STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

LASHAWN DEWON MONROE,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 358825

Circuit Court No. 16-002428-01-FH

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
MICHAEL L. MITTLESTAT (P68478)
Attorney for Defendant-Appellant
State Appellate Defender Office
3031 West Grand Blvd.
Suite 450
Detroit, MI 48202

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Lashawn Monroe seeks leave to appeal from the November 17, 2021 order of the Court of Appeals, which denied him the opportunity to challenge to his plea-based convictions and sentences for Felon in Possession of a Firearm and Felony Firearm. Appendix A.

Mr. Monroe contends, as he did before the Court of Appeals, that convicting and punishing him twice for the identical act violates his Double Jeopardy rights under the federal and state constitutions. US Const, Ams V, XIV; Const 1963, art 1, § 15.

Whether multiple convictions and punishments is authorized for the same act depends on whether the Legislature evidenced its intent to allow it. Answering this questions requires either analyzing the language of the criminal statutes at issue or

by applying the "same evidence" test of *Blockburger v United States*, 284 US 299, 304 (1932). *See also People v Miller*, 498 Mich 13, 17 (2015).

Mr. Monroe contends that Michigan courts have misread the legislative intent behind MCL 750.224f and MCL 750.227b to allow for multiple convictions and punishments for the same act. The language of the two applicable statutes, combined with the timing and legislative history behind their passages, shows that multiple punishment was not intended by the Legislature. Moreover, Michigan has misapplied the *Blockburger* test by requiring that each and every *alternative* means of both statutes match up for there to be a finding of a legislative intent to bar multiple convictions and punishments for Double Jeopardy purposes. Instead, the proper approach under *Blockburger* is to analyze and compare the two offenses as charged, and not every potential application of each statement to every hypothetical factual scenario. This Court's precedent to the contrary, including *People v Ream,* 481 Mich 223 (2008) is wrongly decided and should be reconsidered and overruled.

Properly analyzed, dual convictions and sentences under MCL 750.224f and MCL 750.227b for the same act violates Double Jeopardy. This case involves substantial questions about the validity and application of two legislative acts; it is one of significant public interest and involves the State of Michigan, and it involves legal principles of major significance to the state's jurisprudence. Therefore, review by this Court is appropriate under MCR 7.305(B)(1), (B)(2), and (B)(3).

Mr. Monroe therefore requests that this Court grant leave to appeal or peremptory relief by reversing the Court of Appeals and ordering that vacating his Felony Firearm conviction and sentence.

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

LASHAWN DEWON MONROE,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 358825

Circuit Court No. 16-002428-01-FH

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

MICHAEL L. MITTLESTAT (P68478)
Attorney for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: MICHAEL L. MITTLESTAT (P68478)
Assistant Defender
State Appellate Defender Office
3031 West Grand Blvd.
Suite 450
Detroit, MI 48202

Table of Contents

Index of Authorities

Cases

Constitutions, Statutes

Other Authorities

Statement of Jurisdiction

Defendant-Appellant was convicted in the Wayne County Circuit Court by plea of guilty and was sentenced on January 13, 2020. Defendant-Appellant timely requested the appointment of appellate counsel on February 14, 2020. Appellate counsel was initially appointed on March 9, 2020, within six months of sentencing. Prior counsel withdrew and the State Appellate Defender Office was appointed as substitute appellate counsel on August 3, 2021. An additional transcript was requested on August 3, 2021 and filed on September 1, 2021. The Court of Appeals had jurisdiction to consider Defendant-Appellant's application for leave to appeal as it was filed within 42 days of the filing of the last, timely-ordered transcript in the case. MCR 7.205(A)(2)(b)(ii). The Court of Appeals denied leave to appeal on November 17, 2021. This Court has jurisdiction to grant leave to appeal. MCR 7.303(B)(1).

Statement of Questions Presented

I. Does separate convictions and sentences for the crimes of Felony Firearm and Felon in Possession of a Firearm arising out of the same act violate prohibition against Double Jeopardy under the state and federal constitutions?

Court of Appeals answers, "No."

Lashawn Dewon Monroe answers, "Yes."

Background

Lashawn Monroe seeks leave to appeal from the November 17, 2021 order of the Court of Appeals, which denied him the opportunity to challenge to his plea-based convictions and sentences for Felon in Possession of a Firearm[1] and Felony Firearm,[2] entered in Wayne County Circuit Court before the Honorable Paul Kusic presiding. Appendix A.

Mr. Monroe contends, as he did before the Court of Appeals, that convicting and punishing him twice for the identical act violates his Double Jeopardy rights under the federal and state constitutions. US Const, Ams V, XIV; Const 1963, art 1, § 15.

According to the Presentence Investigation Report ("PSIR") prepared for in this case, the charges arose of an incident occurring on the night of March 3, 2016, when two police officers, who were searching Detroit's East Side for cars to seize under the state's forfeiture laws, stopped a car in which Mr. Monroe was a passenger.[3] As the officer began the process of seizing the car, they allegedly searched Mr. Monroe and found a handgun on his person. According to the officers, Mr. Monroe admitted at that time that he did not license to carry a concealed weapon. Agent's Description, p.2.

---

1 MCL 750.224f

2 MCL 750.227b

3 According to the PSIR, the stop was conducted pursuant to the Wayne County Prosecutors Office's "Push-Off" program of locating and seizing automobiles alleged to have been connected with drug trafficking, as a means of generating revenue for the county. PSIR, Agents Descript, p.2, A description of the program can be found here: http://www.wayne-county-forfeiture.com/content/vehicle-push-notice-wayne-county-drug-possession-or-solicitation-prostitution

Mr. Monroe was originally charged with Carrying a Concealed Weapon, Felon in Possession of a Firearm, and Felony Firearm, *Information.*

On August 4, 2016, Mr. Monroe pleaded guilty to being a Felon in Possession of a Firearm and Felony Firearm before the Honorable Dalton Roberson. PT 3-10. The plea was entered pursuant to a *Cobbs*[4] evaluation for a flat two-year prison sentence for the Felony Firearm count, concurrent with a term of 18 months of probation for the Felon- in-Possession count. *Id.* at 4-7.

On January 13, 2020, Mr. Monroe appeared for sentencing before Judge Roberson's successor judge, the Honorable Paul Kusic. ST 3-12, At that time, Judge Kusic sentenced Mr. Monroe consistently with the *Cobbs* evaluation to two years in prison for the Felony Firearm count, to run concurrently with an 18-month probationary term for the Felon-in-Possession count. *Id.* at 11-12; *Judgment of Sentence.*

Mr. Monroe filed a timely application for leave to appeal, arguing that his dual convictions and sentences for the same act violated double jeopardy principles. See *People v Lashawn Dewon Moore,* Court of Appeals No. 358825. In an order dated November 17, 2021, a two-judge majority of a Court of Appeals panel denied leave to appeal. *See* Appendix A. A third judge, the Honorable Michelle Rick, dissented in the denial and indicated she would have granted leave to appeal. *Id.*

Mr. Monroe now seeks leave to appeal in this Court.

---

4 *People v Cobbs,* 443 Mich 276 (1993).

Argument

I. Separate convictions and sentences for the crimes of Felony Firearm and Felon in Possession of a Firearm arising out of the same act violate prohibition against Double Jeopardy under the state and federal constitutions.

Issue Preservation and Standard of Review

Mr. Monroe may raise this double jeopardy challenge on appeal despite his plea of guilty to the charges.[5] This double jeopardy claim involves a "significant constitutional question,"[6] and is reviewed for plain error affecting substantial rights.[7]

Argument

As the Court provided in *People v Miller:*

> The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...." The Michigan Constitution similarly provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy." The prohibition against double jeopardy protects individuals in three ways: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense."[8]

Double jeopardy claims of this type are resolved in one of two ways. First, a court decides whether the Legislature clearly intended double punishment for

---

5 *People v New*, 427 Mich 482, 491(1986) (plea of guilty does not waive double jeopardy challenge to the convictions).

6 *People v Colon*, 250 Mich App 59, 62 (2002).

7 *People v Matuszak*, 263 Mich App 42, 47 n 1 (2004).

8 *People v Miller*, 498 Mich 13, 17 (2015) (citations omitted).

behavior that violates two criminal statutes. Typically, intent is evidenced only by a *specific* authorization for cumulative punishment under two statutes.[9] But in the wake of our Supreme Court's decision in *People v Miller* the Court has also looked for an indication in the plain language of relevant statutes for an signs of legislative intent *not* to allow dual punishment.[10] If such evidence of a legislative intent either to double punish or not to double punish exists, the court goes no further in deciding the Double Jeopardy claim.[11]

If there is not clear evidence of specific legislative intent, the court performs the *Blockburger* "same offense" test:

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[12]

If each offense requires proof of a fact which the other does not, there is no double jeopardy violation.

---

9 *Id.* at 18. (citing *People v Mitchell,* 456 Mich 693, 695 (1998)).

10 *Miller*, 498 Mich at 23-24 ("…we find it significant that the Legislature specifically authorized multiple punishments for some operating while intoxicated offenses in another subsection of the statute. … The specific authorization for multiple punishments contained in MCL 257.625(7)(d) leads ups to conclude that the Legislature did *not* intend multiple punishments for OWI and OWI-injury offenses arising from the same incident.")

11 *People v Mitchell*, 456 Mich 693, 696 (1998).

12 *Blockburger v United States*, 284 US 299, 304 (1932). In *People v Smith*, 478 Mich 292, 315 (2007), our Supreme Court adopted the *Blockburger* test for assessing the validity of multiple punishments: "*Blockburger* sets forth the appropriate test to determine whether multiple punishments are barred by Const. 1963, art. 1, § 15.14."

A. **There is no express legislative intent to impose multiple punishments for the same act of possessing a firearm. The legislative history evidences an intent *not* to impose multiple punishments for the same act of possessing a firearm.**

To discern whether the Legislature has authorized multiple punishments, the court looks "to the subject, language, and history of the statutes."[13] The focus must always be the intent of the Legislature that enacted the law, not that of a subsequent Legislature enacting later statutes, As Justice Markman explained in his concurring opinion in *Blank v Dep't of Corrections*, 462 Mich 103, 149 (2000):

> A long line of cases, state and federal, has recognized with respect to congressional intent that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' *United States v Price*, 361 US 304, 313; 80 S Ct 326; 4 L Ed 2d 334 (1960), This Court's recent disapproval of legislative acquiescence in *Donajowski* [*v Alpena Power Co.*, 460 Mich 243, 258-61 (1999)], implicitly recognizes that **the only legislative intent that is relevant to interpreting a statute is the intent of the Legislature that enacted it, Consequently, subsequent inaction by a *different* Legislature, whether it be silence or the rejection of an alternative proposal, cannot properly serve as an indicator of what a prior Legislature intended**. (bold emphasis added).[14]

The Felony Firearm statute criminalizes use or possession of a firearm during a felony, and mandates prison sentences of two, five, or ten years that must be served consecutively to the sentence imposed for the underlying felony. The statute also

---

13 *Id.* (citation omitted).

14 *See also Rapanos v United States*, 547 US 715, 749 (2006) (Scalia, J.) (plurality op.) (reiterating "oft-expressed skepticism towards reading the tea leaves of congressional inaction"—including inaction of subsequent legislature as evidence of intent of earlier one).

provides a list of felonies exempted from use as underlying felonies. As enacted in 1976, the statute reads as follows:

> (1) A person who carries or has in his possession a firearm at the time he commits or attempt to commit a felony, except a violation of section 227 or 227a, is guilty of a felony, and shall be imprisoned for 2 years, Upon a second conviction under this section, the person shall be imprisoned for 5 years, Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.
>
> (2) A term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.
>
> (3) The term of imprisonment imposed under this section shall not be suspended, The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).[15]

Because Felon in Possession of a Firearm was not yet a crime when the Legislature made Felony Firearm a crime, the fact that Felon in Possession does not appear on the Felony Firearm list of exempted crimes is not dispositive of legislative intent. Although the statute was amended in 1990[16] to add two more exemptions—MCL 750.223 (unlawful sales of firearms), and MCL 750.230 (altering firearms-identity marks) — the operative question is whether the Legislature would have included felon-in-possession on felony-firearm's exemption list *if that crime existed in 1976.* The statutory language does not answer that question, and so it is appropriate for the Court to make use of the various tools of legislative interpretation.

---

15 MCL 750.227b (added by PA 1976, No. 6, § 1, Eff. Jan. 1, 1977).

16 PA 1990, No. 321, § 1, Eff. March 28, 1991.

To both the Court of Appeals and this Court, that list of exemptions has answered the question of legislative intent: if a felony is not on the list of exemptions, it was deemed to have been intended for use as an underlying felony, and punishment for both the underlying felony and Felony Firearm does not offend state or federal constitutional double-jeopardy principles.[17] However, courts have misconstrued the legislative intent.

In *People v Dillard,* the Court of Appeals incorrectly construed the legislative intent because it focused on the intent of the non-enacting Legislature: the 1992 Legislature that enacted the Felon in Possession law rather than the 1976 Legislature that enacted the Felony Firearm law. The Court reasoned that "had the Legislature wished to exclude the felon in possession charge as a basis for liability under the felony-firearm statute, the Legislature would have amended the felony-firearm statute to explicitly exclude the possibility of a conviction under the felony-firearm statute that was premised on MCL 750.224f."[18] That was, of course, not true of the 1976 Legislature, as the 1992 Felon in Possession law was not yet in existence.

Our Supreme Court in *Calloway, supra*, although looking to the correct legislation to discern intent, did so incompletely: the Court completely overlooked the fact that the crime of Felon in Possession of a Firearm was not conceived until *after* the enactment of the Felony Firearm statute.[19] The Court simply failed to consider

---

17 *Calloway*, *supra* at 448; *Dillard*, *supra.*

18 *Dillard*, *supra* at 168.

19 *Compare* MCL 750.227b (felony-firearm; Eff. Jan. 1, 1977) *with* MCL 750.224f (felon-in-possession; added by PA 1992, No. 217, Eff. Oct. 13, 1992).

that the Legislature could not have intended to exclude Felon in Possession of a Firearm from its list of exemptions *because that crime did not yet exist*.[20]

Examination of the Felony Firearm statute's subject, language, and history strongly suggests that the 1976 Legislature would have exempted Felon in Possession from use as a predicate felony. In 1976, the Legislature listed two felonies that could not be used as the underlying felony in a Felony Firearm prosecution. Those two felonies were the only felonies then in existence that punished possession of ordinary weapons without unlawful intent to use them. The first was carrying a concealed weapon,[21] the second, unlawful possession of a pistol by a licensee.[22] Firearm-possession felonies *not* exempted involved either exceptionally dangerous firearms[23] or possession coupled with unlawful intent to use.[24] Put differently:

> The felony-firearm statute is intended to deter the unlawful possession of firearms by punishing those who commit a felony with a firearm in their possession. Similarly, the felon-in-possession statute is intended to deter the possession of firearms by those who have previously committed a felony. Because the social norms underlying the statutes are similar, an inference may be drawn that he Legislature intended not

---

20 *See Calloway*, *supra* at 452 (noting that felon-in-possession does not appear on the list of exempted crimes without mentioning that the felon-in-possession statute had not yet been enacted when the felony-firearm firearm statute was enacted (or even when last amended)).

21 MCL 750.227.

22 MCL 750.227a; MCL 750.227b (PA 1931, No. 328, § 227b, added by PA 1976, No. 6, § 1, Eff. Jan. 1, 1977).

23 Manufacture, sale, or possession of a machine gun or other automatic firearm (MCL 750.224); Manufacture, sale, or possession of a short-barreled shotgun or short-barreled rifle (MCL 750.224b).

24 Carrying a firearm or dangerous weapon with unlawful intent (MCL 750.226).

> to provide multiple punishments for a single act that violated both statutes.[25]

The Legislature thus revealed its intent *not* to allow prosecution for Felony Firearm where the only underlying felony was possession of an ordinary firearm. Use of firearms possession as both a substantive crime and a basis for additional, felony-firearm punishment would be permitted only if the firearm was unusually dangerous or the defendant possessed the intent to use it unlawfully. Otherwise, the new Felony Firearm law would not be used as a bootstrapping machine to automatically turn one possessory offense into a second possessory offense, and then make the "additional" offense subject to a mandatory, consecutive prison term.

It is apparent that if the Felon in Possession law existed in 1976, the Legislature would likely have included it to its list of felony-firearm exemptions. Because Felon in Possession requires neither proof of a dangerous firearm nor proof of unlawful intent, it more resembles the two exempted than the two non-exempted firearms-possession offenses.

And while "subsequent inaction by a different Legislature…cannot properly serve as an indicator of what a prior Legislature intended,"[26] nothing in the history of the 1992 Legislature that enacted the Felon in Possession law indicates legislators anticipated that those charged and convicted of Felon in Possession would be simultaneously charged and convicted of Felony Firearm.[27] The House Analysis explains that the legislation was spurred by a federal district court decision (subsequently overturned) that excluded the Michigan defendant from the coverage

---

25 *People v Calloway*, 469 Mich 448, 455 (2003) (KELLY, J., dissenting).

26 *Blank v Dep't of Corrections*, *supra*.

27 House Legislative Analysis and Senate Bill Analysis (Appendix B).

of the federal felon-in-possession-of-a-firearm law. The legislation was designed to clear up ambiguities in the law, and to ensure that a felon in possession of a firearm could be prosecuted under both federal and Michigan law.[28]

Part of the discussion in the 1992 legislative analysis of the Felon in Possession law concerned whether the five-year penalty was too severe, particularly for non-violent offenders:

> Such penalties far exceed the misdemeanor penalties that would apply to a non-felon, and would be unnecessary: penalties for violating the federal gun law equal or exceed those proposed by the bill, and could be applied in federal prosecutions against serious criminals, The bills propose to write gun laws on the basis of a person's prior status; they make virtually no accommodation for individual circumstances."[29]

The "Response" to the above-posted issue answered that non-violent offenders would generally *not* be sent to prison, unmistakably suggesting that the mandatory two-year prison term of a Felony Firearm charge was not anticipated or intended by the legislation:

> While it may make some people uncomfortable to have to rely on prosecutorial discretion, the reality is that already-strained prosecutorial resources are not going to be used to attempt to put inconsequential offenders behind bars, and judges are not going to sentence nonviolent minor offenders to already-overcrowded prisons.[30]

This analysis would be far different if the Legislature had intended for every felon found to be in possession of a firearm to face a consecutive two-year prison term for an automatic Felony Firearm charge. Likewise, the "Fiscal Implications" section of

---

28 House Analysis, pp 1-2 (Appendix B).

29 *Id.*

30 *Id.*

the House analysis provides that "[t]he bill's penalty provisions *could* result in additional costs for the Department of Corrections for incarcerating offenders."[31] There is no mention of the fiscal implication of adding a mandatory two-year prison term.

To the extent that the legislative intent is unclear, the principle of fair warning expressed in the rule of lenity provides additional support for exempting Felon in Possession of a Firearm from the reach of the Felony Firearm law.[32] Where the scope of a criminal statute is unclear, the rule of lenity requires courts to err on the side of caution, and to limit the reach of the statute.[33]

Felon in Possession of a Firearm cannot be the underlying felony in a felony-firearm prosecution. Because the prosecution's Felony Firearm case was based on proof of Mr. Monroe being a Felon in Possession of a Firearm, the double jeopardy was violated by entering convictions under both statutes and punishing under both statutes. The remedy is to vacate Mr. Monroe' felon-in-possession conviction as it was never intended to be the underlying felony for a felony-firearm charge and carrying a concealed weapon is statutorily barred from being the underlying felony for said charge.[34]

---

31 *Id.* (emphasis added)

32 "The rule of lenity operates in favor of an accused, mitigating punishment when punishment is unclear." *People v Jahner*, 433 Mich 490, 499 (1989).

33 *People v Meshell*, 265 Mich App 616, 633 (2005); *see United States v Lanier*, 520 US 259, 266 (1997).

34 MCL 750.227b(1).

B. A proper application of the *Blockburger* "same offense" test that turns on the *particular* way the defendant is charged with committing the crime shows that Mr. Monroe shall not be double punished for felon-in-possession and felony-firearm convictions involving the same instance of gun possession.

Although the legislative intent is apparent—the Legislature did not intend for the underlying felony for Felony Firearm to be Felon in Possession of a Firearm—this Court should also consider this an opportunity to clarify double jeopardy jurisprudence in this state. Specifically, in cases where the legislative intent is not clear, and the *Blockburger* "same offense" test is applied, courts should only consider only of the *particular* way the defendant is charged in determining whether each offense contains an element that the other does not. When correctly applied to Mr. Monroe' case, it is clear that convictions for Felon in Possession of a Firearm and Felony Firearm or the same instance of gun possession violate the *Blockburger* "same offense" test.

In *Blockburger*, the United States Supreme Court spelled out the applicable rule that:

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[35]

The Michigan Supreme Court, acknowledging the Double Jeopardy Clause of the Michigan Constitution is in lock-step with the Federal Constitution, adopted the *Blockburger* "same offense" test:

> We conclude that in adopting Const. 1963, art. 1, § 15, the ratifiers of our constitution intended that our double jeopardy provision be

35 284 US at 304.

> construed consistently with then-existing Michigan caselaw and with the interpretation given to the Fifth Amendment by federal courts at the time of ratification. We further conclude that the ratifiers intended that the term "same offense" be given the same meaning in the context of the "multiple punishments" strand of double jeopardy that it has been given with respect to the "successive prosecutions" strand. …
>
> Where the Legislature has not clearly expressed its intention to authorize multiple punishments, federal courts apply the "same elements" test of *Blockburger* to determine whether multiple punishments are permitted. Accordingly, we conclude that the "same elements" test set forth in *Blockburger* best gives effect to the intentions of the ratifiers of our constitution.[36]

As a result, the case law from the Supreme Court should be illustrative in considering Mr. Monroe's convictions of felony-firearm and felon-in-possession.

Consider the following examples from caselaw. The United States Supreme Court has held that where a defendant was charged with manslaughter by automobile and careless failure to reduce speed, the two charges would not amount to the same offense *only if* the defendant was reckless for something other than failing to reduce his speed.[37] Likewise, in the criminal context, in *Harris v Oklahoma*,[38] a defendant was convicted of felony-murder based upon a predicate felony of robbery with firearms could not then be convicted of and sentenced for robbery with firearms, even though felony-murder can be predicated on several other felonies besides robbery with firearms. And finally, in *Whalen v United States,*[39] the United States Supreme Court squarely rejected the argument that two offenses were not the "same" where an aggravated offense could be committed in multiple ways:

---

36 *People v Smith*, 478 Mich 292, 315-316 (2007).

37 *Illinois v Vitale*, 447 US 410 (1980).

38 433 US 682 (1977).

39 445 US 684 (1980).

> The Government contends that felony murder and rape are not the "same" offense under *Blockburger*, since the former offense does not in all cases require proof of rape; that is, D.C. Code § 22-2401 (1973) proscribes the killing of another person in the court of committing rape *or* robbery *or* kidnapping *or* arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, and separately proscribed the six different species of felony murder under six statutory provisions.[40]

In the present case, proof of Felon in Possession of a Firearm is a necessary element of Felony Firearm. If the *Blockburger* test were applied to the present case in the same manner it has been applied in the Supreme Court, Mr. Monroe' Felony Firearm and Felon in Possession of a Firearm convictions would not survive the same offense test.[41] And furthermore, since *Blockburger*, the United States Supreme Court has clarified that if the prosecution used a particular predicate offense to prove an aggravated offense, even if the aggravated offense can be satisfied with proof of other predicate offenses, convictions and punishment on both offenses as charged will not survive the 'same offense' test for the Double Jeopardy Clause.

---

40 *Id.* at 694.

41 *White v Howes*, 586 F3d 1025, 1032 (2009) ("In the instant case, although **we agree with the district court that the two statutes at issue here punish the same offense under *Blockburger***…the Court has never held or intimated that the constitutional bar against double jeopardy circumscribes the legislative prerogative to define crimes and prescribe punishment in the context of a single prosecution.") (emphasis added)

Nevertheless, in *People v Ream*,[42] our Supreme Court distorted this rule and asserted that "[b]ecause the [abstract] statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements….abstract legal elements."[43] In other words, under *Ream* if there is *any conceivable,* hypothetical way that a defendant could be convicted under one statute without committing all the hypothetical alternative ways of falling within the application of another statute, the dual convictions survive a double jeopardy challenge. This application of the *Blockburger* test is contrary to relevant federal law and is constitutionally unsound.

As a result, should this Court find the legislative intent unclear, we request Court reversal of *Ream* and the portion of *Miller* that relies upon *Ream,* and correctly apply the *Blockburger* test to hold that convictions and sentences for Felony Firearm and Felon in Possession of a Firearm for possessing the identical firearm violates double jeopardy.

---

[42] 481 Mich 223, 238-9 (2008)

[43] In *People v Miller*, 498 Mich at 19, our Supreme Court referenced the "abstract legal elements" test in *dicta* without analyzing whether it appropriate to continue applying it as formulated in *Ream,*

Summary and Relief

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant the relief requested.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Michael L. Mittlestat

BY: _____

MICHAEL L. MITTLESTAT (P68478)
Assistant Defender
3031 W. Grand Blvd.
Suite 450
Detroit, MI 48202
(313) 256-9833

Dated: January 11, 2022