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STATE OF COLORADO
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Appeal from Mesa County District Court Judgment of Conviction and Sentence.
Honorable Matthew D. Barrett.
Case Number 22CR371

Plaintiff-Appellee:
PEOPLE OF THE STATE OF COLORADO
v.
Defendant-Appellant
TINA PETERS

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APPELLANT'S REPLY BRIEF

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I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

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s/John Case #2431

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CORRECTIONS TO MISREPRESENTATIONS OF ANSWER BRIEF

1. The People misrepresent that counties "backed up" election records

The People claim that before the "trusted build" was performed, each county "backed up" records of prior elections. (AB p.2,5,6,7). Unfortunately, the "election projects backup" preserves only part of the required digital election information. Federal law requires all digital election information on voting system hard drives to be preserved for 22 months. The "election projects backup" referred to in the Answer Brief preserved only some of the data. As Peters explained to the trial court in her Declaration:

> The Mesa County "election project" records retained the results of the election, but not how the results were obtained. "Election projects" records did not include all electronic information that experts said was essential for a postelection audit.

CF 2713.

52 U.S.C. §21081(a)(2)(A) required every county electromechanical voting system to "produce a record with an audit capacity for such system." §21081(b)(1)(D) required the system "to maintain and produce any audit trail information." §21081(a)(5) refers to voting systems standards issued by the Federal Election Commission in effect on October 29, 2002 ("2002 VSS" available at https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines).

Colorado election statute §C.R.S. 1-5-601 required voting systems to comply with 2002 VSS. Section 2.2.4.1 (h) of VSS specified in part that "all systems shall maintain a permanent record of all original audit data that cannot be modified or overridden."

> Election audit trails provide the supporting documentation for verifying the correctness of reported election results. They present a concrete, indestructible, archival record of all system activity related to the vote tally, and are essential for public confidence in the accuracy of the tally, for recounts, and for evidence in the event of criminal or civil litigation.

VSS §2.2.5.1 (underline added).

The "election projects backup" included only data specified by the vendor, Dominion Voting Systems. It did not include all data necessary to audit the prior election as required by 52 U.S.C. §21081 and VSS §2.2.5.1. [CF 3259-3260][1]

2. The People misrepresent that Peters illegally copied Dominion software.

The People claim that "forensic images were not election records; they were copies of the vendor's proprietary software" (AB p.15), and "no person was authorized to copy the vendor's software." AB p.21. This is false. Paragraph 6.1 of the software license agreement between Dominion and Mesa County permitted the

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[1] The Answer Brief acknowledges at p.2 that Dominion instructed the counties how to perform the "election projects backup." Dominion had no legitimate reason to instruct counties not to preserve records required by federal law.

county to "copy the Software in whole or in part . . . for purposes of system backup." R. Defendant's Exhibits p. 67, Ex. JJ8-029, admitted Tr. 8/2/24 62:23. The forensic images made by Peters were lawfully made for purposes of system backup, to preserve election records before the SOS wiped them from the hard drive.

3. Peters made lawful forensic images because federal law required it.

Peters made forensic images of the EMS server hard drive to comply with federal and state preservation statutes. 52 U.S.C. §20701 requires every "officer of election" in the United States to retain and preserve all election records for 22 months after each federal election. 52 U.S.C. §20706 defines "officer of election" to include any person who under color of federal or state or local law performs "any function, duty, or task" requisite to voting in any federal election. Peters, as the elected Clerk and recorder of Mesa County, had a duty under §20701 to preserve records. The U.S. Department of Justice interprets the word "records" in §20701 to include "all records relating to any act requisite to voting" and specifically including "records created in digital or electronic form." (https://www.justice.gov/archives/opa/press-release/file/1417796/dl?inline=).

The criminal penalty for willfully failing to comply with §20701 is a $1,000 fine or imprisonment for one year, or both. To comply with §20701, Peters engaged Conan Hayes, a qualified consultant with federal security clearances, to make a

forensic image of the voting system hard drive. A forensic image is an unalterable bit-for-bit copy of the original hard drive.

The Answer Brief refers to the software modification performed by SOS as "the Build." The People concede that the software modification performed by SOS on May 25, 2021, erased all digital information on the Mesa County election management server hard drive, and then installed a new version of Dominion software called "the golden image." SOS employee Jessi Romero admitted that the software installation "wipes out everything that's on there." TR 8/1/24 212:8-9. After SOS employee Danny Casias erased everything from the hard drive, and installed new software, it was impossible to audit the 2020 election, as required by 52 U.S.C. §21081 and VSS §2.2.5.1. Like Tina Peters, the Colorado Secretary of State and her employees are "officers of election" as defined in 52 U.S.C. §20706, and as such they owe the duty under §20701 to preserve all election records for 22 months. When Casias and SOS willfully erased the 2020 election records from the Mesa County hard drive, they violated §20701 and became subject to its criminal penalties.

The "BUILD" should be renamed "WIPE." We invite this Court to re-read the Answer Brief substituting the word "Wipe" for the word "Build." The individuals who attempted to destroy evidence, who violated federal law, remain free without charges, while the only elected Clerk and Recorder in Colorado who obeyed federal

law and preserved evidence languishes in prison. The manifest injustice in this case screams for this Court to vacate Tina Peters' convictions, and forthwith release her from custody.

ARGUMENT

I. PETERS IS IMMUNE FROM PROSECUTION IN STATE COURT

A. This Court has jurisdiction to review the denial of immunity

The People argue that Peters' claim to immunity under the Supremacy and Privileges or Immunities Clauses of the United States Constitution is not reviewable on direct appeal, relying solely on the discussion of the appealability of "make-my-day" statutory immunity in *Wood v. People,* 255 P.3d 1136 (Colo. 2011). They merely state, "The same is true for immunity under the Supremacy Clause." AB p. 12. Even a cursory review of *Wood* shows that is not true.

Wood held that make-my-day immunity is an affirmative defense created by statute – not a limit on subject-matter jurisdiction – so that pre-trial denial of such immunity simply allows that claim to be raised at trial. 255 P.3d at 1139, 1140-41. A guilty verdict means the jury found that statutory conditions for make-my-day immunity were absent, and the immunity claim is subsumed in the verdict. *Id.,* at

1139, 1141-42. *Wood* likened pre-trial proceedings to a preliminary hearing. *Id.,* at 1141.

In contrast, the federal immunity at issue in this case is a function of the U.S. Constitution's allocation of state and federal authority, OB pp. 14-15, which deprives state courts of subject-matter jurisdiction over cases like this one. *Id.,* at 15-16. The beneficiary of federal immunity has a constitutional right not to be tried in state court, as *New York v. Tanella,* cited by the People, makes clear. 374 F.3d 141, 147 (2d Cir. 2004) (Supremacy Clause immunity serves "to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the [immunity] issue resolved.").

The district court not only denied Peters' federal immunity in pretrial proceedings, but barred Peters from raising at trial either her immunity claim or its variation in the state statutory affirmative defense of execution of a public duty. OB pp.3, 9, 27-28. For *Wood,* the opportunity for the defendant to raise make-my-day immunity as a trial defense was central to its reasoning that pre-trial proceedings on that claim could not be the basis of a direct appeal. 255 P.3d at 1141. Sharpening the contrast with *Wood* even further, the district court did not even hold a hearing on

Peters' motion to dismiss on federal immunity grounds, hardly the preliminary hearing model described in *Wood*.

There is no basis to conclude that this Court lacks jurisdiction over this appeal.

B. Peters Is Immune from Prosecution for Acts Taken to Comply With Her Federal Statutory Duty.

Neither the district court nor the People directly addressed the combination of three statutes that unmistakably imposed a federal duty on Peters to preserve election records, which is the foundation for her immunity from this prosecution.

52 U.S.C. §20701 requires every "officer of election" to preserve federal election records for 22 months. 52 U.S.C. §20706 defines "officer of election" as "any person who, under color of any Federal, State, Commonwealth, or local law . . . performs or is authorized to perform any function, duty, or task in connection with any [federal election]." C.R.S. §1-1-110(3) provides that the county clerk and recorder shall be the chief designated election official for all coordinated elections.

In sum: while Peters served as clerk and recorder, she was the chief election official for Mesa County. As the chief election official, she was an "officer of election" under federal law §20706. And as an officer of election, she had a duty to preserve federal election records for 22 months or suffer federal criminal penalties.

The People provide no legal support for their baseless argument that Supremacy Clause immunity applies only to federal employees. AB pp. 12-14. No legal rule limits Supremacy Clause immunity to people who receive a federal paycheck, because the primary beneficiary of Supremacy Clause immunity is the federal government itself, preserving its operations, prerogatives, and initiatives from state interference. OB pp. 14-15. During federal elections, the government operates only through individuals like Peters, who act as federal "officers of election," and necessarily are beneficiaries of Supremacy Clause immunity. OB pp. 18-19.

The People ignore that Peters was an "officer of election" under §20706. They quibble that she was not a "federal official or officer," and was not acting as "an agent of a federal official or officer," and was not acting "pursuant to a direct federal court order." AB p. 14. Peters was following the command of a direct federal statute. It is indisputable that a federal statute can create a federal duty, OB pp. 18-19, and, as described above, it is equally indisputable that a federal duty to preserve election records was imposed on Peters by §20701. Accordingly, she qualifies for Supremacy Clause immunity.

The People argue that Peters' actions were not reasonably necessary to fulfill her federal duty. AB pp. 14-16. As a threshold matter it is improper to make such an

argument to this Court because whether actions taken to satisfy a federal duty were reasonably necessary is a highly specific factual inquiry to be made by the lower court (assuming it has jurisdiction at all), not this Court, in the first instance. As the Tenth Circuit explained:

> Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question, rather than the more subtle and detailed facts later presented to a court.

Wyoming v. Livingston, 443 F.3d 1211, 1229 (10th Cir. 2006). The efforts of this Court must be directed to review of the district court's decision, not to engage in its own fact-finding.

The district court did conclude that Peters' actions were not reasonably necessary for Supremacy Clause immunity purposes. [Cf 3067] However, it did not have the jurisdiction to adjudicate Peters' federal immunity claim, much less make such conclusions. OB pp. 14-16, 19. The People cite *Peters v. United States,* 2024 WL 3086003 (10th Cir. 2024), as rejecting this proposition. AB p. 16. But Colorado's courts are not bound the decisions of lower federal courts. *People v. Dunlap*, 975 P.2d 723, 748 (Colo. 1999)(Colorado courts are "not bound by a federal circuit court's interpretation of federal constitutional requirements."); *People v. Barber*, 799 P.2d 936,

940 (Colo. 1990)("Lower federal courts … are not conclusive on state courts, even on questions of federal law."). And the People do not explain how *Peters* could even be persuasive authority for this Court in light of the fact that it is at odds with the uniform body of precedent from the Supreme Court and the other federal courts of appeals that hold that state courts do not have jurisdiction over Supremacy Clause immunity claims. *Compare* OB pp. 14-16.

The district court's error in exercising jurisdiction it did not have was compounded by its error in how it exercised that jurisdiction, specifically by failing to hold an evidentiary hearing. An evidentiary hearing was required because the evaluation of whether conduct was reasonably necessary is a fact-bound inquiry – highly disputed in this case – dependent on both the subjective belief of Peters that her actions were necessary and an objective determination that her conduct was reasonable in the particular circumstances of this case. *See Texas v. Kleinert,* 855 F.3d 305, 314-15 (5th Cir. 2017); *New York v. Tanella,* 374 F.3d 141, 147 (2d. Cir. 2004); *Kentucky v. Long,* 837 F.2d 727, 745 (6th Cir. 1988).

Instead of hearing evidence in the manner developed over centuries, with live testimony of key witnesses tested by cross-examination, the district judge simply indulged his own speculation to conclude that Peters' actions were not reasonably

necessary. [Cf. 3067.] Unbound by any testimonial record, the court used faulty reasoning like: "If Defendant believed her actions to be lawful then there would have been no need for her to … engage in the criminal conduct alleged in the indictment." *Id.* Of course, this excludes half of the equation – the objective facts concerning what SOS was doing and would do, if their secretive protocol to erase election records was in any way hindered. The court made the absurd finding that Peters had no immunity because she engaged in criminal conduct. If only innocent defendants are entitled to immunity, there is no such thing as immunity. Those found innocent do not need it, and those found guilty are not entitled to it.

The People claim that Peters "could have simply refused to allow the Build to occur if she believed it would destroy election records." AB p.15. This is not true, as the record demonstrates. SOS had made it clear that if their protocol for erasing and upgrading the election computers on site was not followed to the letter, the computers would be shipped to Denver, where the erasing and updating would occur anyway. Email from Jessi Romero, Office of the Secretary of State (April 30, 2021) at 2. [People Ex 17, R. p. 24-25; Admitted Tr 8/1/24 149:21.]

The People state that any federal duty to preserve election records does not allow anyone to commit a crime under state law. AB pp. 30-31. This is absurd. The

Supremacy Clause comes into play *by definition* when state authorities claim that federal law is being enforced by "illegal means" under state law. In *Livingston,* federal officials violated state trespass and littering laws to install monitoring devices on wolves. *Id.,* at 1213-15. In *Petition of McShane*, 235 F.Supp. 262 (N.D.Miss. 1964), federal marshals violated state laws when their actions to secure James Meredith's entrance into the University of Mississippi provoked a riot in which people were killed. In both cases, the federal actions were held to be immune from state prosecution. Federal officers have been held immune from state prosecution even for using lethal force in carrying out their duties under federal law. *Clifton v. Cox,* 549 F.2d 722, 730(9th Cir. 1977); *West Virginia v. Laing,* 133 F. 887, 891(4th Cir. 1904); *In re Fair,* 100 F. 149, 151(D. Neb. 1900).

Similarly, the People claim that the federal duty to preserve election records does not allow anyone to investigate "election fraud." AB p. 15. But that is an overblown description of Peters' conduct, which involved observation and videotaping the SOS deletion of election records during the "Wipe," and copying those records to preserve them. Such conduct, even if requiring some deception, was certainly within the "general scope" of Peters' duty under the Civil Rights Act. *Colorado v. Nord,* 377 F.Supp. 2d 945, 949 (D.Colo. 2005)(quoting *Baucom v. Martin,* 677 F.2d 1346, 1350 (11th Cir. 1982)). *See* OB pp. 10-12, 26-27.

Using the name "Gerald Wood" instead of "Conan Hayes" was no more harmful than Samuel Clemens using the name Mark Twain. It was reasonable for Peters to conceal the identity of a person who had been instrumental against criminal cartels.

Furthermore, an elected public officer has authority to investigate malfeasance by third parties that are within the scope of the official's duties. *Perez v. Plaqueminas Par. Com. Council,* 391 S. 2d 1308, 1312 (La. Ct. App. 1980) (holding that, notwithstanding district attorney's prosecutorial independence, elected parish council may investigate district attorney's use of parish funds). Moreover, every citizen enjoys the right to copy public records. *Irizarry v. Yehia,* 38 F.4th 1282, 1289-92 (10th Cir. 2022).

Finally, the People dismiss Peters' claim to immunity under the Privileges or Immunities Clause because, according to the People, it has no "explanation or development of any argument." AB p.16. But this claim is hardly limited to "bare or conclusory assertions." The argument builds on the extensive discussion concerning Supremacy Clause immunity, with which the Privileges or Immunities Clause is closely allied. OB p. 16. The argument cites law review analyses of the Clause and major cases construing the Clause (which has not been subject to extensive litigation). The argument, though succinct, is much more than an unsupported assertion.

Colorado's constitutional overreach in this case parallels the defect the United States Supreme Court unanimously condemned in *Trump v. Anderson*, 601 U.S. 100, 112 (2024): a willful disregard for the supremacy of the U.S. Constitution. In *Anderson*, Colorado exceeded its lawful reach by attempting to enforce Section 3 of the Fourteenth Amendment against a federal candidate—a power the Constitution vests exclusively in Congress. Here, the State has again crossed that line, prosecuting Tina Peters for doing precisely what §20701 commands: safeguard federal election records. By imprisoning a county clerk for performing federally required duties, Colorado has placed its prosecutorial power in direct conflict with Art VI, cl. 2 of the U.S. Constitution.

II. THE DISTRICT COURT DENIED PETERS DUE PROCESS

A. The court denied Peters due process right to present a complete defense. The court excluded evidence that Peters had a federal duty to preserve election records, and then refused to instruct the jury on the affirmative defense of execution of a public duty.

Peters' conduct was justifiable and not criminal if it was required or authorized by a provision of law or judicial decree binding in Colorado. C.R.S. §18-1-701, Execution of Public Duty. In order to establish her affirmative defense, Peters had the burden to present evidence of the provision of law that required her to preserve

election records, namely 52 U.S.C. §20701. Under the Supremacy Clause of the U.S. Constitution, §20701 is binding in Colorado.

The court deliberately prevented Peters from meeting her burden to establish a federal duty. In a pretrial order, the court ruled that information about 52 U.S.C. § 20701 was irrelevant [CF 3401]. The court excluded evidence related to Peters preserving election records, and how she would have best preserved those records [*Id*]. During trial, Peters offered a copy of §20701 (Def. Exhibit H, R. Def. Exhibits p. 85), which the trial court refused to admit Tr. 8/8/24 99:4-104:9. Peters offered witness testimony that federal law required her to preserve records, but the court sustained every objection by the People. [Tr 8/6/24 79:21 - 80:1; 8/8/24 285:1-17, 8/9/24 212:15-25, 214:3 – 216:21, 340:19 - 341:1]. The court misused relevancy as a barrier to prevent the jury from learning about Peters' federal duty.

In addition to excluding evidence of federal duty, the court rejected expert testimony that the Mesa County voting machines, and SOS, illegally deleted election records. Peters proffered declarations from five qualified experts in different disciplines [CF 3222-3291]. The Court ruled that the functionality, reliability and efficacy of the voting machines was not at issue, therefore such evidence was inadmissible [CF 3399-3404]. At the pretrial conference, the court summarized its rulings that foreclosed Peters from presenting a complete defense:

> So whether the machine worked or not doesn't really matter, whether the image taken was accurate or not doesn't really matter. Whether she had a duty to take the image, make the image in the first place doesn't really matter when it relates to the charges here.

Tr 7/19/24 p 33:1-6

The court also prevented the jury from knowing that Dominion and SOS conspired to conceal election crimes. Peters' evidence showed that the object of the conspiracy was to erase digital evidence from the county hard drive during the "Wipe," and to prosecute Peters for revealing what happened. The court violated Peters' 6th Amendment right of confrontation by protecting SOS witnesses Romero and Casias from cross examination about allowing Dominion programmers located outside the U.S. to have illegal real-time access to the Colorado voting system during the 2019 and 2020 primary elections (OB p. 29). The court quashed Peters' subpoena served on Dominion vice president and general counsel Mike Frontera. It excluded an email that showed coordination between Dominion and SOS to investigate Peters. (OB p. 28).

> <u>This trial is not about whether Dominion and the Secretary of State conspired to cover up vulnerabilities in the voting process</u>. . . Accordingly, and without leave of Court, neither party may introduce argument or evidence regarding whether voting machines work as designed or as the public at large is told they are designed to work.

[CF 3403]. If the jury knew that Dominion conspired with SOS to prosecute Peters, and that the object of the conspiracy was to conceal their own election crimes, the jury would have reasonably doubted that Peters was guilty of any crime.

The most telling denial of due process was the trial court's refusal to instruct the jury on Peters' affirmative defense of execution of a public duty. The People concede that there was sufficient evidence in the record to support the instruction. "Peters introduced ample evidence of her alleged beliefs that she was preserving election records, investigating destruction of evidence regarding system reliability, and had a legitimate need to conceal Mr. Hayes' identity." AB pp. 28-29. Where the record contains <u>any</u> evidence tending to establish an affirmative defense, the defendant is entitled to have the jury properly instructed with respect to that defense. *Idrago v. People,* 818 P.2d 752, 754 (Colo. 1991). The remedy for the court's failure to instruct on an affirmative defense is a new trial, because the jury could have had a reasonable doubt as to Peters' guilt if properly instructed. *Id* at 756.

The People argue that Peters was not entitled to affirmative defense instruction based on the duty to preserve records under §20701, because according to the People, §20701 "does not authorize an election officer to use criminal means to do so." AB p. 31, citing *People v. Roberts*, 601 P.2d 654, 656 (Colo. App. 1979), which is easily distinguishable. In *Roberts,* the defendant was a DOC prison guard, who accepted a

$5,000 bribe from a CBI undercover agent, to assist in the escape of an inmate, Jesse Nichols. Defendant's theory was that he participated in the scheme in order to apprehend Nichols' brother, who had already escaped. Roberts tendered an instruction on execution of a public duty, but the appellate court ruled he had failed to present evidence to support the affirmative defense. *Roberts* at 656. Here, there is a mountain of evidence to support the affirmative defense.

The Fifth and Sixth Amendments of the U.S. Constitution require that the jury must decide whether the prosecution has proven beyond a reasonable doubt each element of the offense, and the ultimate issue of guilt or innocence. *U.S. v. Gaudin*, 515 U.S. 506, 522-23 (1995)(holding that trial court violated defendant's Fifth and Sixth Amendment rights by determining that one element of the charge had been proven, without submitting that element to the jury for its determination). An affirmative defense becomes an additional element of the charged offense, which the prosecution must disprove beyond a reasonable doubt. *Martinez v. People*, 550 P.3d 713, 716 (2024). Here, the People concede that evidence in the record supported the affirmative defense of execution of a public duty. Under *Martinez*, the affirmative defense became an additional element of the charged offenses, and the prosecution had the burden to disprove that element beyond a reasonable doubt. Here, as in *Gaudin*, the trial court refused to instruct the jury on that element. The court thus

violated Peters' Fifth Amendment right to due process and her Sixth Amendment right to trial by jury. This error requires reversal of the felony convictions, and a new trial in which Peters is allowed to present a complete defense, and the jury is properly instructed.

Concerning the remaining due process issues, Peters relies on the arguments made at pages 23-35 of her Second Amended Opening Brief.

III. THE EVIDENCE WAS INSUFFICIENT

The Answer Brief uses the word "unauthorized" thirteen times to insinuate that Peters was guilty of criminal conduct by bringing Conan Hayes into the secure area. (AB pp. 7,8,19,54). Examples: "Peters made and executed a plan in coordination with others to provide an unauthorized person with access to the elections server and Build." (AB p. 8); "Casias would not have performed the Build had he known an unauthorized person was present." (AB pp. 7,19); "[Peters] used deception to facilitate non—government actors gaining unauthorized access to the secured election system." (AB p. 54). The People's insinuations are false.

First, it was legal for Peters to bring Hayes into the secure area. The People concede that Election Rule 20.5.3(b), then in effect, allowed Peters to admit Hayes into the secure area so long as he was supervised by her or elections manager Sandy

Brown.[2] The People do not dispute that Peters and Brown supervised Hayes at all times.

Second, it was legal for a county clerk to engage a consultant to make a backup image of the voting system. The trial court recognized this, and at the pretrial conference, it forbade prosecutors from arguing at trial that making the forensic images was illegal. Tr. 7/19/24 53:14-19. As noted at p. 2 above, Dominion granted Peters a contractual right to "copy the Software in whole or in part . . . for purposes of system backup."

When the People say that Hayes was an "unauthorized person," they refer to SOS employee Jessi Romero's email April 30, 2021 [People's Ex. 17] which suggested that because of Covid concerns only "authorized" staff from the state, county, and Dominion should be present. The term "authorized" was not defined in Romero's email, or by rule or statute. The term "unauthorized" is not an element of any of the felonies of which Peters was convicted. The words "authorized" and "unauthorized" were not defined for the jury in Instruction 25, "Definitions and Special Rules [CF 4630-31]. Romero told the jury that the term "authorized" meant, "a county

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[2] The Answer Brief does not mention Rule 20.5.3(b), and it is not listed in the People's Table of Authorities.

employee who was background checked and someone who was authorized to work with the voting system." [Tr. 8/1/24 152:19-21]. The machination employed by the People, both at trial and in their Answer Brief, was using the word "unauthorized" to falsely suggest that it was illegal for Hayes to enter the secure area because SOS had not "authorized" him to be present.

At trial, prosecutors and their witnesses played the words "authorized" and "unauthorized" like their theme song. Opening statement: Tr. 7/31/24 194:20-24, 198:9-10, 199:5-8, 202:3-4; Direct examination: Tr. 8/1/24 105:5-6-7, 120:10-12, 150:23 – 151:13 and Tr. 8/5/24 173:13-14; Closing argument Tr. 8/12/24 58:1-9, and 102:6-9. All of this was to convince the jury that Peters committed a crime by allowing person in the room who had not been "authorized" by SOS.

The pertinent legal question is, which elected official had legal authority to control who entered the secure area? Was it the elected clerk and recorder, or was it the Secretary of State? SOS employee Jessi Romero admitted that SOS lacked this authority:

> Q. (By the Court) Why didn't you check the ID of the authorized individuals for the trusted build?
> A. (By Romero) I was not on site, and **we do not have the authority to do that.**

[Tr. 8/1/24 243:11-14]. Mesa County assistant elections clerk Stephanie Wenholz admitted that having a member of the public present to observe the trusted build was not a crime. [Tr. 8/5/24 53:20-22]. Section 5.2 of the contract between Mesa County and Dominion states that the county has responsibility "for review, analysis and acceptance of the System and the coordination of Customer personnel, equipment, vehicles and facilities" [R. Def. Ex. p.41, Ex. JJ8-003]. It was Clerk Peters, not the SOS, who had authority to determine who was present in the county's facility.

Since Peters had the authority to control who was present, there was no need to convince, persuade, or influence any other public officials. Her choice to use a different name to protect Hayes' personal safety does not satisfy the element of intent required by C.R.S. §18-8-306, Attempt to Influence a Public Servant. The statute requires "intent to alter or affect the decision, vote, action of the public servant concerning any matter which was to be considered or performed by the public servant." Here, SOS had no authority to control who was present from the county. Using Hayes' alternate identity did not affect a decision that SOS had authority to make. The evidence was therefore insufficient as a matter of law to sustain the guilty verdicts on count 1 (Romero), and count 4 (Casias).

The same logic requires vacating the conviction on count 2, in which the alleged victim, Mesa County employee David Underwood, testified that Peters had the authority and made the decision to issue credentials to Gerald Wood (OB p. 20-21).

The conviction for conspiracy to commit criminal impersonation (count 6) must be vacated because there was no evidence that Gerald Wood would have been subjected to liability if he had attended the software modification. The People argue that Wood would have liability "because he was <u>not authorized</u> to attend" (AB p. 21). This argument fails because it was Peters, not SOS, who had control of the facilities. The People next argue that "no person was <u>authorized</u> to copy the vendor's software." (Id.) This argument fails because, as we pointed out on p. 2 above, the Dominion allows its software to be copied "for purposes of system backup." Thus, there is no evidence that Wood would have been subjected to liability, and the conviction for count 6 must be vacated.

The People concede that Jury instruction 16 [CF 4452] failed to set forth the elements of felony criminal impersonation. (AB p. 33). This error undermined the fairness of the trial, because failure to instruct the jury on each element of the offense requires vacating the verdict. *People v. Wambolt*, 431 P. 3d 681, 690 (Colo. App. 2018).

As to the sufficiency of evidence to support count 8, official misconduct, the People fail to identify any evidence demonstrating that Peters intended to obtain a benefit. Instead, the People invite this Court to speculate by "drawing inferences" that Peters intended to benefit "Dr. Frank, his supporters, and herself by providing 'forensic images' of the election server to non-government actors." (AB p. 22). Because there is no evidence of a benefit, this Court must vacate the conviction for official misconduct.

IV. THE SENTENCE VIOLATED PETERS' RIGHTS UNDER THE FIRST, EIGHTH, AND FOURTEENTH AMENDMENTS

The People state correctly that the judgment of conviction shows sentences totaling eight years and nine months (AB p. 52). Judge Barrett said the total sentence was nine years. [Tr. 10/3/24 103:9].

The People argue that, "the trial court based its sentence on the corruption Peters exhibited through her criminal conduct." (AB p. 51). This is incorrect. There is no evidence that Peters was "corrupt" in the sense that she used her office to solicit bribes, embezzle money, or engage in similar corrupt activity.

The trial court stated three times that Peters deserved prison because of words she used to criticize the computer voting system. [Tr. 10/3/24 99:20-24; 100:4-11;

101:14-16]. The record demonstrates that the trial court incarcerated Peters for speech that produced no threat of violence or lawless action, in violation of her rights under the First, Eighth, and Fourteenth Amendments. See OB pp. 37-38.

The consecutive sentences imposed on Peters were not supported by any evidence that justified the trial judge's action. In *People v. Edwards*, 598 P. 2d 126, 130 (Colo. 1979), the court reversed the imposition of consecutive sentences that were not justified by the record. Here, as in *Edwards*, the trial court abused its discretion by imposing consecutive sentences without justification. If all sentences ran concurrently, Peters would serve a maximum of three and one-half years instead of eight years and nine months. This Court should follow *Edwards* and order concurrent sentences on remand.

CONCLUSION

For the foregoing reasons, this Court should:

A. dismiss the case on the ground that Peters is immune from this prosecution under the Supremacy and Privilege or Immunities Clauses of the U.S. Constitution, or

B. alternatively, vacate the convictions unsupported by sufficient evidence, and remand the case for new trial and proceedings consistent with this Court's ruling; and

C. order any proceedings on remand be conducted by a different judge.

Respectfully Submitted August 18, 2025.

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<u>CERTIFICATE OF SERVICE</u>

I certify that, on August 18, 2025, a copy of this Appellant's Reply Brief was electronically served through Colorado Courts E-Filing on opposing counsel of record.

s/ John Case