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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TREVIE BURRELL, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	))))))))))	No. 282,2023 Court Below---Superior Court of the State of Delaware in and for New Castle County ID No. 2107007983

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

APPELLANT'S REPLY BRIEF

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I

THE SUPERIOR COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE STATE SATISFIED D.R.E. 801(d)(2)(E), 804(b)(6), AND 404(b), THUS PERMITTING THE STATE TO INTRODUCE THE NYALA COMMUNICATIONS TO DEMONSTRATE MR. BURRELL'S IDENTITY AND GUILTY KNOWLEDGE.

The State concedes that the Superior Court erred in admitting the Nyala evidence under D.R.E. 804(b)(6). *State of Delaware's Answering Brief* (AB) at 14. However, the State erroneously contends that the Nyala evidence was admissible under D.R.E. 801(d)(2)(E) and D.R.E. 404(b). The State's arguments in both respects are unavailing.

D.R.E. 801(d)(2)(E)

The State cites factual findings of the Superior Court which led that Court to erroneously conclude that Mr. Burrell's "purpose in reaching out to Church through Nyala was to silence Church." AB16. The Superior Court's findings provide no support for the conclusion that any communication by Mr. Burrell was done in furtherance of a conspiracy to tamper with a witness.

The Superior Court's finding that Mr. Burrell and Nyala were incarcerated at the same prison, *id.,* demonstrates presence and access, yet nothing more. *See White v. State,* 906 A.2d 82, 89-90 (Del. 2006) (mere presence in company of alleged coconspirator does not confer conspiratorial liability).

Its finding that the lifting of the protective order that was not reflected on the docket suggested the likelihood that Nyala's knowledge of the trial stemmed from communications from Mr. Burrell, AB16, may demonstrate communication about the trial. However, communications about the trial are not necessarily communications designed to foster witness tampering. Mere association and contact are "not sufficient to give rise to an inference of conspiracy, absent proof of 'knowing participation' in the wrongful conduct. *In re Asbestos Litigation,* 509 A.2d 1116 (Del. Super. 1986), citing *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982); *James Julian, Inc. v. Raytheon Co.*, D. Del., 557 F. Supp. 1058, 1064-65 (1983).

The State references the Superior Court's finding that "Nyala told his son that 'the boy sent me a message telling me that he goes to trial on Monday,' and 'asked his son to get a message to Darrius Church, [Church's brother] to stand down." A16-17. The content of that call, however, demonstrates that it was not Mr. Burrell who asked the son to get a message to Church. The ask is from Nyala who does not attribute it to Mr. Burrell.

In all the recordings and the message on the tablet, there are but two references to someone other than Nyala seeking to have Church "stand down." A309/Ex. 71 at 6:44-6:25. The explicit references at that interval of the recording

are to "motherf---ers" (plural) and "somebody." Neither these references nor their context permits the conclusion that they referred to Mr. Burrell.

The State attempts to dismiss the significance of this failure of proof as Nyala's having been intentionally "inexplicit" due to his knowledge that he was "in phone conversations and on a tablet that the parties would have known were being monitored by the prison." AB19. The State then makes the conclusory assertion that "it is evident from [] context that Burrell had asked Nyala to try to influence Church," AB19, without explaining how it is evident. Whether or not the State's failure of proof was due to Nyala having been "inexplicit," that reason does not advance the critical inquiry: whether the State was able to draw the connection between Nyala's efforts and Mr. Burrell. The evidence does not support such a connection.

The requirement that the defendant's participation in the conspiracy be demonstrated before the statement is introduced, *Ayers v. State,* 97 A.3d 1037, 1041 (Del. 2014), is critical to this hearsay exception and the defendant's Sixth Amendment right of confrontation. The evidence failed to demonstrate this essential fact. Absent such proof, the defendant is deprived of his only tool for vetting the reliability and truthfulness of the witness – cross-examination.

The State also argues that "[e]ven if the message had come to Nyala through a third party from Burrell, that does not mean that Nyala's statements were not

those of a coconspirator to Burrell." AB19. But under that standard, the test for admissibility would be whether the defendant proved that he was not part of conspiracy with the declarant. That is not the correct standard; rather, the State was required to first prove that Mr. Burrell was acting in furtherance of Nyala's plan to tamper with a witness, i.e., that he was a coconspirator. *See Floudiotis v. State,* 726 A.2d 1196, 1212 (Del. 1999) (D.R.E. 801(d)(2)(E) requires that the statement be made in furtherance of the conspiracy). If that proof consisted of an alleged statement from Mr. Burrell, *see* State's discussion of *Swan v. State,* 820 A.2d 342, 353 (Del. 2003) and *Lloyd v. State,* 534 A.2d 1262, 1264-65 (Del. 1987), there still had to be proof in the statement that it furthered the illegal object of the conspiracy. The State introduced no statement from Mr. Burrell that did so.

For this reason alone, the State's concession that the message (or messages) to Nyala could have come through a third party defeats the admissibility of Nyala's statements under the coconspirator exception. It is irrelevant that even if the messages came through a third party, Mr. Burrell *might* have initiated them. The relevant question is whether there was any basis to find that the communication to Nyala came directly from Mr. Burrell or if not, that he initiated it. That proof is necessary because otherwise there is no competent evidence that Mr. Burrell was part of Nyala's plan to tamper with a witness.

As Mr. Burrell pointed out in his Opening Brief (OB), reliance on such "third-party communication would constitute double-hearsay and confrontation clause violations that are not excused or contemplated by" the coconspirator exception. OB24. This gives rise to an alternative basis for exclusion. Even if the person who communicated directly with Nyala was *his* co-conspirator, absent any evidence that any statements Mr. Burrell made to that third person implicated witness tampering (and thus could be deemed to have been made in furtherance of a conspiracy), attribution to Mr. Burrell would constitute rank hearsay and violate his rights to confrontation under the Delaware and United States Constitutions.

Regardless, any such "messages" do not support a finding that whatever Mr. Burrell may have said was said in furtherance of a conspiracy to tamper with a witness. Accordingly, Mr. Burrell also pointed out that there was no proof that "Nyala's attempts were engineered by Mr. Burrell." *Id.* The dubiousness of relying on such "messages" in support of such a finding is further demonstrated by the lack of attribution of these messages to any specific third party.

Rule 404(b)

Mr. Burrell argues in his Opening Brief that the third requirement of *Getz v. State,* 538 A.2d 726, 731 (Del. 1988), that the evidence of Mr. Burrell's participation was not "plain, clear and conclusive," was not established. The State is correct that Mr. Burrell's *Getz* argument tracked his argument regarding the

coconspirator exception, AB21; that is, that evidence did not establish that Mr. Burrell sent the messages to Nyala or that any messages that could be attributed to Mr. Burrell directed witness tampering. In short, because the evidence was insufficient to establish Mr. Burrell's participation in witness tampering for purposes of D.R.E. 801(d)(2)(E), then it necessarily fails the *Getz* test.

II

THE SUPERIOR COURT ERRED AND ABUSED ITS DISCRETION IN REDACTING FROM ANDRE CHURCH'S STATEMENT HIS ELEVENTH-HOUR IDENTIFICATION OF THE PERSON WHO ALLEGEDLY SHOT HIM, THOMAS PAIN; ALTERNATIVELY, THE SUPERIOR COURT COMMITTED PLAIN ERROR BY PERMITTING THE RESULTING DISTORTED STATEMENT THAT FALSELY IMPLICATED MR. BURRELL AS CHURCH'S SHOOTER TO BE PRESENTED TO THE JURY.

In his Opening Brief Mr. Burrell argues that the Superior Court erred in redacting from Andre Church's March 12, 2019 statement to law enforcement his identification of the person who shot him in a different case. OB32-38. Mr. Burrell was prejudiced in two distinct ways by the Superior Court's ruling. The redacted statement permitted the jury to infer that Mr. Burrell was the person who shot Church. *Id.* That false inference prejudiced Mr. Burrell by both suggesting his propensity to shoot people and suggesting that Church recanted because of his fear of the man who shot him before. It also deprived Mr. Burrell of powerful evidence to rebut the State's theory that Church's recantation was motivated by witness tampering, with proof that he would only provide the name of a shooter – even in a case where he was the victim – if there were a payoff for doing so. That evidence would have undermined the reliability and credibility of Church's implication of Mr. Burrell and give credence to Church's recantation. *Id.*

Error in the False Implication of the Redaction

The State takes the following position:

> An *equally reasonable* interpretation of the flow of Church's commentary with the redaction is that Burrell shot Benson as a result of some dispute that started with Church's shooting, not that Burrell shot Church.

AB31 (emphasis added). The State's position is a concession that it is as likely as not that the jurors interpreted the redacted statement to have distorted its true meaning as to who shot Church and led them to conclude that it was Mr. Burrell. That result does not comport with the due process clause. *See e.g., People v. Stallworth,* 164 Cal. App. 4th 1079, 1100-1101 (Cal. 2d Dist. Ct. of Ap. 2008) (where redaction distorted statement by making it more inculpatory, admission violated due process, prejudiced defendant and warranted new trial). Even if it were not a due process violation, a redaction that creates an equally likely inference that the defendant shot a witness whom (1) he never shot and (2) whom he was accused of trying to intimidate, cannot be deemed harmless beyond a reasonable doubt.

Notably, the references that the State cites to suggest an alternative inference, do nothing of the kind. The State summarizes portions of Church's March 12, 2019 statement in which the two incidents (the shootings of Church and Benson) are discussed in a manner that makes clear they are related. *See* AB at 30-31 (referencing Church's comment that "it was all surrounding what took place

with me" and noting that during questioning, the detective "circled back" to the Benson shooting after moving on to the Church shooting). From this the State posits that it is just as plausible that the jury found that "Burrell shot Benson as a result of some dispute that started with Church's shooting . . . ." AB31. That is certainly a plausible inference; however, it is hardly exclusive of or even inconsistent with the (false) inference that Mr. Burrell committed the Church shooting. In fact, as the State points out, Church told police on March 12, 2019, that the gun used to shoot Benson was the gun that had been taken from him when he was shot. AB31. That only further corroborated a finding that Mr. Burrell shot Church, by placing the gun stolen from him at the time of his shooting in Mr. Burrell's hands at the time of Benson's shooting.

The State also suggests that because Church stated that after shooting Benson, Mr. Burrell said "I should shoot you too," the jury would have understood that Mr. Burrell did not shoot him previously. AB31. The State, however, offers no reason Mr. Burrell's alleged contemplation of shooting Church on December 10, 2017, would demonstrate that he did not shoot him previously.

The State then points out that Church told Detective Kirlin that "they" took his gun when he was shot, yet "there was no evidence that anyone other than Benson was shot during the December 10, 2017 incident." *Id.* However, whether other people participated in shooting Church or taking his gun does not impact the

false inference from Church's March 12, 2019 statement that Mr. Burrell was the person who shot Church. And the fact that there were no other victims on December 10, 2017, has nothing to do with whether other people may have been involved in the taking of Church's gun[1] or the false inference that Mr. Burrell shot Church.

The State's final two points in support of an alternative inference are (1) defense counsel's cross-examination of Detective Kirlin and Church establishing that the gun used in the Benson shooting had been Church's, and (2) that Church had offered to cooperate in these shootings and one other shooting. AB31-32.

First, as discussed above, Mr. Burrell's alleged possession of the gun taken from Church only corroborated the false inference that he committed the Church shooting. If he shot Church, then he had the opportunity to seize Church's gun, a gun that the jurors knew had been seized from Church. Indeed, opportunity is one of the bases for other crimes evidence, *Waston v. State,* 2015 Del. LEXIS 148 at *7 (Del. Mar. 19, 2015), and there is little reason to doubt that the jury accepted this evidence for that very purpose.

[1] In fact, in the unredacted version of Church's statement, he makes clear that the person who shot him, Thomas Pain, was by himself when he did so. A261.

Second, the fact that Church agreed to cooperate for secondary gain does nothing to refute the inference that he identified Mr. Burrell as his shooter, and the State fails to provide a reason why it should have.

Standard of Review

The State concedes that the record supports the finding that trial counsel's objection to redacting the name of Church's actual shooter was based in part on his concern that the distorted narrative would "make it sound like Church was shot by [his] client." AB32. That is the very issue raised here and is in accord with Mr. Burrell's argument that this exception is "part and parcel of counsel's preserved objection." OB36. The State, however, argues that trial counsel's subsequent acceptance of the State's further redaction constitutes a waiver and compels plain error review. The State is incorrect. After the Superior Court overruled trial counsel's objection to redacting the name of Church's shooter, trial counsel was clear that he was maintaining his objection, notwithstanding any subsequent agreement or compromise with the State. *See* A32-34 (following the State's going through the redaction to ensure that trial counsel was "okay with everything," trial counsel affirms that he is, subject to his "objection on the part we discussed"). Following the Superior Court's order, trial counsel was still obliged to attempt to mitigate the impact of that order. His negotiating with the State to do so did not undo his objection. A finding to the contrary creates a waiver trap that undermines

effective advocacy. *Cf.* 6 Charles Alan Wright *et al., Federal Practice & Procedure* § 1476 (3d ed. 2019) ("It therefore is not logical to deny a party the right to appeal simply because the party decides to abide by the court's order . . . .").

Even if this Court disagrees, plain error is established. As Mr. Burrell discussed in his Opening Brief, permitting the jury to infer that one's client shot the alleged eyewitness, at a trial in which the State contends the defendant tampered with that witness, is surely prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). OB36-37. Now that the State has conceded that the false inference that Mr. Burrell shot Mr. Church is equally plausible as the inference that he did not, plain error is established.

For all the reasons discussed in the Opening Brief and in this Reply, the State could never demonstrate harmlessness beyond a reasonable doubt upon a jury finding that Mr. Burrell shot Church. Reversal on this basis is warranted.

Error in Precluding the Name of Church's Shooter, and Unnecessarily and thus Unreasonably, Limiting Mr. Burrell's Challenge to Church's Credibility

The State argues that Mr. "Burrell was still able to present the substance of his argument, i.e., that although Church knew who shot him, he did not come forward until he was arrested in March 2019 and, thus, had a suspect motive for

providing information." AB29. The State points out that trial counsel cross-examined Church on the fact that he identified his shooter to the detective. *Id.*

The State's argument should not be considered in isolation, but rather in the context of the trial evidence, especially the quality of the witness Andre Church. Church was involved in three separate shootings. A180. He admitted to possessing a nine-millimeter automatic weapon. A181. He had just been arrested on serious gun and drug charges. A131. The jury had substantial reasons to doubt anything that he admitted on cross-examination, including admissions to statements that trial counsel suggested he made to detectives on March 12, 2019. This is particularly true where, as here, the jury had seen a comprehensive video-recorded statement in which Church discussed these two shootings, yet nowhere in the video *they* saw did Church identify his shooter. Indeed, if as the State concedes, an equally fair inference is that Mr. Burrell was that shooter, this Court can be certain that there was little in the video suggesting a shooter other than Mr. Burrell.

It is therefore too facile a response to say that because Church admitted to implicating a shooter to police on March 12, 2019, any error in omitting the portion of the video where he names the shooter was harmless. His March 12, 2019 accusation was unseen by jurors who viewed what they surely regarded as the entirety of Church's statement to Detective Kirlin regarding the two shootings. The statement delved into both shootings, and it would have defied the jurors'

collective common sense that, if Church identified his shooter during that statement, it would not have appeared in the video.

The State does not attempt to justify the Superior Court's ruling redacting Church's identification of Thomas Pain. There was no principled basis for exclusion. Indeed, in response to the previous argument above, the State suggests the interrelatedness of these incidents, underscoring the relevance of the identity of the actors. *See* AB31 (arguing that the jury might not have taken Church's narrative to mean that Mr. Burrell shot him, but rather that Mr. "Burrell shot Benson as a result of some dispute that started with Church's shooting . . . ."). The State's argument focuses entirely on the question of harm. For the reasons discussed above, the State cannot establish beyond a reasonable doubt that the exclusion of this evidence did not harm Mr. Burrell.

III

THE SUPERIOR COURT COMMITTED STRUCTURAL AND PLAIN ERROR BY PROVIDING THE JURY WITH A CONSTITUTIONALLY INADEQUATE REASONABLE DOUBT INSTRUCTION, WHICH WAS THE EQUIVALENT OF THE CLEAR AND CONVINCING EVIDENCE STANDARD.

In his Opening Brief, Mr. Burrell argues that the "firmly convinced" language provided to his jury in the Superior Court's reasonable doubt instruction equated textually to Delaware's "clear and convincing" evidence standard, based on Delaware precedent. OB39-44. Because that standard necessarily requires a higher degree of doubt than the "beyond a reasonable doubt standard," and because that higher degree of doubt is reflected in Del.P. J. I. Civ. § 4.3's requirement that the proof be "free from serious doubt," the instruction (without the juxtaposed phrase suggested in *Victor v. Nebraska,* 511 U.S. 1, 27 (1994)), violates the due process clause. OB39-44.

The State argues that the "very language Burrell claims is necessary for the reasonable doubt instruction to be constitutionally adequate, the 'real possibility' language, is the very language this court suggested be removed in *McNally.*" AB37. But as Mr. Burrell argued in his Opening Brief at 42, the concerning language that this Court cited in *McNally v. State,* 980 A.2d 364, 368 (Del. 2009) went dangerously beyond the language suggested in *Victor. Compare McNally,* 980 A.2d at 368 ("[if] you think there is a real possibility or, in other words, *a reasonable doubt that the defendant is not guilty*") (emphasis added), with *Victor,*

511 U.S. at 27 ("[if] you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."). The language in the instruction given in *McNally* turns on its head the reasonable doubt requirement (i.e., a reasonable doubt that the defendant is guilty), and confounds the burden of proof. Justice Ginsburg's addition in *Victor* does not; it lowers the burden of proof from what otherwise would be an articulation of the clear and convincing evidence standard.

The State neither addresses nor distinguishes the Delaware precedent Mr. Burrell cites in his Opening Brief holding that the clear and convincing burden requires the factfinder to be "firmly convinced" or have a "firm conviction." OB41. Instead, the State summarily declares that it is merely a semantical issue. *See* AB38-39 (arguing that the presence of the word "convince" in both standards, and the presence of "simply individual phrases," do not suggest identical meaning). But Mr. Burrell does not simply cite the word "convince" and disparate individual phrases; rather he cites the critical definitional phrase.

It is of little relevance that other jurisdictions with a standard different than Delaware's for clear and convincing evidence have not found fault with the "firmly convinced" language. For example, in *State v Davis,* 975 N.W. 2d 1, 16 n. 8 (Iowa 2022), cited by the State (AB39), the Iowa Court held that unlike other jurisdictions that required a "firm belief" to establish clear and convincing

evidence, Iowa does not. Thus, there was no potential heightening of the reasonable doubt standard based on language that is not part of Iowa's burden of proof for clear and convincing evidence. *Id.*

Notably, the Iowa court referenced other jurisdictions that employed the "firm" designation in both the beyond a reasonable doubt instruction and utilize it as a definition for clear and convincing evidence. *Id.* The court found that in these jurisdictions the issue was problematic. *See id.* (discussion of how *State v. Perez*, 976 P.2d 427 (Haw. Ct. App. 1998), and *State v. Putz*, 662 N.W.2d 606 (Neb. 2003) (per curiam), support the argument that in Hawaii and Nebraska the "firmly convinced" instruction lowers the burden of proof in criminal trials).

Similarly, the Connecticut Court in *State v. Jackson,* 925 A.2d 1060 (Conn. 2007), AB39-40, had no cause to address cases like *Shipman v. Division of Social Services,* 454 A. 2d 767 (Del.Fam.Ct. 1982), *State v. Williams,* 2001 Del. Super. LEXIS 418 at *11 (Sept. 4, 2001) or *Guy S. v. Robin C.,* 1999 Del. Fam. Ct. LEXIS 91 at *12-*22 (Feb. 5) (OB41) which make clear that Delaware's clear and convincing evidence standard requires being "firmly" convinced/having a "firm" conviction. The Connecticut standard is simply not the Delaware standard. Additionally, this Court should reject the State's invitation to adopt the Connecticut Court's reasoning that because jurors might be ignorant of these evidentiary standards in any event, there is little risk that they would confuse them.

Jackson, 925 A.2d 1067-68. No court should rely on juror ignorance to enshrine an unconstitutional standard.

Finally, the State cites cases from jurisdictions outside of Delaware that express concern that the "real possibility" language of the FJC standard instruction approved in the *Victor* concurrence might confuse jurors into thinking that the defense has a burden. AB40. But as Justice Ginsburg suggested, the rationale for the use of that phrase was that it "enhanced" the "firmly convinced" language by commanding that the jury "must acquit" if that possibility existed. Far from the instruction that gave this Court concern in *McNally* that arguably required the defendant to demonstrate a reasonable doubt that he is not guilty, 980 A.2d at 368, Justice Ginsburg's suggested addition requires acquittal on the mere real possibility of innocence. The precedent cited by the State also fails to address that the "possibility" language is paired with language requiring that the defendant receive the benefit of any "doubt," a concept that is antithetical to the notion of a defense burden. There is no suggestion that the defendant demonstrate anything, and in this respect, it is no different than requiring the jury to *find* a reasonable doubt before acquitting.

As the Ninth Circuit held, in approving the "real possibility: language, in *United States v. Arturo,* 121 F.3d 1256, 1258 (9th Cir. 1997):

> The term real means a doubt which is authentic, genuine, actual and true instead of its opposite meaning i.e. unreal, apparent, or imaginary

> doubt. The Supreme Court has held that a reasonable doubt is, at a minimum, one based on reason, so "[a] fanciful doubt is not a reasonable doubt." *Victor v. Nebraska,* 511 U.S. 1, 17, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994). *Victor* makes that distinction in the context of approving the phrase "not a mere possible doubt." *Id.*

Assuming this Court disagrees and sees the "real possibility" language as problematic, that does not alter the constitutional necessity for a further instruction that differentiates the beyond a reasonable doubt "firmly convinced" requirement from the clear and convincing evidence "firmly convinced" requirement. As it stands now in Delaware the definitions are virtually identical. That cannot satisfy the due process clause, and the State's reliance on the notion that jurors do not understand these concepts anyway is not reassuring. While the *McNally* Court suggested as a solution (but did not require) the use of the phrase "if you have a reasonable doubt about the defendant's guilt," 980 A.2d 368, the difficulty with that solution is that it relies on the term "reasonable doubt" to explicate the meaning of reasonable doubt.

The *Arturo* Court discussed the "right way" for jurors to understand the phrase if "there is a real possibility that he is not guilty, you must give him the benefit of the doubt." 121 F.3d at 1258. The Court stated that it was:

> [N]ot just whether they think the defendant more likely than not committed the crime charged, or even that he most probably did, but whether they are sure that he did, and if not, he should get the benefit of what is merely a doubt and not a probability.

That model, or its substantive equivalent, distinguishes in a clear plain-spoken way between the clear and convincing evidence standard – one that is unconstitutional in the criminal setting – and the beyond a reasonable doubt standard. Regardless of what formulation this Court would accept as effectively creating that distinction, short of counting on juror ignorance, such a distinction is constitutionally necessary.

CONCLUSION

For all the foregoing reasons, Appellant Trevie Burrell respectfully requests that the Court reverse the judgment of the Superior Court, vacate his convictions and sentence, and remand this matter for a new trial.

Respectfully Submitted:

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Date: March 21, 2024

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	)	
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	)	of the State of Delaware
STATE OF DELAWARE,	)	in and for New Castle County
	)	ID No. 2107007983
Plaintiff Below-Appellee.	)	

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

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This reply brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using a word processor.

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Dated: March 21, 2024

/s/ Herbert Mondros

Herbert Mondros