No. 121926

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SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LESHAWN COATS Defendant-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-2028. There on appeal from the Circuit Court of Cook County, Illinois , No. 13 CR 14193. Honorable Vincent M. Gaughan, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Possession of a single weapon is a single act, and that single act forms the essence of both Armed Violence and Armed Habitual Criminal, so Illinois' one act, one crime doctrine precludes convictions for both offenses.

Leshawn Coats was improperly convicted of two crimes, Armed Violence and Armed Habitual Criminal, based on the single act of possessing one handgun. The State does not dispute that possessing the handgun was a single act,[1] but claims that because Armed Violence required proof of an

[1] The State concedes that the appellate court erred in when it divided Coats's possession of the single handgun in this case into two acts of possession. (St. br. 6, n. 3) It asks this Court to affirm on the sole basis that Armed Violence required the additional act of drug possession. Coats therefore rests on the argument in his opening brief that continuous possession of a single item can only be one act for one act, one crime purposes.

additional act ("committing any felony"), he is not being punished twice for the same physical act. The State does not meaningfully distinguish this Court's precedents, however, and its claim that Coats's "new rule" is "utterly unworkable" is doubly wrong – this Court's rule is not new, and it is easily applied.

A. The State fails to reconcile this Court's precedents, which dictate that possessing a single item can only support one possession offense, even if one of the offenses requires another act.

As Coats explained in his opening brief, the problem with the State's position is that this Court has repeatedly relied on one act, one crime doctrine to vacate convictions even where the vacated conviction required proof of an act not shared by the remaining conviction. Most damaging to the State's case is *People v. McLaurin*, 184 Ill. 2d 58, 106 (1998), which the State misconstrues. In *McLaurin*, the defendant was convicted, among other things, of aggravated arson, murder caused by the arson, home invasion, and residential burglary. *Id*. at 103-04. Contrary to the State's reading, this Court did not somehow aggregate those four crimes and mysteriously vacate the two "least serious." (St. br. 10-11) It specifically found that McLaurin was convicted of two crimes for *each* of two acts; (1) the murder and aggravated arson were based on the single physical act of setting a fire, thus the arson had to be vacated; *id*. at 106, (2) *residential burglary and home invasion were based on the single physical act of entering the dwelling* and thus the

residential burglary had to be vacated. *Id*. That was so even though, as here, one of the crimes (home invasion) required additional physical acts (in McLaurin's case, injuring the victim).

Thus, the State's claim that "there is no double-counting problem in defendant's case because he committed two physical acts and was convicted of two offenses" fails to distinguish *McLaurin*. (St. br. 11) McLaurin committed two physical acts – entering the dwelling and injuring the victim – and was convicted of two offenses. This Court held that was still unacceptable because both residential burglary and home invasion were based on the same act of entering the dwelling, even though home invasion required another act. Here, both of Coats's convictions are based on the same act of possession, even though one of the crimes, as in *McLaurin*, required proof of an additional act.

The State nevertheless claims that "Coats's rule" (i.e. this Court's implicit rule) was rejected by this Court in *People v. Rodriguez*, 169 Ill. 2d 183, 188-90 (1996). First, *Rodriguez* predated *McLaurin* by two years, and to whatever extent they are in conflict, the later decision controls. But *Rodriguez* and *McLaurin* are entirely consistent with the rule Coats asks this Court to clarify, as he explained in his opening brief. (Def. br. 13-15) This Court correctly found in *Rodriguez* that it makes no sense to conclude, as the appellate court did, that home invasion and aggravated criminal sexual assault can be "based" on the act of brandishing a gun. That act is not the crux of either home invasion or sexual assault, so both convictions could

stand. For both offenses, the gun was simply an attendant aggravating factor.

The facts of this case are much closer to *McLaurin* than *Rodriguez*. The crucial act of Armed Violence and of Armed Habitual Criminal is the same – possession of the same gun. As in *McLaurin*, and unlike *Rodriguez*, the shared crucial act was the *only* act involved in one of the crimes – the other element was not an act. (It was a mental state for the burglary in *McLaurin*, and it was a status – having certain felony convictions – in this case). The crucial act in both Armed Violence and Armed Habitual Criminal is possession of a gun. Holding that the same gun cannot simultaneously form the basis of both offenses is consistent with both *McLaurin* and *Rodriguez*.

Turning next to murder, the State confuses the issue by claiming that the bar on convictions for both felony murder and knowing murder of the same victim "reflect[s] the long-standing principle that 'first degree murder is a single offense, and the different theories embodied in the first degree murder statute are merely different ways to commit the same crime.' " That is true but irrelevant; defendants can be convicted of multiple counts of the same crime. See, e.g., *People v. Angarola*, 387 Ill. App. 3d 732, 739 (2nd Dist. 2009) (defendant properly convicted of two counts of forgery because they were based on different physical acts – creating a false document, and delivering the same document).

This Court explicitly relies on one act, one crime doctrine as the basis for the rule barring simultaneous convictions for intentional/knowing murder

and felony murder. See *People v. Smith*, 233 Ill. 2d 1, 20 (2009) (vacating felony murder conviction and relying on one act, one crime doctrine); *People v. Lego*, 116 Ill. 2d 323, 344 (1987) (same holding); *People v. Mack*, 105 Ill. 2d 103, 136-37 (1984) (same). Thus, contrary to the State's implication, the rule barring simultaneous knowing murder and felony murder convictions is not somehow separate from one act, one crime doctrine; this Court has made it clear that the rule is based on, and subordinate to, the doctrine. That longstanding rule is consistent with the implicit rule that Coats asks this Court to make explicit. It is irreconcilable with the rigid interpretation of the doctrine that the State espouses, because felony murder obviously requires additional acts beyond killing the victim.

B. The rule that two convictions cannot stand where they share their crucial act is intuitive, particularly in this case, where it is clear that possessing a gun was the crux of both Armed Violence and Armed Habitual Criminal.

The State further argues that the implicit rule is "utterly unworkable" because it can be hard to identify the crux of a given crime. As evidence, the State disputes *McLaurin*'s characterization of home invasion as essentially an aggravated form of burglary, with a common crucial act of entering the dwelling. The State relies on an outdated precedent where this Court stated that home invasion "is not a property crime," relying on the fact that home invasion is located in the statutory chapter listing "offenses against the

person." (St. br. 13, quoting *People v. Hill*, 199 Ill. 2d 440, 452 (2002)).

First, that is no longer the case. The Criminal Code of 2012 places home invasion where it logically belongs: Part C ("Offenses Directed Against Property"), Article 19 - Burglary. The General Assembly has thus recognized that home invasion is an aggravated form of burglary. Contrary to the State's contention, it is clear that home invasion and burglary share the same crucial act, as *McLaurin* recognized. Similarly, both Armed Violence and Armed Habitual Criminal are simply aggravated forms of unlawful gun possession. The crucial act of both is possessing a gun.

The State also professes confusion about how to identify when a weapon is the crux of an offense, and when it is merely an aggravator as in *Rodriguez*. (St. br. 13-14) Yet it seems doubtful that the State would seriously argue that the essence of aggravated criminal sexual assault is brandishing a gun, with rape merely an incidental aggravating factor. It seems equally obvious that when the legislature names a crime "Armed Violence," defines that crime as possessing a gun while committing *any* felony, includes a statement of legislative intent focusing solely on the dangers of gun possession, *not* particular underlying felonies, and specifies a sentencing range higher than that of any other offense but murder, regardless of the sentence for the underlying felony, the crux of the crime is the gun, not the underlying felony. 720 ILCS 5/33A (West 2012).

One further doubts that defendants convicted of Armed Violence predicated on felony criminal damage to property valued over $300 (*People v.*

Rogers, 208 Ill. App. 3d 808, 812 (3rd Dist. 1991), or on official misconduct (*People v. Becker*, 315 Ill. App. 3d 980, 989 (1st Dist. 2000), or on Class 4 drug possession, believe that they are serving 15-year minimum sentences as punishment for the underlying felony, rather than gun possession. Contrary to the State's argument, it is indeed intuitive, not "utterly unworkable," for judges to conclude that the crux of Armed Violence is gun possession, not the underlying felony. Accord *People v. Lombardi*, 184 Ill. 2d 462, 483 (1998) abrogated on other grounds by *People v. Sharpe*, 216 Ill. 2d 481 (2005) (the "legislature was within its discretion to focus on the use of the weapon rather than the character of the underlying felony" when defining and penalizing Armed Violence).

The authority the State relies on to claim that the gun is merely an "enhancement" to the underlying felony, namely *People v. Koppa*, 184 Ill. 2d 159, 161 (1998), *People v. Del Percio*, 105 Ill. 2d 372, 378 (1985), and *People v. Wade*, 131 Ill. 2d 370, 376 (1989), spoke of enhancements in a different context – that of the prohibition on double enhancement. (St. br. 13-14) Thus, both *Koppa* and *Del Percio* state that felonies that rely on the gun as an element cannot also serve as the predicate felony for Armed Violence, since that would be punishing the same gun twice. *Koppa*, 184 Ill. 2d at 161; *Del Percio*, 105 Ill. 2d at 378. *Wade*, on the other hand, concluded that armed violence based on intimidation did *not* offend the bar on double enhancement, because the gun was not required to prove the predicate. *Wade*, 131 Ill. 2d at 376. Similarly, *People v. Donaldson*, 91 Ill. 2d 164, 168 (1982) held that in

the absence of legislative intent to punish both the underlying felony and the gun possession, a separate conviction could *not* be entered on the predicate felony. (St. br. 14) None of those cases held that the crux of Armed Violence is anything other than possession of a gun, and all of them are consistent with the rule that Coats asks this Court to clarify.

Contrast Armed Violence, 720 ILCS 5/33A (West 2012), Armed Habitual Criminal, 720 ILCS 5/24-1.7 (West 2012), or Unlawful Possession of a Weapon, 720 ILCS 5/24-1 (West 2012), where possession of a weapon defines the offense itself, with the various 15, 20, 25-life firearm enhancements, which are located in the sentencing code, 730 ILCS 5/5-8-1(d)(i)-(iii) (West 2012), or tacked onto offenses like Armed Robbery, 720 ILCS 5/18-2(b), Home Invasion, 720 ILCS 5/19-6(c) (West 2012), or Aggravated Criminal Sexual Assault, 720 ILCS 5/11-1.30 (d)(1) (West 2012). It is not difficult to conclude that in the former case, the crucial act is possession of a gun. In the latter, the gun is an aggravator. Illinois trial judges are capable of drawing that distinction.

C. The error is reviewable despite forfeiture.

The State's forfeiture argument lacks merit for several reasons. First, the State claims that Coats has forfeited even plain error review by failing to argue it to the State's liking in his opening brief. (St. br. 3-4) Little argument was necessary, however, since few propositions of Illinois law are as settled as the proposition that one act, one crime violations are subject to second

prong plain error review: multiple punishments for the same act threaten the integrity of the judicial process. *People v. Artis*, 232 Ill. 2d 156, 168 (2009); *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009), (Def. br. 7) (citing *Samantha V.*). And contrary to the State's citation to Ill. S. Ct. R. 341(h)(7), plain error can be raised for the first time in a reply brief. See, e.g., *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) ("[A]lthough defendant did not argue plain error in his opening brief, he has argued plain error in his reply brief, which is sufficient to allow us to review the issue for plain error."); *People v. Williams*, 193 Ill. 2d 306, 348 (2000) ("Indeed, this court has previously considered a defendant's plain error argument raised for the first time in a reply brief."); accord *People v. Thomas*, 178 Ill.2d 215, 235 (1997).

Second, on the issue of whether the error was "clear or obvious," the State cites no case in this Court's one act, one crime jurisprudence where this Court found an arguable violation of one act, one crime principles, but that the violation was not "clear or obvious" and thus could not be reviewed for plain error. It appears no such case exists.

To the extent the State means that questions that have divided the appellate court, like the one here, are by definition not "clear" or "obvious," this Court very recently rejected a much stronger contention. In *People v. Fort*, 2017 IL 118966, ¶ 39 this Court found clear or obvious error where a juvenile defendant charged with first degree murder, but convicted of the lesser uncharged offense of second degree murder, was sentenced as an adult and not a juvenile without a transfer hearing. This Court concluded that the

error was clear or obvious despite there being no case supporting the defendant's position, and indeed with two appellate cases finding no error at all. *Id*., n. 3. *Fort* thus makes clear that even unified appellate cases finding no error does not preclude a finding of clear error by this Court. The mere existence of a split in the appellate court, as in this case, cannot preclude such a finding.

As Coats explained in his opening brief, the only way to synthesize this Court's one act, one crime doctrine is to clarify the rule that Coats identified. (Def. br. 7) In particular, the State has not distinguished this case from *McLaurin*, which is analogous and which requires that Coats's conviction for AHC be vacated. The error in this case was thus clear or obvious, because a precedent of this Court controls. Notwithstanding the appellate court's conclusion in this case and in *People v. White*, 311 Ill. App. 3d 374 (4th Dist. 2000), it is indeed clear or obvious that a single, shared act formed the crux of both Armed Violence and Armed Habitual Criminal, and that under Illinois law, convictions for both offenses violate the one act, one crime doctrine.

Third, the State's insinuation that Coats's "new rule" is *ipso facto* exempt from plain error review is therefore baseless. (St. br. 4, n. 2) Coats is not advancing a new rule, he is asking this Court to clarify an existing rule – the only rule that harmonizes this Court's one act, one crime precedents.

Even aside from forfeiture, as the final arbiter of Illinois law this Court has the supervisory authority to overlook waiver or forfeiture to achieve the "goals of obtaining a just result and maintaining a sound body of precedent."

People v. Segoviano, 189 Ill. 2d 228, 243 (2000). Both interests are implicated by this case. First, as the State points out, this Court has adhered to the one act, one crime doctrine as a matter of state law, even though the rule is not constitutionally mandated, and even though the original rationale for the rule – parole opportunities – no longer exists. (St. br. 8-9) The continuing need for the rule – "the potential for a surplus conviction and sentence" and collateral consequences of a surplus conviction – was reiterated by this Court in *People v. Artis*, 232 Ill. 2d 156, 167–68 (2009). See also *People v. Davis*, 156 Ill. 2d 149, 160 (1993) (vacating conviction that violated one act, one crime even though the error was waived, not merely forfeited, because of the collateral consequences of an improper conviction). Those concerns plainly apply to this case, where Coats is serving consecutive gun possession sentences for possessing one gun.

Finally, this case presents an ideal opportunity to clarify one act, one crime jurisprudence by making explicit the rule that synthesizes the various one act, one crime cases that facially appear to be in tension. Even if the error here were forfeited, which it is not, this Court could and should exercise its supervisory authority to clarify Illinois law. This Court should vacate Leshawn Coats's conviction for Armed Habitual Criminal because it is based on the same crucial act as his Armed Violence conviction.

CONCLUSION

For the foregoing reasons, Leshawn Coats, defendant-appellant, respectfully requests that this Court vacate his conviction for Armed Habitual Criminal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Samuel M. Hayman, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 12 pages.

/s/Samuel M. Hayman
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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 27, 2017, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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