No. 124797

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2566
eserve.criminalappeals@atg.state.il.us

Attorneys for Plaintiff-Appellee People of the State of Illinois

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

Page(s)

NATURE OF THE CASE

Defendant Alejandro Reveles-Cordova appeals from the judgment of the Illinois Appellate Court, Third District, affirming his convictions and sentences for home invasion and criminal sexual assault.

ISSUE PRESENTED

Defendant was convicted of both criminal sexual assault, 720 ILCS 5/12-13(a)(1) (2010), and home invasion, 720 ILCS 5/12-11(a)(6) (2010). R1526.[1] Subsection (a)(6) of the home invasion statute requires that the State prove defendant guilty of criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual abuse, or aggravated criminal sexual abuse. In order to determine whether one charged crime is a lesser included offense of another charged crime, this Court looks to the abstract elements of the crimes in question. The question presented here is:

Whether criminal sexual assault is a lesser included offense of home invasion.

---

[1] "C_" refers to the common law record, "R_" to the report of proceedings; and "Def. Br." to defendant-appellant's opening brief before this Court.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(d), and 612(b). Defendant timely filed a petition for leave to appeal that this Court allowed on November 28, 2018.

STATUTORY PROVISIONS INVOLVED

§ 12-11. Home Invasion.[2]

(a) A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present or he or she knowingly enters the dwelling place of another and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present and

(1) While armed with a dangerous weapon, other than a firearm, uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or

(2) Intentionally causes any injury, except as provided in subsection (a)(5), to any person or persons within such dwelling place, or

(3) While armed with a firearm uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or

---

[2] The relevant statutes have since been renumbered, but have not changed substantively in any way that affects the Court's analysis here. Citations in this brief are to the 2010 versions of the statutes. Where the cited version of the home invasion statute references other statutes it refers to those statutes by the numbers they were assigned as of 2010.

(4) Uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs and during the commission of the offense personally discharges a firearm, or

(5) Personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person within such dwelling place, or

(6) Commits, against any person or persons within that dwelling place, a violation of Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961.

* * *

(c) Sentence. Home invasion in violation of subsection (a)(1), (a)(2) or (a)(6) is a Class X felony. A violation of subsection (a)(3) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(4) is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(5) is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.

720 ILCS 5/12-11(a)(6) (2010).

§ 12-13. Criminal Sexual Assault.

(a) The accused commits criminal sexual assault if he or she:

(1) commits an act of sexual penetration by the use of force or threat of force; or

(2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or

(3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or

(4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

(b) Sentence.

(1) Criminal sexual assault is a Class 1 felony.

(2) A person who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted of the offense of criminal sexual assault or the offense of exploitation of a child, or who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted under the laws of this State or any other state of an offense that is substantially equivalent to the offense of criminal sexual assault or to the offense of exploitation of a child, commits a Class X felony for which the person shall be sentenced to a term of imprisonment of not less than 30 years and not more than 60 years. The commission of the second or subsequent offense is required to have been after the initial conviction for this paragraph (2) to apply.

(3) A person who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted of the offense of aggravated criminal sexual assault or the offense of predatory criminal sexual assault of a child, or who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted under the laws of this State or any other state of an offense that is substantially equivalent to the offense of aggravated criminal sexual assault or the offense of criminal predatory sexual

assault shall be sentenced to a term of natural life imprisonment. The commission of the second or subsequent offense is required to have been after the initial conviction for this paragraph (3) to apply.

(4) A second or subsequent conviction for a violation of paragraph (a)(3) or (a)(4) or under any similar statute of this State or any other state for any offense involving criminal sexual assault that is substantially equivalent to or more serious than the sexual assault prohibited under paragraph (a)(3) or (a)(4) is a Class X felony.

(5) When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a Class X felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

720 ILCS 5/12-13 (2010).

STATEMENT OF FACTS

On November 22, 2010, defendant was charged, in relevant part, with home invasion, 720 ILCS 5/12-11(a)(6) (2010), and criminal sexual assault, 720 ILCS 5/12-13(a)(1) (2010). C19-20. The charging instrument alleged that defendant had broken into his former girlfriend J.B.'s home two days earlier and sexually assaulted her. *Id.* In 2012, a jury found defendant guilty, but the convictions were reversed on appeal because defendant received ineffective assistance of counsel. *People v. Reveles-Cordova*, 2014 IL App (3d) 120887-U, ¶ 38.

The People retried defendant in 2016. At that trial, the evidence demonstrated that J.B. had dated defendant for 15 years. R1063-64. Their relationship ended in January 2010. R1066. In October 2010, J.B. lived in the home the two had shared with their children. R1067. That month, she obtained an order of protection against defendant. R1069.

On November 20, 2010, J.B. was home alone getting ready for a date with Ben Marshall. R1079. She locked the door to her bedroom while she took a shower. R1080. As she got out of the shower, she heard someone walk up the stairs and try to open the door to her bedroom. R1081-82. Defendant then kicked open the door to her room. R1082. J.B. was naked at the time. *Id.*

J.B. told defendant he had to leave, referencing the order of protection. R1083. Defendant grabbed J.B. R1085. She then received a text message and defendant grabbed J.B.'s phone and asked her who Marshall was. *Id.* Defendant smashed a vase of flowers from Marshall, then called Marshall on the phone and threatened to kill him. R1085,1086, 1180. Marshall could hear J.B. "in the background screaming, leave me alone, leave me alone." R1180.

Defendant told J.B. "that if [she] was having sex with another man, [she] was going to have sex with him, too;" then he threw her onto an

ottoman, pulled out her tampon, and penetrated her vagina with his penis. R1091-93. J.B. did not consent. R1093. After defendant finished, he choked J.B. R1094. J.B. felt her body become "weak and warm" and thought she was losing consciousness. R1097-98. J.B. stopped fighting back. R1097. J.B.'s neighbor called J.B.'s cellphone, as J.B. had asked her to do if she ever saw defendant's truck at the house. R1098-99. Defendant became nervous and left. R1099, 1101.

J.B. got in her truck, parked in front of her neighbor's house, and called Marshall and told him what happened. R1101-02, 1181. J.B. sounded "very fearful, very scared." R1182. Marshall told her to call the police, which she did. R1102, 1184. On the recording of her phone call to police, J.B. can be heard coughing and crying, and her words are often unintelligible between sobs. *See Reveles-Cordova*, 2019 IL App (3d) 160418, ¶ 11. She reported that her ex-boyfriend broke into her house and raped her. *Id.* J.B. went to the hospital, where a rape kit was administered. R1106.

Testimony by police who had responded to the scene corroborated J.B.'s version of events: they described a broken vase, a bloody tampon on the floor, and signs that the bedroom door had been forced open. R1189, 1218. DNA samples taken from J.B.'s vagina matched defendant's DNA, and

defendant's fingerprints were found on the vase and J.B.'s cellphone. R1300, 1304-05.

The jury convicted defendant of criminal sexual assault and home invasion. R1526. The trial court sentenced him to consecutive prison terms of 11 years for home invasion and nine years for criminal sexual assault. C682.

On appeal, defendant argued, in part, that his convictions should merge under the one-act, one-crime rule. *See Reveles-Cordova*, 2019 IL App (3d) 160418, ¶ 31. Specifically, defendant argued that because criminal sexual assault was a predicate offense of home invasion as charged, he could not be convicted and sentenced for both. *Id.* ¶ 65. The appellate court rejected this claim and held that, "using the abstract elements test, . . . because it was possible to commit home invasion without committing criminal sexual assault, the convictions did not merge." *Id.* The court also remanded for a preliminary inquiry on some of defendant's pro se, post-trial allegations of ineffective assistance of counsel; however, since the State conceded at oral argument below that the trial court should have conducted a preliminary hearing on these claims, that issue is not currently before this Court. *Id.* ¶¶ 60-61.

ARGUMENT

I. Standard of Review

Whether one charge is a lesser included offense of another is a legal question that this Court reviews *de novo*. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

II. Criminal Sexual Assault Is Not a Lesser Included Offense of Home Invasion Because It Is Possible to Commit Home Invasion Without Committing Criminal Sexual Assault.

Contrary to defendant's assertion, Def. Br. 20, criminal sexual assault is not a lesser included offense of home invasion. This Court established the one-act, one-crime rule in *People v. King,* 66 Ill. 2d 551 (1977). Under that rule, multiple convictions are prohibited where the offenses arise from the same physical act or where one of the offenses is a lesser included offense of the other. *King,* 66 Ill. 2d at 566. However, multiple convictions "should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts." *Id.*

As this Court explained in *People v. Miller*, 238 Ill. 2d 161 (2010):

> [T]he one-act, one-crime doctrine involves a two-step analysis. First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included

> offenses. If an offense is a lesser-included offense, multiple convictions are improper.

Id. at 165.

Defendant does not dispute that his conduct involved multiple acts. His home invasion conviction was based not merely on his act of criminal sexual assault, but also on his act of entering J.B.'s home — a separate act that supports a distinct conviction. *See People v. Rodriguez,* 169 Ill. 2d 183, 188-89 (1996) (defendant properly convicted of aggravated criminal sexual assault and home invasion where, although both counts alleged a sexual assault, defendant's unlawful entry into victim's bedroom was a separate act supporting a second conviction).

Instead, defendant argues that criminal sexual assault is a lesser included offense of home invasion. Def. Br. 20. In *Miller,* this Court held that the abstract-elements approach applies where, as here, the issue presented is whether one charged offense is a lesser included offense of another charged offense. 238 Ill. 2d at 173. "If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Id.* at 166.

In reaching this conclusion, the Court rejected the more lenient standards it had applied prior to *Miller*. *Id.* at 173. The Court was presented

with three possible approaches to determine whether one offense was a lesser included offense of another: (1) the abstract-elements approach, (2) the charging instrument approach, and (3) the trial evidence approach. *Id.* at 166. The abstract-elements approach is the "strictest" approach because it requires "theoretical or practical impossibility" to find a lesser included offense. *Id.* The charging instrument approach is the "intermediate" approach. *Id.* at 167. And the trial evidence approach is the "broadest and most lenient." *Id.* The Court held that "[t]he justifications for using the charging instrument approach with respect to uncharged offenses — the importance of providing notice to the parties of what offenses a defendant may be convicted of based on the particular facts of the crime and what instructions may be sought — have no applicability when dealing with charged offenses." *Id.* at 173. Instead, the Court concluded, "allowing convictions on both charged offenses, under the abstract elements test, will ensure that defendants are held accountable for the full measure of their conduct and harm caused." *Id.* Indeed, "as a defendant is charged with both offenses, the jury will be instructed on both and, thus, given 'the option' to convict him of only the less serious offense." *Id.*

The abstract-elements test is simply a rule of statutory construction:

> The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different

> statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

Whalen v. United States, 445 U.S. 684, 691-92 (1980). This Court adopted the strictest standard available to ensure that legislative intent was followed. The Court thus made clear that prohibiting multiple convictions and sentences for multiple charged offenses consisting of multiple, if intertwined, criminal acts was a step to be taken only when the strictest standards are met: "Relevant here, the legislature has enacted two separate offenses. . . . Had the legislature intended that a defendant could only be convicted of one of them where they are based on conduct that occurred during the same criminal transaction, it clearly could have said so. It did not." *Id.*

Looking at the abstract elements of home invasion and criminal sexual assault as codified, it is plain that criminal sexual assault is not a lesser included offense of home invasion. The abstract-elements approach is "formulaic and rigid, and considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Id.* (quoting *People v. Novak,* 163 Ill. 2d 93, 106 (1994)). Thus, in *Miller*, this Court held that retail theft is not a lesser included offense of burglary because "it is possible to commit burglary without necessarily committing retail theft." *Id.*

at 176. Similarly, it is possible to commit home invasion without committing criminal sexual assault. For example, a person can commit home invasion by entering a home without authorization and threatening the inhabitants with a knife. 720 ILCS 5/12-11(a)(1) (2010).

Defendant argues that Illinois's appellate courts have split on whether the abstract-elements analysis should consider the statutes as a whole or be confined to the subsections under which defendant was actually charged, and that this Court should follow the lead of those courts that have limited their analyses to the statutory provisions under which defendant was charged. Def. Br. 7; *see also, e.g.*, *People v. Skaggs*, 2019 IL App (4th) 160335, ¶¶ 33-45; *People v. Curry*, 2018 IL App (1st) 152616, ¶¶ 26-28. But even if this Court considers only the statutory subsection under which defendant was charged, it is possible to commit home invasion without committing criminal sexual assault. For example, a person can commit home invasion under subsection (a)(6) by entering a home without authorization and committing predatory criminal sexual assault of a child. 720 ILCS 5/12-11(a)(6) (2010). Thus, under the abstract-elements approach articulated in *Miller*, criminal sexual assault is not a lesser included offense of home invasion.

In fact, defendant's proposed approach, and that adopted by the Fourth District in *Skaggs*, would have this Court revert to the charging instrument

approach that it rejected in *Miller*. Under that jettisoned approach, the criminal sexual assault here would be a lesser included offense because there is no dispute that the charging instrument for home invasion explicitly alleged the criminal sexual assault. C13. But, as *Miller* reasoned, the abstract-elements approach considers "the statutory elements of the charged offenses" in the abstract, not in terms of how they are framed in a particular charging instrument. 238 Ill.2d at 175. The only way to find that criminal sexual assault is a lesser included offense of home invasion is to look *only* to the charging instrument rather than the abstract elements of the offenses. This Court rejected that approach in *Miller* and it should decline to overrule that decision.

III. Home Invasion Is Not Analogous to Felony Murder.

Defendant's reliance on *People v. Smith*, 183 Ill. 2d 425 (1998), and *People v. Coady*, 156 Ill. 2d 531 (1993), is misplaced. *See* Def. Br. 12. First, these cases pre-date *Miller*'s adoption of the abstract-elements approach. Indeed, *Coady* appears to apply the now-rejected charging instrument approach, 156 Ill. 2d at 537, rather than applying the stricter abstract-elements approach that this Court adopted in *Miller,* 238 Ill. 2d at 166.

To be sure, *Miller* cited with approval *Lemke v. Rayes,* 141 P.3d 407, 413 (Ariz. Ct. App. 2006), which applied the "same elements test" (which this

Court said was the "equivalent" of the abstract-elements approach, *Miller,* 238 Ill. 2d at 174-75) and held that the predicate felony of felony murder is a lesser included offense. *See Miller,* 238 Ill. 2d at 175.

But even if *Smith* and *Coady* are still viable, they do not control here because home invasion and felony murder are not analogous. The so-called predicate felony in a felony murder conviction plays a far different role than the criminal sexual assault charge does in defendant's home invasion conviction. In felony murder, the defendant must act with the independent criminal purpose of committing the predicate felony, and the State need not prove any criminal intent in causing the victim's death. *See People v. Davison*, 236 Ill. 2d 232, 239-40, 244 (2010). In other words, to prove felony murder, the State need only prove one *criminal* act — the predicate felony.

In contrast, home invasion consists of two separate criminal acts, each committed with its own criminal purpose. The first criminal act is the knowing, unauthorized entry into someone's home. 720 ILCS 5/12-11(a) (2010). The second criminal act falls into one of three categories found in subsection (b) of the Act: (1) intentionally causing injury to the victim (subsection (b)(2)); (2) using or threatening the use of force with a dangerous weapon (subsections (b)(1), (b)(3), (b)(4), and (b)(5)); or (3) committing one the enumerated sex crimes (subsection (b)(6)).

Felony murder's dependence on the intent element of the predicate felony thus makes it unique. *See Davison*, 236 Ill. 2d at 239-40; *see also Illinois v. Vitale*, 447 U.S. 410, 426 (1980) ("a conviction on a felony-murder charge barred a subsequent prosecution for robbery, where the robbery had been used to establish the requisite intent on the murder charge").

Home invasion is different. The United States Supreme Court has held that felony murder is "a species of lesser-included offense," *Vitale,* 447 U.S. at 420, only because that is what Congress intended. *See Whalen,* 445 U.S. at 694 n.8 ("We have simply concluded that, [under the relevant statute], Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape."). Perhaps this Court would reach the same conclusion about felony murder, even after *Miller*. As discussed, similar to the federal statute, in Illinois the predicate felony "provides the *mens rea* as a substitute for an actual murderous mental state." *People v. Holt,* 91 Ill. 2d 480, 485 (1982).

But it is plain that the General Assembly did not intend the enumerated sex offenses in subsection (a)(6) to be treated as lesser included offenses of home invasion. The essence of a home invasion is the criminal, unauthorized entry into someone's home. *See, e.g.*, *People v. Braboy,* 393 Ill. App. 3d 100, 113 (1st Dist. 2009) ("The gravamen of a home invasion offense

is unauthorized entry."). That act is complete when a person "without authority . . . knowingly enters the dwelling place of another when he or she knows . . . that one or more persons is present." 720 ILCS 5/12-11(a) (2010). Subsection (a)(6) requires the subsequent commission of one of the enumerated sex crimes, such as criminal sexual assault. That sex crime is a discrete offense with its own elements, including its own mental state. Whereas the predicate felony supplies the mental state for felony murder, such that it is literally "included" in the greater offense, home invasion requires one criminal purpose, while the "predicate" offense (which actually occurs subsequently) requires a separate criminal purpose.

Nor is the "predicate" offense necessarily a *lesser* offense. Subsection (a)(6) home invasion is a Class X felony, 720 ILCS 5/12–11(c) (2010), subject to a six-to-30-year prison term. 730 ILCS 5/5-8-1(a)(3) (2010). The enumerated sex crimes in (a)(6) are often subject to greater sentences. Criminal sexual assault, for example, is usually a Class 1 felony, but a second offense under subsection (a)(1) is a Class X felony subject to a 30-to-60-year sentence. 720 ILCS 5/12-13(a)(1), (b)(1)(A) (2010). Moreover, Illinois law mandates that a defendant serve his sentences consecutively, rather than concurrently, if one of the offenses is criminal sexual assault. 730 ILCS 5/5-8-4(d)(2) (2010). If criminal sexual assault were deemed "a species of lesser-

included offense," *Vitale,* 447 U.S. at 420, of home invasion, a defendant's criminal sexual assault conviction would be vacated, and he would face a sentence of six to 30 years in prison, even where the plain language of the criminal sexual assault statute and the Code of Corrections would require him to serve a 30-to-60-year term consecutive to his other sentences.

Thus, if the Court were to accept defendant's argument, the General Assembly's judgment as to the appropriate penalty for a second or successive criminal sexual assault would be thwarted completely: defendant would be punished for home invasion, but spared the far greater punishment that the General Assembly deemed appropriate for a second criminal sexual assault because it was deemed a "lesser" included offense. Such a result is absurd, and it is well settled that, in construing a statute, this Court may not presume that the legislature intended an absurd result. *People v. Zimmerman,* 239 Ill.2d 491, 497 (2010). Because it is clear that the General Assembly did not intend that criminal sexual assault, or any of the other enumerated sex offenses in (a)(6), be treated as lesser included offenses of home invasion, the appellate court's decision below was correct.

IV. Defendant's Discussions of the Legislative and Jurisprudential History of the Armed Violence Statute Do Not Advance His Argument.

Defendant makes two arguments, grounded in the history of the armed violence statute, to support his contention that criminal sexual assault is a lesser included offense of home invasion. First, he relies on this Court's holding in *People v. Donaldson*, 91 Ill. 2d 164 (1982), that the predicate felony of an armed violence conviction is a lesser included offense of armed violence. Def. Br. 23. Second, he points to language in the armed violence statute specifically authorizing a consecutive sentence for some predicate felonies — and the absence of equivalent language in the home invasion statute — as evidence that the General Assembly did not intend separate sentences for the enumerated sex offenses in (a)(6). Def. Br. 21. Neither argument has merit.

First, *Donaldson* is inapposite. It held that "multiple convictions for both armed violence and the underlying felony cannot stand where a single physical act is the basis for both charges." *Donaldson*, 91 Ill. 2d at 170. In other words, *Donaldson*'s analysis concluded at the first step of the one-act, one-crime doctrine: whether the defendant's conduct involved multiple acts or a single act. Multiple convictions were improper because they were based on the same physical act. Because defendant concedes that "this case

involves multiple acts," Def. Br. 10, defendant's reliance on *Donaldson* is misplaced.

Defendant's reliance on the portion of the armed violence statute providing that for some predicate felonies "the court shall enter the sentence for armed violence to run consecutively to the sentence imposed for the predicate offense" — and the absence of equivalent language in the home invasion statute — is similarly off base. *See* Def. Br. 21 (citing 720 ILCS 5/33A-3(d)). As the *Donaldson* Court explained, a defendant could not receive sentences for armed violence and the charged predicate felony because they consisted of a single act, but an expression of clear legislative intent to the contrary would authorize consecutive sentences. 91 Ill. 2d at 170. The addition of subsection (d) to 720 ILCS 5/33A-3 is precisely the clear expression of legislative intent by the General Assembly referenced in *Donaldson*.

But the absence of similar language in the home invasion statute does not mean that the General Assembly did not also intend consecutive sentences for the enumerated offenses in subsection (d). First, at the time the General Assembly passed Public Act 91-404, which enacted § 5/33A-3(d), home invasion did not include a subsection referencing specific enumerated offenses. When the General Assembly later passed Public Act 91-928, which

enacted § 5/12-11(a)(6), there was no need to specifically authorize consecutive offenses for home invasion and the enumerated offenses because consecutive sentences were already mandatory for all of the enumerated offenses. *See* 730 ILCS 5/5-8-4(a)(ii) (2001). In other words, the General Assembly had already made clear its intent that criminal sexual assault and the other subsection (d) offenses should receive consecutive sentences. And because, unlike armed violence, subsection (d) home invasion consists of multiple criminal acts, there was no reason for the General Assembly to believe that this intent needed to be reiterated within the home invasion statute.

To be sure, when § 5/33A-3(d) was first enacted, it specifically enumerated criminal sexual assault as a crime subject to consecutive sentencing, *see* 720 ILCS 5/33A-3(d)(v) (2001),[3] but this follows from the history of the armed violence statute before this Court. In *Donaldson*, this Court held, "[i]n the absence of a clear legislative expression to the contrary we hold that multiple convictions for both armed violence and the underlying felony cannot stand where a single physical act is the basis for both charges."

---

[3] Criminal sexual assault was subsequently removed from subsection (d)'s list when the armed violence statute was amended to exclude criminal sexual assault as a predicate felony following this Court's decision in *People v. Hauschild*, 226 Ill. 2d 63 (2007). *See* Public Act 95-688 § 4.

91 Ill. 2d at 170. In 2001, the General Assembly decided that certain felonies should support multiple convictions and sentences when they served as a predicate for armed violence. Even though § 5/5-8-4(a)(ii) clearly stated that criminal sexual assault was always subject to a separate, consecutive sentence, if the General Assembly had excluded it from the specific list in armed violence, this Court likely would have held that it was intended to receive a separate sentence in that context. *See People v. O'Connell*, 227 Ill. 2d 31, 37 (2007) ("Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions." (internal quotation and citation omitted)). In contrast, home invasion does not include a specific list of felonies subject to separate successive sentences, so there would be no reason to believe that the General Assembly did not intend to require a mandatory consecutive sentence for criminal sexual assault, as required by (what was then) § 5/5-8-4(a)(ii). This is especially true given that armed violence and the enumerated felonies in subsection (d) consist of multiple criminal acts, so there was no reason for the General Assembly to anticipate that *Donaldson's* one-act, one-crime holding was applicable.

V. Consecutive Sentences for Home Invasion and the Enumerated Subsection (d) Offenses Is Most Consistent with this Court's Application of the One-Act, One-Crime Doctrine Since *Miller*.

Defendant contends that limiting application of the abstract-elements test to the elements as charged is most consistent with this Court's historical application of the one-act, one-crime doctrine. Def. Br. 11-17. Defendant's argument relies almost entirely on pre-*Miller* cases such as *Donaldson*, *Coady*, and *Smith*. The only post-*Miller* case that defendant relies on is *People v. Stevie Smith*, 2019 IL 123901. But that case applied the abstract-elements test to hold that aggravated battery of a senior citizen is *not* a lesser included offense of robbery. *Id.* ¶ 39. Defendant relies on *Stevie Smith* for the proposition that aggravated battery with a firearm under subsection 12-4.2(a)(1)[4] is a lesser included offense of armed robbery under subsection 18-2(a)(4), which he claims presents an analogous analysis to the one required here. Def. Br. 14. Defendant is incorrect. First, in *Stevie Smith*, the Court merely held that its opinion was not inconsistent with *People v. Harvey*, 366 Ill. App. 3d 119 (1st Dist. 2006). *Harvey*, which predates *Miller*, vacated the

---

[4] Defendant, like the opinions in *Harvey* and *Stevie Smith*, cites to subsection 12-4.2(a)(2). This is almost certainly a typographical error that originated in *Harvey*. Subsection (a)(2) is aggravated battery with a firearm against an officer of the peace, which is plainly not a lesser included offense of subsection (a)(4) of armed robbery.

lesser offense of aggravated battery because "multiple convictions arising out of a single physical act are prohibited." 366 Ill. App. 3d at 122. In other words, *Harvey* decided the matter at the first step of the one-act, one-crime analysis — whether the crimes arose from a single act — not whether one charged offense was a lesser included offense of another. This Court similarly cited *Harvey* during the first step of its analysis. *See Stevie Smith*, 2019 IL 123901, ¶¶ 17-35. Second, the Court noted that in *Harvey*, "[t]he State conceded a one-act, one-crime problem, and the court accepted its concession with no detailed analysis." *Id.* ¶ 32.

To be sure, in *Stevie Smith*, this Court stated, in dicta, that "the elements of the relevant statutes demonstrate that the aggravated battery offense was a lesser-included offense." *Id.* But unlike the statutes at issue here, a review of § 18-2(a)(4) demonstrates that it is a theoretical impossibility to violate that provision without also violating § 5/12-4.2(a)(1) (as those statutes existed when the crime at issue in *Harvey* was committed). To prove subsection (a)(1) of aggravated battery with a firearm, the State had to prove that the defendant (1) discharged a firearm, (2) that caused injury, (3) to another person. 720 ILCS 5/12-4.2(a)(1) (2000). To prove subsection (a)(4) of armed robbery, the State had to prove that the defendant (1) discharged a firearm, (2) that caused injury, (3) to another person, (4) while

taking property from another person, (5) by use of force or threat of force. 720 ILCS 5/18-2(a)(4) (2000). Thus, all three elements of aggravated battery also had to be proved to establish the offense of subsection (a)(4) armed robbery. In other words, it is practically and theoretically impossible to commit subsection (a)(4) armed robbery without also committing aggravated battery with a firearm. So, under the abstract-elements test, aggravated battery with a firearm was a lesser included offense of subsection (a)(4) armed robbery. In contrast, as demonstrated in Section II, *supra*, it is theoretically possible to commit subsection (a)(6) home invasion without committing criminal sexual assault.

Defendant argues that it is also possible to commit armed robbery without committing aggravated battery with a firearm because a person can commit armed robbery with a dangerous weapon other than a firearm. Def. Br. 14 (citing 720 ILCS 5/18-2(a)(1)). But as this Court made clear in *People v. Clark*, 2016 IL 118845, the offense codified in subsection (a)(4) is entirely separate from the offense codified in subsection (a)(2*). Id.* ¶¶ 36-37. Indeed, subsection (a)(2) is not even a lesser included offense of subsection (a)(4). *Id.* ¶ 38.

In sum, it is theoretically possible to commit home invasion without committing criminal sexual assault, so under the abstract-elements test,

criminal sexual assault is not a lesser included offense of home invasion. Therefore, defendant must receive separate, consecutive sentences for both offenses.

CONCLUSION

This Court should affirm the appellate court's judgment.

June 22, 2020

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2566
eserve.criminalappeals@atg.state.il.us

Attorneys for Plaintiff-Appellee
People of the State of Illinois

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-six pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 22, 2020, the foregoing **Appellee's Brief**, was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following:

Brian W. Carroll
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 North LaSalle Street, 24th Floor
Chicago, Illinois 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

Counsel for Defendant-Appellant
Alejandro Reveles-Cordova

/s/ Garson S. Fischer
Counsel for Plaintiff-Appellee
People of the State of Illinois