No. 124797

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ALEJANDRO REVELES-CORDOVA Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-16-0418. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 10-CF-2429. Honorable Sarah F. Jones, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF FOR DEFENDANT-APPELLANT

The abstract-elements test for lesser-included offenses adopted by this Court in *People v. Miller* should be limited to a comparison of the specific statutory provisions under which the defendant was charged, which is consistent with how this Court has historically applied the test, with the intent of the legislature, and with the principles underlying the one-act, one-crime doctrine.

A. The State's contention that the abstract-elements test requires courts to compare every possible permutation of the statutes is both unworkable and contrary to how this Court has historically applied the test.

Although the State maintains that the abstract-elements test as adopted in *People v. Miller*, 238 Ill. 2d 161 (2010), requires a court to compare all of the statutes' provisions, not just those the defendant was actually charged under, and that this Court's post-*Miller* decisions are consistent with this view, it does not cite a single case in which this Court actually applied the abstract-elements test in such a way. (St. Br. 9–13, 23.)

The State's position is also unworkable. For example, it is well established that the predicate felony underlying a charge of felony murder is a lesser-included offense of the murder under the abstract-elements test. *People v. Coady*, 156 Ill. 2d 531, 537 (1993) (citing *People v. Donaldson*, 91 Ill. 2d 164 (1982)). However, this Court has held that there is but one offense of first degree murder which can be committed in three ways: intentional, knowing, and felony murder. 720 ILCS 5/9-1(a) (West 2020); *People v. Coates*, 2018 IL 121926, ¶¶ 22–23. As such, when a defendant is convicted of both first degree murder and a second charged felony, a court cannot simply rely on the fact that the defendant was charged with first degree murder when assessing whether the second charged offense is a lesser-included predicate of the murder; it necessarily must look to the charging instrument to determine which manner of first degree murder was charged. The State's

interpretation of the abstract-elements test would make such an assessment impossible.

Furthermore, as set forth in Reveles's opening brief, the interpretation promoted by the State would be contrary to how this Court has historically applied the test. (Def. Br. 11–13.) The State's suggestion that this Court's earlier decisions applying the abstract-elements test are no longer good law after *Miller* is unconvincing. (St. Br. 14.) The abstract-elements test was not new to Illinois law when this Court decided *Miller*, and nothing in *Miller* suggests that this Court intended to modify how the test has been historically applied. (Def. Br. 11–13.)

The State also argues that *People v. Donaldson*, 91 Ill. 2d 164 (1982), in which this Court concluded the predicate felony of armed violence was a lesser-included offense under the abstract-elements test, is inapposite because it applies only where multiple offenses are carved out of a single physical act rather than multiple acts. (St. Br. 19.) However, this Court has previously rejected a similar argument. *People v. Mormon*, 92 Ill. 2d 268, 269–70 (1982) (rejecting State's assertion that *Donaldson* did not apply to the defendant's convictions for armed violence predicated on rape and the underlying rape). Indeed, this Court has repeatedly applied *Donaldson* to offenses involving multiple acts. *See Coady*, 156 Ill. 2d at 537 (*Donaldson* prohibited separate convictions for felony murder and its predicate felony); *People v. Payne*, 98 Ill. 2d 45, 54–55 (1983) (*Donaldson* prohibited separate convictions for armed violence and underlying burglary). Further, *Donaldson*'s use of the term "single act" notwithstanding, armed violence generally does involve multiple acts: (1) the possession of a weapon, and (2) the commission of the predicate felony. 720 ILCS 5/33A-2; *Coats*, 2018 IL 121926, ¶ 17.

More importantly, this Court's application of the abstract-elements test in *Donaldson* did not rest on there being only a single physical act. Rather, this Court held that the aggravated battery count was a lesser-included offense of the

armed violence count under *Blockburger* because, as charged, the armed violence count necessarily included all the elements of the aggravated battery such that it was impossible to commit the armed violence without committing the aggravated battery. *Donaldson*, 91 Ill. 2d at 170 . This reasoning applies regardless of whether there are single or multiple acts.

The State parrots the *Bouchee* court's contention that limiting the abstract-elements test to the charged statutory provisions would be a return to the charging-instruments test. (St. Br. 13–14); *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 11. However, as already discussed in Reveles's opening brief, this claim fails as Reveles's proposed interpretation of the test does not require a court to look to the factual allegations contained in the charging instruments. (Def. Br. 16.)

The State further argues that even if one were to consider only subsection (a)(6) of the home invasion statute, criminal sexual assault would still not be a lesser-included offense because it is possible to commit home invasion under that subsection without committing criminal sexual assault. (St. Br. 12, 25.) This argument, too, fails. This Court has held that the charged predicate felony of armed violence is a lesser-included offense under the abstract-elements test despite that a person can commit armed violence under subsection 33A-2(a) by committing "any felony," not only the specific predicate felony charged. 720 ILCS 5/33A-2(a) (West 2020); *Donaldson*, 91 Ill. 2d at 170. Similarly, the charged predicate felony of felony murder is a lesser-included offense under the abstract-elements test despite that the fact that a person can commit first degree murder under subsection 9-1(a)(3) by committing any "forcible felony other than second degree murder," not just the specific felony charged. 720 ILCS 5/9-1(a) (West 2020); *Coady*, 156 Ill. 2d at 537. Indeed, in *Miller* itself this Court cited *Lemke v. Rayes*, 141 P.3d 407, 414 (Ariz. Ct. App. 2006), which explicitly held that armed robbery is an included offense of felony murder predicated on armed robbery despite the fact that felony murder

could theoretically be predicated on other felonies, as an example of how the abstract-elements test should be applied. *Miller*, 238 Ill. 2d at 175.

As with armed violence and felony murder, the charging of criminal sexual assault as the predicate for the home invasion made the criminal sexual assault a lesser-included offense for purposes of the abstract-elements test. *See Donaldson*, 91 Ill. 2d at 170. In other words, it was not theoretically possible to commit the home invasion predicated on the criminal sexual assault without also committing the criminal sexual assault.

Finally, the State contends that, contrary to Reveles's claim, this Court's post-*Miller* decision in *People v. Stevie Smith*, 2019 IL 123901, does not support his position because although armed robbery under subsection (a)(1) can be committed without also committing aggravated battery with a firearm, subsection (a)(1) is not a lesser-included offense of subsection (a)(4). (St. Br. 25 (while the State cites subsection (a)(2), it likely meant subsection (a)(1)).) But this misses the point. If the State's position that *Miller* requires a court to compare *all* of the statute's various provisions were correct, then this Court would have compared aggravated battery with a firearm to all the possible permutations of armed robbery, not just those that are lesser-includes offenses of subsection (a)(4). The State also ignores that even if one limits the comparison to those subsections of the armed robbery statute involving being armed with a firearm, it is still possible to commit armed robbery without committing aggravated battery with a firearm where subsections (a)(2) and (a)(3) do not require the defendant to cause bodily harm. 720 ILCS 5/18-2 (West 2000). Thus, *Stevie Smith* fully supports Reveles's position that under *Miller*, only the statutory provisions the defendant was actually charged under should be compared.

Adopting the State's position would require this Court to overturn decades of precedent regarding how predicate felonies are treated under the one-act, one-

crime doctrine, and would be contrary to the intent of the legislature as demonstrated by its acquiescence in the holdings in *Donaldson* and *Coady*. There is absolutely no indication that this Court intended for its holding in *Miller* to be such a drastic departure.

B. There is no clear indication that the legislature intended for separate punishment.

The State acknowledges that the home invasion statute does not on its face provide for separate sentences for its predicate felonies, but nevertheless maintains that the legislature clearly intended for separate sentences. The State's arguments have no merit.

The State argues that there was no need for the legislature to include language in the home invasion expressly authorizing separate sentences for home invasion and its predicate offenses because section 5-8-4 of the Code of Corrections, 730 ILCS 5/5-8-4(a)(ii) (2000) ("section 5-8-4"), already made consecutive sentences mandatory for those offenses. (St. Br. 21.) However, section 5-8-4 does not override the one-act, one-crime doctrine. In *People v. Rodriguez*, 169 Ill. 2d 183 (1996), decided well before subsection (a)(6) was added to home invasion, this Court explicitly stated that the one-act, one-crime doctrine set forth in *People v. King*, 66 Ill. 2d 551 (1977), applies to convictions for which section 5-8-4 mandates consecutive sentences. *Rodriguez*, 169 Ill. 2d at 187. As such, at the time subsection (a)(6) was added, the legislature would not have believed that section 5-8-4 made it unnecessary to include express language in the home invasion statute authorizing separate sentences. In addition, given that the legislature has never amended the sentencing code to abrogate *Rodriguez*, it must be presumed that it acquiesced in this Court's holding. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 77. Not surprisingly, the State cites no authority supporting its position.

The State also acknowledges that the legislature did included language in the armed violence statute explicitly providing for separate sentences for some predicate offenses, but argues that the lack of similar language in the home invasion statute should not be interpreted as an indication that the legislature did not intend for separate sentences. (St. Br. 20.) However, the State's arguments are confusing and unpersuasive.

Initially, the State argues that armed violence, unlike home invasion, involves a single physical act, and therefore, explicit language was needed to provide for consecutive sentences for the listed offenses given this Court's holding in *Donaldson*; the implication being that such language was not needed in home invasion because it involves multiple acts. (St. Br. 20.) This argument fails because, as discussed previously, armed violence, like home invasion, generally involves multiple acts, and *Donaldson*'s application of the abstract-elements test applies to offenses involving multiple acts. The State then contradicts itself just a few paragraphs later, asserting that because armed violence and the enumerated predicates consist of *multiple* acts, the legislature had no reason to think that *Donaldson* applied. (St. Br. 22.) Besides being contradictory, the State's argument makes no sense. If the legislature believed that *Donaldson* did not apply to armed violence predicated on the enumerated offenses, there would have been no reason for it to include explicit language subjecting those predicate offenses to separate sentences.

The State acknowledges that, prior to this Court's holding in *People v. Hauschild*, 226 Ill. 2d 63 (2007), the armed violence statute actually included criminal sexual assault among the predicate offense that should get separate sentences. (St. Br. 21.) The most logical explanation for the offense's inclusion in the list is that the legislature understood that separate sentences for armed violence predicated on criminal sexual assault and the underlying criminal sexual assault would normally not stand under the one-act, one-crime doctrine, and it

wanted to make an exception in that particular situation. However, the State makes a convoluted argument that the legislature may have included criminal sexual assault in the provision because while separate sentences normally would stand due to section 5-8-4(a)(ii), had criminal sexual assault been excluded from the provision, courts would have likely interpreted the exclusion as an indication that the legislature did not intent for separate sentences despite what section 5-8-4(a)(ii) stated. (St. Br. 22.) The State appears to reason that because home invasion does not include a list of specific predicate felonies subject to separate sentences, the legislature would not think that courts might interpret the statute as overriding section 5-8-4(a)(ii), and therefore, the lack of express language providing for separate sentences for criminal sexual assault should not be interpreted as an indication that the legislature did not intend for separate sentences. (St. Br. 22.)

The State's strained reasoning does not stand up to scrutiny. First off, the State's theory is based on a false premise; as stated above, given this Court's holding in *Rodriguez*, the legislature had no reason to believe that section 5-8-4(a)(ii) overrode the one-act, one-crime doctrine. Second, section 5-8-4(a)(ii) also mandated consecutive sentences for first degree murder, 730 ILCS 5/5-8-4(a)(ii) (West 2000), and, like home invasion, the subsection of the first degree murder statute setting out felony murder does not include a list of predicate felonies subject to consecutive sentences, 720 ILCS 5/9-1(a)(3), yet the predicate to felony murder is a lesser-included offense under the abstract-elements test. *Coady*, 156 Ill. 2d at 537. There is no reason to interpret home invasion any differently. In any event, the State's twisting explanation hardly demonstrates a *clear* indication of legislative intent.

Next, the State mirrors the *Bouchee* court's argument that the legislature must have intended for criminal sexual assault to be sentenced separately from home invasion because there are some circumstances under which criminal sexual

assault can be subject to a higher sentencing range than home invasion. (St. Br. 17–18); *Bouchee*, 2011 IL App (2d) 090542, ¶ 16. But as Reveles already noted in his opening brief and the State ignores, there are also circumstances in which the predicate offense of felony murder can have a higher sentencing range than the felony murder itself, yet separate sentences are not allowed. (Def. Br. 22.)

The State raised a similar argument in *People v. Mormon*, 92 Ill. 2d 268 (1982). There, the State argued that because a defendant convicted of armed violence predicated on rape would be subject to a sentence no higher than that which he would be subject to for the underlying rape, "holding that only one conviction may stand . . . [would] defeat[ ] the legislative intent that a rapist who uses a weapon be more severely punished than a rapist who does not." *Id.* at 270. While acknowledging that armed violence would not provide an enhanced penalty under those circumstances, this Court rejected the State's argument, holding that because there was no clear legislative expression to the contrary, convictions for both armed violence and the underlying rape could not stand. *Id.* Thus, the mere fact that criminal sexual assault is not necessarily a "lesser" offense in every circumstance is not a clear indication that the legislature intended for separate sentencing. Indeed, when the legislature wants to address such situations, it does so explicitly in the language of the statute. *See, e.g.*, 720 ILCS 5/33A-3(b) (West 2020) ("Violation of Section 33A-2(a) with a Category III weapon is a Class 2 felony *or the felony classification provided for the same act while unarmed, whichever permits the greater penalty.*" (emphasis added)). There is no such language in the home invasion statute. What is more, in those circumstances in which criminal sexual assault could receive a greater sentence than home invasion, the prosecution could simply pursue only the criminal sexual assault charge.

The State also repeats the *Bouchee* court's argument that home invasion is not analogous to felony murder because the predicate felony of felony murder

supplies the mental state for the murder, while home invasion has its own mental state separate from the predicate felony. (St. Br. 14–17.) However, the State does not cite any decisions of this Court, or statements from the legislature, holding that the reason a defendant cannot be convicted of both felony murder and the underlying felony is because the underlying felony supplies the mental state for the murder, and that separate convictions would otherwise be proper. Contrary to the State's speculation, this Court's conclusion that a defendant cannot receive separate convictions and sentences for felony murder and its predicate was based on a straightforward application of *King*. *People v. Kenny Smith*, 183 Ill. 2d 425, 431–32 (1998).

Secondly, the State ignores that armed violence, like home invasion, requires a culpable mental state in addition to that required by the predicate felony, and yet the predicate felony of armed violence is a lesser-included offense under the abstract-elements test. (Def. Br. 23); *People v. Alejos*, 97 Ill. 2d 502, 506–07 (1983) (Committing the felony while knowingly possessing a weapon increases the defendant's culpability); *People v. Adams*, 265 Ill. App. 3d 181, 186 (4th Dist. 1994) (a defendant's knowledge that he is armed is an element of armed violence). Thus, the distinction that the State and the *Bouchee* court make between home invasion and felony murder is not meaningful in this context.

Finally, the State's assertion that criminal sexual assault has elements and a mental state distinct from those of home invasion predicated on criminal sexual assault is off base. (St. Br. 16–17.) Contrary to the State's suggestion, the offense of home invasion is not complete once a person makes an unauthorized entry. Rather, home invasion predicated on criminal sexual assault is not committed until and unless the person also commits *all* of the elements of criminal sexual assault. The State in this case was required to establish each and every element of criminal sexual assault, including the required mental state, in order to prove

Reveles guilty of home invasion. Thus, the home invasion no less included the mental state for the criminal sexual assault than felony murder includes the mental state of its predicate felony. What is more, the State's attempt to argue that the two offenses have separate purposes is merely an attempt to invoke the independent-motivation test (which provided that separate convictions for felony murder and its predicate were proper if the predicate and the killing had separate purposes, *People v. Williams*, 60 Ill. 2d 1, 14–15 (1975)) which this Court cast away more than 40 years ago in *King*. *See Kenny Smith*, 183 Ill. 2d at 432–33 (noting that *King* abrogated *Williams*).

And so, the State's attempts to identify a clear indication that the legislature intended for separate sentences all fail. There is no indication that the legislature intended for the predicates of home invasion to be treated any differently than the predicates of felony murder and armed violence. And to the extent the legislature's intent is ambiguous, the rule of lenity mandates that the ambiguity be resolved in Reveles's favor. *See Donaldson*, 91 Ill. 2d at 170. The State does not dispute this point.

C. Conclusion.

In sum, the State's contention that *Miller* requires a comparison of all permutations of the relevant statutes, rather than a comparison of the specific provisions charged, is contrary to this Court's historic application of the abstract-element test and is unworkable. Furthermore, there is no clear indication that the legislature intended for criminal sexual assault and home invasion predicated on that criminal sexual assault to receive separate convictions and sentences. Accordingly, this Court should hold that the abstract-elements test calls for a comparison of only the specific statutory provisions actually charged, reverse the appellate court's decision affirming Reveles's conviction and sentence for criminal sexual assault, and vacate that conviction and sentence.

CONCLUSION

For the foregoing reasons, Alejandro Reveles-Cordova, defendant-appellant, respectfully requests that this Court vacate his conviction and sentence for criminal sexual assault.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 11 pages.

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No. 124797

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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 July 27, 2020, 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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