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-FH

Defendant-Appellant Lashawn Dewon Monroe's Corrected Supplemental Brief

Steven Helton (P78141)
Emma Lawton (P80816)
Assistant Defenders

Counsel for Lashawn Dewon Monroe

State Appellate Defender Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
Phone: (313) 256-9833
shelton@sado.org
elawton@sado.org

Date: October 27, 2022

Table of Contents

Index of Authorities

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

Statement of the Questions Presented

First Question

Were *People v Calloway*, 469 Mich 448 (2003) and *People v Ream*, 481 Mich 223 (2008) correctly decided?

Mr. Monroe answers: No.

The Court of Appeals did not answer.

The trial court did not answer.

Second Question

Even if *People v Calloway*, 469 Mich 448 (2003) and *People v Ream*, 481 Mich 223 (2008) were incorrectly decided, should their rulings be retained under the principles of *stare decisis*?

Mr. Monroe answers: No.

The Court of Appeals did not answer.

The trial court did not answer.

Statement of Facts

A felony complaint against Lashawn Monroe was filed on March 3, 2016, charging him with one count of carrying a concealed weapon (CCW). At the preliminary examination, a Detroit Police Department officer testified that on March 3, 2016, Detroit Police were conducting a 'Push-Off Operation', which entailed "hav[ing] an officer who poses as a would-be drug dealer … [a]nd the buyers get their cars forfeited." 6a. The officer was notified that someone in a burgundy Buick LeSabre had attempted to buy three baggies of marijuana, so he pulled over a car that matched the description. 6a-7a, 15a. The officer approached the vehicle, told the driver "that their vehicle [wa]s being forfeited," and directed the passengers to exit. 8a. Mr. Monroe got out of the back passenger seat, and the officer patted him down, at which point he discovered a handgun in Mr. Monroe's pocket and arrested him. 8a-9a.

At the conclusion of the preliminary examination, Mr. Monroe was bound over on CCW, as well as the added charges of Felon in Possession of a Firearm, under the theory that it had been less than five years since he was sentenced to HYTA for his delivery of marijuana conviction, and with Felony Firearm, under the theory that he was in possession of a firearm at the time that he committed Felon in Possession of a Firearm. 16a, 19a, 22a.

The parties subsequently reached a plea agreement, whereby Mr. Monroe would plead guilty to Felon in Possession and Felony Firearm in exchange for dismissal of the CCW charge. 25a. The trial court provided a Cobbs Evaluation of 18 months probation for his Felon in Possession conviction and two years in prison for his Felony Firearm conviction. 25a-26a.

As the factual basis for his plea, Mr. Monroe acknowledged that in August 2013, he had been convicted of a felony, and that on March 3, 2016, he was in possession of a handgun. 31a. The court accepted his plea. 31a. Mr. Monroe was sentenced to 2 years' prison and a concurrent 18-month probationary term, in accordance with the original Cobbs evaluation. 46a, 48a.

Mr. Monroe subsequently filed an application for leave to appeal, asking the Court of Appeals to vacate his convictions, but leave was denied. 49a. Mr. Monroe then sought leave to appeal to this Court.

The Court ordered oral argument on Mr. Monroe's application, and directed the parties to submit supplemental briefing on whether:

(1) this Court's decisions in *People v Calloway*, 469 Mich 448 (2003), and *People v Ream*, 481 Mich 223 (2008), were correctly decided;

(2) and if not, whether they should nonetheless be retained under principles of stare decisis, *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000). [50a.]

The Court should answer both questions in the negative for the reasons set forth below.

Arguments

Michigan's 1963 Constitution provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. Similarly, 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...." This protection extends to the states through the Fourteenth Amendment, although "every State incorporate[d] some form of the prohibition in its constitution or common law" before the extension was recognized. *Benton v Maryland*, 395 US 784, 795 (1969).

The Double Jeopardy Clauses of the Michigan and United States Constitutions restrain the government in three scenarios: a second prosecution after acquittal for the same offense, a second prosecution after conviction for the same offense, and multiple punishments for the same offense. See *People v Miller*, 498 Mich 13, 17 (2015) and *Witte v United States*, 515 US 389, 395-396 (1995). Lashawn Monroe's convictions and sentences in this case violate double jeopardy's prohibition against multiple punishments.

When determining if multiple punishments arising out of a single act or the same transaction violate double jeopardy, the first and primary question is "whether there is clear indication of legislative intent to impose multiple punishment for the same offense." *People v Mitchell*, 456 Mich 693, 696 (1998). Where "a legislature specifically authorizes cumulative punishment under two statutes, … a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment …." *Missouri v Hunter*, 459 US 359, 368-369 (1983). Conversely, double jeopardy prohibits the imposition of multiple punishments where the Legislature did not intend for the same conduct or transaction to give rise to multiple convictions or multiple punishments. *Rutledge v United States*, 517 US 292, 307 (1996).

This Court's recent precedent has reduced the protections afforded by Article 1, § 15 to below those provided by the Fifth Amendment and required by the Fourteenth Amendment. *People v Ream*, 481 Mich 223 (2008) held that it was unnecessary to consider whether the Legislature intended to authorize multiple punishments for offenses based on the

same conduct when the two offenses are not the 'same offense' under the 'abstract statutory elements' test the Court first outlined two years earlier in *People v Smith*, 478 Mich 292 (2006). Under Michigan's present conception of the *Blockburger* test, the predicate offense underlying a compound offense–that is, a crime that incorporates the commission of another offense as one of its elements, such as Felony Firearm, Felony Murder, or Using a Computer to Commit a Crime–is not a lesser included offense of the compound felony where the compound offense can be predicated upon more than one type of offense. *Ream*, 481 Mich at 238-240. As a result, in Michigan, double jeopardy does not prohibit multiple punishments for, or successive prosecutions of, a compound offense and its underlying predicate. These decisions have prevented Article 1, § 15 from serving its intended purpose, have resulted in over-incarceration, and have made Michigan less protective of the rights afforded by the double jeopardy prohibition than practically all other jurisdictions within the United States.

The Court's cursory rejection of the double jeopardy concerns created by the imposition of multiple punishments for convictions of Felon in Possession and Felony Firearm predicated upon Felon in Possession is emblematic of double jeopardy's diminished impact under Michigan law. In *People v Calloway*, 469 Mich 448, 452 (2003), the Court held that the Legislature necessarily intended multiple punishments for individuals who possessed a firearm after having been convicted of a felony because MCL 750.227b does not explicitly state that Felon in Possession cannot serve as a predicate to Felony Firearm.

Calloway was wrong. It ignored the fact that MCL 750.224f, the Felon in Possession statute, did not exist when MCL 750.227b, the Felony Firearm statute, was enacted. It failed to consider that the conduct presently proscribed and punished under MCL 750.224f was proscribed and punished under MCL 750.227 when MCL 750.227b was enacted, and that the Legislature exempted MCL 750.227 from serving as a predicate to Felony Firearm. It failed to consider that MCL 750.224f was not enacted to create a new substantive offense or to modify the punishment previously authorized by MCL 750.227, but to simplify the Criminal Code and address federal confusion about how felons could have their civil rights restored. *Calloway* erred in assuming the Legislature intended for Felony Firearm to be predicated upon all

felonies created after 1976 and that it also intended to authorize multiple punishments for Felony Firearm and any offense that was not explicitly excluded from serving as its predicate.

The legislative history shows otherwise. In 1976, the Legislature intended that Felony Firearm would not apply to offenses that punished the mere possession of a firearm in violation of Michigan's licensing statutes. When the Legislature enacted Felon in Possession in 1992, it did not expect that it was creating a new predicate offense for Felony Firearm. The legislative history shows that Felon in Possession was enacted to resolve confusion about the administration of felons' firearm rights following changes to the pistol-licensing statute in 1990. Congressional reports assured members that the enactment of MCL 750.224f would not significantly increase the costs of incarceration and that judges would exercise discretion to avoid sending felons to prison simply for possessing a firearm without first having their right to do so restored. Contrary to those assurances, *Calloway*'s interpretation of MCL 750.224f, MCL 750.227b, and double jeopardy means that every felon who unlawfully possesses a firearm faces a mandatory prison term under a corollary Felony Firearm charge.

For the reasons set forth below, the Court should order that Mr. Monroe's Felony Firearm conviction and sentence be vacated and reverse *Calloway* and its other double jeopardy precedent from the 2000's, which incorrectly interpreted the *Blockburger* test in the context of compound felonies.

Issue Preservation

A double jeopardy violation is a jurisdictional error or the equivalent as it eliminates the very authority of the State to convict or punish an individual. "[T]hose rights which might provide a complete defense to a criminal prosecution, those which undercut the state's interest in punishing the defendant, or the state's authority or ability to proceed with the trial may never be waived by guilty plea." *People v Johnson*, 396 Mich 424, 444 (1976), abrogated on other grounds by *People v New*, 427 Mich 482 (1986). "These rights are similar to the jurisdictional defenses in that their effect is that there should have been no trial at all." *Id*. As a result, Mr. Monroe's guilty plea did not waive the present

double jeopardy violation and he was not required to object or seek plea withdrawal to preserve this issue for appeal. *New*, 427 Mich at 488-489.

Standard of Review

This Court "review[s] de novo questions of law regarding statutory interpretation and the application of the state and federal Constitutions." *People v Wafer*, _Mich_ (2022) (Docket No 153828); slip op at 4, citing *Miller*, 498 Mich at 16-17.

I. *People v Ream*'s 'abstract statutory elements test' was fundamentally flawed and improperly prioritized that test of over legislative intent when analyzing whether double jeopardy precluded multiple punishments for offenses arising from the same conduct.

In *People v Ream*, 481 Mich 223, 229 (2008), this Court 'readopted' what it deemed the 'abstract statutory elements test' for all species of double jeopardy claims and for all types of offenses. Under this conception of double jeopardy, successive or multiple prosecutions of both a compound offense and its underlying predicate are not prohibited as long as the compound offense ***theoretically*** could be predicated upon more than one crime. *Ream* subordinated the Legislature's intent to authorize multiple punishments for multiple convictions based on the same conduct to the Court's abstract statutory-elements test, which effectively authorized multiple punishments for all compound offenses, absent an explicit statutory prohibition.

Ream relied on four prior opinions issued by the same five-Justice majority over the preceding six years to upend more than thirty years of Michigan double jeopardy jurisprudence. Its analysis and ultimate holding disregarded the United States Supreme Court's interpretation of the Fifth Amendment's Double Jeopardy Clause in the context of multiple punishments and complex crimes, and lost sight of the abuses and concerns that caused the framers to enshrine the double jeopardy protection in the Michigan and United States Constitutions.

A. The Legislature's intent dictates whether the imposition of multiple punishments for offenses based on the same conduct violates double jeopardy

"Where successive prosecutions occur, double jeopardy principles protect a defendant's interest in not having to twice run the gauntlet, in not being subjected to 'embarrassment, expense and ordeal,' and in not being compelled 'to live in a continuing state of anxiety and insecurity,' with enhancement of the 'possibility that even though innocent he may be found guilty.' " *People v Herron*, 464 Mich 593, 601 (2001), quoting *Green v United States*, 355 US 184, 187-188 (1957). But "[d]ifferent interests are involved when the issue is purely one of multiple punishments, without the complications of a successive prosecution." *People v Robideau*, 419 Mich 458, 485 (1984). "This is so because the 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' " *Albernaz v United States*, 450 US 333, 344 (1981), quoting *Whalen v United States*, 445 US 684, 689 (1978).

"In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v Johnson*, 467 US 493, 499 (1984). "[O]nce the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown v Ohio*, 432 US 161, 165 (1977). As a result, "the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors." *Id.*

The majority in *Ream* held that under Const 1963, art 1, § 15, "multiple punishments are authorized if 'each statute requires proof of an additional fact which the other does not.' " *Ream*, 481 Mich at 228, quoting *Smith*, 478 Mich at 307, quoting *Blockburger v United States*, 284 US 299, 304 (1932).

Then, "if the legislature expressed a clear intention that multiple punishments be imposed, imposition of such sentences does not violate the Constitution, regardless of whether the offenses share the 'same

elements.' " *Id.* at 228 n 3, quoting *Smith*, 478 Mich at 316, quoting *Hunter*, 459 US at 368. This approach is backwards.

"[W]hen considering whether two offenses are the 'same offense' in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments." *Miller*, 498 Mich at 19. "[T]he critical question is whether the Legislature has indicated its intent in the text to prohibit multiple punishments." *Wafer*, *supra* at 14. "The intent of the Legislature … is determinative." *Albernaz*, 450 US at 340.

A finding that two offenses are the 'same offense' under *Blockburger* creates a presumption that the "legislature does not intend to impose two punishments for that offense." *Rutledge*, 517 US at 297, quoting *Whalen*, 445 US at 691–692. *Ream*, 481 Mich at 238 n 16 created an inverse, and apparently irrebuttable presumption because it "view[ed] the fact that the Legislature has authorized the punishment of two offenses that are not the 'same offense,' i.e., each offense includes an element that the other does not, as a relatively clear legislative intent to allow multiple punishments." The Legislature necessarily authorizes some punishment for every criminal offense it creates. See *People v Goulding*, 275 Mich 353, 359 (1936). A judicial conclusion that two crimes are not the 'same offense' does not indicate legislative intent to authorize multiple punishments for both offenses, especially where the Court's conclusions about which offenses are 'the same' changes dramatically after the relevant statutes are enacted. Compare *People v Wilder*, 411 Mich 328 (1981) (finding felony murder and its underlying predicate are the same offense) with *Smith*, 478 Mich at 307 (reaching the opposite conclusion).

Additionally, "[i]t has long been understood that separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition." *Brown*, 432 US at 164, citing 1 J. Bishop, New Criminal Laws 1051 (8th ed. 1892); Comment, Twice in Jeopardy, 75 Yale L.J. 262, 268-269 (1965). See also *Wafer*, *supra*; slip op at 16 ("the fact that statutory involuntary manslaughter is not a lesser included offense does not necessarily mean that the Legislature intended to allow cumulative punishments for both crimes"); *People v Harding*, 443 Mich 693, 712

(1993) (holding that although successive prosecutions for felony murder and armed robbery arising from the same episode did not violate double jeopardy, but multiple punishments for both offenses would because "the Legislature did not intend to impose punishments for both crimes"); and *Prince v United States*, 352 US 322, 327 (1957) (where Congress amended bank robbery to penalize acts incidental to the theft, "[i]t was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended to also pyramid the penalties."); *Callanan v United States*, 364 US 587, 594 (1961).

In *People v Miller*, 498 Mich 13 (2015), the Court "set forth a two-part test to determine when multiple punishments are, or are not, permitted." *Wafer*, *supra* at 6. "The first step is to look to the ordinary meaning of the statute," which entails providing "a fair reading of the statutory text, in light of its context, to discern its ordinary meaning." *Id.* As discussed in Section II, *infra*, the text and context of both MCL 750.224f and MCL 750.224b indicate the Legislature's clear intent not to authorize multiple punishments for both convictions of Felony Firearm and a Felon in Possession of a Firearm when the former is predicated upon the latter. "However, if the intent is not apparent from the text, Michigan courts apply the abstract-legal-elements test under *People v Ream*, 481 Mich 223 (2008)." *Id.* As discussed immediately below, *Ream*'s this test is inherently flawed and cannot be meaningfully applied to compound offenses.

B. *Ream*'s 'abstract statutory elements' test is inherently flawed and will result in unconstitutional prosecutions, convictions, and sentences until it is overruled.

Ream, 481 Mich at 239-240, purported to readopt *Blockburger*'s 'abstract legal elements' test for all species of double jeopardy claims and for all types of offenses. After making this announcement, the Court employed its conception of this test to determine that felony murder and the criminal sexual conduct offense, upon which that the defendant's felony murder conviction was predicated, were not the same offense:

> The killing of a human being is one of the elements of first-degree felony murder. Sexual penetration is one of the elements of first-degree criminal sexual conduct. First-degree felony murder contains an element not included in

> first-degree criminal sexual conduct, namely, the killing of a human being. Similarly, first-degree criminal sexual conduct contains an element not necessarily included in first-degree felony murder, namely, a sexual penetration. First-degree felony murder does not necessarily require proof of a sexual penetration because first-degree felony murder can be committed without also committing first-degree criminal sexual conduct. … [U]nlike first-degree criminal sexual conduct, first-degree felony murder does not necessarily require proof of a sexual penetration. … Because first-degree felony murder and first-degree criminal sexual conduct each contains an element that the other does not, we conclude that these offenses are not the 'same offenses' under either the Fifth Amendment or Const. 1963, art. 1, § 15, and, therefore, defendant may be punished separately for each offense.

Id. at 241 (cleaned up).

Ream's analysis and ultimate conclusion are contrary to the United States Supreme Court precedent the *Ream* majority asserted it was following and to the overarching purpose served by the double jeopardy protection. The Court should reverse *Ream* and a hold that a predicate offense is a necessarily the lesser included offense of the compound offense it serves to support, and it is therefore, the 'same offense'.

1. Ream's 'abstract elements' test contradicts the United States Supreme Court's unwavering recognition that the offense upon which a compound offense is predicated is the 'same offense' as the compound offense under Blockburger

Under *Ream*, whether double jeopardy prohibits multiple punishments or even successive prosecutions of a compound and predicate offense turns on a technicality: how the statute that created the compound offense was drafted. If a compound offense is written in a manner that allows it to be predicated upon more than one offense, which practically all do, double jeopardy permits multiple punishments and successive prosecutions. While the Legislature does have the power to allow multiple punishments, it cannot override double jeopardy's

restriction on successive prosecutions. See *United States v Wilson*, 420 US 332, 349 (1975). But *Ream*'s interpretation of the Double Jeopardy Clause grants it this power by allowing different results depending on the specificity used to define compound offenses.

For example, MCL 750.316(1)(b) lists numerous predicate felonies that can give rise to a conviction of felony murder. *Ream*, 481 Mich at 546-547, held that because felony murder can be committed by one who commits a homicide during the perpetration of a crime other than criminal sexual conduct, criminal sexual conduct is not be a lesser included offense of or the 'same offense' as felony murder. But if the Legislature had created separate felony-murder statutes for each possible predicate offense, *Smith*, 478 Mich at 307, would prohibit a successive prosecution of the underlying offense and *Ream*, 481 Mich at 228, would prohibit multiple prosecutions of both crimes, as the commission of the hypothetical offense-specific variant of felony murder would always 'require' proof of the predicate offense, and the predicate would be a lesser included offense of the felony murder.

But the protection afforded by double jeopardy does not turn on "so formal a difference in drafting" when it holds so little practical significance. *Whalen*, 445 US at 694. *Ream*'s analysis and result are arbitrary, defeat the interests the double jeopardy protection is intended to serve, and conflict with the common sense *Blockburger* analysis employed by all United States opinions analyzing compound offenses.

First, in *Harris v Oklahoma*, 433 US 682 (1977), the defendant was tried and convicted of felony murder, predicated upon armed robbery, and was then tried and convicted of the armed robbery underlying his conviction of felony murder. The Court's analysis was concise, logical, and remains binding:

> When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one. [*Id.* at 682]

Harris was not an outlier. It was the first of several Supreme Court holdings that rejected *Ream*'s analysis.

In *People v Whalen*, 445 US 684 (1980), the defendant was convicted and sentenced for both felony murder and rape, which served as the predicate offense for felony murder. The Court squarely rejected the prosecution's *Blockburger* argument, which was identical to the *Ream* majority's understanding of the proper analysis:

> 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 a rape; that is, DC Code § 22–2401 (1973) proscribes the killing of another person in the course of committing rape or robbery or kidnaping or arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in 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 the 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, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it. [*Id.* at 694]

Then, in *Illinois v Vitale*, 447 US 410, 411 (1980), after getting into an accident that resulted in the death of two children, the defendant was charged with failing to reduce speed to avoid an accident, which required drivers to reduce the speed of their vehicle "as may be necessary to avoid colliding with any person or vehicle." The day after he was tried and convicted of that offense, the defendant was charged with two counts of involuntary manslaughter, which required proof of "homicide by the reckless operation of a motor vehicle in a manner likely to cause death

or great bodily harm." *Id.* at 416-417 (citations omitted). The manslaughter charges could be established "by showing a death caused by his recklessly failing to slow his vehicle to avoid a collision with the victim," but, like the *Ream* majority, the prosecution asserted that double jeopardy did not bar successive prosecutions because "manslaughter by automobile need not involve any element of failing to reduce speed." *Id.* at 418.

In rejecting the prosecution and the *Ream* majority's understanding of *Blockburger*, the *Vitale* Court cited *Harris*, and explained:

> The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense.
>
> The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. [*Id.* at 420]

The Court then reaffirmed this analysis: "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." *Id.* at 421.

Following *Vitale*, the defendant in *Rutledge v United States*, 517 US 292 (1996), was convicted of conspiracy to distribute controlled substances in violation of 21 USC § 846 and continuing criminal

enterprise (CCE) under 21 USC § 848. The conspiracy conviction could only be obtained by conspiring to violate Subchapter I of the Drug Abuse Prevention and Control Act, whereas a person could be convicted of CCE by acting in concert with at least five other people to violate Subchapter I ***or*** II of the Act. 21 USC § 848(c). The Supreme Court reasoned that a conviction of CCE "necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846" and therefore violated Double Jeopardy because Congress had not authorized multiple punishment. 517 US at 307. Yet *Ream* would conclude that these were not the same offense because, in the abstract, conspiracy *could* be committed by agreeing to violate a different law contained in Subchapter I and CCE *could* be committed by the formation of an agreement to violate an offense in Subchapter 2.

The *Ream*, 481 Mich at 237 n 15, majority acknowledged that none of the United States Supreme Court cases it cited utilized its 'abstract statutory elements' test when considering compound offenses, but said its test was supported by *People v Robideau*, 419 Mich 458 (1984), which the same 5-Justice majority had overruled a year earlier in *Smith*, 478 Mich at 315, and by *Wayne County Prosecutor v Recorder's Court Judge*, 406 Mich 374 (1979), which, bluntly, did not address this issue. *Id.*

The majority did not acknowledge *Vitale*. It concluded that *Rutledge* was inapplicable because it "involved a lesser included offense," not "a compound offense." *Ream*, 481 Mich at 237 n 15. Finally, it held that the analysis used in *Harris* and *Whalen* had been overruled in *United States v Dixon*, because *Grady v Corbin*, 495 US 508, 520 (1990) had "expressly adopted the 'same conduct' test that was used in *Harris* and *Whalen*," which "was explicitly abandoned in *Dixon*." *Ream*, 481 Mich at 236-237.

These conclusions were incorrect. While a plurality of the *Dixon* Court agreed that *Grady*'s 'same conduct' test should be overruled, it did not implicitly overrule or explicitly abandon *Harris* or *Whalen*. As explained below, *Dixon* unambiguously reaffirmed the logic and analysis of *Harris* and *Whalen*.

2. United States v Dixon, the case that the Ream majority held compelled it to overrule thirty years of double jeopardy jurisprudence, actually required Ream to conclude that a compound felony, such as felony murder or felony firearm, is the same offense or a lesser included offense as the underlying predicate upon which it was based

The *Ream* Court asserted that voters ratifying the 1963 Constitution believed Article 1, § 5 provided identical protections to the Fifth Amendment's Double Jeopardy Clause. *Ream*, 481 Mich at 239, citing *Nutt*, 469 Mich at 690. It then held that the Fifth Amendment only proscribes multiple punishments for two offenses when they qualify as the same offense under its conception of the abstract legal elements test. *Ream*, 481 Mich at 239, citing *Nutt*, 469 Mich at 690. The majority acknowledged that in addition to the several prior Michigan Supreme Court opinions it was overruling, its analysis and outcome were contrary to United States Supreme Court precedent in *Harris v Oklahoma*, 433 US 682 (1977) and *Whalen v United States*, 445 US 684 (1980). *Id.* at 236. However, it asserted that this was inconsequential because "the 'same conduct' test was explicitly abandoned in [*United States v Dixon*, 509 US 688, 704 (1993)]," and "[t]herefore, the *Blockburger* test once again is the controlling test for addressing double-jeopardy challenges." *Id.* at 236-237. It is unclear why *Ream* interpreted *Dixon* in this manner, as its fractured opinions clearly required the opposite conclusion.

In *Dixon*, 509 US at 691, Alvin Dixon was released on bond while awaiting trial, and was subject to an order prohibiting him from committing "any criminal offense." While on bond, he was indicted for having committed possession of cocaine with intent to distribute (PWID). At the show cause hearing, the prosecution presented evidence he had committed PWID, and he was found guilty of criminal contempt of court under DC Code 23-1329, based on his violation of the bond order, by virtue of his commission of PWID. *Id.* at 692. DC Code 23-1329(a) provides: "A person who has been conditionally released … and who has violated a condition of release shall be subject to … prosecution for contempt of court." Dixon moved to dismiss the indictment for the PWID offense (among other related charges), upon which his contempt conviction was predicated.

Also in *Dixon*, Michael Foster was served with a civil protection order, which prohibited him from threatening or assaulting Ana Foster. *Id.* at 692. He was subsequently charged with violating the order on multiple occasions, and ultimately convicted of four counts of criminal contempt by assaulting and threatening Ana Foster, pursuant to DC Code 16-1005, which made violation of a protective order punishable as criminal contempt. *Id.* at 693. Afterward, the government obtained an indictment charging Foster with the assaults and threats that were the basis for the criminal contempt charges. *Id.* at 693.

Under *Ream*'s 'abstract statutory elements' test, successive prosecutions of Foster and Dixon for criminal contempt and the substantive criminal offenses upon which their contempt convictions were predicated, would not be barred by double jeopardy because one can commit criminal contempt without committing assault or PWID, and one can also commit PWID and assault without violating a court order, a necessary element of criminal contempt. However, this was not the result the majority of the Justices reached. The *Dixon* Court held: "Dixon's subsequent prosecution, as well as Count I of Foster's subsequent prosecution, violate the Double Jeopardy Clause." *Id.* at 712 (Opinion of SCALIA, J., joined by KENNEDY, WHITE, STEVENS, and SOUTER, Js.).

While the *Dixon* Court was extremely fractured, a majority of the Justices agreed that successive prosecutions of the compound offense (criminal contempt) and the predicate offense (PWID and assault), were barred by double jeopardy. This was either because the compound offense and its predicate were the 'same offense' under *Blockburger*, *Dixon*, *supra* at 697-699 (opinion of Justice SCALIA, joined by KENNEDY, J.) or because "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Id.* at 735 (partial concurrence of WHITE, J., joined by STEVENS and SOUTER). Additionally, Justice Blackmun filed a separate opinion "agree[ing] with Justice Souter that "the *Blockburger* test is not the exclusive standard for determining whether the rule against successive prosecutions applies in a given case," and stating that "[i]f this were a case involving successive prosecutions under the substantive criminal law (as was true in *Harris v Oklahoma*, 433 US 682 (1977), *Illinois v Vitale*, 447 US 410 (1980), and *Grady*), I would agree that the

Double Jeopardy Clause could bar the subsequent prosecution." *Id.* at 741-742 (BLACKMUN, J., dissenting in part). It was only because criminal contempt served a different purpose than the felonies upon which the defendants' contempt convictions were predicated (and not because criminal contempt and PWID/assault were not the 'same offense' under *Blockburger*), did Justice Blackmun disagree with his colleagues and conclude that the Fifth Amendment allowed successive prosecutions for contempt and its predicate.

Only three members of the *Dixon* Court may generally have agreed with the *Ream* majority's understanding of *Blockburger*, 509 US at 713-714 (Opinion of REHNQUIST, C.J., joined by O'CONNOR and THOMAS, Js.), while six members plainly disagreed. But even Justices Rehnquist, O'Connor, and Thomas would have reached the exact opposite result than that reached by the *Ream* majority. Justice Rehnquist wrote that he would not overrule *Harris v Oklahoma*, 433 US 682 (1977), but would instead limit it "to the context in which it arose: where the crimes in question are analogous to greater and lesser included offenses," but he would not overrule it. *Id.* at 714. In *Harris*, the Court held that the Fifth Amendment barred a successive prosecution for robbery with a firearm following the defendant's conviction of felony murder, which was predicated upon the defendant's commission of robbery: "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one." *Harris*, 433 US at 682, citing *In re Neilsen*, 131 US 176 (1889).

Contrary to the *Ream* majority's interpretation of *Dixon*, the Supreme Court had not overruled *Harris* or *Whalen*. It effectively affirmed and extended them. The *Ream* majority's criticisms of *Harris* and *Whalen* were its own, not *Dixon*'s. Its disagreements with those decisions reflected an understanding of the Fifth Amendment that was and is contrary to that of the United States Supreme Court. By its own logic then, *Ream*'s holding conflicted with the intention of the Michigan voters who ratified Article I, § 15 with the expectation that it would mirror the Fifth Amendment. See *Ream*, 481 Mich at 233-234, citing *Smith*, 478 Mich at 314-315 and *People v Nutt*, 469 Mich 565, 591-592 (2004).

In his concurrence in *Whalen*, 445 US at 699 n 3, Justice Blackmun cited *People v Hughes*, 85 Mich App 674 (1978) (BRONSON, J., concurring) and *People v Anderson*, 62 Mich App 475 (1975) as two state court rulings that correctly determined the constitutionality of multiple punishments by examining the legislature's intent. Notably, those Michigan decisions predated *Ream* and followed the double jeopardy analysis that *Ream* rejected.

In *Hughes*, 85 Mich App at 682-683, the Court of Appeals concluded that double jeopardy was not offended by multiple punishments for armed robbery and felony firearm convictions arising out of the same transaction because by enacting the felony firearm statute, "the Legislature has attempted to make certainty of minimal punishment the standard where firearms are involved in the commission of felonies," a purpose which "applies with equal force to robbery armed crimes as to other crimes." Ultimately, the Court of Appeals held that "[s]ince the Legislature intended the type of result obtained in the instant case, the convictions do not violate double jeopardy protection." *Id.* 683. Judge Bronson, whose concurrence Justice Blackmun endorsed, wrote separately in *Hughes* to explain:

> The Legislature often provides for different statutory offenses which could apply to the same act. In such a case, the prohibition on multiple punishment prevents courts from cumulating punishment where it appears that the Legislature did not intend that the defendant be cumulatively punished. See *Gore v United States*, 357 US 386 (1958). As an aid to ascertaining the Legislature's intent, courts have applied certain rules of construction. For example, it is presumed that the Legislature did not intend to punish cumulatively a greater and necessarily included offense. Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L J 513 (1949); ... In short, a "rule of lenity" prohibits multiple punishment where the legislative intent is unclear or doubtful. See *People v Nelson*, 79 Mich App 303 (1977).
>
> Where the legislative intent regarding punishment is clear, however, there is no multiple punishment problem.

Id. at 684–685 (BRONSON, J., concurring).

In *People v Anderson*, 62 Mich App 475, 482 (1975), the defendant was convicted of both felony murder and the robbery underlying his felony murder conviction and challenged the robbery conviction as violating the double jeopardy clause. The Court of Appeals explained "the armed robbery constitutes a necessary element of first-degree (felony) murder." *Id.* Because "part of the punishment for felony murder can be attributed to the underlying felony," so "defendant had been sentenced for armed robbery when sentenced for felony murder and could not again be sentenced for the robbery armed part of the crime." *Id.* at 483.

Regardless of whether their conclusions about the legislative intent was accurate, *Anderson* and *Hughes* engaged in the correct double-jeopardy analysis. Neither case was an outlier. They applied the law in the manner the United States and Michigan Supreme Courts had directed, as had numerous opinions issued by this Court until veering off track in *Smith* and *Ream*.

Even if the *Ream* majority had correctly interpreted *Dixon* as somehow undermining or rejecting the approaches of *Whalen* and *Harris*, none of the opinions in *Dixon* implied that those cases had been or were being overruled. Two years before deciding *Ream*, the same five-Justice majority had set forth courts' obligations with respect to precedent believed to be on shaky ground: "lower courts must follow decisions of higher courts even if they believe the higher court's decision was wrongly decided or has become obsolete." *Paige v Sterling Heights*, 476 Mich 495, 524 (2006). The Michigan Supreme Court was bound by the same rule with respect to the federal constitution: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v Felton*, 521 US 203, 237 (1997) (citation omitted).

The opinions in *Dixon*, *Harris* and *Whalen* were–and remain–binding precedent that compelled a different result and analysis than *Ream* promulgated. Accordingly, this Court should overturn *Ream*.

3. Like Dixon, the other sources the Ream majority cited in support in fact disagreed with its formulation of the 'abstract statutory elements test' for compound offenses

In support of its assertion that it was bringing Michigan into the mainstream by adopting the abstract elements test for all offenses and all analyses, the *Ream* Court cited one law review article and one 1981 Montana Supreme Court opinion. 481 Mich at 240. Both sources should have led the majority to the very opposite conclusion than the one it reached.

Ream relied solely on *Montana v Close*, 191 Mont 229, 247 (1981), to argue that "a majority of states focus on the abstract legal elements." 481 Mich at 240. *Close* also was the only case *Ream* identified where a court had permitted a felony murder conviction and its predicate felony to stand. *Id*. But in *Close* the Montana Supreme Court employed the very analysis that the *Ream* Court believed it rejected:

> The test for determining what constitutes the same offense differs depending on whether the case involves multiple prosecutions or multiple punishments imposed at a single prosecution. The standard is broader in cases involving multiple prosecutions. Two statutory crimes that constitute "the same offense" for purposes of multiple prosecutions do not necessarily constitute "the same offense" for purposes of multiple punishments. …
>
> The rule is not always dispositive on questions of double jeopardy for purposes of multiple punishments. ***The dispositive question is whether the legislature intended to provide for multiple punishments. The Blockburger test is merely one rule of statutory construction to aid in the determination of legislative intent.*** The ultimate question remains one of legislative intent.

Id. at 245-246, citing *Brown v Ohio*, 432 US 161 (1977) and *Whalen v United States*, 445 US 684 (1980). The *Close* Court then examined the legislature's intent before "finding that the legislature did not intend to preclude punishment for both felony homicide and, in this case, the

underlying felonies of robbery and aggravated kidnapping in enacting the felony murder statute." *Id.* at 247.

The same year that *Ream* relied on *Close*, the Montana Supreme Court rejected its past decision's reasoning as erroneous:

> The basic premise of the *Close* rationale is false. The *Close* Court engaged in a *Blockburger* analysis and held that "it is clear that proof of felony homicide will not necessarily require proof of either robbery or aggravated kidnapping." "One can commit felony homicide without committing robbery, or commit aggravated kidnapping without committing felony homicide. Therefore, *Blockburger* does not require the conclusion that felony homicide and the underlying felony merge."
>
> Although the Court was correct that, in the abstract, one can commit felony murder without necessarily committing aggravated kidnapping or can commit aggravating kidnapping without committing felony homicide, a defendant cannot commit the offense of felony homicide without committing a predicate felony offense. Thus when the State uses an offense (such as kidnapping or robbery or, as here, assault) as a predicate offense in its charge of felony homicide, ***the accused cannot be found guilty of felony homicide without having committed the predicate offense of kidnapping, robbery, or assault. When the State chooses to charge the offenses in that fashion, the offenses merge. The predicate offense becomes a lesser included offense of the felony homicide charge.***

State v Russell, 347 Mont 301, 306 (2008) (emphasis added), quoting *Close*, 191 Mont at 246-247.

The only other source that *Ream* relied on for the proposition that "a majority of states focus on the abstract legal elements" was a law review article that in fact discussed how state courts determine whether one offense qualifies as a lesser included offense of another. *Ream*, 481 Mich at 239, citing Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 Rutgers L. J. 351 (2005). This was an issue that *Ream*, 481 Mich at

237 n 15, deemed irrelevant when it disregarded *Rutledge*. Significantly, the article did not suggest that most jurisdictions considered compound and predicate felonies to be different offenses under *Blockburger*. Instead, the article referenced both Justice Breyer's and Chief Justice Rehnquist's criticism of 'the elements test', and the confusion this test had caused, and then explained that in the context of felony murder, "no single felony would ever satisfy an elements test definition of a lesser included offense that required that it be impossible to commit the charged offense without simultaneously committing the lesser included offense." *Id.* at 367-369. The article stated that because of this, the *Harris* Court "held that robbery was a lesser included offense of felony murder," a "result [that] makes good sense." *Id.* at 369-370. The article then noted that *Dixon*, which *Ream* concluded had overruled *Harris*, "resulted in still more uncertainty," as "[t]he Court could produce no analysis supported by a majority of its members, and the fractured opinions prompted a wave of scholarly criticism denouncing the Court's confusion." *Id.* at 370.

C. Principles of stare decisis do not support continued adherence to Ream.

The Court has a duty to re-examine *Ream*'s reasoning and central holdings, and "is not constrained to follow precedent when governing decisions are unworkable or badly reasoned." *Robinson v City of Detroit*, 462 Mich 439, 464 (2000). There is no reason to continue to adhere to *Ream*'s holdings. *Ream* was poorly reasoned, has garnered no reliance interest, and has been rendered unworkable by this Court's subsequent opinions and by the stress it has placed on the MDOC. Moreover, the supremacy of the United States Supreme Court on matters of federal constitutional law and the incorporation of the Fifth Amendment by the Fourteenth Amendment mandate that *Ream*'s interpretation of the federal Double Jeopardy Clause, regardless of the policy preference in favor of stare decisis. US Const, art VI, cl 2. See *People v Pennington*, 383 Mich 611, 620 (1970) (holding that "the anti-exclusionary provision of Article 1, § 11, Michigan Constitution of 1963, cannot, under Federal decisions, stand against the Fourth and Fourteenth Amendments to the United States Constitution and the decision in *Mapp*[*v Ohio*, 367 US 643 (1961)]) and *Howlett v Rose*, 496 US 356, 371 (1990) (explaining that the "Supremacy Clause forbids state courts to dissociate themselves

from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.").

No principles of stare decisis favor continued adherence to *Ream*. Its holdings have not garnered reliance interest, since, "by definition there can be no reliance on the [*Ream*'s] rule that" a compound offense and its underlying predicate are not the same offense under *Blockburger* and that multiple punishments are permitted for such offenses. See *People v McKinley*, 496 Mich 410, 423 (2014). "[T]o have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Robinson*, 462 Mich at 467. "The nature of a criminal act defies any argument that offenders attempt to conform their crimes—which by definition violate societal and statutory norms." *People v Gardner*, 482 Mich 41, 62 (2008). There is no reason to believe the possibility of multiple punishments will deter criminal behavior to any greater degree than a single punishment.

An "important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus v American Federation*, 138 S Ct 2448, 2479 (2018). As explained above, the federal precedent upon which *Ream* was premised required it to reach the opposite conclusion than it arrived at, a fact that the *Ream* majority did not appear to recognize and certainly did not address or explain.

The flaws in *Ream*'s analysis and logic were recognized as soon as the opinion issued. See *Ream*, 481 Mich at 244 (Cavanagh, J., dissenting) ("The majority misapplies the Blockburger test by comparing the abstract elements of a compound offense to one of its predicate offenses, rather than comparing the actual elements that were established at trial and that actually comprise the defendant's convictions."). See also Jordan Padover, *State Constitutional Law-Criminal Procedure-The Constitutional Guarantee of Protection Against Double Jeopardy is Not Violated When a Defendant is Convicted of, and Punished for, Separate Offenses That Contain Different Elements*, 40 Rutgers LJ 969, 993 (2009) (*Ream* "failed to articulate the implications of this test for compound and predicate offenses— in the absence of clearly expressed legislative intent to the contrary, defendants will almost always be subject to multiple punishments. As a result, the constitutional guarantee of protection against double jeopardy from multiple punishments is left in shambles.").

"The doctrine of stare decisis is of course 'essential to the respect accorded to the judgments of the Court and to the stability of the law.' " *Arizona v Gant*, 556 US 332, 348 (2009), quoting *Lawrence v Texas*, 539 US 558, 577 (2003). But *Ream*, and the two opinions it correctly found supported its analysis–*Smith* and *Nutt*–were issued with the same Justices in the majority, along with an avalanche of other opinions that overruled decades-old precedent over a few short years. These decisions showed little regard for stare decisis, cast Michigan's law into a state of flux, and created a crisis in confidence among interested observers. See Robert Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 Wayne L Rev 1911, 1943 (2009):

> [T]his unprecedented overruling of the Court's prior decisions advanced the Court majority's policy objectives of limiting tort liability and workers' compensation recovery and of making it more difficult for persons charged with a crime to avoid a conviction. Since the former Court majority completely abandoned stare decisis in order to advance its policy objectives, the legitimacy of the Court majority's abandonment of stare decisis is seriously called into question. It is respectfully submitted that a new Court majority should restore stare decisis to Michigan jurisprudence and in a principled way should confront the consequences of the former Court majority's abandonment of stare decisis.

See also Sarah K. Delaney, *Stare Decisis v The "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1992-2002*, 66 Alblr 871, 903-904 (2003):

> Although the majority insists that every statutory interpretation case can be decided under a plain language analysis, they failed to take into consideration the difficulty that previous courts have had interpreting the statutory language—an indicator that the language is ambiguous. By the majority labeling each controlling statute as unambiguous, it was able to assert that, because the past court failed to comport with the plain meaning of the statute, the present court had a constitutional duty to correct the wrong.

The Court can continue to restore public confidence in the prudence of the Court's stability and commitment to the rule of law, while raising Michigan's double jeopardy protection up to the Constitutional minimum mandated by the Fifth and Fourteenth Amendments. It can do this by issuing a thorough and well-reasoned opinion that overrules *Ream* based on the Court's obligation to enforce binding federal precedent, to properly interpret the Michigan Constitution and analyze the Legislature's intent, and to prevent the evils that the double jeopardy protection is intended to prevent.

II. *People v Calloway* was wrongly decided and should be overturned. Stare decisis does not warrant continued adherence to an erroneous holding that has resulted in untold individuals being convicted and punished for both Felony Firearm and Felon in Possession of a Firearm, in violation of the Double Jeopardy Clauses of the Michigan and United States Constitutions, and in contravention of the Legislature's intent.

Standard of Review

A challenge to Double Jeopardy is a question of law that the Court reviews de novo. *Herron*, 464 Mich at 599.

Discussion

In determining whether existing precedent should be followed, "[t]he first question, of course, should be whether the earlier decision was wrongly decided." *Robinson*, 462 Mich at 464. The legislative history demonstrates that *People v Calloway* was wrongly decided.

A. *Calloway* incorrectly concluded that the Legislature intended Felony Firearm to be predicated on Felon in Possession, without considering the 20-year gap between the statutes. The legislative history and context demonstrate that the Legislature intended exempt Felon in Possession from serving as a predicate to Felony Firearm.

As in the present case, the defendant in *People v Calloway*, 469 Mich 448 (2003) was charged and convicted of both Felony Firearm and Felon in Possession of a Firearm, with Felon in Possession serving as the predicate offense for Felony Firearm. And as in the present case, the defendant challenged the imposition of multiple punishments for the two offenses as a violation of double jeopardy.

Calloway presented an interesting question that warranted careful analysis: how should the Court determine whether a newly-created offense was a predicate felony to an older offense? Felony Firearm, MCL 750.227b, was enacted in 1976. 1976 PA 6 § 2. Felon in Possession of a Firearm, MCL 750.224f, was not enacted until 1992. 1992 PA 217, § 2. When the Legislature enacted Felony Firearm, it was, of course,

impossible to list Felon in Possession as an exception since the statute was not yet part of the Code. The *Calloway* majority did not recognize that question, and instead decided that the plain text of Felony Firearm (old offense), stripped of context, prevented Felon in Possession (new offense) from serving as a predicate offense:

> Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession and felony-firearm. [*Id.* at 452.]

As discussed above, legislative intent dictates whether "separate sanctions for multiple offenses arising in the course of a single act or transactions" violates double jeopardy. *Iannelli v United States*, 420 US 770, 786 n 17 (1975), citing *Blockburger*, 284 US at 304. The issue cannot be resolved simply by determining that there is no explicit statutory language preventing one of the offenses from serving as a predicate of the other. Thus, the *Calloway* Court answered the wrong question, and this error led the Court to the wrong result. As Justice Kelly noted, the majority's "analysis avoid[ed] the constitutional question and assume[d] that, by providing a short list of exceptions, the Legislature intended cumulative punishments for all unlisted crimes." *Id.* at 456 (KELLY, J., concurring).

To properly resolve the issue before it, the *Calloway* Court was required to initially resolve whether the Felon in Possession could serve as a predicate to Felony Firearm. This required the Court to consider whether the 1976 Legislature that enacted the Felony Firearm statute intended the behavior later criminalized by the 1992 Legislature as Felon in Possession to also constitute the commission of Felony Firearm. If it concluded that the 1976 Legislature intended for the unlawful possession of a firearm by a felon to give rise to a Felony Firearm conviction, the *Calloway* Court was then required to determine whether the 1976 Legislature intend to authorize multiple punishments for both offenses. The short answer to both questions is no.

In considering legislative intent, "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." *Iron Street Corp*

v Michigan Unemployment Compensation Commission, 395 Mich 643, 655 (1943). As Justice Markman explained three years before *Calloway* was decided:

> 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 (1960). … ***[T]he only legislative intent that is relevant to interpreting a statute is the intent of the Legislature that enacted it.*** Consequently, subsequent action 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.

Blank v Department of Corrections, 462 Mich 103, 149 (2000) (MARKMAN, J., concurring in result) (footnote omitted) (emphasis added).

An examination of the legislative histories of MCL 750.227b and MCL 750.224f, and of the legal landscape in which both statutes were enacted shows that *Calloway* was wrongly decided. It is clear from the chronology and context of MCL 750.227b's enactment that the Legislature did not intend to allow Felony Firearm to be predicated on the behavior later criminalized by MCL 750.224f: the unlawful possession of a firearm by a felon who was prohibited from possessing that firearm by virtue of their prior conviction. Therefore, the Legislature certainly did not intend to authorize multiple punishments for both offenses.

In 1976, the Legislature enacted MCL 750.227b to deter people from carrying guns while committing serious crimes. See *Wayne County Prosecutor*, 406 Mich at 391. As enacted, Felony Firearm could not be predicated on two specific felony offenses: MCL 750.227 (concealed carry of a weapon) and MCL 750.227a (unlawful possession of a pistol by a licensee). 1976 PA 6 § 1. The listed exceptions comprised all of the felony-level enforcement provisions of the pistol-licensing statute. That statute, MCL 28.422, regulated felons' rights to possess firearms, and its provisions were the precursor to Felon in Possession. Fundamentally, the 1976 Legislature created exceptions for the contemporary statutes enforcing 'Felon in Possession.'

In 1990, the Legislature revisited MCL 28.422. The Legislature removed the language that restored the firearms-rights of felons from MCL 28.422, and did not replace it. The Legislature did not change the enforcement of MCL 28.422, which remained what it had been in 1976.

In 1992, the Legislature realized that the changes to MCL 28.422 had painted firearms-rights for felons into a corner by deleting the restoration procedure. 115a-116a. To remedy this omission, the Legislature enacted MCL 750.224f. Colloquially referred to as "Felon in Possession," this statute codified the procedure by which felons could have their firearms rights restored, then added an enforcement provision for possession of a firearm by those who did not complete the restoration process. See 1992 PA 217 § 1. Rather than regulating felons' firearm rights through a network of statutes, as had occurred between 1976 and 1991, the Legislature took the opportunity to simplify the restrictions and restoration procedure, and clarify the penalty for violating these procedures by compiling those provisions in one place.

But this simplification of the Criminal Code did not signal the Legislature's intent to modify the types of offenses upon which Felony Firearm could be predicated. From its inception, Felony Firearm did not punish individuals whose felonious behavior was a violation of pistol-licensing laws. The Legislature did not create or intend to create a new predicate offense for Felony Firearm when it reorganized those laws under Felon in Possession.

1. The unlawful possession of a firearm by a felon has been exempted from serving as the predicate offense for Felony Firearm since the inception of the MCL 750.227b.

When it enacted Felony Firearm, the Legislature made plain its intention to exclude as predicate offenses all crimes related to the possession of otherwise-lawful firearms by a person prohibited by law from possessing that weapon—including felons. This intention is reflected in the exceptions the Legislature created for laws regulating and enforcing who could possess a firearm.

In 1976, a felon's right to possess a firearm was dictated by MCL 28.422, which provided that:

> No person shall purchase, carry, or transport a pistol without first having obtained a license …. [I]n no event shall such a license be issued to a person who has been convicted of a felony or confined therefor in this state or elsewhere during the 8 year period immediately preceding the date of such application ….

MCL 28.422, as amended by 1972 PA 15. A "pistol," for purposes of the statute, was "any firearm, loaded or unloaded, 30 inches or less in length." MCL 28.421, as amended by 1964 PA 216.

Former MCL 28.422 banned possession of a pistol without a license and regulated felons' access to firearms by defining: (1) which criminal convictions would affect the felon's right to possess a firearm (all felonies), (2) what types of firearms they were barred from possessing (firearms 30 inches or less in length), and (3) how long felons were prohibited from possessing such firearms (8 years after conviction or release from imprisonment). See *United States v Merideth*, 961 F2d 1579 (CA 6, 1992) ("Michigan law restricts a convicted felon's right to possess pistols and carry a concealed weapon pursuant to Michigan Compiled Laws § 28.422.").

MCL 28.422's prohibition on unlicensed pistols was enforced through the twin applications of MCL 750.232a and MCL 750.227. The former made it a misdemeanor for any person to purchase a pistol without first obtaining a license. See MCL 750.232a, as added by 1948 CL 750.232a; *People v Pritchett*, 62 Mich App 570, 574 (1975) (concluding MCL 750.232a proscribed unlicensed carry of a weapon even if it was not concealed). The latter made it a felony to carry a concealed pistol or to transport a pistol in a vehicle without obtaining a license in accordance with MCL 28.422. See MCL 750.227, as amended by 1973 PA 206.

Felony Firearm did not apply to a person with a past felony conviction who obtained or openly carried a pistol without a license, since that behavior was a misdemeanor. See MCL 750.232a, *supra*. And Felony Firearm explicitly excepted MCL 750.227, which in 1976 was the mechanism to punish a person who carried a concealed firearm despite past felony convictions that barred them from obtaining a license. See MCL 750.227, *supra*. Thus, from its inception, Felony Firearm could

not be predicated on the unlawful possession of a firearm by a felon in violation of MCL 28.422. See MCL 750.227b, as added by 1976 PA 6.

The 1976 Legislature intention to exempt mere possession of firearms from Felony Firearm was unambiguous. It also exempted MCL 750.227a, the only other felony at that time that involved pistol-licensing violations albeit not involving felons. 1975 House Journal 1332. And misdemeanor possessory offenses were by definition not predicate offenses. See, e.g., MCL 750.223(1) (punishing sale of pistol to unlicensed person); MCL 750.223(2) (punishing sale of firearm longer than 30 inches to a person under 18); MCL 750.229 (barring pawnbrokers from accepting or selling pistols).

The 1990 Legislature's amendments to Felony Firearm did not displace the 1976 Legislature's intent. In fact, its legislation reflected the same intention to prevent firearm licensing violations from resulting in Felony Firearm convictions. The 1990 Legislature added two new possessory felonies under MCL 750.223: subsection (2), the second or subsequent sale of a firearm over 30 inches to a person under 18 years old, and subsection (4), the sale of a firearm to a felon. 1990 PA 321. The Legislature then added exceptions to Felony Firearm for both newly created felonies, which, like the felonies original excepted, targeted mere possession of firearms.

Felon in Possession is the only simple firearm-possession felony offense that is not exempted from MCL 750.227b—at least as it has been interpreted by *Calloway*. But *Calloway*'s interpretation of MCL 750.227b is wrong because it permits a felon's unlicensed possession of a firearm to result in a Felony Firearm conviction, despite the Legislature's intent to except the entire class of felonies that Felon in Possession belongs to.

2. *The Legislature exempted all pistol-licensing violations from serving as predicate offenses for Felony Firearm because multiple convictions and punishments for the commission of such offenses would not have furthered the Felony-Firearm statute's goal of deterring "persons who commit crimes while armed."*

In 1976, the Legislature was motivated to enact the Felony-Firearm statute by its perception that people who committed crimes while armed

were receiving sentences that were too lenient. 57a. The legislative analysis describing House Bill 5073, which was ultimately enacted as MCL 750.227b, explained that Felony Firearm was designed to address the following problem:

> [I]n 1973, 24% of the people who were charged with armed robbery in Michigan served no time in prison. Some persons contend that the lack of mandatory imprisonment for persons who commit crimes while armed contributes significantly to the rising rate of serious crime. [57a.]

The Legislature focused on the increased danger that resulted from the possession of a firearm ***in connection*** with another crime. Rising rates of armed robbery were a specific concern, and Governor Milliken argued that HB 5073 was necessary because "[w]eapons-related offenses are increasing: armed robbery, often a handgun crime, was up 11 percent in the first half of 1975—more than any other index crime." 1975 Senate Journal 2124. The Bill's legislative analysis also focused on the exponential danger created when firearms are present during the commission of other crimes, noting that "persons committing crimes like breaking and entering or shoplifting ***sometimes carry a gun intending to use it only as a threat, but when unexpectedly confronted, use the gun violently***. Such persons might think twice before carrying a firearm if they knew that conviction would result in a mandatory sentence." 57a (emphasis added).

Further, the Legislature's description of the behavior HB 5073 sought to deter and punish makes clear that it was passed in order to address concerns about crimes that were made more dangerous by the presence of a gun. The initial House analysis of the bill discussed "crimes involving ***the use*** of firearms," 57a, and the Senate conducted a public hearing on the Bill where it defined the question as "Mandatory Minimum Sentencing: When guns are ***used in the commission of crime***." 1975 Senate Journal 2237-2238. Further, HB 5073 was specifically intended to target and punish non-felons: "The street criminal knows that the chance of imprisonment for a first conviction of a felony is not great. Certainty of punishment, which the bill would provide, would act as a deterrent to crimes involving the use of firearms." 57a.

The mere unlawful possession of a firearm was never a predicate for Felony Firearm. See II.A.1 supra. The possessory crimes the Legislature did allow to serve as predicate offenses paired possession of a firearm with circumstances indicating other illegal activity. No exceptions were made for possession of unusually dangerous firearms that could never be lawfully possessed, such as automatic firearms and machine guns under MCL 750.224 or short-barreled shotguns and short-barreled rifles under MCL 750.224b. Similarly, there was no exception for the possession of a firearm ***with intent to use it unlawfully*** against another person under MCL 750.226, as this was the exact activity the Legislature sought to deter and punish.

And, again in 1990, the Legislature conformed to the intent of the 1976 Legislature when it did not except any of the newly-created felonies that criminalized the possession of illegal weapons or that coupled possession with other criminal behavior. See 1990 PA 321. Following directly in the tracks of the 1976 Legislature's intent to allow the possession of automatic firearms to serve as a predicate offense, see MCL 750.224e, the 1990 Legislature permitted no exception with MCL 750.227b for the possession of devices intended to enable the transformation of a semiautomatic into an automatic firearm. Other new felonies that did not receive an exception entailed the unlawful discharge of a weapon: MCL 750.234a (discharge at a vehicle), MCL 750.234b (discharge at a dwelling or occupied structure), and MCL 750.234c (discharge at an emergency or law-enforcement vehicle). The Legislature also provided no exception for new felonies that were, at their heart, theft offenses: MCL 750.357b (larceny of a firearm) and MCL 750.535b (receiving and concealing a stolen firearm). As intended by the 1976 Legislature, these new crimes properly served as predicates for Felony Firearm because they took aim at illegal behavior made more dangerous by the presence or use of a firearm.

3. MCL 750.224f was enacted in 1992 to address the 'glitches' and unanticipated consequences of the 1992 amendments to MCL 28.422.

The history of MCL 750.224f shows the Legislature's clear intent to administer felons' firearm rights, not to expand punishment under Felony Firearm. Until 1990, MCL 28.422 had governed the suspension

and restoration of a person's firearm rights following a felony conviction. See MCL 28.422, as added by 1927 PA 372. But through 1990 PA 320, the Legislature removed the section of MCL 28.422 that provided for the restoration of felons' firearm-rights. To correct that error, the Legislature enacted MCL 750.224f in 1992. Thus, the Felon in Possession statute regulates the same behavior that was originally excluded from Felony Firearm: violations of firearms regulations.

The 1990 legislation was not intended to remove the firearms-rights restoration process from MCL 28.422. As introduced, the Bill created a separate subsection (11) for restoration. A felon prohibited from receiving a license under the proposed subsection (3)(c) would petition relief from the Director of the Department of State Police. The Director could then restore the right to possess a firearm if doing was not contrary to public interest and the applicant's conviction and record suggested they were unlikely to be a danger to the public. The Bill would also have allowed unsuccessful applicants to seek judicial review of the Director's denial in circuit court. 1990 House Bill 6009.

(c) ~~Has~~ EXCEPT AS PROVIDED IN SUBSECTION (11), THE PERSON HAS not been convicted of a ~~felony or has not been incarcerated as a result of a felony conviction in this state or elsewhere during the 8 year period immediately preceding the date of application~~ CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN 1 YEAR. THIS SUBDIVISION DOES NOT APPLY TO A CONVICTION THAT HAS BEEN EXPUNGED OR SET ASIDE, OR FOR WHICH THE PERSON HAS BEEN PARDONED OR HAS HAD HIS OR HER CIVIL RIGHTS RESTORED UNLESS THE EXPUNGEMENT, ORDER, OR PARDON EXPRESSLY PROVIDES THAT THE PERSON SHALL NOT SHIP, TRANSPORT, POSSESS, OR RECEIVE FIREARMS.

HB 6009 as introduced, amending MCL 28.422(3)(c)

(11) A PERSON WHO IS PROHIBITED FROM RECEIVING A LICENSE UNDER SUBSECTION (3)(C) MAY APPLY TO THE DIRECTOR FOR RELIEF FROM THE PROHIBITION. THE DIRECTOR MAY GRANT RELIEF IF THE APPLICANT SHOWS TO THE DIRECTOR'S SATISFACTION THAT THE CIRCUMSTANCES REGARDING THE CONVICTION AND THE APPLICANT'S RECORD AND REPUTATION ARE SUCH THAT THE APPLICANT WILL NOT BE LIKELY TO ACT IN A MANNER DANGEROUS TO PUBLIC SAFETY AND THAT GRANTING RELIEF IS NOT CONTRARY TO THE PUBLIC INTEREST. IF THE DIRECTOR DENIES RELIEF, THE PERSON MAY SEEK JUDICIAL REVIEW OF THE DENIAL IN CIRCUIT COURT.

HB 6009 as introduced, proposed MCL 28.422(11)

But subsection (11) was inexplicably omitted from the final version of the Bill. See 1992 House Journal 2692, 4569-4575. As enacted, 1990 PA 320 ended the automatic restoration of rights and eliminated the 8-year waiting period. *Id.* Under the amended subsection (3)(c), felons could regain their right to possess a firearm by having their conviction expunged or set aside or by having their civil rights restored. *Id*. However, because subsection (11) was left out of the enacted statute, no procedure existed that would allow felons to actually have their civil rights restored.

The confusion caused by the absence of the rights-restoration procedure referenced in subsection (3)(c) was immediate. Federal courts began debating and reaching opposite conclusions regarding the 1990 "civil-rights restoration" provision of MCL 28.422(3)(c). Compare *United States v Driscoll*, 970 F2d 1472 (CA 6, 1992) with *United States v Gilliam*, 778 F Supp. 935 (E D Mich 1991).

In response, the 1992 Legislature sought to repair this "defect in Michigan law", 116a, by enacting MCL 750.224f as a separate statutory scheme to administer felons' firearm-rights and enforce violations, rather than regulating that behavior as a species of CCW, proscribed jointly through MCL 750.227, MCL 750.232a, and MCL 28.422.

4. The 1992 Legislature did not expect or intend for MCL 750.224f to serve as a predicate to Felony Firearm. It did not intend for a violation of MCL 750.224f to automatically result in multiple convictions and punishments or an automatic mandatory prison sentence.

The goal of the 1992 Legislature was to resolve how felons could regain their right to possess firearms. To accomplish this, it removed the process for restoration of firearms rights from MCL 28.422 and created a separate statutory scheme for rights restoration under MCL 750.224f and MCL 28.424. The new regulatory scheme was then incorporated into MCL 28.422(3)(c) by replacing the 'civil-rights restoration' language with MCL 750.224f as the touchstone for a felon's eligibility to acquire a pistol license. See 1992 PA 219.

(c) The person ~~has not been convicted of a crime punishable by imprisonment for more than 1 year. This subdivision does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned or had his or her civil rights restored unless the expungement, order, or pardon expressly provides that the person shall not ship, transport, possess, or receive firearms~~ IS NOT PROHIBITED FROM POSSESSING, USING, TRANSPORTING, SELLING, PURCHASING, CARRYING, SHIPPING, RECEIVING, OR DISTRIBUTING A FIREARM UNDER SECTION 224F OF THE MICHIGAN PENAL CODE, ACT NO. 328 OF THE PUBLIC ACTS OF 1931, BEING SECTION 750.224F OF THE MICHIGAN COMPILED LAWS.

HB 5400 as introduced, amending MCL 28.422(3)(c)

Next, the 1992 Act added to MCL 750.224f The provisions that had been removed from MCL 28.422 in 1990 were also included in MCL 750.224f to dictate (1) how long felons banned from possessing firearms, and (2) how felons' right to possess a firearm could be restored.

The Legislature reduced the 8-year waiting period for all felons, but imposed more stringent criteria for rights-restoration after convictions of certain offenses. Under the newly-created MCL 750.224f(1), the automatic restoration of firearms rights was reinstated following a significantly shorter waiting period: 3 years after the person had paid all associated fines, served all terms of imprisonment, and successfully completed probation or parole. 1992 PA 217. For more serious "specified felonies" defined by MCL 750.224f(6), the Legislature imposed a 5-year waiting period, paired with a specific application process for restoration of firearms rights, which required petitioning the county's concealed weapons licensing board. 1992 PA 217.

The newly-created MCL 28.424 laid out the procedural and substantive requirements of that application. 1992 PA 219. Mirroring the provisions of 1990's doomed subsection (11), a person seeking restoration of their firearms rights was required to successfully demonstrate that they were not a danger to public safety. Compare *id.* with 1990 House Bill 6009. And, like subsection (11), the statute created a right to petition to have the circuit court review the board's denial. 1992 PA 219.

(11) A PERSON WHO IS PROHIBITED FROM RECEIVING A LICENSE UNDER SUBSECTION (3)(C) MAY APPLY TO THE DIRECTOR FOR RELIEF FROM THE PROHIBITION. THE DIRECTOR MAY GRANT RELIEF IF THE APPLICANT SHOWS TO THE DIRECTOR'S SATISFACTION THAT THE CIRCUMSTANCES REGARDING THE CONVICTION AND THE APPLICANT'S RECORD AND REPUTATION ARE SUCH THAT THE APPLICANT WILL NOT BE LIKELY TO ACT IN A MANNER DANGEROUS TO PUBLIC SAFETY AND THAT GRANTING RELIEF IS NOT CONTRARY TO THE PUBLIC INTEREST. IF THE DIRECTOR DENIES RELIEF, THE PERSON MAY SEEK JUDICIAL REVIEW OF THE DENIAL IN CIRCUIT COURT.

HB 6009 as introduced, proposed MCL 28.422(11)

(3) The concealed weapons licensing board shall, by written order of the board, restore the rights of a person to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm if the board determines, by clear and convincing evidence, that all of the following circumstances exist:

(a) The person properly submitted an application for restoration of those rights as provided under this section.

(b) The expiration of 5 years after all of the following circumstances:

(*i*) The person has paid all fines imposed for the violation resulting in the prohibition.

(*ii*) The person has served all terms of imprisonment imposed for the violation resulting in the prohibition.

(*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition.

(c) The person's record and reputation are such that the person is not likely to act in a manner dangerous to the safety of other persons.

(4) If the concealed weapons licensing board pursuant to subsection (3) refuses to restore a right under this section, the person may petition the circuit court for review of that decision.

MCL 28.424(3), as enacted by 1992 PA 219

Because MCL 750.224f also included an enforcement provision, it merged into a single statute the regulation of felons' possession of firearms and the penalty for noncompliance, which in 1976 had been regulated and enforced by the network of MCL 28.422, MCL 750.232a, and MCL 750.227. Indeed, the Legislature imposed the same penalty on Felon in Possession that it imposed for Concealed Carry of a Weapon—a maximum of 5 years prison. Compare MCL 750.224f(3), as added by 1992 PA 217, with MCL 750.227(3).

The Legislature intended MCL 750.224f to be a regulatory statute for "nonviolent minor" behavior, not a hammer to root out violent crime, and certainly not as a means to ensure felons who merely possessed firearms received prison sentences. 117a. The changes favored leniency and discretion over the functionally permanent ban that resulted from the 1990 amendment of MCL 28.422. The Legislature reinstated automatic restoration of firearms rights as the baseline presumption for most offenses, shortened the waiting period from 8 years to 3 and 5 years, and created a right to appeal the denial of an application to restore firearms rights.

The Legislature did not intend that compiling these provisions into a separate statute would transform violations of the firearms-regulation scheme—originally excluded from Felony Firearm—into predicate offenses. See *Callanan*, 364 US at 594 ("We attribute 'to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different ….' ") (quoting *United States v Rabinowich*, 238 US 78, 88 (1915)). It also did not intend to create a new class of felonies that would necessarily result in the commission of Felony Firearm and a corresponding wave of mandatory prison sentences. The Legislature did intend to clean up certain 'administrative glitches' caused by the 1990 amendment of MCL 28.422.

This is most evident in the legislative analysis, which asserted:

> 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-crowded prisons***. Moreover, the nature of a gun possession offense is such that a person is not likely to be charged with that offense unless he or she was committing some other crime. It is not likely that the firearm would otherwise come to the attention of the authorities. [117a (emphasis added).]

The 1992 Legislature did not expect MCL 750.224f to authorize or require a mandatory prison sentence based on a felon's mere possession of a weapon without a license where they had not also committed some

other crime. Yet as interpreted by *Calloway*, it is impossible to commit Felon in Possession without also committing Felony Firearm. Like Mr. Monroe, today every single person charged with Felon in Possession also faces a mandatory prison sentence based on a corresponding Felony-Firearm charge.

Had the Legislature expected that a conviction of Felon in Possession would effectively result in a mandatory prison sentence by serving as a predicate to Felony Firearm, it would have accounted for a corresponding rise in prison costs, as it did when it created Felony Firearm. But unlike the 1976 Legislature, which had prepared for the impact of MCL 750.227b by earmarking approximately $265 million for the expected impact on the MDOC's operating costs, the 1992 Legislature appropriated no additional funds to pay for MCL 750.224f. Compare 1976 Senate Journal 85-86, and HB 5400, 5432 Bill Analysis at 117a.

Indeed, because the Legislature believed Felon in Possession convictions would only be detected if the person was also "committing some other crime," there was no need for MCL 750.224f to be a predicate offense for Felony Firearm. 117a. When a felon committed a crime and possessed a firearm, that additional crime would be the predicate for MCL 750.227b to punish a 'serious crime' made more dangerous by the presence of a firearm. It is clear that the Legislature did not believe it also would be necessary to impose a mandatory prison sentence on a felon who possessed a firearm—a person the Legislature believed was an "inconsequential … nonviolent minor offender." 117a.

B. Stare decisis does not justify retaining *Calloway*'s holding.

As discussed above, *Calloway*'s holding that Felony Firearm could be predicated upon Felony in Possession was incorrect, so its conclusion that the Legislature intended multiple punishments for both offenses was necessarily wrong. Because *Calloway* was wrongly decided, "[t]he Court must proceed on to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Robinson*, 462 Mich at 465-466.

The reliance interest in *Calloway* is nonexistent. There is no reason to believe that individuals are deterred from violating the Felon in

Possession statute because they fear a concurrent prosecution for Felony Firearm and a consecutive prison sentence upon conviction. Indeed, "[t]he nature of a criminal act defies any argument that offenders attempt to conform their crimes—which by definition violate societal and statutory norms—to a legal test …." *Gardner*, 482 Mich at 62.

Further, the result in *Calloway* demonstrates how *Ream*'s embrace of a formalistically extreme and severely limited interpretation of the Double Jeopardy Clause upset citizens' reasonable expectations about their constitutional rights. Where a court confounds "legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest." *Robinson*, 462 Mich at 467.

Because it is impossible under *Calloway*'s interpretation of MCL 750.227b for someone to commit Felon in Possession without also committing Felony Firearm, reasonable citizens would assume that the Double Jeopardy clause prohibits multiple convictions and punishments for those crimes. The Legislature also recognized this, and so exempted mere possession of a firearm from serving as a predicate offense. In most jurisdictions the Legislature and citizens would be correct in their expectations. See, e.g., *Ellington v State*, 314 Ga 335, 346 (2022) ("conviction for possession of a firearm during the commission of a felony … should have merged for sentencing purposes into the conviction for possession of a firearm by a convicted felon during the commission of a felony"). See also *State v Ruff*, 143 Ohio St 3d 114 (2015); *Byars v State*, 130 Nev 848, 860 (2014) (explaining that where one offense is necessarily included in another, a defendant can be convicted of only one). Any citizen would recognize the redundancy inherent in the charge of 'committing the felony of being a felon who possesses a weapon, while possessing a weapon.' Yet that is the charge *Calloway* authorized when it held that double jeopardy permits Felony Firearm to be predicated on Felon in Possession.

Neither does practical workability weigh in favor of retaining *Calloway*. See *Gardner*, 482 Mich at 61-62 ("practical workability bears little on our decision" to overrule where the new "is no less workable" than the current rule). Under *Calloway*'s interpretation of Felony Firearm, the Department of Corrections has for years managed the unfunded incarceration of untold numbers of individuals that the

Legislature believed would receive non-prison sentences. By contrast, properly interpreting Felony Firearm to exclude Felon in Possession as a predicate offense allows judges the discretion to tailor individual sentences for defendants and lifts the burden of incarceration from MDOC.

Another "important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus*, 138 S Ct at 2479. As noted above, the quality of *Calloway*'s reasoning was poor. It assumed that the Legislature intended to authorize multiple punishments for Felony Firearm and Felon in Possession because MCL 750.224f was not one of the exceptions listed under MCL 750.227b(1), but failed to consider the fact that MCL 750.224f did not exist when MCL 750.227b was enacted. The *Calloway* majority then assumed, without discussion, that because it interpreted Felon in Possession as capable of serving as a predicate for Felony Firearm, that the Legislature intended separate punishments for both crimes, a point that obviously required further analysis given that "[t]he issue presented in th[e] case [wa]s one of multiple punishments for the same offense." *Calloway*, 469 Mich at 450. See, e.g., *People v Wafer*, _Mich_ (2022) (Docket No. 153828); slip op at 5-7.

Fundamentally, *Calloway* is a relatively recent decision that addressed what was, at the time, a question of first impression for this Court: how should the Court determine whether a newly-created felony was classified as a predicate offense or an exception under Felony Firearm? It was not "part of a long line of cases interpreting identical statutory language." *Gardner*, 482 Mich at 67. Instead, it was one of several opinions issued by the same five-Justice majority over a handful of years that disregarded rules set forth in a long line of cases that would have led to a different outcome. See, e.g., *People v Herron*, 464 Mich 593 (2001); *People v Robideau*, 419 Mich 458 (1984); *People v Wilder*, 411 Mich 328 (1981); *People v. Jankowski*, 408 Mich 79 (1980); and *People v Stewart (On Rehearing)*, 400 Mich 540 (1977).

Because its holding clearly contravenes the Legislature's intent and there is no reliance interest in its favor, this Court should overrule *Calloway*.

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,

State Appellate Defender Office

By: /s/ Steven Helton
Steven Helton (P78141)
/s/ Emma Lawton
Emma Lawton (P80816)

Counsel for Lashawn Dewon Monroe

State Appellate Defender Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
Phone: (313) 256-9833
shelton@sado.org
elawton@sado.org

Date: October 27, 2022

Certificate of Compliance

I hereby certify that this document contains 13,517 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

State Appellate Defender Office

By: /s/ Steven Helton
Steven Helton (P78141)
/s/ Emma Lawton
Emma Lawton (P80816)

Counsel for Lashawn Dewon Monroe

State Appellate Defender Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
Phone: (313) 256-9833
shelton@sado.org
elawton@sado.org

Date: October 27, 2022