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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 REPLY BRIEF ON APPEAL

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Dated: February 27, 2017

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PRELIMINARY STATEMENT

This is a Reply Brief in support of Prentiss Butcher's appeal.

The State's Answering Brief is cited as "Answering Br.," the Opening Brief is cited as "Op. Br.," the Appendix filed with the Opening Brief is cited as "A," and the Reply Appendix is cited as "AR." All of these references are followed by a page number.

This Reply Brief addresses several of the State's arguments. The State's arguments not addressed here were anticipated and addressed in Appellant's Opening Brief. Appellant does not waive or concede any of those arguments but instead submits that they have been adequately briefed and thus are ripe for decision.

CORRECTED STATEMENT OF FACTS

The Statement of Facts in the Opening Brief incorrectly made reference to "informal discussions" between counsel and Superior Court. Upon closer inspection of the record, defense counsel submitted two e-mails to Superior Court which, indeed, were made part of the record and therefore are included in the within Reply Appendix. These e-mails were therefore not "informal discussions" and contain argument to Superior Court, the substance of which defense counsel also addressed and preserved at sentencing on July 19, 2016.

By e-mail dated March 17, 2016, submitted to Superior Court and to the State, defense counsel (1) formally objected to any application of a 10-year mandatory minimum sentence of imprisonment under 11 *Del. C.* § 1448(e)(1)(c) based on two predicate "violent felony" convictions (but conceding in candor that Mr. Butcher should be sentenced to five-years of imprisonment based on one "violent felony" conviction under 11 *Del. C.* § 1448(e)(1)(b)); and (2) requested a continuance.[1]

By e-mail dated July 12, 2016, submitted to Superior Court and to the State, defense counsel cited authorities in support of the argument why Mr. Butcher cannot be sentenced to a 10-year mandatory-minimum sentence of imprisonment under 11 *Del. C.* § 1448(e)(1)(c). Defense counsel argued to the court below, first,

[1] AR1.

that the current version of "violent felony" in effect on the date Mr. Butcher committed the instant offense of Possession of a Firearm by a Person Prohibited is "controlling,"[2] and had removed Mr. Butcher's former offense of Possession of Cocaine within 300 Feet of a Park.[3] Second, the general savings statute under 11 *Del. C.* § 211 is inapplicable because the object to be attained (as shown in the Synopsis to House Bill No. 277) was to prevent "the unintended consequence of **repealing an existing law, thus ending a prosecution for conduct which occurred prior to the repeal**."[4] Third, because Mr. Butcher is challenging his putative sentence for the instant offense, not his prior conviction for Possession of a Controlled Substance within 300 Feet of a Park, there was nothing to implicate 11 *Del. C.* § 211 and the State's reliance on *State v. Trawick* was therefore "without merit."[5]

Defense counsel further cited and pointed out the applicability of the Ned Carpenter Act of 2011, which took effect before Mr. Butcher committed the instant offenses and also specified which "former" Title 16 offenses would remain for purposes of the "violent felony" classification under 11 *Del. C.* § 4201(c) — and the legislature purposefully excluded the former offense of Possession of a

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[2] AR2.
[3] *Id.* at 2-3.
[4] *Id.* at 2 (quoting Synopsis to H.B. 277 (emphasis in original)).
[5] *Id.*

Controlled Substance within 300 Feet of a Park (former 16 *Del. C.* § 4768).[6] Defense counsel reasoned, "Thus, had the General Assembly intended that 16 Del.C. §§ 4767 and 4768 retain their designation as violent felonies, it would have specified those statutory offenses as 'former' offenses that remained on the § 4201(c) list of violent felonies as it did with the "former" PWID [Possession With Intent to Deliver] and Trafficking offenses instead of simply striking them in their entirety."[7]

[6] *Id.* (discussing Act of Apr. 20, 2011, 78 Del. Laws, ch. 13).
[7] *Id.* (alteration added).

REPLY ARGUMENT

I. AS TO ARGUMENT I (ILLEGAL SENTENCE UNDER 11 *Del. C.* § 1448(e)(1)(c)), THE STATE'S COUNTER-ARGUMENTS ARE WITHOUT MERIT.

Under a 10-year mandatory minimum term of confinement in 11 *Del. C.* § 1448(e)(1)(c), why can a prior version of "violent felony" under Section 4201(c) — ***not*** in effect at the time of commission of the instant offense of Possession of a Firearm by a Person Prohibited, be lawfully applied to Mr. Butcher? The State's counterarguments are without merit.

A. The State Misreads *Sommers v. State* and Makes a Hyperliteral Error in Reading 11 *Del. C.* § 1448(e)(1)(C).

The State counter-argues that 11 *Del. C.* § (e)(1)(c) contains a past participle: "Ten years at Level V, if the person ***has been convicted*** on 2 or more separate occasions of any violent felony."[8] But the State makes a hyperliteral error, because 11 *Del. C.* § 1448(e)(3) reads in part, "For the purposes of this subsection, 'violent felony' means any felony so designated by § 4201(c) of this title . . ."[9] By overlooking Subsection (e)(3), the State rewrites Subsection (e)(1)(c) to mean "has been convicted on 2 or more separate occasions of any violent felony **[previously listed]**." But *Sommers v. State* held that Subsection

[8] Answering Br. 9 (quoting 11 *Del. C.* § 1448(e)(1)(c) (emphasis added)).
[9] 11 *Del. C.* § 1448(e)(3).

(e)(3) unambiguously means those crimes "**currently listed**" in Section 4201(c).[10] *Sommers* further made clear that 11 *Del. C.* § 1448(e)(1)(c) & (e)(3) must be read *in pari materia* with the definition of "violent felony" under 11 *Del. C.* § 4201(c).[11]

The State misreads *Sommers*, because by "currently listed" this Court meant at the time of commission of the instant offense.[12] *Sommers* stands for the proposition that the legislature can add to the list of "violent felony" after-the-fact of a conviction. Contrary to the State's suggestion,[13] the true corollary to *Sommers* is that qualifying offenses can also be removed, that is, "widened or shrunk according to what the General Assembly classified as a violent felony."[14]

B. The State Substitutes Its Policy-Preferences for That of the Legislature Which, if Considered by This Court, Support Mr. Butcher's Position.

Where the Ned Carpenter Act of 2011 designated which "former" Title 16 offenses would remain as a "violent felony" and had removed Mr. Butcher's former offense of Possession of a Controlled Substance within 300 Feet of a Park (Former 16 *Del. C.* § 4768),[15] the State counter-argues that former Title 16 offenses "were removed from the listing in section 4201(c)—they were not re-

[10] *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (emphasis added).
[11] *Id.* at *2.
[12] *See* Answering Br. 15 n.22.
[13] *See id.*
[14] *State v. Edgar*, 2016 WL 6195980, at *1 (Del.Super. Oct. 21, 2016).
[15] Op. Br. 16-17.

classified."[16] This is illogical; the legislature cannot reclassify any other way.

However, the State asserts that Former 16 *Del. C.* § 4768 is now an aggravating factor under current 16 *Del. C.* § 4753 (by virtue of §§ 4701(41), 4751A[17]) and survives as a matter of public policy because the Ned Carpenter Act "did not make those prior offenses noncriminal or nonviolent conduct . . ."[18] The State errs, because "violent felony" is distinguished from the law of other jurisdictions which "merely describe, rather than specifically enumerate, 'crimes of violence,'" whereas "violent felony" is nothing more than a "specific list of offenses enumerated in 11 Del. C. § 4201(c)."[19] As such, "violent felony" is not a description of violence-in-fact and "it does not criminalize any behavior."[20] Other jurisdictions under similar recidivist statutes have held it is irrelevant if the conduct at issue is non-violent or victimless.[21]

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[16] Answering Br. 10.
[17] *See* 16 Del. C. §§ 4701(41) (defining "Protection park, recreation area, church, synagogue or other place of worship"), 4751A (Aggravating Factors Relating to Drug Offenses).
[18] Answering Br. 10.
[19] *Williams v. State*, 2014 WL 642281, at *2 (Del. Feb. 7, 2014) (distinguishing the United States Sentencing Guidelines from 11 *Del. C.* § 4201(c)).
[20] *State v. Edgar*, 2016 WL 6195980, at *2 (Del. Oct. 21, 2016).
[21] *See, e.g.*, *State v. Graycek*, 368 N.W.2d 815, 819 (S.D. 1985) (rejecting constitutional overbreadth and equal protection challenges to the inclusion of Third Degree Burglary under a "crime of violence" recidivist classification) ("It was for the legislature to determine within its proper range of discretion that those persons who commit burglaries by means of surreptitious, non-violent entry are equally as deserving of enhanced punishment on a subsequent felony as those whose

The State's argument also violates the separation of powers,[22] by substituting its policy-preferences for that of the legislature. The judiciary is unconcerned with the wisdom, policy, or expedience of a statute otherwise constitutional.[23] But even considering public policy, Former 16 *Del. C.* § 4768 defined conduct which made no distinction in possession (1) *with* or *without* intent to manufacture or deliver, and therefore included simple possession; and (2) *the quantity* of controlled substances.[24] Now, however, aggravating factors are applied

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burglaries are committed in a more aggravated manner.").

[22] *New Castle County Council v. State*, 688 A.2d 888, 892 (Del. 1996) ("[C]ourts must be mindful that under our constitutional scheme, in the absence of limitations imposed by either the federal or state constitutions, the General Assembly's power has been described by this Court as 'unlimited.'" (citation omitted)); Del. Const., art. II, § 1.

[23] *State v. Kamalski*, 429 A.2d 1315, 1319 (Del.Super. 1981); *State v. Tobasso Homes*, 28 A.2d 248, 252 (Del. Ct. Gen. Sess. 1942).

[24] Former Section 4768, in effect in 2010, reads:

> Except as authorized by this chapter, any person who illegally distributes, delivers, possesses a controlled substance or counterfeit controlled substance listed in § 4714, § 4716, § 4718, § 4720 or § 4722 of this title while in any park or recreation area owned, operated or utilized by any county or municipality, or by the State, or by any board, commission, department, agency, corporation or organization thereof, or in any "parkland" as defined in § 8110(a)(2) of Title 9, or in any church, synagogue or other place of worship, or within 300 feet of the boundaries of any such parkland, park, or recreation area or church, synagogue or other place of worship, is guilty of a felony and upon conviction shall be imprisoned for a term of not more than 15 years and fined not more than $250,000.

DEL. CODE ANN. TIT. 16, § 4768(a), at 383-84 (Michie 2003 & 2010 Cum. Supp.)

within a tier-system relating to quantity,[25] and the legislature's corresponding change to "violent felony" under 11 *Del. C.* § 4201(c) also reflects its discretion not to include all Title 16 offenses, even if an aggravating factor is present.[26]

For instance, "violent felony" includes 16 *De. C.* § 5754(1), thereby excluding subsections (2) and (3).[27] Subsection (3) liability is imposed for any person who "[p]ossesses a controlled substance in a Tier 1 quantity, ***and there is an aggravating factor*** . . ."[28] Simple possession of a Tier 1 quantity within 300 feet of a park is now not enough to be considered a "violent felony"; whereas it previously did *before* the Ned Carpenter Act.

The State references 16 *Del. C.* § 5753 from the "violent felony" list,[29] but only three out of five alternatives for that offense involve aggravating factors and all require proof which Former 16 *Del. C.* § 4768 did not, whether of mens rea ("with intent to manufacture or deliver"[30]), quantity (Tier 2 possession[31]), or

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(repealed 2011) [**AR26-27**]; *see also*, *id* §§ 4701 (Definitions), 4714 (Schedule I), 4716 (Schedule II), 4718 (Schedule III), 4720 (Schedule IV), 4722 (Schedule V), at 341-357 [**AR8 to AR24**].

[25] 16 Del. C. § 4751C.

[26] *See id.* §§ 4701(41), 4751A.

[27] *See* 11 Del. C. § 4201(c) (designating § 4754(1)).

[28] 16 Del. C. § 4754(3) (emphasis added).

[29] 11 Del. C. § 4201(c).

[30] *See* 16 Del. C. § 4753(2).

[31] *See id.* § 4753(4).

attendant circumstances ("there are 2 aggravating factors"[32]). Former 16 *Del. C.* § 4768 is not now a per se "violent felony," even as an "aggravating factor," because the legislature has now exercised greater sophistication in its judgment as to what should be a Title 16 "violent felony." The State's policy argument therefore supports Mr. Butcher's position.

C. The State's Argument under the General Savings Statute is Non-Responsive to the Opening Brief.

In the Opening Brief, Mr. Butcher called to this Court's attention authority in *State v. Edgar* (by the Hon. CHARLES E. BUTLER) and *State v. Taylor* (*Homer*), that general savings statutes do not reach collateral consequences,[33] a decision by the U.S. Supreme Court that nothing is "incurred" under a savings statute (where ours is modeled on federal law) until "when an offender becomes subject to them, i.e., commits the underlying conduct that makes the offender liable,"[34] and that American law is settled that future recidivist sentencing based on a prior conviction is a collateral consequence and therefore not part of the conviction itself.[35]

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[32] *See id.* § 4753(5).
[33] Op.Br. at 19-22 (citing and discussing *State v. Edgar*, 2016 WL 6195980 (Del.Super. Oct. 21, 2016) and *State v. Taylor (Homer)*, 259 P.3d 289 (Wash. Ct. App. 2011)).
[34] *Id.* at 21 (quoting and discussing *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012)).
[35] *Id.* (quoting 21 AM. JUR. 2D *Criminal Law* § 620 (WestLaw)).

In the Answering Brief, the State invokes Delaware's criminal savings statute under 11 *Del. C.* § 211,[36] but makes no effort to discuss or distinguish these aforementioned authorities.[37] Neither does the State argue why 11 *Del. C.* § 211 applies to collateral consequences, or why future sentencing for recidivists is anything but a collateral consequence.[38]

Therefore, the State has not developed a well-reasoned counter-argument that is responsive to the Opening Brief.[39]

D. The State's Retroactivity Argument is Erroneous — the Ned Carpenter Act of 2011 Took Effect before the Instant Offense, and Collateral Consequences Form No Part of a Judgment of Conviction.

The State argues that the Ned Carpenter Act did not provide for retroactive application,[40] that "convictions remain undisturbed" if amendatory legislation "is silent on that point,"[41] and that "re-classification of prior violent felonies would undo the intent of plea offers and potentially require re-litigation of multiple

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[36] *See* Answering Br. 11 ("The general savings statute is applicable here, as the amendment does not provide for retroactive re-classification of the repealed statute.").
[37] *See id.*
[38] *See id.*
[39] *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008); *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del.Super. Nov. 12, 2008) ("[C]ounsel is required to develop a reasoned argument supported by pertinent authorities."); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) (waiver for perfunctory or undeveloped arguments).
[40] Answering Br. 12.
[41] *Id.* at 13.

cases," citing *State v. Jones*, *State v. Ismaaeel*, *Morales v. State*, and *Stewart v. State*.[42]

But there is no retroactivity here, because the Act took effect on September 1, 2011, before the instant offense was committed in 2015.[43]

The State confuses two distinct concepts: the judgment of conviction itself versus its prospective, collateral consequences. The legislature's reclassification of "violent felony" under the Act does not create re-litigation because a judgment of conviction does not include collateral consequences.[44] The cases cited by the State are inapposite, where an amendatory statute reduced punishment for an offense *after* commission but either before sentencing (*Ismaaeel*[45]) or after sentencing (*Jones*, *Morales*, and *Stewart*[46]). These cases offer no support for the State, because involving direct rather than collateral consequences, and where the Ned Carpenter Act took effect before Mr. Butcher's instant offense.

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[42] *Id.* at 11 & n.11 (citing *State v. Jones*, 2004 WL 838605 (Del.Super. Apr. 15, 2004), *State v. Ismaaeel*, 840 A.2d 644 (Del.Super. 2004), *Morales v. State*, 2004 WL 2291309 (Del. Oct. 7, 2004), and *Stewart v. State*, 2004 WL 2291304 (Del. Oct. 5, 2004)).
[43] Op. Br. 16.
[44] *Villa v. State*, 456 A.2d 1229, 1232 (Del. 1983); *Krewson v. State*, 552 A.2d 840, 843 (Del. 1988).
[45] *Ismaaeel*, 840 A.2d at 645 (Del.Super. 2004).
[46] *Jones*, 2004 WL 838605, at *1; *Morales*, 2004 WL 2291309, at *1; *Stewart*, 2004 WL 2291304, at *1.

E. The State's Discussion of *State v. Trawick*, *State v. Weeks*, and *French v. State* is Non-Responsive to the Opening Brief.

In the Opening Brief, Mr. Butcher discussed *State v. Trawick*,[47] *State v. Weeks*,[48] and *French v. State*,[49] showing that these cases are distinguishable as a matter of fact or inapplicable or erroneous as a matter of law.[50] Specifically, we pointed out that Superior Court erred in *Trawick* and *Weeks* for failing to adhere to this Court's teaching in *Sommers v. State* that it is the "specific crimes ***currently listed***" in 11 *Del. C.* § 4201(c) that are applied.[51] We argued that a pronouncement in *French* (that "violent felon" is a status) was unnecessary dicta based on the facts of that case, erroneous for disregarding the Repealability Canon and the legislature's intent that parentheticals in Section 4201(c) only summarize another statute (and do not create new matter), and that *French* was properly read narrowly by Judge BUTLER in *Edger* to mean, consistent with *Sommers*, to the extent the law of a collateral consequence is unmodified before the commission of a future offense.[52]

In the Answering Brief, the State discusses *Trawick*, *Weeks*, and *French*, but

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[47] 2014 WL 5741005 (Del.Super. Jan. 4, 2016).
[48] 2014 WL 10895228 (Del.Super. Aug. 25, 2014).
[49] 38 A.3d 289 (Del. 2012).
[50] Op. Br. 22-27.
[51] *Id.* at 26-27 (quoting *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (emphasis added)).
[52] *Id.* at 24-26 (citing, inter alia, *State v. Edgar*, 2016 WL 6195980, at *4 (Del.Super. Oct. 21, 2016).

such is non-responsive to the arguments from the Opening Brief.[53] The Answering Brief ignores Judge BUTLER's decision entirely.[54] Therefore, the State has not developed a well-reasoned counter-argument responsive to the Opening Brief.[55]

Finally, the State cites *State v. Robinson* for the proposition, "It is the generally prevailing rule that the pardon of a conviction does not preclude the conviction from being considered as a prior offense under a statute increasing the punishment for a subsequent offense."[56] This is inapposite, because a pardon is an executive action; *Robinson* does not mean that the legislature may never amend its own statutes increasing or decreasing the punishment for a subsequent offense. The State's counter-arguments are within merit.

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[53] *See* Answering Br. 13-16.
[54] *See id.*
[55] *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008); *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del.Super. Nov. 12, 2008) ("[C]ounsel is required to develop a reasoned argument supported by pertinent authorities."); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) (waiver for perfunctory or undeveloped arguments).
[56] Answering Br. 16 (quoting *State v. Robinson*, 251 A.2d 552, 556 (Del. 1969)).

II. AS TO ARGUMENT II (CONSTITUTIONAL DUE PROCESS), THE STATE ERRONEOUSLY SUGGESTS THAT KNOWLEDGE OF A REPEALED LAW MEANS KNOWLEDGE OF EXISTING LAW.

The State argues that Butcher knew *the prior law* that he had two "violent felony" convictions in 2010 and in 2011.[57] But fair warning relates to existing laws, not repealed laws.[58] Butcher was entitled to rely on the Ned Carpenter Act, because it removed Former 16 *Del. C.* § 4768 from the list of "violent felony" many years before the instant offense.

Finally, the State counter-argues that Butcher had fair warning based on "this Court's holding in *French v. State* ('after a person has been convicted of a violent felony, that person becomes a 'violent felon' for purposes all subsequent criminal conduct.')."[59] The State errs, first, because the facts and holding in *French* were predicated on the Habitual Offender Statute,[60] not the application of 11 *Del. C.* § 1448(e)(3) where Mr. Butcher was sentenced for the instant offense.[61] Second, the Ned Carpenter Act of 2011 was not before the Court in *French*, which means that nothing diminished Butcher's reasonable reliance on it. Third, the

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[57] Answering Br. 17-18.
[58] Op. Br. 30 (discussing and quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (emphasis added)).
[59] *Id.* at 19.
[60] 11 *Del. C.* § 4214.
[61] *French*, 38 A.3d at 291 ("At sentencing, French conceded that he was subject to enhanced sentencing under 11 *Del. C.* § 4214(a)," but disagreed on the minimum sentence).

panel in *French* never overruled *Sommers v. State*, where this Court — construing 11 *Del. C.* § 1448(e)(1)(c) — held that "violent felony" mean those crimes "**currently listed**" in Section 4201(c).[62]

Where *Sommers* construed 11 *Del. C.* § 1448(e)(1)(c) — on which the subject of this appeal is predicated — and *French* did not, the State offers no meritorious reason why *French* should be deemed as having given fair warning.

[62] *Sommers v. State*, 2010 WL 5342953, at *2 (Del. Dec. 20, 2010) (emphasis added).

CONCLUSION

For the forgoing reasons, and for those raised in the Opening Brief, Appellant Prentiss Butcher respectfully requests that this Honorable Court grant the relief sought in the Opening Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This reply 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.

2. This reply brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3,424 words, which were counted by Microsoft Word for Mac 2011 Version 14.5.3.

Respectfully submitted,

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Appellee.	:	

CERTIFICATE OF SERVICE

I, John S. Malik, hereby certify that on this 27th day of February, A.D., 2017, I have had forwarded via LexisNexis File and Serve electronic delivery a copy of Appellant's Reply Brief to the individual at the following address:

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