EFiled: Mar 12 2026 04:07PM EDT
Filing ID 78713193
Case Number 373,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LENELL T. ABBOTT,	)	
	)	
Defendant—Below,	)	
Appellant,	)	
	)	
v.	)	No. 373, 2025
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff—Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Abbott was arrested on May 5, 2023, and subsequently he was repetitiously indicted on several weapons and drug offenses, along with one count of Reckless Endangering 1st Degree and one of Criminal Mischief < $1000. A1, D.I.#1; A2–3, D.I.#5, #18, #24; A15–29. Roughly a month before trial, the State entered a *Nolle Prosequi* on the Reckless Endangering and Criminal Mischief Counts. A5, D.I.#36. Abbott moved for relief from prejudicial joinder on December 13, 2024, which was granted, severing the two drug charges into DUC# 2305002463B before trial. A5–6, D.I.#40, A12.

On December 17, 2024, after waiving jury trial the day before, Abbott proceeded to trial on three counts in DUC# 2305002463A, all of which were alleged to be in violation of 11 *Del. C.* § 1448. A6, D.I.#42, #46; A40. Two of the counts alleged the possession of handguns and the third alleged the possession of ammunition. A26–28. The trial court reserved verdict pending briefing on the disputed applicability of a higher minimum mandatory sentence relating to one alleged prior violent felony. A6, D.I.#46–50.

On April 9, 2025, the trial court found Abbott guilty on all three counts, but found that the State had not met its burden of proof on one of the two prior violent felonies it alleged, finding in favor of trial counsel's arguments on the issue. A8,

D.I.#54; A231–35. On April 15, 2025, the State filed a *Nolle Prosequi* on both counts in DUC# 2305002463B.

On August 12, 2025, Abbott was sentenced to serve five years of imprisonment on one firearm count, three of which were minimum mandatory, followed by probation. A9, D.I.#60; A253. Abbott was sentenced to serve another consecutive three years of minimum mandatory imprisonment on the second firearm count, followed by probation. A253. On the ammunition count, Abbott was sentenced to probation. A254.

This is Abbott's Opening Brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. Abbott's three convictions under 11 *Del. C.* § 1448 should have merged into a single count in sentencing, as he possessed the two firearms and ammunition simultaneously within his home for self-defense. While this Court has yet to fully analyze the merger of multiple firearms convictions under § 1448, the persuasive weight of precedent from around the country reflects that both federal and state-level analogues to § 1448 have been found to be ambiguously worded as to the unit of crime, often requiring application of the rule of lenity and merger of the multiple counts of firearm possession. For both statutory and legislative reasons, similar ambiguity exists within § 1448, which should produce the same conclusion. Examination of § 1448's ambiguity alongside the persuasive weight of precedent across jurisdictions should also lead this Court to reconsider its prior rejection of merger between firearm and ammunition counts under § 1448.

STATEMENT OF FACTS

Officer Patrick Campbell

Campbell is a Delaware State Police Detective. A90. He testified that he first met Abbott on May 5, 2023, at Abbott's residence, 43 Cathy Avenue in Dover. A91–92. That morning, Abbott invited Campbell into his residence and when asked about firearm possession, he directed Campbell to retrieve a handgun, which contained ammunition, from an air vent in his home. A93–94. Campbell retrieved both the firearm and ammunition and preserved them as evidence. A95. He also recorded audio of Abbott directing him to the firearm, which was played at trial as the State's Exhibit 2. A101.

Campbell took Abbott into custody for a Mirandized interview at State Police Troop 3, played during trial as State's Exhibit 3, during which Abbott acknowledged possessing the firearm because he had been frightened by a nearby shooting. A102–04. Prior to embarking upon an additional search of the residence, Campbell spoke again with Abbott, who told him there was a second gun in the residence that was also concealed in the bathroom air conditioning vent. A104–05. As directed by Abbott, police recovered the second gun, along with ammunition, from the bathroom air conditioning vent, and took them into evidence. A105–07.

Through Campbell, the State presented a sentencing order as evidence of a 2008 Delaware conviction for Possession with Intent to Deliver a Schedule I

Controlled Substance, marking it as State's Exhibit 11. A121. Campbell also testified as to documentation relating to Abbott having a pair of 2001 convictions in Virginia. A119–22.

On cross-examination, Campbell testified that Abbott had been very polite, very respectful, and unexpectedly cooperative. A123–25. Campbell affirmed that Abbott had reported he was fearful because of recent shootings in his mobile home park. A126. Though it was against Abbott's best interests, Campbell acknowledged he was "very helpful" in surrendering his weapons by promptly telling police where to find them. A124–25.

Officer William Miller

Miller is also an officer with the Delaware State Police. A128. Miller testified that he transported the first firearm and ammunition that Campbell recovered on the morning of May 5, 2023. A129–32.

Officer Colby Cox

Cox is also an officer with the Delaware State Police. A134. Cox testified he was working in the Evidence Detection Unit and received the first firearm and ammunition recovered after Miller transported them to Troop 3. A135–42.

Officer Brandon Yencer

Yencer is also an officer with the Delaware State Police. A143. On May 5, 2023, he collected a DNA sample from Abbott using two swabs. A144–46.

Officer Ryan Wright

Wright is also an officer with the Delaware State Police. A147. On May 5, 2023, he handled evidence processing in Abbott's case and participated in a search of Abbott's residence. A149–50. Wright recovered the second handgun and ammunition from the residence and preserved them in evidence. A150–54; A157. Wright found documents belonging to Abbott inside the residence but did not observe anyone else's possessions in the home, nor evidence of any other resident there. A156–57.

Wright later swabbed the recovered firearms for DNA. A158–59. He submitted those swabs, together with Abbott's DNA sample, to the Division of Forensic Science for testing. A171.

Bethany Netta

Netta is a senior forensic DNA analyst at the Division of Forensic Science. A176–77. She tested the DNA samples from Abbott's case and authored a report on her testing and conclusions. A185–86. She testified that swabs from both firearms matched Abbott's DNA profile with an extremely high degree of statistical correlation. A188–89.

I. ABBOTT'S THREE CONVICTIONS UNDER 11 DEL. C. § 1448, FOR SIMULTANEOUSLY POSSESSING TWO FIREARMS AND AMMUNITION IN HIS HOME, ARE MULTIPLICITOUS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSITUTION.

Question Presented

Whether Abbott's three convictions under 11 *Del. C.* § 1448, for simultaneously possessing two firearms and ammunition in his home, are multiplicitous in violation of the double jeopardy clause of the United States Constitution. This matter should be reviewed on direct appeal in the interests of justice[1] because it presents a highly consequential question of a substantial right that has not been squarely addressed by prior precedent and analysis.[2]

Standard and Scope of Review

Claims of multiplicity not raised in the trial court are reviewed for plain error.[3] "A multiplicity violation may constitute plain error."[4] "Further, 'plain error review in a multiplicity challenge not contesting the facts is effectively *de novo*.'"[5]

[1] Pursuant to Delaware Supreme Court Rule 8.
[2] See *Patrick v. State*, 261 A.3d 1282, 1290 (Del. 2021); *Brown v. State*, 2021 WL 2588923 (Del. June 24, 2021); *Buchanan v. State*, 981 A.2d 1098 (Del. 2009).
[3] *Patrick* at 1287 (citing *Mills v. State*, 201 A.3d 1163, 1167 (Del. 2019)).
[4] *Handy v. State*, 803 A.2d 937, 940 (Del. 2002).
[5] *Patrick* at 1287 (quoting *White v. State*, 243 A.3d 381, 397 (Del. 2020)).

Merits of Argument

"The Double Jeopardy Clause of the United States Constitution states that no '... person [shall] be subject for the same offense to be twice put in jeopardy of life or limb....'"[6] The principle protects "(1) against successive prosecutions; (2) against multiple charges under *separate statutes;* and (3) against being charged multiple times under the *same statute*."[7]

"Multiplicity is 'the charging of a single offense in more than one count of an indictment.' Dividing one offense into 'multiple counts of an indictment violates the double jeopardy provisions of the constitutions of the State of Delaware and of the United States.'"[8] This Court has downplayed the applicability of *Blockburger v. United States*[9] and 11 *Del. C.* § 206 (which effectively codifies *Blockburger*),[10] when examining "one violation of a single statute or two discrete violations of that same statute had occurred."[11]

In assessing multiplicity in possessory offenses, this Court approvingly cited *Rashad v. Burt* for the formulation that "if the possessions are sufficiently

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[6] *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002) (quoting U.S. Const. amend. V.); see also Del. Const. art. I, § 8.
[7] *Id.* at 1285 (citations omitted).
[8] *Id.* (citations omitted).
[9] *Blockburger v. U.S.*, 284 U.S. 299 (1932).
[10] *Patrick* at 1289.
[11] *Williams* at 1286 (citing *Rashad v. Burt*, 108 F.3d 677, 680 (6th Cir. 1997)). See also *Patrick* at 1289.

differentiated by time, location or intended purpose, then there is no double jeopardy violation for convicting someone for possession of the same substance. This test consists of factors a court may use in determining, under the circumstances, whether two violations of same statute have occurred."[12]

"[W]hen a defendant is punished multiple times for a single act, we generally engage in statutory interpretation to decide whether the General Assembly intended multiple punishments for the single criminal act."[13] "[T]he touchstone for multiplicity is legislative intent."[14]

a. ***Prior Delaware precedent has not analyzed merger of two firearms under § 1448.***

In 2021, this Court noted in *Brown v. State* that "[w]e leave for another day the question ostensibly answered, but without analysis or the citation of authority, in *Buchanan v. State*: whether 11 *Del. C.* § 1448 contemplates separate PFBPP counts—and separate sentencing upon conviction—for the simultaneous possession of multiple firearms."[15] Subsequently, while *Buchanan* was cited approvingly in *Patrick v. State*,[16] the *Patrick* case analyzed a multiplicity challenge to prohibited

[12] *Williams* at 1286 (quoting *Rashad* at 681) (internal quotations omitted). See also *Patrick* at 1288.
[13] *Patrick* at 1288.
[14] *Handy* at 939.
[15] *Brown v. State*, 2021 WL 2588923 (Del. June 24, 2021) (citing *Buchanan v. State*, 981 A.2d 1098 (Del. 2009)).
[16] *Patrick* at 1290.

possession of a single firearm under § 1448, which had been charged as two counts based upon different reasons for prohibition. The controversy presented by the present case was not examined directly and was not argued by the parties in *Patrick*, so it should not be resolved indirectly by *Patrick*. Instead, the *status quo ante* identified in *Brown* persists, and the merger issue under § 1448 is ripe for further examination.

b. ***Many other states have embraced federal precedent to guide analysis of analogous statutes.***

The federal "felon-in-possession" firearm statute, 18 U.S.C. § 922(g), has previously been examined in Delaware and found to be, though not identical, "the same as or equivalent to" the Delaware offense of Possession of a Firearm by a Person Prohibited under 11 *Del. C.* § 1448.[17] "[T]he decisional law of other states may be persuasive, especially when there is a 'historical convergence' between the laws or constitutional provisions at issue."[18]

Consequently, it is of great significance that the federal circuit courts have developed a unified approach to the federal analogue, § 922(g), hinging upon the lack of clear legislative intent to identify the unit of prosecution as either one or more firearms. The Supreme Court of Nevada noted that:

> The federal courts have achieved rare unanimity on the unit of prosecution 18 U.S.C. § 922(g)(1) authorizes in

[17] *State v. Goodman*, 2021 WL 1690028 at *3 (Del. Super. April 29, 2021).
[18] *Capriglione v. State ex rel. Jennings*, 279 A.3d 803, 808 (Del. 2021).

> felon-in-possession cases. Every United States circuit court of appeals has deemed section 922(g)(1) ambiguous as to its unit of prosecution, applied the rule of lenity as stated in *Bell*, 349 U.S. at 83,[19] and held that "when a defendant's possession of multiple firearms is simultaneous and undifferentiated, the government may only charge that defendant with one violation of § 922(g)(1) ... regardless of the actual quantity of firearms involved."[20]

This uniform federal approach was catalogued at length by the Mississippi Supreme Court in *McGlasten v. State*,[21] which then turned to the impact of federal precedent upon many state jurisdictions. *McGlasten* catalogued seven states where "any firearm" language tracking federal law led to application of the same principles in favor of merger,[22] and four states where examination of "a firearm" language did not support merger.[23]

c. ***§ 1448 is ambiguous and thus Delaware should follow other jurisdictions in resolving the ambiguity in favor of lenity.***

In reviewing 11 *Del. C.* § 1448 in comparison with other jurisdictions' laws, the relevant prohibition on conduct is found in § 1448 (b): "Any prohibited person as set forth in subsection (a) of this section who knowingly possesses, purchases, owns or controls a deadly weapon or ammunition for a firearm while so prohibited

[19] *Bell v. U.S.*, 349 U.S. 81, 83 (1955).
[20] *State v. Fourth Jud. Dist. Ct*., 481 P.3d 848, 852 (Nev. 2021) (quotation omitted)
[21] *McGlasten v. State*, 328 So.3d 101, 105 (Miss. 2021).
[22] *Id.* at 105 (citations omitted).
[23] *Id.* at 104–05 (citations omitted).

shall be guilty of possession of a deadly weapon or ammunition for a firearm by a person prohibited." § 1448 (a) sets the scope of legal prohibitions in Delaware: "Except as otherwise provided in this section, the following persons are prohibited from purchasing, owning, possessing, or controlling a deadly weapon or ammunition for a firearm within the State…"

Penalties are set by § 1448 (c):

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

Although § 1448 refers to "a deadly weapon" and "a firearm", the distinction between single and multiple weapons is both less significant and less clear than it may seem. At the time of the general revision of the Delaware Criminal Code in 1972, the following conduct constituted a violation of § 1448:

> Any person, having been convicted in this State or elsewhere of a felony or a crime of violence involving bodily injury to another, whether or not armed with, or having in his possession any weapon during the commission of such felony or crime of violence, or any person who has ever been committed for a mental disorder to any hospital, mental institution or sanatorium (unless he possesses a certificate of a medical doctor or psychiatrist

> licensed in this State that he is no longer suffering from a mental disorder which interferes with or handicaps him in the handling of a firearm), or any person who has been convicted for the unlawful use, possession or sale of a narcotic, dangerous drug, or central nervous system depressant or stimulant drug as those terms were defined prior to the effective date of the Uniform Controlled Substance Act in January 1973, or of a narcotic drug or controlled substance as defined in Chapter 47, Title 16, Delaware Code, who purchases, owns, possesses, or controls **any deadly weapon** is guilty of a class E felony."[24]

That usage of "any" persisted in the code until 1992, when § 1448 was amended nearer to its present structure, and the usage of "any" shifted to "a", as seen in the revised § 1448(b): "Any prohibited person as set forth in Subsection (a) hereof who knowingly possesses, purchases, owns, or controls **a deadly weapon** while so prohibited shall be guilty of possession of a deadly weapon by a person prohibited."[25] Yet the legislative history reflects that the change from "any" to "a" appears unrelated to the purpose of the bill and may have been entirely inadvertent. The Synopsis of the bill stated that:

> In past years, great attention has been given to removing weapons from the hands of criminals. The purpose of this Bill is to create a balanced approach to **curtailing access to weapons by persons who should not have access to them.**

[24] 58 Laws 1972, ch. 497, § 1 (emphasis added).
[25] 68 Laws 1992, ch. 422, § 1 (emphasis added), attached to Appellant's Opening Brief as Exhibit A.

> This Bill **creates a new class of prohibited persons**, that class consisting of persons who committed offenses as juveniles which would have otherwise been felonies and which would have otherwise made them prohibited persons if adults. However, this prohibition is automatically lifted at the age of twenty-five (25) if no further offenses occur.
>
> This Bill also allows persons convicted of misdemeanors to shed their prohibition after five (5) years.
>
> The provisions of this Bill **track favorably with Federal Law** and was jointly drafted by the Delaware State Police and the Delaware Sportsman's Association to address problems since the original legislation was enacted.[26]

The bill's focus on *who* was prohibited is also demonstrated by the House Public Safety Committee Meeting Minutes from June 10, 1992,[27] during which the bill, then HB 558, was discussed:

> HB 558, providing certain punishments upon conviction for the crime of possession of a deadly weapon by prohibited persons, **creates a new class of persons** prohibited from possessing and purchasing a deadly weapon.
>
> []
>
> Rep. B. Ennis, co-sponsor of HB 558, related that this legislation was written in the language found in Title 11 of the Delaware Code. **This legislation clarifies who is prohibited from possessing deadly weapons**, which was jointly drafted by the Delaware Sportsman's Association and the Delaware State Police.

[26] 68 Laws 1992, ch. 422, § 1, Op. Br. Ex. A.
[27] Attached to Appellant's Opening Brief as Exhibit B.

> Motion to release was made by Rep. Davis, seconded by Rep. Houghton. The vote was three (3) on its merits and one (1) unfavorable. HB 558 was released from committee.[28]

The intent that the bill "track favorably with federal law",[29] as noted in the Synopsis, is significant because as of 1992, federal law reflected the same persistent ambiguity discussed *supra*.[30] There was no intent noted to create a distinction with federal law. Instead, the legislative history reflects convergence with the federal law, which is ambiguous on the issue.

Moreover, the revisions of Delaware's statute were made in light of specific, longstanding statutory authority guiding construction of Delaware's Criminal Code. Most pertinent for the present case, 11 *Del. C.* § 223. *Words of gender or number*, states that:

> Unless the context otherwise requires, **words denoting the singular number may, and where necessary shall, be construed as denoting the plural number**, **and words denoting the plural number may, and where necessary shall, be construed as denoting the singular number,** and words denoting the masculine gender may, and where necessary shall, be construed as denoting the feminine gender or the neuter gender.

In effect, this provision should serve to discourage Delaware courts from investing great meaning in incidental constructions of single or plural phrasing such

[28] Op. Br. Ex. B at *2 (emphasis added).
[29] Op. Br. Ex. A at *2.
[30] Op. Br. at *10–11. See, e.g., *U.S. v. Berry*, 977 F.2d 915, 918 (5th Cir. 1992).

as "a" versus "any". As part of the Criminal Code, § 1448 should be read *in pari materia* with § 223, which is found in Chapter 2, "General Provisions Concerning Offenses." Moreover, this approach would be consistent with this Court's refusal to focus its analysis upon the distinction between "a" versus "any" in *Mills v. State*.[31]

"[C]riminal statutes must be construed liberally in favor of the accused and strictly against the State."[32] "[A]mbiguity must be resolved in favor of the defendant and against the State."[33] Careful examination of the history of 11 *Del C.* § 1448 and § 223 fully supports the application of lenity as articulated in *Bell*:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.

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[31] *Mills v. State*, 201 A.3d 1163, 1170–71 (Del. 2019).
[32] *State v. Ross*, Del. Ct. of Gen. Sessions, 4 Terry 490, 50 A.2d 410 (1947).
[33] *State v. Sharon H.*, 429 A.2d 1321, 1328 (Del. Super. 1981) (citing *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978)) (additional citations omitted).

11 *Del C.* § 1448(e) imposes significant minimum mandatory penalties, including ten years of incarceration in some cases, based upon the prohibition in question. Substantial multi-year minimum mandatory prison sentences should not be imposed multiplicitously based upon ambiguities within the Delaware Criminal Code; this is a constitutional violation of Abbott's right against double jeopardy.

In light of the violation, this Court should adopt the procedure described in *McGlasten*: "[t]he correct and widely followed approach to dealing with multiplicitous counts is to merge the wrongly charged multiplicitous counts into one single count of conviction. This entails vacating all but one of McGlasten's four convictions and resentencing him on the remaining count of conviction."[34]

d. ***Prior Delaware precedent on the merger of a firearm with ammunition under § 1448 should be revisited.***

The arguments *supra* also suggest that this Court should revisit its holding on merger of a firearm and ammunition under § 1448 in *Brown v. State*.[35] Though the Order affirming the ruling below[36] specifically found that *Buchanan* did not resolve the merger issue because *Buchanan* lacked "analysis or the citation of authority" on the issue, the lower court, approaching the issue *sua sponte*, treated *Buchanan* as

[34] *McGlasten* at 108.
[35] *Brown v. State*, 2021 WL 2588923 (Del. June 24, 2021).
[36] *State v. Brown*, 2020 WL 5122968 (Del. Super. Ct. Aug. 20, 2020) (written order issued August 31, 2020).

settling the issue.[37] It does not appear that review of the matter included some of the pertinent legislative history or the statutory ambiguity surrounding what Delaware intended as the "unit" of the offense under § 1448 (especially in light of § 223), and the trial court had discarded with comparison[38] of the federal statute as appropriate even though the federal prohibition on both firearms and ammunition under 18 U.S.C. § 922(g) should have afforded it greater weight.[39]

This Court should apply lenity to the ammunition count, in addition to the firearm counts, and remand Abbott to the Superior Court for sentencing on a single violation of § 1448.

[37] *State v. Brown* at *3.
[38] *State v. Brown* at *4.
[39] See, e.g., *U.S. v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998).

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated and reversed, remanding the case to the trial court for resentencing.

Respectfully submitted,

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DATED: March 12, 2026