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Case Number 438,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KATHLEEN MCGUINESS, Defendant-Below Appellant, v. **STATE OF DELAWARE,** Plaintiff-Below, Appellee.	No. 438, 2022 On Appeal from the Superior Court of the State of Delaware ID No. 2206000799

APPELLEE STATE OF DELAWARE'S UNSEALED AND CORRECTED ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: May 8, 2023

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NATURE OF THE PROCEEDINGS

The appellant, Kathleen McGuiness ("McGuiness") is the former Auditor of Accounts for the State of Delaware. While in that office as a statewide official, she was charged with five crimes related to her abuse of public office: (1) Conflict of Interest (29 *Del. C.* § 5805); (2) Theft (11 *Del. C.* § 841); (3) Structuring: Noncompliance with Procurement Law (29 *Del. C.* § 2906); (4) Official Misconduct (11 *Del. C.* § 1211(1) or (3)); and (5) Act of Intimidation (11 *Del. C.* 3532).[1]

A New Castle County Grand Jury first indicted McGuiness on October 11, 2021.[2] On March 28, 2022, a different New Castle County Grand Jury returned a superseding indictment which did not allege new crimes, but which only extended dates to incorporate post-indictment conduct for Counts Four (Official Misconduct) and Five (Act of Intimidation) and adding facts supporting Counts Three (Structuring) and Five.[3]

A New Castle County jury was selected on May 26, 2022. After jury selection, McGuiness raised a venue challenge which was briefed the weekend before trial. On May 31, 2022, after discussions with the Court, the State dismissed the New Castle County charges and announced its intent to present its case to the

[1] A31.
[2] *Id.*
[3] A270.

next available Kent County Grand Jury on June 6, 2022.[4] On June 6, 2022, a Kent County Grand Jury returned an identical indictment.[5] On June 7, 2022, McGuiness filed a Rule 21(b) Motion to move venue back to New Castle County, which the State opposed.[6] On June 9, 2022, the Superior Court denied McGuiness' motion and set trial for the following week.

The parties selected a jury and on June 14, 2022, McGuiness proceeded to trial.[7] The jury found McGuiness guilty of Counts One, Three, and Four on July 1, 2022.[8] On August 30, 2022, following a post-trial Motion for acquittal and Motion for New Trial, the Superior Court dismissed Count Three.[9] The Superior Court sentenced McGuiness on October 19, 2022, to one (1) year of Level V concurrent incarceration suspended for one (1) year Level I concurrent probation, a $10,000 fine, and 500 hours of community service.[10] On November 18, 2022, McGuiness filed her notice of appeal. McGuiness then filed a timely 72-page opening brief on March 14, 2023. This is the State's Answering Brief on Appeal.

[4] B263.
[5] A796.
[6] D.I. 4, Case No. 2206000799.
[7] A2602.
[8] A5115-A5116.
[9] B306.
[10] A5145-A5146.

SUMMARY OF THE ARGUMENT

I. Argument I is denied. As the Superior Court repeatedly found, the State did not violate *Brady v. Maryland*. The State provided the complained-of production of digital evidence by the Filter Team—in a searchable format from work computers used by McGuiness and her daughter—more than two (2) months before trial. In addition, the Superior Court barred the prosecution from using any portion of the Filter Team's digital evidence production that had not been previously provided. McGuiness maintained continuous access to her state email and network drives. Any "new" information provided after March 31, 2022 was *de minimis*, and none of it was suppressed by the State, nor was it exculpatory.

II. Argument II is denied. The Superior Court properly applied *Brady* and did not stymie Defendant's use of any affirmative defenses. Selective or vindictive prosecution are not affirmative defenses.

III. Argument III is denied. Sufficient evidence was presented at trial in support Count One (Conflict of Interest).

IV. Argument IV is denied. Count 5 (Act of Intimidation) was properly before the jury and the relevant evidence presented for that indicted charge was not unfairly prejudicial to McGuiness.

V. Argument V is denied. Relevant evidence presented at trial in support of Count Three (Structuring) did not result in "prejudicial spillover."

VI. Argument VI is denied. Counts One (Conflict of Interest) and Four (Official Misconduct) were not unconstitutionally multiplicitous.

VII. Argument VII is denied. The Superior Court did not violate the Delaware Constitution or prejudice Defendant by limiting a repetitious and improper line of cross examination.

VIII. Argument VIII is denied. The Superior Court did not misinterpret 10 *Del. C.* § 3925 in denying McGuiness' request to hire private counsel at public expense.

STATEMENT OF FACTS

In April of 2020, three employees of the Office of the Auditor of Accounts ("OAOA") contacted the Department of Justice ("DOJ") with concerns that they had witnessed the elected Auditor of Accounts, Kathleen K. McGuiness ("McGuiness"), commit misconduct.[11] The employees were McGuiness' new fiscal/business manager, the outgoing Administrative Auditor, and a senior auditor.[12] They feared retaliation for being whistleblowers.[13]

All three OAOA employees expressed concerns regarding office spending, McGuiness' political activity on the job, and the misuse of no-bid contracts.[14] The business manager also knew that McGuiness was monitoring her email.[15]

Several months later, in October of 2020, the then-Administrative Auditor and the new Human Resources ("HR") specialist became the fourth and fifth whistleblowers, respectively, to contact DOJ about the circumstances surrounding the state employment of McGuiness' daughter and her friend.[16] The Administrative Auditor noticed that McGuiness' daughter was still on the payroll despite being

[11] A4153-A4154; A4244; A4354-A4355.
[12] A4421.
[13] A4153-A4154; A4244; A4354-A4355
[14] A4090-A4111.
[15] A4155.
[16] A4423; A4281-A4283; A4294-A4296

away at college, while other casual-seasonal employees did not have work in the earlier stages in the pandemic.[17]

In September of 2020, an OAOA business manager corresponded with McGuiness and her Chief of Staff about an invoice that the Division of Accounting had rejected for a company called "My Campaign Group" (a one-person campaign company run by one of McGuinness' former political consultants).[18] McGuiness then directed her Chief of Staff to use his state-issued credit card to pay a portion of the final invoice ($1,950) directly to the owner of My Campaign Group via PayPal.[19] Had that $1,950 credit card payment been paid through the Division of Accounting, it would have exceeded the $50,000 threshold for My Campaign Group's no-bid contract.[20] The $1,950 payment was later improperly coded as a payment to a second company operated by the same political consultant.[21]

The Chief of Staff then contacted DOJ to express his concerns about McGuiness' conduct.[22] He was afraid to be seen on his phone by McGuiness, and said she read everyone's email.[23] The Chief of Staff reported that the My Campaign Group state contract was a contract for political campaign work at the State's

[17] A3921-A3923; A4288-A4290.
[18] A4190-A4192; A4221: 8-12.
[19] A3985-A3986.
[20] A3138-A3139.
[21] A3979.
[22] A3988-A3989.
[23] A3993-A3994.

expense.[24] The Chief of Staff also said that My Campaign Group received a more lucrative state contract when it morphed into "Innovate Consulting" through a rigged bidding process.[25] When asked if he was aware of any other concerning incidents, the Chief of Staff cited his ethical concerns with the employment of McGuiness' daughter, saying that she did not appear to do any work.[26]

In December of 2020, McGuiness emailed the Department of Technology and Information ("DTI") and asked for the names of "anyone who had requested e-records for anyone in the auditors (sic) office since Jan 2019," not including McGuiness.[27] The Superior Court later recognized this as a potential indicator that she was aware of an investigation against her at that time.[28]

In early 2021, McGuiness placed the Administrative Auditor whistleblower on a performance improvement plan.[29] In March of 2021, McGuiness fired her Chief of Staff, claiming he had engaged in an inappropriate relationship with an employee.[30] The Chief of Staff said that McGuiness initially encouraged the relationship, and at the time he was fired, the relationship had been over for more

[24] A3991 (transcript reads "audio recording played" 11 *Del. C.* § 3507); A4080: 11-19.
[25] A4006-A4010.
[26] A3991 (transcript reads "Audio recording played," pursuant to 11 *Del. C.* § 3507).
[27] A4427.
[28] A4706-A4707.
[29] A4279-A4280.
[30] A3977.

than six months.[31] That same month, Innovate Consulting ceased its business relationship with McGuiness.[32]

In May of 2021, the DOJ's Division of Civil Rights and Public Trust ("DCRPT") reached out to several casual-seasonal employees who experienced a significant decline in available work hours at the beginning of the 2020 pandemic, at the same time that McGuiness' daughter and her friend began working with full/near full casual-seasonal workweeks.[33] Two of the employees were paid less per hour than McGuiness' daughter and McGuiness' daughter's friend.[34] Neither of those employees were permitted to "bank hours" like McGuiness' daughter and friend had done for working at the State Fair.[35] Both employees described less-than-ideal work conditions, including exclusion from employee gatherings, being required to ask permission to go to the bathroom, and being left behind when the power went out.[36]

On June 15, 2021, DCRPT placed a phone call to McGuiness' daughter's friend.[37] Immediately following the conversation, the DCRPT investigator received

[31] A3973; A3974-A3975.
[32] A3653-A3654.
[33] A4464-A4465.
[34] A3290; A3314.
[35] A3314; "banking" hours is the practice of spreading extra hours worked from one pay period over future pay periods.
[36] A3311-A3313.
[37] A3063.

a phone call from a blocked number. Phone records showed the blocked call was made from McGuiness' phone.[38] That same day, the DCRPT investigator received a call from McGuiness' then-Chief Deputy Auditor,[39] who inquired about the reason for the call with McGuiness' daughter's friend.[40]

In July of 2021, a whistleblower's grievance was denied by McGuiness' new Chief of Staff.[41] In August of 2021, a new witness took to social media to complain about McGuiness' employment of her daughter.[42] The whistleblower suggested that McGuiness consult the Public Integrity Commission ("PIC") about the hiring and employment of her daughter.[43] Thereafter, McGuiness reached out to the PIC to ask if she brought the matter forward, would it be considered "putting things on the record."[44] When told "yes" by the attorney for the PIC, McGuiness never called back.[45]

On August 18, 2021, McGuiness' Chief of Staff requested DTI to change the job title of McGuiness' daughter from "PIO" (Public Information Officer) down to "Intern."[46] In violation of DTI policy, McGuiness filed e-Records requests to

[38] A4431-A4434.
[39] A4434-A4435.
[40] A4643-A4644.
[41] A5003.
[42] A4999; A5001-A5002.
[43] A5001-A5002.
[44] A5002.
[45] *Id*.
[46] A2921-A2922; A2975-A2976; A4445-A4446.

monitor the content of certain employees' email to include dates after the employees left the OAOA and started working for different state agencies.[47] On August 23, 2021, McGuiness made an e-records request for one whistleblower's secured/private messages going back to January and continuing into 2024.[48]

On September 16, 2021, DCRPT interviewed McGuiness' latest Chief of Staff. During the interview, she discussed several casual-seasonal employees under her supervision, including 2021 employees Conor Perry and Colin Donnelly.[49] When prompted, the Chief of Staff mentioned McGuiness' daughter last.[50]

On September 22, 2021, the State sought and the Superior Court approved an Order Authorizing a Filter Review of Potentially Privileged Communications.[51] On September 27, 2021, DCRPT interviewed McGuiness' daughter over the phone, with her father present.[52] She claimed she could not remember who first told her about the intern position, and claimed she was interviewed by McGuiness' Chief of Staff prior to being hired.[53] She did not remember when the interview occurred, how long it was, and any questions asked.[54] She could not remember how she received

[47] A2903-A2904; A2908; A4293-A4294; A4355-A4357.
[48] State's trial exhibit 15.
[49] A4662-A4663. This fact was highlighted during the trial.
[50] *Id*. at A4663.
[51] B1.
[52] A3795.
[53] A3796-A3797 (transcript reads "Audio recording played" pursuant to 11 *Del. C.* § 3507).
[54] *Id.*

the job offer.[55] With regard to her lack of email use, she said she was on email "essentially the whole day." When questioned whether she used any personal email for work, she replied "just state email."[56] A review of state records showed that McGuiness had signed all of her daughter's onboarding paperwork and was listed as her supervisor on both the paperwork and in the payroll system.[57]

On September 28, 2021, the State sought and the Superior Court approved a search warrant for the State of Delaware offices of the OAOA.[58] The warrant, which was served the next day, included the following:

> Pursuant to Title 29, 2508(b). The Attorney General shall have the right of access at all times to the books, papers, records and other documents of any officer, department, board, agency, instrumentality or commission of the state government. In this case, the places to be searched are the state offices of the Auditor of Accounts. Though the Attorney General may have right of access to state records and that the expectations of privacy may be diminished in state offices, your affiant believes probable cause nonetheless exists to show that the offices of the Auditor of Accounts reasonably contain evidence of the crimes described above.[59]

A Delaware State Police High Tech Crimes Unit detective assisted in the September 29, 2021 search warrant to seize the digital devices.[60] On October 8, 2021, following the recovery of digital devices belonging to the State of Delaware

[55] *Id.*
[56] *Id.*
[57] A2694-A2695; A3912-A3916.
[58] A720.
[59] *Id*. at para. 40.
[60] B192.

but purportedly used by McGuiness and her daughter for work, the Superior Court approved a warrant to search the digital devices. The October 8, 2021 warrant included the following:

> The State of Delaware Department of Technology and Information (DTI) has an Acceptable Use Policy that includes: ***You acknowledge and understand that all uses of the State's resources is subject to monitoring and there is no right to privacy when using State resources***. DEFENDANT signed the Acceptable Use Policy by "Supervisor Signature (*as required)" on March 22, 2020, for DAUGHTER, who also signed.[61]

The October 8, 2021 warrant also included an even more robust filter process to safeguard McGuiness' privileged communications and irrelevant materials.[62] DCRPT immediately provided this warrant to the Delaware State Police High Tech Crimes Unit ("DSP HTCU") and directed that the results of the search were to be provided directly to the Filter Team, and not DCRPT (the prosecution team).

On October 11, 2021, a New Castle County Grand Jury returned an indictment against the Defendant.[63] On October 14, 2021, McGuiness filed a motion requesting that the taxpayers pay for her to retain private counsel of her own choosing.[64]

[61] B189 at para. 43.
[62] *Id.*
[63] A31.
[64] A42.

On December 17, 2021, the prosecution provided an electronic discovery production that tracked the allegations in the indictment.[65] The discovery included McGuiness' daughter's and her friend's state email records.[66] The discovery also included McGuiness' daughter's "Gmail" correspondence with OAOA employees.[67] The production included a trove of other electronic communications.[68] The State provided McGuiness with the Superior Court warrants and authorization of the filter process in the same production.[69] Of particular note, the State's discovery letter read: "PENDING FILTER – Documents recovered from review of digital files."[70] The Prosecution Team did not have access to these materials until April of 2022, following their return to McGuiness.

In January 2022, DSP HTCU determined it was unable to use its own forensic search tools to review the material on the computers.[71] The State worked with a private vendor to create a protocol to search the files on the computers, which were

[65] B32.
[66] *Id.*
[67] *Id.*
[68] *Id*. Other provided email communications included: "Email correspondence on the payments to My Campaign Group within AoA" (*Id*. at Folder 30), "Email correspondence on the payments to My Campaign Group with Div. of Accounting" *(Id.* at Folder 31), "Email correspondence regarding parades and comp time" (*Id*. at Folder 37), "Email correspondence regarding Social Media Policies of employees and former employees" *(Id*. at Folder 39), "Email correspondence provided to the State by whistleblowers" (*Id*. at Folder 40), and "Email correspondence which cleared the State's Filter Protocols…." (*Id*. at Folder 41).
[69] *Id.*
[70] *Id.*
[71] D.I. 13 – 2 at Exhibit G.

subsequently delivered to the filter team as previously authorized by the court.[72] After filter team review, the information on the devices was returned to the Defendant in a searchable format.[73] The State also returned the hard drive on the Defendant's work computer.

On March 28, 2022, another New Castle County Grand Jury returned a superseding indictment with extended dates to incorporate new conduct for Counts Four (Official Misconduct) and Five (Act of Intimidation) and additional supporting facts for Counts Three (Structuring) and Five.[74] With the exception of the extended dates for Official Misconduct and Structuring, the charging paragraphs for each criminal offense remained the same.[75]

On March 31, 2022, the Filter Team wrote directly to McGuiness' counsel with regard to materials seized from the work computers in the office of the Auditor of Accounts.[76] The two-page letter included the following:

> On February 9, 2022, the Delaware State Police (DSP) delivered ESI they seized pursuant to the aforementioned warrant to Parcels, Inc., the Filter Team's vendor for e-discovery services. That information was uploaded into Parcels' e-discovery platform in order to permit DDOJ to carry out its Filter Team obligations. Due to the large volume of ESI, the Filter Team's **review is ongoing.** To date, no member of the

[72] *Id.*
[73] *Id.*
[74] A270.
[75] *Id.*
[76] B166.

> Prosecution Team has been provided access to the data DSP delivered to Parcels.[77]

In an April 19, 2022 hearing, McGuiness complained that the material could not be searched without her incurring large financial costs.[78] The Prosecution Team had not yet acquired the digital material provided to McGuiness by the Filter Team but reminded McGuiness that email communications had been reviewed and filtered.[79] McGuiness said that what would aid her defense is not email, but rather video and documents saved to the computers, and that these things were difficult to find.[80] The Prosecution offered to return the hard drive to McGuiness in order to facilitate her search.[81] On April 22, 2022, the State supplied McGuiness with a rebuilt version of the laptop hard drives to aid in her review of materials saved exclusively to the State of Delaware work computers (and unlike email communications or items saved on her network, unavailable to her from the time they were seized). The Prosecution team first accessed this information once the filter was complete – weeks after it was supplied to McGuiness. The Prosecution team was able to search the laptop materials within one day and supplied McGuiness with a report detailing the findings. None of the materials were exculpatory.

[77] *Id*. (emphasis added).
[78] B129.
[79] *Id.*
[80] *Id.*
[81] *Id*.

Regardless, the Superior Court excluded the State from using any digital materials provided after March 31, 2022. Even so, to comply with its continuing duty to provide *Brady*, the State conducted diligent searches of the materials.

After declining to continue the case, McGuiness proceeded to trial on June 14, 2022. The jury found her guilty of Counts One, Three, and Four on July 1, 2022.[82] The Superior Court noted, toward the end of the trial: [redacted][83]

On August 30, 2022, following a post-trial motion for judgment of acquittal and Motion for New Trial, the trial court dismissed Count Three.[84] McGuiness was sentenced on October 19, 2022, to one (1) year of Level V incarceration suspended for one (1) year Level I on Conflict of Interest and Official Misconduct, concurrently, a $10,000 fine, and 500 hours of community service.[85]

[82] A5115-A5116.
[83] A4558-A4559.
[84] B306.
[85] A5145-A5146.

ARGUMENT

I. THE STATE DID NOT COMMIT A *BRADY* VIOLATION. MCGUINESS DECLINED THE COURT'S OFFER FOR ADDITIONAL TIME TO REVIEW MATERIALS PRODUCED BY THE FILTER TEAM FROM HER AND HER DAUGHTER'S WORK COMPUTERS, MUCH OF WHICH MCGUINESS ALREADY HAD IN HER POSSESSION.

A. QUESTION PRESENTED

Whether McGuiness can prevail on a claim that the State violated *Brady v. Maryland* when the Filter Team provided her with searchable material from her office's work computers more than 60 days in advance of trial, and she declined a continuance.

B. STANDARD OF REVIEW

Claims of a *Brady* violation are reviewed *de novo*.[86]

C. MERITS OF THE ARGUMENT

McGuiness claims, as she did throughout the case and in post-verdict motions, that the State withheld exculpatory material and impeachment evidence in violation of its obligations as outlined in *Brady* and its progeny. McGuiness' claims remain meritless.

[86] *Wright v. State*, 91 A.3d 972, 982 (Del. 2014).

The State made its initial discovery production on December 17, 2021 which included notice to McGuiness of the filter team authorization and search warrants.[87] In March 2022, the State provided *Jencks* materials under an agreed upon protective order, including witness interviews.[88] On April 6, 2022, the Filter Team provided the materials recovered from the work devices seized from her State of Delaware office.[89] After McGuiness received these materials in a searchable platform from a well-known discovery vendor, she complained of the cost and difficulty in searching the materials.[90] The prosecution team, which had not yet received the Filter Team's April 6, 2022 production to McGuiness' counsel, offered to return the actual office laptops to her if it aided the ease of her search. On April 22, 2022, the State worked with the DSP HTCU to return of copies of the office laptops to McGuiness' counsel. The same day, McGuiness filed a motion to dismiss and for sanctions[91] which the court granted in part and denied in part, excluding certain materials produced after March 31, 2022 from use in the State's case-in-chief.[92]

In the State's Response to the Motion to Dismiss, the State explained that the Filter Team was delayed by the inability to utilize the DSP HTCU forensic software

[87] B32.
[88] B109.
[89] A439.
[90] B129.
[91] A378
[92] D.I. 104, Case No. 2110001942

and the necessity of creating a search protocol with a private vendor.[93] The ensuing discovery provided to McGuiness in April 2022 in a searchable format eased her ability to determine whether any of the material would be useful to her defense.[94] The State also provided McGuiness the hard drives from the work computer to ensure that she had access to everything she could need for trial.

The first trial date of May 31, 2022 was later moved two additional weeks due a change of venue.[95] At no time did McGuiness request a continuance of the trial date to review the digital evidence. The Court stated it would have continued the trial date even farther into the future if McGuiness asked, but she never did.

"There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State, and (3) its suppression prejudices the defendant."[96] Whether a *Brady* violation has occurred often turns on the third component-materiality.[97] While materiality does not require the defendant to show that the disclosure of the suppressed evidence would have resulted in an acquittal,[98] a reviewing court is not required to order a new trial whenever a combing of the

[93] A439.
[94] A443-A445.
[95] B327.
[96] *Wright v. State,* 91 A.3d 972, 988 (2014) (citing *Starling v. State,* 882 A.2d 747, 756 (Del. 2005).
[97] *Wright,* 91 A.3d at 988 (citing *Atkinson v. State,* 778 A.2d 1058, 1063 (Del. 2001).
[98] *Id.*

prosecutor's files after the trial has disclosed evidence possibly useful to the defendant but not likely to have changed the verdict.[99] *Brady* does not impose a duty upon the State to "direct a defendant to exculpatory evidence within a larger mass of disclosed evidence."[100]

McGuiness wants this Court to impose a stricter duty than that which is contemplated by *Brady* and its progeny. The fact remains that McGuiness has failed to make the requisite showing to substantiate a *Brady* violation.

McGuiness has incorrectly claimed that the trial Court created a more lenient *Brady* standard for her case because it was a "white-collar crime" case and wrongly asserts that the State failed to review or provide *Brady* materials. This is incorrect: the State reviewed the digital materials at issue prior to trial and provided the materials to McGuiness in a usable and searchable format *prior to trial.*[101] Importantly, the court fashioned a remedy – materials produced by the State after March 31, 2022 were excluded from their case-in-chief.[102]

After the ruling on the discovery violation, McGuiness again moved to dismiss the case but did not request the possible remedy of a continuance.[103] Even

[99] *Giglio v. U.S.*, 405 U.S. 150, 154 92 S.Ct. 763 (1972).
[100] *United States v. Warshak*, 631 F3d 266, 297 (6th Cir. Dec 14, 2020)(quoting *United States v. Skilling*, 554 F3d 529 (5th Cir. 2009), vacated in part on other grounds, 561 US. 358 (2010)).
[101] D.I. 104 at pg.13.
[102] D.I. 104 at pg. 9.
[103] A378; A499.

if the Court had found a *Brady* violation, the appropriate remedy would have been additional time to review and prepare a defense-which the defendant rejected multiple times, citing a nebulous claim of prejudice after a mere seven (7) months of pre-trial practice.

1. McGuiness' examples of "exculpatory" evidence are not exculpatory.

The State diligently searched and provided McGuiness with filtered material for exculpatory and relevant evidence throughout this case. Irrationally, the defense insists no search ever occurred and exculpatory evidence was thereby "suppressed." Not so. The State complied with its continuing *Brady* obligation throughout the trial, and any new evidence produced by the Filter Team after March 31, 2022 was excluded from the State's case in chief.

McGuiness claims suppression of exculpatory evidence by suggesting that the State was concealing lists of ***McGuiness' own employees***, who she claims were similarly situated to her daughter. The personnel facts she claims are exculpatory are not – they are irrelevant, and they were clearly known to defense because several 2021 casual-seasonal employees were presented at trial.[104]

McGuiness unsuccessfully advanced the expanded class of "comparators" argument at trial that she makes here.[105] This shows she had the material. The

[104] A4659-A4662.
[105] A4628-A4631.

circumstances of casual seasonal employees not on staff when her daughter began her employment were irrelevant to the charges and not exculpatory to McGuiness. As discussed further *infra*, two of the employees at issue may have received similar compensation to McGuiness' daughter but were not useful as comparators because 1) they did not receive the same cumulative benefits and 2) the *statutes at issue do not require comparator evidence.* Even so, the jury accepted the State's argument that the more appropriate comparison was to the employees who lost work in 2020 as her daughter came on board. The evidence at issue, which again, McGuiness had, was not exculpatory.[106]

2. McGuiness has failed to show that the State suppressed any evidence – McGuiness had the claimed evidence at her disposal.

McGuiness alleges that the State "suppressed" evidence throughout the trial and the months leading up to it.[107] The trial court rejected this argument prior to trial and again after the trial.[108]

Not only did McGuiness have access to all of the discovery materials and information prior to indictment and trial, McGuiness was provided filtered materials in December of 2021 and March of 2022. The Filter Team returned the digital

[106] The evidence at trial demonstrated that McGuiness knew she was under investigation in June of 2021. Trying to afford similar benefits to other casual-seasonals after she knew she was under investigation would tend to be inculpatory as consciousness of guilt.
[107] A378; A484.
[108] D.I. 13-2 at Exhibit G.

material it could access to McGuiness "in a functional and searchable format" more than two months before the start of the trial.[109] The State digitally rebuilt McGuiness' computer and provided it to her so she could easily search it. The State received her desktop materials from the Filter Team weeks after McGuiness did and was able to search them in one day. In addition, the State excerpted everything that appeared relevant and *again* provided it to McGuiness on May 9, 2022. Even so, the Superior Court prohibited the State from using these materials at trial but allowed McGuiness to make full use of it if she desired.[110]

Additionally, the discovery here, unlike in most cases, tracked each supporting fact in a detailed indictment with corresponding electronic folders. This Court has said that a Defendant is not entitled to a CliffsNotes version of the discovery, especially when so much of it is the Defendant's own communications.[111] Here, McGuiness essentially had just that from the State by as early as December of 2021. Moreover, by way of pre-indictment materials and the speaking indictment itself, McGuiness had an outline of the entire case from the very beginning.

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[109] *Id.* at pg. 13.

[110] *Id.* at pgs. 9 – 10: ("If documents from the laptops are used by the Defendant in her case, the Court will consider to what extent the State may use the excluded documents in rebuttal during trial.").

[111] W*harton v. State*, 246 A.3d 1 10, 1 18 (Del. 2021). *See also United States v. Levine*, 983 F.2d 165, 167 (10th Cir. 1992) (holding that "the defendant is not entitled to know all the *evidence* the government intends to produce, but only the *theory* of the government's case") (internal quotations and citations omitted).

Finally, virtually every piece of evidence offered by the State was public record.[112] The Superior Court noted that much of it – any email involving McGuiness, her daughter, or anyone else in her office – was available to McGuiness before and during trial even if the State had not produced it.[113] But the State did produce it, as the court wrote, in a timeline that "plays in the State's favor as to their *Brady* obligation."[114]

The State did not suppress any evidence and therefore, this claim fails.

3. McGuiness cannot show prejudice.

McGuiness complains that she received exculpatory evidence "six weeks before the scheduled start of trial" and was therefore prejudiced by effective preclusion because she would not be able to timely make use of it at trial.[115] The trial began more than two months from the complained production. Moreover, at McGuiness' request, the Court suppressed the referenced evidence, but in so doing, offered McGuiness "additional time to search and review the documents." McGuiness declined the offer.[116] The Superior Court further found that, "in

[112] The State understands that the existence of public record does not completely absolve it of its *Brady* obligations; it does, however, make the Defendant's argument strain credulity.
[113] D.I. 13-2 at Exhibit G at pg. 13 ("It is also important to note, the files in dispute here are from the Defendant's and her daughter's own laptops to which they should reasonably have some idea as to what is contained therein.").
[114] *Id.* at pg. 12.
[115] A1474 at pg. 16.
[116] D.I. 13 at Exhibit G at pgs. 9, 13.

providing the files to the defense, the State has done so in a functional and searchable format which the Defendant has already utilized to support her Motion."[117] Finally, much of the complained-of, suppressed "discovery contains information belonging to the Defendant, of which she has had continuous access to, including her State of Delaware email and State of Delaware OAOA network."[118]

Further, McGuiness cannot show prejudice based upon the scheduled trial date. McGuiness asked for expedited scheduling and as the trial court repeatedly stated, McGuiness' trial occurred sooner that similarly situated defendants. McGuiness "fared better than most, and the critical timing of whether she can seek reelection has prioritized her case over many others."[119] Indeed, when the court offered a later trial date in response to her pretrial *Brady* and other claims, she responded: "The defendant is going to object strenuously . . . to any continuance of the trial date much past the end of June."[120] Then, on the eve of trial, McGuiness challenged venue, which provided her an extra two weeks to prepare for trial-with no change to the evidence. As the Superior Court wrote on May 13, 2022, "[T]he

[117] *Id.* at pg. 13.
[118] *Id.*
[119] *Id.* at pg. 12.
[120] A2388.

Defendant has not been prejudiced or delayed any more than other defendants navigating the criminal justice system's post-pandemic landscape."[121]

McGuiness' Brady arguments fail. McGuiness cannot demonstrate that any *Brady* violations occurred, she refused the offered remedy for a continuance to review discovery materials she had easy access to and has not provided any credible basis for a new trial.

[121] D.I.-13 at Exhibit E, at pgs. 11 – 12. The Court further observed, "She has no basis to complain [about the pace of the litigation] and this assertion by the Defendant is totally without merit." The trial occurred within one year of indictment, an amount of time which is presumptively not prejudicial. And the State cannot find a single case in which a defendant was prejudiced by a trial occurring too quickly at the defendant's request, with a rejection of an offer for a continuance.

II. THE DEFNDANT NEVER ASSERTED A SELECTIVE OR VINDICTIVE PROSECUTION CLAIM AND THERE WAS NO EVIDENCE OR FACTUAL BASIS TO ASSERT IT.

A. QUESTION PRESENTED

Whether there exists a basis or McGuiness properly raised a claim of selective prosecution or vindictive prosecution below.

B. STANDARD OF REVIEW

Where a defendant did not preserve the record and properly raise a [selective nor vindictive prosecution] claim, this Court will review for *plain error*.[122] Selective or vindictive prosecution is a due process claim, not an affirmative defense.[123]

C. MERITS OF THE ARGUMENT

As a threshold matter McGuiness' claim is subject to plain error standard of review because she failed to raise the claim below.[124] McGuiness bears a heavy burden; "[a] defendant challenging a criminal prosecution at either the law enforcement or prosecution inflection points must provide 'clear evidence' of discriminatory effect and discriminatory intent."[125] A reviewing Court can only

[122] *Pierce v. State*, 270 A.3d 219 (Del. 2022).
[123] *Holland v. State*, 158 A.3d. 452, 465 (Del. 2017), citing *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).
[124] Del. Supr. Ct. R. 8; Del. Supr. Ct. R. 30.
[125] *United States v. Washington*, 869 F.3d 193, 214 (3d Cir. 2017).

find plain error when "the error complained of is so clearly prejudicial to a defendant's substantial rights as to jeopardize the fairness and integrity of the trial."[126]

McGuiness asserts that she was not able to pursue selective or vindictive prosecution as affirmative defenses because the court limited her questions to Investigator Robinson. This argument is meritless for several reasons. First, selective and vindictive prosecution claims are not affirmative defenses. Second, McGuiness has no credible theory of discriminatory effect or discriminatory purpose. Third, as addressed below and in Argument VII, McGuiness was permitted to cross examine Investigator Robinson in grueling detail regarding the statements in his affidavit and the quality of the investigation. Lastly, McGuiness was not retried or subjected to prosecutorial vindictiveness after securing an acquittal or seeking an appeal of a lesser charge. The court's denial of her request to elicit testimony regarding the names of the specific individuals who assisted in the preparation of the affidavit at issue did not give rise to the level of a *Brady* violation or plain error. McGuiness' speculation is not a valid claim.

[126] *Pierce* at 228, citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Although McGuiness' attempts to conflate her purported selective or vindictive prosecution claim by bootstrapping it to another alleged claim of a *Brady* violation. To be sure, the claim is speculative at best since no record evidence supports or leads to a legitimate inference of selective or vindictive prosecution.

McGuiness implies, without further explanation, that because she was the first person to be prosecuted under 29 *Del. C.* § 5805, there was some nefarious purpose behind her prosecution that would be revealed by the disclosure of the names of any lawyer at the DDOJ that had assisted Investigator Robinson in creating a probable cause affidavit. The State provided the information that the lead trial counsel, Chief Deputy Attorney General, and other attorneys within the DDOJ had assisted Robinson in authoring the affidavit. At trial, McGuiness challenged both the sufficiency and methodology of the investigation in front of the jury, and her cross examination is part of the record. McGuiness' demand for internal communications amongst DDOJ personnel during the investigation was nothing more than a fishing expedition that is not supported by the Superior Court Criminal Rules.[127] Moreover, McGuiness cannot find any assistance in legal precedent. McGuiness was not entitled to the information. It did not advance a selective or vindictive prosecution argument and was not *Brady* material. The State still provided the names to McGuiness and no motion regarding selective or vindictive prosecution was forthcoming. In any event, McGuiness argued the following, in closing:

[127] Del. Super. Ct. Crim. Rule 16(a)(2) specifically states that "this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the attorney general or other state agents in connection with the investigation or prosecution of the case, or of statements by state witnesses or prospective state witnesses."

> Here's what you know for sure: Chief Investigator Robinson made repeated false statements under oath in a search warrant application in front of a judge and then to a grand jury, and in this trial – in this trial we learned it wasn't just his mistake. That search warrant was reviewed by a special team of investigators and lawyers and they still got it horribly wrong. Can you trust that special team of investigators and lawyers to get it right now?[128]

The record shows that McGuiness was not denied the ability to paint the investigation, the investigator – and the attorneys involved – as untrustworthy. The jury apparently found the mischaracterizations exaggerated and found McGuiness guilty of the conduct related to the warrant application.

It is axiomatic that the State has "broad discretion as to whom to prosecute."[129] If there is probable cause to believe that an individual has committed a crime, the State may bring charges. However, the Constitution prohibits selective enforcement of the law based on protected characteristics such as race or other immutable qualities.[130] To make a *prima facie* case of selective prosecution, the defendant must show that (1) the policy to prosecute or enforce

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[128] A5008.

[129] *Albury v. State*, 551 A.2d 53 (Del. Nov. 28, 1988) citing *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 *reh'g denied*, 435 U.S. 918, 98 S.Ct. 1477, 55 L.Ed.2d 511 (1978)).).

[130] *Drummond v. State*, 909 A.2d 594 (October 5, 2006) 2006 WL 2842732 at * 2, citing *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1263 (10th Cir.2006) (citing *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)).

the law had a discriminatory effect and (2) it was motivated by a discriminatory purpose.[131] To show a discriminatory effect, the Defendant must show that a similarly situated person outside of her protected class was treated differently,[132] and to show a discriminatory purpose, the Defendant must show evidence that "intent to discriminate was a motivating factor in the decision to enforce the criminal law against [her]."[133] McGuiness has not advanced a colorable selective prosecution claim.[134]

Nor can McGuiness plausibly claim vindictive prosecution. These prohibitions on vindictive prosecution have been applied in the context of prosecution to stymie protected expression under the First Amendment[135] or indicting a Defendant on a felony charge after his appeal of a misdemeanor conviction for the same conduct in violation of the Double Jeopardy Clause of the 5th Amendment.[136] Such cases acknowledge that defendants should not be selected for prosecution based on their unpopular or undesirable but legal speech or be subject to harsh treatment by the State because they exercised their right to an appeal of a conviction.

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[131] *United States v. Armstrong,* 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). *See also Small v. State,* 106 A.3d 1050 (Del. 2015).
[132] *Id.*
[133] *Alcaraz-Arellano,* 441 F.3d at 1264.
[134] The Defendant has not stated what protected class she is in.
[135] Accord *Acara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S. Ct. 3172 (July 7, 1986).
[136] *See Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098 (May 20, 1974).

By contrast, here McGuiness only asserts that the State has utilized a statute for the first time to indict her. The fact that multiple people were involved with drafting an investigative document is wholly irrelevant to her charges. McGuiness could argue legal error with the charge, flaws in the affidavit, or claim there was insufficient evidence to support a charge, and she did. It does not follow, however, that testimony from a DDOJ investigator about privileged work product or the DDOJ's investigative and collaborative process within yields motive or factual evidence that substantiates a due process claim that morphed into a *Brady* violation based upon the Court's handling of the matter. McGuiness' claim has no factual or legal basis and is unavailing.

III. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO CONVICT MCGUINESS OF COUNT ONE (CONFLICT OF INTEREST).

A. QUESTION PRESENTED

Whether there was sufficient evidence for the jury to find McGuiness guilty of Count One (Conflict of Interest) and for the Court to properly deny McGuiness' Motion for Judgment of Acquittal.

B. STANDARD OF REVIEW

When reviewing sufficiency-of-the-evidence claims, this Court must decide whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find the essential elements of the charged offense beyond a reasonable doubt.[137] This Court reviews challenges of a motion for judgment of acquittal *de novo*.[138]

C. MERITS OF THE ARGUMENT

To convict McGuiness of Count One (Conflict of Interest: Violation of the State Officials' Code of Conduct), the jury had to find beyond a reasonable doubt that McGuiness participated in the review or disposition of a matter pending before the State in which she had a personal or private interest. McGuiness attempts to redefine the requirements for a conviction by asserting that the State did not show

[137] *Pierce* at 227; *Hastings v. State*, WL 150456 *5 (Del. 2023).
[138] *Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006).

evidence of a proper class of comparators to her daughter and asserts that there was not sufficient evidence to prove this charge. McGuiness is wrong.

The facts provided at trial established that McGuiness' daughter was hired as a casual seasonal state employee at the OAOA under McGuiness' personal direction. While the trial court correctly noted – and the State has long maintained – it is not an automatic conflict of interest for a state employee to hire a family member, the context and manner in which McGuiness conducted herself in this instance clearly rose to a conflict of interest.[139] Namely, McGuiness, as her daughter's supervisor, operated under a conflict of interest and failed to remove herself from the employment decision making process and provided favorable treatment to her daughter.

Several official documents, including on-boarding paperwork, listed McGuiness as her daughter's supervisor - and McGuiness signed much of the paperwork herself. McGuiness' daughter's friend was also hired at the same time to work for the OAOA. The record reflects that the daughter was hired without first being interviewed by OAOA staff and she was paid more per hour than two of the three casual-seasonal employees who were on payroll at the beginning of the daughter's employment. Then three of those employees quickly lost available work

[139] B311-B312.

while the daughter logged hours. McGuiness' daughter was allowed to "bank" 16 hours-in excess of the hourly cap on casual-seasonal employees and apply them to weeks in which she did little or no work, while other casual-seasonal OAOA employees were either not even aware of or did not utilize this practice.

Unlike her friend, McGuiness' daughter continued to receive State paychecks while enrolled in college in Charleston, South Carolina, in the fall of 2020. She never accessed the office nor used office email between August 17th and December 11th, 2020, but she still received paychecks from the OAOA which were deposited in a joint account with McGuiness. The daughter never used state Virtual Private Network ("VPN") to work remotely in 2020 and she sent very few emails from her Gmail account, proof of which the State provided in discovery. Within the small sampling of emails, several were not work-related.[140] Moreover, McGuiness addressed work complaints on behalf of her daughter to OAOA staff.

Again, the conflict-of-interest charge required the State to prove beyond a reasonable doubt that 1) McGuiness was a "State officer" at the time of the charged offense; 2) McGuiness "participated on behalf of the State in review or disposition of a matter pending before the State" and 3) the matter was one in which McGuiness had a "personal or private interest."[141] As the jury found, McGuiness' behavior

[140] A2819-A2823; A2832-A2834.
[141] 29 *Del.C.* §5805(a)(2)(a).

checked all the boxes. The statute does not require the State to present comparator evidence of McGuiness' choosing.

The first element was undisputed. The second element, that McGuiness "participated" in the process, was proven through the documents showing that McGuiness oversaw the hiring process of her daughter and directly assigned work to her daughter while employed at the OAOA, something which the daughter admitted.[142] The third element requires that McGuiness had a "personal or private interest" in the hiring of her daughter, defined as "an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter."[143] Specifically, an interest which "tends to impair the person's independence of judgment" is "any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons . . ."[144]

While McGuiness points to other casual-seasonal employees who later received similar compensation or benefits to her daughter, the cumulative facts show that McGuiness' daughter was receiving a "financial benefit . . . to a greater extent

[142] B313.
[143] *Id.*
[144] 29 *Del. C.* § 5805 (a)(2)

than such benefit. . .would accrue to others who are members of the same class or group of persons."[145] At a minimum, the facts show that she was *receiving a salary while away at school and not utilizing her work email to transmit any work performed for the OAOA*.[146] From the moment she was hired and McGuiness became her supervisor, McGuiness' actions and inactions were a conflict of interest, financially and professionally. The proven favoritism to McGuiness' daughter, combined with the irregular and unethical onboarding process were sufficient proof of a conflict of interest.

McGuiness' argument that the State did not present other casual-seasonal employees as comparators is unavailing, because the argument was never solely about the paycheck. It was about the higher salary, the extra salary earned while ostensibly doing no work for the agency, the banking of the hours, and the allowance from the start for her daughter to work over the generally allowed amount for casual-seasonal employees. In trial, McGuiness attempted to expand the class or group of persons that the daughter should be compared to beyond those referenced in the indictment. That argument failed then as it does now, as no other casual- seasonal employee received the same cumulative favors as the daughter did. While some casual-seasonal employees worked the same amount of hours, received the same

[145] *Id.*
[146] A4423; A4446-A4452.

base pay, were able to bank their hours, or were later permitted to work remotely, McGuiness' daughter was the only one who received all of those favors during the early stages of the pandemic while others lost available work. No other casual-seasonal employee received every benefit that she did, nor did they have the State's salary deposited into an account held jointly by McGuiness. Moreover, the evidence demonstrated no other person was able to work so little and yet receive compensation.

The evidence supporting Count One was overwhelming and the jury, having considered McGuiness' arguments about an expanded class, appropriately found that the State proved that charge beyond a reasonable doubt at trial.

IV. COUNT FIVE (ACT OF INTIMIDATION) WAS PROPERLY BEFORE THE JURY AND IT DID NOT UNFAIRLY PREJUDICE MCGUINESS ON OTHER CRIMINAL CHARGES.

A. QUESTION PRESENTED

Whether the Court properly admitted evidence relating to Count Five for the jury's consideration.

B. STANDARD OF REVIEW

Review of a trial court's evidentiary rulings is subject to abuse of discretion.[147]

C. MERITS OF THE ARGUMENT

McGuiness complains about the evidence introduced as it relates to Count Five; specifically, she objects to any evidence of harassment or intimidation of her staff occurring before September 11, 2021, when she claims she became aware of the investigation. Her argument on this point is unavailing for several reasons: 1) she was acquitted on this count, so obviously the jury was able to parse through the admitted evidence and arrive at a reasoned verdict and 2) the State presented credible evidence of her awareness of the criminal investigation into her misconduct at least as early as June 2021.

McGuiness' email monitoring was a feature of the case from the beginning. It was apparent in the discovery, discussed in pre-trial motions

[147] *Houston v. State*, A.3d 102, 108 (Del. 2021).

and arguments, and directly relevant to the grand jury's indictment. It was not uncharged misconduct. And McGuiness was not unfairly prejudiced by this evidence – she was acquitted of Count Five. Of course, just because McGuiness was acquitted of that particular count does not render the evidence inadmissible. Here, the verdict suggests that the jury parsed the evidence objectively and consistent with the jury instructions.

It also does not follow that the submitted evidence was inadmissible under *Getz*[148] and *DeShields*.[149] Relevant evidence is "inherently prejudicial" to one party in a legal proceeding.[150] The balancing test under D.R.E 403 states that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Unfair prejudice within the context of this rule suggests that a jury will render an adverse decision based on emotional grounds instead of properly weighing the evidence. The State introduced this evidence to prove the intimidation charge. The fact that the jury heard this evidence and rendered a decision *in her favor* means that the jurors were obviously able to separate out any personal distaste they may or may not have had towards McGuiness and render what they believed to be a fair verdict.

[148] *Getz v. State*, 538 A.2d 726 (Del. 1988).
[149] *Deshields v. State*, 706 A.2d 502 (Del. 1998).
[150] *Gallaway v. State*, 65 A.3d 564, 569 (Del. 2013).

V. RELEVANT EVIDENCE IN SUPPORT OF COUNT THREE (STRUCTURING) DID NOT RESULT IN "PREJUDICIAL SPILLOVER" AND IT PROPERLY FORMED A BASIS, IN PART, FOR THE JURY TO CONSIDER OFFICIAL MISCONDUCT.

A. QUESTION PRESENTED

Whether the presentation of evidence relating to Count Three (Structuring) resulted in "prejudicial spillover" in the jury's consideration of all Counts.

B. STANDARD OF REVIEW

Claims of prejudicial review raised timely are subject to plenary review.[151] However, when a defendant does not raise the issue of prejudicial review, such claims are subject to plain error review.[152]

C. MERITS OF THE ARGUMENT

McGuiness' argument on the doctrine of prejudicial spillover fails in two regards – first, because the evidence of her conduct in handling contracts for the State was admissible to show Official Misconduct in violation of Count Four of the indictment and second, because the detailed and precise jury instructions from the trial court cured the potential for any prejudicial spillover.

Under Delaware law, state contracts cannot be structured to avoid compliance with the procurement code.[153] Nor may payments within those

[151] *United States v. Lee*, 612 F.3d 170 (3d Cir. 2010).
[152] *Id.*
[153] *29 Del. C. § 6903*.

contracts be split to avoid compliance with the procurement code.[154] The jury, as the independent fact finder, found that McGuiness engaged in a no-bid contract with her former political campaign consultant who owned a company called My Campaign Group. The evidence showed that McGuiness personally engaged directly with the consultant. She approved all payments to the consultant. In addition, McGuiness offered the consultant a second no-bid contract. My Campaign Group has never, in Delaware or in any other state, had another government contract.

McGuiness knew that she needed to obtain approval to exceed the purchase order to satisfy the final payment to My Campaign Group. Aside from the technicalities of the structuring offense, this act alone constituted evidence of an unauthorized exercise of official functions in the context of official misconduct.

McGuiness now advances the theory that her acquittal on Count Three somehow unfairly prejudiced her on separate charges, even though those separate charges had distinct elements and were supported by evidence separate from the structuring charge. McGuiness' brief does not set forth the test to be applied when asserting a prejudicial spillover claim, as noted by the *Wright* Court:

[154] State of Delaware's Budget and Accounting Manual, Chapter 7 - Purchasing and Disbursements -No. I under "General" - *See* https://budget.delaware.gov/accounting-manual/documents/chapter07.pdf?ver=0316 at pg 5.

> We apply a two-step test for prejudicial spillover. First, we ask "whether the jury heard evidence that would have been inadmissible at a trial limited to the remaining valid count[s]." If all evidence on the discarded counts … *would remain admissible at a trial on the remaining valid counts*… then our inquiry ends...If some evidence would be inadmissible, then we proceed to the second step. There, we ask whether that evidence (the "spillover evidence") was prejudicial. *Id.* We answer that question by weighing four factors: "whether (1) the charges are intertwined with each other; (2) the evidence for the remaining counts is sufficiently distinct to support the verdict on these counts; (3) the elimination of the invalid count significantly changed the strategy of the trial; and (4) the prosecution used language of the sort to arouse a jury."[155]

The evidence advanced in this matter in support of the structuring charge was relevant to the charge of Official Misconduct. The Official Misconduct charge was not dependent on the charge of Structuring. The manner in which McGuiness obtained a benefit from the state work of the political consultant was also evidence of Official Misconduct.

The Court instructed the jury: "[y]ou will be required to reach a separate verdict for each offense. *Each verdict must be independent of your decision on any other*."[156] This Court has previously found that precise instructions directing a jury to reach a separate verdict for each charged offense based on the evidence supporting that charge were sufficient to eliminate a "spillover" effect.[157]

The evidence for Count Three was admissible; Count Four was not

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[155] *United States v. Wright*, 665 F.3d 560 (3d Cir. 2012), supra, citing *United States v. Cross*, 308 F.3d 308, 317 (3d Cir.2002) and *United States v. Murphy*, 323 F.3d 102, 122 (3d Cir.2003).
[156] A5084.
[157] *Skinner v. State*, 575 A.2d 1108, 1120 (Del. 1990).

dependent on Count Three and supported by independent evidence, and there is no colorable claim of strategy change or improper comment by the prosecution. McGuiness' spillover claim is thus unavailing.

VI. COUNT ONE (CONFLICT OF INTEREST) AND COUNT FOUR (OFFICIAL MISCONDUCT) ARE NOT CONSTITUTIONALLY MULTIPLICTIOUS

A. QUESTION PRESENTED

Whether Count One (Conflict of Interest) and Count Four (Official Misconduct) were multiplicitous.

B. STANDARD OF REVIEW

This issue was litigated post-trial in the Superior Court. Review of a trial court's evidentiary rulings is subject to abuse of discretion.[158]

C. MERITS OF THE ARGUMENT

McGuiness claims that Count One (Conflict of Interest) and Count Four (Official Misconduct) are multiplicitous in violation of the Double Jeopardy Clauses of the United States Constitution and the Delaware Constitution.

Multiplicity is the "charging of a single offense in more than one count of the indictment."[159] The longstanding *Blockburger* test is "whether each [statutory] provision requires proof of a fact which the other does not."[160] The question is whether a defendant committed one as opposed to two discrete violations of the same statute, not whether the defendant was charged twice for the same violation.[161]

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[158] *Houston v. State*, A.3d 102, 108 (Del. 2021).
[159] *Id.*
[160] *Blockburger v. United Slates*, 284 U.S. 299, 304 (1932).
[161] *Id.* (citing *United States v. Forman*, 180 F.3d 766, 769 (6th Cir. 1999).

A conviction for Count Four required the jury to find elements that were not contained in Count One. Thus, Count Four is an entirely separate charge from Count One under *Blockburger*.[162] Nor is Count One a lesser-included offense of Count Four.

One of the ways the indictment stated that McGuiness committed official misconduct was, in part, by committing an unauthorized act. The State appropriately argued if the members of the jury "agree that on any one act and find the defendant intended to gain a personal benefit, then she is guilty of official misconduct."[163] The Court instructed the jury properly by identifying the "acts" and instructing the jury as to the specific unanimity requirement. This claim by McGuiness has no merit.

[162] *Id.* at 304.
[163] A4993-A4994: 22-23, 1

VII. THE SUPERIOR COURT DID NOT VIOLATE THE DELAWARE CONSTITUTION NOR UNFAIRLY PREJUDICE MCGUINESS WHEN LIMITING HER TRIAL COUNSEL'S REPETITIVE LINE OF CROSS EXAMINATION.

A. QUESTION PRESENTED

Whether the Court violated the Delaware Constitution when limiting McGuiness' trial counsel's improper and repetitive line of cross examination.

B. STANDARD OF REVIEW

This Court reviews constitutional claims *de novo*. [164]

C. MERITS OF THE ARGUMENT

McGuiness claims that the Court made an "unconstitutional" and "prohibited comment" in "defense of" a State witness. After the State presented its Chief Investigator during its case-in-chief, and the defense submitted him to vigorous cross-examination. The defense then called the Investigator when presenting its case and returned to the oft-repeated line of questioning suggesting that the Investigator lie[d].[165] in keeping details of the investigation vague. The State objected to the repetitive nature of the questioning. The Court said:

> If you want to pursue this, we all know what it is. It's an investigative technique used by the officer. You want to ask him that, that's fine. But to imply that because this is false, he is lying. That's simply unfair, Mr. Wood.

[164] *Norwood v. State*, 991 A.2d 18 (Del. 2010).
[165] A4892.

> So you can ask him about investigation techniques if you'd like. But to imply it otherwise is not acceptable.[166]

The Court prevented the defense from pursuing a fruitless argument on a minor, commonly-understood investigative technique that was not coercive and in no way affected the voluntariness of the witness' statement.[167]

The trial court has discretion to exercise reasonable control over the mode and order of a witness interrogation.[168] The State agrees that a judge's control over the courtroom does not extend to comments on the credibility of a witness or comments on the evidence.[169] But that is not what happened here. The Judge properly limited a line of questioning that was repetitive and devolving into badgering.

Throughout the trial, defense counsel was given vast latitude to explore purported flaws with the State's investigation, particularly with regards to Investigator Robinson's conduct. The Court's singular statement regarding an

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[166] *Id.*

[167] *See Taylor v. State,* 23 A.3d 851, 854 (Del. 2011) ("[I]t is settled law that the police may use tactics such as deceit, threats, and promises without necessarily rendering the witness' statement involuntary." (citing *Baynard v. State,* 518 A.2d 682, 690 (Del. 1986)).

[168] D.R.E 611.

[169] *Wright v. State,* 405 A.2d 685, 689 (Del. 1979):

> Undue impatience, irritation, or sarcasm must be avoided by a Delaware Judge, especially when a party is acting as his own counsel. "Article IV, s 19 of the Delaware Constitution prohibits a trial judge from commenting on the evidence. This prohibition applies equally to the judge's instructions to the jury and to comments made by the judge in the course of the trial." *State Highway Department v. Buzzuto,* Del.Supr., 264 A.2d 347, 351 (1970). Furthermore, a Trial Judge has a duty "to avoid any language or any conduct which would lead the Jury to suspect that the Judge is favorable to one party to the trial . . .." *Buckley v. R.H. Johnson & Co.,* Del.Super., 2 Terry 546, 25 A.2d 392, 397 (1942).

irrelevant line of questioning did little to alter or affect the defense's narrative and McGuiness suffered no cognizable prejudice as a result.

VIII. THE SUPERIOR COURT DID NOT MISINTERPRET 10 *DEL. C.* § 3925 IN DENYING MCGUINESS THE APPOINTMENT OF HER OWN PRIVATE COUNSEL AT THE PUBLIC'S EXPENSE.

A. QUESTION PRESENTED

Whether the Court properly interpreted 10 *Del. C.* § 3925 in its October 28, 2021 Order denying McGuiness' request for the appointment of private counsel.

B. STANDARD OF REVIEW

Questions involving statutory interpretation are reviewed *de novo*.[170]

C. MERITS OF THE ARGUMENT

Delaware law has long codified the provision of counsel for public officials "in a criminal . . . action against the person arising from state employment . . . ."[171] The language, as the Superior Court held below, is "clear and unambiguous"[172]: such a defendant, regardless of his or her financial means, is entitled to a court-appointed attorney from the Department of Justice or, if a conflict exists, the Office of Defense Services ("ODS"). Here, contrary to the statute's plain language, the Defendant—of reported significant financial means—again asserts that a Court must take two unnecessary steps that each controvert the statute: first, to appoint her retained private attorney as her counsel, despite no such allowance in the statute and no

[170] *Freeman v. X-Ray Associates, P.A.*, 3 A.3d 224, 227 (Del. 2010).
[171] 10 *Del. C.* § 3925.
[172] D.I. 16, Case No. 2110001942.

conflict with ODS; and second, to compensate her counsel at more than five (5) times the conflict counsel rate.

Delaware law, since 1976, has provided counsel for its employees charged with conduct arising out of their employment.[173] The statute is clear: state employees are entitled to a defense provided by the Department of Justice ("DOJ"). If a conflict exists, the Court may then appoint ODS.[174]

The straightforward statute reads, in full—

> *Any public officer or employee, in a criminal or civil action against the person arising from state employment, shall be entitled to petition the court for a court-appointed attorney to represent the person's interests in the matter. If the judge, after consideration of the petition, examination of the petitioner and receipt of such further evidence as the judge may require, determines that the petition has merit, the judge shall appoint an attorney to represent the interests of such public officer or employee. The court-appointed attorney shall represent such person at all stages, trial and appellate, until the final determination of the matter, unless the attorney is earlier released by such person or by the court. The court may first appoint an attorney from the Department of Justice.* ***If the court determines that the Department is unable to represent such public officer or employee, the court may appoint an attorney from the Office of Defense Services in criminal actions only****, and in civil actions may appoint an attorney licensed in this State. This section shall also apply to all federal courts within this State.*[175]

The law outlines a simple process, as reiterated in the Superior Court's

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[173] 10 *Del. C.* § 3925.

[174] *See also Manchester v. Rzewnicki*, 777 F. Supp. 319, 327 (D. Del. 1991), aff'd, 958 F.2d 364 (3d Cir. 1992) ("In the event that a conflict of interest exists, the official has the right to petition . . .").

[175] 10 *Del. C.* § 3925. (Emphasis added).

opinion: "A public officer charged with conduct arising from her state employment is entitled to a defense provided by the [DOJ]. If the DOJ is unable to represent the public officer, [ODS] is the public officer's court-appointed alternative."[176]

The statute was written for exactly this type of case because "[s]tate representation for actions taken while acting on behalf of the state is not only fair, but it may be necessary to encourage professionals to accept such appointments."[177] Here, the DOJ prosecuted McGuiness. Therefore, if McGuiness wished for state-provided counsel, she could have petitioned ODS. There existed no ODS conflict in this case.[178]

McGuiness has renewed her arguments below with only this added sophistry: because 10 Del. C. § 3925 states that the Court "may" appoint an attorney from ODS, and that language is permissive, the Court somehow *shall* appoint her desired private counsel at their agreed-upon rate. It is a bizarre reading of a plainly written statute that permits a state employee to have an appointed ODS attorney when they are charged criminally – they are otherwise free to retain counsel of their choosing, at their own expense, like anyone charged with a crime in the United States.

Section 3925 does not allow for taxpayer funding of private counsel that a

[176] *Id*.
[177] *Manchester*, 777 F. Supp at 327.
[178] D.I. 16, Case 2110001942, at p. 4.

criminal defendant has already selected. Indeed, doing so would undermine one of the statute's core principles: "State representation . . . conserves public funds."[179] The law, amended by the General Assembly as recently as 2015, is premised on providing DOJ or ODS counsel—and no one else—to state employees defending themselves from action taken in the course of their employment.

Nor does Supreme Court Rule 68 subvert applicable state law. Here, the statute defines a court's jurisdiction to appoint counsel in criminal matters; a rule cannot prevail over the statutory requirement to appoint ODS (in lieu of DOJ).[180] To the extent McGuiness believes that § 3925 cedes to Rule 68, such a view "would theoretically permit this court to override by court rule any statutory provision duly enacted by our General Assembly. . . [I]t would offend the separation of powers established by the Delaware Constitution[.]"[181] Though McGuiness may wish it, "[T]he Court cannot change the statute."[182]

Finally, as was made clear below, setting aside clear law to pay $550 per hour to her retained private law firm, as McGuiness wishes, would exacerbate existing

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[179] *Manchester*, F. Supp at 327.
[180] *See Imbragulio v. Unemployment Insurance Appeals Board*, 223 A.3d 875, 879-80 (2019).
[181] *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 490 (2000).
[182] *Williams v. Singleton*, 2 Storey 488, 491 (1960) (refuting "Appellant [who] would have us amend a jurisdictional statute by applying the rule."). Here, "the statutory language is clear and unambiguous," therefore the Court's "inquiry ends and the plain meaning of the statute governs the action." *Swallows Holding, Ltd. v. C.I.R.*, 515 F.3d 162, 170 (3d Cir. 2008); *see also Gov't of the V.I. v. Knight*, 989 F.2d 619, 633 (3d Cir. 1993) ("[I]f the statutory language is unambiguous, the plain meaning of the words ordinarily is regarded as conclusive.").

systemic inequities. The Superior Court denied this claim because the statute is "clear and unambiguous"; this Court should, as well for ODS counsel regardless of her financial means. Compensating a wealthy defendant's law firm by several times the Court's standard fees would metastasize the statutory entitlement into something absurd.

CONCLUSION

For the foregoing reasons, the State did not commit any *Brady* violations nor unfairly prejudice McGuiness. The Superior Court did not err in its holdings at issue, and there was no prejudicial effect on McGuiness. The State respectfully requests that this Court **AFFIRM** the Superior Court's decision.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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