IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

State of Delaware,	)	
	)	
	)	
v.	)	
	)	ID No. 2206000799
Kathleen McGuiness,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

Pursuant to Superior Court Rule of Criminal Procedure 29(c), the Defendant hereby moves for judgment of acquittal on Counts One, Three, and Four of the Indictment. In support of her Motion, the Defendant avers the following:

Introduction and Background

1. On October 11, 2021, the State charged the Defendant by indictment in New Castle County.

2. On March 28, 2022, the State obtained a superseding indictment against the Defendant in New Castle County.

3. On June 6, 2022, after entering a *nolle prosequi* in the New Castle County case, the State charged the Defendant by indictment in Kent County. (A copy of the Indictment is attached hereto as Exhibit A.)

4. On June 14, 2022, the Court began a jury trial in this matter.

5. On June 28, 2022, at the end of the State's case, the Defendant moved pursuant to Rule 29(a) for judgment of acquittal on each of the five Counts. June 28 Tr. 177:18–214:22 (excerpts attached hereto as Exhibit B). The Court reserved its decision. Exhibit B at 214:23–215:3.

6. On June 29, 2022, at the end of the Defendant's case, the Defendant renewed her Rule 29(a) motion for judgment of acquittal on each of the five Counts. June 29 Tr. Afternoon Session 27:15–17 (excerpts attached hereto as Exhibit C). Again, the Court reserved its decision. Exhibit C at 27:18–28:7.

7. On June 29, 2022, the Court instructed the jury on the law. (A copy of the Court's Jury Instructions is attached hereto as Exhibit D.)

8. On July 1, 2022, the jury found the Defendant guilty on Counts One, Three, and Four of the Indictment. The Defendant promptly renewed her Rule 29(a) motion and informed the Court of her intention to file a Rule 29(c) motion and a Rule 33 motion. July 1 Tr. 5:20–6:1 (excerpts attached hereto as Exhibit E). The Court asked that each motion be submitted as a written filing. Exhibit E at 6:2–7.

9. To date, there has been no decision on the Defendant's Rule 29(a) motion. The Defendant respectfully reasserts her Rule 29(a) motion and requests a decision thereon. *See* Exhibit B at 177:18–215:3.

10. In the instant filing, the Defendant moves pursuant to Rule 29(c) for judgment of acquittal.

Legal Standard

11. The Superior Court is empowered to set aside a guilty verdict and enter judgment of acquittal. Super. Ct. Crim. R. 29(c).

12. A judgment of acquittal is appropriate when no "rational trier of fact, viewing the evidence in light most favorable to the State, could find a defendant guilty beyond a reasonable doubt of all the elements of the crime." *Clark v. State*, 224 A.3d 997, 1003 (Del. 2020).

Argument

13. **Count One.** The State spent a great deal of trial time attempting to string together a narrative that would fit the strictures of 29 *Del. C.* § 5805. The result is a square peg forced into a round hole. The Defendant hired her daughter, Elizabeth "Saylar" McGuiness. Other employees resigned for personal reasons long after the decision to hire Saylar was made. Saylar did things that other employees did for the same pay. Somehow, according to the State, this was a crime.

14. The Indictment referenced only three casual-seasonal employees. Exhibit A ¶¶ 7–9. The record reflects that two of these casual-seasonal employees, Rooslie Maurice and Lizbethmary Vargas, had completely different roles at the Office of the Auditor of Accounts ("OAOA") than Saylar. No rational jury could place these individuals in the "same class or group of persons" required to sustain a conviction on Count One. Exhibit D at 6.

15. The third casual-seasonal employee referenced in the Indictment, Lydia August, actually received ***better*** treatment than Saylar. In fact, August was twice approved to be paid to work more than 29.5 hours in a week. The same cannot be said for Saylar. No rational jury could conclude that the Defendant's conduct "would result in a financial benefit to accrue to [Saylar] to a greater extent than such benefit would accrue to" August, as required to sustain a conviction on Count One. Exhibit D at 6.

16. The State conveniently overlooked Kyra Marshall, another casual-seasonal employee who worked during the period charged in Count One. She was neither interviewed during the State's investigation nor presented as a State's witness at trial. Marshall received precisely the same treatment as Saylar, as did Virginia Bateman, another casual-seasonal employee. No rational jury could conclude that Saylar received any unique financial benefit at all.

17. The State ultimately focused its trial strategy on what the Indictment called "advantages unavailable to other employees . . . ." Exhibit A ¶ 22. The record makes clear, however, that not only were these "advantages" available and obtained by other employees, but also that some were not even "financial benefits," as required to sustain a conviction on Count One. Exhibit D at 6.

18. Finally, the State insinuated in its Indictment, and again during trial, that the departures of Maurice, Vargas, and August were related to Saylar's hiring.

The evidence, however, reflects that Maurice and Vargas resigned for personal reasons after the pandemic reduced their hours and rendered their front-desk position unnecessary, and that August ultimately left Delaware pursuant to a longstanding plan to follow her boyfriend. In any event, to the extent that these are actually disguised "detriments," the State forfeited this basis for conviction during the prayer conference, as the Court's jury instructions reflect.

19. Against this backdrop, it is clear that the State failed to prove the elements of Count One beyond a reasonable doubt. Judgment of acquittal is therefore warranted.

20. With respect to the third element of Count One, no rational jury could find that Saylar was treated differently than "others who are members of same class or group of persons." Exhibit D at 6.

21. The jury was never told what the "same class or group of persons" means. Exhibit D at 6. The State had to prove the contours of the class beyond a reasonable doubt. The State failed to do so.

22. To the extent that the State intended to prove that the class encompasses all casual-seasonal employees of OAOA, it failed to present sufficient evidence about the class members. In fact, the State's witnesses mentioned five casual-seasonal employees who necessarily would fall within this class: Colin Donnelly, Connor Perry, Quinn Ludwicki, John Repass, and Grandville Brown. Exhibit B at

143:19–145:3. The only evidence pertaining to any of these individuals actually showed that Quinn Ludwicki was paid ***more*** per hour than Saylar. State Exhibit 2 at 4 (List of Authorized Positions report). Beyond that, there is no way of knowing how much money the other four casual-seasonal employees named in this paragraph earned per hour. There is also no way to know whether any of these five casual-seasonal employees had access to the State car, the number of hours they worked, or when and where they worked.

23. Nor is there any way of knowing ***anything*** about the other casual-seasonal workers employed by OAOA: their names, wages, privileges, and working conditions are entirely unknown. The State had the burden of proving that Saylar was treated better financially than "others who are members of the same class or group of persons." Exhibit D at 6. There is simply no evidence that would support a rational conclusion that Saylar received a benefit of ***any*** kind that was not equally available to each of the other five casual-seasonal employees. Because the State failed to provide the jury with evidence upon which such proof could be based, no rational jury could convict on this basis.

24. Who, then, did the jury include in the "same class or group of persons"? The only possible answer is the short list of OAOA casual-seasonal employees who testified: Maurice, Vargas, August, Marshall, and Bateman.

25. Maurice and Vargas served as front-desk receptionists. June 14 Tr. Afternoon Session 99:14, 100:3–4 (excerpts attached hereto as Exhibit F). By its very nature, their job could not be done remotely; they had to be in the office to greet visitors and answer telephone calls, among other administrative tasks. Exhibit F at 101:1–7. Saylar served a completely different role. She worked on communications, graphics, and outreach for OAOA. June 22 Tr. 185:18–186:3 (excerpts attached hereto as Exhibit G). Some of this work could be done remotely, and it was in fact done remotely by Marshall and Bateman (in addition to Saylar). June 16 Tr. Morning Session 10:17–20 (Bateman) (excerpts attached hereto as Exhibit H); June 29 Tr. Morning Session 13:11–23, 14:1–19 (Marshall) (excerpts attached hereto as Exhibit I). No rational jury could convict the Defendant on this basis.

26. Only August, Marshall, and Bateman remain. Saylar did not receive financial benefits over these individuals.

27. August, Marshall, Bateman, and Saylar all earned the same wages. State Exhibit 2 (List of Authorized Positions report); Exhibit G at 179:10–12 (Saylar); Exhibit G at 207:15–23, 208:13–17 (Bateman); Exhibit I at 8:23–9:6 (Marshall); Exhibit I at 47:11–13 (August).

28. They were all subject to the same 29.5-hours-per-week limit. Exhibit H at 30:11–31:1 (Bateman); Exhibit G at 180:17–181:3 (Saylar); Exhibit I at 9:7–23

(Marshall); Exhibit I at 46:21–47:2 (August). August actually worked ***more*** than anyone else on two occasions. Defense Exhibit 4 (August payroll records); Exhibit F at 78:1–79:12 (State witness Anne Spano testified that August worked over the casual-seasonal hour maximum and worked more hours in a pay period than Saylar ever did).

29. They all "banked hours" when they worked more than 29.5 hours in a week. Exhibit H at 46:23–48:23 (Bateman); Exhibit G at 182:4–183:6, 183:18–184:8 (Saylar); Exhibit I at 25:17–26:23 (Marshall); Exhibit I at 52:9–53:18 (August).

30. They all completed the same types of tasks. Exhibit H at 7:13–17 (Bateman); Exhibit G at 185:18–186:3 (Saylar); Exhibit I at 10:1–15 (Marshall); Exhibit I at 45:23–46:11 (August).

31. They all drove the Defendant to events, either in the Defendant's personal car or in the Defendant's Fleet Services car. Exhibit H at 32:1–36:5 (Bateman); Exhibit G at 187:12–188:1, 209:21–212:12, 212:23–214:13 (Saylar); Exhibit I at 27:12–29:18 (Marshall); Exhibit I at 48:4–5, 48:21–49:13 (August).

32. Some of the so-called "advantages" proffered by the State are not even financial in nature, as required to sustain a conviction on Count One. The same is true of the State's theory that Saylar's "paper authorization" to work up to 37.5 hours per week is evidence of a financial benefit. It is not. As an initial matter, there is no

evidence about who authorized the 37.5-hours limit, so there is no rational basis to conclude that it was the Defendant. Second, there is no evidence that the Defendant or Saylar even knew about this higher-hours limit. Finally, and most importantly, there is no evidence that Saylar was ever paid for more than 29.5 hours per week. The undisputed fact is that Saylar believed that she could only be paid for a maximum of 29.5 hours per week. Exhibit G at 180:17–181:3. Indeed, that is why she (and other casual-seasonal employees) had to "bank" hours. The mere existence of this higher-hours limit is not evidence of a financial benefit.

33. The State argued at trial, and might argue still now, that Saylar received some kind of unique financial benefit because she was allowed to work remotely while at college while Bateman and Marshall were not. But any such argument would be based upon inappropriate speculation (as would any verdict), because the State never asked Bateman or Marshall whether they ***wanted*** to work remotely while at college. The trial record is silent on that point.[1] Similarly, the trial record is silent as to whether any of the five additional casual-seasonal employees described in Paragraph 22 of this Motion worked remotely while in college. Speculation that they did not cannot form a basis for the jury's verdict.

[1] In fact, if anything, the evidence suggests that the Defendant offered Bateman the ability to work remotely. *See* Defense Exhibit 85 (the Defendant emailed Saylar on September 25, 2020 and stated that she "will ask [Saylar] and Va if she is free to continue assisting Alaina with the graphics for our media*").

34. The State might also attempt to argue that if it proved beyond a reasonable doubt that Saylar received a benefit that was unavailable to Maurice or Vargas, it thus sustained its burden of proving that Saylar received a financial benefit "to a greater extent than such benefit would accrue to others who are members of the same class or group of persons," as required to prove guilt for Count One. Exhibit D at 6. However, such an argument misreads the law. 29 *Del. C.* § 5805 requires a comparison between the benefits conferred to Saylar as compared to those available to the "same class" ***as a whole***. It is not enough to prove that Saylar might have received a benefit not available to a small subset of the class as a whole; the statute does not read, "*some* of the members of the same class or group of persons." Such a construction would substantially broaden the potential scope of 29 *Del. C.* § 5805 and is not supported by the plain language of the statute. Maurice and Vargas are only two of eight causal-seasonal employees that were mentioned as a part of the trial record (excepting Saylar), and such a small subset of comparators is insufficient to define "the same class or group of persons." Exhibit D at 6.

35. Accordingly, no rational jury could find that the State proved the third element of Count One beyond a reasonable doubt.

36. With respect to the second element of Count One, no rational jury could find that the Defendant "participated on behalf of the State in the review or disposition" of the departures of Maurice, Vargas, or August, which the State

insinuated in the Indictment and at trial were somehow related to Saylar's hiring. These individuals took their employment into their own hands when they resigned for personal reasons.

37. At the outset, to the extent that this theory is just a backdoor way of proving a "detriment" to Maurice, Vargas, or August, the State expressly forfeited that theory during the prayer conference. Exhibit C at 10:6–8. This Court, noting that "[t]here was no detriment," therefore struck the "detriment" language from the jury instructions. Exhibit C at 10:6–10; *see* Exhibit D at 6. The conviction therefore cannot stand on this basis.

38. In any event, it is undisputed that Maurice and Vargas resigned for personal reasons. June 16 Tr. Afternoon Session 92:8–14 (Maurice) (excerpts attached hereto as Exhibit J); Defense Exhibit 27 (Maurice resignation letter); Exhibit J at 115:11–117:8 (Vargas); Defense Exhibit 30 (Vargas resignation text message). Moreover, they each resigned long ***after*** the decision to hire Saylar and Bateman. Although it is true that their hours were reduced when they returned to work in May (from 29.5 to 20 hours per week), there is absolutely no evidence establishing who decided to reduce their hours. Defense Exhibit 113. The State could have asked this question of its witnesses (such as, notably, Thomas Van Horn), but it failed to do so. And, of course, Saylar and Bateman were hired for a completely different position as replacements for August. Defense Exhibit 110. It

is no surprise that their hours would differ from those of Maurice and Vargas. The State's attempt to string together Saylar, Maurice, and Vargas is inapt and irrational.

39. August also resigned for personal reasons. The State's own records and the testimony of one of its own trial witnesses reflect the fact that August resigned from her position at OAOA. *See* Defense Exhibit 112 (State of Delaware Department of Labor records indicating August resigned); June 23 Tr. Morning Session 64:9–66:18 (State witness Patricia Moore acknowledging State records reflecting August's resignation and admitting August resigned) (excerpts attached hereto as Exhibit K).

40. August had ***always*** planned to leave OAOA within a year of her start date to live with her boyfriend at an out-of-state medical school. Exhibit I at 53:22–54:7. She informed the Defendant of this plan when she was first hired. *Id.* at 54:9–14. Only when her boyfriend failed to receive acceptance to medical school did August ask to stay on at OAOA until June 2020, three months longer than she had planned originally. *Id.* at 55:6–12, 58:14–23. And August did, in fact, stay on for the additional time that she requested, ending only two weeks shy of June—an insignificant amount of time, as this Court noted. *Id.* at 72:5–12. By February 2020, the Defendant had already started preparing to onboard Saylar and Bateman in order to fill the gap that August's anticipated resignation—which, again, August had ***always wanted***—would create. *Id.* at 54:15–55:3.

41. For these reasons, the Court should grant the Defendant's Motion as to Count One and enter judgment of acquittal thereon.

42. **Count Three.** During the course of its attempt to convict the Defendant of another crime never before charged—let alone prosecuted successfully—the State advanced two novel legal theories in support of Count Three. One is a prejudicial variance from the Indictment already rejected by the Court. The other contradicts this Court's jury instructions and the plain language of the statute. Neither can sustain the conviction.

43. Even if one of these theories sufficed, there is no evidence that the Defendant possessed the requisite state of mind. The State needed to prove beyond a reasonable doubt that the Defendant ***willfully*** fragmented or subdivided the My Campaign Group contract and ***intended*** to avoid compliance with Chapter 69 of Title 29. The State offered ***no*** evidence to prove these *mentes reae*. To the contrary, the record reflects that the State Procurement Code was "not [the Defendant's] wheelhouse," Defense Exhibit 123, so she relied on her staff, who turned out to be similarly ignorant of the intricacies of procurement law or missing in action entirely.

44. The law and the facts thus delineated, judgment of acquittal is warranted on Count Three.

45. The State's first theory concerned the "taking [of] a contract that exceeded $50,000 and dividing it into two or more contracts of less than $50,000 in

order to avoid the State's bidding requirement." *State v. McGuiness*, 2022 WL 1538488, at *3 (Del. Super. Ct. May 13, 2022).

46. The Court categorically rejected this theory as neither pled in the Indictment nor supported by any facts of which the Court was aware. *Id.*; *see* May 24 Tr. 39:2–58:5 (repeatedly rejecting $50,000 theory at *Franks* hearing) (excerpts attached hereto as Exhibit L). Accordingly, the Court ruled, "No party should attempt during the trial to assert otherwise." *McGuiness*, 2022 WL 1538488, at *3; *see* Exhibit L at 44:9–10 ("If that's your theory, it's not happening at the trial next week.").

47. To the extent that the State introduced evidence of this theory at trial, *see* June 15 Tr. Afternoon Session 51:3–5 (excerpts attached hereto as Exhibit M), June 21 Tr. 193:4–13 (excerpts attached hereto as Exhibit N), Exhibit G at 12:6–9, and the jury convicted the Defendant on that basis, her conviction runs headlong into the Court's ruling and should be undone for that reason.

48. Conviction on the $50,000 theory would also violate the doctrine of unconstitutional variance. A prejudicial "variance between the crime charged in an indictment and the evidence adduced at trial is fatal . . . ." *Manuel v. State*, 186 A.3d 103, 2018 WL 2127136, at *2 (Del. 2018) (TABLE). A prejudicial variance "undermines the defendant's right to be informed of the charges against him so that he may be enabled to present his defense and not be taken by surprise by the evidence

offered at the trial; and that he may be protected against another prosecution for the same offense." *Id.* (brackets and quotations omitted).

49. Because the Court held as a matter of law that the Indictment did not plead the $50,000 theory and that the facts could not support it, a conviction on this basis is untenable.

50. That leaves the State's second theory, concerning "fragmenting or dividing invoices into amounts less than $5,000 to avoid oversight . . . ." *McGuiness*, 2022 WL 1538488, at *3. This theory, too, is fatally flawed.

51. In its jury instructions, the Court defined "contract" as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Exhibit D at 12.

52. There are only two such contracts alleged in the Indictment, one with My Campaign Group and the other with Innovate Consulting. As the Court recognized in its Memorandum Opinion, "there are no allegations that this second contract with Innovate was improper . . . ." *McGuiness*, 2022 WL 1538488, at *1. Thus, if any contract could support the conviction, it must be the My Campaign Group contract.

53. There was no evidence presented at trial that the My Campaign Group contract itself—as opposed to the payments made thereunder—was fragmented or subdivided.

54. This Court's jury instructions cinched the matter.

55. First, the Court defined "fragment" as "to break up into fragments." Exhibit D at 12. But ***what*** need be broken into fragments? According to the statute, it is the contract itself: "Any person, who, with intent to avoid compliance with this chapter, wilfully fragments or subdivides any ***contract*** for the purchase of materiel, nonprofessional services, public works or professional services, shall be subject to the penalties listed in this section." 29 *Del. C.* § 6903(a) (emphasis added).

56. Second, the Court defined "subdivide" as "to divide the contract into more parts or into several parts." Exhibit D at 12. Consistent with the plain language of 29 *Del. C.* § 6903(a), the Court's definition was limited to "***the contract***" itself.

57. Evidence of fragmented or subdivided payments, therefore, cannot sustain the conviction. Exhibit D at 12.

58. This conclusion does not depend upon the Court's reconsideration of the Defendant's position that section 5.4 of the Budget and Accounting Policy Manual provides the only possible definition of the *actus reus* criminalized by 29 *Del. C.* § 6903(a) or that the Delaware Supreme Court's holding in *State v. Barnes* requires this Court to give "strong consideration" to the statutory interpretation of

"key governmental stakeholders most involved in implementing" the statute, *see* 116 A.3d 883, 890 (Del. 2015).[2]

59. Even if one of these legal theories passes muster, the evidence adduced at trial simply does not.

60. As set forth in the Court's jury instructions, the State must prove two distinct *mentes reae* beyond a reasonable doubt: "The Defendant ***willfully*** fragmented or subdivided the contract" and "The Defendant's fragmentation or subdivision of the contract was made with the ***intent to avoid compliance with the State Procurement Code***." Exhibit D at 12 (emphasis added).

61. First, the Court defined "willfully" as "the Defendant knew her conduct was unlawful and intended to do something that the law forbids." Exhibit D at 12.

62. There is ***no*** evidence that the Defendant knew that her conduct regarding the My Campaign Group contract was unlawful, let alone that the Defendant intended to do something with the My Campaign Group contract that the law forbids.

[2] However, the Defendant hereby reasserts her argument that the Court erred when it declined to define the offense in accordance with the definition of structuring set forth in section 5.4 of the Budget and Accounting Policy Manual. *See* Defendant's Motion to Dismiss Count Three of the Indictment for Unnecessary Delay and Failure to Adequately Describe an Offense, Docket No. 57 (Apr. 5, 2022); Defendant's Motion for Reargument, Docket No. 101 (May 16, 2022).

63. To the contrary, the record reflects that the Defendant was unsure. "[T]his is not my wheelhouse," the Defendant told her staff. Defense Exhibit 123.

64. Defense Exhibit 123 shows that on September 16, 2020, then-Senior Accountant Shequanna Cousin told the Defendant and then-Chief of Staff Thomas Van Horn that a My Campaign Group voucher "was pushed back because the funding has not been encumbered. . . . The remaining balance of the total invoice was $6,900."

65. Within five minutes, the Defendant asks Cousin, "Can we pay 4900.00 of the 6900.00?"

66. The next day, Cousin responds unequivocally: "Yes it is possible to do."

67. Cousin goes even further in that same email, offering to "process a partial payment of $9,250.00 of the $11,250.00 invoice, of which $4,350.00 will be paid with the standing PO and $4,900.00 will be direct claimed."

68. Either that same day or the next day, Cousin leaves for vacation and never returns. June 24 Tr. 80:19–22, 82:3–14 (excerpts attached hereto as Exhibit O). The Defendant did not know that Cousin would never return. Exhibit O at 82:18–20. Cousin leaves the My Campaign Group invoice unpaid. Exhibit O at 95:1–5.

69. On September 21, 2020, the Defendant, believing that Cousin was only "out today," emails Van Horn about the remaining balance.

70. Van Horn informs the Defendant that he paid $4,350 of the balance, but that "We have to do a [sic] after the fact PO for the rest."

71. The Defendant quickly responds with a litany of questions. She is unsure how Van Horn made the $4,350 payment ("A check in the mail?"); unsure what Van Horn meant by "We have to do a [sic] after the fact PO for the rest" ("Since this is not my wheelhouse, now want [sic]?"); unsure what Cousin meant by "$4,900 will be directed claimed" ("the4900.00 [sic] need to be direct claimed (?)"); and unsure about the effect of all this ("The balance due is after the face [sic] as well of 2k?"). Cousin was, after all, the individual responsible for completing after-the-fact waivers.

72. This evidence directly contradicts the State's position that the Defendant knew that her conduct was unlawful, let alone that she intended to do something that the law forbids. No rational jury could conclude that the Defendant ***willfully*** fragmented or subdivided the My Campaign Group contract. For this reason, the conviction cannot stand.

73. Second, the Court defined "intent to avoid compliance with the State Procurement Code" as "it was the Defendant's conscious objective or purpose to

avoid compliance with Chapter 69, Title 29 of the Delaware Code relating to procurement and the regulations established thereunder." Exhibit D at 12–13.

74. There is no evidence that the Defendant consciously set out to route the My Campaign Group contract around the laws and regulations relating to procurement.

75. At the outset, Jane Cole of the Division of Accounting admitted that her employees from time to time erroneously approved vouchers because of a mistaken interpretation of the requirements of the Budget and Accounting Policy Manual. State's Exhibit 40; Exhibit O at 80:12–16; Exhibit J at 46:2–8; Exhibit H at 127:8–129:10. A slew of after-the-fact waivers introduced into evidence by the Defendant further reveal that employees throughout State government were also prone to such mistakes. Defense Exhibits 16–24; Exhibit J at 17:13–38:3.

76. Moreover, there is ***zero*** evidence that the Defendant knew about the $5,000 limit. Because she did not know that the limit existed, she could not have consciously set out to avoid compliance with it.

77. Even if she knew about the $5,000 limit, there is no evidence that the Defendant's "conscious objective or purpose" was to avoid compliance with it. There is no evidence that any of the My Campaign Group invoices were split into an amount of less than $5,000 at the direction of the Defendant.

78. There is no evidence that the Defendant intended ***at the time of entering*** the My Campaign Group contract to fragment or subdivide payments made under that contract in order to avoid compliance with the State Procurement Code.

79. Indeed, Christie Gross testified that the COVID-19 work underlying the payments in question was not contemplated when the My Campaign Group contract was executed in December 2019—nor could it have been, as the start of the pandemic was still several months away. Exhibit G at 103:16–105:11.

80. That is why Defense Exhibit 35, an addendum adding that COVID-19 work, was necessary.

81. Nor is there evidence that the Defendant intended ***during the performance of*** the My Campaign Group contract to fragment or subdivide payments made under that contract in order to avoid compliance with the State Procurement Code.

82. Again, the record reveals the opposite for the reasons discussed with respect to the second element of Count Three. Defense Exhibit 123 shows that the Defendant was right, the State Procurement Code "is not [her] wheelhouse." Instead, she asked a litany of questions of her Senior Accountant and her Chief of Staff and relied on their answers. In fact, the ***only*** rational interpretation of Defense Exhibit 123 is that the Defendant (and Van Horn) intended, or at least assumed, that an after-the-fact waiver would be forthcoming from Cousin. As Jane Cole testified,

had Cousin submitted an after-the-fact waiver for the transaction, it would have complied fully with the Budget and Accounting Policy Manual. Exhibit J at 37:2–38:3, 50:20–51:1. Defense Exhibit 123 is fatally inconsistent with the idea that the Defendant intended to avoid compliance with the State Procurement Code. Nothing could be further from an intent to avoid compliance with the State Procurement Code.

83. This is not a matter of shifting blame. It is not a matter of attention to detail. It is a matter of the highly specific *mentes reae* required to support a conviction under 29 *Del. C.* § 6903(a) beyond a reasonable doubt. Because there is simply no evidence that the Defendant knew about the $5,000 limit or that her conscious objective or purpose was to avoid compliance with that limit, no rational jury could convict the Defendant on Count Three.

84. For these reasons, the Court should grant the Defendant's Motion as to Count Three and enter judgment of acquittal thereon.

85. **Count Four.** As this Court's jury instructions make clear, a conviction on Count Four is sustainable only if the Defendant is convicted on Count One, Count Three, or both. Exhibit D at 15–16. Because the Court should grant this Motion as to Counts One and Three for the reasons elucidated above, the Court should also grant this Motion as to Count Four and enter judgment of acquittal thereon.

86. Even if the conviction on Count One or Count Three withstands this Motion, however, the Court should grant this Motion as to Count Four because there is no evidence of either an "unauthorized act" for purposes of 11 *Del. C.* § 1211(1) or an official function performed "in a way intended to benefit the Defendant's own property or financial interests" for purposes of 11 *Del C.* § 1211(3).

87. With respect to 11 *Del. C.* § 1211(1), as the Court observed during the prayer conference, neither "the conflict of interest in Count 1 [n]or the structuring in Count 3" is an "act." Exhibit C at 14:19–15:3.

88. The Defendant agrees. The Defendant further notes that the Court made this observation after the close of all the evidence, and it is only this evidence upon which a rational verdict could be based.

89. Moreover, even if conflict of interest or structuring were an "act" for purposes of element 3A of Count Four, the State needed to prove beyond a reasonable doubt that said act was "unauthorized" ***and that the Defendant knew that said act was unauthorized***. Exhibit D at 15. There was no evidence adduced at trial to support that finding. This comes as no surprise. It defies logic to conclude that the Defendant was not authorized to make hiring and contracting decisions for OAOA, let alone that she knew that. For these reasons, the Defendant respectfully moves for judgment of acquittal to the extent that the verdict was based on 11 *Del. C.* § 1211(1).

90. With respect to 11 *Del. C.* § 1211(3), the State failed to prove beyond a reasonable doubt that the Defendant performed an official function "in a way intended to benefit her own property or financial interests . . . ." Exhibit D at 15.

91. First, for the reasons limned above, no rational jury could find that the Defendant committed official misconduct, to wit, Count One or Count Three. In turn, no rational jury could find that the Defendant did so "intentionally," which the Court defined as the Defendant's "conscious objective or purpose to engage in official misconduct." Exhibit D at 15–16.

92. Second, even if the conduct underlying Count One or Count Three was intentional official misconduct, there is no evidence that the Defendant engaged in this conduct "to benefit her own property or financial interests." Exhibit D at 15.

93. 11 *Del. C.* § 1211(3) is unambiguous on this point. To convict the Defendant, a jury must find that through the conduct underlying Count One or Count Three, the Defendant "intended to benefit the Defendant's ***own property*** or ***financial*** interests . . . ." Exhibit D at 15. No rational jury could so find.

94. The conduct underlying Count One was the "hir[ing] of her daughter and her daughter's friend into state employment, affording her daughter benefits not available to other state employees." Exhibit A ¶ 40.

95. There is no evidence that this conduct was intended to benefit the Defendant's ***own*** property or financial interests. Investigator Robinson testified

conclusively that there was "zero evidence" that Saylar was sharing any of her salary with the Defendant. Exhibit B at 89:17–90:9. Unlike the second element of Count Four, which relates to a broader "personal benefit" encompassing "a gain or advantage conferred on the Defendant's behalf or at the Defendant's request upon a third person," element 3B of Count Four relates ***only*** to the Defendant herself. Exhibit D at 15. The General Assembly emphasized this point by including the word "own," which otherwise would be rendered superfluous. *See Zambrana v. State*, 118 A.3d 773, 780 (Del. 2015) (rejecting interpretation that "would conflict with the General Assembly's clearly pronounced purpose in enacting the statute and render other statutory language superfluous"). Indeed, the official Commentary to the Delaware Criminal Code of 1973 ("Commentary") explains that this point "needs to be narrowly confined to situations in which [a defendant] could not justifiably have acted in the way in which [s]he did for reasons independent of personal advantage." State of Del., *Del. Crim. Code with Comment.* 346 (1973), https://archive.org/details/delawarecriminalcode/page/n365/mode/2up.

96. The State's theory at trial was that because some of Saylar's work was "political promotion," the Defendant intended to gain a benefit. June 30 Tr. 23:10–15 (excerpts attached hereto as Exhibit P).

97. Setting aside the fact that the State never said which type of benefit this is, there are two glaring problems with this theory.

98. The first problem is that it represents a prejudicial variance from the Indictment. The only conduct underlying Count One that may support a conviction on Count Four is that which is alleged in the Indictment. *See Manuel*, 2018 WL 2127136, at *2. The conduct alleged relates exclusively to the hiring of Saylar and Bateman and to affording Saylar benefits not available to other state employees. Exhibit A ¶ 40. To the extent that the jury found the Defendant guilty on Count Four for Saylar's "political promotion," the conviction cannot stand because that theory is referenced nowhere in the Indictment.

99. The second problem is that even with this prejudicial variance, the evidence still does not support the State's theory.

100. To the extent that the jury found that the conduct underlying Count One was intended to benefit the Defendant's property interest, the verdict is unsustainable as a matter of law. In *Slawik v. State*, the Delaware Supreme Court held that an elected official holds no property interest in his or her elected office even ***after*** they are elected—never mind when they are merely promoting themselves for office. 480 A.2d 636, 644–45 (Del. 1984). Thus, the Defendant had no property interest to intend to benefit.

101. To the extent that the jury found that the conduct underlying Count One was intended to benefit the Defendant's financial interest, the verdict is similarly irrational. The jury rejected the State's attempt to prove a financial benefit by

finding the Defendant not guilty on Count Two. Moreover, the General Assembly has declared that an elected official may not hold a financial interest in his or her elected office. That is the very essence of the anti-bribery laws set forth in 11 *Del. C.* §§ 1201–1209. Thus, the Defendant had no financial interest to intend to benefit.

102. For these reasons, the Defendant respectfully moves for judgment of acquittal to the extent that the verdict was based on the conduct underlying Count One.

103. The only other possible basis to sustain the conviction on Count Four is the conduct underlying Count Three.

104. The conduct underlying Count Three was the "structur[ing] [of] payments in a no-bid contract to a political campaign consulting company." Exhibit A ¶ 41.

105. There is no evidence that the conduct underlying Count Three was intended to benefit the Defendant's ***own*** property or financial interests. As noted above, element 3B of Count Four is unconcerned with an intention to benefit anyone other than the Defendant. Exhibit D at 15.

106. The State's theory at trial was that because Christie Gross "raised the profile of the office" or "advanced [the Defendant's] cause politically," the Defendant intended to gain a benefit. Exhibit P at 23:15–21.

107. Again, the State failed to prove anything at all about which type of benefit this is or to show that "raising the profile" of one's office was somehow inappropriate.[3] Either way, the same problems plague this theory.

108. The first problem is that this theory represents a prejudicial variance from the Indictment. The only conduct underlying Count Three that may support a conviction on Count Four is that which is alleged in the Indictment. *See Manuel*, 2018 WL 2127136, at *2. The conduct alleged relates exclusively to the structuring of payments under the My Campaign Group contract. Exhibit A ¶ 41. To the extent that the jury found the Defendant guilty on Count Four for Gross's "rais[ing] the profile of the office" or "advanc[ing] [the Defendant's] cause politically," the conviction cannot stand.

109. The second problem is that even with this prejudicial variance, the State's theory is still unsubstantiated.

110. The Defendant was not a party to the My Campaign Group contract. State Exhibit 72 undisputedly shows that the contract was between OAOA and My Campaign Group.

[3] The State's attempt to portray Gross's work as somehow inappropriate is wholly unsupported by the record. The trial record only supports the conclusion that she provided valuable policy and communications services to OAOA.

111. This corroborates the State's apparent slip of the tongue at trial, in which it conceded that the so-called benefit was "rais[ing] the profile ***of the office***"—or at least helping the Defendant advance her own promotion of the office.

112. As a matter of law, the State's theory is insufficient to sustain the conviction. For the reasons discussed above with respect to the conduct underlying Count One, the Defendant has neither a property interest nor a financial interest in her elected office. *See Slawik*, 480 A.2d at 644–45 (no property interest); 11 *Del. C.* § 1201–1209 (no financial interest). Thus, the Defendant had neither a property interest nor a financial interest to intend to benefit.

113. For these reasons, the Defendant respectfully moves for judgment of acquittal to the extent that the verdict was based on the conduct underlying Count Three.

114. Because no rational jury could conclude that the State proved the elements of 11 *Del. C.* § 1211(1) or 11 *Del C.* § 1211(3) beyond a reasonable doubt, the Court should grant the Defendant's Motion as to Count Four and enter judgment of acquittal thereon.

115. **Multiplicity.** This Court instructed the jury, consistent with the State's Indictment and its theory at trial, that the Defendant may be found guilty on Count Four only if she is found guilty on Count One, Count Three, or both. Exhibit D at 15–16. This rendered Counts One and Three lesser included offenses of Count Four.

The conviction of these lesser included offenses alongside Count Four was multiplicitous in violation of the Double Jeopardy Clauses of the United States Constitution and the Delaware Constitution.

116. The Double Jeopardy Clauses guarantee acquittal, not retrial, on all three Counts. Alternatively, the Defendant respectfully moves for judgment of acquittal on Count Four and for a new trial on Count One and Count Three; for judgment of acquittal on Count One and Count Three and for a new trial on Count Four; or for a new trial on all three Counts.

117. Both the United States Constitution and the Delaware Constitution guarantee that no person shall be "twice put in jeopardy of life or limb." U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); Del. Const. art. I, § 8 ("[N]o person shall be for the same offense twice put in jeopardy of life or limb . . . ."). Given their "virtually identical" language, Delaware courts apply these Constitutional guarantees harmoniously. *White v. State*, 243 A.3d 381, 396 (Del. 2020) (quotations omitted) (quoting *Tarr v. State*, 486 A.2d 672, 673 n.1 (Del. 1984)).

118. "Among the rights afforded by the Double Jeopardy Clauses is protection against multiple punishments for the same offense." *Id.* (brackets and quotations omitted).

119. “This protection is termed ***multiplicity*** and flows from the principle that legislatures, not courts, prescribe the scope of punishments.” *Id.* (brackets and quotations omitted).

120. The prohibition against multiplicity is central to the “fairness and integrity of the trial process,” and violations of the doctrine are “basic, serious and fundamental.” *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002).

121. In 11 *Del. C.* § 206, the General Assembly codified the multiplicity test set out in *Blockburger v. United States*, 284 U.S. 299 (1932). *White*, 243 A.3d at 397 n.69.

122. 11 *Del C.* § 206 prohibits a conviction for more than one offense when “[o]ne offense is included in the other, as defined in subsection (b) of this section . . . .” 11 *Del. C.* § 206(a)(1). Subsection (b) provides that an offense is included in another when “[i]It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged . . . .” *Id.* § 206(b)(1); *see Stevens v. State*, 129 A.3d 206, 211 (Del. 2015) (defining such an offense as a “lesser included offense”).

123. Collectively, 11 *Del. C.* § 206 and *Blockburger* provide that “[w]here the charges derive from two different statutes the question is whether, both sections being violated by the same act, the accused committed two offenses or only one[,]

for which the inquiry is whether each provision requires proof of a fact which the other does not." *White*, 243 A.3d at 397 (quotations omitted).

124. Here, the State's multiplicity error involves not just two different statutes, but three.

125. The State has explicitly and repeatedly conceded that elements 3A and 3B of Count Four are based on Counts One and Three. Exhibit C at 14:19–23 (The Court: "Tell me again what you think the act constituting an unauthorized exercise of official function was." The State: "***Either the conflict of interest in Count 1 or the structuring in Count 3***." (emphasis added)), 15:1–8 (The Court: "That's not an act, so tell me what the act is that you think she was unauthorized to do. I mean --" The State: "So it can be any act. And what we've alleged in the indictment is essentially the preceding paragraphs which we have been ***limited to the context of the daughter's employment and the context of My Campaign Group contract***." (emphasis added)).

126. The State even argued this to the jury in closing, though it wrongfully added Count Two—an issue which supports a new trial, should the Court deny this Motion. Exhibit P at 21:20–22:7 ("Now, if you find that the defendant committed unauthorized acts, an act unauthorized in ***Count 1*** conflict of interest concerning the daughter's employment, ***Count 2*** which related to Delaware money, or ***Count 3*** of structuring, not all, but any, then you can consider whether the defendant intended

to gain some personal benefit by committing these acts. Again, not all of them, but any of them. If she intended to gain some personal benefit by ***any of the things that we just discussed***, then she's ***guilty of official misconduct***." (emphasis added)).

127. Consequently, the Court instructed the jury as follows:

> The State alleges that the Defendant ***committed Official Misconduct either by*** (1) "hir[ing] her daughter and her daughter's friend into state employment, affording her daughter benefits not available to other state employees," or (2) by "structuring payments in a no-bid contract to a political campaign consulting company."
>
> In order to find the Defendant ***guilty of Official Misconduct***, you must unanimously agree that ***one or both of these allegations have been established*** by the State.

Exhibit D at 15–16 (emphasis added); *see* Exhibit P at 121:17–122:4.

128. This rendered proof of Count One or Count Three an element of Count Four. Put another way, Count One and Count Three became lesser included offenses of Count Four.

129. A careful analysis of these elements, as required by 11 *Del. C.* § 206 and *Blockburger*, proves the point. *See White*, 243 A.3d at 397.

130. A conviction on Count One requires proof beyond a reasonable doubt that: "(1) The Defendant was a 'state officer' at the time of the charged offense; (2) The Defendant 'participated on behalf of the State in the review or disposition of a matter pending before the State'; and (3) The matter was one in which the Defendant had a 'personal or private interest.'" Exhibit D at 6.

131. A conviction on Count Three requires proof beyond a reasonable doubt that: “(1) The Defendant entered into a contract for professional services; (2) The Defendant willfully fragmented or subdivided the contract; and (3) The Defendant’s fragmentation or subdivision of the contract was made with the intent to avoid compliance with the State Procurement Code.” Exhibit D at 12.

132. A conviction on Count Four, however, requires proof of Count One or Count Three ***plus*** proof beyond a reasonable doubt that “(1) The Defendant was a public servant at the time of the charged offense; [and] (2) The Defendant intended to obtain a personal benefit from, or caused harm to, a person . . . .” Exhibit D at 15.

133. This means that Count Four subsumes Count One and Count Three; it is the “greater” offense encompassing the “lesser” offenses of Count One and Count Three.

134. As shorthand for the elements charged, a few variables illustrate the point.

a. Count One: A + B + C

b. Count Three: D + E + F

c. Count Four: G + H + either (A + B + C) or (D + E + F)

135. Thus, Count Four requires proof of not just one, but ***two*** facts that Count One and Count Three do not: G and H (“The Defendant was a public servant at the

time of the charged offense" and "The Defendant intended to obtain a personal benefit from, or caused harm to, a person").

136. But neither Count One (A + B + C) nor Count Three (D + E + F) requires proof of a fact which Count Four does not.

137. Thus, it is clear that the State indicted, prosecuted, and convicted the Defendant on multiplicitious charges in violation of the Double Jeopardy Clauses of the United States Constitution and Delaware Constitution.

138. Of course, the Delaware Supreme Court treats 11 *Del. C.* § 206 and *Blockburger* as mere "aid[s] to statutory construction." *Johnson v. State*, 5 A.3d 617, 621 (Del. 2010). When "the legislature clearly declares its intent to impose more than one penalty for acts constituting crimes," 11 *Del. C.* § 206 and *Blockburger* give way to that legislative intent. *Id.* at 620–21.

139. There is ***no*** support—let alone "clear" support—for the proposition that the General Assembly intended 11 *Del. C.* § 1211 (Count Four) to punish the same conduct as 29 *Del. C.* § 5805 (Count One) or 29 *Del. C.* § 6903 (Count Three).

140. Delaware courts have found such clear legislative intent only for closely related crimes, such as burglary and possession of a firearm during the commission of a felony, *see Johnson*, 5 A.3d at 621, conspiracy and racketeering, *see White*, 243 A.3d at 396–400, driving under the influence and reckless driving–

alcohol related, *see Stevens*, 129 A.3d at 211, and robbery and aggravated menacing, *see Poteat v. State*, 840 A.2d 599, 602–06 (Del. 2003).

141. Indeed, even if the Court looks to legislative history, that history supports the Defendant's position. Specifically in the context of multiplicity, the Delaware Supreme Court affords "great weight" to the official Commentary. *Poteat*, 840 A.2d at 605.

142. The Commentary explains that "[s]ection 1211 is not intended to cover all forms of official misconduct." State of Del., *Del. Crim. Code with Comment.* 346 (1973), https://archive.org/details/delawarecriminalcode/page/n365/mode/2up.

143. Instead, the General Assembly recognized and intended that other, more narrowly focused statutes would cover conduct that might also be viewed, at least colloquially, as official misconduct.

144. If 11 *Del. C.* § 1211 covered ***all*** forms of official misconduct, including conflict of interest under 29 *Del. C.* § 5805 and "structuring" under 29 *Del. C.* § 6903, there would be no need to include separate criminal provisions within those statutes. The fact that the General Assembly ***did*** include separate criminal provisions within those statutes suggests that the General Assembly did not intend the blunt hammer of 11 *Del. C.* § 1211 to extend to 29 *Del. C.* § 5805 or 29 *Del. C.* § 6903.

145. The General Assembly is not responsible for the overlap of Counts One, Three, and Four. The Delaware Department of Justice is. Its charging decision led this Court astray and resulted in an untenable conviction on two lesser included offenses and the greater offense itself.

146. The only sensible remedy is acquittal. Retrial would not resolve these issues. It would only perpetuate the "basic, serious and fundamental" taint that they left on the "fairness and integrity of the trial process . . . ." *See Williams*, 796 A.2d at 1284.

147. As the United States Supreme Court held in the multiplicity context over forty years ago, "[w]here the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings." *Brown v. Ohio*, 432 U.S. 161, 166 (1977).

148. The Court should not reward the State's error—exacerbated by its violations of *Franks* and *Brady*—with yet another opportunity to rethink its legal theories and reprosecute this case.

149. The Double Jeopardy Clauses therefore guarantee acquittal, not retrial, on all three Counts. Alternatively, the Defendant respectfully moves for judgment of acquittal on Count Four and for a new trial on Count One and Count Three; for

judgment of acquittal on Count One and Count Three and for a new trial on Count Four; or for a new trial on all three Counts.

Conclusion

For the foregoing reasons, the Defendant respectfully moves for judgment of acquittal on Counts One, Three, and Four of the Indictment.

Dated: July 20, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2022, I caused to be served via email a true and correct copy of the above and foregoing document upon all counsel of record.

/s/ Steven P. Wood
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