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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| **GREGORY BROWN,** | ) | |
| | ) | |
| Defendant – Below, | ) | |
| Appellant, | ) | |
| | ) | |
| **v.** | ) | **No. 317, 2020** |
| | ) | |
| **STATE OF DELAWARE,** | ) | |
| | ) | |
| Plaintiff – Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE'S ANSWERING BRIEF

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DATE: February 19, 2021

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## NATURE AND STAGE OF THE PROCEEDINGS

On October14, 2019, a New Castle County grand jury indicted Gregory Brown ("Brown") on charges of Possession of a Firearm By a Person Prohibited ("PFBPP"), Possession of Ammunition By a Person Prohibited ("PABPP"), Carrying a Concealed Deadly Weapon ("CCDW"), Possession of a Firearm While Under the Influence, and Driving Under the Influence ("DUI"). A2; A7-9. After a two-day bench trial, A Superior Court judge convicted Brown of PFBPP, PABPP, Possession of a Firearm While Under the Influence, and DUI.[1] A3. Prior to sentencing, the trial judge *sua sponte* raised the issue of whether the PFBPP and PABPP charges merged for sentencing. Ex. A to Op. Brf. After briefing from the parties, the court determined that merger of PFBPP and PABPP was not required and sentenced Brown to a 5-year minimum mandatory term of incarceration for the PFBPP charge and an aggregate ten years incarceration suspended for descending levels of supervision on the remaining charges. Ex. A and Ex. B to Op. Brf. This appeal followed. This is the State's Answering Brief.

[1] The court acquitted Brown of CCDW. A3.

## SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court correctly determined that PFBPP and PABPP do not merge for sentencing purposes. The unambiguous language of 11 *Del. C.* § 1448 demonstrates the General Assembly's clear intent to permit separate prosecution and punishment for PFBPP and PABPP for a prohibited person's singular possession of a loaded firearm.

## STATEMENT OF FACTS

On the morning of August 22, 2019, Janice Yeager ("Yeager") saw a man, later identified as Gregory Brown, standing outside of his car parked in front of her home in Newark, Delaware. A25. According to Yeager, Brown was "yelling very loudly," and she called the police. A26. Officer Arthur Dreher, formerly of the New Castle County Police Department ("NCCPD"), responded to the complaint. A29. When he arrived at the scene, Officer Dreher observed a silver sedan with the driver's side door partially opened, the engine running, and Brown, shirtless and passed out in the driver's seat. A30-31. At first, Officer Dreher was unable to wake Brown. A31. When a second officer arrived on scene, Officer Dreher woke up Brown and removed him from the car. A31. As Brown got up, Officer Dreher observed a bottle of liquor in the passenger compartment and a handgun on top of the driver's seat. A31-32. A recording of Officer's Dreher's interaction with Brown, captured on Officer Dreher's body-worn camera, was admitted into evidence. A33; State's Trial Ex. 3.

NCCPD Master Corporal Matthew DiSabatino arrived at the scene after Officer Dreher. A38. M/Cpl. DiSabatino recovered the firearm that Brown was sitting on prior to Officer Dreher pulling him out of the car. A40. M/Cpl. DiSabatino testified that the firearm he collected from the driver's seat was a loaded Bersa 380

Thunder. A41. He also determined that Brown is prohibited from possessing a firearm because of a prior felony conviction for Robbery Second Degree. A42. After securing the firearm, M/Cpl. DiSabatino conducted a DUI investigation due to Brown's "slurred speech, his physical demeanor, [and] his inability to exit the vehicle without assistance." A43. As part of the DUI investigation, M/Cpl. DiSabatino obtained a search warrant for Brown's blood. A44. Julie Willey, the director of the Delaware State Police crime lab analyzed Brown's blood sample and determined that his blood alcohol concentration was .04.[2] A54; A60. After completing her analysis, Willey forwarded Brown's blood sample to the Division of Forensic Sciences, where a forensic chemist confirmed the presence of cannabinoids (THC) in Brown's blood. A61; A70.

[2] Brown's blood alcohol concentration was below the .08 threshold set by 21 *Del. C.* § 4177. However, the State proceeded on a dual theory of impairment and/or presence of an illegal drug.

ARGUMENT

## I. THE SUPERIOR COURT CORRECTLY DETERMINED PFBPP AND PABPP DO NOT MERGE FOR SENTENCING PURPOSES. BROWN'S SENTENCES FOR BOTH OFFENSES DO NOT VIOLATE THE FIFTH AMENDMENT TO THE UNTIED STATES CONSTITUTION OR ARTICLE I, § 8 OF THE DELAWARE CONSTITUTION.

### Question Presented

Whether separate sentences for PFBB and PABPP violate the Double Jeopardy Clause(s) of the United States and Delaware Constitutions, when the underlying offenses arise from a defendant's singular possession of a loaded firearm.

### Standard of Review

This Court "review[s] claims alleging an infringement of a constitutionally protected right, including the right not to be subjected to double jeopardy, *de novo.*"[3]

### Merits of the Argument

On appeal Brown claims the Superior Court erred when it determined his sentences for PFBPP and PABPP did not merge for sentencing purposes. He contends, "PFBPP and PABPP should merge for sentencing purposes when ammunition is found inside of a firearm because Double Jeopardy precludes multiple sentences for the same offense."[4] Brown's argument is unavailing.

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[3] *Sullins v. State*, 930 A.2d 911, 915 (Del. 2007) (citing *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006)).
[4] Op. Brf. at 6.

In *White v. State*, this Court recently explained the Double Jeopardy Clause's prohibition against multiplicity as follows:

> Both the United States and Delaware Constitutions guarantee that no person shall be "twice put in jeopardy of life or limb. Among the rights afforded by the Double Jeopardy Clauses is protect[ion] against multiple punishments for the same offense. This protection is termed *multiplicity* and flows from the principle that [l]egislatures, not courts, prescribe the scope of punishments. The multiplicity doctrine, which is rooted in the prohibition against double jeopardy, prohibits the State from dividing one crime into multiple counts by splitting it into a series of temporal or spatial units.[5]

The sole authority Brown relies upon in support of his multiplicity argument is *United States v. Keen.*[6] In *Keen*, the United States Court of Appeals for the 9th Circuit determined that Congress did not intend for the simultaneous possession of a firearm and ammunition to constitute separate units of prosecution under 18 U.S.C. § 922(g)(1).[7] However, as the Superior Court noted,

> Federal courts hold that simultaneous receipt of more than one weapon covered by [the statute] supports conviction for only one offense thereunder. But this is a matter of statutory interpretation—not of constitutional compulsion. Because the *any* in *any firearm or ammunition* may be said to fully encompass (i.e., not necessarily exclude any part of) plural activity, federal courts view it as ambiguous and so, consistent with the federal Double Jeopardy Clause and rule of lenity, construe it strictly in the federal defendant's favor. In turn, under

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[5] *White v. State*, 243 A.3d 381 (Del. 2020) (citations and internal quotation marks omitted).

[6] *United States v. Keen*, 104 F.3d 1111 (9th Cir. 1996).

[7] *Keen*, 104 F.3d at 1119. *Contra United States v. Walker*, 380 F.3d 391, 394 (8th Cir. 2004) holding possession of a firearm and ammunition are separate offenses under section 922(g)(1)).

> that federal statute, simultaneous possession of a firearm and ammunition is a single offense. Because, under that federal statute, the allowable unit of prosecution... is the incident of possession. Hence, under that federal statute, charging of and sentencing for multiple counts requires an additional showing, *i.e.*, that the prohibited items were "acquired at different times or stored in separate places. This relates how the federal judiciary interprets a particular federal statute. It provides no basis from which this Court could construct a state constitutional protection from the Delaware Double Jeopardy Clause to operate more expansively than its federal equivalent.[8]

Brown's reliance on a federal court's interpretation of a federal statute is misplaced. "The determinative consideration in evaluating a challenge to cumulative punishments and prosecutions is legislative intent."[9] Thus, "the primary inquiry must be one of statutory construction and whether there exists clearly expressed legislative intent to impose multiple punishments."[10]

> Section 1448(b) of title 11 of the Delaware Code provides, in part:
>
> (b) Any prohibited person as set forth in subsection (a) of this section who knowingly possesses, purchases, owns or controls a deadly weapon or ammunition for a firearm while so prohibited shall be guilty of possession of a deadly weapon or ammunition for a firearm by a person prohibited.[11]

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[8] *State v. Brown*, 2020 WL 5122968, at *4 (Del. Super. Aug. 20, 2020) (citing *United States v. Frankenberry*, 696 F.2d 239, 245 (3d Cir. 1982); *United States v. Marino*, 682 F.2d 449, 454 n.5 (3d Cir. 1982); *United States v. Kinsley*, 518 F.2d 665, 667 (8th Cir. 1975); *United States v. Tann*, 577 F.3d 533, 537 (3d Cir. 2009); *Keen*, 104 F.3d at 1118 n.11; *Jones v. State*, 2016 WL 2929109, at *2 (Del. May 16, 2016); *Priest v. State*, 2015 WL 7424860, at *1 (Del. Nov. 20, 2015) (internal quotation marks omitted)).

[9] *Robertson v. State*, 630 A.2d 1084, 1092 (Del. 1993).

[10] *Nance v. State*, 903 A.2d 283, 286 (Del. 2006) (citations omitted).

[11] 11 *Del. C.* § 1448(b).

"A conviction for PFBPP requires proof that a defendant was a prohibited person and knowingly possessed a firearm. Similarly, a conviction for PABPP requires proof that a defendant was a prohibited person and knowingly possessed firearm ammunition."[12] When analyzing a double jeopardy claim, this Court employs the *Blockburger*[13] test to determine "whether each provision [of the challenged statute] requires proof of an additional fact which the other does not."[14] Here, the Superior Court correctly noted,

> These factual elements are entirely distinct. "[A] firearm need not be loaded or operable to sustain a conviction for Possession of a Deadly Weapon by a Person Prohibited." And a defendant can be convicted of PABPP without any allegation that he was ever in possession of a firearm. Though PFBPP and PABPP *can* be completed with a single act of handling a loaded firearm, they are objectively susceptible to independent commission and proof.[15]

The General Assembly's intent to separately punish PFBPP and PABPP is also evident in the sentencing scheme proscribed by section 1448. While PFBPP and PABPP are treated identically under subsection (c),[16] the sentencing enhancements

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[12] *Crosby–Avant v. State*, 2018 WL 2427595, at *4 (Del. May 29, 2018).
[13] *Blockburger v. United States*, 284 U.S. 299 (1932).
[14] *See, e.g.*, *Hackett v. State*, 569 A.2d 79, 80 (Del. 1990) (quoting *Blockburger*, 284 U.S. at 304 (internal quotes omitted)).
[15] *Brown*, 2020 WL 5122968, at *3 (quoting *Buchanan v. State*, 981 A.2d 1098, 1104 n.40 (Del. 2009)) (other citations omitted).
[16] *See* 11 *Del. C.* § 1448(c), which provides:

found in subsection (e) are exclusively applicable to possession of a firearm.[17] Indeed, subsection (e)(2)(d) provides additional clarity in assessing legislative intent:

> d. Nothing in this paragraph shall be deemed to be a related or included offense of any other provision of this Code. Nothing in this paragraph shall be deemed to preclude prosecution or sentencing under any other provision of this Code nor shall this paragraph be deemed to repeal any other provision of this Code.[18]

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> (c) Possession of a deadly weapon by a person prohibited is a class F felony, unless said deadly weapon is *a firearm or ammunition for a firearm*, and the violation is one of paragraphs (a)(1)-(8) of this section, in which case it is a class D felony, or unless the person is eligible for sentencing pursuant to subsection (e) of this section, in which case it is a class C felony. As used herein, the word "ammunition" shall mean 1 or more rounds of fixed ammunition designed for use in and capable of being fired from a pistol, revolver, shotgun or rifle but shall not mean inert rounds or expended shells, hulls or casings. (Emphasis added).

[17] *See* 11 *Del. C.* § 1448(e)(1), which provides, in part:

> Notwithstanding any provision of this section or Code to the contrary, any person who is a prohibited person as described in this section and who knowingly possesses, purchases, owns or controls a *firearm or destructive weapon* while so prohibited shall receive a minimum sentence of . . .
>
> * * * *
>
> (2) Any person who is a prohibited person as described in this section because of a conviction for a violent felony and who, *while in possession or control of a firearm* in violation of this section, negligently causes serious physical injury to or the death of another person through the use of such firearm, shall be guilty of a class B felony and shall receive a minimum sentence of . . . . (Emphasis added).

[18] 11 *Del. C.* § 1448(e)(2)(d).

Section 1448 is unambiguous. The plain language of the statute demonstrates the General Assembly's intent to permit separate prosecution and punishment for possession of a firearm and possession of ammunition by a person prohibited arising from the possession of a single loaded firearm.

This Court previously addressed a multiplicity challenge to section 1448 in *Buchanan v. State*.[19] In three separate counts of an indictment alleging violations of section 1448, the State charged Buchanan with possessing a .22 caliber handgun, a .45 caliber handgun, and .45 caliber ammunition.[20] On appeal from the Superior Court's denial of a postconviction motion, Buchanan claimed the three counts of possession of a deadly weapon by a person prohibited should have been merged into a single offense.[21] This Court rejected Buchanan's argument, finding:

> there is simply no merit to this contention. Buchanan was found in possession of two different handguns as well as ammunition for one of the guns. Each handgun and the ammunition constituted a different offense. Merger was not appropriate and counsel committed no error in failing to challenge the indictment on these grounds.[22]

[19] *Buchanan v. State*, 2011 WL 3452148, at *4 (Del. Aug. 8, 2011).
[20] *Buchanan*, 981 A.2d at 1100.
[21] *Buchanan*, 2011 WL 3452148, at *4.
[22] *Id.*

The firearms in Buchanan's case were not loaded,[23] however that fact does not distinguish *Buchanan* from the case at bar. The Superior Court addressed the unloaded firearm distinction, finding:

> [t]o distinguish Brown's case would require imposing *lesser* criminal liability on a prohibited person for possessing ammunition and a firearm if the ammunition is loaded versus loose. Such a strange interpretation runs counter to the purpose of the statute, which is to protect society from gun violence from "previously-convicted violent felons and drug dealers by increasing the punishment for their illegal possession of a firearm." A loaded weapon is necessarily a more imminent danger than an unloaded one.[24]

The court correctly assessed the General Assembly's intent to separately punish possession of ammunition and possession of a firearm by a person prohibited for possession of a single loaded firearm. Here, as in *Buchanan*, Brown simultaneously possessed a firearm and ammunition. The fact that the ammunition in Brown's case was located within a firearm, thus rendering it far more dangerous, has no impact on the multiplicity analysis and the result should be no different here.

The clear intent of the General Assembly as expressed through the unambiguous language of section 1448 coupled with this Court's decision in *Buchanan* demonstrate that PFBPP and PABPP do not merge for sentencing

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[23] *Buchanan*, 981 A.2d at 1100.
[24] *Brown*, 2020 WL 5122968, at *3 (quoting *Ross v. State*, 990 A.2d 424, 431 (Del. 2010)).

purposes. The Superior Court did not violate the federal or Delaware constitutional protections against multiplicity when it sentenced Brown.

## CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

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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)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
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DATE: February 19, 2021