State of Michigan
In the Supreme Court

The People of the State of Michigan	
Plaintiff-Appellee,	MSC No. 163937
v.	COA No. 358825
Lashawn Dewon Monroe	Wayne County Circuit Court
Defendant-Appellant.	Case No. 16-002428-01 FC

Defendant-Appellant Lashawn Dewon Monroe's Reply Brief

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I. A conviction and sentence obtained in violation of the Double Jeopardy Clause is void. Plain error does not apply to void convictions or sentences.

The prosecution's answer contends that Mr. Monroe's application should be denied because "there is absolutely no way that defendant can meet his burden under the plain error test." Pr. Br. 10. However, the constitutional error in this case "implicates the very authority of the state to bring the defendant to trial." *People v New*, 427 Mich 482, 495 (1986). As such, plain error has no bearing on whether Mr. Monroe's conviction and sentence violate Double Jeopardy and no bearing on whether he is entitled to relief.

Plain error does not apply when the error goes to the State's legal authority to enter judgment and sentence the defendant. In *People v Washington*, 508 Mich 107 (2021), this Court recently considered a defendant's successive 6.500 motion, which sought relief from a sentence that had been imposed while the trial court lacked authority to resentence the defendant. This Court held that Mr. Washington's sentence was void because it had been imposed before the Court of Appeals' order remanding for resentencing became effective and before the trial court's authority to modify the judgment initially appealed from had been restored. *Id.* at 120, 127, citing MCR 7.215(F)(1)(a); MCR 7.305(C)(6)(a). Like Mr. Monroe's sentence, Mr. Washington's sentence was void. The error at issue in both cases existed because the trial court lacked the authority to impose any sentence for the offense, and "a lack of jurisdiction renders an action void." *Id.* at 118. Plain error was inapplicable because "there was no valid sentence to review." *Id.* at 131.

In *Washington*, the prosecution asserted that the error had been "forfeited and waived" because Mr. Washington had not objected in the trial court to a lack of subject-matter jurisdiction. MSC No. 160707, # 110 (Plaintiff-Appellee's Supp. Br.), p. 42. If *Washington* had followed the logic the prosecution advocates in Mr. Monroe's case, Pr. Br. 20, the jurisdictional defect at sentencing would have been reviewed for plain error because the issue of subject-matter jurisdiction was "unpreserved," even though the error could not be "waived." But although Mr. Washington was much further into the appellate process than

Mr. Monroe when he initially raised this "unpreserved" jurisdictional error, this Court did not analyze Mr. Washington's sentence for plain or harmless error before it vacated the sentence.

The Court did not overlook plain error review. *Washington* explained: "Unlike other errors that a defendant eventually loses the ability to raise, the lack of subject-matter jurisdiction cannot be ignored for purposes of finality because the existence of subject-matter jurisdiction goes to the trial court's very authority to bind the parties to the action at hand." *Id.* at 132. Harm-based review is simply inapplicable to errors that deprive the trial court of subject-matter jurisdiction. See *In re LT*, __ Mich App __ (2022) (Docket No. 356667), slip op at 8 (trial court lacked authority to conduct criminal contempt trial without a prosecutor, requiring conviction and sentence to be vacated for lack of jurisdiction).

Washington's explanation for why the bar against successive 6.500 motions does not limit claims of subject-matter jurisdiction applies with the same force to 'unpreserved' Double Jeopardy violations:

> The trial court's **judgment of sentence was void and defendant's failure to raise the issue** on direct appeal, on his first motion for relief from judgment, or in a habeas petition **cannot render the judgment of sentence valid**.

Id. at 131-132 (emphasis added).

This Court has recognized that a Double Jeopardy violation, like subject-matter jurisdiction, goes "beyond the factual determination of a defendant's guilt and implicate[s] the very **authority** of the state to bring a defendant to trial." *New*, 427 Mich at 491-492 (emphasis in original), quoting *People v White*, 411 Mich 366, 398 (1981) (MOODY, J., concurring). Double Jeopardy falls within the class of constitutional errors that "deprive the court of jurisdiction" and "impugn the very authority of the court to try and convict the criminal defendant." *People v Carpentier*, 446 Mich 19, 47 (1994) (RILEY, J., concurring in part). "***Thus a jurisdictional defect or its equivalent has been found when the defendant raises the issue of … double jeopardy***." *Id.* at 48 (emphasis added).

As such, a conviction or punishment that violates Double Jeopardy will not stand simply because the trial court's violation of Double Jeopardy is not 'preserved.' The State lacks "the right … to prosecute the defendant in the first place." *White*, 411 Mich at 398. A defendant's failure to object before the trial court to a Double Jeopardy violation "cannot render the judgment of sentence valid." *Washington*, 508 Mich at 132. The violation "cannot be ignored" because it fundamentally voids the court's authority to convict and sentence the defendant. *Id.*

In *People v Carines*, 460 Mich 750, 764 (1999), the Court held that constitutional errors could be subject to plain error because "[t]he policy underlying the issue forfeiture rule provides no basis for distinguishing constitutional from nonconstitutional error." But those policy concerns are not present when Double Jeopardy prohibits the state from convicting or punishing the defendant. A defendant would gain no strategic benefit by harboring a Double Jeopardy violation and needs no incentive to timely object. An objection conclusively terminates the prosecution whenever it is raised.

This Court has not yet directly decided this question. Mr. Monroe acknowledges that the Court of Appeals has previously applied plain-error review to Double Jeopardy violations. *See*, *e.g.*, *People v Wilson*, 242 Mich App 350, 360 (2000). But even under plain-error review, "***there would necessarily exist plain error affecting defendants' substantial rights***" where the trial court was deprived of jurisdiction by a Double Jeopardy violation. See *People v Kanaan*, 278 Mich App 594, 602 (2008) (emphasis added).

II. The relationship between Felony Firearm and Felon in Possession is unique because the 1976 Legislature did consider and exclude a felon's unlawful possession of a weapon when it enacted Felony Firearm. The 1992 Legislature created ambiguity by enacting a different statute, Felon in Possession, to regulate that behavior.

Adopting the prosecution's interpretation of Felony Firearm would require the Court to turn a blind eye to the context in which the statute was enacted and ignore the Legislature's explicit intent to create an exception for the mere unlawful possession of a firearm by a felon. According to the prosecution, any analysis that goes beyond identifying the excepted felonies by their section number is unnecessary because "MCL 750.224f is not and never has been included on the list of exempted felonies described in MCL 750.227b." Pr. Br. 36. This simplistic construction of the Michigan Compiled Laws as a series of numbers—750.227, 750.227b, 750.224f—ignores the substantive behavior those statutes regulate.

When interpreting a statute, the Court's "primary goal is to ascertain and give effect to the Legislature's intent." *People v Sharpe*, 502 Mich 313, 326 (2018), citing *People v Gardner*, 482 Mich 41, 50 (2008). Therefore, "[t]he controlling test as to the meaning of a statutory provision is always the legislative intent when fairly ascertainable." *Iron Street Corp v Unemployment Compensation Committee*, 305 Mich 643, 655 (1943). "But the 'intent' referred to is the one entertained by the legislature at the time of the passage of the act, and not the intent expressed by a subsequent amendment." *Id.*

There is no question that the behavior underlying Felon in Possession—a felon's unlawful possession of a firearm—***was excluded as a predicate felony*** at the time the Legislature enacted Felony Firearm in 1976. This conclusion comes from the plain texts of Felony Firearm and its contemporaries MCL 28.422 (setting forth pistol licensing requirements), MCL 750.227 (punishing concealed carry without a license), and MCL 750.232a (punishing acquisition of a pistol without a license); it is not an obscure interpretation of legislative materials. App. Corr. Supp. Br 39-40; cf. Pr. Br. 35. "A statute must be read in conjunction with other relevant statutes to ensure that the

legislative intent is correctly ascertained." *Bush v Shabahang*, 484 Mich 156, 167 (2009).

Since its inception, Felony Firearm (MCL 750.227b) has excluded CCW (MCL 750.227)—and, by extension, a felon's unlawful possession of a firearm. Until 1992, a felon's right to possess a firearm was governed by MCL 28.422 and violations were punished through CCW. See App. Corr. Br. 40-41. In 1992, the Legislature replaced CCW—the listed exception to Felony Firearm— with Felon in Possession (MCL 750.224f) as the touchstone for violations of MCL 28.422 by felons. See App. Corr. Supp. Br. 39-49. But the 1992 Legislature did not consider or acknowledge that its enactment of Felon in Possession might expand the conduct punished by Felony Firearm. See id. at 45-49.

The question *People v Calloway*, 469 Mich 448 (2003), overlooked, and which was essential to determining whether the Legislature authorized multiple punishment, was whether the 1992 Legislature changed what behavior the 1976 Legislature excluded from serving as a predicate to Felony Firearm. This Court should revisit and overturn *Calloway* because legislative intent dictates whether multiple punishments for the same offense violates Double Jeopardy. A thorough consideration of Felony Firearm and Felon in Possession in light of their statutory contexts and legislative histories demonstrates that no Legislature ever intended for Felon in Possession to serve as a predicate offense for Felony Firearm. And no Legislature has authorized multiple punishment for these offenses.

The prosecution, like *Calloway*, erroneously defers to the holdings in *People v Mitchell* and its predecessors to conclude that Felon in Possession must be a predicate offense of Felony Firearm. Pr. Br 36-37; *Calloway*, 469 Mich at 451-452. But the situation confronted by *Calloway* was unique because Felon in Possession was a new statute that regulated behavior previously punished as CCW, an exception to Felony Firearm. The felonies at issue in *Wayne County Prosecutor*, *Morton*, and *Sturgis* had always been predicate offenses. And *Mitchell* interpreted the actions of the 1990 Legislature which, unlike the 1992 Legislature that enacted Felon in Possession, had specifically addressed and amended Felony Firearm.

The three predecessor cases to *Mitchell* interpreted the relationship between Felony Firearm and predicate offenses that already existed in 1976. Nothing had changed about the text of Felony Firearm or about the context of the Michigan Penal Code to raise a question about the statutory language when those opinions were entered. Thus, those cases were correct to focus exclusively on the plain language of Felony Firearm, and Mr. Monroe does not argue otherwise. See *Wayne County Prosecutor v Recorder's Court Judge*, 406 Mich 374, 387-388 (1979) (Armed Robbery and Second-Degree Murder could serve as predicate offenses); *People v Morton*, 423 Mich 650, 660 (1985) (multiple counts of Assault with a Dangerous Weapon could be charged as an equivalent number of violations of Felony Firearm); *People v Sturgis*, 427 Mich 392, 405-406 (1986) (Felonious Assault could serve as independent predicate offense despite concurrent charge of CCW).

People v Mitchell differed from these cases because it marked the first time the Court considered whether a felony (MCL 750.535b) enacted after 1976 could serve as a predicate to Felony Firearm. 456 Mich 693, 696-697 (1998). *Mitchell* concluded that the Legislature had intended exceptions only for felonies "explicitly enumerated in the felony-firearm statute." *Id.* at 698. Because MCL 750.535b was not a listed exception, it was a predicate offense. *Id.*

The deciding factor in *Mitchell* was that the 1990 Legislature had explicitly addressed Felony Firearm when it enacted MCL 750.535b. 456 Mich at 697-698. "Statutes in pari materia should be construed together, particularly when, as here, they were passed or re-enacted in the same legislative session and approved by the governor on the same day." *Reed v Alger*, 327 Mich 108, 113 (1950). The 1990 Legislature had simultaneously amended Felony Firearm to exclude two ***other*** newly-created felonies from serving as predicate offenses in the same Act that created MCL 750.535b. See 1990 PA 321, 103a-106a. This made it clear that the 1990 Legislature had considered and decided ***not*** to add an exception for MCL 750.535b. *Mitchell*, 456 Mich at 697. As such, *Mitchell* correctly determined that the Legislature had intended MCL 750.535b to serve as a predicate offense.

Calloway ignored these crucial differences and instead short-circuited its analysis by simply relying on *Mitchell*'s holding without conducting its own examination of Felony Firearm and Felon in

Possession. 469 Mich at 452. *Calloway*'s ruling may have the appeal of simplicity, but it comes at the cost of accuracy and adherence to legislative intent. "[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage." *United States v Wise*, 370 US 405, 411 (1962). "A statute's history—'the narrative of the statutes repealed or amended by the statute under consideration—properly forms part of its context ….' " *Department of Talent & Economic Development / Unemployment Insurance Agency v Great Oaks Country Club Inc*, 507 Mich 212, 227 (2021) (cleaned up), quoting *People v Pinkney*, 501 Mich 259, 276 n 41 (2018). *Mitchell*'s reasoning was not applicable to Felon in Possession because the 1992 Legislature was silent as to Felony Firearm when it enacted MCL 750.224f, and, unlike the 1990 Legislature, there is no indication that its silence was intentional.

"A fair reading of legislation demands a fair understanding of the legislative plan." *King v Burwell*, 576 US 473, 498 (2015). This Court should examine the full statutory context and structure of Felony Firearm and Felon in Possession, because ambiguity arises out of the changing relationship between MCL 750.227b, MCL 750.227, and MCL 750.224f between 1976 and 1992. The 1992 Legislature did not touch Felony Firearm, but it did change the statutory structure regulating the possession of firearms by felons.

There is no indication the 1992 Legislature considered how this new Felon in Possession statute would interact with the old Felony Firearm statute. And there certainly is no indication that the Legislature intended or even realized that the existing statutory exception for CCW within Felony Firearm would no longer apply to the conduct now punished by Felon in Possession. As explained in Mr. Monroe's supplemental brief, the 1976 Legislature was concerned with deterring the use of firearms during the commission of a crime when it enacted Felony Firearm and created exceptions for the unlawful possession of firearms. App. Corr. Supp. Br. 41-43. And it is unmistakable that the 1976 Legislature intended and did provide an exception to Felony Firearm for a felon's mere unlawful possession of a firearm—the behavior subsequently defined and punished under Felon in Possession. App. Corr. Supp. Br. 38-39. By contrast, the 1992 Legislature was concerned with regulating the restoration of felons' firearms rights, not

with punishment, when it transferred the provision governing the unlicensed possession of a firearm by a felon into the newly-created MCL 750.224f. App. Corr. Supp. Br. 45-49.

Calloway's erroneous ruling has resulted in the conviction and incarceration of untold defendants for a crime the Legislature did not intend or authorize. This Court should overturn *Calloway* and interpret Felony Firearm as it was written and intended: to exclude the unlawful possession of a firearm by a felon.

Conclusion and Relief Requested

For the reasons stated above, Lashawn Dewon Monroe respectfully requests that this Honorable Court order that his conviction and sentence for Felony Firearm be vacated.

Respectfully submitted,

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Respectfully submitted,

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