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Case Number 428,2016

IN THE SUPREME COURT OF THE STATE OFDELAWARE

PRENTISS BUTCHER,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 428, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

Upon Appeal from the Superior Court of the State of Delaware to the Supreme Court of Delaware

APPELLANT'S OPENING BRIEF

JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Appellant,
Prentiss Butcher

Dated: January 9, 2017

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NATURE AND STAGE OF THE PROCEEDINGS[1]

Under Delaware Supreme Court Rule 6(a)(ii), Prentiss Butcher appeals from his judgment of sentence in Superior Court, namely, as to Possession of a Firearm by a Person Prohibited, 11 *Del. C.* § 1448, and seeks reversal and vacatur of his sentences and remand for re-sentencing.

A grand jury jointly-indicted Butcher (Case No. 1503015114), and William Gemignani (Case No. 1503015122), on charges relating to March 23, 2015. As applied to Butcher, these charges were Possession of a Firearm by a Person Prohibited (Count I), Possession of Ammunition by a Person Prohibited (Count II), and Carrying a Concealed Deadly Weapon (Count III).[2] As applied to Gemignani, these were Illegal Possession of a Controlled or Counterfeit Substance (Count IV) and Rear Lamps on Motor Vehicle (Count V), a civil violation under 21 *Del. C.* § 4334(a).[3]

On November 16-17, 2015, Butcher was tried in Superior Court before the Hon. DIANE CLARKE-STREETT. On February 17, 2015, a jury found Butcher guilty on all counts as applied to him.[4] Superior Court sentenced

[1] "A__" refers to a page of Appellant's Appendix in support of his Opening Brief. "T__/__/__" refers to a page of the Trial Transcript and "T__/__/__V" refers to a page of the Verdict Transcript.
[2] A6-7.
[3] A7.
[4] D.I. # 19; A4.

Butcher on July 19, 2016.[5] He filed a timely Notice of Appeal on August 18, 2016. This is his Opening Brief on appeal.

[5] D.I. #25; A4. The Sentencing Order incorrectly recites July 1, 2016. *See* A48.

SUMMARY OF ARGUMENT

I. As to Possession of a Firearm by a Person Prohibited under Count I of the Indictment, the court below imposed an illegal sentence, namely, an unauthorized 10-year mandatory minimum term of incarceration under 11 *Del. C.* § 1448(e)(1)(c) by application of a prior version of "violent felony" under 11 *Del. C.* § 4201(c) not in effect at the time of the instant offense — in order to find that Prentiss Butcher had two predicate convictions of "violent felony" rather than one. Mr. Butcher's 2010 conviction of Possession of Cocaine within 300 Feet of a Park was removed as an enumerated "violent felony" under the Ned Carpenter Act of 2011, Act of Apr. 20, 2011, 78 Del. Laws, ch. 13, which was applicable because having taken effect before the commission of the instant offense. This Court already held, in *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010), that "the specific crimes currently listed" in 11 *Del. C.* § 4201(c) are applied to recidivist punishments for the most recent offense under 11 *Del. C.* § 1448(e)(1)(c), and the court below erred by disregarding that case. For these reasons and those set forth below, the ruling by the court below, that "violent felony" is a status under 11 *Del. C.* § 4201(c) which cannot be subsequently amended or repealed by the legislature, should be reversed, and the judgment of sentence should be vacated and this case remanded for re-sentencing.

(1) The Ned Carpenter Act amended Possession of a Deadly Weapon by a Person Prohibited, as well as "violent felony" under 11 *Del. C.* § 4201(c), choosing which "former" Title 16 offenses would continue for sentencing purposes and deleting the offense of Distribution, Delivery, or Possession of a Controlled Substance within 300 Feet of a Park or Recreation Area (Former Section 4768 of Title 16). This was a purposeful legislative choice entitled to the Negative-Implication Canon (*expressio unius est exclusio alterius*). The amendment to "violent felony" under the Ned Carpenter Act is incorporated by reference for recidivist sentencing under Possession of a Firearm by a Person Prohibited, 11 *Del. C.* § 1448(e)(1)(c). The legislature manifestly intends under 1 *Del. C.* § 307(b) that all reference statutes also incorporate all subsequent amendments to the statute referred to.

(2) The criminal savings statute, 11 *Del. C.* § 211(a), is inapplicable here, as correctly found by the Hon. CHARLES E. BUTLER in *State v. Edgar*, 2016 WL 6195980 (Del.Super. Oct. 21, 2016), because the operative language ("penalty, forfeiture or liability incurred under such statute") does not embrace the happening of collateral consequences in the uncertain future. Even so, no criminal penalty for recidivist punishment is "incurred" under Section 211 until a person commits the most recent offense where such punishment is sought. Nothing here was "saved" by that statute, and the court

below erred for ruling otherwise.

(3) A "violent felony" under 11 *Del. C.* § 4201(c) is definitional, not a status reduced to judgment or order of court. There is no statutory procedure to judicially "declare" or "designate" a person as a "violent felon," such as is provided under the Habitual Criminal statute, 11 *Del. C.* §§ 4214-15. As such, a "violent felony" may be amended or repealed by the legislature at any time before commission of the most recent offense where recidivist punishment is sought. To hold otherwise violates the Repealability Canon, that is to say, that no legislature may deprive its successors of the power to alter, amend, or repeal the law. That a person "retains the status of 'violent felon' for any future convictions," a pronouncement by a panel of this Court in *French v. State*, 38 A.3d 289, 290 (Del. 2012), is dicta unwarranted under the facts of that case and erroneous as a matter of law. The State's expansive reading of that dicta was properly rejected by Judge BUTLER in *State v. Edgar*, 2016 WL 6195980 (Del.Super. Oct. 21, 2016).

(4) The State's position should also be rejected under the Canon of Avoidance, *In re Arons*, 756 A.2d 867, 873 n.3 (Del. 2000), because it amounts to increased punishment as a result of judicial decision-making from before the fact ("*ex ante facto*"), which is doubtful for all of the same reasons why neither legislatures nor courts can impose punishment from after

the fact ("*ex post facto*"). The U.S. Supreme Court held that the right to fair warning as a matter of due process is infringed by *ex post facto* judicial decision-making, i.e., "from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face." *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). That also applies where a sentencing court imposes punishment under a recidivist statute not in force at the time of commission of the instant offense. *State v. Taylor (Edwin)*, 568 S.E.2d 50, 53 (W. Va. 2002). "The fundamental principle that the required criminal law must have existed when the conduct in issue occurred," is safeguarded as a matter of Due Process if deprivations result "from courts as well as from legislatures." *Bouie*, 378 U.S. at 354 (citation omitted). For these reasons, no rational distinction exists between *ex post facto* and, here, *ex ante facto* judicial decision-making — a 10-year mandatory minimum term of imprisonment imposed on Mr. Butcher by reference to a prior version of 11 *Del. C.* § 4201(c) not in effect at the time of commission of his instant offense. Avoiding entanglements with the Due Process clauses under the U.S. and Delaware Constitutions, U.S. Const., amend. XIV § 1; Del. Const., art. I, § 7, militate in favor of a reading that the only punishment, including recidivist punishment, which may be imposed is what existed at the time of commission of the most

recent offense.

II. Alternatively, it is more than a constitutional entanglement, *In re Arons*, 756 A.2d 867, 873 n.3 (Del. 2000), but an actual infringement of the protections against arbitrary or capricious governmental action and of the right to fair warning, under the Due Process clauses, U.S. Const., amend. XIV § 1; Del. Const., art. I, § 7, where the court below imposed enhanced punishment on Mr. Butcher by reference to a prior version of 11 *Del. C.* § 4201(c) not in effect at the time of commission of the instant offense. This is a new species of unconstitutionality, namely, greater punishment *ex ante facto*, which is impermissible for the same reasons why it cannot be done *ex post facto*. This is so, for the same reasons stated and authorities cited in Argument, Part I.C.4, which are incorporated by reference. Additionally, Due Process forbids arbitrary or capricious actions by the legislature and the judiciary. Picking and choosing which law is applicable, where effective before or after the fact but not when the crime was committed, is the very embodiment of an arbitrary or capricious action condemned as a matter of due process. Neither is it narrowly tailored to a necessary governmental purpose. These constitutional protections prevail, even if this Court were to hold that the criminal savings statute, 11 *Del. C.* § 211(a), is somehow applicable. 11 Del. C. § 211(a) is therefore unconstitutional as applied to Butcher's case.

STATEMENT OF FACTS

On November 17, 2015, and after trial on the merits of the Indictment, a petit jury found Prentiss Butcher guilty as to Count I: Possession of a Firearm by a Person Prohibited, 11 *Del. C.* § 1448; Count II: Possession of Ammunition by a Person Prohibited, 11 *Del. C.* § 1448; and Count III: Carrying a Concealed Deadly Weapon, 11 *Del. C.* § 1442.[6] Under the Indictment, Butcher committed all of these offenses on March 23, 2015.[7]

I. CONTROVERSY IN THE SENTENCING OF BUTCHER.

Superior Court deferred sentencing at the request of defense counsel.[8] After informal discussions with Superior Court by counsel for the parties, the State filed a letter-brief on July 18, 2016.[9] There, the State submitted argument and citation to authorities in support of its position that Butcher was subject to a 10-year mandatory minimum sentence of imprisonment under 11 *Del. C.* § 1448(e)(1)(c) by virtue of two predicate convictions for "violent felony" in his offense history, as defined under a ***prior*** version of 11 *Del. C.* § 4201(c) before the 2011 enactment of the Ned Carpenter Act.[10] The State argued, specifically, that Butcher's second predicate "violent felony" is a

[6] D.I. #19; A4;
[7] A6-8.
[8] D.I. #23; A4.
[9] A9-12.
[10] Act of Apr. 20, 2011, 78 Del. Laws, ch. 13 [**A54 to A68**].

2010 conviction for Possession of Cocaine within 300 Feet of a Park (16 *Del. C.* § 4768 (repealed 2011)). In support of its position, the State invoked the criminal savings statute under 11 *Del. C.* § 211 and cited unpublished decisions by Superior Court in *State v. Trawick*[11] and in *State v. Weeks,*[12] and decisions by this Court in *French v. State,*[13] *Sommers v. State,*[14] *Ross v. State,*[15] and *Dahms v. State*.[16]

At sentencing on July 19, 2016, defense counsel stated on the record the arguments (raised previously during informal discussions) why the Ned Carpenter Act applied to Butcher where his instant offenses occurred after its effective date,[17] the legislature purposefully chose which "former" Title 16 offenses would qualify as "violent felony" under 11 *Del. C.* § 4201(c) and purposefully excluded Possession of a Controlled Substance within 300 Feet of a Park, [18] and why caselaw cited by the State was distinguishable, inapplicable, or wrongly decided.[19] Defense counsel also pointed out that

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[11] 2014 WL 5741005 (Del.Super. Jan. 4, 2016) (amended opinion) (Cooch, *R.J.*), *in* A11.
[12] 2014 WL 10895228 (Del.Super. Aug. 25, 2014) (Scott, *J.*), *aff'd.*, 123 A.3d 473 (Del. 2015) (unpublished table decision), *in* A3.
[13] 38 A.3d 289 (Del. 2012), *in* A3.
[14] 2010 WL 5342953 (Del. Dec. 20, 2010), *in* A11.
[15] 990 A.2d 424 (Del. 2010) (en banc), *in* A12.
[16] 2004 WL 1874650 (Del. Sept. 3, 2004), *in* A11
[17] A15; T07/19/2016 — 3.
[18] A18 to A20; T07/19/2016 — 6 to 8.
[19] A20 to A21; T07/19/2016 — 8 to 9 (arguments by John S. Malik, Esquire, for Prentiss Butcher) (discussing "Summers v. State," as cited in the State's letter-brief, where *Sommers* was clearly meant), 9 (discussing *Ross v. State*); A22 to A23; T07/19/2016 — 10-11 (discussing "Doms v. State," as cited in the State's letter-brief, where *Dahms* was

Sommers actually supported Butcher's position — because the enumerated list of "violent felony" under 11 *Del. C.* § 4201(c) has "to be for specific crimes currently listed in 4201(c),"[20] and that the opinion contained a typo where it cited the statute as "4210(c)" rather than "4201(c)."[21] Based on the law as it stood at the time of Butcher's commission of his instant offenses, in 2015, defense counsel argued that sentencing was appropriate under Subdivision (e)(1)(b) rather than (e)(1)(c) of 11 *Del. C.* § 1448, based on only one predicate conviction of "violent felony." The State reiterated its arguments presented in the letter-brief.[22]

Superior Court accepted the State's position, noting *State v. Weeks* and *French v. State* and placing "great weight" on the latter,[23] "Therefore, I find that the State can use the prior conviction as a prior violent felony, and it meets the requirements as the second predicate violent felony to enhance Mr. Butcher's sentence."[24] Superior Court proceeded to sentence Butcher accordingly, after hearing from the parties further and granting Butcher's allocution.[25] As to Count I, Superior Court found on the record that Butcher

clearly meant), A27 to A28;T07/19/2016 — 15-16 (discussing *French v. State*).
[20] A20; T07/19/2016 — 8.
[21] *Id.*
[22] *See* A23 to A27; T07/19/2016 — 11-15.
[23] A29; T07/19/2016 — 17.
[24] A30; T07/19/2016 — 18.
[25] A30 to A42; T07/19/2016 — 18 to 30.

had two predicate convictions of "violent felony" warranting the 10-year mandatory minimum sentence of incarceration.[26] Superior Court therefore imposed 15 years of Level 5 incarceration suspended after 10 years at Level 5 supervision, with terms of probation having scheduled (but discretionary) flow-downs from Level 5 to Level 4 and from Level 4 to Level 3.[27] As to Counts II and III, Superior Court respectively imposed five years of Level 5 incarceration, suspended for one year in favor of Level 3 probation.[28] Probation under counts II and III is concurrent with probation under Count I.[29] All terms of confinement are to run consecutively. The effective date of the sentence is April 23, 2015.[30] This appeal followed.

II. SPLIT OF AUTHORITY IN SUPERIOR COURT.

On October 21, 2016, the Hon. CHARLES E. BUTLER of Superior Court issued a written decision in *State v. Coty Edgar*,[31] upon a conviction for Possession of a Firearm by a Person Prohibited. Judge BUTLER rejected the State's position that any amendment which decreases the list of "violent felony" in 11 *Del. C.* § 4201(c) is inapplicable, as well as the caselaw cited by

[26] A43; T07/19/2016 — 31.
[27] *Id.*
[28] A45; T07/19/2016 — 33.
[29] *Id.*
[30] *Id.*
[31] 2016 WL 6195980 (Del.Super. Oct. 21, 2016) (Crim. A. No. 1508012447) [**A69 to A73**].

the State, substantially the same as the instant case. Whereas Butcher was convicted in respect of conduct occurring on March 23, 2015, Coty Edgar tendered a guilty plea as to conduct which occurred in August of 2015.[32]

[32] *Id.* at *1.

ARGUMENT

I. SUPERIOR COURT IMPOSED AN ILLEGAL SENTENCE, BY IMPERMISSIBLY APPLYING A 10-YEAR MANDATORY MINIMUM TERM OF CONFINEMENT UNDER PRIOR LAW RATHER THAN THE LAW IN EFFECT AT THE TIME OF COMMISSION OF THE INSTANT OFFENSE.

A. Question Presented.

As to Possession of a Firearm by a Person Prohibited under Count I of the Indictment, did the court below impose an illegal sentence, namely, a 10-year mandatory minimum term of imprisonment under 11 *Del. C.* § 1448(e)(1)(c), where Prentiss Butcher only had one (rather than two) predicate conviction of "violent felony" based on the law in effect at the time of commission of the instant offense?

Butcher preserved this issue in the court below by argument on the record at sentencing.[33] Additionally, if it could even be suggested that any argument raised in this Brief was not fairly presented below, then the interests of justice favor such consideration and determination by this Court,[34] because a split of authority in the court below, resulting from *State v. Edgar*,[35] occurred after Mr. Butcher was sentenced and had appealed.

[33] *See* Statement of Facts, Part II *supra*.
[34] Del. Supr. Ct. R. 8.
[35] 2016 WL 6195980 (Del.Super. Oct. 21, 2016).

B. Standard and Scope of Review.

Statutory interpretation is a question of law reviewed *de novo*.[36] Whether a prior conviction qualifies as "a predicate felony under title 11, section 1448(e)(1) is a question of law which is reviewed *de novo* by this Court."[37]

C. Merits of Argument.

Both parties agree that Prentiss Butcher was convicted in 2010 of the former Title 16 offense of Possession of a Controlled Substance within 300 Feet of a Park. But where Butcher adamantly disagrees with the State, and had duly objected before the court below, is that such no longer qualified as a predicate "violent felony" for recidivist sentencing at the time he committed the instant offense of Possession of a Firearm by a Person Prohibited. It is axiomatic, and this Court has held in *Sommers v. State*, that a person may only be punished under 11 *Del. C.* § 1448(e)(1)(c) by the law in effect at the time of commission of the instant offense, namely, "the specific crimes ***currently listed*** in section [4201](c)."[38] That is so normative that research has not found any contrary authority in other jurisdictions: "A person convicted of a crime is given the sentence in effect when the crime was committed, including any

[36] *Dixon v. State*, 673 A.2d 1220, 1224-25 (Del. 1996).
[37] *Sommers v. State*, 2010 WL 5342953, at *1 (Del. Dec. 20, 2010); accord. *United States v. McConnell*, 605 F.3d 822, 824 (10th Cir. 2010) ("Whether a prior conviction qualifies as a 'crime of violence' under the Guidelines is a legal question that we examine de novo." (citation omitted)).
[38] *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (discussing 11 *Del. C.* § 1448(e)(1)(c)) (emphasis and alteration added).

applicable habitual offender act penalties."[39] It proceeds from an ancient maxim from the Greeks and Romans — *nulla poena sine lege*.

The law is clear that the legislature may ***increase*** the list of "violent felony" predicates under 11 *Del. C.* § 4201(c) even *after* conviction, if such punitive amendments took effect *before* the commission of the most recent offense which incurred the recidivist punishment.[40] The instant case presents the corrollary: the legislature may also ***decrease*** such list by remedial amendments effective before the commission of the most recent offense. The legislature did so here in the Ned Carpenter Act of 2011, which took effect long before Butcher committed his instant offense in 2015. The court below erred by accepting the State's arguments to the contrary and by ignoring this Court's opinion in *Sommers*, and Judge BUTLER correctly rejected the State's "dubious" position in *State v. Edgar*.[41] Relief is manifestly due, where Superior Court imposed an illegal sentence in the nature of an unauthorized 10-year mandatory minimum term of incarceration.

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[39] 24 C.J.S. *Criminal Law* § 2292, at 383 (2006) (citation omitted) [**A76**].

[40] *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (recidivist punishment under 11 *Del. C.* § 1448(e)(1)(c)); *Chambers v. State*, 93 A.3d 1233, 1235-36 (Del. 2014) (recidivist punishment under Title 21 for Driving Under the Influence); *State v. Owens*, 101 A.2d 319, 320 (Del.Super. 1953) (Layton, *J.*) (refusing to sentence under the Habitual Criminal statute, where the instant offense occurred before its effective date); *People v. Snook*, 947 P.2d 808 (Cal. 1997) (recidivist DUI punishment is not ex post facto, so long as the most recent offense occurred after the effective date of amendatory statute).

[41] 2016 WL 6195980, at *5 (Del.Super. Oct. 21, 2016).

1. The Ned Carpenter Act of 2011 is Applicable Here, because Its Revision to 11 *Del. C.* § 4201(c) Was in Effect at the Time of Commission of Butcher's Instant Offense and Incorporated by Reference in 11 *Del. C.* § 1448.

As convicted under the Indictment, for Count I and for all other counts, Butcher's offense of Possession of a Firearm by a Person Prohibited occurred on March 23, 2015.[42] Our governor approved the Ned Carpenter Act on April 20, 2011,[43] and it took effect on September 1, 2011.[44] Clearly, the Act became effective long before Butcher's instant offense.

Under the Act, our legislature amended, among other things, the offense of Possession of a Deadly Weapon by a Person Prohibited.[45] In addition to altering and repealing criminal offenses under Title 16, the Act *decreased* the list of "violent felony" predicate convictions under 11 *Del. C.* § 4201(c), namely, deleting the Title 16 offenses of Distribution, Delivery, or Possession of a Controlled Substance within 1,000 Feet of School Property (Former Section 4767) and Distribution, Delivery, or Possession of a Controlled Substance within 300 Feet of a Park or Recreation Area (Former Section 4768).[46] Clearly, Butcher's 2010 conviction for Possession of Cocaine within 300 Feet of a Park is, and was at the time he committed the instant

[42] A6 to A7.
[43] Act of Apr. 20, 2011, 78 Del. Laws, ch. 13 § 73 [**A68**].
[44] *Id.* § 72.
[45] *Id.* §§ 5-6 (amending 11 *Del. C.* § 1448) (renumbering paragraph (a)(9) as (a)(10), adding new paragraph (a)(9), and altering subsection (c)) [**A55**].
[46] *Id.* § 10 [**A56**].

offense, no longer enumerated as a "violent felony."

Although the Ned Carpenter Act repealed certain Title 16 offenses outright,[47] it also designated which "former" Title 16 offenses would continue for sentencing purposes as a "violent felony" under 11 *Del. C.* § 4201(c).[48] Consequently, under the familiar principle of *expressio unius est exclusio alterius*, "the expression of one thing is the exclusion of another."[49] By retaining some "former" Title 16 offenses and deleting others from 11 *Del. C.* § 4201(c), the legislature's choice to exclude Mr. Butcher's 2010 conviction as a "violent felony" was clearly purposeful.

The offense of Possession of a Firearm by a Person Prohibited contains its own sentencing scheme for recidivism,[50] but incorporates by reference the enumerated list of "violent felony" under 11 *Del. C.* § 4201(c).[51] Section 1448 of the Delaware Criminal Code is therefore a *reference statute*. Our legislature manifestly intends under 1 *Del. C.* § 307(b), "Whenever any reference is made to any portion of this Code or any other law, the reference applies to all amendments thereto."[52] Section 307(b) renders superfluous in any reference statute (such as 11 *Del. C.* § 1448(e)(3)) the putative clause, *and all amendments thereto*. The Code

[47] *See, e.g.*, *id.* § 43 (striking 16 *Del. C.* § 4768 in its entirety) [**A63**].
[48] *Id.* § 8 [**A55**].
[49] *Walt v. State*, 727 A.2d 836, 840 (Del. 1999) (en banc) (citation omitted).
[50] 11 Del. C. § 1448(e)(1)-(2); *see also*, *id.* § 1448(e)(1)(3) (exempting sentences from the provisions of 11 *Del. C.* § 4215).
[51] *Id.* § 1448(e)(3).
[52] 1 Del. C. § 307(b).

Revisors have authority to delete that language as such, if included within an enactment.[53] The old common law rule, that subsequent amendments to a referred statute were not incorporated by the reference statute, is superseded by Section 307(b). This view is confirmed in the *Delaware Legislative Drafting Manual*,[54] and it is a fair inference that Section 307(b) is a background principle adhered to by the legislature in statutory enactments.

That old common law rule emerged within a radically different cultural context, where any of these factors were present in the American states: (1) part-time legislatures, (2) no standing codifications of the statutory law, with their annotations and cross-references to related statutes, or (3) no permanent code revisors, research offices or other legislative agencies. But none of that is descriptive of today's Delaware General Assembly. And nothing in the history of the Ned Carpenter Act comports with the rationales behind the old common law rule. The Preamble recites the legislature's intent to enact a "comprehensive revision of Delaware's drug offenses."[55] Comprehensiveness, clearly, necessitated the legislature to consider how drug offenses interact with Title 11 and other Code

[53] *See* 1 Del. C. § 211(a)(6).
[54] Delaware Legislative Drafting Manual, at 123-24 (Legislative Council, Div. of Research, Jan. 2015) (rejecting *Powell v. Levy Court*, 235 A.2d 374 (Del. 1967)) ("A close reading of the case suggests the appellee simply acceded to the Court's rule. The editors maintain this decision is an outlier and § 307(b) controls as seven years later the General Assembly recodified § 307(b) containing the same legislative interpretation rule in the Delaware Code of 1974.") [**A93 to A94**].
[55] Act of Apr. 20, 2011, 78 Del. Laws, ch. 13, pmbl. cl. 6 [**A55**].

provisions, such as Possession of a Firearm by a Person Prohibited and recidivist enhancements under 11 *Del. C.* § 4201(c). The old common law rule reflects the assumption of an unskilled legislature, and no longer aids but thwarts intent.

In sum, there is no reason for the judiciary to force the legislature to work twice as hard to say the same thing. The reference to "violent felony" in 11 *Del. C.* § 1448(e)(3) incorporates Section 4201(c) and all subsequent amendments; the definition of "violent felony" under Section 4201(c) was amended under the Ned Carpenter Act to exclude convictions, like Butcher's, for Possession of a Controlled Substance within 300 Feet of a Park; that Act was in effect before Butcher committed the instant offense of Possession of a Firearm by a Person Prohibited; and Butcher may only be punished by the law applicable at the time of commission of the instant offense. Consequently, the court below imposed an illegal sentence by imposing a mandatory minimum of 10 years of imprisonment under 11 *Del. C.* § 1448(e)(1)(c) for two predicate convictions of "violent felony." Relief is manifestly due.

2. The Savings Provisions under 11 *Del. C.* § 211 are Inapplicable.

In the court below, the State invoked the general savings provisions under 11 *Del. C.* § 211 and cases decided under that statute,[56] including *Dahms v. State*.[57] But Judge BUTLER correctly rejected this position in *State v. Edgar*.[58] His honor

[56] A11 to A12.
[57] 2004 WL 1874650 (Del. Aug. 17, 2004).
[58] 2016 WL 6195980 (Del.Super. Oct. 21, 2016).

observed that the operative language in Section 211 — "penalty, forfeiture or liability incurred under such statute"[59] — does not refer to collateral consequences, much less any happenings in the "uncertain future."[60] As such, a *criminal penalty* for recidivist punishment is not "incurred" under Section 211 until a person commits the most recent offense where such punishment is sought.[61] Consequently, nothing was *saved* under Section 211, and the State's analysis "is not well taken."[62]

Here, likewise, when Butcher was convicted in 2010 of Possession of Cocaine within 300 Feet of Park, the uncertain possibility of how recidivist statutes may treat that conviction *in the future* does not and cannot amount to any "penalty, forfeiture or liability" which is "incurred" under 11 *Del. C.* § 211(a), because Butcher did not commit the offense of Posession of a Firearm by a Person Prohibited until 2015 — *after* the effective date of the amendment to "violent felony" in 11 *Del. C.* § 4201(c). Similarly, *Dahms* is inapposite and offers no support for the State, because that case involved a defendant who sought application of a remedial statute which took effect *after* the date of commission of the offense.[63]

The common sense decision by Judge BUTLER is amply supported by caselaw

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[59] 11 Del. C. § 211(a).
[60] *Edgar*, 2016 WL 6195980, at *4 ("It would seem self-evident that if a consequence of a conviction is merely 'collateral,' then by definition it is not a 'penalty, forfeiture or liability' within the meaning of the savings clause.").
[61] *Id.* at *3 ("The penalties in place at the time ***this crime*** was committed did not include a 'violent felony' enhancement." (emphasis added)).
[62] *Id.* at *4.
[63] *Dahms*, 2004 WL 1874650, at *1.

in federal jurisdictions, where Court recognizes that Section 211 is "modeled in part upon federal law,"[64] as well as other jurisdictions with comparable statutes. The U.S. Supreme Court held that penalties are "incurred" under the federal savings statute, 1 *U.S.C.* § 109, "when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable."[65] Consequently, the savings clause acts as a bar, where an ameliorative sentencing law is enacted after conviction *but before sentencing* on ***that*** conviction.[66] Otherwise, no federal court has held that yesterday's repealed penal laws are applicable to tomorrow's crimes, and Judge BUTLER is undoubtedly correct to say that the State's theory is "unprecedented."[67]

The law of American jurisdictions is well-settled, "The possibility that the conviction could be used to enhance a future sentence for a future conviction is a collateral consequence."[68] Other jurisdictions recognize, as did Judge BUTLER, that criminal savings statutes are inapplicable to collateral consequences, because such are not yet "incurred" as a matter of law until the happening of all facts necessary to establish liability. In *State v. Taylor*,[69] the State of Washington prosecuted and convicted a man for failing to register as a sex offender, where previously convicted

[64] *Lewis v. State*, 144 A.3d 1109, 1114 (Del. 2016) (en banc) (quotation omitted).
[65] *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012) (citations omitted).
[66] *Warden v. Marrero*, 417 U.S. 653, 661 (1974).
[67] *Edgar*, 2016 WL 6195980, at *4.
[68] 21 AM. JUR. 2D *Criminal Law* § 620 (WestLaw) (citations omitted) [**A78 to A79**].
[69] *State v. Taylor* (*Homer*), 259 P.3d 289 (Wash. Ct. App. 2011).

of a sex offense in 1988 under a statute later repealed that same year.[70] But the instant offense of failing to register as a sex offender — at the time he allegedly violated it — made no provision for his former statutory offense within the scope of the duty to register.[71] Accordingly, the Washington court reversed the judgment, and specifically rejected the government's claim under the criminal savings statute on multiple grounds. Relevant to the instant case is this ground: "[T]he duty to register [as a sex offender] is not a penalty, forfeiture, or liability, but a collateral consequence of a conviction."[72]

Taylor, as well as Judge BUTLER's decision in *Edgar*, are properly read to mean that collateral consequences are not "incurred" under a savings statute, until all the grounds establishing liability are met. The rationales in those decisions apply with equal force here. No recidivist punishment becomes "incurred" under 11 *Del. C.* § 211 until the offender is liable for it. Here, that was the year 2015, not 2010.

3. "Violent Felony" under 11 *Del. C.* § 4201(c) is a Definitional Provision, not a Status Reduced to Judgment or Order of Court, Which the Legislature May Amend or Repeal at Its Pleasure.

In the court below, the State invoked Superior Court's decisions in *State v. Trawick*[73] and *State v. Weeks*,[74] and this Court's decision in *French v. State*[75] about

[70] *Id.* at 290.
[71] *Id.* at 291-92.
[72] *Id.* at 294 (alteration added).
[73] 2014 WL 5741005 (Del.Super. Jan. 4, 2016) (amended opinion).
[74] 2014 WL 10895228 (Del.Super. Aug. 25, 2014).
[75] 38 A.3d 289 (Del. 2012).

"violent felony," arguing "that ***that designation*** also remains for purposes of sentencing enhancers"[76] and Butcher's two prior convictions, therefore, "has ***designated*** him as a violent felon."[77] In the court below, the State also cited the case of *Ross v. State* for the proposition that 11 *Del. C.* § 1448(e)(1)(c) is unambiguous.[78]

Here, the State conflates 11 *Del. C.* § 4201(c) with the operation of the Habitual Criminal statute.[79] The latter provides that "the Attorney General shall file a motion" — *to the court* — "to have the defendant declared an habitual criminal" — *by order of court* — "under § 4214 of this title,"[80] and only "upon the State's petition" may the court enter an order, imposing punishment and declaring a person an habitual criminal.[81] Clearly, the State submits a "petition to have the person declared to be an habitual criminal," that is, *by judgment or order of court*.[82]

But as Judge BUTLER cogently observes, a "violent felony" under Section 4201(c) "is merely definitional — it does not criminalize any behavior."[83] Neither does it have any operation of its own, because there is no statutory procedure to have the judiciary *declare* or *designate* a person a "violent felon." The en banc decision by this Court in *Ross*, as cited by the State in the court below, establishes that the

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[76] A11 (emphasis added).
[77] A12 (emphasis added).
[78] *Ross v. State*, 990 A.2d 424, 429 (Del. 2010) (en banc).
[79] 11 Del. C. §§ 4214-15.
[80] *Id.* § 4215(b) (alterations added).
[81] *Id.* § 4214(a).
[82] *See id.* § 4214(b) (last sentence), (c) (last sentence), (d) (last sentence).
[83] *Edgar*, 2016 WL 6195980, at *2

word "conviction" in 11 *Del. C.* § 1448(e)(1)(c) has its ordinary meaning from the Delaware Criminal Code, that is, "a verdict of guilty by the trier of fact, whether judge or jury, or a plea of guilty or a plea of nolo contedere accepted by the court."[84] Conspicuously absent from that definition is a judicial declaration or designation that a person is a "violent felon." The law is well-settled that punishment under a "conviction" does not embrace collateral consequences; or else, all the courts of this country would have been in error to say that offenders cannot withdraw their guilty pleas, because having not been appraised of such.[85] Butcher agrees with the *Ross* Court that "the statute is unambiguous"[86] — because it contains nothing to support the State's novel theory that "violent felony" is an immutable status by operation of law which cannot be prospectively amended or repealed by the legislature.

Where not reduced to judgment or order of court in any particular case, the legislature may amend or repeal at its pleasure any recidivist punishment based on a defendant's "prior record at any time before commission of the underlying offense."[87] This conclusions rests on the Repealability Canon, namely, that no legislature may tie the hands of its successors by holding that a statute cannot be

[84] *Ross*, 990 A.2d at 429 (quoting 11 *Del. C.* § 222(3)).
[85] *See, e.g.*, *Edgar*, 2016 WL 6195980, at *4 n.6 (citing *Kipp v. State*, 704 A.2d 839 (Del. 1998) for the proposition that failing to inform the defendant that a conviction would prohibit him from possessing firearm in future is merely a collateral consequence); 21 AM. JUR. 2D *Criminal Law* § 620 (WestLaw) (collecting cases) [**A78 to A79**].
[86] *See Ross*, 990 A.2d at 429.
[87] *State v. Everett*, 816 So. 2d 1272, 1281 (La. 2002).

repealed or altered in future.[88] To the extent a panel of this Court, in *French*, stated in dicta that a person "retains the status of 'violent felon' for any future convictions,"[89] that is more appropriately understood, as Judge BUTLER read it, to the extent the law is unmodified by the legislature before the commission of a future offense.[90] To construe it otherwise is contrary to the Repealability Canon.

This pronouncement in *French* was dicta, because the facts of the case showed an adequate alternative predicate of Escape after Conviction,[91] removing any need to consider if the Habitual Criminal statute was met by conviction for Possession of a Firearm by a Person Prohibited. The dicta is also erroneous because the panel construed *a parenthetical* associated with a reference in Section 4201(c): "[§] 1448(e) Possession of a Deadly Weapon by Persons Prohibited (Firearm or Destructive Weapon, Owned, Possessed or Controlled ***by a Violent Felon***)."[92] The panel therefore made much of this parenthetical "(. . . by a Violent Felon)," where the *Delaware Legislative Drafting Manual* reminds us that references only adopt the

[88] *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." (citations omitted)).
[89] *French*, 38 A.3d at 290.
[90] *Edger*, 2016 WL 6195980, at *4 ("*French* does not even attempt to answer the question what happens when the underlying felonies supporting the petition are declassified as violent felonies by the legislature. That issue was not before the Court.").
[91] *French*, 38 A.3d at 292.
[92] 11 Del. C. § 4201(c) (emphasis and alteration added).

other statute as a matter of law *and are not intended to define new matter*.[93] Associated parentheticals, as such, are editorial aids for the convenience of *paraphrasing* any of the contents of the referred statute.[94] The ordinary meaning, where only Section "1448(e)" is referenced in Section 4201(c), is that Possession of a Deadly Weapon by a Person Prohibited is a "violent felony," if any only if the offender had received recidivist punishment under subsection (e) based on how "violent felony" was defined *at that particular time*. It is too far afield to say that an associated parenthetical to a reference somehow evinces intent to fashion a new, immutable status not reduced to judgment or order of court.

To the extent *State v. Weeks* and *State v. Trawick* stand for the proposition that "once a violent felon, always a violent felon," then such decisions also erred for disregarding the teaching in *Sommers v. State* that it is the "specific crimes ***currently listed***" in Section 4201(c) that are applied to recidivist punishments.[95] It also appears that *Trawick* and *Weeks* miscomprehended that "violent felony" is a statutory enumeration and a collateral consequence as punishment under a future offense, not a "status" reduced to judgment or order of court like an Habitual Criminal

[93] Delaware Legislative Drafting Manual, at 123 (Legislative Council, Div. of Research, Jan. 2015) ("Incorporation by reference is a useful tool because it assures the drafter of uniformity, clarity, and consistency between the provisions while saving space and time.") [**A93**].
[94] *Id.* at 101 ("Use parentheses only if necessary to make clear a reference to another statutory provision by indicating the nature of the referenced provision.") [**A89**].
[95] *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (emphasis added).

declaration.[96]

4. The State's Interpretation is Constitutionally Doubtful, because Imposing Punishment from before the Fact (*Ex Ante Facto*) is an Entanglement for the Same Reasons Why It Cannot be Imposed from after the Fact (*Ex Post Facto*) as a Matter of Due Process.

Under the Canon of Avoidance, courts will avoid any statutory application that is constitutionally doubtful, i.e., circumstances rendering a statute void or inviting "constitutional entanglements."[97] The Canon of Avoidance does not require a formal ruling of unconstitutionality; only that one of two plausible interpretations of a statute is less prone to create a constitutional entanglement. Here, even if a plausible interpretation of the statutory law, the State's position fosters rather than reduces constitutional entanglements, because it amounts to increased punishment as a result of judicial decisionmaking from before the fact ("*ex ante facto*"[98]). It is doubtful for all of the same reasons why neither legislatures nor courts can impose punishment from after the fact ("*ex post facto*"). Avoiding entanglements with the Due Process clauses under the U.S. and Delaware Constitutions,[99] militate in favor of a reading that the only punishment, including recidivist punishment, which may

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[96] *See, e.g.*, *Trawick*, 2014 WL 5741005, at *3 ("[T]he repeal of [former 16 Del. C.] § 4768 several months after Defendant's conviction leaves Defendant's conviction undisturbed." (alteration added)); *Weeks*, 2014 WL 10895228, at *1 ("At the time of defendant's [prior] convictions both crimes were designated as violent felonies." (alteration added)).
[97] *In re Arons*, 756 A.2d 867, 873 n.3 (Del. 2000).
[98] *See* BLACK'S LAW DICTIONARY 111 (10th ed. 2014) (defining "ante" as Latin for *before*); *id.* at 679 (defining "ex" as Latin for *from*) [**A98 to A99**].
[99] U.S. Const., amend. XIV § 1; Del. Const., art. I, § 7.

be imposed is what existed at the time of commission of the most recent offense.

The Ex Post Facto clauses in Article I, Sections 9 and 10 of the U.S. Constitution [100] prohibit, among other things, "Every law that *changes the punishment* and inflicts a *greater punishment*, than the law annexed to the crime, when committed."[101] Recidivist statutes do not impose *ex post facto* punishment, because the qualifying predicate convictions are *either* elements of the most recent offense *or* "[t]he punishment is for the new crime only, but is the heavier if he is an habitual criminal."[102] In either situation, recidivist punishment finds reference only to the law at the time of commission of the most recent offense.[103]

While the Ex Post Facto clauses only portend to legislation, the U.S. Supreme

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[100] U.S. Const., art. I. § 9 cl. 3, § 10 cl. 1.

[101] *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion by Iredell, *J*.) (emphasis in original)).

[102] *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901); accord. *Gibbs v. State*, 208 A.2d 306, 308 (Del. 1965) ("The Statute clearly contemplates the imposition of [enhanced punishment] as the greater penalty for the fourth or subsequent conviction and not as a penalty for any separate offense." (alteration added)); *see also*, *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) ("Mandatory minimum sentences increase the penalty for a crime," and constitute an "element" of the offense); *id.* at 2160 n.1 (questioning without deciding the vitality of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) that prior convictions need not be found at trial by proof beyond a reasonable doubt); *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) (reasoning that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

[103] *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (recidivist punishment under 11 *Del. C.* § 1448(e)(1)(c)); *Chambers v. State*, 93 A.3d 1233, 1235-36 (Del. 2014) (recidivist punishment under Title 21 for Driving Under the Influence); *State v. Owens*, 101 A.2d 319, 320 (Del.Super. 1953) (Layton, *J.*) (refusing to sentence under the Habitual Criminal statute, where the instant offense occurred before its effective date); *People v. Snook*, 947 P.2d 808 (Cal. 1997) (recidivist DUI punishment is not ex post facto, so long as the most recent offense occurred after the effective date of amendatory statute); 24 C.J.S. *Criminal Law* § 2292, at 383 (2006) (citation omitted) [**A76**].

Court recognizes "that limitations of *ex post facto* judicial decisionmaking are inherent in the notion of due process."[104] Such judicial construction or application works a deprivation of the right to fair warning "from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face."[105] This occurred in a West Virginia case, where a sentencing court was reversed for applying an amended recidivist statute where the defendant committed the instant offense before the effective date of the amendment.[106]

It is axiomatic that a 10-year mandatory minimum sentence under 11 *Del. C.* § 1448(e)(1)(c) is an increased penalty for the offense, and therefore part of the crime to which Butcher was entitled to fair notice as a matter of Due Process.[107] If the mischief to be remedied is changes to punishment greater "than the law annexed to the crime, ***when committed***,"[108] then no rational difference exists whether that resulted from applications of law effective *before* or *after* but not *when* the offense was committed. The U.S. Supreme Court held, "The fundamental principle that the required criminal law must have existed when the conduct in issue occurred," is

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[104] *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (citation omitted).
[105] *Id.* at 457 (citation omitted).
[106] *State v. Taylor (Edwin)*, 568 S.E.2d 50, 53 (W. Va. 2002).
[107] *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) ("Mandatory minimum sentences increase the penalty for a crime," and constitute an "element" of the offense); *id.* at 2160 n.1 (questioning without deciding the vitality of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) that prior convictions need not be found at trial by proof beyond a reasonable doubt); *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) (reasoning that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").
[108] *Collins*, 497 U.S. at 42 (1990) (quotation omitted) (emphasis added).

safeguarded as a matter of Due Process if deprivations result "from courts as well as from legislatures."[109] The right to fair warning means that individuals can rely on the meaning of a statute "until explicitly changed" by the legislature.[110]

Here, the State's position that "violent felony" is an immutable status creates an entanglement whether it is an unforeseeable judicial expansion of statutory language otherwise narrow and precise on its face.[111] Nothing in the statutory law provides that "violent felony" is a status, like Habitual Criminal, reduced to judgment or order of court in particular cases.[112] Or that the legislature may not prospectively alter or repeal the enumerations in "violent felony."[113] The construction urged by the State depends on lifting dicta from *French v. State*, which as already shown depended on an associated parenthetical in a reference statute, "(. . . by a Violent Felon)."[114] Such an associated parenthetical — an editorial aid to paraphrase the contents of another statute — hardly constitutes a fair warning. It also conflicts with this Court's decision in *Sommers v. State*, that "the specific crimes ***currently listed*** in section [4201](c)" apply to punishment under 11 *Del. C.* §

[109] *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citation omitted).
[110] *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (citations omitted).
[111] *Rogers*, 532 U.S. at 457.
[112] *See supra* Part C.3.
[113] *See supra* Part C.3.
[114] *See supra* Part C.3.

1448(e)(1)(C),[115] whereas *French* involved the Habitual Criminal statute.[116] In short, it is too tenuous to say why Butcher had fair warning under the statutory law that he would be subject to a 10-year mandatory minimum term of imprisonment.

For the forgoing reasons, it is the State's position (and not Butcher's) that invites constitutional entanglements, by applying a form of 11 *Del. C.* § 4201(c) not in effect when Butcher committed the instant offense in 2015. Such a "dubious"[117] reading is constitutionally doubtful, and should be avoided.

[115] *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (discussing 11 *Del. C.* § 1448(e)(1)(c)) (emphasis and alteration added).
[116] *See supra* Part C.3.
[117] *State v. Edgar*, 2016 WL 6195980, at *5 (Del.Super. Oct. 21, 2016).

II. UNDER THE DUE PROCESS CLAUSES OF THE U.S. AND DELAWARE CONSTITUTIONS, IT IS IMPERMISSIBLE *EX ANTE FACTO* PUNISHMENT TO APPLY A 10-YEAR MANDATORY MINIMUM TERM OF CONFINEMENT UNDER PRIOR LAW RATHER THAN THE LAW IN EFFECT AT THE TIME OF COMMISSION OF THE INSTANT OFFENSE.

A. Question Presented.

As to Possession of a Firearm by a Person Prohibited under Count I of the Indictment, did the court below impose a sentence in violation of the Due Process clauses of the U.S. and Delaware Constitutions as applied to Prentiss Butcher,[118] namely, a 10-year mandatory minimum term of imprisonment under 11 *Del. C.* § 1448(e)(1)(c) and under a prior version of 11 *Del. C.* § 4201(c), where Butcher cannot be unreasonably or arbitrarily deprived of his liberty and where he is entitled to a right to fair notice that punishment be made according to the law in effect at the time he committed the instant offense and not in effect from before the fact (*ex ante facto*)?

Butcher did not preserve this issue in the court below. However, waiver is excused, if plain error requires review in the interests of justice.[119] Plain errors are those affecting substantial rights.[120] The right to fair notice as a matter of Due Process, based on the law as it existed at the time of commission

[118] U.S. Const., amend. XIV § 1; Del. Const., art. I, § 7.
[119] Del. Supr. Ct. R. 8.
[120] *Greene v. State*, 966 A.2d 824, 828 (Del. 2009).

of the offense, is a fundamental and substantial right.[121] A court elsewhere held that it is plain or "manifest error," warranting excusal from the preservation rule, whether a judgment was obtained based on a predicate offense under a repealed statute.[122] The interests of justice also favor such consideration and determination by this Court, because a split of authority in the court below, resulting from *State v. Edgar*,[123] occurred after Mr. Butcher was sentenced and had appealed.

B. Standard and Scope of Review.

"To the extent that we examine the trial judge's legal conclusions, we review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts."[124] Also, "To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[125] Statutory interpretation is a question of law reviewed *de novo*.[126]

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[121] *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("The fundamental principle that the required criminal law must have existed when the conduct in issue occurred," is safeguarded as a matter of Due Process from violations "from courts as well as from legislatures." (citations omitted)).
[122] *State v. Taylor (Homer)*, 259 P.3d 289, 292 (Wash. Ct. App. 2011).
[123] 2016 WL 6195980 (Del.Super. Oct. 21, 2016).
[124] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008) (citations omitted).
[125] *Id.* at 1285 (citations omitted).
[126] *Dixon v. State*, 673 A.2d 1220, 1224-25 (Del. 1996).

C. **Merits of Argument.**

The instant case presents a brand new species of unconstitutionality, namely, greater punishment resulting from *ex ante facto* judicial decisionmaking ("from before the fact"[127]) — the corrollary to *ex post facto* judicial decisionmaking ("from after the fact"). In either case, both violate Due Process in the nature of an unreasonable and arbitrary governmental action and the fundamental right to fair notice under the U.S. and Delaware Constitutions,[128] where any greater punishment is applied where not in effect at the time of commission of the offense. Here, that occurred where the court below imposed a repealed version of 11 *Del. C.* § 4201(c), in determining that Prentiss Butcher had two predicate convictions of "violent felony," rather than one, for a 10-year mandatory minimum term of incarceration under 11 *Del. C.* § 1448(e)(1)(c).

If the Court concludes, as does Butcher, that the State's position creates more than a constitutional entanglement but an outright violation of Due Process, then relief is manifestly due for the same reasons stated and authorities cited in Argument, Part I.C.4, *supra*, which are incorporated by reference as though fully set forth herein. Additionally, this Court has

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[127] *See* BLACK'S LAW DICTIONARY 111 (10th ed. 2014) (defining "ante" as Latin for *before*); *id.* at 679 (defining "ex" as Latin for *from*) [**A98 to A99**].
[128] U.S. Const., amend. XIV § 1; Del. Const., art. I, § 7.

consistently held that the Due Process Clause under Article I, Section 7, of the Delaware Constitution affords broader protections than does the U.S. Constitution.[129] Those greater protections are sought here as well.

To the extent this Court determines that the criminal savings statute under 11 *Del. C.* § 211(a) is somehow applicable here, then such is unconstitutional as applied to Prentiss Butcher's case. Under the Due Process clauses of the U.S. and Delaware constitutions, especially under the broader protections of Article I, Section 7, of the Delaware Constitution, the statutory law must give way to the constitutional due process right of a fair warning, that only the law in effect at the time of the most recent offense is what will be applied. The U.S. Supreme Court held, "The fundamental principle that the required criminal law must have existed when the conduct in issue occurred," is safeguarded as a matter of Due Process if deprivations result "from courts as well as from legislatures."[130] Because fair notice is a fundamental right, strict scrutiny applies, and the statute must be narrowly tailored to advance a compelling government interest.[131] Additionally, constitutional due process requires that the legislature and the judiciary refrain

[129] *E.g.*, *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989); *Bryan v. State*, 571 A.2d 170, 176-77 (Del. 1983).
[130] *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citation omitted).
[131] *Trumball v. Fink*, 668 A.2d 1370, 1370 (Del. 1995) (en banc).

from arbitrary or capricious actions.[132]

If somehow made to apply to collateral consequences, then Section 211 is not narrowly tailored to advance a compelling governmental interest, because (1) "liability" is not "incurred" as applied to uncertain events in the future and, until the happening of such events, the legislature is free to amend or repeal any statute which creates civil or criminal liability[133]; and (2) fundamental and natural justice embraces the ancient maxim from the Greeks and Romans — *nulla poena sine lege* — that no punishment can be had without the existence of law in effect at the time of commission; consequently, neither the legislature nor the judiciary can infringe upon such a fundamental right in the guise of interpreting a savings statute. For the courts to pick and choose which law is applicable, whether *before* or *after* the fact but not ***when*** the crime was committed, that is the embodiment of arbitrary and capricious action condemned as matter of due process.[134] Such impermissible infringements occurred where, as here, the court below imposed greater punishment on Butcher, by reference to a prior version of 11 *Del. C.* § 4201(c) not in effect at the time of commission of the instant offense. If the criminal

[132] *State v. Ayers*, 260 A.2d 162, 171 (Del. 1969).
[133] *See supra* Part I.C.2.
[134] *See Lynce v. Mathis*, 519 U.S. 433, 439-40 (1997) (reasoning as a matter of due process that the "specific prohibition ex post facto laws is only one aspect of the broader constitutional protection against arbitrary changes in the law.").

savings statute could somehow have "saved" this constrained interpretation, then such also is unconstitutional as applied. As such, relief is manifestly due.

CONCLUSION

For the forgoing reasons, Appellant Prentiss Butcher respectfully requests that the Court reverse the ruling by the court below, namely, that "violent felony" is a status which cannot be prospectively amended or repealed by the legislature; vacate his sentences and remand for re-sentencing; and grant such other relief as may be necessary, just, or appropriate.

Respectfully submitted,

/s/ John S. Malik
JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Defendant,
Prentiss Butcher

Dated: January 9, 2017

EXHIBIT “A”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

- - - - -

STATE OF DELAWARE	:	I.D. No. 1503015114
	:	
vs.	:	
	:	
PRENTISS BUTCHER,	:	
	:	Sentencing Hearing
Defendant	:	July 19, 2016

- - - - -

BEFORE: HONORABLE DIANE CLARKE STREET, JUDGE

APPEARANCES:

BARZILAI AXELROD, ESQ.
Deputy Attorney General
For The State

JOHN S. MALIK, ESQ.
For Defendant

* * *

HEARING TRANSCRIPT
JULY 19, 2016

* * *

I looked at the submissions from both sides, and the Court finds that the issue is -- pivots around whether prior conviction of the defendant for drugs within 300 feet of a park should be considered a prior violent felony, which would be a predicate to enhance his sentence on the current charge of Possession of a Firearm by a Person Prohibited. And he has -- the defendant has a prior -- another prior conviction, and there is no dispute as to whether that other prior conviction is a violent felony.

So, the question is whether he has a history of one violent -- prior violent felony or two prior violent felonies.

As to the defendant's argument that the charge of the drugs within 300 feet of a park has -- had its designation -- or has been re-classified and it is no longer a violent felony, the State has countered that by providing several cases in addition, several cases including *Weeks*, State against Weeks and French against State. The Court places great weight on French against State, basically that once the status has been -- I guess

you could say conferred on somebody and that the person remains with that status, and based on that reasoning, although the charge of the drugs within 300 feet of a park was re-classified, at the time that Mr. Butcher was sentenced on that charge, it was a violent felony; and although the particular charge has now been re-classified going forward, if the Court views this the way the Court views the *French* case, and that is the status remains as having been convicted of a prior violent felony, and there's nothing in the statute that specifically speaks to that issue, or speaks to that issue to definitively and unambiguously say that the prior status changes.

Therefore, I find that the State can use the prior conviction as a prior violent felony, and it meets the requirements as the second predicate violent felony to enhance Mr. Butcher's sentence.

Okay. So, now let's go forward to the actual sentencing.

MR. AXELROD: Your Honor, as to the sentencing, as I indicated, Miss Finocchiaro apologizes. She is in another trial at this time.

I miss the life I had before I took the path of self-destruction. Now that I think about all the pain that I caused everyone, I realize that this isn't the reason I was put on earth. This isn't me, and I miss my life.

I'm also in touch with my God more than ever. That's basically all I got.

THE COURT: All right.

Mr. Butcher, I've looked at your case long and hard, and you seem like an intelligent man; and I do agree with your attorney that you had been brought up under some very rough and unfortunate and chaotic circumstances. I am impressed with the fact that you have gotten up to almost graduating from high school under those circumstances, but I cannot ignore the other side of this, which is that you have an extensive record.

You need correctional treatment. You have a long history of violations of Probation. I am concerned also with the explanations that you gave the Presentence Officer dealing with the fact that you had a loaded gun and you're riding around on the streets of Wilmington. You seem to deflect

attention to what the police did or should not have done, and whether or not you agree with the police officers, you respect police officers for the job they do. The fact you were riding around with a loaded gun, no good can come from that.

As you heard, I do find that you have two prior predicate felonies offenses, and so your sentence is effective March 23rd, 2015. You're sentenced to 15 years at Level V. That is suspended after 10 years for 5 years at Level IV, DOC discretion; hold at Level V until space is available at Level IV. That is suspended after 6 months for 2 years at Level III.

You are to have an anger management course and to successfully complete it. You are to have a substance abuse evaluation and mental health evaluation and TASC monitoring.

If you can get a substance abuse program while incarcerated, I would like you to do that. I believe the Key Program is one of the programs in jail.

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. You are to get your

IN THE SUPREME COURT OF THE STATE OFDELAWARE

PRENTISS BUTCHER,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 428, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

CERTIFICATE OF SERVICE

I, John S. Malik, do hereby certify that on this 9th day of January A.D., 2017, I have had forwarded via Lexis Nexis File and Serve electronic delivery a copy of Appellant Prentiss Butcher's Opening Brief and Appendix to the following individual at the following address:

Elizabeth McFarlan, Esquire
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

/s/ John S. Malik
JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Appellant,
Prentiss Butcher

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word and reviewed by Microsoft Word for Mac 2011 Version 14.5.3.

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Respectfully submitted,

/s/ John S. Malik

JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Appellant,
Prentiss Butcher

Dated: January 9, 2017