



IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY PATRICK, )  
 )  
Defendant-Below, )  
Appellant, )  
v. ) No. 355, 2020  
 )  
STATE OF DELAWARE )  
 )  
Plaintiff-Below, )  
Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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## NATURE AND STAGE OF THE PROCEEDINGS

Corey Patrick was indicted on several weapons and drug offenses. The weapons offenses included Possession of a Deadly Weapon During the Commission of a Felony (PDWDCF) and 3 “person prohibited” offenses. Two of the “person prohibited” offenses (one for a firearm and one for ammunition) were predicated on a stipulation that he was a “person prohibited.” This was due to a prior conviction of a felony. His third “person prohibited” charge, (for a firearm) was predicated on an allegation that Patrick simultaneously possessed a firearm and a controlled substance.<sup>1</sup>

At trial, Patrick unsuccessfully objected to evidence related to a lengthy drug investigation of which he was a target.<sup>2</sup> He also moved for a judgment of acquittal due to insufficient evidence of “possession” for the weapons charges. The judge granted the motion on the PDWDCF charge and denied the motion on the “person prohibited” charges.<sup>3</sup>

The jury convicted Patrick of all counts upon which it deliberated. He was sentenced to 13 years in prison plus probation.<sup>4</sup> This is his Opening Brief in support of a timely-filed appeal.

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<sup>1</sup>A1, 6. The State dropped 3 counts of Endangering the Welfare of a Child.

<sup>2</sup> See Oral Evidentiary Rulings, Ex. A.

<sup>3</sup> See Oral Decisions on Motion for Judgment of Acquittal and Renewed Motion for Judgment of Acquittal, Ex.B.

<sup>4</sup> See October 14, 2020 Sentence Order, Ex.C.

## **SUMMARY OF THE ARGUMENT**

1. The trial court abused its discretion when it allowed the jury to hear the unfairly prejudicial evidence that Patrick was the target of a lengthy drug investigation that culminated in the issuance of two search warrants. The State claimed this evidence was relevant to establish a link between Patrick and the residence where the firearm, ammunition and a portion of the substances were found. The State also claimed it was necessary to add context for Patrick's arrest. Yet, had the judge exercised proper discretion, he would have found an alternative to introduce evidence relevant to the State's case that was not unfairly prejudicial.

2. No rational trier of fact could find Patrick guilty beyond reasonable doubt of Possession of a Deadly Weapon By a Person Prohibited, (PDWBPP) under 11 Del.C. §1448 (a) (9). Unlike other categories of PDWBPP, §1448 (a) (9) has a "temporal" requirement as it prohibits a person from possessing a firearm "who, at the same time, possesses a controlled substance in violation of §§ 4763, or 4764 of Title 16." Here, the State failed to show a nexus between possession of a firearm and possession of a controlled substance.

3. The two charges of Possession of a Deadly Weapon by a Person Prohibited, based on possession of one firearm but predicated on different reasons for prohibition, are multiplicitous in violation of the United States Constitution.

## STATEMENT OF FACTS

On August 26, 2019, Corey Patrick, Darlene Ryder and Corey, Jr. spent their Saturday afternoon shopping at the Christiana Mall while, unbeknownst to them, they were being loosely monitored by Detective Schlimer of the Delaware State Police. Schlimer waited in his car until the family came out of the mall with shopping bags, got into a GMC Terrain and headed toward Kent County. The detective followed.

According to Schlimer, Patrick drove the GMC down Route 1 then stopped in the area of White Oak Road in Dover, Delaware where he and Ryder picked up two of Patrick's three other children. The family then travelled to the Walmart in Camden, Delaware as Schlimer continued to follow. Next, multiple officers, including Schlimer, watched Patrick pull the GMC into the Walmart parking lot, get out of the GMC and walk into the store. The rest of his family remained in the vehicle.<sup>5</sup>

Patrick was not monitored while he was inside the store,<sup>6</sup> however, police kept an eye on the GMC and Patrick's family. At no time during the surveillance of Patrick, his family or his vehicle that day did police see anything consistent with criminal activity. Nor did police see anyone try to

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<sup>5</sup>A-20.

<sup>6</sup>A-25.

approach Patrick, his family or the GMC.<sup>7</sup> Nevertheless police decided to take Patrick into custody after he exited the store and before he made his way back to the GMC.<sup>8</sup> According to police, he was detained so that they could execute two search warrants that were issued earlier that day as the result of an almost 4-month long drug investigation of which Patrick was a target. The warrants were issued for an apartment in which police believed Patrick resided and for the GMC Terrain which he was driving.

Prior to transporting Patrick from Walmart to Troop 3, Detective Holl patted him down and purportedly found close to \$1,000 in cash and 2 cell phones.<sup>9</sup> However, he did not count the cash and, at trial, he could not remember the denominations of the bills.<sup>10</sup> Further, Holl did not turn on either of the phones at that time to view their contents. Significantly, Patrick had no drugs of any kind on his person.

Schlimer claimed that he searched the GMC<sup>11</sup> and discovered, in the driver's side door handle/pocket, a substance he believed to be heroin in bags branded, "Angry Duck."<sup>12</sup> He also claimed that he found, behind the driver's

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<sup>7</sup> A-15-20, 22-24, 37, 74-75.

<sup>8</sup> A-21.

<sup>9</sup> Detective Howard, the CIO, testified that it was \$930. A-90.

<sup>10</sup> A-30-36.

<sup>11</sup> A-37.

<sup>12</sup> A-38-40.

seat, a book bag containing \$3,600 in cash,<sup>13</sup> “heroin packaging,” multi-colored rubber bands and loose pills he believed to be Oxycodone,<sup>14</sup>

After Patrick’s detention, Detective Cunningham of the Dover Police Department executed the search warrant of 306 Tollhouse Place, Apt. G-304 which Detective Howard testified police had identified as Patrick’s residence.<sup>15</sup> The apartment, on the third floor of a building which provided internal doors for each unit, opened up to a kitchen followed by a living area and two bedrooms and bathrooms. According to Cunningham, the master bedroom included a partial walk-in closet.<sup>16</sup>

Attached to the three walls in the closet were white wire shelves from which clothes hung. While Cunningham initially admitted that there were both men’s and women’s clothing in the closet, he later quibbled about that fact with defense counsel.<sup>17</sup> Under the hanging clothes were shoe boxes, other clothes and plastic totes. There were also boxes on the shelf above the hanging clothes.<sup>18</sup> Purportedly, in the right corner of that shelf, Cunningham

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<sup>13</sup> Howard testified it was \$3,691 in car. A-90.

<sup>14</sup> A-38, 41.

<sup>15</sup> A-43.

<sup>16</sup> A-44.

<sup>17</sup> A-59-62.

<sup>18</sup> A-46.

found a man's shoe box. He claimed to have found a black Glock Model 42 semi-automatic firearm inside that box.<sup>19</sup>

The firearm was not loaded but there was a magazine lying just beneath it which contained 2 rounds of ammunition.<sup>20</sup> Significantly, no drugs, packaging or money were found with firearm and ammunition.<sup>21</sup> DNA testing was later conducted on various locations of the firearm and ammunition rounds and, while there were mixed profiles revealing that multiple individuals touched those locations, no conclusion could be made as to whether Patrick had ever touched them.<sup>22</sup>

Also in the box with the firearm and ammunition was paperwork with Patrick's name on it. At least one document provided Patrick's address as 51 Webbs Lane, Apt. C-1, Dover, Delaware.<sup>23</sup> A document also contained the results of a paternity test<sup>24</sup> revealing he was the father of a child with Maisha Morrison.<sup>25</sup> Understandably, Patrick had a difficult relationship with Ryder, who was the mother of his other three children. At one point, there was a "no contact order" set as a bail condition for Patrick as the result of an incident

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<sup>19</sup> A-44-45,53,85.

<sup>20</sup> A-63, 85.

<sup>21</sup> A-58.

<sup>22</sup> A-64-67.

<sup>23</sup> A-50-53, 62.

<sup>24</sup> A-11-13, 55-57, 62.

<sup>25</sup> A-62.

that purportedly took place between the couple.<sup>26</sup> Despite the rocky relationship, Ryder provided the jury with proof that she was the one who was leasing the apartment. She also testified, under oath, that the firearm in her apartment belonged to her and not to Patrick.<sup>27</sup> She had not told him about it and she put it in the box on the top shelf in the closet to keep it out of the reach of her children.<sup>28</sup> She also testified that she had clothes in that closet and throughout her apartment.<sup>29</sup> She testified that she obtained the firearm “on the street” for her protection. After the trial court ordered her to do so, she identified the person from whom she bought the firearm.<sup>30</sup>

Cunningham stated that, in another box in the closet, he found white and green cellophane wrap consistent with packaging larger amounts of heroin.<sup>31</sup> The detective also claimed that, in a pocket of a large black Calvin Kline jacket hanging in the closet, he found what he believed to be 33 bags of heroin and 12 unopened Suboxone strips. The purported heroin was in blue wax paper bags which were folded inside in a small clear Ziploc bag. Then, 13 Ziploc bags were packaged as a bundle.<sup>32</sup> Howard told the jury that

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<sup>26</sup> A-116-117, 121.

<sup>27</sup> A-117-118.

<sup>28</sup> A-118-119.

<sup>29</sup> A-120.

<sup>30</sup> A-122-123.

<sup>31</sup> A-47.

<sup>32</sup> A-48-49, 54.

additional heroin was found in the pocket of a pair of jeans laying on the bed and in a fanny pack on a table in the apartment entranceway.<sup>33</sup>

Finally, according to Howard, there was a black safe on the floor in the back right corner of the closet that contained \$5,300.<sup>34</sup> Significantly, there were no drugs, firearms or drug paraphernalia in the safe. The bills were in small denominations and Ryder testified that, while she currently worked at Kentucky Fried Chicken, she was previously a waitress at Red Lobster.<sup>35</sup>

All of the suspected drugs were sent to Delaware's Division of Forensic Science to be tested. With respect to the GMC, the report asserted the police found the following: 0.43 grams of heroin and 7 x 10 mg tablets of Oxycontin. The lab report indicated the following substances were found in the apartment: 0.41 grams of heroin combined in the coat and jean pockets, 12 Suboxone (Buprenorphine) strips, and 0.0132 grams of heroin in fanny pack. Thus, the total amount of heroin found as a result of the execution of the search warrants was well under one gram.<sup>36</sup>

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<sup>33</sup> A-86-89. State's Trial Exhibits 24 and 25.

<sup>34</sup> A-49, 90.

<sup>35</sup> A-118, 123-124.

<sup>36</sup> A-68-73. State's Trial Exhibit 22.

**I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO PRESENT EVIDENCE THAT, PRIOR TO HIS ARREST, PATRICK HAD BEEN THE TARGET OF A LENGTHY DRUG INVESTIGATION CONDUCTED BY MEMBERS OF THE GOVERNOR’S TASK.**

*Question Presented*

Whether the trial court abused its discretion when it permitted the State to present evidence that for close to 4 months, Patrick had been the target of a drug investigation in which members of the Governor’s Task Force regularly observed his daily activities with the assistance of a Global Positioning System device attached to his vehicle and that culminated with the issuance of two search warrants.<sup>37</sup>

*Standard and Scope of Review*

This Court will set aside a trial court’s evidentiary rulings that are the result of an abuse of discretion.<sup>38</sup>

*Argument*

The trial court abused its discretion when it admitted into evidence, through the testimony of multiple police officers, that Patrick had been the target of an ongoing drug investigation that culminated in the issuance of two search warrants. As part of that evidence, the jury heard: the drug

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<sup>37</sup> A-27-29, 79-85, 91.

<sup>38</sup> *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008).

investigation was conducted by the Governor’s Task Force, (GTF); the GTF is a unit comprised of police and probation officers who specialize in drug investigations; the GTF did not conduct the investigation alone, it teamed up with the Dover Police Department Drug Unit; multiple officers were involved in the investigation; the investigation lasted from early May, 2019 through late August 26, 2019, close to 4 months; and Patrick’s activities were monitored on a daily basis with the aid of GPS monitoring.

The State asserted this evidence of the investigation was relevant to the issue of “possession” as it showed the jury how police linked Patrick to the residence where the firearm, ammunition and a portion of the substances were found. To the extent any evidence gleaned from the investigation was relevant to the issue of possession or to provide context to Patrick’s arrest, it could have been provided in a much less prejudicial manner. As it stands, however, the unfair prejudice from the extensive details of the drug investigation unnecessarily introduced into evidence outweighed the probative value it added to the State’s case. Thus, Patrick’s convictions must be reversed.

***Inadmissible Testimony About The Lengthy Drug Investigation***

On the first day of testimony, the prosecutor asked Detective Holl routine questions about his training and experience then began the following inquiry:

Prosecutor: What's your current assignment?

Holl: I'm currently assigned as a detective with the Kent County Governor's Task Force.

Prosecutor: What is the Governor's Task Force?

Holl: It's a unit within the --<sup>39</sup>

Defense counsel objected, arguing that “one answer to being on the Governor's Task Force is that [the detective’s] role is to round up fugitives who are wanted.” Thus, defense counsel was concerned that a response to the pending question “would imply prior criminal conduct by Mr. Patrick, and that's something that I would like to avoid.”<sup>40</sup> The following exchange occurred next:

Prosecutor: That seems to be an area that can be addressed on cross-examination. I mean he wasn't a fugitive. He was being rounded up, he was taken into custody pursuant to a warrant, which is exactly how he got into court today. And as Mr. George pointed you, [sic] it is relevant.

Defense Counsel: I don't think there was any warrant pending when he was taken into custody.

Prosecutor: There was a search warrant when he was taken in custody.

The Court: He was picked up for a warrant. If he was actually picked up on a warrant, you can actually ask those questions. That is pertinent and proper. It may be prejudicial, but so be it. But you can certainly address it on cross-examination if he was not a fugitive as such. Thank you.<sup>41</sup>

Direct examination continued as follows:

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<sup>39</sup> A-27.

<sup>40</sup> A-28.

<sup>41</sup> A-28-29.

Prosecutor: What is the Governor's Task Force?

Holl: The Governor's Task Force is a unit comprised of State Police and probation officers which target probationers and conduct drug investigations.

Prosecutor: Do you, as a member of Governor's Task Force, often work with the [Delaware State Police] Kent County Drug Unit?

Holl: Yes.

Prosecutor: Were you working with the Kent County Drug Unit on August 26, 2019?

Holl: Yes.<sup>42</sup>

Subsequently, near the end of the State's case, Detective Howard, the Chief Investigating Officer, revealed that, from "the beginning of May of 2019" through the date of Patrick's arrest,<sup>43</sup> the GTF, in conjunction with the Dover Police Department Drugs Vice and Organized Crime Unit, conducted a drug investigation in which police observed Patrick's "daily activities" on a "fairly regular[]" basis.<sup>44</sup> Howard claimed that during this almost 4-month long investigation, police witnessed him enter the GMC Terrain and 309 Tollhouse Place, Apartment G-304 in Dover, Delaware as part of a daily routine.<sup>45</sup> However, Howard also testified that he learned that Apartment G-

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<sup>42</sup> A-29.

<sup>43</sup> A-76.

<sup>44</sup> A-76.

<sup>45</sup> A-76.

304 was Patrick’s residence “through inquiries into DMV records and other CJIS, Criminal Justice Inquiries.”<sup>46</sup>

Even after Howard told the jury how police linked Patrick to the apartment and GMC, the prosecutor elicited testimony about the use of electronic surveillance. Howard explained that police affixed a GPS device to Patrick’s vehicle to assist “live time track[ing]” in high volume locations at certain times of day.<sup>47</sup> Howard testified that coordinates from the GPS device led Schlimer to the Christiana Mall on August 26, 2019.<sup>48</sup>

Upon further questioning, Howard told the jury that police decided “to end the investigation that day and take [Patrick] into custody and execute the search warrants[.]”<sup>49</sup> He then began to tell the jury “the reason why [police] followed” Patrick and decided that the Camden Walmart was the appropriate location to arrest Patrick. However, defense counsel immediately objected on the grounds of relevancy and unfair prejudice.

In objecting, counsel stated, “I know that these jurors are not legal scholars, but there would, obviously, be a reason why a GPS would be placed on a vehicle.”<sup>50</sup> He continued, “[w]e’ve already got testimony that places him

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<sup>46</sup> A-76-77.

<sup>47</sup> A-78-79.

<sup>48</sup> A-79.

<sup>49</sup> A-80.

<sup>50</sup> A-81.

in that area and the vehicle in that area and the GPS doesn't add to that, but it does create this sense of this broad investigation that doesn't speak to the issues.”<sup>51</sup> The prosecutor responded that the testimony was relevant as to whether the items in the apartment belonged to Patrick and that the GPS evidence was disclosed to defense counsel in discovery. Further, none of the drug transactions discussed in the application for the GPS monitor was testified to even though she believed, “frankly, this would be fair game[.]”<sup>52</sup> Ultimately, the judge found the evidence to be relevant “with respect to wherever the defendant lived and probability of the transportation of the alleged drugs in the course of his travels.” However, he ordered the State to move on as it had made its point.<sup>53</sup>

Eventually, the judge seemed to reach his limit when Howard once again mentioned the lengthy nature of the investigation. This time, the trial court struck the testimony.<sup>54</sup>

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<sup>51</sup> A-81-82.

<sup>52</sup> A-81.

<sup>53</sup> A-83-84.

<sup>54</sup> A-91.

*Any Probative Value of Evidence of the Lengthy Drug Investigation Was Substantially Outweighed by The Danger of Unfair Prejudice*

“Background information” may sometimes “be necessary to give the jury a complete picture at trial and to ensure the jury is not confused in a way that would be unfavorable to the prosecution.”<sup>55</sup> Such information should be primarily used to “fill in gaps” and “help the jury understand the case in context.”<sup>56</sup> For example, allowing an officer to provide “some explanation of his presence and conduct” ensures that he is not “put in the false position of seeming just to have happened upon the scene[.]”<sup>57</sup> However, because “[t]he need for the evidence is slight, [as compared to] the likelihood for misuse, [which is] great[.]”<sup>58</sup> the “preferable practice” is to allow the State to provide this context based “upon information received” rather than introducing specific statements or detailed facts.<sup>59</sup>

Under D.R.E. 403, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of [...]unfair prejudice[.]” Here, the State claims that evidence of the ongoing drug

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<sup>55</sup> *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2010)..

<sup>56</sup> *Williams v. State*, 98 A.3d 917, 920–21 (Del. 2014).

<sup>57</sup> *Id.* (internal citations omitted). See *Sullins v. State*, 2008 WL 880166\*2 (Del. April 2, 2008).

<sup>58</sup> *Sanabria*, 974 A.2d at 113 (internal citation and quotation marks omitted). See *McNair v. State*, 1997 WL 753403\*2 (Del. Nov.25, 1997).

<sup>59</sup> *Sanabria*, 974 A.2d at 114.

investigation targeted at Patrick was relevant to its case. Yet, evidence of such an investigation, like that of “an extraneous offense,” can “arouse prejudice that a defendant is more likely to have committed the alleged crime.”<sup>60</sup> Thus, the trial court was required to consider whether there was a less prejudicial means by which the jury could be provided that information.<sup>61</sup> Sound judicial discretion would select an alternative “found to have substantially the same or greater probative value but a lower danger of unfair prejudice[.]”<sup>62</sup> Here, the trial court abused its discretion by failing to consider lesser prejudicial alternatives for the State to introduce evidence linking Patrick to the apartment and providing context for the arrest.

To establish a link between Patrick and the apartment, the State presented evidence that police confirmed G-304 was his residence “through inquiries into DMV records and other CJIS, Criminal Justice Inquiries.” Detective Howard then went on to tell the jury that during the almost 4-month

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<sup>60</sup> *Pena v. State*, 856 A.2d 548, 551 (Del. 2004).

<sup>61</sup> *Sanabria*, 974 A.2d at 113.

<sup>62</sup> *See Old Chief v. United States*, 519 U.S. 172, 182–83 (1997) (“If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.”).

long investigation, police witnessed him enter the 309 Tollhouse Place, Apartment G-304 in Dover, Delaware as part of a daily routine.

The State could have achieved the same level of proof without connecting it to the fact that he was the target of an ongoing drug investigation and that Patrick had a prior criminal record. Similar to the generic stipulation the parties entered into in order to prevent the jury from learning that Patrick had a prior conviction of a felony, the State could have generically informed the jury that inquiries into “official State records confirmed Patrick’s residence. Thus, this would prevent the jury from inferring that Patrick had a criminal record as his address was in the criminal justice system. And, by the way, it would have prevented the stipulation from being rendered fruitless.

To the extent the Court finds that actual observations by police of Patrick entering and exiting G-304 were relevant to the State’s case even with the proof from the State documents, their introduction could also have been made without connection to the fact that Patrick was the *target* of a criminal investigation. It would have been sufficient for Howard, who was one of the officers who observed Patrick’s conduct, to testify that on certain dates and times he witnessed the activity. What can be said for sure is that none of the following evidence that was introduced was necessary to establish a link:

the drug investigation was conducted by the Governor's Task Force, (GTF); the GTF is a unit comprised of police and probation officers who specialize in drug investigations; the GTF did not conduct the investigation alone, it teamed up with the Dover Police Department Drug Unit; multiple officers were involved in the investigation; the investigation lasted from early May, 2019 through late August 26, 2019, close to 4 months; and Patrick's activities were monitored on a daily basis with the aid of GPS monitoring; search warrants were issued as the result of this lengthy investigation.

This significant amount of unnecessary evidence was unfairly prejudicial even when considering any need by the State to provide context for the jury regarding the conduct of police on the actual day of Patrick's arrest. While it was arguably necessary to provide the jury with an understanding as to why Patrick was being followed and then arrested on August 26<sup>th</sup>, the trial court failed to consider any less prejudicial alternatives to that employed by the State. It allowed the introduction of the evidence without balancing the probative value to the State against the unfair prejudice to the defendant.

Informing the jury that police had obtained two search warrants as the result of a lengthy investigation that involved physical and electronic monitoring Patrick's daily routine allowed the jury to infer that he engaged in

illegal activity before the search warrants were issued.<sup>63</sup> Proper context could still have been provided without giving the jury details into the investigation, by informing the jury that detaining an individual is standard procedure when conducting a “court authorized search.”<sup>64</sup>

Where this court has upheld evidence regarding a prior drug investigation, it has been when only generic information has been provided to the jury. In *Pena v. State*, the defendant’s conviction was affirmed because the “testimony did not reveal that Pena was the target of the investigation, or that the traffic stop was a part of the Pena investigation.”<sup>65</sup> Further, “the trial judge took steps to mitigate any prejudice that may have resulted from the “investigation” comments.”<sup>66</sup> Even if the trial court had properly conducted a balancing test and concluded “that the probative value of the background information is not substantially outweighed by its unfair prejudice to the

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<sup>63</sup> See *State v. Payano*, 768 N.W.2d 832, 862 (WI 2009) (noting that balancing is necessary as to what to tell jury as a defendant is likely to be prejudiced when jury is told that a court issued a warrant but could speculate if not given reasons); *Goldsmith v. Witkowski*, 981 F.2d 697, 703-04 (4<sup>th</sup> Cir. 1992) (finding testimony as to why police chose to execute search warrant on a particular day harmful “because it implied that he was not an innocent visitor to the apartment, and also that he was the target of a police investigation”).

<sup>64</sup>*State v. Smith*, 2014 WL 1757881, at \*3 (N.J. Super. Ct. App. Div. May 5, 2014)

<sup>65</sup> 856 A.2d at 551.

<sup>66</sup> *Id.*

defendant” it *must* issue a limiting instruction to the jury as to the proper purpose for which that evidence must be used.<sup>67</sup>

Here, in addition to the significant details provided to the jury, no limiting instruction was provided. Therefore, the jury was free to use that evidence to establish that Patrick was engaging in drug dealing from his house and car for several months. Thus, his convictions must be reversed.

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<sup>67</sup> *Sanabria*, 974 A.2d at 116.

**II. NO RATIONAL TRIER OF FACT COULD FIND PATRICK GUILTY BEYOND REASONABLE DOUBT OF POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED, PURSUANT TO 11 DEL. C. §1448 (a) (9), AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE POSSESSED A FIREARM AT THE SAME TIME AS HE POSSESSED A CONTROLLED SUBSTANCE.**

*Question Presented*

Whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find Patrick guilty beyond reasonable doubt of Possession of a Deadly Weapon by a Person Prohibited pursuant to 11 *Del.C.* §1448 (a) (9) when the State failed to present sufficient evidence that he possessed a firearm at the same time as he possessed a controlled substance.<sup>68</sup>

*Standard and Scope of Review*

This Court “review[s] the denial of a motion for judgment of acquittal *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.”<sup>69</sup>

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<sup>68</sup> A-92-109, 125-131.

<sup>69</sup> *Monroe v. State*, 28 A.3d 418, 430 (Del. 2011) (internal quotation marks and citation omitted).

### *Argument*

No rational trier of fact could find Patrick guilty beyond reasonable doubt of Possession of a Deadly Weapon By a Person Prohibited, (PDWBPP) under 11 Del.C. §1448 (a) (9) because the State failed to provide sufficient evidence that he had a firearm physically available or accessible to him at the same time that he possessed a controlled substance. While § 1448 (a) sets out several means by which one may be prohibited for purposes of the offense of PDWBPP, §1448 (a) (9) prohibits a person from possessing a firearm “who, at the same time, possesses a controlled substance in violation of §§ 4763, or 4764 of Title 16.” In addition to being charged with PDWBPP under this subsection, Patrick was charged with two “person prohibited” counts under §1448 (a) (1) due to a prior conviction of a felony. He stipulated that he was a “person prohibited” for purposes of §1448 (a) (1) but he did not stipulate that he was prohibited for purposes of §1448 (a) (9).<sup>70</sup> The final weapons offense for which Patrick was charged was Possession of a Deadly Weapon During the Commission of a Felony (PDWDCF).

Following the State’s case, Patrick moved for judgment of acquittal. He argued, among other things, that the State failed to establish the element of

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<sup>70</sup> The parties stipulated that Patrick was a person prohibited pursuant to §1448(a)(1) for purposes of PDWBPP and PABPP, the first two person prohibited counts in the indictment. A-110.

“possession” for any of the weapons offenses. The firearm and ammunition were found inside a box in the back corner of a closet located in the Dover apartment at the same time that Patrick was detained at the Camden Walmart. Thus, Patrick was nowhere near the firearm, ammunition or substances in the apartment at the time of his arrest.

Relying on the distinction between the construction of the term “possession” as an element of the offense of PFDCF and the construction of that term as an element of the offense of PDWBPP, the trial court granted Patrick’s motion on the PDWDCF charge but denied his motion as to the three “person prohibited” charges. This Court’s analysis leading to the distinction in the application of the term “possession” turned on the premise that, at the time of this Court’s decision in *Lecates v. State*,<sup>71</sup> all categories in §1448 (a) prohibited possession at “any time” based on a person’s status. Whereas, PDWDCF only prohibits possession during a felony. Because §1448 (a) (9) was not enacted until after *Lecates* and because §1448 (a) (9) is akin to PDWDCF in that it does not prohibit possession *per se*, the rationale in *Lecates* does not apply and Patrick’s conviction of his third count of PDWBPP should be reversed.

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<sup>71</sup> 987 A.2d 413, 419 (Del. 2009).

In *Mack v. State*, this Court held that “a felon is in possession of a deadly weapon” for purposes of PDWDCF “only when it is physically available or accessible to him during the commission of the crime. General dominion and control of a weapon located elsewhere and not reasonably accessible to the felon, obviously, is not the test[.]”<sup>72</sup> Years later, in *Lecates*, this Court attempted to clarify what appeared to be an inconsistent application of the possession standard in the context of weapons offenses.<sup>73</sup> The Court landed on the opinion that the *Mack* standard continued to apply to the offense of PDWDCF but did not apply to PDWBPP. Instead, a defendant could be guilty of PDWBPP if he constructively possessed a deadly weapon and he fit into a prohibited status contained in §1448(a). The rationale was that PDWDCF only prohibits possession of a weapon *during the felony* and, at the time of the *Lecates* decision, all variations of PDWBPP prohibited a person from possessing a weapon or ammunition *at any time*.<sup>74</sup>

Here, consistent with *Mack*, the trial court granted Patrick’s motion for judgment of acquittal on the charge of PDWCF as follows:

[t]he State's argument is that there was a continuing series of events which made a continuing series of felonies. I don't think that's going to be helpful to the State in this regard. That will not apply here. The State must beat the standard as set forth in *Mack*. In this case, the gun was

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<sup>72</sup> 312 A.2d 319, 322 (Del. 1973).

<sup>73</sup> 987 A.2d 413, 419 (Del. 2009).

<sup>74</sup> *Lecates*, 987 A.2d at 420.

not physically available or accessible to the defendant, that is there was no nexus in this regard when he was actually arrested. Nexus is an important element in -- for this particular count. Therefore, the defendant is to be acquitted of Count No. 1.<sup>75</sup>

Then, with respect to the three “person prohibited” charges, the trial court explained that, pursuant to *Lecates*, the State was not required to present evidence that the firearm “was physically available and accessible at the specific time of the arrest.”<sup>76</sup> Rather, for conviction on these charges, the State need only prove constructive possession. The trial court then concluded there was sufficient evidence that Patrick “number one, knew the location of the gun; number two, had the ability to exercise dominion and control of the gun; and, number three, intended to guide the destiny of the gun.”<sup>77</sup> Therefore, the trial court denied the motion as to all three “person prohibited” charges. However, this last portion of the court’s ruling is flawed as applied to PDWBPP under §1448 (a) (9) – the prohibition of the simultaneous possession of a deadly weapon and a controlled substance.

At the time *Lecates* was decided, none of the sections of PDWBPP contained a temporal requirement between the defendant and the weapon at a specific time. On the other hand, PDWDCF did, and continues to, contain

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<sup>75</sup> A-113-114.

<sup>76</sup> A-114-115.

<sup>77</sup> A-114-115.

such a requirement. It is this difference that prompted the *Lecates* Court to conclude that possession of a firearm for purposes of “PDWDCF requires more than merely possessing a gun[]”<sup>78</sup> and that “under Section 1448(a), the State need only prove that a defendant possessed or controlled a weapon at some point, not necessarily at the time of his arrest.”<sup>79</sup>

Significantly, §1448 (a) (9) had not been enacted at the time *Lecates* was decided. That subsection was added in 2011<sup>80</sup> and, unlike the other provisions in §1448 (a), it *does* contain a temporal requirement similar to that in PDWDCF. As such, this section of PDWBPP is distinguishable from the other sections of 1448 and must be construed in the same manner as PDWDCF. In other words, it is not a “*per se*” prohibition, the prohibition is dependent upon the circumstances.<sup>81</sup> Accordingly, to sustain a conviction under §1448 (a) (9), the State must show possession of a firearm by the prohibited person and a nexus between the firearm and the drugs.<sup>82</sup>

To construe §1448 (a) (9) consistent with the other categories of PDWBPP and inconsistent with PDWDCF yields absurd results. The purpose of PDWDCF is to discourage the accessibility of a deadly weapon during the

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<sup>78</sup>*Lecates*, 987 A.2d at 419.

<sup>79</sup> *Miller v. State*, 2005 WL 1653713 at \*3 (Del. July 12, 2005) .

<sup>80</sup> See 2011 Delaware Laws Ch. 13 (H.B. 19), September 1, 2011.

<sup>81</sup> *Lecates*, 987 A.2d at 421.

<sup>82</sup> *Thomason v. State*, 208 S.W.3d 830, 833 (2005).

commission of a crime, in order to “reduc[e] the probability of serious harm to the victim.”<sup>83</sup> So, for example, if a defendant does not have physical access to a firearm at the time he is dealing drugs on the street, there is no increase threat of harm to the victim. Therefore, he is not guilty of PFDCF. On the other hand, another defendant who has a misdemeanor quantity of marijuana on his person when he is stopped for speeding can be felonized under §1448 (a) (9) for constructively possessing a firearm in the closet of his apartment miles away.<sup>84</sup>

Because the State failed to present sufficient evidence that a firearm was physically available or accessible to Patrick at the same time that he possessed a controlled substance, his third count of PDWBPP should be reversed.

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<sup>83</sup> *Mack*, 312 A.2d 322.

<sup>84</sup> *State v. Blanchard*, 776 So. 2d 1165, 1171 (La. 2001) (“In cases where the defendant is not in actual possession of the firearm and the firearm is not within his immediate control, to interpret this statute to prohibit the constructive possession of a firearm simultaneously with the possession of a controlled dangerous substance, without some connection between the firearm and the drugs, could likewise lead to absurd consequences.”)

**III. THE TWO CHARGES OF POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED, BASED ON POSSESSION OF ONE FIREARM BUT PREDICATED ON DIFFERENT REASONS FOR PROHIBITION, ARE MULTIPLICITOUS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.**

***Question Presented***

Whether the two charges of Possession of a Deadly Weapon by a Person Prohibited, based on the possession of one firearm but predicated on different reasons for prohibition, are multiplicitous in violation of the Double Jeopardy Clause of the United States Constitution.<sup>85</sup>

***Standard and Scope of Review***

“A multiplicity violation may constitute plain error.”<sup>86</sup>

***Argument***

Assuming, *arguendo*, this Court finds no error in the trial court’s denial of Patrick’s motion for judgment of acquittal on the offense of PDWBPP as charged under §1448 (a) (9), it must vacate his conviction of that offense on the grounds of double jeopardy.<sup>87</sup> The double jeopardy clause, via the multiplicity doctrine, protects against “splitting a single offense into multiple

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<sup>85</sup> Del.Sup.Ct. Rule 8.

<sup>86</sup> *Handy v. State*, 803 A.2d 937, 940 (Del. 2002).

<sup>87</sup> U.S.Const. Amend. V.

charges.”<sup>88</sup> Patrick was found in possession of only one firearm and ammunition for one gun. As this Court has made clear, each handgun and the ammunition constitute a different offense for purposes of §1448.<sup>89</sup> In other words, two charges under §1448 were appropriate in our case as merger does not apply when there is a charge for a gun and a separate charge for ammunition. The problem, however, is the State charged Patrick twice under §1448 for the firearm and once for the ammunition.

The proper unit of prosecution in the “person prohibited” offense is not the qualifying class of which a defendant is a member but “each unlawful act of possession.”<sup>90</sup> Here, Patrick was prosecuted separately for being a person prohibited in possession of a firearm not because he possessed more than 1 firearm but because he was purportedly prohibited for two separate reasons: 1) a prior conviction of a felony; and 2) simultaneous possession of a controlled substance. Because “the statute was meant to create punishments for each act of possession” and not for each qualifying status only one of Patrick’s convictions as a person prohibited for possessing a firearm can stand along with the conviction for possessing ammunition.<sup>91</sup>

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<sup>88</sup> *Spencer v. State*, 868 A.2d 821, 822-25 (Del.2005).

<sup>89</sup> *Buchanan v. State*, 26 A.3d 213 (Del. 2011).

<sup>90</sup> *See Melton v. State*, 842 A.2d 743 (Md. 2004).

<sup>91</sup> *See Clark v. State*, 96 A.3d 901 (Md. 2014) (holding that where a person possesses only one weapon, three separate sentences could not be sustained).

## CONCLUSION

For the reasons and upon the authorities cited herein, Patrick's convictions must be reversed.

Respectfully submitted,

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