STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

TARONE DEVON WASHINGTON,

Defendant-Appellee.
_____/

Supreme Court No. 156283

Court of Appeals No. 330345

Lower Court No. 2015001344 FH

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JUDGMENT APPEALED FROM, STATEMENT OF JURISDICTION, AND RELIEF SOUGHT

The People seek leave to appeal from the Court of Appeals' opinion vacating defendant's conviction for possession of a firearm during the commission of a felony (felony-firearm) under MCL 750.227b of the Penal Code. *People v Washington*, unpublished opinion per curiam of the Court of Appeals, decided 7/06/17 (Docket No. 330345) (17a-44a). This Court has jurisdiction over this application for leave to appeal under MCR 7.303(B)(1). This Court has directed the Clerk to schedule oral argument on whether to grant the People's application for leave to appeal, and has ordered the parties to file supplemental briefs and appendices (48a).

The People request that this Court reverse the Court of Appeals and reinstate defendant's felony-firearm conviction. The People ask the Court to hold that a crime that constitutes a felony under MCL 750.7 is to be considered a felony for purposes of the Penal Code, including the felony-firearm statute, regardless of how it is labeled elsewhere. The People also request that the Court overrule or clarify prior cases, as detailed below, to the extent that they contradict the holding the People seek.

STATEMENT OF QUESTION PRESENTED

The Penal Code defines the offense of possession of a firearm during the commission of a felony (felony-firearm). The Penal Code also defines "felony," and the offense of maintaining a drug house meets that definition. Is maintaining a drug house a felony for purposes of the felony-firearm statute, regardless of how it is labeled in the Public Health Code?

Plaintiff-Appellant answers: "YES"
Defendant-Appellee answers: "NO"
The trial court was not presented with this question.
The Court of Appeals majority answered: "NO"

STATEMENT OF FACTS

A jury found defendant guilty of maintaining a drug house, MCL 333.7405(1)(d), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, possession of marijuana, MCL 333.7403(2)(d), and receiving and concealing a stolen firearm, MCL 750.535b(2) (3a). Defendant was sentenced as an habitual offender to 20 to 180 months' imprisonment for receiving and concealing a firearm and to a consecutive two-year term for felony-firearm (4a). For maintaining a drug house and possession of marijuana, defendant was sentenced to 193 days in jail with credit for time served (3-4a). Defendant appealed, raising issues that are not before this Court.

The Court of Appeals' question

The felony-firearm statute, part of the Penal Code, provides that "[a] person who carries or has in his or her possession a firearm when he or she attempts to commit a felony … is guilty of a felony…." MCL 750.227b(1). The information charged defendant with carrying or possessing a firearm when he committed or attempted to commit the crime of maintaining a drug house (21a-22a). Maintaining a drug house is defined in MCL 333.7405, part of the Public Health Code.

On its own motion, the Court of Appeals directed the parties to brief and argue the question:

> Does a conviction for keeping or maintaining a drug house, MCL 333.7405(1)(d), a misdemeanor punishable by up to 2 years in prison, when enhanced under the habitual offender statute, MCL 769.10, constitute a predicate felony for purposes of the offense of possession of a firearm during the commission of a felony, MCL 750.227b[?] [16a]

This question arises because the Penal Code and the Health Code conflict as to whether maintaining a drug house is a felony. Within the Health Code, MCL 333.7406 provides that a criminal conviction of maintaining a drug house renders the offender "guilty of a misdemeanor,

punishable by imprisonment for not more than 2 years...." But the Penal Code defines a felony as "an offense for which the offender on conviction may be punished by death, or by imprisonment in state prison." MCL 750.7. A term of imprisonment longer than one year may be served in a state prison. See MCL 769.28, which provides that a term of imprisonment of one year or less must be served in a county jail and not a state prison.

Thus, maintaining a drug house is a misdemeanor under the Health Code, but because it is punishable by imprisonment, it is a felony under the Penal Code.

The Court of Appeals majority opinion

The Court of Appeals affirmed defendant's convictions except for the felony-firearm conviction, which it vacated (18a). The majority declared that if it were "writing on [a] blank slate," it would hold that "a two-year misdemeanor qualifies as a felony for purposes of the felony-firearm statute," regardless of whether the two-year misdemeanor was found in the Penal Code, the Public Health Code, or elsewhere (25a). This was simply "because the offense of felony-firearm is found in the Penal Code and, therefore, we should apply the definition of 'felony' found in the Penal Code" (25a-26a). It would also "avoid the absurdity of treating some two-year misdemeanors as felonies for felony-firearm purposes, while treating others as misdemeanors, with the only distinction being in which code they are found" (26a n 6).

But the majority did not believe it was writing on a blank slate (26a). Instead, it believed that three cases dictated a different result.

The first of these was *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985) (23a). *Smith* involved four consolidated cases in which the primary issue was "whether offenses defined in the Penal Code as misdemeanors punishable by up to two years in prison may be considered 'felonies'

for the purposes of the habitual-offender, probation, and consecutive sentencing provisions of the Code of Criminal Procedure." *Id.* at 432. The offenses at issue – resisting an officer in the discharge of his duty, MCL 750.479; joyriding, MCL 750.414; and attempted arson of personal property, MCL 750.74, MCL 750.92 – all carried two-year maximum sentences. *Smith*, 423 Mich at 435-437. At the time *Smith* was decided, the sections of the Penal Code that defined those offenses (MCL 750.479, MCL 750.414, and MCL 750.92 as it applied to MCL 750.74) provided that they were misdemeanors,[1] despite MCL 750.7's provision that crimes with two-year maximum sentences are felonies. *Smith*, 423 Mich at 435-438. But MCL 761.1(g) in the Code of Criminal Procedure, much like MCL 750.7 in the Penal Code, defined a felony as a crime for which the offender could be "punished by death or by imprisonment for more than 1 year, or an offense expressly designated by law to be a felony." *Smith*, 423 Mich at 439.

This Court observed that the Penal Code and the Code of Criminal Procedure were enacted separately and have distinct purposes. *Smith*, 423 Mich at 442. The Penal Code's purpose is "'to define crimes and prescribe the penalties therefor....'" *Id.*, quoting Preamble, MCL 750.1 *et seq.*[2] The purpose of the Code of Criminal Procedure is to "'codify the laws relating to criminal procedure....'" *Smith*, 423 Mich at 442, quoting Preamble, MCL 760.1 *et seq*. Each code, this Court stated, "has its own definitions of 'misdemeanor' and 'felony' in order to more effectively promote the distinct purposes of each.'" *Smith*, 423 Mich at 442. The Court found it "obvious that the Penal Code definitions apply only to the Penal Code," and that the definitions in the Code of Criminal Procedure applied only in that code. *Id.* at 444. "To apply the definition of

[1] Since *Smith* was decided, MCL 750.479 was amended in 2002 to make resisting an officer a felony, and the arson statutes, MCL 750.71 – MCL 750.79, have been amended to create different levels of felony and misdemeanor arson offenses.

[2] This clause has since been amended slightly; it now reads "to define crimes and prescribe the penalties and remedies...."

misdemeanor in one statute to the operations of the other statute," the Court declared, "would defeat the purposes of the other statute." *Id.* Thus, in order to achieve the intended purpose of the Code of Criminal Procedure, the Court held that that code's definition of "felony," and not the definitions in various sections of the Penal Code, controlled in matters governed by the Code of Criminal Procedure, such as habitual offender status, probation, and consecutive sentencing. *Id.* at 445.

In the introduction to its majority opinion in *Smith*, this Court previewed its holding as follows:

> The plain language of the statutes involved, considered in light of the purposes sought to be accomplished, leads us to conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes. [*Smith*, 423 Mich at 434.]

Seizing on a portion of this language, the Court of Appeals majority in this case interpreted it as a statement that "two-year misdemeanors are misdemeanors for purposes of the Penal Code" – regardless of whether they are designated as misdemeanors in the Penal Code or elsewhere (25a-26a).

The majority recognized that this point in *Smith* was "arguably dicta" (25a). But the majority also pointed to *People v Williams*, 243 Mich App 333; 620 NW2d 906 (2000); and *People v Baker*, 207 Mich App 224; 523 NW2d 882 (1994) (23a-24a). In *Williams*, 243 Mich App at 334-335, the defendant pled guilty to resisting arrest pursuant to MCL 750.479, which at the time (as in *Smith*), still defined that crime as a misdemeanor,[3] even though it could be punished by up to

[3] At the time, MCL 750.479 read, in pertinent part: "Any person who … shall … obstruct, resist, oppose, assault, beat or wound any [peace officer] in their lawful acts, attempts and efforts to maintain, preserve, and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years…."

two years' imprisonment. After the defendant failed to appear at sentencing, he was convicted of absconding on a felony bond, MCL 750.199a.[4] *Williams*, 243 Mich App at 334. The Court of Appeals reversed, holding that resisting arrest, defined as a misdemeanor in the Penal Code, could not be considered a felony for purposes of establishing the crime of absconding on a felony bond. *Id.* at 335. The Court said, "Although a misdemeanor that may result in two years' imprisonment may be deemed a felony for purposes of … the Code of Criminal Procedure, … it cannot be deemed a felony for purposes of the Penal Code." *Id.*, citing *Smith* (statutory citations omitted). As in *Smith*, the Court in *Williams* did not address the status of a crime designated as a misdemeanor by a statute other than the Penal Code.

Similarly, in *Baker*, 207 Mich App at 225, the defendant was convicted of felony-firearm based on his simultaneous conviction of resisting a police officer – which, again, was defined under MCL 750.479 at the time as a misdemeanor. The Court of Appeals, citing *Smith*, agreed with the defendant that "the provisions of the Penal Code … govern whether resisting arrest is a felony for purposes of the felony-firearm statute." *Id.* Thus, resisting a police officer could not establish the felony element of the felony-firearm conviction, which the Court vacated. *Id.* at 225-226. Again, the Court was faced with a crime designated as a misdemeanor in the Penal Code, not in some other legislation.

The Court of Appeals majority in the instant case regarded *Williams* and *Baker*, as "binding precedent … that says that two-year misdemeanors remain misdemeanors for purposes of the felony-firearm statute" (26a). The majority would have followed that precedent and certified a conflict, but "given the statement in *Smith* that two-year misdemeanors are misdemeanors for

[4] "Any person who shall abscond on or forfeit a bond given in any criminal proceedings wherein a felony is charged shall be deemed guilty of a felony…."

purposes of the Penal Code," the majority thought it "best to leave it to the Supreme Court to resolve this issues" (26a). The majority "urge[d] the prosecutor to appeal this case and for the Supreme Court to grant leave and definitively resolve the status of two-year misdemeanors for purposes of the felony-firearm statute" (26a).

The Court of Appeals dissent

Judge Swartzle began by summarizing his analysis of the relevant case law: "When determining how to characterize a criminal offense that is itself purportedly an element of a different, primary criminal offense, … courts must look solely to the definitions and labels of the code where the primary offense is located" (38a). In *Smith*, the Court had been faced with whether underlying offenses found in the Penal Code, and labeled therein as misdemeanors, should nonetheless be considered felonies for purposes of the Code of Criminal Procedure because they met the definition of "felony" in the latter code (39a). The Court had stressed that each code had a distinct purpose and "'has its own definitions of "misdemeanor" and "felony" in order to more effectively promote the distinct purpose of each'" (40a, quoting *Smith*, 423 Mich at 442). "[T]he Supreme Court stated in no uncertain terms," Judge Swartzle observed, that "'[t]o apply the definition of misdemeanor in one statute to the operations of the other statute would defeat the purposes of that statute'" (40a, quoting *Smith*, 423 Mich at 444). Thus, *Smith*

> stand[s] for the general proposition that location matters: Definitions and labels in a code apply to and throughout that code, but that code alone. When a primary offense and underlying offense are located in the same code, then any conflict is resolved through traditional rules of statutory construction. When the two offenses are located in different codes, the definitions and labels in the primary offense code trump those in the other code. [39a.]

Baker and *Williams* simply followed this general proposition. In *Baker*, the underlying offense (resisting arrest) and the primary offense (felony-firearm) were both found in the Penal

Code. At that time, the Penal Code specifically labeled resisting arrest as a misdemeanor. The Court's decision that resisting arrest could not be the underlying offense for felony-firearm, therefore, was consistent with *Smith* because it applied the label from the Penal Code when both the underlying and primary offenses were found there. Similarly, in *Williams*, the underlying offense (resisting arrest) and the primary offense (absconding on a felony bond) were both found in the Penal Code. Again, the Court applied the Penal Code label (42a).

Judge Swartzle found support in *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, decided October 23, 2008 (Docket No. 279439) (42a-43a). The defendant in *Thomas* was convicted of possession of marijuana, second offense, MCL 333.7403, MCL 333.7413. Because it was a second offense, it was punishable by imprisonment for up to two years. MCL 333.7413. The defendant in *Thomas* argued that his felony-firearm conviction could not be predicated on the offense of possession of marijuana, second offense, MCL 333.7403, MCL 333.7413, because that offense was specifically designated as a misdemeanor. The Court of Appeals disagreed, noting that under *Baker*, 207 Mich App at 225, "the provisions of the Penal Code … govern whether a particular offense is a felony for purposes of the felony-firearm statute" (46a). The designation of the crime as a misdemeanor in the Public Health Code was irrelevant in determining whether it was a felony for purposes of the Penal Code (46a). The felony-firearm conviction, therefore, was valid (46a-47a).

From all of these cases, Judge Swartzle formulated a general rule:

> When determining how to characterize a criminal offense that is itself purportedly an element of a different, primary criminal offense, courts must look to the definitions and labels in the primary offense's code, full stop. As our case law shows, there are two distinct circumstances to which this general rule will apply: (1) when the underlying offense and primary offense are in different codes (*Smith* and *Thomas*), and (2) when the two offenses are in the same code (*Baker* and *Williams*). In the first circumstance, the general rule dictates that the definitions in the primary offense's code trump any label or definition in the underlying offense's

> code. This is *Smith* where, for purposes of the primary offense of habitual offender, the Supreme Court applied the definition of felony in the Code of Criminal Procedure to the underlying offenses of joyriding and resisting and obstructing an officer, even though both underlying offenses were labeled misdemeanors in the Penal Code. (Similarly in *Thomas*, where the underlying offense was in the Public Health Code and the primary offense was in the Penal Code.)
>
> In the second circumstance, the general rule requires that a court apply the definitions and labels in the primary offense's code, which is the same code as the underlying offense. Any conflicts between a definition and label within the same code should then be resolved through normal rules of statutory construction, such as the specific trumps the general. This is *Baker* and *Williams*. [43a.]

Applying this rule, Judge Swartzle noted that the primary offense in this case (felony-firearm) was a Penal Code offense, while the underlying offense (maintaining a drug house) was found in the Health Code. As in *Smith* and *Thomas*, the primary and underlying offenses were in different codes. The definitions of "felony" and "misdemeanor" in the Penal Code, therefore, controlled (43a). Since the Penal Code defined "felony" as an offense punishable by imprisonment in state prison, and since maintaining a drug house was punishable by imprisonment in a state prison under MCL 333.7406 and MCL 769.28, maintaining a drug house was a felony under the Penal Code and could be the underlying offense for felony-firearm (43a-44a).

The majority had erred, Judge Swartzle concluded, by misconstruing a lone clause from the introduction in *Smith*: "'the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code'" (41a, quoting *Smith*, 423 Mich at 434). In context, this clause merely reflected a recognition that "the underlying offenses in *Smith* were specifically *labeled* as misdemeanors in the Penal Code and, for purposes of the Penal Code, those specific labels must control over the general definition found in that code" (41a). The *Smith* Court was not proclaiming a general rule that *all* two-year misdemeanors were considered misdemeanors for purposes of the Penal Code, regardless of whether they came from the Penal Code or some other code (41a-42a). The Penal Code contained no suggestion that the Legislature intended such a rule,

and the majority's interpretation ignored *Smith*'s discussion of "the key distinction to be drawn between definitions and labels within codes versus those across codes" (42a).

ARGUMENT

The Penal Code defines the offense of possession of a firearm during the commission of a felony (felony-firearm). The Penal Code also defines "felony," and the offense of maintaining a drug house meets that definition. Thus, maintaining a drug house is a felony for purposes of the felony-firearm statute, regardless of how it is labeled in the Public Health Code.

Standard of Review. This issue presents a question of statutory construction. Such questions are reviewed de novo. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

To determine whether an offense is a felony for purposes of the felony-firearm statute, this Court must look to the definitions of "felony" and "misdemeanor" within the Code that contains the felony-firearm statute: the Penal Code. That principle is supported by the rules of statutory construction and by this Court's case law. And because maintaining a drug house is a felony according to the Penal Code's definition, it is a felony for purposes of the felony-firearm statute.

A. Because the felony-firearm statute is part of the Penal Code, the Penal Code's definition of "felony" determines whether an offense is a felony for purposes of the felony-firearm statute.

The Penal Code proscribes possessing a firearm during the commission of most felonies:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, 227, 227a, or 230,[5] is guilty of a felony and shall be punished by imprisonment for two years.... [MCL 750.227b(1).]

[5] The excepted felonies are selling firearms and ammunition, MCL 750.223; carrying a concealed weapon, MCL 750.227; unlawful possession of a pistol by a licensee, MCL 750.227a; and altering, removing, or obliterating marks of identity on a firearm, MCL 750.230.

The Penal Code defines "felony" and "misdemeanor":

> The term "felony" when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison. [MCL 750.7.]
>
> When any act or omission, not a felony, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, and imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor. [MCL 750.8.]

When a statute specifically defines a term, that definition alone controls. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). And the Legislature made clear in MCL 750.7 that whenever the term "felony" is used in the Penal Code, it "*shall be construed*" according to the definition in MCL 750.7: an offense for which the offender may be punished by death or by imprisonment in state prison. Because MCL 750.227b is part of the Penal Code, its use of the term "felony" must be construed according to that definition.

The Public Health Code proscribes the offense commonly referred to as maintaining a drug house:

> (1) A person shall not do any of the following:
>
> * * *
>
> (d) Knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances or that is used for keeping or selling controlled substances in violation of this article.
>
> * * *
>
> (2) A person who violates subsection (1) is subject to the penalties prescribed in section 7406. [MCL 333.7405.]
>
> A person who violates section 7405 may be punished by a civil fine of not more than $25,000.00 in a proceeding in the circuit court. However, if the violation is prosecuted by a criminal indictment alleging that the violation committed

> knowingly or intentionally, and the trier of the fact specifically finds that the violation was committed knowingly or intentionally, the person is guilty of a misdemeanor, *punishable by imprisonment for not more than 2 years*, or a fine of not more than $25,000.00, or both. [MCL 333.7406 (emphasis added).]

Because the maximum term of imprisonment for maintaining a drug house is more than one year, that term can be served in a state prison. Compare MCL 769.28, which provides, in pertinent part, "....[I]f a person convicted of a crime ... is committed or sentenced to imprisonment for a maximum of 1 year or less, the commitment or sentence shall be to the county jail of the county in which the person was convicted and not to a state penal institution." Since maintaining a drug house is punishable by imprisonment in a state prison, it meets the Penal Code's definition of "felony" in MCL 750.7. And since that definition applies by its own terms throughout the Penal Code, maintaining a drug house is a felony for purposes of the felony-firearm statute, MCL 750.227b. That should be the end of the analysis.

Indeed, as discussed in the statement of facts, both the majority and the dissent in the Court of Appeals agreed with this reasoning (25a-26a; 43a-44a). And as Judge Swartzle observed, the Court of Appeals had previously employed this analysis in *Thomas*. The defendant in *Thomas* argued that his felony-firearm conviction could not be predicated on the offense of possession of marijuana, second offense, MCL 333.7403, MCL 333.7413, because that offense was specifically designated as a misdemeanor. The Court of Appeals disagreed:

> As defendant notes, possession of marijuana is expressly designated as a misdemeanor under the Public Health Code. However, this Court has explicitly stated that the provisions of the Penal Code, MCL 750.1 *et seq.*, govern whether a particular offense is a felony for purposes of the felony-firearm statute. See *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994). Thus, contrary to defendant's argument, the designation of the offense of possession of marijuana as a misdemeanor in the Public Health Code is irrelevant in determining whether the crime constitutes a felony for purposes of the Penal Code.
>
> The Penal Code provides, "The term 'felony' *when used in this act*, shall be construed to mean an offense for which the offender, on conviction may be

> punished by death, or by imprisonment in state prison." MCL 750.7 (emphasis added). Because defendant's conviction of possession of marijuana, second offense, was punishable by imprisonment for up to two years, MCL 333.7413(2),[6] we find that it constitutes a felony under the Penal Code. The felony-firearm conviction based on the predicate conviction of possession of marijuana, second offense, is therefore valid. [46a-47a.]

But the majority in the instant case felt restrained from applying the same reasoning because the majority misconstrued part of a statement in *Smith*. According to the majority's misreading of *Smith*, the Legislature intended *all* "two-year misdemeanors" to be considered as misdemeanors under the Penal Code, despite the Penal Code's declaration that they are felonies, and regardless of whether they were designated as misdemeanors in the Penal Code or somewhere else. The majority's analysis and conclusion on this point were in error. As discussed below, this is not what *Smith* said.

B. ***People v Smith*, 423 Mich 427 (1985) stands for the proposition that a legislative act's definitions control within that act, not for the proposition that a crime defined as a two-year misdemeanor outside the Penal Code is a misdemeanor for purposes of the Penal Code.**

The question in *Smith* was "whether offenses defined in the Penal Code as misdemeanors punishable by up to two years in prison may be considered 'felonies' for the purposes of the habitual-offender, probation, and consecutive sentencing provisions of the Code of Criminal

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[6] The enhanced sentencing provision of the Public Health Code, MCL 333.7413, made all the difference in *Thomas*. A first offense of possession of marijuana is punishable by "imprisonment for not more than 1 year." MCL 333.7403(2)(d). That sentence could not be served in a state prison. MCL 769.28. Thus, a first offense of possession of marijuana would not have qualified as a felony under MCL 750.7. It was the enhanced sentence that rendered the crime a felony.

In this case, neither the Court of Appeals majority nor the dissent addressed the impact of the habitual offender statute, MCL 769.10, which raised defendant's maximum penalty for maintaining a drug house to three years' imprisonment. But this does not change the analysis. Even without the enhancement, maintaining a drug house is punishable by imprisonment in a state prison, and thus is a felony under MCL 750.7.

Procedure." 423 Mich at 432. This Court correctly concluded that they could, since the definitions of "felony" and "misdemeanor" in the Code of Criminal Procedure, rather than those in the Penal Code, applied. *Id.* at 445. It was in this context that this Court stated:

> The plain language of *the statutes involved*, considered in light of the purposes sought to be accomplished, leads us to conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes. [*Id.* at 434 (emphasis added).]

In other words, the fact that the Legislature defined some crimes as misdemeanors in the Penal Code did not affect their status as felonies under the definition in the Code of Criminal Procedure.

But as Judge Swartzle pointed out, the Court of Appeals majority in this case pulled the clause "the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code" out of this context. This Court in *Smith* had no occasion to consider the status, for purposes of the Penal Code, of an offense defined as a two-year misdemeanor *outside* the Penal Code.[7] The Court of Appeals majority simply construed this clause too broadly.[8]

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[7] Even if this Court's language in *Smith* could plausibly be read as addressing this question, it would be dictum because the question was unnecessary to the Court's decision of the case before it. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011).

[8] The majority further confused the analysis by discussing the definition of "felony" in the Code of Criminal Procedure, which is not implicated in this case. The Code of Criminal Procedure, similarly to the Penal Code, defines "felony" as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g). The majority called this definition "the only potential means of justifying" a decision that maintaining a drug house could be the underlying felony for a felony-firearm conviction (24a). But neither the People nor Judge Swartzle's dissent relied on this definition; they relied on the definition of felony in the Penal Code because that is the code that defines felony-firearm. The majority's statement is hard to explain, since the majority itself, but for its reading of *Smith*, would have relied on the definition of felony in the Penal Code (25a-26a).

Unfortunately, this was not the first time the Court of Appeals made this mistake. In *Williams*, the Court stated generally, "Although a misdemeanor that may result in two years' imprisonment may be deemed a felony for purposes of the … Code of Criminal Procedure, … it cannot be deemed a felony for purposes of the Penal Code." 243 Mich App at 335, citing *Smith*. Like the majority in this case, the Court in *Williams*, which was faced with an offense defined as a misdemeanor in the Penal Code, made an overbroad statement of the holding in *Smith* without regard to the origin of the two-year misdemeanor.

Far from supporting the majority's conclusion, as Judge Swartzle noted, *Smith* declared that for purposes of a particular legislative code, definitions within that code should control and should trump contrary definitions from other codes (39a). Different codes have different purposes and supply their own definitions to advance those distinct purposes. *Smith*, 423 Mich at 442. "To apply the definition of misdemeanor in one statute to the operations of the other statute would defeat the purposes of the other statute." *Id.* at 444.

That principle is just as applicable here, where the question is whether to apply a definition of misdemeanor in the Public Health Code to the operations of the Penal Code. The Penal Code is intended to "'define crimes and prescribe the penalties therefor,'" *Smith*, 423 Mich at 437, quoting Preamble, MCL 750.1 *et seq*. The primary purpose of the Public Health Code, as expressed in the Preamble to MCL 333.1101 *et seq.*, is to "protect and promote the public health." The extended statement of purpose includes, as one of more than 20 other phrases, "to provide for penalties and remedies." But unlike the Penal Code, the Health Code does not include the expressed intent to "define crimes." More significantly, the Health Code does not purport to define the crime of felony-firearm. The Penal Code does that by proscribing the possession of a firearm during the commission of a felony, MCL 750.227b, and by defining "felony," MCL 750.7. To

paraphrase *Smith*, applying the Health Code's designation of an offense as a misdemeanor to the operations of the Penal Code would defeat the purposes of the Penal Code.

The majority's reading of *Smith* also contradicts the principle that this Court will "'read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003), quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The Penal Code contains its own definition of "felony," and that definition is unambiguous. Neither MCL 750.227b, nor MCL 750.7, nor any other part of the Penal Code directs the reader to another code's designation of an offense as a felony or misdemeanor, much less instruct that the other code's designation should supplant the Penal Code's own definition. To the contrary, the Penal Code instructs, "All provisions of this act shall be construed according to the fair import of *their* terms, to promote justice and to effect the objects of the law." MCL 750.2 (emphasis added).

And the authors of the Penal Code knew how to incorporate other statutes when they so desired:

> When the performance of any act is prohibited by this or *any other statute*, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition, or in *any other* section or *statute*, the doing of such act shall be deemed a misdemeanor. [MCL 750.9 (emphasis added).]

In MCL 750.9, the Legislature *has* directed the reader to other codes. If any statute, inside or outside the Penal Code, creates a crime, but no penalty is provided anywhere, that crime is a misdemeanor.

The omission of a provision from some parts of a statutory scheme and the inclusion of that provision in other parts should be construed as intentional. *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006), quoting *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Had the Legislature so desired, it could have written MCL 750.7 to say

something like: "The term 'felony' when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison, unless any other statute designates that crime as a misdemeanor." Or the Legislature could have included a similar restriction in the felony-firearm statute itself. It did neither. Instead, it declared that if an offender may be punished by imprisonment in state prison, the offense is a felony. Period.

C. ***People v Baker*, 207 Mich App 224 (1994) and *People v Williams*, 243 Mich App 333 (2000) were wrongly decided, and do not help defendant's case in any event.**

Baker and *Williams*, the other two cases relied on by the Court of Appeals majority, also do not support the majority's result. Both of those cases dealt with a situation not present in this case: determining whether a crime defined as a misdemeanor *within a specific section of the Penal Code* could nonetheless constitute a felony for purposes of another section of the Penal Code. Both cases construed MCL 750.479, which at the time provided that resisting a police officer was a "misdemeanor, punishable by imprisonment in the state prison for not more than 2 years." In both cases, the Court of Appeals answered the question incorrectly. But even if this Court concludes otherwise, *Baker* and *Williams* do not change the result in this case because no part of the Penal Code defines maintaining a drug house as a misdemeanor.

In *Baker*, the question was whether a violation of MCL 750.479 (resisting a police officer) was a felony for purposes of MCL 750.227b, the felony-firearm statute. The Court, without mentioning the definition of felony in MCL 750.7, answered "no" because at the time, MCL 750.479 specifically designated it as a misdemeanor. 207 Mich App at 225. Similarly, in *Williams*, 243 Mich App at 334-335, the question was whether a violation of MCL 750.479 was a felony for

purposes of MCL 750.199a, which proscribes absconding on a felony bond. The Court noted the definitions of felony and misdemeanor in MCL 750.7 and MCL 750.8, but did not consider them in its analysis. *Id.* Instead the Court, citing *Smith*, said, "Although a misdemeanor that may result in two years' imprisonment may be deemed a felony for purposes of … the Code of Criminal Procedure, … it cannot be deemed a felony for purposes of the Penal Code." *Id.* at 335.

These holdings are erroneous because in each case, the Court of Appeals should have looked to MCL 750.7, not to MCL 750.479, to construe MCL 750.227b (*Baker*) and MCL 750.199a (*Williams*). MCL 750.7 declares that "[t]he term 'felony' when used in this act [the Penal Code], shall be construed to mean an offense for which the offender on conviction may be punished by … imprisonment in state prison." It contains no exceptions for crimes labeled as misdemeanors – even within the Penal Code itself.

For example, MCL 750.227b provides that a person is guilty of felony-firearm if he or she "carries or has in his or her possession a firearm when he or she attempts to commit a *felony* …" (emphasis added). This is an instance of the term "felony" being used in the Penal Code. Therefore, the definition of "felony" in MCL 750.7 applies. The Court in *Baker* should have looked to MCL 750.7 to define "felony" when it construed MCL 750.227b, not to the designation of resisting arrest as a misdemeanor in MCL 750.479. Construing the statutes in harmony leads to the conclusion that while the Legislature intended a violation of MCL 750.479 (before its amendment in 2002) to be considered a misdemeanor for other purposes,[9] it nonetheless intended that it could support a conviction of felony-firearm.

[9] For example, a person convicted solely of violating MCL 750.479 before the 2002 amendments could truthfully state on a job application that he or she had never been convicted of a felony.

Similarly, the Court in *Williams* was faced with MCL 750.199a, which states that a person is guilty of absconding on a felony bond if he or she "abscond[s] on or forfeit[s] a bond given in any criminal proceedings wherein a felony is charged …" This is another use of the term "felony" within the Penal Code, and the definition in MCL 750.7 – not the designation of resisting arrest as a misdemeanor in MCL 750.479 – applies. Giving effect to both MCL 750.7 and MCL 750.479 compels the conclusion that the Legislature intended resisting arrest (again, before the 2002 amendment to MCL 750.479) to be deemed a misdemeanor for some purposes, yet intended that a person who absconds while on bond for resisting arrest could be charged and convicted under MCL 750.199a.

But even if this Court disagrees with this analysis and concludes that the conflicts between statutes within the Penal Code should be resolved in some other way, that conclusion would not aid defendant in this case. Here there are no competing or inconsistent statutes within the Penal Code. The principle of *Smith* – that a legislative act's definitions control within that act – applies here with no complications. Under the Penal Code's definition in MCL 750.7, maintaining a drug house is a felony because it is punishable by imprisonment in state prison. Since the felony-firearm statute, MCL 750.227b, is part of the Penal Code, the definition of felony in MCL 750.7 determines whether a crime is a felony for purposes of that statute.

D. The felony-firearm statute and the statute proscribing maintaining a drug house cannot be construed *in pari materia* to reach the result defendant suggests.

In his answer to the People's application for leave to appeal, defendant suggests that the relevant sections of the Penal Code and the Public Health Code can be reconciled. This is possible because, according to defendant, maintaining a drug house also meets the Penal Code's definition of a misdemeanor. No, it doesn't.

> The term "felony" when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison. [MCL 750.7.]
>
> When any act or omission, *not a felony*, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, and imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor. [MCL 750.8 (emphasis added).]

As the emphasized words show, if an offense meets the definition of felony in MCL 750.7, the definition of misdemeanor in MCL 750.8 does not apply. Defendant essentially contends that the words "not a felony" can be read out of MCL 750.8, and MCL 750.7 can be ignored altogether, for the sake of harmony between MCL 333.7406 and MCL 750.227b. This violates the principles that every word in a statute is to be given effect, *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999), and that appellate courts are to "construe an act as a whole to harmonize its provisions," *Macomb County Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). When MCL 750.7 and 750.8 are read together, and effect is given to the words "not a felony" in MCL 750.8, maintaining a drug house simply cannot be categorized as a misdemeanor under the Penal Code.

Statutes are not to be construed together in a way that produces "contradiction, or repugnance, or absurdity." *People v Harrison*, 194 Mich 363, 370-371; 160 NW 623 (1916), quoting Lewis Sutherland on Statutory Construction (2d Ed) § 267. Defendant's suggestion does not construe the Penal Code and the Health Code *in pari materia*; it simply overrides the unambiguous language of the Penal Code.

Defendant's proposal also conflicts with the way in which this Court harmonized contrasting codes in *Smith*. The Court held that the Penal Code's designation of certain offenses as misdemeanors did not control for purposes of the Code of Criminal Procedure. 423 Mich at 434, 444. The Code of Criminal Procedure's general definitions of "felony" and "misdemeanor"

were, and are, very similar to the general definition of those terms in the Penal Code. When *Smith* was decided, the Code of Criminal Procedure defined them as follows:

> "'(g) "Felony" means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year, or an offense expressly designated by law to be a felony.
>
> '(h) "Misdemeanor" means a violation of a penal law of this state which is not a felony, or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or by a fine that is not a civil fine.'"[10] [*Smith*, 423 Mich at 439, quoting MCL 761.1 (emphasis omitted).]

The Court in *Smith* agreed that the Penal Code and the Code of Criminal Procedure should be construed *in pari materia*. 423 Mich at 441-442. But the Court did not do what defendant suggests it should do now. The Court did not try to make the crimes designated in the Penal Code as two-year misdemeanors fit the definition of misdemeanor in the Code of Criminal Procedure. To do so, the Court would have had to ignore the definition of felony in the Code of Criminal Procedure, as well as the words "which is not a felony" in its definition of misdemeanor.

Instead, the Court emphasized that the Penal Code and the Code of Criminal Procedure were enacted for different purposes, and that "to apply the definition of misdemeanor in one statute to the operations of the other statute would defeat the purposes of the other statute." *Smith*, 423 Mich at 444. The Court resolved the apparent conflict not by manipulating or ignoring one code's definition, but by concluding that the Legislature intended some crimes to be considered as misdemeanors for purposes of one code, but as felonies for purposes of the other code. *Id.* at 434.

So here. The Legislature enacted the Penal Code and the Public Health Code for different purposes. It intended some crimes, including maintaining a drug house, to be considered

[10] Since *Smith* was decided, MCL 761.1 has been amended in ways that do not affect this analysis. The subsections defining "felony" and "misdemeanor" are now (f) and (n), respectively; the words "by death or" have been removed from the definition of felony; and other nonsubstantive changes have been made.

misdemeanors for purposes of the Health Code, but as felonies for purposes of the Penal Code. It did *not* intend for the Penal Code's definitions of felony and misdemeanor to be ignored or rewritten.

And the holding the People seek does not render meaningless the Health Code's designation of maintaining a drug house as a misdemeanor. A person convicted of that offense avoids the negative consequences of a felony conviction in matters governed by the Health Code. For example, a person sentenced for manufacturing or delivering a controlled substance may receive a term of imprisonment that runs "consecutively with any term of imprisonment imposed for the commission of another *felony*." MCL 333.7401(3) (emphasis added). Because the Health Code defines maintaining a drug house as a misdemeanor, a person convicted of maintaining a drug house and of manufacturing or delivering a controlled substance cannot receive consecutive sentences under MCL 333.7401(3). See *People v Wyrick*, 474 Mich 974; 707 NW2d 188 (2005) (vacating the imposition of consecutive sentences under MCL 333.7401(3) where the other "felony" was possession of marijuana, second offense, which the Health Code expressly designated as a misdemeanor); *People v Hughes*, 217 Mich App 242, 246; 550 NW2d 871 (1996) (declining to apply the Penal Code's definition of felony to MCL 333.7401(3) because that definition, by the plain language of MCL 750.7, applies only within the Penal Code).

Also, MCL 333.7416(1) makes it a felony to recruit, induce, solicit, or coerce a minor to commit or attempt to commit "any act that would be a felony under this part if committed by an adult." MCL 333.7405 is within the part of the Health Code referenced here (Part 74, Offenses and Penalties, which includes MCL 333.7401 – MCL 333.7461). But because MCL 333.7406 designates violations of MCL 333.7405 as misdemeanors, a person cannot be convicted under MCL 333.7416(1) for recruiting or inducing a minor to maintain a drug house.

Treating the offense of maintaining a drug house as a misdemeanor for purposes of the Health Code, but as a felony for purposes of the Penal Code, gives full effect to both statutes and is consistent with *Smith* and the rules of statutory construction.

REQUEST FOR RELIEF

The People request this Court to hold that a crime that constitutes a felony under MCL 750.7 is to be considered a felony for purposes of the Penal Code, including the felony-firearm statute, regardless of how it is labeled elsewhere. The People further ask the Court to clarify or disapprove the language in *Smith* to the extent it can be read to support a contrary result, and to overrule *Baker* and *Williams*. Finally, the People request this Court to reverse the Court of Appeals and reinstate defendant's felony-firearm conviction.

DATED: January 31, 2018

Respectfully submitted,

/s/ Aaron J. Mead

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