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Case Number 441,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAMOTTE JOHNS,	)	
	)	
Defendant Below-Appellant,	)	No. 441, 2024
	)	
v.	)	Court Below---Superior Court of the State of Delaware in and for New Castle County ID No. 2208009197A
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S SECOND CORRECTED OPENING BRIEF

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April 16, 2025

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NATURE OF PROCEEDINGS

On August 17, 2022, detectives from the Wilmington Police Department arrested Appellant, Lamotte Johns and executed a search warrant on a property in his possession at 514 West 6th Street in Wilmington, Delaware. The State indicted Appellant and charged him with the following offenses:

1. Drug dealing - 16 Del. C. § 4752(a)(1);
2. Drug dealing - 16 Del. C. § 4752(a)(1);
3. Possession of a firearm by prohibited person - 11 Del. C. § 1448 (prior conviction);
4. Receiving stolen firearm -11 Del. C. § 1450;
5. Possession of firearm during commission of a felony - 11 Del. C. § 1447(A);
6. Possession of ammunition prohibited person - 11 Del. C. § 1448;
7. Possession of drug paraphernalia - 16 Del. C. § 1447(A); and
8. Conspiracy - 11 Del. C. §512 .

Appellant filed a motion to suppress physical evidence seized from 514 West 6th Street.

On May 31, 2023, the trial court denied Appellant's motion.

On April 1, 2024, the case went to trial. On April 4, 2024, the jury returned guilty verdicts on all charges except conspiracy.

On October 11, 2024, the court imposed sentence:

1. 0481 – 7 years, 6 months (suspended after 5 years);

2. 0479 – 12 years (suspended after 10 years);
3. 0477 – 4 years (suspended after 2 years);
4. 0478 – 4 years (suspended after 2 years);
5. 0482 – 1 year;
6. 0480 – 1 year.

All sentences are imposed at Level Five and run consecutively for a total period of incarceration of 21 years.

SUMMARY OF THE ARGUMENT

I.

Police executed a warrant on Appellant's premises and seized a firearm allegedly stolen. At trial, the State called a detective who testified that, according to NCIC, the gun was reported stolen. This testimony was offered for the truth of the matter asserted-that the gun was stolen..

This testimony was objectionable (though not objected to) double hearsay under the rules of evidence and its admission constitutes plain error. Someone reported the theft to the police and the police reported the theft to NCIC which was then testified to by a third officer unconnected to the investigation. Separately, the NCIC report also violated Appellant's right to confrontation under the Sixth Amendment as it was testimonial in nature. The NCIC report was incompetent hearsay and testimonial evidence that should have been excluded. Without that evidence, the State cannot meet its burden of proof for this charge and the conviction should be vacated.

I.

In violation of Delaware's rules of evidence and the Sixth Amendment to the United States Constitution, the Superior Court erred and committed plain error by admitting unlawful hearsay testimony from the State that the firearm recovered from appellant's premises was identified as stolen pursuant to NCIC**.**

II.

Detectives obtained a warrant to search Appellant's premises. From that search, police seized physical evidence including drugs, paraphernalia, a firearm and currency. Appellant's charges arise from this evidence. Appellant moved to suppress the physical evidence because the affidavit supporting the application lacked probable cause to believe proceeds of illegal activity would be present in the premises. The trial court erroneously found the presence of probable cause and denied Appellant's motion. The information in the affidavit contained stale, unreliable, speculative and insufficient facts needed to establish probable cause. The affidavit contained three anonymous tips, two of which were nearly a year old and stale. The third tip lacked credibility. It does not identify the time that the information was received. It gave no predictive conduct corroborated by police, nor the basis of the information asserted. The affidavit identifies two traffic stops that are alleged to support probable cause but careful scrutiny refutes that. In one, police recovered marijuana from the driver after he met with someone briefly in front of Appellant's house; Appellant was not identified there. In a second stop, the driver was observed leaving Appellant's premises after an hour and then fled the traffic stop. There was no evidence that he was involved in illegal activity with Appellant. No controlled sales were conducted; no human traffic was observed; and no credible informants provided reliable information. The sum of the credible affidavit information is insufficient to establish probable cause. The warrant should have been invalidated. The motion should have

been granted and the evidence suppressed. Appellant's convictions should be vacated and the case remanded for a new trial.

III.

Title 11, § 1448 of the Delaware Code violates the Second Amendment on its face, and as applied to Appellant. The Second Amendment framework from *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), demands that the State demonstrate that 11 Del. C. § 1448 "is consistent with this Nation's historical tradition of firearm regulation." *Id*. at 17. In *United States v. Rahimi*, the Supreme Court reiterated that the "central considerations" in that inquiry are "whether modern and historical regulations impose a *comparable burden* on the right of armed self-defense and whether that burden is *comparably justified*." 144 S.Ct. 1889, 1898 (2024). The State cannot offer a single historical regulation that is relevantly similar to 11 Del. C. § 1448's categorical lifetime ban on felons or those with drug convictions, let alone a historical tradition of such a categorical ban. As 11 Del. C. § 1448 clearly violates the Second Amendment under the framework and analysis applied in *Bruen* and *Rahimi*, this Court should vacate Appellant's convictions for possession of a firearm and ammunition.

STATEMENT OF THE FACTS

On August 17, 2022, police executed a search warrant at Appellant's property. A0145-A0147; search warrant and application attached as Exhibit "A" to Appellant's Opening Brief. From that search, police recovered approximately 7,500 grams of marijuana, approximately 10 grams of methamphetamine, a handgun and five rounds of ammunition, and drug paraphernalia. A0149-A0156; A0434-A0441, A0447, A0450, A0455, and A0534-543. The warrant summarized

an investigation of alleged drug dealing at Appellant's property. In the application affidavit, there were four areas of information. *Id.*

First, information was received in September of 2021, nearly a full year before the application was submitted. *Id.* The affidavit stated that police received two anonymous tips of Appellant's involvement in illegal activity at 514 West 6th Street. *Id.* Tip one stated that Appellant was selling marijuana, alcohol and tobacco and possessed firearms. *Id.* Anonymous tip two stated that Appellant was selling marijuana and cocaine stored at 514 West 6th Street, that he drove a silver Mercedes with Delaware registration, and possessed firearms. *Id.* It is unstated whether these were separate tipsters. *Id.* Police did not investigate these tips until a year later. *Id.* None of this information was corroborated at the time. *Id* .

A third anonymous tip was supplied ten months later - July 2022. *Id.* Again, it is unclear whether the tipster was independent of the early tips. The tip stated that

Appellant possessed firearms and was selling a large quantity of marijuana and other illegal substances from 514 West 6th Street. *Id.* The drugs were allegedly prepackaged and sold primarily during the evenings or nighttime. *Id.* Those critical allegations were not confirmed. The source stated that Appellant also operated an unlicensed barbershop and sold food and alcohol. *Id.* The tip provided a mobile number for Appellant. Investigators confirmed the phone number and Appellant's registration for a Mercedes Benz. *Id.* The tip stated that Appellant had a felony gun charge, also confirmed. *Id.* Investigators confirmed that Appellant used 514 West 6th Street for the registration of his automobile. *Id.*

Beyond the anonymous tips, investigators described encounters with two individuals who had contact with 514 West 6th Street. *Id.* The affiant noted surveillance of 514 West 6th Street during the first week of August 2022. *Id.* An individual was observed stopping in front of the premises and making contact with an unidentified male at the front door. *Id.* He returned to his vehicle and was stopped for a moving violation. *Id.* The driver possessed marijuana which he said he had just purchased from a friend who he knows from "cutting hair." *Id.* The "friend" was not identified.

Finally, the affidavit stated that investigators surveilled 514 West 6th Street on August 11, 2022 and observed Charles Webster enter the premises, remain for one hour, and then leave in his car. *Id.* Police stopped Webster who supplied his license, a

fictitious registration, and an expired insurance card. *Id.* Webster refused to exit his vehicle and, when advised he was resisting arrest, sped off. *Id.*

Appellant moved to suppress the evidence seized from his premises based on the absence of probable cause in the warrant affidavit. Trial Court Opinion, 5-21-23 attached as Exhibit "B;"; A020-A043.

On April 1, 2024, trial commenced. The State presented witnesses who described the search and evidence seized. A0149-A0156, A0208-A0209; A0434-A0441, A0447, A0450, A0455, and A0534-A0543. Detective Jeffrey Silver testified that a gun seized in the search was reported stolen in "NCIC." A0149-A0156. The State offered no record of this NCIC report nor any foundation for what the report constituted, how it was created, how it was maintained, or how Wilmington Police received access to it. A0208-A0209.

The trial was bifurcated with counts one, two, four, five, seven and eight heard first followed by counts three and six-involving Appellant's felony record. In part one, Appellant was found guilty of counts one and two (drug dealing), four (stolen firearm), five (firearm possession during a felony), and seven (drug paraphernalia). A0629-A0631. In part two, the jury convicted Appellant of possession of a firearm and ammunition by a prohibited person (count three and six). A0639-A0679. The only new evidence in part two was a stipulation that Appellant was prohibited by Delaware law from possessing a firearm or ammunition. A0639-A0649. The Court imposed a

cumulative sentence of 19 years of incarceration. A0695-A0697.

ARGUMENT I

In Violation of Delaware's Rules of Evidence and the Sixth Amendment to the United States Constitution, the Superior Court Erred and Committed Plain Error By Admitting Unlawful Hearsay Testimony From The State That The Firearm Recovered From Appellant's Premises Was Identified As Stolen Pursuant To NCIC.

A. Question Presented

Whether the court erred by allowing the State to prove the firearm's stolen status, an element of the charged offense, by inadmissible hearsay that NCIC had a stolen notice in its system and whether its admission violated Appellant's right to confrontation under the Sixth Amendment? The issue was not preserved below by trial counsel but should be reviewed under the interest of justice as an exception to Rule 8 though plain error review. Plain error occurs only when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Smith v. Delaware State Univ.*, 47 A.3d 472, 479 (Del. 2012). It is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Here the error is plainly apparent from the record, and effects Appellant's fundamental right to a fair trial by allowing in unlawful hearsay that is testimonial in nature, thereby violating Delaware's rules of evidence but also

Appellant's right to confrontation under the 6th Amendment to the United States Constitution. The evidence at issue was needed to meet a foundational element of the offense-theft. Proof of this element through the admission of squarely unlawful evidence resulted in a manifest injustice.

B. Scope of Review

This error was not preserved by trial counsel and should be addressed as plain error under Supr. Ct. Rule 8, in that this violation was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

C. Merits of Argument

Appellant was convicted of possession of a stolen firearm. The State relied on the testimony that NCIC showed that the firearm had been reported stolen from North Carolina. The NCIC testimony is inadmissible hearsay. Under Delaware's Rules of Evidence, Detective Silver's testimony concerning his findings in NCIC should have been precluded. Under DRE 801, hearsay is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers into evidence to prove the truth of the matter asserted in the statement." The statement at issue pertains to the stolen status of the firearm and constitutes numerous out-of-court statements including: (1) the gun was owned by a third party; (2) the gun was taken without permission with no intent to return it; and (3) the theft report in

NCIC was made by an officer.

The testimony that the firearm was stolen was offered for the truth of the matter asserted and necessary to prove elements of the offense including 1) third party ownership; 2) the owner's deprivation of the firearm; and 3) that Appellant believed the firearm was obtained under circumstances amounting to theft. In fact, this testimony is double hearsay as it contains the claim of ownership and theft by and a secondary hearsay that the theft was entered into the NCIC system by a police officer then testified to by Detective Silver.

D.R.E. 802 states that "[hearsay] is not admissible except as provided by law or these rules." The State offered no exception to the hearsay rule.

> Many other jurisdictions consider NCIC inadmissible hearsay. In *State v. Torres*, the court stated as follows:
>
> > "It was error to permit Lazu to testify about information obtained from NCIC because it was inadmissible hearsay. Hearsay is 'a statement that: (1) declarant does not make while testifying at the current hearing or trial; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement'. N.J.R.E. 801(c). Hearsay is inadmissible unless a recognized hearsay exception applies. N.J.R.E. 802. 'Testimony that the information was received from a specific source such as NCIC… violates the hearsay rule and, moreover, 'violates the accused's Sixth Amendment right to confront witnesses against him.'".

State v. Underwood, 286 N.J. Super 129, 139 (1995)(citations omitted).

New Jersey's hearsay rule is identical to Delaware's and in *State v. McGee*, 131

N.J. Super. 292, 298 (N.J. Super. 1974), the court, on identical facts, reversed a conviction where the only proof of firearm theft was NCIC information. *See also Castillo-Salgado v. State*, 2014 WL 3764492 (July 30, 2014)(unpublished)(denying admission of NCIC report as hearsay, citing *United States v. Long*, 578 F.2d 579, 581 (5th Cir. 1978) (an NCIC report is hearsay not coming within a recognized exception to the hearsay rule); *Velietstra v. State*, 800 N.E. 2d 972, 975 n. 5 (Ind. Ct. at App. 2003) and *State v. Stewart*, 2014 U.T. App. 112, ¶11 n.3, 327 p. 3d 595 (2014). *See also United States v. Davis*, 568 F.2d 514 (6th Cir. 1978); *United States v. Johnson*, 413 F. 2d 1396 (11th Cir. 1969) (NCIC information was double hearsay in that witness testified as to what he learned from NCIC and NCIC in turn gathered information from the other police departments); *Sanders v. State*, 786 So. 2d 1078 (Miss. Ct. at 2001); *Dillingham v. Commonwealth*, 95 S.W. 2d 377 (Ky. 1999), *cert denied* 528 U.S. 1166 (2000); *Commonwealth v. Travaglia*, 661 A.2d 352 (Pa. 1995) (NCIC printout inadmissible where proponent failed to establish proper basis for admission under business records exception).

In sum, the testimony from Detective Silver that he reviewed an NCIC report indicating that the gun in question in this case was stolen was inadmissible and plainly prejudicial to Appellant in that it was the only evidence admitted to prove a critical element of the offense-ownership by a third party and theft. Without that testimony, there would be no evidence that the firearm was stolen which would have

resulted in an acquittal on that charge. For this reason, Appellant's conviction for felon in possession of a stolen firearm should be reversed.

The testimony also violated the Sixth Amendment by abridging Appellant's right to confrontation. The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend.VI. This protection applies to states through the Fourteenth Amendment. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009). In *Crawford v. Washington*, 541 U.S. 36 (2004). The Court overruled the reliability test for confrontation clause objections and set in place a new, stricter standard for admission of hearsay statements under the confrontation clause. Under the *Ohio v. Roberts,* 448 U.S. 56 (1980) reliability test, the confrontation clause did not bar admission of an unavailable witness's statement if the statement had an adequate indicia of reliability. *Crawford*, 541 U.S. at 40 (describing the *Roberts* test) evidence satisfied that test if it fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness. *Id. Crawford* rejected the *Roberts* analysis, concluding that although the ultimate goal of the confrontation clause is to ensure reliability of evidence, "it is a procedural rather than a substantive guarantee." *Id.* at 61. It continued: The confrontation clause "commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id. Crawford* went on to hold that testimonial

statements by declarants who do not appear at trial may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 68.

A *Crawford* issue arises whenever the State seeks to introduce statements of a witness who is not subject to cross-examination at trial. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (testimonial statements are solemn declarations or affirmations "made for the purpose of establishing or proving some fact.")(*quoting Crawford*, 541 U.S. at 51). Here, the evidence was offered for the truth of the matter asserted and is plainly testimonial in nature. The *Crawford* rule applies only to testimonial evidence. *Davis v. Washington*, 547 U.S. 813 (2006). Evidence is testimonial when the circumstances objectively indicate that the statements were made to prove past facts potentially relevant to later criminal prosecution and not in connection with a witness' pursuit of aid in an ongoing emergency. *Id.*; see also *Melendez-Diaz*, 557 U.S. at 316 (suggesting that an officer's investigative report describing the crime scene is testimonial); see also id. at 321-22 (police reports do not qualify as business records because they are made essentially for use in court). Here, evidence of the gun theft was nothing more than a routine report of a stolen object which when offered as proof against Appellant is testimonial in nature and subject to the protections of the Sixth Amendment. The evidence should have been precluded and Appellant should have been acquitted of the stolen firearm count.

ARGUMENT II

The Trial Court Erred By Determining That the Affidavit Provided Probable Cause for the Issuance of a Warrant for the Search of Appellant's Residence; Physical Evidence Seized as a Result of That Search Should Have Been Suppressed.

A. Question Presented

Whether the trial court erred by upholding the validity of the search warrant where the affidavit was lacking in probable cause that evidence of a crime would be found at the premises? The issue was preserved through the filing and argument of a motion to suppress physical evidence and addressed in argument at A20-A43 and the trial court's opinion at Exhibit "B" to Appellant's opening brief.

B. Scope of Review

This Court reviews the denial of a motion to suppress for abuse of discretion. *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006). The Supreme Court will reverse the trial court's factual findings only if they are clearly erroneous. *Loper v. State*, 8 A.3d 1169, 1172 (Del. 2010). The trial court's legal conclusions addressing constitutional issues are reviewed *de novo*. *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

C. Merits of Argument

Under Article I, Section 6 of the Delaware Constitution, "the people shall be

secure in their persons, houses, papers, and possessions from unreasonable searches and seizures." While the Fourth Amendment to the United States Constitution contains similar language: "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures should not be violated," the Delaware Supreme Court has rejected the notion that the two Constitutional provisions "mean exactly the same thing". *Juliano v. State*, 254 A.3d. 369, 377 (Del. 2020). The Delaware Constitution offers broader protections than its federal corollary. *Jones v. State*, 745 A.2d 856, 866 (Del. 1999).

Both the United States and Delaware Constitutions provide that a search warrant may be issued only upon a showing of probable cause. U.S. Const., Amend. IV; Del Const. Art. I, section 6. Probable cause is established when a nexus between the items to be sought and the place to be searched appears." *Hooks v. State*, 416 A.2d 189, 203 (Del. 1980). The Delaware Constitutional requirements for search warrants are codified in 11 Del. C. §§ 2306 and 2307. *Sisson v. State*, 903 A.2d 288 (Del. 2006). Section 2306 provides that an application for a search warrant must "state that the complainant suspects that such persons or things are concealed in the house, place, conveyance, or person designated [in the search warrant application] and shall recite the facts upon which this suspicion is founded." *Id.* Section 2307(a) provides that "the warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things or persons sought in particular as

particularly as possible." *Wheeler v. State*, 135 A.2d 282, 295 (Del. 2016). On a motion to suppress challenging the validity of a search warrant, the defendant bears the burden of establishing the challenged search or seizure was unlawful. *Sisson*, 883 A.2d at 885. In this case, Appellant met that burden and his motion to suppress should have been granted.

A court reviewing a motion to suppress the proceeds of a search pursuant to a warrant must employ a four corners test to determine whether the application demonstrates probable cause. *Sisson*, 883 A.2d at 876. Under the four corners test, the reviewing court must discern whether the supporting affidavit "sets forth sufficient facts on its face for a judicial officer to form a reasonable belief that an offense has been committed and that seizable property would be found at the particular place." *Id. citing Pierson v. State*, 338 A.2d 571, 573 (Del. 1975). When reviewing the sufficiency of the application, the reviewing court must review the application as a whole and not on the basis of its separate allegations. *Id.*, citing *Gardner v. State*, 567 A.2d 404, 409 (Del. 1989). Thus, a magistrate may find probable cause when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006) (*citing Stones v. State*, 196 WL 14557 at 2 (Del. 1996)).

Turning to the affidavit at issue, there are two categories of information that were relied upon for probable cause. First, there were three anonymous tips alleging

Appellant's involvement in drug dealing and firearm possession. The United States Supreme Court stated that anonymous sources begin with less credibility than an informant whose reputation can be assessed and who can be held responsible if his allegations turn out to be fabricated. *Florida v. JL*, 102 S.Ct. 1375 (2000), citing, *Adams v. Williams*, 92 S.Ct. 1921 (1972)("an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity"); and *Alabama v. White*, 110 S.Ct. 2412 (1990).

For an anonymous tip to be credited for a probable cause analysis, it must contain predictive information that is subject to an act actually corroborated by police as a test of the informant's knowledge or credibility. *J.L.,* 529 U.S. at 270 (quoting *White,* 496 U.S. at 329 (1990)). That allegations concerning the existence of contraband or firearms turned out to be correct after the fact does not suggest that prior to the search police had a reasonable basis for suspecting the subject or the location as having the presence of criminal conduct. *Id.* The Delaware Supreme Court has similarly recognized this principle. *Guilfoil v. State*, 3 A.3d 1097 (Del. 2010). For a tip to be considered in a probable cause analysis, it must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id., citing Florida v. JL,* 102 S.Ct. 1375.

Here, the anonymous tips contained personal details concerning the identity of the appellant, including his phone number, his motor vehicle, the identity of his

child, the address of his residence, and the fact that he conducted an unlicensed barber shop there. "An accurate description of a suspect's observable location and appearance is, of course, reliable in this limited sense; it will help the police correctly identify the person who the tipster means to accuse. Such a tip does not show the tipster has knowledge of concealed criminal activity." *Id.* Probable cause requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. *Id. citing* Ford W. LaFave Search and Seizure Section 9.4(H) p. 213 (Third edition 1996), (distinguishing reliability as to identification from reliability to the likelihood of criminal activity which is central to essential and anonymous tip cases.)

Here, to the extent to which there was any predictive behavior described, that was not corroborated by police. In the AS3 tip, the tipster stated that Appellant engaged in drug sales mostly in the evening or at night. Despite the affidavit's assertion that surveillance was conducted, there is no evidence regular drugs sales, much less sales in the evening or nighttime as alleged. There is no evidence of any regular sales, foot traffic or patronage occurring at Appellant's premises. The tip stated that Appellant sold pre-packaged marijuana but nothing corroborated that. The touchstone for reliability of an anonymous tip – predictive criminal behavior that is corroborated – is absent from the affidavit.

The anonymous tips lack other indicia of reliability. In *Balentine v. State*, 207

A. 3d 566 (Del. 2019), the Supreme Court instructed courts into what they should consider when determining whether to credit an informant's information. Courts should assess i) whether the informant's allegations arise from firsthand knowledge; ii) how fresh or stale the informant's information is; iii) the nature of the informant's relationship to the defendant; and iv) whether the informant had ever been in the defendant's premises. The tips fail to contain this information.

For the September 2021 tips, they were received eleven months before the warrant application. The tips provide no time period for when the information was gathered. The information could be stale when it was provided. It certainly was stale at the time the warrant was sought.

The July 2022 tip lacks every indicia of reliability identified in *Balentine* and *Guilfoil*. There is no evidence the tip came from first-hand observations versus hearsay. There is no indication of when the tipster obtained the information and it could be stale. The tip says nothing about the relationship, if any, between Appellant and the tipster.

According to the affidavit, following the July 2022 tip, police started surveillance of Appellant's premises but saw no regular human traffic to the house. Police report that a single person conferred with another person in front of the house. The affidavit neither identifies Appellant nor describes a transaction. Further, if not Appellant, the person who came from the house may be a barber shop

patron or employee and reduces the likelihood that crime proceeds would be in the residence. Police reportedly followed the person as he drove away from the short meeting, stopped him for a motor vehicle code violation and learned he possessed marijuana that he claimed to have just purchased from a friend. The subject couldn't or wouldn't provide the name of that friend, further diminishing his credibility. Police did not show him Appellant's photo for identification. The affidavit did not state whether he was charged with marijuana possession or other crimes, whether he avoided charges due to his statement, or whether police gave him other incentives calling into question his credibility. His criminal record was not provided nor whether he had been an informant before.

Police do not explain why no identification was made. There is no detail about the marijuana transaction such as cost, planning or conversation. There was nothing about whether the person had been there before, made purchases in the past or how the purchase was arranged. Investigators did not see the transaction and were relying on the person stopped to provide key details, none of which are present. Police do not confirm the reliability of the informant's information and its reliability cannot be assumed, especially where the transaction was not witnessed. Following this car stop, there are no controlled purchases, no observed transactions, and no observed human traffic to Appellant's premises.

The last relevant affidavit facts involve a police encounter with Charles

Webster who is seen entering Appellant's premises on a different day for one hour then departing without any suspicious activity. Webster was stopped for a purported traffic code violation and produced a fictitious vehicle registration and expired insurance. Police knew nothing about him before the stop. Webster displayed nervousness and refused to exit his vehicle and didn't want to be searched. When ordered from his vehicle, Webster fled and escaped police pursuit. Webster had no stated criminal history or any known connection to Appellant. Webster's visit and the reason for his flight are unknown and add nothing to the probable cause analysis.

In sum, the information in the affidavit is unreliable, incomplete, reliant upon inferences that require speculation, and are insufficient to support probable cause. The facts here are akin to those in *State v. Cannon*, where the court found an absence of probable cause and granted a motion to suppress. 2007 WL 1849022 (Del. Sup. 2007). In *Cannon*, informants stated that Cannon was selling large quantities of drugs and provided specific street locations for such activity. *Id.* at 1-2. The informants gave Cannon's address, identified his car, and stated that he carried a firearm. *Id.* Police corroborated the registered address of the car and conducted surveillance there. *Id.* Police watched Cannon drive from his residence, stop and accept passengers for a few minutes. *Id.* In another stop, Cannon entered a silver car for a few minutes. *Id.* After Cannon returned to his car, police stopped the silver car and the driver reported receiving cocaine from Cannon. *Id*. Police sought a search

warrant for Cannon's residence relying on the tipster's information and the officer's statement that drug dealers only carry what they need for a sale and keep "the other drugs at a secure location, including but not limited to their residence." *Id.*

The Court found the affidavit did not show the informant's past proven reliability and no indication that "Cannon was using his residence to deal drugs or to store drugs, drug paraphernalia, or any other evidence of drug transactions." *Id.* at 5. The police investigation was also found to be lacking as there were no controlled buys and no evidence that Cannon was bringing contraband to or from his home. *Id.* The Court invalidated the search, finding that absent "additional factual information giving rise to a probability that evidence would be found in Cannon's home, was unreasonable for the issuing magistrate to accept the affidavit's content as supporting the evidentiary nexus necessary for a search of Cannon's home." *Id.*

Likewise, here, the affidavit lacks reliable evidence of illegality or any corroborative investigation that the warrant should never have issued and should be invalidated.

ARGUMENT III

The Trial Court Should Have Dismissed Charges Brought Under 11 Del. C. § 1448 Which Prohibits Individuals With a Felony or Drug Conviction from Possessing a Firearm as It Violates the Second Amendment.

a. Questions Presented

Whether Appellant's Convictions on Count IV (firearm) and Count VI (ammunition) for violations of 11 Del. C. § 1448 should be vacated because the statute is unconstitutional both facially and as applied to Appellant? The issue was not preserved below by trial counsel but should be reviewed under the interest of justice as an exception to Rule 8 though plain error review. Plain error occurs only when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Smith v. Delaware State Univ.*, 47 A.3d 472, 479 (Del. 2012). It is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Here, there can be no more fundamental defect than where the very statute upon which Appellant was charged violates his rights under the United States Constitution. Given that this Court applies *de novo* review of a constitutional issue, nothing is lost by the failure of the trial court to have had an opportunity to rule of this strictly legal issue. The interest of justice also justify review by this Court given the broad impact the issue could have

across the criminal justice system.

b. Standard of Review

Appeals of constitutional issues receive *de novo* review. *Nance v. State*, 903 A.2d 283, 285 (Del. 2006). To preserve an issue for appeal, however, it must be raised in the trial court. *Id.* Appellant did not make a Second Amendment challenge below. *Id.* Constitutional issues that are not raised in the trial court are reviewed for plain error. *Id.* To constitute plain error, an error must be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.* at 286.

c. Merits of Argument

a. 11 Del. C. § 1448 is facially unconstitutional

i. The State bears a heavy burden in justifying 11 Del. C. § 1448.

Whether 11 Del. C. § 1448 violates the Second Amendment is an issue of first impression in this Court. As such, Appellant submits a detailed review of recent Second Amendment United States Supreme Court and Third Circuit jurisprudence. The Second Amendment's text is simple: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. It protects the right of "the people" to "keep and bear Arms." U.S. Const. amend. II. In its landmark *Heller* decision, the Supreme

Court held that, regardless of militia service, the Second and Fourteenth Amendments guarantee the right to possess a handgun at home for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 584, 592 (2008).

In *New York State Rifle and Pistol Association v. Bruen*, 597 U.S. 1 (2022), the Supreme Court announced a new two-step analytical approach to whether a statute infringes on a person's Second Amendment rights. 597 U.S. at 17-19. At the first step, a court determines whether "the Second Amendment's plain text covers an individual's conduct[.]" *Id*. at 24; *see id*. at 20 (explaining that the " 'textual analysis' focuse[s] on the 'normal and ordinary' meaning of the Second Amendment's language" (quoting *Heller*, 554 U.S. at 576-78)). If the text applies to the conduct at issue, "the Constitution presumptively protects that conduct." *Id*. at 24.

At the second step, a court determines whether the law in question "is consistent with the Nation's historical tradition of firearm regulation." *Id*. If it is, the presumption made at the first step of *Bruen* is overcome, and the restriction in question stands. To satisfy the second-step analysis, the State bears the burden of identifying a "founding-era" historical analogue to the modern firearm regulation. *Id*. at 24-27. Courts are to look to the founding because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id*. at 34. The question is "whether historical precedent from before, during, and even after the founding evinces a comparable tradition of regulation." *Id*. at 27

(quoting *Heller*, 554 U.S. at 631). In considering that precedent, however, Courts discount "[h]istorical evidence that long predates" and "guard against giving postenactment history more weight than it can rightly bear." *Id*. at 34-35.

Title 11 Del. C. § 1448 disarms permanently "any person" convicted of any felony or any drug related crime. 11 Del. C. § 1448. To justify a firearm regulation, "the [State] must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *see United States v. Rahimi*, 602 U.S. 680 (2024). The State thus bears the burden of establishing the constitutionality of 11 Del. C. § 1448 by identifying well-established historical analogues.

Here, the State cannot offer a single historical regulation that is similar to 11 Del. C. § 1448's categorical lifetime ban on "any person" convicted of a felony or drug related crime, let alone a historical tradition of such a categorical ban. Put simply, "there are no examples of founding, antebellum, or Reconstruction-era federal laws like 11 Del. C. § 1448 permanently disarming noncapital criminals." *Range v. Att'y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023) (Porter, J., concurring), *cert. granted, J. vacated*, *Garland v. Range*, 144 S.Ct. 2706 (July 2, 2024). 11 Del. C. § 1448 is facially unconstitutional because it violates the Second Amendment in all its applications. *Rahimi*, 602 U.S. at 693. *Cf. United States v. Lopez*, 514 U.S. 549 (1995) (declaring statute facially unconstitutional without considering any other

applications in which the statute might be constitutional). Appellant is among "the people," covered by the Second Amendment. *Range*, 69 F.4th at 101-03. 11 Del. C. § 1448 regulates Second Amendment conduct. *Id*. When, as here, the Second Amendment's text covers an individual's conduct, "the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 24.

In *Bruen*, the Supreme Court explained that when facing a Second Amendment challenge, the government "bears the burden" of "affirmatively prov[ing] that its regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 597 U.S. at 19, 24. "A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply [ing] faithfully the balance struck by the founding generation to modern circumstances.' " *Rahimi*, 602 U.S. at 692. "Why and how the regulation burdens the right are central to this inquiry." *Id.*; *see also id*. at 1932 (Thomas, J., dissenting)("A historical law must satisfy both [the how and the why] to serve as a comparator."). "The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.' " *Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 30).

Title 11 Del. C. § 1448 disarms *permanently* any person convicted of a felony or drug related offense. 11 Del. C. § 1448. The government cannot cite a single historical firearm restriction that is similar to 11 Del. C. § 1448; it cannot identify

historical precursors that imposed "a comparable burden on the right of armed self-defense" and were "comparably justified." *Bruen*, 597 U.S. at 3. Applying *Bruen,* 11 Del. C. § 1448 is facially unconstitutional.

ii.*Rahimi* forecloses argument that the Second Amendment is limited to "law-abiding, responsible citizens."

There is a strong presumption that the Second Amendment applies to "all Americans." *Heller*, 554 U.S. at 581; *Lara v. Commissioner Pennsylvania State Police*, —— F.4th ——, 2025 WL 86539 at *5 (3d Cir. January 13, 2025). In *Heller*, the Supreme Court reiterated that "the people ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id*. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). The Court also explained that "the term unambiguously refers to all members of the political community, not an unspecified subset." *Id*. Accordingly, there is "a strong presumption that the Second Amendment right ... belongs to all Americans." *Id*. at 581.

The United States argued that the Second Amendment protects only "law-abiding, responsible citizens." Pet. for Writ of Certiorari (hereinafter "Range Pet."), *Garland v. Range*, No. 23-374 at 8 (U.S. Oct. 5, 2023). The government's "law-abiding, responsible citizens" limitation traces back to *District of Columbia v. Heller*, 554 U.S. 570, 65 (2008). The Court echoed this language in *Bruen*,

repeatedly referring to the petitioners as "law-abiding, responsible citizens." 597 U.S. at 70; *see also, e.g.*, *id*. at 8 ("ordinary, law-abiding citizens"); *id*. at 15 ("law-abiding, adult citizens); *id*. at 26 (" 'law-abiding, responsible citizens' " (quoting *Heller*, 554 U.S. at 635)); *id*. at 31 ("ordinary, law-abiding, adult citizens"). Based on these statements, the United States argued that Supreme Court's "precedents recognize that Congress may disarm persons who are not law-abiding, responsible citizens." Range Pet. at 11.

The Third Circuit recently rejected over-reliance on this language. First, the criminal histories of the plaintiffs in *Heller, McDonald*, and *Bruen* were not at issue in those cases. So their references to "law-abiding, responsible citizens" were *dicta*. And while it heeded that phrase, it was careful not to overread it as it and other circuit courts did with *Heller*'s statement that the District of Columbia firearm law would fail under any form of heightened scrutiny. Second, other constitutional provisions refer to "the people." For instance, "the people" are recognized as having rights to assemble peaceably, to petition the government for redress, and to be protected against unreasonable searches and seizures. Felons are not categorically barred from First Amendment or Fourth Amendment protection because of their status. It is true, however, that prisoners have no First Amendment right to peaceably assemble, *see Pell v. Procunier*, 94 S.Ct. 2800 (1974), and no Fourth Amendment right as to prison-cell searches. *Hudson v. Palmer*, 104 S.Ct. 3194 (1984). There is

no valid reading of "the people" that excludes Americans from the scope of the Second Amendment while they retain their constitutional rights in other contexts.

Third, as the plurality stated in *Binderup*: "That individuals with Second Amendment rights may nonetheless be denied possession of a firearm is hardly illogical." *Binderup v. Attorney General,* 836 F.3d 336, 344 (3d Cir. 2016)(Ambro, J.). That statement tracks then-Judge Barrett's dissenting opinion in *Kanter v. Barr*, in which she persuasively explained that "all people have the right to keep and bear arms," though the legislature may constitutionally "strip certain groups of that right." 919 F.3d 437, 452 (7th Cir. 2019). Fourth, *Rahimi* makes clear that citizens are not excluded from Second Amendment protections just because they are not "responsible." *See Rahimi*, 144 S. Ct. at 1903; *Range v. Attorney General*, 124 F.4th 218, 226-27 (3d Cir. 2024)(*en banc*). In *Lara v. Commissioner Pennsylvania State Police*, ––– F.4th –––, 2025 WL 86539 at *5, the Third Circuit refused to "categorically exclude felons" from "the people."[1]

The Supreme Court rejected the argument that the Second Amendment allows Congress to disarm anyone who is not "responsible." *Rahimi*, 602 U.S. at 701; *see id*. at 27 (Thomas, J., dissenting)("The Government... argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-

[1] In *Lara*, the Third Circuit also rejected the notion that the definition of "the people" was controlled by the understanding of that term at the time of the founding. Doing so would mandate that only white, landed males. *Id*

abiding.' Not a single Member of the Court adopts the Government's theory."). As the Court explained, the United States' proposed use of "responsible" as the dividing line does not "derive from our case law." *Rahimi*, 144 S.Ct. at 1903. Although *Heller* and *Bruen* "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the right," those opinions "said nothing about the status of citizens who were not 'responsible.' " *Id.*; *see also Id*. at 45 (Thomas, J., dissenting) ("The Government's claim that the Court already held the Second Amendment protects only 'law-abiding, responsible citizens' is specious at best."). That "question was simply not presented" in *Heller* or *Bruen*. *Rahimi*, 602 U.S. at 702. In addition, the Court explained, "'[r]esponsible' is a vague term" that cannot demarcate the bounds of the Second Amendment, since "[i]t is unclear what such a rule would entail." *Rahimi*, 602 U.S. at 701; *see also id*. at 775 (Thomas, J., dissenting on other grounds) ("[T]he Government's 'law-abiding, dangerous citizen' test--and indeed any similar, principle-based approach--would hollow out the Second Amendment of any substance. Congress could impose any firearm regulation so long as it targets 'unfit' persons. And, of course, Congress would also dictate what 'unfit' means and who qualifies.").

Thus, *Rahimi* forecloses any attempt by the government to limit "the people" to "responsible" citizens. And what is true of "responsible" is equally true of "law-abiding." The Supreme Court in *Rahimi* did not specifically address the "law-

abiding" portion of the Unite State's argument because it did not claim that statute disarming persons under domestic violence restraints was justified by Congress' power to disarm the non-"law-abiding." Instead, the United States relied only on a (purported) government power to deny firearms to those who are not "responsible." *See United States v. Rahimi*, No. 22-915, Pet'r Br. 27-29 U.S. August 14, 2023 (arguing § 922(g)(8) defendants are "not 'responsible' " and suggesting, by contrast, that felons and illegal immigrants are not "law-abiding"). But both prongs of the government's proposed test--"responsible" and "law-abiding"-- derive from the same source: *Heller*'s and *Bruen*'s use of those words to describe the challengers in those cases. And just as the "responsible" question "was simply not presented" in *Heller* or *Bruen*, those cases did not address the "law-abiding" question either. *Rahimi*, 602 U.S. at 702.

The term "law-abiding," moreover, is just as "vague" as the term "responsible." *Id*. Neither provides a coherent, workable metric for deciding who is and is not among "the people." *See Range*, 69 F.4th at 102 ("[T]he phrase 'law-abiding, responsible citizens' is as expansive as it is vague."). The Third Circuit recently rejected reliance on these terms. The Supreme Court cautioned that "responsible" is too vague a concept to dictate the Second Amendment's applicability and using the term that way would create an "unclear ... rule" that does not "derive from [Supreme Court] case law." *Id*. So too with the phrase "law-

abiding." The Supreme Court's references to "law-abiding, responsible citizens" do not mean that every American who has traffic tickets or minor misdemeanor offenses is no longer among "the people" protected by the Second Amendment. Perhaps, then, the category refers only to those who commit "real crimes" like felonies or felony-equivalents? At English common law, felonies were so serious they were punishable by estate forfeiture and even death. William Blackstone, Commentaries on the Laws of England 54 (1769). But at the Founding, many states were moving away from making felonies--including crimes akin to making false statements--punishable by death in America. *See United States v. Moore*, 111 F.4th 266, 270-72 (3d Cir. 2024)(citing various Founding-era felony laws and penalties). For example, in Massachusetts, New Jersey, Kentucky, Virginia, Connecticut, and New York, forgery and counterfeiting were punishable with imprisonment, hard labor, fines, or corporal punishment, but *not* death. Federally, the Crimes Act of 1790 criminalized conduct involving falsification of records and stealing property of the United States, and punished such conduct with fines, corporal punishment, or a term of imprisonment. And today, felonies include a wide swath of crimes, some of which seem minor. Meanwhile, some misdemeanors seem serious. As the Supreme Court noted recently: "a felon is not always more dangerous than a misdemeanant." *Lange v. California*, 594 U.S. 295, 305, (2021); *Range v. Attorney General*, 124 F.4th as 227.

iii.*Rahimi* similarly forecloses argument that the Second Amendment permits the legislature to disarm anyone it deems "dangerous."

Rahimi forecloses argument that the Second Amendment permits the legislature to disarm anyone it deems "dangerous" for the same reasons it rejects the "law-abiding, responsible citizens" argument. To begin, the term "responsible," as used by the United States in *Rahimi*, was synonymous with "dangerous." At oral argument, the United States confirmed that "when it used the term 'responsible' in its briefs, it *really* meant 'not dangerous.' " *Rahimi*, 144 S.Ct. at 1945 (citing Tr. of Oral Arg. at 10-11 (wherein the United States confirmed it uses the terms "not responsible" and "dangerous" interchangeably))(Thomas, J., dissenting); *see also* Tr. of Oral Arg. at 11 (positing there was "no daylight at all... between not responsible and dangerous").

The United States argued there was a historical tradition of disarming those who are not "responsible," by which it meant anyone who "would endanger himself or others." *Rahimi*, No. 22-915, Pet'r Brief 29, U.S. August 14, 2023; *see also id.* ("Because persons who are subject to domestic-violence protective orders pose an obvious *danger* to others, they are not '*responsible*' individuals.")(emphasis added). Thus, the "dangerousness" argument just repackages the United States' "responsible" citizen theory. It was *this* argument--*i.e.*, dangerousness equals irresponsibility, which justifies disarmament--that the Supreme Court "reject[ed]" in

Rahimi. 144 S.Ct. at 1903. It necessarily follows that the State in this case cannot defend 11 Del. C. § 1448

by invoking a purported tradition of disarming the "dangerous."

Additionally, "dangerous" is just as "vague" as "responsible," *see Rahimi*, 144 S.Ct. at 1903; *see also United States v. Daniels*, 77 F.4th 337, 353 (5th Cir. 2023), *Cert. granted, J. vacated*, 144 S.Ct. 2707 (July 2, 2024) (granting petition for writ of certiorari, vacating judgment and remanding for further consideration in light of *Rahimi*) ("Dangerous" is an elastic, malleable term that has "no true limiting principle."). Those terms are therefore too nebulous to define a historical tradition that courts must invoke to determine who does and does not enjoy Second Amendment rights. Whether a particular person's felony record renders him dangerous is anyone's guess. As in *Rahimi*, it is "unclear what such a rule would entail." *Id*.

In a concurrence in *Rahimi*, Justice Barrett warned against defining a historical tradition of firearms regulation too abstractly. Courts, she wrote, "must be careful not to read a principle at such a high level of generality that it waters down the right." *Rahimi*, 144 S.Ct. at 1926 (Barrett, J., concurring). Justice Gorsuch made the same point, warning that courts should not "try[] to glean from historic exceptions overarching 'policies,' 'purposes,' or 'values' to guide them in future cases." *Id*. at 1908 (Gorsuch, J., concurring)(citation omitted). Nor should courts

"extrapolate from the Constitution's text and history 'the values behind that right, and then ... enforce its guarantees only to the extent they serve (in the courts' views) those underlying values.' " *Id*. (citation omitted). Rather, courts "must proceed with care in making comparisons to historic firearms regulations, or else they risk gaming away an individual right the people expressly preserved for themselves in the Constitution's text." *Id*.

Adopting a "dangerous" principle would conflict with these insights, *see Medina v. Whitaker*, 913 F.3d 152, 159-60 (D.C. Cir. 2019) (concluding " 'dangerousness' standard" is too "amorphous ... to delineate the scope of the Second Amendment"), and could not be reconciled with the *Rahimi* Court's effortless and unanimous rejection of the government's "responsible" theory. Such an open-ended notion could be used to justify widespread disarmament and effectively "eviscerate" the right to keep and bear arms. *Bruen*, 597 U.S. at 31. *See Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting) ("The government could quickly swallow the [Second Amendment] right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun."). Even the United States acknowledged--in its petition for certiorari seeking review of the Third Circuit's decision in *Range*--that a "danger" regime is not "feasible," and that determining whether an individual poses "a danger to public safety" is "a very difficult and subjective task." Range Pet. at 21-22.

iv.*Rahimi's* historical analysis of 18 U.S.C.§ 922(g)(8) confirms that 11 Del. C. § 1448 does not fit within "this Nation's historical tradition of firearm regulation."

As set forth in *Rahimi*, the Supreme Court applied the *Bruen* framework for analyzing Second Amendment challenges for the first time. 144 S.Ct. 1889. The Court held that 18 U.S.C.

§ 922(g)(8)(C)(i)--which prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that the person represents a credible threat to the physical safety of others--is constitutional. The Court reaffirms that Second Amendment challenges mandate detailed historical analysis applied to a specific law; vague and malleable adjectives (like law-abiding and responsible) cannot demarcate the outer bounds of the Second Amendment.

The *Rahimi* Court declined to "undertake an exhaustive historical analysis... of the full scope of the Second Amendment." *Rahimi*, 144 S.Ct. at 1903 (quoting *Bruen*, 597 U.S. at 31). But it reviewed surety laws and "going armed" laws to discern a tradition of *temporarily* disarming someone *found by a court to pose a credible threat to the physical safety of others*, just as § 922(g)(8)(C)(i) does today.[2]

[2] Surety laws and affray laws are not appropriate analogues for 11 Del. C. § 1448. *Bruen* characterizes "going armed" and surety laws as restrictions on "*the manner* of public carry," not as restrictions on *who* may carry. 142 S.Ct. at 2150 (emphasis in original). Surety laws applied "only *after* an individual was reasonably accused of intending to... breach the peace" with a firearm, disarmament. The accused could still carry arms by posting bond or proving a need for self-defense, and the law did not place any burden on the right to keep arms at home for self-defense. Thus, their burden

The Court explained that surety laws--like § 922(g)(8)(C)(i)-- mitigated "demonstrated threats of physical violence" and were temporary. *Rahimi*, 602 U.S. at 698. So-called "going armed" laws--again, like § 922(g)(8)(C)(i)--were similarly limited in scope, disarming people based on individualized determinations that they threatened public safety rather than overly broad categorical bans. *Id*. at 698-699. In stark contrast, 11 Del. C. § 1448 contains no requirement of a judicial determination that the person being disarmed poses a contemporaneous threat to the physical safety of another person, and the statute permanently disarms people solely on the basis of a prior conviction at any time for any felony conviction or conviction for a crime involving controlled substances.

Additionally, like domestic violence restraining orders today, the surety regime was individualized, "offer[ing . . .] significant procedural protections. Before the accused could be compelled to post a bond for 'go[ing] armed,' a

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on the Second Amendment was "likely too insignificant." *Bruen*, 142 S.Ct. at 2148-49, and not remotely "comparable" to Section 1448's severe burden of total, lifetime deprivation of the right to keep and bear arms, which burden is criminally enforced by imprisonment. Further, the *Bruen* Court also observed that surety statutes came too late (mid-19th century) and were not enforced, except pretextually against Black defendants, before concluding they were "surely too slender a reed on which to hang a historical tradition of restricting the right to public carry." *Bruen*, 142 S.Ct. at 2148-49. *See Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122, 133 (3d Cir. 2024) (holding scope of Second Amendment protections is pegged to public understanding of right in 1791 while confirming statutes from mid to-late nineteenth century come too late to satisfy government's burden)

complaint had to be made to a judge or justice of the peace by 'any person having reasonable cause to fear' that the accused would do him harm or breach the peace." *Rahimi*, 144 S.Ct. at 1900. The magistrate would take evidence, and the accused would respond to the allegations. *Id*. Further, an individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason. *Id*. "Many postfounding *Bruen*, 142 S.Ct. at 2148 (emphasis in original); and did not result in total going armed laws" incorporated similar exceptions. *See id*. at 1942 (Thomas, J., dissenting).

Not so for someone disarmed under 11 Del. C. § 1448. Section 1448 is a categorical ban that permanently disarms people on the basis of any prior felony conviction or conviction for a controlled substance offense without an individualized judicial determination, accompanied by due process protections, that the person currently poses a credible threat to the physical safety of others. *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007)(explaining provision for restoring firearm rights, 18 U.S.C. § 925(c), "rendered inoperative" by lack of funding). Critically, where § 922(g)(8)'s restriction is "temporary" and "only prohibits firearm possession so long as the defendant 'is' subject to a restraining order," *Rahimi*, 144 S.Ct. at 1902, 11 Del. C. § 1448 imposes a "permanent, life-long prohibition on possessing firearms." *Id*. at *34 (Thomas, J., dissenting); *see also United States v. Duarte*, 101 F.4th 657, 685 (9th Cir. 2024) (discussing "18U.S.C. § 922(g)(1)'s (felon in possession) no-

exception, lifetime ban"), *vacated for Reh'g en banc*, 108 F.4th 786. 11 Del. C. § 1448 also does not provide for exceptions if arms are needed in self-defense.

Again, the State cannot identify a single historical firearm law that imposed anything close to 11 Del. C. § 1448's broad Second Amendment divestment, *i.e.*, a categorical, life-long prohibition for any person ever convicted of a felony or drug offense.

Further, the State cannot analogize to Capital punishment and estate forfeiture regulations, *see* Range Pet. at 13-16, which are squarely foreclosed by *Range*, and nothing in *Rahimi* calls that conclusion into question. "[F]ounding-era governments' execution of some individuals convicted of certain offenses does not mean the State, then or now, could constitutionally strip a felon of his right to possess arms if he was not executed" *Range*, 69 F.4th at 105. Likewise, the Court explained that founding-era "confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession." *Id*. "Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally." *Id*; *see also United States v. Veasley*, 98 F.4th 906, 917 (8th Cir. 2024)("[Historical statutes criminalizing firearms] was not about mere possession, or even openly carrying a firearm. It required more, the 'offensive' *use* of a firearm in a way that terrorized others.") (citing *Bruen*, 597 U.S.at 45).

Reliance on state ratifying conventions likewise do not supply an appropriate analogue. In Rahimi, the United States argued that its "dangerous" test found support in proposals from Pennsylvania's and Massachusetts' constitutional ratifying conventions, which would have excluded criminals and non-peaceable citizens from the right to keep and bear arms. *See Rahimi*, No. 22-915, Pet'r Brief 17-18, U.S. August 14, 2023. Justice Thomas' *Rahimi* dissent, however, rightly explains that "[t]hese proposals carry little interpretative weight." 144 S.Ct. at 1936 (Thomas, J., dissenting). It is " 'dubious,' " Justice Thomas wrote, " 'to rely on drafting history to interpret a text that was widely understood to codify a pre-existing right.' " *Id*. (quoting *Heller*, 554 U.S. at 603). And in any event, both Pennsylvania and Massachusetts rejected the cited proposals. The United States never explained why or how language *excluded* from the Constitution could operate to limit the language actually ratified. The more natural inference seems to be the opposite--the unsuccessful proposals suggest that the Second Amendment preserves a more expansive right. After all, the Founders considered, and rejected, any textual limitations in favor of an unqualified directive: "[T]he right of the people to keep and bear Arms, shall not be infringed." *Id*. (emphasis in original).

The United States also argued that even after adoption of the 1689 English Bill of Rights, the English government retained the power to disarm the dangerous. Range Pet. at 17. Justice Thomas' *Rahimi* dissent refutes this contention as well. *See Rahimi*,

144 S.Ct. at 1935 (Thomas, J., dissenting). The United States' argument was rooted in "various English laws from the late 1600s and early 1700s" that "authorized local officials to disarm individuals judged 'dangerous to the Peace of the Kingdome.' " *Rahimi*, 144 S.Ct. at 1933 (quoting Militia Act of 1662). But while, "[a]t first glance," these laws might support the government's position, "historical context compels the opposite conclusion": "The Second Amendment stems from English resistance *against* 'dangerous' person laws." *Id*. (emphasis in original). As Justice Thomas explains, "[t]he sweeping disarmament authority wielded by English officials during the 1600s, including the Militia Act of 1662, prompted the English to enshrine an individual right to keep and bear arms." *Id*. at 1934. The 1689 English Bill of Rights, in which that right was enshrined, " 'has long been understood to be the predecessor to our Second Amendment.' " *Id*. (quoting *Heller*, 554 U.S. at 593). Indeed, the Second Amendment is "even more protective of individual liberty," as it does not contain several textual limitations found in the English Bill of Rights. *Id*. (noting English Bill of Rights protects right to keep and bear arms "only where 'suitable to [Protestants'] Conditions and as allowed by Law' "). "In short, laws targeting 'dangerous' persons led to the Second Amendment. It would be absurd to permit the Government to resurrect those selfsame 'dangerous' person laws to chip away at that Amendment's guarantee." *Id*.

In addition, the 17th- and 18th-century English "dangerous" person laws are not "comparably justified" relative to 11 Del. C. § 1448. *See Bruen*, 597 U.S. at 29.

Justice Thomas' *Rahimi* dissent explains that the Militia Act and similar laws were "driven by" a desire to "quash[] treason and rebellion." 144 S.Ct. at 1934. By contrast, "§ 922(g)(8) is concerned with preventing interpersonal violence." *Id*. at 1935. Because the "dangerous" person laws and § 922(g)(8) differ in terms of "why" they burden the right to keep and bear arms, *Bruen*, 597 U.S. at 29, the former "offer the Government no support," *Rahimi*, 144 S.Ct. at 1935 (Thomas, J., dissenting).

v. *Rahimi* does nothing to undermine the Third Circuit's reasoning or decisions in *Range*.

Finally, although the Supreme Court granted *certiorari* in *Range* and remanded for further consideration in light of *Rahimi, Rahimi* does nothing to undermine this Court's reasoning or decision in the prior incarnation of *Range*, or the more recent post-remand decision in *Range*. In *Rahimi*, the Supreme Court criticized the Fifth Circuit for "requir[ing] a 'historical twin rather than a 'historical analogue' " and for failing to "correctly apply [its] precedents governing facial challenges." *Rahimi*, 144 S.Ct. at 1903. Neither criticism applies to the Third Circuit's decisions in *Range*. First, this Court in *Range* properly decided an as-applied challenge. Second, the *Range* Court did not require a historical twin. *Range v. Attorney General*, 124 F.4th at 228. Rather, the Third Circuit rejected the government's theory that the Second Amendment protects only " 'law-abiding, responsible citizens,' " as unsupported by *any* analogous historical restriction that

was similar in "how" and "why" it restricted the right. *See Range*, 69 F.4th at 104-05; 124 F.4th at 229. To the extent *Rahimi* bears on the Third Circuit's reasoning, it only serves to support it. Indeed, as previously set forth, *Rahimi* eviscerates the proposition that the legislature may, consistent with the Second Amendment, disarm those who are not "responsible." *Rahimi*, 144 S.Ct. at 1903. As the Court explained, "[i]t is unclear what such a rule would entail," and no such distinction can be "derive[d] from our case law." *Id*. This Court in *Range* consistently rejected the government's theory that the Second Amendment protects only " 'law-abiding, responsible citizens,' " as an overreading of dicta in *Heller* and *Bruen* and as "expansive as it is vague." *See Range*, 69 F.4th at 101-04.

b.11 Del. C. § 1448 is unconstitutional as applied to Appellant.

Appellant was convicted of possession of a firearm by a prohibited person, which specified a prior felony conviction for firearm possession by a prohibited person. 11 Del. C. § 1448.[3] To preclude Appellant from possessing firearms, the State must show that 11 Del. C. § 1448, as applied to him, "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*,

[3] The trial was bifurcated and the section 1448 charges were heard in a second trial. A0618-680. Trial counsel agreed to an amendment of the indictment to eliminate language containing the actual prior conviction for person prohibited from possession of a firearm to eliminate possible prejudice from the jury hearing about a prior firearms charge. A0619-A0645

at 19. Historical tradition can be established by analogical reasoning, which "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id*. at 30. To be compatible with the Second Amendment, modern laws must be " 'relevantly similar' to laws that our tradition is understood to permit." *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29). "Why and how the regulation burdens the right are central to this inquiry." *Id*.

In *Range*, the Third Circuit noted the government's reliance on the Supreme Court's statement in *Heller* that " 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.' 554 U.S. at 626, 128 S.Ct. 2783." *Range*, 124 F.4th at 228. A plurality of the Supreme Court reiterated that point in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). In his concurring opinion in *Bruen*, Justice Kavanaugh, joined by the Chief Justice, wrote that felon-in-possession prohibitions are "presumptively lawful" under *Heller* and *McDonald*. 597 U.S. at 81, 142 S.Ct. 2111 (quoting *Heller*, 554 U.S. at 626-27 & n.26). Nevertheless, the Third Circuit went forward in *Range*.

The Third Circuit observed that "[s]ection 922(g)(1) is a straightforward 'prohibition[] on the possession of firearms by felons.' " *Range*, 124 F.4th at 228 (*citing Heller*, 554 U.S. at 626). The Court further observed that since 1961 "federal law has generally prohibited individuals convicted of crimes punishable by more

than one year of imprisonment from possessing firearms." *Range*, 124 F.4th at 229. The earliest version of that statute, the Federal Firearms Act of 1938, applied only to *violent* criminals. *Id*. "[T]he current federal felony firearm ban differs considerably from the [original] version .... [T]he law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *Range*, 124 F.4th at 229 (*citing United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) and *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)).

The Court in *Range* rejected any claim that the 1961 law was sufficient to demonstrate a historical tradition of regulation.[4] And even if the 1938 Act were "longstanding" enough to warrant *Heller*'s assurance--a dubious proposition given the *Rahimi* Court's focus on Founding-era sources, 144 S. Ct. at 1899-1900, and the *Bruen* Court's emphasis on Founding-and Reconstruction-era sources, 597 U.S. at 34, 59-60 --Appellant would not have been the type of prohibited person under that law since his prior convictions were entirely dissimilar to those included in the

[4] "Whatever timeframe the Supreme Court might establish in a future case, *see Rahimi*, 144 S. Ct. at 1898 n.1, we are confident that a law passed in 1961--some 170 years after the Second Amendment's ratification and nearly a century after the Fourteenth Amendment's ratification--falls well short of "longstanding" for purposes of demarcating the scope of a constitutional right. So the 1961 iteration of § 922(g)(1) [felon in possession] does not satisfy the Government's burden." *Range*, 124 F.4th at 229.

1938 law. *See Range*, 124 F.4th at 229.

Older historical analogues also fail. In *Rang*e, the United States argued that "legislatures traditionally used status-based restrictions" to disarm certain groups of people. *Range*, 124 F.4th at 229. Apart from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Third Circuit still found that the United States did not successfully analogize those groups to *Range. Id*. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks did nothing to prove that Range is part of a similar group today. *Id.* Further, this Court found that such analogies would be "far too broad[]." *Range*, 124 F.4th at 229-30 (*citing Bruen*, 597 U.S. at 31 (noting that historical restrictions on firearms in "sensitive places" do not empower legislatures to designate any place "sensitive" and then ban firearms there)).[55]

Admittedly, *Rahimi* did sanction disarming (at least temporarily) physically dangerous people. *Range*, 124 F.4th at 230 The law that it upheld required "a finding that [the defendant] represents a credible threat to [someone else's] physical safety."

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[5] The Third Circuit noted that colonial laws disarmed Loyalists for helping the British army or "bearing arms against" the Continental Congress, noting that the colonies reasonably feared that Loyalists might take up arms again. But there was no such basis to fear that Range was disloyal to his country, nor is there reason to believe that Appellant is disloyal to the United States. *Range*, 124 F.4th at 229-30.

18 U.S.C. § 922(g)(8)(C)(i); *Rahimi*, 144 S. Ct. at 1894, 1896, 1898, 1901-02. It did so "because the Government offer[ed] ample evidence" of a tradition of disarming people who "pose[] a clear threat of physical violence to another." *Id*. at 1898, 1901; *accord id*. at 1898 ("credible threat to the physical safety of others"). Here however, there is no evidence that Appellant poses a physical danger to others.

Thus, the State's only other option is to try to stretch dangerousness to cover all felonies and controlled substance violations. *Rahimi* left open the possibility of "banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." Id., 144 S. Ct. at 1901. Such an argument would conclude that those convicted of serious crimes, as a class, can be expected to misuse firearms. But as the Third Circuit observed, "[e]ven if that categorical argument could suffice to uphold the original 1938 felon-in-possession ban, it does not support the current one," nor would it support the nearly identical ban as set forth in 11 Del. C. § 1448. *Range*, 124 F.4th at 230. Again, it is "far too broad[]." *Id.* (citing *Bruen*, 597 U.S. at 31). It operates "at such a high level of generality that it waters down the right." *Rahimi*, 144 S.Ct. at 1926 (Barrett, J., concurring).

In *Range*, the Third Circuit considered the United State's argument that "the Founding generation determined that many criminal offenses were of such 'gravity' that they should 'expose offenders to the harshest of punishments, including death.' " *Range*, 124 F.4th at 230. Such capital punishments included some non-violent

offenses. *Id.* at 230-31. This Court rejected that argument. Yet the Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here--de facto lifetime disarmament for all felonies and controlled substance offenses--is rooted in our Nation's history and tradition. Though dissenters read *Rahimi* as blessing disarmament as a lesser punishment generally, the Court did not do that. Instead, it authorized temporary disarmament as a sufficient analogue to historic temporary imprisonment *only* to "respond to the use of guns to threaten the physical safety of others." Compare *Rahimi*, 144 S. Ct. at 1902, *with United States v. Diaz*, 116 F.4th 458, 469-70 (5th Cir. 2024) (similarly broad reasoning); and *Range*, 124 F.4th at 231.

As applied to Appellant, the State cannot show that the historical tradition demonstrates analogical equivalents to the permanent ban on his possession of firearms. The facts and circumstances of his case do not demonstrate the constitutional permissibility of a permanent ban on his possession of firearms as called for by 11 Del. C. § 1448.

For the reasons stated, 11 Del. C. § 1448 is both facially unconstitutional and unconstitutional as applied to Appellant.

CONCLUSION

For the foregoing reasons, Appellant Lamotte Johns respectfully requests that the Court order that the physical evidence seized as a result of the search warrant be suppressed, that conviction on all counts be reversed and that a new trial be ordered. Appellant also requests that his convictions for 1) prohibited person not to possess a firearm, 2) prohibited person not to possess ammunition and 3) receipt of a stolen firearm be vacated for all of the above stated reasons.

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Respectfully Submitted:

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