IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

<u>DEFENDANT'S MOTION FOR NEW TRIAL</u>

Pursuant to Superior Court Rule of Criminal Procedure 33, the Defendant hereby moves for a new trial on Counts One, Three, and Four of the Indictment. In support of her Motion, the Defendant avers the following:

<u>Introduction and Background</u>

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

2. On February 25, 2022, the Defendant moved to Dismiss Count Five of the Indictment. (A copy of the Defendant's Motion to Dismiss Count Five of the Indictment ("Motion to Dismiss Count Five"), Docket No. 39, is attached hereto as Exhibit A.)

3. On March 28, 2022, the State obtained a superseding indictment against the Defendant in New Castle County. (A copy of the Superseding Indictment, Docket No. 54, is attached hereto as Exhibit B.)

4. On April 5, 2022, the Defendant moved to dismiss Count Three due to the State's unnecessary delay and failure to adequately describe an offense. (A copy of the Defendant's Motion to Dismiss Count Three of the Indictment for Unnecessary Delay and Failure to Adequately Describe an Offense ("Motion to Dismiss Count Three"), Docket No. 57, is attached hereto as Exhibit C.)

5. On April 22, 2022, the Defendant moved to dismiss the Indictment or alternatively sanction the State for discovery violations. (A copy of the Defendant's Motion to Dismiss the Indictment or Alternatively Sanction the State for Discovery Violations ("Motion for Dismissal or Sanctions"), Docket No. 73, is attached hereto as Exhibit D.)

6. On May 2, 2022, the Court denied the Defendant's Motion to Dismiss Count Five. *See State v. McGuiness*, 2022 WL 1489572, at *1 (Del. Super. Ct. May 2, 2022) (attached hereto as Exhibit E).

7. On May 13, 2022, the Court denied the Defendant's Motion to Dismiss Count Three. *See State v. McGuiness*, 2022 WL 1538488, at *1 (Del. Super. Ct. May 13, 2022) (attached hereto as Exhibit F).

8. On May 18, 2022, the Court granted in part and denied in part the Defendant's Motion for Dismissal or Sanctions. *See State v. McGuiness*, 2022 WL 1580601, at *1 (Del. Super. Ct. May 18, 2022) (attached hereto as Exhibit G).

9. On May 19, 2022, the Defendant moved for reargument of the Court's denial of her Motion for Dismissal or Sanctions. (A copy of the Defendant's Motion for Reargument is attached hereto as Exhibit H.)

10. That same day, the Court denied the Defendant's Motion for Reargument in an Order. (A copy of the Court's Order is attached hereto as Exhibit I.)

11. 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 J.)

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

13. 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 K.)

14. 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 L). The Court asked that each motion be submitted as a written filing. July 1 Tr. 6:2–7 (Exhibit L).

Legal Standard

15. The Superior Court is empowered to grant a new trial when a new trial is "in the interest of justice." Super. Ct. Crim. R. 33.

Argument

The State's Brady *Violations*

16. If it was "unfortunate" two months ago that the State's required production pursuant to *Brady v. Maryland* was still "an issue at this point in the litigation," as the Court then observed, it is by now lamentable. Despite the Court's admonition to the State in May 2022 that "since it now appears both the Filter Team and the Prosecution Team have access to these documents, their *Brady* obligations continue," the State continued to withhold material exculpatory and impeachment evidence. This adversely affected the Defendant's ability to prepare and present her case, including her ability to conduct necessary investigations. There is no question that the guilty verdicts in this case are not worthy of confidence.

17. Under *Brady* and its progeny, "the State's failure to disclose exculpatory and impeachment evidence that is material to the case violates a defendant's due process rights." *Wright v. State*, 91 A.3d 972, 987 (Del. 2014) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985) and *Brady v. Maryland*, 373 U.S. 83, 88 (1963)). The State's *Brady* obligation is "based on the requirement of due process and, as such, is grounded in principles of fairness—not punishment

of society for misdeeds of a prosecutor but an avoidance of an unfair trial of the accused." *Risper v. State*, 250 A.3d 76, 90 (Del. 2021) (citations and quotations omitted).

18. Despite that fundamental obligation, during the course of this prosecution, the State committed what is almost surely the largest *Brady* violation in Delaware history, measured in terms of volume, when it failed to search ESI evidence in its possession following the execution of a search warrant for *Brady* materials. The State compounded that failure—and exacerbated the prejudice suffered by the Defendant—when it failed to produce evidence easily accessible to it pursuant to 29 *Del. C.* § 2508(b).

19. As described in the Defendant's Motion for Dismissal or Sanctions, on ***April 6, 2022***, the State produced to the Defendant 511,266 digital files that it had seized during its execution of a search warrant at the Office of the Auditor of Account's ("OAOA") offices on ***September 29, 2021***. The Court ultimately found that none of these files were ever searched by the State for the presence of exculpatory information. *McGuiness*, 2022 WL 1580601, at *2 (Exhibit G). This egregious violation of the State's *Brady* obligation can be cured only by a new trial.

20. There is no doubt that the State's *Brady* violations in this case have involved an unjustifiable failure to produce material and exculpatory evidence. To date, the Court has not imposed any meaningful sanction as a consequence of the

State's massive breach of its *Brady* obligations. *Id.* at *5 (Exhibit G). The Court's reasoning in support of its decision not to dismiss the Indictment as a consequence of the State's *Brady* violation is demonstrably incorrect as a matter of both fact and law, and its failure to dismiss the Indictment has resulted in a trial that was fundamentally unfair to the Defendant. Only a new trial can provide a sufficient remedy for the State's failure to disclose exculpatory evidence.

21. The State's *Brady* violations warrant, ***at least***, a new trial in the "interest of justice," as that phrase is defined for the purposes of Rule 33. *See United States v. Bowen*, 799 F.3d 336, 349 (5th Cir. 2015) (if a court finds "that a miscarriage of justice" may have occurred at trial, it may warrant granting a new trial in the interest of justice pursuant to Federal Rule of Criminal Procedure 33); *United States v. Josleyn*, 206 F.3d 144, 151 (1st Cir. 2000) (if the government possesses *Brady* evidence but does not disclose it, the nondisclosure warrants a new trial if the evidence is "material"); 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Criminal* §§ 586, 588 (4th ed. 2011) (if the prosecutor indulges in misconduct of a substantial nature that interferes with the defendant's right to a fair trial, such as a *Brady* violation, a new trial must be ordered pursuant to Federal Rule of Criminal Procedure 33). The United States Supreme Court has defined materiality for *Brady* purposes as evidence which, if disclosed, would have created

a "reasonable probability" that the result of the trial would have been different. *Bagley*, 473 U.S. at 682; *see Wright*, 91 A.3d at 988.

22. "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." *Wright*, 91 A.3d at 988. Once the Court has found a *Brady* violation, the inquiry ends, for a *Brady* violation "necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (citations and quotations omitted).

23. "In order for the State to discharge its responsibility under *Brady*, the prosecutor must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense." *Wright*, 91 A.3d at 988. "That entails a duty on the part of the individual prosecutor to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* (quotations omitted).

24. In evaluating the "materiality" of a *Brady* violation, a "reviewing court may also consider any adverse effect from nondisclosure on the preparation or presentation of the defendant's case," *id.* at 987–88 (quotations omitted), such as the

prevention of the Defendant from "conducting a necessary investigation," *Dickens v. State*, 437 A.2d 159, 161 (Del. 1981).

25. "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." *Kyles*, 514 U.S. at 434. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [s]he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

26. Put another way, a motion for a new trial based on *Brady* does not involve "a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434–35. "Rather, the defendant must show that the State's evidence creates a ***reasonable probability*** that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Wright*, 91 A.3d at 988 (quotations omitted). "A reasonable probability of a different result occurs where the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* (quotations omitted).

27. "Materiality is not limited to the individual effect of each piece of exculpatory or impeachment evidence. Instead, materiality is determined in the context of the entire record." *Id.* (quotations omitted). "A reviewing court first evaluates the tendency and force of the undisclosed evidence item by item. The court then evaluates the cumulative effect of the suppressed evidence separately." *Id.* (footnote and quotations omitted). "Individual items of suppressed evidence may not be material on their own, but may, in the aggregate, undermine confidence in the outcome of the trial. The State's obligation under *Brady* to disclose evidence favorable to the defense turns on the ***cumulative effect*** of all such evidence suppressed by the government." *Id.* (footnote and quotations omitted).

28. The magnitude of the State's disregard of its *Brady* obligations is underscored by placing it in its procedural context. On March 1 and March 9, 2022, the Defendant made *Brady* requests to the State that challenged the State's theory of "Structuring" as alleged in Count Three of the first Indictment and told the State that its allegations of multiple payments being made to My Campaign Group in August and September 2020, all in amounts of less than $5,000, were false. *See* Defendant's Motion to Dismiss Count Three (Exhibit C) (further explaining the falsity of the first Indictment's allegations as to multiple payments being made to My Campaign Group). Rather than admitting that the charge of "Structuring" was no longer supported by probable cause—or the facts—and without any response to the

Defendant's *Brady* requests, the State obtained a superseding Indictment on March 28, 2022, that alleged an entirely new legal theory in support of the "Structuring" charge. *See* Superseding Indictment (Exhibit B) ¶¶ 31–32.

29. Thereafter, on April 5, 2022, the Defendant moved pursuant to Rule 48(b) to dismiss the newly redefined Count Three. The Motion alleged, *inter alia*, that the Defendant was unfairly prejudiced by the State's shift to a new theory of liability less than six weeks before the scheduled start of trial. The Motion further argued that the re-indicted charge was both "opaque" and appeared to be contrary to both the plain language of 29 *Del. C.* § 6903 and, importantly, Section 5.4 of the State Division of Accounting's Budget and Accounting Policy Manual ("BAPM") (which 29 *Del. C.* § 6903 purports to enforce).

30. On April 6, 2022, the day after the Defendant filed her Motion to Dismiss Count Three—and, again, less than six weeks before trial was scheduled to begin—the State provided 511,266 files to the Defendant, all of which had been in the State's possession ***for more than six months***.

31. Following the State's voluminous and delayed production of the seized materials, the Defendant filed her Motion for Dismissal or Sanctions pursuant to Superior Court Rules of Criminal Procedure 7(c), 16(d)(2), and 48(b). This Motion outlined the timeline of the State's production for the Court's consideration and requested that the Court either dismiss the Indictment in its entirety or sanction the

State for unnecessary delay. The Court sanctioned the State under Rule 16, ruling that "any material from the three laptops seized during the search of the Defendant's office that was produced after March 31, 2022, is excluded from the State's case in chief." *McGuiness*, 2022 WL 1580601, at *4 (Exhibit G). The Court did not find any *Brady* violation, however, and so did not enforce any further sanction upon the State. *Id.* at *5 (Exhibit G).

32. The Court's decision to deny the Motion for Dismissal or Sanctions was based in part upon the Court's factually erroneous finding that the State "did not have the technical capability" to search the seized ESI for exculpatory material. *Id.* (Exhibit G). However, and as pointed out in the Defendant's May 19, 2022 Motion for Reargument, the State has ***never*** argued that it was unable to search the large majority of the seized ESI. The record itself contains no support for the Court's conclusion that the State was unable to search the large majority of the seized ESI. Defendant's Motion for Reargument 3, 6 (Exhibit H).[1] The Court's factual finding in this regard is thus demonstrably incorrect.[2] Even if the finding was correct, as

[1] On May 19, 2022, the Court denied the Defendant's Motion for Reargument in a form Order that did not address the Defendant's contention on this point. Court's Reargument Order, Docket No. 108.

[2] Equally incorrect was the Court's finding, as set forth in the *Brady* section of its Opinion, that the State was not able to access the unproduced files until ***early March***

noted by the Court, the State could have complied with its *Brady* obligations by simply cloning the various seized storage media and providing the cloned drives to the Defendant—but it did not do so.[3] *McGuiness*, 2022 WL 1580601, at *5 (Exhibit G).

33. It is now clear that the State's *Brady* violations have resulted in the suppression of material evidence such that there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Wright*, 91 A.3d at 988 (citations omitted). The State presented a factually false theory of the case at trial about what it claimed were unique benefits not available to other employees of the same class that were bestowed upon Elizabeth "Saylar" McGuiness as a consequence of her employment. Proof of that element of the offense of Conflict of Interest was essential to the jury's verdict. But the State had exculpatory evidence in its possession until six weeks

2022 and that there was "***only a month delay*** from the time the State gained access to the material to when they delivered that material to the defense." *McGuiness*, 2022 WL 1580601, at *5 (Exhibit G). This finding is internally inconsistent with the Court's finding in the Rule 16 section of the same Opinion that "***by December 21, 2021*** . . . .the data contained in all three laptops was accessed and ***the encryption challenges were overcome.***" *Id.* at *1 (Exhibit G). These internal contradictions were raised in the Defendant's Motion for Reargument and were not addressed by the Court in its denial of that motion.

[3] The State only provided the Defendant with a hard drive of the Defendant's computer (not ***all*** of the stored media) on April 22, 2022, just over a month before the parties expected trial to begin.

before the start of trial that conclusively belies that argument. Some of it was produced among the 511,266 seized ESI files, while some of it has ***never*** been produced.

34. For example, a review of the 511,266 unsearched files has since revealed 11 List of Authorized Position ("LAP") Reports for 11 dates in 2019, 2020, and 2021 in addition to the sole LAP Report introduced by the State at trial (which related to a single date in May 2020). State Exhibit 2. Those late-disclosed reports demonstrate that between March 2020 and September 10, 2021 (the date of offense specified in Count One of the Indictment), OAOA employed at least ***five*** casual-seasonal employees (in addition to Saylar) ***who never testified at trial, and about whom no information was introduced***. All five of the casual-seasonal employees whose identities are described in those late-disclosed LAP reports suppressed by the State were paid ***more*** per hour than Saylar.[4] The State made much of its argument that Saylar was the only casual-seasonal employee of OAOA who was capped at 37.5 hours per week. June 14 Tr. Afternoon Session 31:12–38:19 (excerpts attached hereto as Exhibit M). But the State knew or should have known that its argument was false, as the State had OAOA LAP report for June 8, 2019 in its possession

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[4] Quinn Ludwicki received an hourly wage of $18.82; Colin Donnelly and Grandville Brown received $20 per hour; Stephen Dyke received $21 per hour; and Connor Perry received $25 per hour.

among the seized ESI, and that report showed that Lydia August, another casual-seasonal employee, also had her hours capped at 37.5 hours per week.

35. The magnitude of the State's *Brady* violation increases when the scope of suppressed evidence is broadened to include ***all*** of OAOA LAP reports for the period between March 2020 and September 10, 2021 that were readily accessible to the State pursuant to 29 *Del. C.* § 2508(b).[5] The complete set of LAP reports for the period between March 2020 and September 10, 2021 actually shows ten ***more*** casual-seasonal employees in addition to those mentioned *supra*. Four of these were paid the same hourly wage as Saylar, and two were paid ***more***. Like Saylar and August, one of the undisclosed casual-seasonal employees also had his hours capped at 37.5 hours per week. Furthermore, the State argued during trial that only Saylar and her friends were allowed to bank hours. June 30 Tr. 102:11–13 (excerpts attached hereto as Exhibit N). But because the State failed to disclose the identities of other casual-seasonal employees, there is no way to evaluate the veracity of that argument.

36. In other words, the State had evidence in its possession pertaining to a total of 15 casual-seasonal employees (in addition to Maurice, Vargas, August, Bateman, and Marshall). Though we know virtually nothing about those additional

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[5] The Attorney General is given the right to access all records maintained by any State agency through 29 *Del. C.* § 2508(b).

casual-seasonal employees, the LAP Reports do show that 11 of the 15 were paid the same as—or more—than Saylar. Thought the State made much at trial about Saylar's access to OAOA's State car, the State has evidence in its possession, pursuant to 29 *Del. C.* § 2508(b) which gives the State access to the records maintained by Fleet Services, that will show how many of those 15 additional casual-seasonal workers also had access to the State Car. That information was similarly not shared with the Defendant.

37. Rule 33 empowers this Court to grant a new trial "if required in the interest of justice." Super. Ct. Crim. R. 33. In order to show that the interest of justice requires a new trial as a consequence of a *Brady* violation, the Defendant must show that "(1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment." *E.g. United States v. Durante*, 689 F. App'x 692, 694 (3d Cir. 2017) (discussing Federal Rule of Criminal Procedure 33, which is substantively identical to Superior Court Criminal Rule 33); *accord Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001) (citing *Kyles* 514 U.S. at 434) (new trial warranted when State's suppression of exculpatory evidence "undermines [the] confidence in the outcome of the trial"). And, importantly, if a defendant was unable to use the exculpatory evidence effectively at trial because of delayed disclosure, a new trial is warranted. *Atkinson* 778 A.2d at 1062; *see Rose v. State*, 542 A.2d 1196, 1199 (Del.

1988) (citing *United States v. Pollack*, 534 F.2d 964, 973–74 (D.C. Cir. 1976)) (disclosure by government must be made at such time as ***to allow the defense to use favorable material effectively in presentation of case***).

38. All of this exculpatory evidence was available to the State and none of it was produced to the Defendant until six weeks before the scheduled start of trial. Some of it has ***never*** been produced. Because of the massive size of the April 6 production, coming as it did just six weeks before the scheduled start of trial, the Defendant was precluded from using the exculpatory evidence effectively at trial. There can be no doubt that the State's failure to produce evidence in its possession as to the name, wages, and weekly hour caps of OAOA's casual-seasonal employees, whether as that evidence exists in the seized ESI or in the Delaware Department of Human Resources' records, drastically undermines confidence in the Defendant's conviction for Conflict of Interest (Count One) and Official Misconduct (Count Four).

39. The State's failure to provide the names of those employees to the Defendant—or to interview the employees themselves—means that the jury knows ***nothing*** of the other conditions and privileges of their employment by OAOA. Yet, the jury was instructed that in order to find the Defendant guilty of Count One, it needed to find beyond a reasonable doubt that, *inter alia*, Saylar received a financial benefit that was not available "to others who are members of the same class or

persons." June 30 Tr. at 116:6–13 (Exhibit N). Simply put, because the State suppressed all evidence as to the large majority of OAOA's casual-seasonal employees, the Defendant was unable to effectively argue that the State had not proven this element of the offense beyond a reasonable doubt. That being so, the materiality of the suppressed evidence cannot be contested. Indeed, it is crucial to a fair trial on Count One.

40. The materiality as well as the gravity of the State's violation of its constitutional obligation to provide the Defendant with exculpatory evidence in its possession is underscored by the attached affidavits of Colin Donnelly and Connor Perry. *See* Aff. Colin Donnelly (attached hereto as Exhibit O); Aff. Connor Perry (attached hereto as Exhibit P). Like Saylar, each affiant worked as a casual-seasonal employee of OAOA. Like Saylar, each affiant attended college out-of-state. And, like Saylar, ***each affiant worked for OAOA remotely while attending college out-of-state***.[6] This evidence directly contradicts the State's argument to the jury that only Saylar was allowed to work remotely while attending college. June 30 Tr. 102:14–17 (Exhibit N). With this evidence, and in light of the fact that at least nine casual-seasonal employees of OAOA were paid a ***higher*** hourly wage than Saylar,

[6] Counsel has confirmed that a third casual-seasonal employee of OAOA, Margo Gordon, also worked remotely while attending college. Gordon declined to sign an affidavit to that effect as she "does not want to get involved."

the State's argument that Saylar somehow received a benefit not available to other similarly situated employees evaporates. The materiality of undisclosed casual-seasonal employees' identities cannot be seriously contested, nor can the impact of the State's suppression of this evidence be overstated.

41. The 511,266 files also contained emails and other documents that were clearly relevant to the issues involved with the indicted charges. For Count One alone, the files included 206 documents responsive to the search term "Saylar," 1,095 documents responsive to "Elizabeth McGuiness," and 1,184 responsive to "McGuiness, Elizabeth." Moreover, there were 24,857 files for which "McGuiness, Elizabeth" was listed as the "File Custodian." Obviously, whether and when Saylar performed legitimate work for OAOA was of fundamental importance to the prosecution. It is equally obvious that the huge amount of ESI relevant to this issue that the State produced just six weeks before the scheduled start of trial was highly material to that issue.

42. In the same vein for Count Three, there were 6,112 files responsive to "Christie Gross," 1,358 responsive to "My Campaign Group," and 935 responsive to "Innovate Consulting." The State made much at trial about the type of work performed for OAOA by Christie Gross, and argued (falsely) that she was merely a campaign consultant. June 30 Tr. at 17:21–18:4 (Exhibit N). Obviously, the sheer volume of emails between Christie Gross and OAOA was bound to show the true

and legitimate nature of the work she performed for OAOA. Given these numbers, any argument that the State's *Brady* violation was immaterial is untenable.

43. The State may well attempt to excuse its failure to meet its constitutional obligation to provide the Defendant with exculpatory evidence pertaining to the employment conditions of similarly situated casual-seasonal employees in OAOA by arguing that the evidence it suppressed was available to the Defendant herself. But such an excuse has been squarely foreclosed by the United States Supreme Court. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). In fact, the Delaware Supreme Court has never adopted the "due diligence" exception to the *Brady* rule. To the contrary, the Delaware Supreme Court has held that exculpatory information contained in a publicly available newspaper article, but ***not*** provided to the Defendant by the State, nonetheless constituted a *Brady* violation despite the State's argument that the defendant would have learned of the information had he exercised due diligence. *Wright*, 91 A.3d at 993.[7]

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[7] In an earlier opinion in the same case, Justice Ridgely, then in dissent, cited *Banks* while noting that "the due diligence rule has been criticized as inconsistent with Brady." *State v. Wright*, 67 A.3d 319, 327 (Del. 2013), *as amended* (May 28, 2013) (Ridgely, J., dissenting).

44. In denying the Defendant's Motion for Dismissal or Sanctions, the Court overlooked these authorities. Instead, the Court cited the Third Circuit's opinion in *United States v. Pelullo* for the proposition that "the government is not obliged under *Brady* to furnish a defendant with information which [s]he already has or, with reasonable diligence, she can obtain for [her]self." *McGuiness*, 2022 WL 1580601, at *4 (Exhibit G) (citing 399 F.3d 197, 212 (3d. Cir. 2005)).

45. This Court's reliance on *Pellulo* was misplaced and erroneous because in 2016 the Third Circuit ***overruled*** its prior cases adopting the "due diligence" rule, including *Pellulo*. *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 293 (3d Cir. 2016) ("To the extent that we have considered defense counsel's purported obligation to exercise due diligence to excuse the government's non-disclosure of material exculpatory evidence, we reject that concept as an unwarranted dilution of *Brady*'s clear mandate."). *See also United States v. Bergrin*, 2022 WL 1024624, at *9 (3d Cir. Apr. 6, 2022) (holding that the trial court erred when it turned aside a defendant's *Brady* challenge by relying on the "due diligence" rule set forth in *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991), because "*Dennis* overruled *Perdomo* and held that a defendant's exercise of due diligence is not a consideration when deciding whether the government has complied with its *Brady* obligations"); *Murphy v. Adm'r E. Jersey State Prison*, 2021 WL 2822179, at *3 (3d Cir. July 7, 2021) ("[T]he concept of due diligence plays no role in the *Brady* analysis . . . ."),

cert. denied sub nom. Murphy v. Johnson, 142 S. Ct. 719 (2021); *United States v. Blankenship*, 19 F.4th 685, 694 (4th Cir. Dec. 7, 2021) ("To be clear, the government's need to comply with its *Brady* obligations is not obviated by the defendant's lack of due diligence. The constitutional right cannot be so burdened.").

46. This Court's application of the "due diligence" exception to *Brady* in the face of the exception's criticism by the United States Supreme Court, its explicit rejection by the Third Circuit, and its implicit rejection by the Delaware Supreme Court is clearly erroneous. A new trial is the appropriate remedy in light of the State's suppression of a massive amount of material evidence that disproves the State's claim that Saylar somehow received a benefit from her employment that was unavailable to other similarly situated OAOA casual-seasonal employees.

47. The Court further erred in its denial of the Defendant's mid-trial *Brady* request for information pertaining to the role of the Chief Deputy Attorney General in the drafting of the false statements made in the September 28, 2021 search warrant. During cross-examination at the May 24, 2022 *Franks* hearing, Investigator Robinson repeatedly said "yes" when asked if he knew that certain information was false before ***he*** wrote the probable cause affidavit that contained the false statements:

Q. And you had this statement from Division of Accounting before ***you wrote the search warrant***; right?
A. Right.
Q. Before ***you wrote the search warrant*** that contains facts that are contrary to the truth; right?

A. We later learned, yes.
Q. But you told me you had this spreadsheet before ***you wrote the search warrant***.
A. That's correct.
* * * * * * * * * *
Q. That wasn't my question. My question is you had this spreadsheet.
A: That's right.
Q. And you had it before ***you wrote the search warrant***; right?
A: Yes.
Q: And the spreadsheet from Division of Accounting said one lump sum payment in August; right?
A. Right.
O. And you knew that when ***you wrote the search warrant***; right?
A. Yes.
* * * * * * * * * *
Q. And ***you told a court under oath*** that there were multiple payments under $5,000 in September, multiple, more than one; right?
A: There were more than one payment in September.
A: That wasn't my question. ***You told the court under oath*** there were multiple payments under $5,000 in September; correct?
A: Correct.
Q. That's false?
A. Correct.
Q. And you knew it when ***you wrote the search warrant***; right?
A. Correct.

May 24 Tr. at 65:9–67:5 (emphasis added) (excerpts attached hereto as Exhibit Q).

48. Despite this apparently unequivocal admission of responsibility, at trial, Investigator Robinson attributed authorship of the false statements and other half-truths in the affidavit to an "investigative team" comprised of "multiple lawyers." June 27 Tr. at 213:21–228:22 (Exhibit R). But when defense counsel asked Investigator Robinson ***who*** wrote the search warrant affidavit, the Court sustained

the State's objection to the question. June 28 Tr. at 43:17–46:3 (Exhibit S).[8] Later that day, the Defendant served a *Brady* request upon the State, asking for:

1. any information received from the Division of Accounting in July, August and September of 2020 relating to My Campaign Group, and any discussion of that information between and among "the investigative team;"
2. any discussion of Christie Gross and My Campaign Group between and among "the investigative team;"
3. any discussion of any casual/seasonal employee in the Auditor's Office who had access to Kathy McGuiness's state car in 2019, 2020 and 2021 between and among the investigative team in July, August and September of 2020;
4. any discussion between and among "the investigative team" in July, August and September of 2020 about the circumstances leading to the end of employment by the OAOA of Lizbethmary Vargas, Rooslie Maurice and Lydia August; and
5. any communications between and among the investigative team in 2021 relating to any decision, direction or suggestion to Frank Robinson that he conceal the fact of the ongoing investigation from Kathy McGuiness.

(A copy of the Defendant's June 27, 2022 *Brady* request is attached hereto as Exhibit T.)

49. The next day, the Defendant brought her *Brady* request to the attention of the Court. June 28 Tr. 23:18–41:15 (Exhibit S). The Defendant explained that the requested information was necessary to evaluate who was responsible for the various false statements and half-truths in the search warrant affidavit. *Id.* (Exhibit

[8] The Defendant has elected to file Exhibit S under seal.

S). The State identified the Chief Deputy Attorney General as one of those responsible for the contents of the affidavit, leading the Defendant to also want to evaluate whether it might be appropriate and advisable to call the Chief Deputy Attorney General as a witness for the purpose of impeaching him. *Id.* at 23:18–27:8 (Exhibit S). *See also* D.R.E. 607. The Court refused to order the State to produce the requested material to the Defendant. *Id.* at 41:4–15 (Exhibit S).

50. The requested material was clearly disclosable. The United States Supreme Court has held that information that can be used by the defense to attack "the thoroughness and even the good faith of the investigation" is disclosable pursuant to *Brady*. *Kyles*, 514 U.S. at 445. "A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." *Id.* (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)); *see Fontenot v. Crow*, 4 F.4th 982, 1076 (10th Cir. 2021) (same), *cert. denied*, 142 S. Ct. 2777 (2022); *Floyd v. Vannoy*, 894 F.3d 143, 165 (5th Cir. 2018) (en banc) (*Brady* compels disclosure of information useful "to discredit the caliber of the investigation or the decision to charge the defendant").

51. Moreover, the requested information was independently disclosable because it was reasonably calculated to lead to the discovery of evidence that would be useful for the Defendant's evaluation of a vindictive prosecution defense. June

28 Tr. 23:18–27:8; 35:18–40:16 (Exhibit S). Vindictive prosecution is one which is "vindictive in the normal sense of the word; that is, resulting from specific animus or ill will . . . ." *State v. Honie*, 1999 WL 167733, at *3 (Del. Super. Ct. Feb. 5, 1999) (quoting *State v. Wharton*, 1991 WL 138417, at *10 (Del. Super. Ct. June 3, 1991)). To establish prosecutorial vindictiveness, the defendant must "carry the heavy burden of proving that his prosecution could not be justified as a proper exercise of prosecutorial discretion." *United States v. Ball*, 18 F.4th 445, 454 (4th Cir. 2021) (brackets and quotations omitted).

52. The United States Court of Appeals for the Fifth Circuit has observed that

> [a] defendant's decision to pursue or disclaim an affirmative defense instruction is not made in a vacuum; defendants must evaluate the evidence available to them and determine whether seeking the instruction is likely to help or harm their cause. Denying defendants access to evidence they are entitled to under *Brady* can significantly change this risk calculus. For this reason, courts routinely find that evidence supporting an affirmative defense is exculpatory and, therefore, favorable under *Brady*.

United States v. Cessa, 861 F.3d 121, 131 (5th Cir. 2017). *Cf. Wharton*, 1991 WL 138417, at *5 (permitting discovery into the defendant's claim of selective prosecution because defendant had made a showing of a "colorable basis" for such discovery, and collecting cases in accord with same).

53. At trial, the Defendant described the basic facts supporting her request to investigate the potential existence of a vindictive prosecution claim at some length. June 28 Tr. 23:18–41:15 (Exhibit S).[9] On top of those facts, the potential existence of such a vindictive prosecution claim should also be reviewed by the Court in light of the unprecedented nature of this prosecution, based as it is upon two statutes (Conflict of Interest and "Structuring") that are each several decades old and yet have ***never*** been the basis of a criminal prosecution before now. For that reason, the Court previously held that the Defendant had raised a "colorable basis" for discovery of facts that may support a claim of selective prosecution when it granted in part the Defendant's January 31, 2022 Motion to Compel.

54. The fact that the Chief Deputy Attorney General might have been the author, or at least one of the authors, of a search warrant that contained multiple false averments of fact would unquestionably be exculpatory evidence in this case. The Court's failure to require the State to produce communications that would have resolved the question of responsibility for those false statements was erroneous.

55. Each of the *Brady* violations discussed *supra* are of sufficient magnitude alone to warrant the granting of a new trial to the Defendant pursuant to Rule 33 in the interest of justice. What is more, the cumulative effect of each of the

[9] The arguments offered to the Court by Defendant's counsel are incorporated herein by reference.

State's *Brady* violations, when considered together, weighs decisively in favor of a new trial. In order to obtain a new trial pursuant to Rule 33 based upon cumulative error, a defendant "must show that the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair." *United States v. LaVictor*, 848 F.3d 428, 455 (6th Cir. 2017).

56. There can be no doubt that the State's multiple violations of its *Brady* obligations "undermines [the] confidence in the outcome of the trial." *Atkinson*, 778 A.2d at 1063. Under such circumstances, a new trial is warranted pursuant to the "interest of justice" provision of Rule 33.

<u>Inadmissible Character Evidence Erroneously Admitted by the Court</u>

57. In pre-trial motions—and repeatedly during trial—the Defendant objected to the testimony of certain State witnesses on the grounds that the testimony would be irrelevant, unfairly prejudicial, and inadmissible character evidence. *See* D.R.E. 402, 403, 404(a). In response, the State repeatedly represented to the Court that the testimony was somehow relevant to proof of Count Five. The Defendant countered time and time again by noting that the acts described in the objected-to testimony occurred in 2019, 2020, or early 2021—long before the Defendant had any awareness that she was the subject of an investigation, and long before the individuals in question were actually "witnesses" as defined by 11 *Del. C.* § 3531(3).

58. As discussed *infra*, the Court chose to rely upon the State's repeated assurances of relevancy and thus overruled the large majority of the Defendant's objections. The Court also rejected multiple applications by the Defendant requesting that the State be required to make an offer of proof as to what evidence it intended to introduce to show that the Defendant was aware that she was under investigation prior to September 2021 and knew who the witnesses against her in that investigation might be.

59. The Court's faith in the State was, unfortunately, misplaced. In the end, the State ***never*** presented ***any*** evidence suggesting that the Defendant was aware that she was under investigation at any point prior to, at best, June 2021. The State also ***never*** presented ***any*** evidence that the Defendant ***ever*** knew who the witnesses against her might be. Consequently, all evidence relating to uncharged acts of the Defendant that occurred before the Defendant knew she was under investigation was irrelevant. Because of the admission of what can now only be described as inadmissible character evidence, the Defendant's right to a fair trial on all of the charges against her was fatally compromised.

60. The danger to a Defendant's right to a fair trial posed by the erroneous admission of character evidence has long been recognized by the Delaware Supreme Court, as well as by other courts and commentators across the United States. "A jury may not hear about a person's bad character, else they might punish him for his

bad character rather than the issues at trial." *Baumann v. State*, 891 A.2d 146, 149 (Del. 2005); *see Dowling v. United States*, 493 U.S. 342, 361–62 (1990) (Brennan, J., dissenting) (warning that a jury "may feel the defendant should be punished for that [uncharged] activity even if he is not guilty of the offense charged"); *United States v. Murray*, 103 F.3d 310, 316 (3d Cir. 1997) (stating that uncharged misconduct evidence can carry a "substantial danger of unfair prejudice"); Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 1.3 (2022 ed.) ("Evidence of a criminal defendant's uncharged misconduct creates a risk that the jury will penalize a defendant for his or her bad character.").

61. Despite this well-settled principle, the Court disregarded multiple warnings by the Defendant that the irrelevant and improper character evidence admitted against her was subjecting her to "death by a thousand cuts" and that the resulting prejudice could not be cured simply by dismissing Count Five because the prejudice would taint ***all*** of the charges. June 23 Tr. 19:14–19 (excerpts attached hereto as Exhibit U); June 24. Tr. 8:20–9:18 (excerpts attached hereto as Exhibit V); June 27 Tr. 18:1–6 (Exhibit R). Instead, the Court repeatedly made clear that it intended to let the lack of evidence of the Defendant's awareness "percolate" until the end of the State's case. *E.g.* June 15 Tr. Morning Session 100:14–101:18 (excerpts attached hereto as Exhibit W); June 21 Tr. 181:15–21 (excerpts attached hereto as Exhibit X); June 27 Tr. 20:5–8 (Exhibit R).

62. Ultimately, the Court took no action at all at the end of the State's case, even after the Defendant moved for judgment of acquittal pursuant to Superior Court Rule of Criminal Procedure 29(a). The Court's refusal to limit the prejudicial effect of irrelevant and improper character evidence therefore unfairly prejudiced the Defendant's right to a fair trial on ***all*** of the indicted charges.

63. Even if the Court ***had*** ultimately dismissed Count Five, the prejudicial effect of the inadmissible character evidence doubtless affected the jury's assessment of ***all*** of the indicted charges. The Court's failure to prevent the State from introducing the impermissible character evidence, coupled with its refusal to require the State to provide an offer of proof demonstrating the relevance of the evidence, has resulted in prejudice to the Defendant that can be cured only by a new trial. The Delaware Supreme Court has held the admission of evidence at trial that is later deemed to be inadmissible is appropriately cured by a new trial—or even a judgment of acquittal—if the erroneous admission of evidence was "prejudicial," meaning that it affected the verdict. *Waters v. State*, 242 A.3d 778, 783 (Del. 2020). There is no question that the erroneous admission of impermissible character evidence here has prejudiced the Defendant.

64. The Court defined the temporal limits pertaining to Count Five in its opinion denying the Defendant's Motion to Dismiss Count Five when it held that proof of guilt for Count Five required proof that the Defendant knew she was under

investigation and that she knew who the witnesses against her were ("the date of her knowledge"). *McGuiness*, 2022 WL 1489572, at *2–3 (Exhibit E). The Defendant's efforts to exclude the evidence as both irrelevant and unfairly prejudicial began with her Motion *in Limine* to Preclude Evidence or Argument Concerning Defendant's Knowledge of Inquiry Prior to September 11, 2021, Docket No. 90. On May 24, 2022, the Court deferred its ruling on that motion.

65. Once the trial began, the Defendant renewed her motion to exclude evidence of uncharged misconduct occurring prior to the date of her knowledge at the first available opportunity, prior to the testimony of Jonathan Purdy. The Defendant sought to bar evidence of the Defendant's e-Record requests prior to the date of her knowledge on grounds of irrelevance and unfair prejudice. June 15 Tr. Morning Session 3:9–16:2 (Exhibit W). The Defendant also requested that the State be required to present an offer of proof as to the relevance of such evidence. *Id.* at 6:23–7:4 (Exhibit W). *See* D.R.E. 103, 104. The Court overruled the objection and declined to require an offer of proof. June 15 Tr. Morning Session 12:20–16:25 (Exhibit W). The Court observed that it would perhaps address the issue anew at the end of the State's case if the State's proof of the Defendant's date of knowledge did not comport with its representations to the Court. *Id.* at 13:4–15:20 (Exhibit W).

66. The Court then allowed the admission of eight e-Record requests, despite Purdy's testimony that none of the subjects of the e-Record requests were

aware of the requests. *Id.* at 89:9–90:9 (Exhibit W). The fact that the individuals were not aware of the e-Record requests is, of course, logically inconsistent with the relevance of those requests as proof of Count Five, especially in light of the definition of "malice" as set forth at 11 *Del. C.* § 3531(1). And, of the eight e-Record requests admitted into evidence, ***seven were submitted prior to June 2021*** (the earliest arguable date of knowledge). State Exhibits 11–17, 19.[10] The Defendant thus moved to strike the testimony related to the e-Record requests, arguing again that the evidence was irrelevant. June 15 Tr. Morning Session 99:17–101:7 (Exhibit W). The Court denied the motion and again stated that it would address the matter at the end of the State's case if the Court was not convinced that the State had "presented sufficient evidence." *Id.* at 100:14–101:18 (Exhibit W).

67. On the third day of trial, the Defendant made another motion *in limine* to exclude the testimony of three State witnesses, Bailey Brooks, Dan Hamilton, and Melissa Schenck, arguing that each would present testimony that would be irrelevant, unfairly prejudicial, and impermissible character evidence. June 21 Tr. 3:16–19:13 (Exhibit X). The Court granted the Defendant's motion as to Brooks, *id.* at 12:21–13:13 (Exhibit X), but allowed the State to present the testimony of

[10] State Exhibit 18 was apparently withdrawn.

Schenck and Hamilton over the Defendant's objections. *Id.* at 17:1–19:13 (Exhibit X).

68. Schenck ultimately testified about events of uncharged misconduct that occurred in 2021 and early 2022 that related to her continued requests to work at home due to COVID concerns. The State ***never*** introduced ***any*** evidence that the Defendant knew that Schenck might be a witness against her. *Id.* at 20:20–39:19 (Exhibit X). Schenck's testimony was undoubtedly irrelevant, and thus unfairly prejudicial.

69. The testimony of Hamilton was even more irrelevant, as he testified that he did not become a witness within the meaning of 11 *Del. C.* § 3531(3) until ***after*** all of the events that he described in his testimony occurred. Moreover, Hamilton testified that he did ***not*** feel intimidated by the situation. *Id.* at 101:4–10 (Exhibit X). All of these facts were known to the State before Hamilton testified, as they were all discussed during his recorded pre-trial interview with Investigator Robinson and the prosecutors. Hamilton's testimony therefore had no logical relevance to the Defendant's case ***at all***, as a matter of law.

70. The State also presented the testimony of Andrena Burd. Over the Defendant's objection, the Court allowed her to testify about the Defendant's alleged instructions to her staff to delete certain text messages in ***2019*** that pertained to an employee grievance. *Id.* at 201:2–202:8 (Exhibit X). That incident of uncharged misconduct occurred ***before*** the State's investigation of the Defendant even began, and was therefore wholly irrelevant as a matter of law.

71. As the trial unfolded, the Defendant continued to object to the testimony of multiple State witnesses. One of these was Elizabeth Vasilikos, who testified about events that all occurred before the Defendant's date of knowledge. The Defendant objected to her testimony because it, too, constituted impermissible character evidence. June 23 Tr. 3:13–4:7 (Exhibit U). The Court overruled the objection and allowed the testimony to proceed based upon the State's representation to the Court that it would have "sufficient evidence to establish when Ms. McGuiness became aware of the investigation." *Id.* at 4:8–18 (Exhibit U).

72. The Defendant renewed her objection to the testimony as impermissible character evidence, noting that it constituted "death by 1,000 cuts." *Id.* at 19:14–19 (Exhibit U). At this point, the objection as to one specific line of inquiry was sustained, but the witness was then asked questions about a grievance filed by Kathleen Davies, which required the Defendant to object, once again, in the jury's presence. The Court sustained the objection and recognized that the State was "switching theories" in support of Count Five to one that was not set forth in the Indictment. *Id.* at 30:5–16 (Exhibit U). Consequently, almost ***all*** of Vasilikos's testimony was logically irrelevant and unfairly prejudicial, yet the Court went on to permit similarly irrelevant testimony from further witnesses.

73. For example, the Defendant also objected to the testimony of Kelsey Thomas about the Defendant's use of a PCard to pay for a SiriusXM radio subscription. *Id.* at 232:14–236:21 (Exhibit U). That incident occurred ***before*** the State's investigation of the Defendant began. Defense Exhibit 121. Furthermore, Thomas left OAOA in July 2020, long before the Defendant's alleged date of knowledge. June 23 Tr. 239:4–7 (Exhibit U). Thomas's testimony was therefore wholly irrelevant to the charged offenses as a matter of law, and therefore unfairly prejudicial.

74. The Court nonetheless overruled the Defendant's objection and allowed the testimony, observing once again that the State would have to connect the event to "harassment of these employees [as it] relates to some event, investigation, [or] inquiry." *Id.* at 236:12–19 (Exhibit U). The legal irrelevancy of the testimony was further confirmed by Thomas when she admitted that she ***never*** told the Defendant or anyone else in OAOA administration that she had gone to the Attorney General's Office with her complaints. June 24 Tr. 23:9–24:19 (Exhibit V). Predictably, the State never offered ***any*** proof that the Defendant ever learned that Thomas might be a witness against her prior to her indictment in October 2021.

75. Finally, the State was also permitted to present the testimony of Dawn Haw-Young, an individual who complained that she was placed on a performance improvement plan in January 2021—again, well before any alleged date of the

Defendant's knowledge. June 27 Tr. 12:15–20:14 (Exhibit R). The evidence was clearly irrelevant to the charged conduct, and thus constituted impermissible uncharged misconduct evidence. Defendant's counsel moved to strike the testimony and, once again, complained of "death by a thousand cuts" as a result of the uncharged misconduct evidence. *Id.* at 19:19–20:4 (Exhibit R). As the Defendant had reiterated many times before trial, during trial, and in this Motion, the State offered no proof of the Defendant's knowledge that she was under investigation or that the Defendant knew that Haw-Young might be a witness against her. *Id.* at 16:3–23:1 (Exhibit R). Nonetheless, the Court denied the motion and stated that it would let the lack of evidence of awareness "percolate at some point when the State's done . . . ." *Id.* at 20:5–6 (Exhibit R).

76. It should now be obvious that none of the evidence described above was logically relevant to ***any*** of the indicted offenses, nor was it ever. Despite the State's repeated assurances to the Court, it never introduced ***any*** evidence suggesting that the date of knowledge could conceivably be before June 2021.[11] Indeed, the

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[11] The Defendant does not concede that the telephone conversations in June 2021 between Investigator Robinson and Virginia Bateman or Amy Gulli established that the Defendant knew that she was under investigation ***or*** who the witnesses against her might be. In both telephone calls, Investigator Robinson intentionally concealed the fact that he was investigating either a crime or anything to do with the Defendant. His stated purpose in doing so was to prevent the Defendant from learning that she was under investigation. June 28 Tr. 124:13–127:3 (Exhibit S). The State should not now be rewarded for this obfuscation.

State did not even bother to argue to the jury in closing that the Defendant's date of knowledge was sometime prior to June 2021. That being so, it is clear that the Court's misplaced faith in the State's representations led it to erroneously admit the uncharged misconduct evidence. In so doing, the Defendant's right to a fair trial was profoundly prejudiced.

77. The Court also erred when it failed to analyze the uncharged misconduct evidence pursuant to the well-established framework required in such instances.

78. D.R.E. 404(b) forbids the State from offering evidence of a defendant's uncharged misconduct to support a general inference of bad character. *Getz v. State*, 538 A.2d 726, 730 (Del. 1988). In *Getz*, the Delaware Supreme Court set guidelines for the admissibility of evidence under D.R.E. 404(b):

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive."
> (4) The other crimes must not be too remote in time from the charged offense.
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.

> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.

Howell v. State, 268 A.3d 754, 779 (Del. 2021) (citing *Getz*, 538 A.2d at 734).

79. This Court ***never*** applied the well-established *Getz* framework to ***any*** of its rulings. If the Court had, it would have inevitably concluded that the evidence was not material to an ultimate fact in dispute in the case because the evidence was, in each instance, irrelevant to Count Five because it predated the Defendant's alleged date of knowledge. *See Chavis v. State*, 235 A.3d 696, 699 (Del. 2020) (explaining that uncharged misconduct evidence must have "independent logical relevance," meaning that "it must have probative relevance which is independent of its relevance as character evidence").

80. Moreover, the Court did not balance the probative value of the evidence against its unfairly prejudicial effect (as required by *Getz* and D.R.E. 403) by applying the factors delineated in *DeShields v. State*, which require the Court to consider:

> (1) the extent to which the point to be proved is disputed;
> (2) the adequacy of proof of the prior conduct;
> (3) the probative force of the evidence;
> (4) the proponent's need for the evidence;
> (5) the availability of less prejudicial proof;
> (6) the inflammatory or prejudicial effect of the evidence;
> (7) the similarity of the prior wrong to the charged offense;
> (8) the effectiveness of limiting instructions; and

(9) the extent to which prior act evidence would prolong the proceedings.

Howell, 268 A.3d at 779–80 (citing *DeShields v. State*, 706 A.2d 502, 506–07 (Del. 1998)).

81. The only *DeShields* factor that the Court implicitly applied was the State's need for the evidence. But because the evidence was wholly irrelevant, both D.R.E. 402 and D.R.E. 403 compelled its exclusion. Evidence which has no probative value but which carries the danger of unfair prejudice can never pass muster under D.R.E. 403. *See Risper*, 250 A.3d at 88 ("[E]vidence of prior misconduct is admissible only when it has independent logical relevance ***and*** when its probative value is not substantially outweighed by the danger of unfair prejudice." (emphasis added)); 22A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Evidence* § 5214.1 (2d ed.) ("[B]y definition, 'irrelevant evidence' lacks any probative value . . . .").

82. Each witness permitted to testify to irrelevant acts of uncharged misconduct significantly increased the prejudice suffered by the Defendant. The "cumulative error doctrine" recognizes that individual errors that do not entitle a defendant to relief "may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." *Albrecht v. Horn*, 471 F.3d 435, 468 (3d

Cir. 2006) (cited with approval in *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009)). Here, the "death by a thousand cuts" that the Defendant repeatedly warned against was allowed to occur, thereby compromising her right to a fair trial.

83. It is well-settled that:

> [t]here is a grave potential for misunderstanding on the part of the jury when [uncharged misconduct] evidence is admitted. This evidence of prior criminal acts cannot be submitted to the jury without guidance from the trial court. Therefore, when such evidence is admitted, it "***must be accompanied by a cautionary instruction*** which fully and carefully explains to the jury the limited purpose for which that evidence has been admitted."

Weber v. State, 547 A.2d 948, 956 (Del. 1988) (emphasis added) (quoting *Getz*, 538 A.2d at 734 (citations omitted)).

84. Here, the Court failed to give limiting instructions in response to the Defendant's repeated objections to the uncharged misconduct evidence, either contemporaneously with the admission of the evidence or as part of the Court's final instructions. While it is true that a trial court is ***generally*** not required to give a limiting instruction, *sua sponte*, when evidence of prior bad acts is admitted, *Pennewell v. State*, 947 A.2d 1123, 2008 WL 1823074, at *3 (Del. 2008) (TABLE), it is also true that the Delaware Supreme Court has found an exception to that general rule in cases where, as here, the uncharged misconduct evidence was admitted over a defendant's timely objections, *Williams v. State*, 796 A.2d 1281, 1290 (Del. 2002) (distinguishing *Weber*, 547 A.2d at 955, which found error where the trial court did

not *sua sponte* give a limiting instruction pertaining to uncharged misconduct evidence, noting the defendant had repeatedly objected to the evidence).

85. Moreover, as evinced by the Court's failure to engage in a *Getz* analysis, the Court did not consider the evidence to be uncharged misconduct evidence at all. When the Court refused to consider the evidence as uncharged misconduct evidence it effectively precluded any request for limiting instructions. Instead, the Court erroneously relied upon the State's unsupported claims of relevance and essentially (and wrongly) treated the evidence as *direct proof* of Count Five, notwithstanding its prior rulings that made the evidence clearly irrelevant. In light of these circumstances, including the Court's repeated refusal to consider the evidence to be uncharged misconduct evidence, the failure of the Court to give any limiting instructions to the jury constitutes error.

86. Furthermore, the admission of this uncharged misconduct evidence tainted the jury's consideration of Counts One, Three, and Four. Under the doctrine of "prejudicial spillover," evidence erroneously admitted in support of one charge can have a deleterious effect on a jury's consideration of other charges. *United States v. Fattah*, 914 F.3d 112, 186 (3d Cir. 2019). Prejudicial spillover is a widely recognized basis for a new trial. *United States v. Wright*, 665 F.3d 560, 575 (3d Cir. 2012), *as amended* (Feb. 7, 2012) (vacating judgment of conviction and remanding for new trial).

87. Prejudicial spillover has two components: (1) the admission of evidence that would have been inadmissible with respect to other charges and (2) the evidence prejudiced the Defendant. *See United States v. Murphy*, 323 F.3d 102, 118 (3d Cir. 2003), *as amended* (June 4, 2003) (vacating judgment of conviction and remanding for new trial). In evaluating prejudice, courts consider "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 [would have] significantly changed the strategy of the trial; and (4) the prosecution used language of the sort to arouse a jury." *Wright*, 665 F.3d at 575 (vacating judgment of conviction and remanding for new trial).

88. For the reasons limned *supra*, this uncharged misconduct evidence was inadmissible even with respect to Count Five, let alone Counts One, Three, and Four. Its admission clearly and severely prejudiced the Defendant.

89. First, these charges are inextricably intertwined. According to the State, Count Five concerned intimidation of individuals who "blew the whistle" on the conduct underlying Counts One, Three, and Four. *See* June 30 Tr. 5:22–6:3 (Exhibit N) (arguing in closing that the Defendant "ruled her office with an iron fist, taking calculated steps to try to prevent her own employees, those with the courage to speak up, from ever being witnesses against her ***official misconduct***" (emphasis added)), 24:2–16 (Exhibit N) (arguing in closing that Thomas Van Horn, Kelsey

Thomas, Lisa Elder, Laura Horsey, Patty Moore, and Dawn Haw-Young "had already reached out to the State of Delaware and given statements about what they observed in the auditor's office, the misconduct, their concerns about personnel and about the ***My Campaign Group contract***. And when I say 'personnel,' specifically the ***defendant's daughter***" (emphasis added)).

90. Second, the evidence to support Counts One, Three, and Four is plainly insufficient to support these convictions, as the Defendant has argued at length in her Rule 29(a) and Rule 29(c) motions, which are hereby incorporated by reference.

91. Third, the elimination of Count Five and its uncharged misconduct evidence would have drastically changed the trial and defense counsel's strategy. Count Five was a major part of the trial. Indeed, five witnesses—Melissa Schenck, Dan Hamilton, Elizabeth Vasilikos, Dawn Haw-Young, and Lisa Elder—were called exclusively for purposes of Count Five.

92. Finally, the State repeatedly aroused the jury with language that would have otherwise had no place in this trial. *See, e.g.*, June 30 Tr. 24:6 (Exhibit N) ("blow the whistle"), 29:17 (Exhibit N) ("blowing the whistle"), 30:1–3 (Exhibit N) ("the audacity to question what does this confidentiality mean"), 33:18–19 (Exhibit N) ("So the monitoring is now taken up a level"), 34:10–14 (Exhibit N) ("Just look at what the defendant did herself. Look at how she reacted to key events and key people. Though the evidence itself, the defendant's conduct tells you that she's

guilty. That is consciousness of guilt.”), 35:4–6 (Exhibit N) (“the abuse by intimidating employees who had the courage to confront her or question her misconduct”), 103:20–22 (Exhibit N) (“this overwhelming pattern of e-mail surveillance against key people who knew key things and the time in which they knew it”).

93. The interest of justice demands a new trial without such prejudicial spillover. *See Wright*, 665 F.3d at 575; *Murphy*, 323 F.3d at 118.

94. The Court’s decision to admit uncharged misconduct evidence over the Defendant’s repeated objections, compounded by its failure to analyze the evidence pursuant to the *Getz* and *DeShields* frameworks, profoundly prejudiced the Defendant’s right to a fair trial. *See Holtzman v. State*, 718 A.2d 528 (Del. 1998) (reversing conviction where trial record did not reflect a proper evidentiary basis for decision to admit uncharged misconduct evidence and trial judge failed to give a limiting instruction pertaining to the permissible use of such evidence). During trial, the Court repeatedly warned the State that if it failed to link the evidence of uncharged misconduct to proof of Count Five, the State would bear the consequences of its failure. Unfortunately, to date only the Defendant has borne the consequences of that failure. Only a new trial will suffice to cure the prejudice that resulted from the Court’s reliance upon the State’s unfulfilled promises of relevancy.

<u>Shifting Theories of "Structuring"</u>

95. A fundamental premise of the criminal law is that defendants understand the charges against them. Here, not even the State understood Count Three. One thing is clear: it is certainly not about "'structuring' in the traditional context." When, as explained *supra*, the Defendant pointed out problems with the State's first theory, the State simply shrugged and re-indicted on a new theory. But that new theory fell apart, too, this time under Court scrutiny at a *Franks* hearing a few weeks later. Unfortunately, by then the damage was done. Defense counsel had spent nearly seven months preparing to defend against the first theory. That left only about three weeks—less than 10% of the time from indictment to trial—to prepare a defense against the new theory. The interest of justice demands better.

96. The United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ." U.S. Const. amend. VI.

97. The Delaware Constitution goes even further: "[i]n all criminal prosecutions, the accused hath a right . . . to be plainly and fully informed of the nature and cause of the accusation against him or her . . . ." Del. Const. art. I, § 8.

98. Here, the State's shifting theories of "structuring" ensured that the Defendant was not plainly and fully informed of the accusations in Count Three.

99. If anyone should know what Count Three was about, it was the State. But that is not the case.

100. The first indictment was flatly wrong. Count Three of the first indictment alleged multiple payments from OAOA to My Campaign Group on August 5, 2020 and multiple payments from OAOA to My Campaign Group on September 22, 2020. *See* Motion to Dismiss Count Three (Exhibit C). When the Defendant pointed out in a *Brady* request that these allegations were demonstrably false, the State did not drop Count Three, but instead recrafted it and, on March 28, 2022, re-indicted the Defendant. Exhibit B ¶ 31.

101. Shortly after the State obtained the second indictment, on April 6, 2022, as described *supra*, the State buried defense counsel with more than 500,000 documents. Those documents were in addition to the approximately 17,000 documents that the State had already produced by that point.

102. Two weeks before trial was scheduled to begin, the Court explained in its Memorandum Opinion that the re-indicted Count Three did not allege "'structuring' in the traditional context." *McGuiness*, 2022 WL 1538488, at *3 (Exhibit F). The Court ruled that "there is no allegation that the Defendant attempted to avoid the procurement procedure by taking 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 requirements." *Id.* (Exhibit F).

103. This unambiguous ruling—buttressed by a warning that "No party should attempt during the trial to assert otherwise"—apparently left the State confused about the nature and cause of the accusations in Count Three. Certainly, the Defendant was confused as to exactly what she was alleged to have done wrong.

104. Later, with one week remaining before trial, the State sparred with the Court at a *Franks* hearing over whether the second indictment alleged illegal structuring of a contract exceeding $50,000 in order to avoid the State's bidding requirements. May 24 Tr. 39:13–58:5 (Exhibit Q).

105. A few excerpts from the transcript reveal the State's lasting confusion:

> THE COURT: There's nothing in your indictment, Mr. Denney, nothing -- I've looked multiple times -- that says the fact that it exceeded $50,000 was, in fact, either wasn't event an allegation or that it's a crime. Tell me where.
>
> MR. DENNEY: We disagree.
>
> THE COURT: Well, tell me where.

May 24 Tr. 39:13–19 (Exhibit Q).

* * * * * * * * * *

> THE COURT: I have difficulty with the math figuring that out, but I'll take your word it bumps it over $50,000. Where is that a crime? You can't go back in time. I mean, they had a contract. It was a legal contract. And that at some point in time -- it's not like they go from 45,000 to $75,000 -- there is a payment that exceeds somewhat over $50,000. There is nothing in your indictment that says that's a crime, nothing. There's nothing. The fact that initially, if it was over $50,000, it had to be approved, that's clear. There is nothing in your indictment

that says once it exceeded the $50,000, that that, in fact, became a criminal act.

May 24 Tr. 40:22–41:11 (Exhibit Q).

* * * * * * * * * *

THE COURT: Mr. Denney, I understand your theory. The problem you have is what you've written in the indictment and what the grand jury has returned. Nothing in your indictment, nothing says that once it exceeded $50,000 that was a structuring that causes a criminal act to occur. Nothing. Count III is simply, they have created invoices less than $5,000 to avoid oversight by the Department of Accounting.

May 24 Tr. 42:4–11 (Exhibit Q).

* * * * * * * * * *

MR. DENNEY: So there was multiple things going on here. The line splitting would be if it's done to willfully avoid procurement is a violation of the Delaware law. If the PayPal is done to avoid compliance, that's a violation, and the coding of that payment against another contract. And this is all literally --

THE COURT: All great theories, Mr. Denney, but not in your indictment.

MR. DENNEY: Everything I just said is in the indictment.

THE COURT: It is not, sir.

MR. DENNEY: I just read it, Your Honor.

THE COURT: It's not, Mr. Denney. The only thing that your indictment says is that initially it says that they split the payments to make sure they're less than $5,000. Your second indictment says they split the payments less than $5,000 so they could charge it against different accounts. That's what your indictment says. It says nothing about the fact that once you hit the threshold of $50,000 and they made another payment that they have in -- that they intended that payment in

> some way to avoid the accounting process, nothing. If that's your theory, it's not happening at the trial next week.

May 24 Tr. 43:9–44:10 (Exhibit Q).

> * * * * * * * * * *

> THE COURT: I have very big concerns about the theory the State has articulated.

May 24 Tr. 54:14–15 (Exhibit Q).

106. The Defendant explained that she, too, was confused about the nature and cause of the accusations in Count Three:

> MR. WOOD: Your Honor, I appreciate what the Court is saying. So the record is clear, I'm saying this: We filed a motion to dismiss because the charge is unclear. And the constitution and this court's rules require that the charge be clear. I'm standing here telling you I don't know what the charge is. I'm not asking you to weigh the facts.

May 24 Tr. 55:7–14 (Exhibit Q).

107. In response, the Court gave the State even more time to figure out what Count Three means:

> THE COURT: The only thing that Mr. Denney has said that -- first of all, there is nothing to support that I can find that would suggest that simply exceeding the $50,000 threshold on a contract that was legally bid for less than fifty is a criminal act. Simply nothing that I can find. What Mr. Denney has said, and ***perhaps this is the State's theory***, is that once it became clear that the additional PayPal payment would cause the contract to exceed $50,000, to avoid any suspicion about that payment, they arranged for it to be accountingly applied to Innovate Consulting.

May 24 Tr. 56:23–57:10 (Exhibit Q).

108. In light of the shared confusion between counsel and the Court, it was contrary to the interest of justice to proceed on Count Three.

109. Yet just a few weeks after this exchange, with defense counsel still buried under hundreds of thousands of documents and with an eye toward what the State's theory ***might be***, trial on Count Three began.

110. The Defendant's confusion was exacerbated by the Court's May 13, 2022 ruling denying the Defendant's Motion to Dismiss Count Three. *See generally McGuiness*, 2022 WL 1538488 (Exhibit F). In her Motion, among other things, the Defendant challenged the sufficiency of Count Three because it failed to allege which sections of the State Procurement Code and the BAPM were violated, as required by Rule 7(c). Exhibit B ¶ 49. In its ruling, the Court turned aside the Defendant's challenge pursuant to Rule 7(c), but required the State to specify the precise provision(s) of the BAPM that were violated "at trial." *McGuiness*, 2022 WL 1538488, at *4 (Exhibit F). In other words, the Defendant did not have this information that was vital to her defense prior to the start of trial.

111. The Sixth Amendment to the United States Constitution and Article I, Section 8 of the Delaware Constitution do not permit a "figure-it-out-as-you-go" approach to prosecution. This is particularly unjust where, as here, the crime has ***never before been charged***, and where, as here, the Court rejected the specific guidance of the Section 5.4 of BAPM (which defined "structuring") when defining

the offense. *McGuiness*, 2022 WL 1538488, at *3–4 (Exhibit F); Exhibit K at 12–13.

112. If the State did not understand Count Three—and clearly it did not—then there is no way that the Defendant could have understood Count Three nearly as well as the United States Constitution and the Delaware Constitution guarantee. And she, in fact, did not.

113. For these reasons, the Court should grant the Defendant's Motion as to Count Three and order a new trial thereon.

<u>The Court's Unconstitutional Comment on the Credibility of a Witness</u>

114. Article IV, Section 19 of the Delaware Constitution has long been understood to prevent trial judges from commenting upon the credibility of witnesses. *E.g.*, *Herring v. State*, 805 A.2d 872, 876 (Del. 2002); *Brown v. State*, 105 A.2d 646, 652 (Del. 1954) (Tunnell, J., dissenting) ("Article 4, Sec. 19, of the constitution forbids judges in jury trials to comment on the weight or credibility of 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." *Wright v. State*, 405 A.2d 685, 689 (Del. 1979) (quotations omitted) (quoting *State Highway Dep't v. Buzzuto*, 264 A.2d 347, 351 (Del. 1970)); *State v. Dunnell*, 2021 WL 1716647, at *12 (Del. Super. Ct. Apr. 30, 2021), *aff'd*, 271 A.3d 188 (Del. 2022). *See* Randy J. Holland, *The Delaware Constitution: A Reference Guide* 149–51

(2002) (a comment prohibited by Article IV, Section 19 "is an expression made directly or indirectly by the court that conveys to the jury the court's estimation of the truth, falsity, or weight of testimony"). The Court's defense of Investigator Robinson's use of false statements as an "investigative technique" runs squarely afoul of this constitutional prohibition.

115. When the Court made its prohibited comment, defense counsel was examining Investigator Robinson about the statements he made in May and June 2021 to various witnesses, including Lydia August, in which he said that he was "contacting a bunch of people. . . . throughout state government" to investigate casual-seasonal employees whose employment ended or began during the pandemic. June 29 Tr. Morning Session 86:2–88:11 (excerpts attached hereto as Exhibit Y). Although Robinson eventually admitted that he was only contacting employees of OAOA, he would not concede that the representation that he was contacting people "throughout state government" was false. *Id.* (Exhibit Y).

116. When defense counsel pressed Investigator Robinson on his refusal to concede falsity, the State objected, arguing that the question had already been "asked and answered." *Id.* at 88:12–14 (Exhibit Y). The Court sustained the State's objection—but not on those grounds. Instead, the Court declared, in the presence of the jury:

> THE COURT: 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. So you can ask him about investigation techniques if you'd like. But to imply it otherwise is not acceptable.
>
> MR. WOOD: I think I was trying --
>
> THE COURT: Move on.

Id. at 88:15–89:1 (Exhibit Y).

117. A crucial part of the Defendant's strategy was showing that the State's investigation was unfair—and thus, not to be trusted by the jury—because of the false statements and half-truths the State made throughout the investigation and even to the Grand Jury. Despite the obvious importance of the issue, the Court's comment indicated its disapproval of this strategy to the jury in violation of Article IV, Section 19.

118. The Court's comment violated the Delaware Constitution for several additional reasons. The Court inappropriately conveyed to the jury the Court's view that false statements made for purposes of an "investigative technique" were somehow not "false" statements, a view that endorsed the witness's refusal to admit that the statements were false. In this way, the Court also conveyed to the jury that falsehoods are somehow more acceptable when uttered by the police than when

uttered by others. Neither the law nor the dictionary definition of "false" admits to such a distinction.

119. Webster's Third New International Dictionary (1981) defines "false" as "not corresponding to truth or reality; not true" and "intentionally untrue." Black's Law Dictionary (11th ed. 2019) defines "false" as "1. Untrue; 2. Deceitful; lying; 3. Not genuine; inauthentic; 4. Wrong; erroneous." Thus, as a matter of common English usage, the Court's comment was clearly erroneous because Investigator Robinson's comment was, by definition, "false."

120. Second, the Court incorrectly assumed that the Defendant's line of questioning was intended to create an impression that the witness was lying, and the Court refused to permit defense counsel to explain otherwise.[12] Article IV, Section 19 prohibits "an expression by the court, directly or indirectly, that conveys to the jury the court's estimation of the truth, falsity or weight of testimony in relation to a matter at issue." *Herring*, 805 A.2d at 876 (quotations omitted). Here, the Court's comment suggested to the jury that the Court was of the view that the police were empowered to use falsehoods as an "investigative technique" and that there was nothing untoward about doing so. Delaware's Constitution leaves the decision about

[12] Had the Court permitted an explanation, defense counsel would have explained that he was attempting to impeach the credibility of the witness by demonstrating Investigator Robinson's unwillingness to admit that he had made false statements to several witnesses during the course of the investigation.

whether investigative falsehoods are appropriate and, importantly, reflective of a law enforcement witness's credibility, solely to the jury. Article IV, Section 19 forbids the Court from encroaching upon the jury's fact-finding role—yet that is precisely what the Court's comment did.

121. The Court's comment in defense of Investigator Robinson's credibility, especially when taken together with the other errors as discussed *supra*, squarely violated Article IV, Section 19 of the Delaware Constitution. A new trial is thus warranted in the interest of justice.

<u>Multiplicity</u>

122. 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 K at 15–16. This rendered Counts One and Three lesser included offenses of Count Four. The indictment, prosecution, and conviction on 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. *See White v. State*, 243 A.3d 381, 396–98 (Del. 2020) (citing 11 *Del. C.* § 206; *Blockburger v. United States*, 284 U.S. 299 (1932)).

123. For the reasons discussed at length in the Defendant's Motion for Judgment of Acquittal, incorporated herein by reference, this multiplicity warrants

complete acquittal on Count One, Count Three, and Count Four. *See Brown v. Ohio*, 432 U.S. 161, 166 (1977) ("Where 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."). 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.

Cumulative Error

124. Any of the grounds asserted *supra* are by themselves sufficiently prejudicial to the Defendant's right to a fair trial such that this Court should order a new trial in the interest of justice pursuant to Rule 33. The cumulative effect of all these errors cinches the matter.

125. "Individual errors that do not entitle a [defendant] to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008). Citing *Fahy* with approval, the Delaware Supreme Court has held that for the purposes of assessing a new trial claim, cumulative error must derive from multiple errors that caused "actual prejudice." *Swan v. State*, 248 A.3d 839, 869 (Del. 2021); *see United States*

v. Gabinskaya, 829 F.3d 127, 134 (2d Cir. 2016) (applying cumulative error analysis to motion for new trial pursuant to Federal Rule of Criminal Procedure 33).

126. There can be no doubt that the multiple errors during the course of this prosecution and trial, as outlined herein, were such that the proceeding was fundamentally unfair. Only a new trial can cure the prejudice that has denied the Defendant her constitutional right to a fair trial.

Conclusion

For the foregoing reasons, the Defendant respectfully moves for a new trial on Counts One, Three, and Four of the Indictment pursuant to Rule 33.

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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