STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Elizabeth L. Gleicher, P.J., Michael J. Kelly and Douglas B. Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

-vs-

JOEL EUSEVIO DAVIS

Defendant-Appellee.
_____/

Supreme Court No. 156406

Court of Appeals No. 332081

Circuit Court No. 15-5481-01

DEFENDANT-APPELLEE'S

BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

BY: JACQUELINE J. McCANN (P58774)
MICHAEL L. MITTLESTAT (P68478)
Attorneys for Defendant-Appellee
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

TABLE OF CONTENTS

*trimmed MSC brief - appellee.docx*31233
Joel Eusevio Davis

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, & Rules

STATEMENT OF JURISDICTION

Defendant-Appellee does not contest that this Honorable Court has jurisdiction in this matter.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **Do MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct? Do Defendant's convictions for both thus violate the state and federal constitutional prohibitions on Double Jeopardy? Do neither *United States* v *Powell* nor *People v Doss* preclude this Court from granting relief?**

A. Is the legislative intent against multiple punishments demonstrated by the plain language of the statutes?

B. Because the Legislature did not intend multiple punishments here, would allowing both convictions to stand violate the state and federal constitutional prohibitions on Double Jeopardy?

C. *United States v Powell* and *People v Doss* do not compel a different result?

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

COUNTER-STATEMENT OF FACTS

Defendant-Appellee Davis accepts the People's Statement of Facts, except that he notes that his Statement of Questions Presented in his brief on appeal in the Court of Appeals was specifically as follows:

> **II.** WHERE THE CRIMES OF ASSAULT WITH INTENT TO DO GREAT BODILY HARM LESS THAN MURDER AND DOMESTIC VIOLENCE ASSAULT HAVE DIAMETRICALLY OPPOSED *MENS REA* ELEMENTS DID THE LEGISLATURE EVIDENCE AN INTENT NOT TO CONVICT AND PUNISH DEFENDANTS UNDER BOTH MCL 750.84 AND 750.81A FOR THE SAME ACTS? IN LIGHT OF THIS, DO MR. DAVIS'S CONVICTIONS AND SENTENCES FOR BOTH OFFENSES VIOLATE DOUBLE JEOPARDY? (1b, Statement of Questions from Defendant's brief on appeal in the Court of Appeals)

Additional facts may be provided *infra*.

In its order granting leave to appeal, this Honorable Court asked the parties to address the following:

> (1) whether the defendants convictions under MCL 750.8 la(3) and MCL 750.84 violate double jeopardy; (2). whether MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct, compare *People v Miller*, 498 Mich 13, 18-26 (2015) with *People v Doss*, 406 Mich 90, 96-99 (1979); (3) whether the Court of Appeals erred in recognizing a rule against mutually exclusive verdicts in Michigan, see generally *United States v Powell*, 469 US 57, 69 n 8 (1984); *State v Davis*, 466 SW3d 49 (Tenn, 2015); and (4) whether the Court of Appeals erred in applying this rule to the facts of this case.[1]

[1] *People v Davis*, 501 Mich 1064 (2018).

STANDARD OF REVIEW

This Court reviews questions of law regarding statutory construction and the application of the state and federal constitutions de novo. *People v Miller*, 498 Mich 13, 17-18 (2015).

ARGUMENTS

I. MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct. Defendant's convictions for both thus violate the state and federal constitutional prohibitions on double jeopardy. Neither *United States* v *Powell* nor *People v Doss* precludes this Court from granting relief.

A. The legislative intent against multiple punishments is demonstrated by the plain language of the statutes.

The Legislature's intent that a person not be convicted and sentenced for both aggravated domestic assault, MCL 750.81a(2), and assault with intent to commit great bodily harm (AWIGBH), MCL 750.84, for the same acts committed against the same victim is shown by the plain language of the statutes. The statutes contain contradictory and mutually exclusive *mens rea* provisions.

Aggravated domestic assault is statutorily defined in relevant part as an assault causing aggravated injury by a person who acts "*without intending to commit murder or to inflict great bodily harm less than murder*." MCL 750.81a(2)[2] (emphasis added). The assault with intent to do great bodily harm less than murder statute of course requires proof that the defendant acted

[2] In full, MCL 750.81a(2) provides that "[e]xcept as provided in subsection (3), an individual who assaults his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household, without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL: 750.81a(3) elevates the offense to a felony punishable by up to five years in prison if the defendant had one or more prior convictions under subsection (2); MCL 750.81 – 750.84 or 750.86; or a law of another state or political subdivision of another state substantially corresponding to the same.

with "*intent to do great bodily harm, less than the crime of murder*." MCL 750.84 (emphasis added).

The language in MCL 750.84(3) that allows for conviction and punishment for "any other violation of law arising out of the same conduct as the violation of this section," does not compel a different result. While this phrasing would appear broad, reliance on it falls apart when considered along-side the clear language of MCL 750.81a(1) and (2), that excludes acts committed with the intent to do great bodily harm or with intent to kill from conviction for aggravated domestic assault. In enacting statutes with such diametrically opposed *mens rea* requirements, the Legislature spoke with clarity and the otherwise broad language of MCL 750.84(3) does not support allowing convictions and punishments for offenses involving diametrically opposed mens reas.

This Court has explained that when statutory language is clear, it must be followed:

> When interpreting a statute, "our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language." "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." "When a statute's language is unambiguous, ... the statute must be enforced as written. No further judicial construction is required or permitted." *People v Pinkney*, 501 Mich 259, 268 (2018).

The prosecutor wishes this Court to instead read the language "without intending to commit murder or to inflict great bodily great bodily harm less than murder" out of the aggravated domestic assault statute, and render it mere surplusage or nugatory in contravention of this Court's well established rules for statutory construction. In *Miller*, at 25, this Court wrote of "our well-recognized rule that we 'must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" (citation omitted).

B. Because the Legislature did not intend multiple punishments here, allowing both convictions to stand violates the state and federal constitutional prohibitions on Double Jeopardy.

The United States and the Michigan Constitutions provide that no person may be put in jeopardy twice for the same offense. US Const, Ams V,[3] XIV[4]; Const 1963, art 1, § 15.[5] Double jeopardy is composed of a successive prosecution strand and a multiple punishment strand. See *North Carolina v Pearce*, 395 US 711 (1969); *Miller*, *supra* at 17. This case involves the multiple punishments strand. See *Miller*, *supra* at 17.

As this Court recently explained in *Miller*, *supra* at 17-18:

> The multiple punishments strand of double jeopardy "is designed to ensure that courts confine their sentences to the limits established by the Legislature" and therefore acts as a "restraint on the prosecutor and the Courts." The multiple punishments strand is not violated "[w]here 'a legislature specifically authorizes cumulative punishment under two statutes....'" Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." (Footnotes omitted.)

[3] US Const, Am V, provides in pertinent part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...."

[4] The Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *People v Ream*, 481 Mich 223, 255 (2008); *Benton v Maryland*, 395 US 784, 795-796 (1969).

[5] Const 1963, art 1, § 15 provides in pertinent part that "[n]o person shall be subject for the same offense to be twice put in jeopardy."

If the Legislature's intent is clear, the courts must abide by it. Only if the Legislature's intent is not clear, the courts should look to the *Blockburger/Ream*[6] same elements test.[7] *Miller, supra* at 19.[8]

As demonstrated above by the plain language of the statutes, the Legislature did not intend multiple punishments here. Because the Legislature did not intend for a defendant to be punished for these two offenses with their contradictory and mutually exclusive mens rea provisions, for the same acts against the same victim it violates the state and federal prohibitions against Double Jeopardy for a person to be convicted and sentenced for aggravated domestic assault and AWIGBH. This Court must dismiss and vacate his aggravated domestic assault conviction, the less serious conviction, and order resentencing on the remaining count. *Miller,* 498 Mich at 26-27.

C. ***United States v Powell*** **and** ***People v Doss*** **do not compel a different result.**

In *United States v Powell*, 469 US 57, 69 n 8; 105 US 471; 83 L Ed 2d 461 (1984), while holding that generally inconsistent jury verdicts should not be disturbed on appeal, the US Supreme Court left open the possibility that a defendant is entitled to relief where he is convicted of two crimes that are mutually exclusive.

---

[6] *Blockburger v US*, 284 US 299, 304, 52 SCt 180, 76 LEd 306 (1932); *People v Ream*, 481 Mich 223 (2008).

[7] It is not a violation of double jeopardy to convict a defendant of multiple offenses if "each of the offenses for which defendant was convicted has an element that the other does not...." This means that, under the *Blockburger/Ream* test, two offenses will only be considered the "same offense" where it is impossible to commit the greater offense without also committing the lesser offense. *Miller, supra* at 19-20.

[8] This Court's one-paragraph order in *People v Strawther*, 480 Mich 900 (2007), which only looked to the *Blockburger* test in holding that felonious assault and AWIGBH convictions did not constitute double jeopardy, without analyzing legislative intent, pre-dated *Miller*. Therefore, *Strawther* was at least implicitly abrogated by *Miller*.

In *People v Doss*, 406 Mich 90 (1979), this Court did not address a Double Jeopardy question, as the defendant was charged with a single count of statutory manslaughter, MCL 750.329. In *Doss*, this Court addressed the analytically distinct question of whether the statutory language "without malice" was an element of the offense that the People must prove. The Court of Appeals held that the Information should have been quashed because the People had failed to establish an essential element of the statutory offense, i.e. that the defendant acted "without malice". *Id.* at 96-98. This Court noted that "it is manifestly impossible for an act to be at the same time malicious and free from malice" (*Id.* at 98) and that "'[m]alice' or 'malice aforethought' is that quality which distinguishes murder from manslaughter." (*Id.* at 99). However, this Court held that the prosecutor is not required to prove an absence of malice, which it described as absence of an element, explaining that crimes do not have negative elements that must be proven. *Id.* at 99.

This Court's holding in *Doss* made instinctive sense in its context of a single charge of statutory manslaughter. This Court is loath to allow the guilty to go free without punishment by asserting that the prosecution has undercharged and overproven its case. *People v Holtschlag*, 471 Mich 1, 20-21 (2004) (a defendant may not seek relief on sufficiency grounds on the basis that the prosecutor "'over-proved'" its case by proving the defendant acted with a more culpable mens rea than charged).

However, *Doss* did not address the question of how a jury should be instructed when the defendant is charged with more than one offense and those offenses have mutually exclusive elements. What if the prosecutor in *Doss* had charged the defendant with second-degree murder and statutory manslaughter? Should the jury be informed that "'[m]alice' or 'malice aforethought' is that quality which distinguishes murder from manslaughter" (*Id.* at 99) or that

"it is manifestly impossible for an act to be at the same time malicious and free from malice" (*Id.* at 98)? Under the standard criminal jury instructions, Michigan jurors are not informed of the contradictory and mutually exclusive *mens rea* feature of murder and statutory manslaughter. MI Crim JI 16.11.[9] Just as the jurors in this case were not informed of the contradictory and mutually exclusive *mens rea* feature for AWIGBH and aggravated domestic assault. (2b-6b, preliminary and final instructions on elements).

It is also not consistent with a defendant's state and federal right to a jury trial to allow jurors to unknowingly enter contradictory and mutually exclusive verdicts, which increase the punishment imposed upon a defendant.[10] US Const VI, XIV; Const 1963, art 1, § 20; see *People v Lockridge*, 498 Mich 358, 370 (2015). It is also unfair to jurors themselves, who most likely would not convict defendants of contradictory and mutually exclusive offenses if they were actually informed of the distinction. Jurors should not be duped into rendering contradictory and mutually exclusive verdicts.

---

[9] MI Crim JI 16.11:
(1) [The defendant is charged with the crime of _____ / You may also consider the lesser charge of] involuntary manslaughter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
(2) First, that the defendant caused the death of [name deceased], that is, [name deceased] died as a result of [state alleged act causing death].
(3) Second, that death resulted from the discharge of a firearm. [A firearm is an instrument from which (shot / a bullet) is propelled by the explosion of gunpowder.]
(4) Third, at the time the firearm went off, the defendant was pointing it at [name deceased].
(5) Fourth, at that time, the defendant intended to point the firearm at [name deceased].
[(6) Fifth, that the defendant caused the death without lawful excuse or justification.]

[10] The defendant receives two sentences instead of one. Additionally, for each individual sentence the defendant stands before the court as someone having been convicted of multiple offenses which can cause the court to increase the sentence impose. It also impacts the defendant's sentencing guidelines range via the scoring of Prior Record Variable 7 for a concurrent conviction, e.g. raising even a first time offenders prior record level from A to at least C. MCL 777.57 (PRV 7); MCL 777.61 -777.69 (sentencing grids).

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee **JOEL EUSEVIO DAVIS** asks that this Honorable Court affirm the Court of Appeals' decision and remand to the trial court for appropriate relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Jacqueline J. McCann
_____

JACQUELINE J. McCANN (P58774)
MICHAEL L. MITTLESTAT (P68478)
Attorneys for Defendant-Appellee
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: October 5, 2018