved usage of the English language, technical words and phrases which have “acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning”. 1 Del. C. § 303; *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160 (Del. Ch. Feb. 27, 2003)(“Where a statute uses words which have a commonly accepted meaning at common law, absent a showing to the contrary, it is presumed the word is used in the sense which it is understood at common law”). Although the Superior Court’s Order on Judgment for Acquittal correctly states that no Delaware cases have interpreted “official functions” within the context of a prosecution under 11 Del. C. § 1211(3), the Superior Court failed to apply the more appropriate definition found in Delaware, other persuasive jurisdictions, and secondary authority. Stated

more directly, the Superior Court's statement that there are is no "Delaware, secondary, or persuasive authority that defines or sets limits upon what constitutes an 'official function'" is incorrect and requires Gregory's conviction to be vacated. (A357).

Gregory's discussion of "official functions" begins with two persuasive jurisdictions which define the term "official functions" with a specific reference to the public official's actual or apparent authority. The clearest interpretation of "official functions" can be found in the persuasive jurisdiction of New York, which has an official misconduct statute which requires proof of "official functions". NY CLS Penal § 195.00. New York Courts have interpreted "official functions" as only applying to conduct that relates specifically to the real and/or apparent authority of the public official's office. In *People v. Rossi*, 415 N.Y.S.2d 21, 22 (N.Y. App. Div. 1979), the court held that a police officer who received payment to "fix" traffic summons upon payment of money was not performing "official functions" because dismissing traffic summons was not within the scope of a police-officer's real or apparent authority. Similarly, in *People v. Lucarelli*, 737 N.Y.S.2d 247 (N.Y. App. Div. 2002), the Supreme Court of New York held that a police officer who informed a suspect's mother of impending crimes was not performing "official functions" because even though receiving information was part of the officer's actual authority, warning a parent of such information was not. Finally, in *People v. Groskin*, 505

N.Y.S.2d 475 (N.Y. App. Div. 1986), the Court held that a police officer who was withholding conjugal visits in exchange for sexual favors was not performing “official functions” because the grant of conjugal visits was outside the “narrowly confined” duties bestowed upon Defendant under New York law. Each of these cases provides a specific definition of “official functions” which requires an explanation of actual and/or apparent authority of the public official’s office to properly define the scope of the statute’s breadth. Similarly, each of those cases held that “official functions” did not include every action taken by the public official, but only constituted actions which were pursuant to the specific statutory authority given to that public official. That same level of specificity was lacking from the Superior Court’s Final order; and accordingly, constitutes reversible error.

New Jersey’s definition of “official functions” is also instructive, as it provides a narrow definition of “official functions” which is limited to the official authority of the defendant, and not the personal or even unethical conduct the accused may be engaged in outside of defendant’s authority. In *State v. Schenkolewski*, 693 A.2d 1173, 1187 (N.J. Super 1997), the New Jersey Superior Court held that “official functions” must be defined by “the scope of the defendant’s apparent authority” and “include those duties which are imposed by law as well as those which are clearly inherent in and naturally arise from the nature of the office”. New Jersey relies on this specific definition to ensure that official misconduct is not

proven just by showing criminal conduct committed by a person who happens to be a public officer, but that the misconduct specifically relates to the person's official duties. *Id.*; *State v. Roseman*, 2011 N.J. Super. Unpub. LEXIS 2353, at *12 (N.J. Super. Sept. 1, 2011). For example, in *State v. Keuny*, 986 A.2d 703, 712 (N.J. Super. 2010), the Superior Court of New Jersey vacated the conviction of a police officer who was accused of unlawfully withdrawing money from an ATM machine because the unauthorized withdrawal had nothing to do with the exercise of a police officer's official functions. In support of this holding, the court held that the "defendant's oath as a police officer to defend and obey the laws of New Jersey, in of itself, does not make him strictly liable for official misconduct for all crimes he may commit". *Id.* Once again, the interpretation of "official functions" provides more specific detail than the Superior Court's final order because the term "official functions" is more closely related to the authority of the public official's office.

Although the State may argue that these jurisdictions are not binding upon Delaware, there is ample authority supporting the position that 1 Del. C. §303 required the Superior Court to use the common law interpretation of "official functions" over the more colloquial definition used in the Superior Court's final order. First, the New York and New Jersey cases referenced above clearly indicate that the term "official functions" has a particular, legal meaning which requires the Court to limit the term to the public official's actual authority. The inclusion of

actual and apparent authority within this definition lends greater credence to a technical definition under 1 Del. C. §303, as Delaware precedent requires Courts use the common law definition of agency terminology when interpreting statutes. In *Fasciana*, the Delaware Chancery Court held that agency terms require a technical legal interpretation, and not a colloquial interpretation based on common language. *Id.* at 169. In *Fasciana*, the Court held that the term “agent” was most likely used by the General Assembly in “the more precise sense characteristic of its primary common law definition” to best advance the purpose of the underlying corporate statute. *Id.* Gregory would note that the Delaware Supreme Court previously held in *Howell v. State*, 421 A.2d 892 (Del. 1980) that the General Assembly intended 11 Del. C. §1211 to track the common law; and therefore, the Court should have followed that direction in how 11 Del. C. §1211(3) was interpreted.

Gregory would also note that “official functions” has also been interpreted by Delaware Courts to reference the public official’s authority, even just in dicta. In *State ex rel. Jennings v. Capriglione*, 2021 Del. Super. LEXIS 383 (Del. Super. May 4, 2021), the Superior Court held that the Town of Newport’s Chief of Police engaged in an “exercise of official functions” by deleting police surveillance videos because the Chief of Police “had the **authority**” to take that action. *Id.* at *16. (emphasis added). In *Smith v. City of Milford Police*, 1996 Del. Super. LEXIS 586 (Del. Super. Dec. 19, 1996), the Superior Court referenced an ethical trial against a

police officer who was accused of violating 11 Del. C. §1211 for stopping drivers so he could make social arrangements afterward. Within the Court’s discussion, it was mentioned that the police officer was found not guilty under 11 Del. C. §1211 because the officer “did not use his **authority** as a police officer” when stopping the driver to make social arrangements. *Id.* (emphasis added). To that end, there is significant support in Delaware common law that “official functions” required a more technical definition incorporating references to Gregory’s actual and apparent authority.

Finally, Gregory would note that respected secondary authority provides further support for a more specific definition of “official functions” in the context of a criminal official misconduct statute, but for purposes of ensuring Constitutional protections for the criminally accused. The American Jurisprudence states that the “existence of a duty owed to the public is essential to be liable for misconduct in office, for otherwise the offending behavior becomes merely the private misconduct of one who happens to be an official”. 63C Am. Jur. 2d *Public Officers and Employees* §358 (2022). (“There must be a connection between the official misconduct charged and the duties of the office”). The American Jurisprudence also notes that official misconduct statutes must be specific, because a statute that “does not specifically enumerate the types of misconduct prohibited” is unconstitutional vague and subject to discretionary prosecutions. *Id.*; see also, *State v. DeLeo*, 356

So. 2d. 306 (Fla. 1978)(holding that official misconduct statute was unconstitutional for failing to provide persons of “common intelligence fair warning of what is corrupt and outlawed”). To that end, a more specific definition of “official functions” is not only required by 1 Del. C. §303, but also by the Due Process clause of the Delaware Constitution.

This final point is an important component of Gregory’s pursuit of a correct statutory interpretation of “official functions”, as the Superior Court’s definition of “official functions” lacked the Constitutional protections guaranteed to similar defendants in other jurisdictions. There is considerable difference between the Gregory’s definition of “official functions”, which includes specific legal terms like apparent authority, actual authority, and statutory duties, and the Court’s definition of “official functions”, which is simply that “actions taken were related to the job or duty of a person in an office, position or trust” or that the actions had a “close nexus” to the Gregory’s public office. (A356, A359). That difference greatly affects not only Gregory’s conviction, but also how 11 Del. C. §1211 may be considered by public officers in the future and/or used by prosecutors for discretionary enforcement. The Superior Court had a duty to provide an accurate description of the statutory language to ensure both the goal of the legislature and the fundamental fairness provided by Due Process and the Delaware Constitution; and by failing to

do so, the Superior Court committed reversible error which warrants reversal as a matter of law.

2. The Superior Court Failed to Property Resolve the Ambiguity in 11 Del. C. §1211(3).

To the extent this Court would disagree with Gregory's definition of "official functions"; Gregory would argue in the alternative that the Superior Court committed reversible error when it failed to identify "official functions" as an ambiguous term and apply the Delaware rules for statutory interpretation for ambiguous statutes. The Delaware rules for statutory interpretation are "designed to ascertain and give effect to the intent of the legislators, as expressed in the statute". *Del Tech. & Cmty. College v. State Human Rels. Comm'n*, 2017 Del. Super. LEXIS 238, at *3 (Del. Super. May 17, 2017). The court's first step is to determine if the statutory language is ambiguous, by which the court must determine "reasonably susceptible to two different interpretations or if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature". *Id.* at *3-4. If statutory language is ambiguous, the court must consider the statute as a whole, rather than in parts, and the Court reads each section in light of all others to produce a harmonious whole". *Doroshov, Pasquale, Krawitz, & Bhaya v. Nanticoke Mem. Hosp., Inc.*, 36 A.3d 336, 342-43 (Del. 2011).

As a starting point, Gregory would proffer that the term "official functions" is an ambiguous term based on the different meanings asserted within the previous section of this brief. At very least, Gregory has identified a distinct difference in

how the Superior Court interpreted “official functions” compared to how Delaware and other surrounding jurisdictions have interpreted this term for the past forty years. This difference is more than just Gregory disagreeing with the State and the Superior Court, but instead Gregory has made a sufficient showing that “official functions” is susceptible to either a broad or narrow interpretation, depending on whether it references the public officer’s actual or apparent authority. To that end, Gregory would argue that the Superior Court’s failure to identify this term as ambiguous constitutes grounds for remand to provide further explanation on how the statute should be construed.

Within that inquiry, Gregory would again proffer that 11 Del. C. §1211 requires a narrow interpretation of §1211(3) to ensure that the entire statute can be read as a harmonious whole. In support of this argument, Gregory would direct the Court to the case of *Howell v. State*, in which the Delaware Supreme Court affirmed the conviction of a former-school board president who failed to reimburse the Wilmington School District for materials and labor furnished to the president’s home while he was in office. *Howell*, 421 A.2d at 894. Throughout this decision, the Court interpreted 11 Del. C. §1211(2), a separate and distinct charge, which states in pertinent part:

A public servant is guilty of official misconduct when, intending to obtain a personal benefit or to cause harm to another person...the public servant

knowingly refrains from performing a duty which is imposed by law or is clearly inherent in the nature of the office.

11 Del. C. §1211(2). The Court's interpretation of this statute focused on the broad language of subsection (2), and how the General Assembly used the language "a duty which is imposed by law or is clearly inherent in the nature of the office" to expand the liability of public servants outside of their "official powers, functions and duties". *Id.* at 896-97.

This case is important to the "harmonious whole" of §1211 because the broader language in subsection (2) is not found in any other subsection of §1211. In particular, subsection (3) does not state that a public servant is liable for duties "clearly inherent in the nature of the office", but only liable for "performing official functions", which can only be interpreted as a narrower class of conduct compared to subsection (2). *See, Dowling v. Board of Professional Counselors of Mental Health*, 1996 Del. Super. LEXIS 339, at *16-17 (Del. Super. Aug. 13, 1996) ("The legislature is presumed to have inserted every statutory provision for some useful purpose and construction, and when different terms are used in various parts of the statute, it is reasonable to assume that a distinction between the terms was intended"). By way of contrast, the Superior Court's interpretation of "official functions" provides no distinction between subsection (2) and subsection (3), despite the fact that the Superior Court itself recognized the distinction between the two

subsections in its order denying Gregory's Motion for Judgment of Acquittal. (A358). The failure to resolve this distinction constitutes reversal error.

Gregory's arguments concerning the scope of §1211(2) are further supported by the case of *State v. Green*, 376 A.2d 424 (Del. Super. Jul. 13, 1997), which would seemingly hold that the Superior Court's interpretation of "official functions" would not suffice even with the broader language of subsection (2). In that decision, the Superior Court reviewed the indictments of a State Bank Commissioner who accepted loans from a private lender pursuant to 11 Del. C. §1211(2). *Id.* Within that decision, the court explained that the statutory phrase "a duty which...is clearly inherent in the nature of his office", meant "those unspecified duties that are so essential to the accomplishment of the purpose for which the office was created that they are clearly inherent in the nature of the office". *Id.* at 428. The court continued to state that there were limits to how far §1211(2) could reach, holding that this did not include the duty of avoiding unspecified conflicts-of-interest because such a broad definition would "defeat the legislative policy that officers and employees of the State must have the benefit of specific standards to guide their conduct and should be subject to criminal penalties only for violation of those standards that are found to be especially vital to government". *Id.* Once again, it is hard to reconcile the broad standard of "official functions" relied on by the Superior Court in

Gregory's case, when the §1211(2) has both broader text and a narrower interpretation.

In full, the only harmonious reading of §1211(3) is to provide a narrower interpretation compared to the statutory text and progeny of §1211(2). The statutory text suggests that §1211(3) should only consider specific duties of office with a connection to the officer's apparent or actual authority, since the broader language of 1211(2) regarding duties that are "clearly inherent in the nature of his office" is missing. The *Howell* and *Green* decisions further suggest that even 1211(2) has limitations that the Superior Court did not apply in the Gregory's case, since the Superior Court took no limitations on the scope of "official duties" in its final order. Ultimately, this Court must consider subsection (2) to encapsulate a broader scope of duties than subsection (3), and an interpretation which relies solely on Webster's dictionary provides no such clarity on that difference. (A356-359). By failing to make that distinction, the Superior Court committed reversible error that requires reversal as a matter of law.

II. The Superior Court Incorrectly Denied Gregory’s Motion for Judgment of Acquittal Based on the Sufficiency of the Evidence.

A. Question Presented

Did the Superior Court err by denying Gregory’s Motion for Judgment of Acquittal based on the sufficiency of the evidence? This question was preserved at (A338-43), and addressed by the Court in its written comments entering the Final Order and Judgment.

B. Standard of Review

This question presents a question of law in connection with a motion for judgment of acquittal on grounds of the sufficiency of the evidence. *Castro v. State*, 266 A.3d 201, 207 (Del. 2021). The Court reviews the denial of a motion for acquittal under a de novo standard, and the standard of review is “whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of the crime”. *Priest v. State*, 879 A.2d 575,577 (Del. 2005); *Brown v. State*, 967 A.2d 1250, 1252 (Del. 2009).

C. Merits of the Argument

The Superior Court committed reversible error in denying Gregory’s Motion for Judgment of Acquittal because the evidence on record does not establish that Gregory performed “official functions” in connection with the correct interpretation

of 11 Del. C. §1211(3). A Motion for Judgment of Acquittal should be granted where the State offered insufficient evidence to sustain a verdict of guilt. Del. Super. Ct. Crim. R. 29(a); *Castro*, 2020 Del. Super. LEXIS 250, at *3. In reviewing this motion, the Court may consider the evidence “together with all legitimate inferences therefrom...from the point of view most favorable to the State”. *Id.* Based on the previous section of this brief, the State’s evidence at trial does not support the conclusion that Gregory performed “official functions” required to sustain a conviction under 11 Del. C. §1211(3). For purposes of this section, Gregory will rely on the interpretation referenced in this brief; which states that “official functions” must relate to the actual and apparent authority of the public official’s office.

1. The Superior Court Did Not Properly Define “Official Functions” Based on the State’s Evidence.

The Superior Court erred in failing to grant Gregory’s Motion for Judgment for Acquittal because the State failed to submit evidence proving official functions, including the second half of §1211(3), which states that the State must prove that the defendant exercised official functions “under circumstances in which the public servant’s actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions”. As stated above, the appropriate definition of “official functions” requires that the State establish that the conduct taken by the Gregory was within the actual or apparent authority of the City Council President; however, no such showing was made at trial or within the Superior Court’s final order. The State’s failure in meeting this element should have been considered in the Superior Court’s review of Gregory’s Motion for Judgment of Acquittal on sufficiency of the evidence; and accordingly, the Superior Court’s failure to do so constitutes reversible error.

According to Delaware law, the apparent and actual authority of the city council in appropriating the City budget is clearly reserved to the elected City Council and the City Council’s statutory voting authority. A public official’s actual and apparent authority is derived by both the State Constitution, statutes, and ordinances. 63C Am. Jur. 2d *Public Officers and Employees* §221 (2022). Pursuant

to the Wilmington Code of Ordinances and the City Charter, the Wilmington City Council has the duty and authority to adopt the annual operating budget ordinance for the City's fiscal year. *Wilmington, Delaware Code of Ordinances* §2-300. The Code further states that “[n]o action of the city council, except as provided in this title article, shall be valid or binding unless adopted with the concurrence of a majority of all the members of the city council including the president of council”. *Wilmington, Delaware Code of Ordinances* §2-201. This approval is specifically included for appropriations made by the council as part of the budget, stating “[s]pecial funds may not be appropriated or spent without council approving by resolution the receipt of such funds”. *Wilmington, Delaware Code of Ordinances* §2-300.

To that end, the City Council President's actual and apparent authority is derived from those ordinances; and therefore, it was the State's burden to establish that Gregory's "official functions" derived from that power. There was no showing within the State's evidence which defined Gregory's authority as City Council President, or any showing of the second half of §1211(3), which included what circumstances the Gregory should have considered when taking action as City Council president. Both the State and the Superior Court's failure to meet this element constitutes reversible error which warrants reversal as a matter of law.

2. The Superior Court Did Not Limit “Official Functions” to an Appropriate Time Based on the State’s Evidence.

The Superior Court erred in denying Gregory’s Motion for Judgment of Acquittal because it relied on evidence of Gregory’s conduct which were taken clearly outside of the City Council President’s authority. Gregory could only be found liable under §1211(3) for actions completed while Gregory was the City Council President, which limits the scope of this inquiry up until January 3, 2017 when new President Hanifa Shabazz took office. Limiting the scope of “official functions” to this date is not only supported by the interpretation of “official functions” as set forth in Gregory’s Opening Brief, but also in the second half of § 1211(3), which requires that the State prove “circumstances in which the public servant’s actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions”.

Both the State and the Superior Court failed to establish this element, as Gregory’s conviction relies heavily on evidence where Gregory lacked authority as City Council President after January 3, 2017. The Superior Court’s final order states that it relied in the City Ethics Commission’s stipulation that Gregory “pressured” Shabazz after Gregory left office, which took place after Shabazz was the sitting City Council President. (A357). Any actions past that point would not be “official

functions” because Gregory lacked the actual or apparent authority of a public official after that date. To that end, the only available evidence in the record which *could* qualify for Gregory’s “official functions” would be (1) Gregory submitting emails to Basnight as part of a draft application for SDA, and (2) Gregory sending an email indicating that appropriations were “earmarked” for SDA on November 10, 2016. This distinction is important because all evidence of Gregory’s conduct after he left office is irrelevant to §1211(3) because it legally cannot meet the standard of an “official function”, or qualify as “circumstances in which the public servant’s actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions”. Accordingly, the Superior Court’s inclusion of such evidence constitutes reversible error, which requires reversal as a matter of law.

3. The Superior Court Did Not Satisfy the Burden of Proof for “Official Functions” Based on the State’s Evidence.

Turning to the available evidence, Gregory’s conviction under 1211(3) cannot be sustained by Gregory’s act of submitting information to Basnight on behalf of SDA because the City Council President’s actual and/or apparent authority does not include submitting a draft application for an appropriation to the City Council President. The City Council President does not have actual or apparent authority to submit an application for appropriations to the incoming City Council President per the Wilmington City Code or the Delaware State Code, since the President’s “official functions” with the budget is only to vote on its approval with the remaining members. (A051-53). By submitting the draft application while in office, Gregory was acting outside of his role as City Council President, which is a clear distinction made within other jurisdictions and the American Jurisprudence when interpreting the term “official functions”. *Schenkolewski*, 693 A.2d at 1187, *Roseman*, 2011 N.J. Super. Unpub. LEXIS 2353, 63C Am. Jur. 2d *Public Officers and Employees* § 358 (“There must be a connection between the official misconduct charged and the duties of the office”).

This distinction is made more apparent when considering the fact that Gregory was leaving public office and by submitted the application like all other non-profits seeking appropriations, Gregory recognized that he lacked the discretion to

appropriate the funds on by his own power. (A067-71). In other words, it would be impossible to find that the City Council President's "official duties" would include sending a draft application for an appropriation because the City Council President has sole discretion to disburse the funds on his/her own accord. (A054-54, A078, A98, A108, A131-32). The Superior Court failed to recognize the clear distinction between Gregory's "official functions" as outgoing City Council President, and his submission of the draft application for appropriations as a private citizen; and accordingly, that error warrants reversal as a matter of law.

This same distinction is true with Gregory's email dated November 10, 2016, in which Gregory informed Shabazz that he "earmarked" discretionary funds for the SDA, because Gregory lacked any actual or apparent authority to "earmark" funds for the incoming President. First, although the Superior Court and the State put heavy reliance on the word "earmark" in Gregory's November 10, 2016 email, there is also nothing within the Wilmington City Charter which grants the outgoing President the authority to "earmark" funds. The authority to disburse appropriations rests solely with the Councilmembers in office, and must be approved by the specific procedures set forth in *Wilmington, Delaware Code of Ordinances* § 2-300. Gregory also would restate the same argument concerning the draft application, where the City Council President would not need the authority to "earmark" funds because the City Council President had the sole discretion to make appropriations. (A98, A108,

A131-32). Therefore, neither the City Code nor the regular course of the City Council President's business would make "earmarking" an act consistent with the City Council President's actual authority.

Gregory would further note that all testimony on record supported the conclusion that "earmarking" was not within the City Council President's authority. All of the witnesses, including Shabazz, City Councilmember Michael Brown, Gregory, and Chief Financial Officer Marchelle Basnight, stated that the City Council President had no authority to "earmark" funds, nor that the email bound the incoming President to grant the appropriation. (A078). Shabazz herself, the City Council President who approved the SDA appropriation stated that the earmarking email had no official function or influence over Shabazz's appropriation to SDA. (A98, A108, A131-32). The Superior Court's final order states that the jury could reasonably find this action to be an "official function", but this finding goes against the City Code and the testimony of four City employees with decades of government experience. (A98, A108, A131-32, A186-87, A242-244). The jury's verdict is not just inconsistent or illogical, but completely unsupported by the evidence in the record. Therefore, the Superior Court should not have left the decision of whether "earmarking" was an official function to the jury because there was no legal support that this action was within the scope of the City Council President's official duties.

By failing to make this ruling under the applicable standard, the Superior Court committed reversible error.

As a final note, the Superior Court's final order references evidence in support of a finding on "official functions" which is unsupported by the record, and the Superior Court's inclusion of this evidence lends greater support for reversal and remand. On two separate occasions within its final order, the Superior Court referenced that Gregory's term shared the fiscal year with Shabazz; and that this somehow imputed some authority upon Gregory in the approval of the budget. (A352). On page 2 of the order, the Superior Court states "[b]ecause the City renewed the Fund each fiscal year, the \$250,000.00 in discretionary money straddled Mr. Gregory and Ms. Shabazz's terms, which transitioned at the end of the calendar year". (A352). While this may be accurate, this fact misrepresents Gregory's authority over the budget, as all witnesses testified that only the sitting City Council president had the authority to make appropriations out of the discretionary fund, and the Wilmington City Code clearly states that only the sitting Councilmembers have the authority to approve the budget. (A98, A108, A131-32, A186-87, A242-244). Simply put, although Gregory and Shabazz may have straddled the same fiscal year, only Shabazz had actual and/or apparent authority over the SDA appropriation.

Although this may seem like a harmless notation, the Superior Court later states that the "allocation of the total available \$250,000 in funds for the 2017 fiscal

year fell to Mr. Gregory *and* Ms. Shabazz’s discretion because their terms of office straddled the same fiscal year”, which is plainly incorrect from both a factual and legal perspective. (A357). Gregory had no authority or discretion over the available funds per the testimony of all witnesses, the Wilmington City Code, and the actual budget signed solely by Shabazz as City Council President. (A98, A108, A131-32, A186-87, A242-244). The Superior Court’s inclusion and reliance on this information requires remand because this statement, which Gregory would stress is incorrect, constitutes the only alleged exercise of actual authority by Gregory in the final order. To that end, the Superior Court’s final order must be reversed as a matter of law.

CONCLUSION

For the reasons set forth in this Opening Brief, the Superior Court's final order denying Gregory's Motion for Judgment of Acquittal must be reversed. The Superior Court failed to appropriately define the term "official functions" in 11 Del. C. § 1211(3) and failed to apply the evidence on record to the correct standard. Accordingly, the Superior Court's final order must be reversed.

E. CALVIN HARMON, JR., ESQ.

/s/ E. Calvin Harmon, Jr., Esq.
E. Calvin Harmon, Jr., Esq. ID No.2598
2201-A N. Market St.
Wilmington, DE 19802
(302) 351-4333 telephone
Attorney for Defendant/Appellant.

Dated: June 21, 2022