No. 23-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2023

Sylvester Onyejiaka, Jr.,

Petitioner,

v.

State of Missouri,

Respondent.

Appendix to Petition for a Writ of Certiorari to the Supreme Court of Missouri

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SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC99871
	)	
SYLVESTER ONYEJIAKA, JR.,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
The Honorable Bryan L. Hettenbach, Judge

Sylvester Onyejiaka was found guilty by a jury of possessing a controlled substance in violation of section 579.015.1[1] and unlawfully using a weapon while in possession of a controlled substance in violation of section 571.030.1(11). Onyejiaka appeals, arguing his convictions infringe upon his right to be free from double jeopardy because they arise from the same conduct. Analyzing the statutes in question, this Court finds no double jeopardy violation exists because the legislature specifically authorized multiple punishments under sections 579.015.1 and 571.030.1(11) for conduct such as Onyejiaka's. The circuit court's judgment is affirmed.

[1] All statutory references are to RSMo 2016, unless otherwise specified.

Factual and Procedural Background

In January 2019, police officers pulled over a vehicle driven by Onyejiaka to conduct a traffic stop. Upon approaching the vehicle, the officers observed a firearm located between the driver's seat and the center console. Onyejiaka voluntarily exited the vehicle and consented to its search. The officers discovered an off-white substance wrapped in cellophane. The substance was later identified as .33 grams of cocaine base.

Onyejiaka was charged with two crimes: (1) the possession of a controlled substance in violation of section 579.015.1; and (2) the unlawful use of a weapon while in possession of a controlled substance in violation of section 571.030.1(11). A jury found Onyejiaka guilty of both counts. The circuit court sentenced Onyejiaka to concurrent three-year prison terms, suspended execution of both sentences, and placed him on supervised probation. Onyejiaka appeals, claiming the two convictions violated his right to be free from double jeopardy.[2]

Standard of Review

Onyejiaka failed to preserve his double jeopardy claim in the circuit court and requests plain error review pursuant to Rule 30.20. "Plain error review is discretionary." *State v. Minor*, 648 S.W.3d 721, 731 (Mo. banc 2022). This Court will not exercise its discretion to conduct plain error review "unless the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has

[2] After an opinion by the court of appeals, this Court granted transfer. Mo. Const. art. V, sec. 10.

resulted." *State v. Brandolese*, 601 S.W.3d 519, 526 (Mo. banc 2020) (internal quotation omitted).

Generally, constitutional issues must be raised at the earliest possible opportunity to be preserved for appellate review. *See State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012). However, "a double jeopardy allegation determinable from the face of the record is entitled to plain error review on appeal." *Id.* (internal quotation omitted). This is because "[t]he right to be free from double jeopardy is a constitutional right that goes to the very power of the State to bring the defendant in the court to answer the charge brought against him." *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007).

Analysis

"The double jeopardy clause of the Fifth Amendment guarantees that no person shall 'be subject for the same offense to be twice put in jeopardy of life and limb.'" *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010) (quoting U.S. Const. amend. V). The double jeopardy clause protects against multiple "prosecutions for the same offense after either an acquittal or a conviction" as well as "multiple punishments for the same offense." *Id.* Onyejiaka claims his convictions violate his right to be free from multiple punishments for the same offense.

However, "a defendant may be convicted in one proceeding of more than one offense based upon the same conduct if the legislature intends to punish the conduct under more than one statute." *State v. Villa-Perez*, 835 S.W.2d 897, 903 (Mo. banc 1992); *see also State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). As the Supreme Court of the United States has explained:

> In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are "multiple" is essentially one of legislative intent.

Ohio v. Johnson, 467 U.S. 493, 499 (1984) (internal citations omitted). Accordingly, this Court's double jeopardy analysis regarding multiple punishments is limited to determining whether the legislature intended to impose multiple punishments. *State v. Hardin*, 429 S.W.3d 417, 421 (Mo. banc 2014) (quoting *McTush,* 827 S.W.2d at 186).

The legislature may express its intent to authorize multiple punishments in one of two ways. *Id.* at 421-22. First, the legislature may express such intent within the offense-specific statutes under which the defendant was convicted. *Id.* If the legislature expressed its intent to authorize multiple punishments under the offense-specific statutes, no double jeopardy violation exists. *McTush*, 827 S.W.2d at 186. Second, in the absence of an offense-specific indication of legislative intent, the legislature has generally expressed its intent regarding multiple punishments in section 556.041.[3] *See Hardin*, 429 S.W.3d at 421-24; *see also State v. Collins*, 648 S.W.3d 711, 719-21 (Mo. banc 2022).

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[3] Section 556.041 states the legislature's general intent to authorize multiple punishments due to the same conduct unless an exception applies. Specifically, section 556.041 provides:

> When the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense. Such person may not, however, be convicted of more than one offense if:
>
> (1) One offense is included in the other, as defined in section 556.046; or

Crucially, Onyejiaka's convictions do not result in a double jeopardy violation because sections 579.015 and 571.030 express the legislature's intent to authorize multiple punishments in this specific situation. Focusing upon the statutes in question, section 579.015.1 states, "A person commits the offense of possession of a controlled substance if he or she knowingly possesses a controlled substance[.]" Section 579.015.2 further provides, "The offense of possession of any controlled substance except thirty-five grams or less of marijuana or any synthetic cannabinoid is a class D felony."[4] Section 571.030.1 lists 11 different ways the felony of unlawful use of a weapon may be committed, including if a person knowingly "[p]ossesses a firearm while also knowingly in possession of a controlled substance that is sufficient for a felony violation of section 579.015." *Id.* sec. 571.030.1(11). A violation of subdivision (11) of section 571.030.1 is a class E felony.[5] *Id.* sec. 571.030.8(1).

The plain language of the statutes combined with this Court's guiding principles of statutory construction lead to only one conclusion—that the legislature intended multiple

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(2) Inconsistent findings of fact are required to establish the commission of the offenses; or

(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

[4] A class D felony is punishable by a term of imprisonment not to exceed seven years. Section 558.011.1(4).

[5] A class E felony is punishable by a term of imprisonment not to exceed four years. Section 558.011.1(5).

punishments in this situation. *See State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010) ("When interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute."). Section 571.030.1(11) states an individual can be found guilty of unlawful use of a weapon only if the offender "[p]ossesses a firearm ***while also*** knowingly in possession of a controlled substance that is sufficient for a ***felony violation*** of section 579.015." (Emphasis added). Consequently, if the legislature intended for an individual such as Onyejiaka to be convicted solely under section 571.030.1(11) when guilty of both offenses, it would have classified a violation of section 571.030.1(11) as a more serious felony than a felony violation of section 579.015.[6] But instead, the legislature did the opposite and classified Onyejiaka's violation of section 579.015 as a more serious felony than his felony violation of section 571.030.1(11). Allowing Onyejiaka and other offenders of section 579.015 to reduce the severity of their offense and sentence by carrying a firearm while in possession of a controlled substance is an absurd result this Court must presume the legislature did not intend. *See Murray v. Mo. Highway & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001) ("Construction of statutes should avoid unreasonable or absurd results.").

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[6] Possession offenses under subsections 3 and 4 of section 579.015 are inapplicable to this analysis because they are classified as misdemeanors. In other words, without more, an offender who solely violated subsections 3 or 4 of section 579.015 could not be convicted under section 571.030.1(11) because those offenses are insufficient to establish a felony violation of section 579.015. "It is a cardinal rule of statutory interpretation that [t]he legislature is presumed to know the existing law when enacting a new piece of legislation." *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 567 (Mo. banc 2012) (alteration in original) (internal quotation omitted).

Moreover, the legislature's addition of subdivision (11) to section 571.030.1 in 2014 would have been meaningless if the legislature intended for an individual who violates section 571.030.1(11) to be charged solely under section 579.015. "The legislature is presumed not to enact meaningless provisions." *Wollard v. City of Kan. City*, 831 S.W.2d 200, 203 (Mo. banc 1992). Based upon the plain language of section 571.030.1(11) and this Court's rules of statutory interpretation, therefore, the only outcome the legislature could have intended by enacting section 571.030.1(11) is to authorize multiple punishments for violations of sections 579.015 and 571.030.1(11).

This conclusion is supported by the separate and distinct purposes of sections 579.015 and 571.030. Section 579.015 prohibits and punishes certain drug-related conduct. On the other hand, section 571.030 prohibits and punishes specified types of improper conduct involving a firearm. Accordingly, "[t]he statutes protect against separate and distinct evils[.]" *State v. Walker*, 352 S.W.3d 385, 392 (Mo. App. 2011) (holding the legislature intended multiple punishments for forcible rape and statutory rape though there was a single act of sexual intercourse because the statutes criminalizing those offenses serve distinct purposes). Onyejiaka violated two different prohibitions with two distinct purposes by possessing a firearm while conducting an illegal activity and by possessing a controlled substance. *Accord Rowbottom v. State*, 13 S.W.3d 904, 908 (Ark. 2000) (considering a similar statutory scheme and holding the "General Assembly has thereby made it clear in our judgment that it wishes to assess an additional penalty for simultaneously possessing controlled substances and a firearm").

In response, Onyejiaka argues in past instances in which this Court has held the legislature authorized multiple punishments for the same conduct, such as under Missouri's armed criminal action statute, the statute explicitly stated the punishment "shall be in addition to any punishment provided by law for the crime committed." *See Missouri v. Hunter*, 459 U.S. 359, 362 (1983). Ultimately, while the language in Missouri's armed criminal action statute provides an obvious indication of legislative intent, that language is not the only way for the legislature to express its intent to authorize multiple punishments. The legislature need not use "certain magic words." *See Bachtel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo. banc 2003) (rejecting the argument that specific language is required to waive sovereign immunity). Here, the plain language of the statutes, combined with several fundamental principles of statutory interpretation, clearly demonstrates the legislature's intent to authorize multiple punishments under sections 579.015 and 571.030.1(11). Nothing further is required. No double jeopardy violation exists.

Conclusion

For the reasons set forth above, the circuit court's judgment is affirmed.

Robin Ransom, Judge

All concur.

In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

STATE OF MISSOURI,	)	No. ED109930
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
vs.	)	1922-CR01088-01
	)	
SYLVESTER ONYEJIAKA, JR.,	)	Honorable Bryan L. Hettenbach
	)	
Appellant.	)	Filed: September 27, 2022

OPINION

Sylvester Onyejiaka ("Onyejiaka") was found guilty by a jury in the Circuit Court of the City of St. Louis of two crimes - (1) the possession of a controlled substance and (2) the unlawful use of a weapon by possessing a firearm while also being in possession of a controlled substance. These charges arose from a traffic stop that took place on January 28, 2019, in which police officers discovered a firearm and a small bag of crack cocaine in Onyejiaka's vehicle. In his sole point on appeal, Onyejiaka asserts that since both counts share the offense of possession of a controlled substance and the legislature did not specifically authorize cumulative punishments for both offenses, the trial court violated his right to be free from double jeopardy under the Fifth Amendment of the United States Constitution by accepting guilty verdicts, entering judgment, and sentencing Onyejiaka on both counts.

We affirm because we find that these two convictions and sentences are not for the same offense and thus do not violate Onyejiaka's right to be free from double jeopardy.

Factual and Procedural Background

On January 28, 2019, two officers patrolling the Walnut Park West neighborhood, a high-crime area in the City of St. Louis, pulled over Onyejiaka's Nissan sedan to conduct a traffic stop. As the officers approached the vehicle, they asked Onyejiaka, the vehicle's sole occupant, to lower the windows. At that point, they observed a firearm between the driver's seat and the center console. Onyejiaka gave the officers consent to search his vehicle.

While searching the vehicle, the officers discovered in the center console an off-white substance wrapped in cellophane. The substance was later identified as .33 grams of crack cocaine. Onyejiaka was arrested at the scene. After being Mirandized, Onyejiaka stated that he was going to use the substance to smoke "mo," which the officers understood to be "primo," a mixture of marijuana and crack cocaine.

Onyejiaka was charged under section 579.015.1[1] with possession of a controlled substance, and under section 571.030.1(11) with unlawful use of a firearm while in possession of a controlled substance. The jury found him guilty of both offenses and the trial court sentenced him to three years in prison on each count. The court suspended execution of the sentences and placed him on two years of supervised probation. Onyejiaka now claims on appeal that the convictions and sentences violated his right to be free from double jeopardy.

Standard of Review

Since Onyejiaka failed to raise his double jeopardy argument in the trial court, he now seeks plain error review pursuant to Missouri Supreme Court Rule 30.20[2]. Plain error is

[1] All statutory references are to Revised Statutes of Missouri (2016) unless otherwise stated.
[2] All rule references are to the Missouri Supreme Court Rules (2018).

appropriate when we find that manifest injustice or a miscarriage of justice has resulted from the trial court's error. *State v. Baumruk,* 280 S.W.3d 600, 607 (Mo.banc 2009). "Generally . . . we have discretion to review for plain error only where the appellant asserting error establishes facially substantial grounds for believing that the trial court's error was evident, obvious, and clear, and that manifest injustice or a miscarriage of justice has resulted." *State v. Clark,* 494 S.W.3d 8, 12 (Mo. App. E.D. 2016).

In general, the party seeking review of a constitutional issue must raise the issue at the earliest opportunity possible. *State v. Liberty*, 370 S.W.3d 537, 546 (Mo.banc 2012). However, because the right to be free from double jeopardy is a "constitutional right that goes 'to the very power of the State to bring the defendant into court to answer the charge brought against him,'" *id.* (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)), a double jeopardy violation that can be determined from the face of the record is entitled to plain error review even if the defendant failed to preserve the issue. *State v. Neher*, 213 S.W.3d 44, 48 (Mo.banc 2007).

Discussion

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. The Double Jeopardy Clause offers: "(a) protection from successive prosecutions for the same offense after either an acquittal or conviction and (b) protection from multiple punishments for the same offense." *State v. Flenoy*, 968 S.W.2d 141, 143 (Mo.banc 1998) (citing *State v. Snider*, 869 S.W.2d 188, 195 (Mo. App. E.D. 1993). The latter protection is at issue here. When multiple punishments are implicated, we consider whether "cumulative punishments were intended by the legislature . . . ." *State v. McTush*, 827 S.W.2d 184, 186 (Mo.banc 1992).

To determine legislative intent, we examine the statutes at issue to decide whether the legislature "clearly expressed" an intent to apply cumulative punishments for the same conduct. *Flenoy*, 968 S.W.2d at 144. If the statutes "specifically authorize" cumulative punishments, no double jeopardy issue exists. *McTush*, 827 S.W.2d at 186. If, however, the statutes are silent as to cumulative punishments, we look to section 556.041, the "general intent" statute. *Id.* at 187.

Therefore, we first consider the language of the criminal statutes at issue—section 579.015 and section 571.030—to decide whether they expressly authorize cumulative punishments. Section 579.015.1 states, "A person commits the offense of possession of a controlled substance if he or she knowingly possesses a controlled substance . . . ." Section 571.030.1 establishes the offense of unlawful use of weapons when the offender uses a weapon in one of eleven different factual contexts, one of which is when "he or she knowingly . . . possesses a firearm while also knowingly in possession of a controlled substance that is sufficient for a felony violation of section 579.015." Both statutes are silent as to cumulative punishments.

Although the State concedes that neither statute expressly sanctions multiple punishments for these crimes, it insists that since the legislature need not use "certain magic words" to express its intent, we may glean from the plain language of these statutes and their legislative histories that the legislature intended cumulative punishments. *Batchel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo.banc 2003). We disagree.

While we agree that the legislature need not use "certain magic words," the words it uses must express its intent to apply cumulative punishments and here the State has failed to identify such an expression of intent. And we know that the Missouri legislature knows how to do so. For example, section 571.015, the armed criminal action statute, articulates that "[t]he punishment imposed pursuant to this subsection shall be *in addition to* and consecutive to any punishment

provided by law for the crime committed, by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." (Emphasis added). In this regard, the legislature expressed its intent in clear and unequivocal language.[3]

Nevertheless, in cases where the statutes are silent on the question, courts look to section 556.041. In *State v. Elliott*, the court decided that "because the statutes are silent on the issue, we must examine whether cumulative punishment is permitted for the same conduct pursuant to [section] 556.041, which states the *legislature's general intent regarding cumulative punishments*." 987 S.W.2d 418, 478 (Mo. App. W.D. 1999) (emphasis added). Furthermore, in *State v. Walker*, where the forcible rape and statutory rape statutes were silent on the issue of cumulative punishments, the court rejected the defendant's argument that the legislative history indicated that the legislature intended cumulative punishments and instead relied on the general cumulative punishment statute, section 556.041. 352 S.W.3d 385, 389-392 (Mo. App. E.D. 2011).

Section 556.041 states that "[w]hen the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense. Such person may not, however, be convicted of more than one offense if . . . one offense is included in the other, as defined in section 556.046." Under section 556.046, "[a]n offense is so included when . . . it is established by proof of the same or less than all the facts required to establish the commission of the offense charged."

[3] Courts have applied this language to reject assertions of double jeopardy violations based on the armed criminal action statute and an underlying statutory violation. *See Flenoy*, 968 S.W.2d at 145 (holding that murder, robbery, and armed criminal action did not constitute the same offenses because the legislature clearly stated that the punishment for armed criminal action was to be "in addition to" punishments for related felonies); *see also State v. Couts*, 133 S.W.3d 52, 56 (Mo.banc 2004) (holding that defendant's convictions of both the armed criminal action and unlawful use of a weapon did not violate double jeopardy because the legislature "specifically intended to permit conviction and sentence for both offenses.").

In determining whether an offense is included in the other, we focus on the statutory elements of the offenses as opposed to "how the . . . offense was indicted, proved, or submitted to the jury." *State v. Hardin*, 429 S.W.3d 417, 423 (Mo.banc 2014); *see also Elliott*, 987 S.W.2d at 421. In other words, we focus on *all* the statutory elements of the offenses as a whole set forth in the statutes rather than simply on the elements of the offense listed in the indictment. Moreover, if a statute may be violated in multiple ways, the critical issue for double jeopardy purposes is what the statute requires and we do not limit our analysis to the specific way the indictment claims the statute was violated. *See State v. Watkins*, 533 S.W.3d 838, 846 (Mo. App. S.D. 2017); *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo.banc 2002) ("The elements of the two offenses must be compared in theory, without regard to the specific conduct alleged."). Missouri courts have consistently rejected an indictment-based application when considering if an offense is included. *State v. Collins*, No. SC 99211, 2022 WL 1559253 at *7 (Mo.banc 2022).

The foregoing principles are well-illustrated in *State v. Hardin*, where the court faced circumstances similar to those before us. In *Hardin*, the defendant claimed that his convictions for a protective order violation and for aggravated stalking constituted double jeopardy because they were based on the same conduct. 429 S.W.3d at 421. Similar to section 571.030 at issue here, which includes eleven different ways to commit the offense of unlawful use of a weapon, the aggravated stalking statute may be violated in five different ways including the violation of a protective order. *Id.* at 423.

The *Hardin* court rejected his double jeopardy claim reasoning that because it was possible to commit aggravated stalking without violating an order of protection, i.e., by engaging in one of the four other aggravators listed in the statute, violating a protective order was not included in the offense of aggravated stalking for double jeopardy purposes. *Id.* at 424.

Additionally, in *State v. Collins*, the defendant asserted that second-degree harassment was a lesser included offense of tampering with a judicial officer. WL 1559253 at *5. Similar to the statute at issue here and to the aggravated stalking statute in *Hardin*, the tampering statute included four distinct ways to commit the offense. *Id.* at *6. Thus, in rejecting Collins's double jeopardy claim, the court found that it was "possible to commit tampering with a judicial officer without also committing second-degree harassment." *Id.* at *7; *see also State v. Watkins*, 533 S.W.3d 838, 846 (Mo. App. S.D. 2017).

The reasoning employed by the *Hardin* and *Collins* courts applies here and is fatal to Onyejiaka's appeal because he could have violated section 571.030 in eleven different ways—for example, by setting a spring gun (section 571.030.1(2)), or discharging a firearm into a dwelling house (section 571.030.1(3)). We conclude therefore that Onyejiaka's conviction for possession of a controlled substance is not included in his conviction for unlawful use of weapons because it is possible to violate the statute on the unlawful use of a weapon without also violating the possession-of-a-controlled-substance statute.

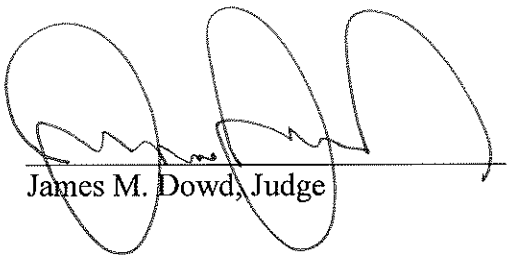
For his part, Onyejiaka asserts that the statutes at issue in *Hardin* and *Collins* are distinguishable from the statutes at issue here in that section 571.030.1's subsections operate independently of one another and are tied to different punishments. Accordingly, he contends that we should compare only the "relevant" subsection, section 571.030.1(11), with the elements of possession of a controlled substance because "this comports with how Missouri courts have routinely applied the same elements test when analyzing the unlawful use of weapons statute for double jeopardy purposes" (*citing Bates v. State*, 421 S.W.3d 547, 551 (Mo. App. E.D. 2014);

State v. Alexander, 505 S.W.3d 384, 398 (Mo. App. E.D. 2016)). We disagree and are unpersuaded by the authorities on which Onyejiaka relies.[4]

We conclude, therefore, that the reasoning employed in *Hardin* and *Collins* controls here inasmuch as those cases are directly on point. Possession of a controlled substance requires proof that the defendant knowingly possessed the illegal substance. And the crime of unlawful use of a weapon could be established by possessing a controlled substance, but it could also be established by proof of other facts. Therefore, the offense of unlawful use of a weapon does not include possession of a controlled substance for double jeopardy purposes.

Conclusion

Because we find that the trial court did not plainly err by accepting the guilty verdicts, entering judgment, and sentencing Onyejiaka on both counts for which he was tried, we affirm the judgment of the trial court.



James M. Dowd, Judge

Kelly C. Broniec, P.J., and
Philip M. Hess, J. concur.

[4] For instance, in *Bates*, the defendant argued that his convictions of first-degree assault and unlawful use of a weapon under section 571.030.1(3) violated his right to be free from double jeopardy because the convictions were based on the same conduct. 421 S.W.3d at 550. The first-degree assault statute states, "A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person." Section 565.050.1. The unlawful-use-of-a-weapon statute states, "A person commits the crime of unlawful use of a weapon if he or she knowingly . . . discharges or shoots a firearm into a dwelling house." Section 571.030.1(3). The *Bates* court rejected the double jeopardy argument because each offense had an element different from the other. *Id.* One statute required proof that the shot was fired at a dwelling house, while the other required proof that the shot was fired in attempt to injure another person. *Id.* As a result, the court was not required to conduct the section 556.041 analysis to determine whether the unlawful use of a weapon was an offense included in the assault charge because the first-degree assault charge and the unlawful-use-of-a-weapon charge under subsection 3 of section 571.030.1 had different elements. *Id.* (*See also State v. Alexander*, 505 S.W.3d 384, 398 (Mo. App. E.D. 2016)).

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	Cause No. SC99871
	)	
Sylvester Onyejiaka,	)	
	)	
Appellant.	)	

MOTION FOR REHEARING

Appellant Sylvester Onyejiaka respectfully requests this Court sustain his motion for rehearing. On June 13, 2023, this Court denied Mr. Onyejiaka's direct appeal, holding that his constitutional right to be free from double jeopardy was not violated "because the legislature specifically authorized multiple punishments under sections 579.015.1 and 571.030.1(11)" for possessing a controlled substance and for possessing a gun while possessing the same controlled substance. Mr. Onyejiaka seeks a rehearing and/or reconsideration under Missouri Supreme Court Rule 84.17 because the opinion overlooks and misinterprets material aspects of law and fact.

I. The legislature did not specifically authorize cumulative punishments for sections 571.030.1(11) and 579.015.1

The opinion misinterpreted the law in holding that sections 571.030.1(11) and 579.015.1 specifically authorize cumulative punishments.

As explained by the Supreme Court of the United States in *Missouri v. Hunter*, when a legislature specifically authorizes cumulative punishments under two statutes for the same conduct, *Blockburger* does not apply. *Missouri v. Hunter*, 459 U.S. 359, 368-369 (1983). Such specific authorization creates an exception to the *Blockburger* rule. *Whalen v. United States*, 459 U.S. 359, 366-367 (1983)).

In considering whether a defendant could be sentenced for both robbery in the first degree and armed criminal action without violating double jeopardy, the *Hunter* Court held:

> Where, as here, a legislature *specifically authorizes* cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Missouri v. Hunter, 459 U.S. 359, 368-369 (1983) (emphasis added).

Here, the opinion relies on "the plain language of the statutes, combined with several fundamental principles" to extrapolate the legislature's supposed authorization of multiple punishments under sections 571.030.1(11) and 579.015. But, neither statute "specifically authorizes" cumulative punishment, as required by *Hunter*, nor do they include a "clear indication" permitting cumulative punishment.

As the Court explained in *Whalen*:

> The assumption underlying the [*Blockburger*] 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, 455 U.S. 684, 691-692.

The *Whalen* Court emphasized that "where the offenses are the same . . . cumulative punishments are not permitted, unless elsewhere specifically authorized by Congress." *Id.* at 693. These passages were also quoted by the *Hunter* Court in upholding convictions under Missouri's robbery and armed criminal action statutes. *Hunter*, 459 U.S. at 366-367. Without a clear indication of legislative intent, the *Blockburger* rule controls:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not.

Id. (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

Neither of the statutes in question here provide a "clear indication" that the Missouri legislature approved cumulative punishments. As the opinion states, the Court used "several fundamental principles of statutory

interpretation" to reach its conclusion that the legislature did authorize cumulative punishments.

The opinion states that the legislature "need not use certain 'magic words'" to express its intent. While it is true that the legislature does not need to use the exact language found in Missouri's armed criminal action statute, *Hunter* makes it clear that in order to bypass the double jeopardy's bar against multiple punishments, the language must "specifically authorize[]" cumulative punishment.

Here, there exists no specific authorization of cumulative punishment in sections 571.030.1(11) or 579.015.1. Therefore, the *Blockburger* rule controls. Because possession of a controlled substance is included in the offense of unlawful use of weapon by possessing a gun while possessing a controlled substance, the *Blockburger* rule bars the sentences imposed. The opinion here misinterprets the law by broadening the narrow exception of the *Blockburger* rule found in *Hunter*. This Court should rehear and/or reconsider this case.

II. Imposing sentences on both statutes would not permit offenders of section 579.015 to reduce the severity of their offense and sentence

The opinion states that "[a]llowing Onyejiaka and other offenders of section 579.015 to reduce the severity of their offense and sentence by carrying a firearm while in possession of a controlled substance is an absurd

result this Court must presume the legislature did not intend." But a finding that the legislature did not expressly authorize cumulative punishments and that possession of a controlled substance is included in 571.030.1(11) would not lead to such a result.

If this Court determined that the imposition of sentences on both statutes did violate the Double Jeopardy Clause, and the legislature declined to revise the statutes to specifically authorize cumulative punishment, a defendant would not be able to reduce the severity of their offense and sentence by carrying a gun while possessing a controlled substance. The reason is found in sections 556.041 and 556.046.

Section 556.041 is the general intent statute which authorizes multiple punishments unless, as relevant here, "one offense is included in the other, as defined in section 556.046." Section 556.046 defines an included offense:

> A person may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged.

If a person is caught possessing cocaine base, he or she would not receive a jury instruction on section 571.030.1(11) if they admitted to also possessing a gun while possessing the cocaine base. Section 571.030.1(11) is not an included offense of section 579.015.1. The reason is because section

571.030.1(11) requires two elements: possession of a controlled substance and a gun. Section 579.015 only requires one element for a conviction: possession of a controlled substance.

On the other hand, section 579.015.1 is an included offense to section 571.030.1(11), because its single required element – possession of a controlled substance – is a required element of 571.030.1(11). The opinion here states "if the legislature intended for an individual . . . to be convicted solely under section 571.030.1(11) when guilty of both offenses, it would have classified a violation of section 571.030.1(11) as a more serious felony than a felony conviction of section 579.015." But this conclusion is an inference – a supposition – and should not be dispositive of this case. While it is true that Missouri courts interpret a statute with the "primary goal to give effect to legislative intent reflected in the plain language of the statute," that goal cannot defeat the federal constitutional protections against double jeopardy.

While it may seem absurd or unreasonable that a class D felony offense is included in a class E felony offense, or to interpret section 571.030.1(11) as not clearly authorizing cumulative punishments, when a federal constitutional protection such as double jeopardy is violated, the absurd or unreasonable result should be corrected by the legislature, not the courts. Mr. Onyejiaka should not bear the cost of a poorly drafted statute. That cost belongs to the state.

The opinion misstates and misapplies the law. This Court should rehear and reconsider this case.

III. Bachtel's "magic words" dicta regarding sovereign immunity waiver should not apply to criminal statutes

As mentioned above, the opinion states that the legislature "need not use certain 'magic words'" to express its intent. The opinion relies on *Bachtel v. Miller County Nursing Home District*, 110 S.W.3d 799, 800 (Mo. banc 2003). *Bachtel* involved a question of whether the legislature had waived sovereign immunity to permit a private cause of action for employees fired after making mandatory reports of abuse and neglect in nursing homes. *Id.* The *Bachtel* Court explained that case law cited by the nursing home "merely requires that the intent of the legislature to waive sovereign immunity must be express rather than implied" and that the legislature was not required to use "certain magic words" to waive it. *Id.* at 804. "It is the express statement of the legislature's intent to allow itself to be sued, not the use of magic words, that is dispositive." *Id.*

The opinion's reliance on *Bachtel* misinterprets and misapplies the law.

Sovereign immunity is a right that belongs to the state, and the state may waive it. The federal constitutional right to be free from double jeopardy, on the other hand, belongs to the *person* and the state may *not* waive it.

Where a statute fails to provide a clear indication that the legislature specifically authorized cumulative punishments, or the statute is ambiguous on the matter, the rule of lenity should apply. *See Albernaz v. United States*, 450 U.S. 333, 342 (1981) ("[W]e recognize[] that the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.").

Here, the statutes are not clear that the legislature authorized cumulative punishments. Criminal statutes must be clear. A regular person in Missouri reading sections 571.030.1(11) and 579.015.1 would not be able to easily discern that they could be charged, convicted, and sentenced to both, because, as the opinion notes, the Court relied on "plain language, combined with several fundamental principles of statutory interpretation" to reach its conclusion. A person in Missouri can be expected to read a criminal statute's plain language and understand the definition of a crime and know its punishment. But that person cannot be expected to utilize principles of statutory interpretation to understand the definition of a crime and its punishment.

By relying on *Bachtel*, the opinion misapplies the law on sovereign immunity waiver to double jeopardy. By relying on statutory interpretation principles not known to the average person, the opinion misinterprets and

fails to apply *Hunter*'s requirement that a legislature must "specifically authorize cumulative punishment under two statutes" to avoid the Double Jeopardy Clause's bar against cumulative punishment. This Court should rehear and/or reconsider this case.

CONCLUSION

For the foregoing reasons, Mr. Onyejiaka prays this Court sustains his motion for rehearing under Rule 84.17.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on June 28, 2023, an electronic copy of the foregoing was sent to all attorneys of record via the Missouri eFiling System.

/s/ Nina McDonnell
Nina McDonnell

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
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BETSY AUBUCHON
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Kristen Shively Johnson - via efiling system
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In Re: State of Missouri, Respondent, vs. Sylvester Onyejiaka, Jr., Appellant.
Missouri Supreme Court No. SC99871

Counselors:

The Court issued the following order on this date: "Appellant's motion for rehearing overruled."

Very truly yours,

BETSY AUBUCHON

Falena L. Vittetoe-Moore
Director Court en Banc

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08/15/2023

Case Disp- Opin & Mandate Sent

CERTIFIED COPY OF OPINION AND MANDATE MAILED TO THE ST. LOUIS CITY CIRCUIT CLERK. OPINION RELEASE SHEET E-MAILED TO THOMASON REUTERS.

Overruled

APPELLANT'S MOTION FOR REHEARING OVERRULED.

06/28/2023

Motion for Rehearing

Appellants Motion for Rehearing; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

06/13/2023

Opinion- Affirmed

ALL CONCUR. MOTIONS FOR REHEARING MUST BE FILED WITHIN 15 DAYS FROM THIS DATE (RULE 84.17). THE PROVISIONS OF RULE 44.01(E) DO NOT APPLY TO EXTEND THE TIME FOR FILING MOTIONS FOR REHEARING.

Signed Majority Opinion

Author of Opinion - Robin Ransom

05/02/2023

Notice

Notice of Change of Attorney Contact Information; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

03/29/2023

Case Submitted

ARGUED AND SUBMITTED.

Scheduled For: 03/29/2023; SUPREME COURT OF MISSOURI; 2; SUPREME COURT OF MISSOURI

03/23/2023

Appendix Filed

Appellants Appendix to Substitute Reply Brief; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

Appellant's Reply Brief

Appellants Substitute Reply Brief; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

03/10/2023

Substitute Respondent's Brief

Respondents Substitute Brief; Electronic Filing Certificate of Service.

Filed By: KRISTEN SHIVELY JOHNSON

On Behalf Of: STATE OF MISSOURI

02/16/2023

Case Docketed

CAUSE DOCKETED FOR ORAL ARGUMENT ON MARCH 29 AT 9:00 A.M. PLEASE SEE ATTACHED DOCKET LETTER, DOCKET AND NOTICE TO COUNSEL. COUNSEL ARGUING BEFORE THE COURT MUST SIGN IN WITH THE DEPUTY CLERK IN THE COURTROOM NO LATER THAN 8:45 A.M.

02/15/2023

Sustained in Part

ORDER ISSUED: RESPONDENT'S MOTION FOR EXTENSION OF TIME SUSTAINED IN PART. RESPONDENT'S SUBSTITUTE BRIEF IS DUE ON OR BEFORE MARCH 10, 2023, AND APPELLANT'S SUBSTITUTE REPLY BRIEF IS DUE ON OR BEFORE MARCH 23, 2023. ANY FURTHER EXTENSIONS WILL NOT BE GRANTED WITHOUT EXTRAORDINARY CAUSE.

Associated Entries: 02/15/2023 -

Mot Ext Time to File Brief

+

Mot Ext Time to File Brief

Motion for Extension of Time to File Substitute Brief; Electronic Filing Certificate of Service.

Filed By: KRISTEN SHIVELY JOHNSON

On Behalf Of: STATE OF MISSOURI

Associated Entries: 02/15/2023 -

Sustained in Part

+

01/31/2023

Sustained

ORDER ISSUED: APPELLANT'S MOTION TO FILE APPELLANT'S SUBSTITUTE BRIEF ONE DAY OUT OF TIME SUSTAINED.

Associated Entries: 01/31/2023 -

Mot to File Brief Out of Time

+

Appendix Filed

Appellants Appendix to Substitute Brief; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

Substitute Appellant's Brief

Appellants Substitute Brief; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

Mot to File Brief Out of Time

Appellants Motion to File Substitute Brief one Day Out of Time; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

Associated Entries: 01/31/2023 -

Sustained

+

01/30/2023

Amicus Curiae Brief

Brief of Amicus Curiae; Electronic Filing Certificate of Service.

Filed By: JOSEPH CHARLES WELLING

On Behalf Of: CHAD FLANDERS, JOSEPH CHARLES WELLING

Amicus Curiae Brief

Brief of Missouri Association of Criminal Defense Lawyers as Amicus Curiae; Electronic Filing Certificate of Service.

Filed By: ELIZABETH UNGER CARLYLE

On Behalf Of: MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

12/27/2022

Sustained Until

Order Issued: Appellant's motion for extension of time to file substitute brief sustained. Appellant's substitute brief is now due on or before January 30, 2023.

Associated Entries: 12/27/2022 -

Mot Ext Time to File Brief

+

Mot Ext Time to File Brief

Appellant's Motion for an Extension of Time in Which to File Substitute Brief; Electronic Filing Certificate of Service.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

Associated Entries: 12/27/2022 -

Sustained Until

+

12/20/2022

Record on Appeal Transferred

CLERK, MISSOURI COURT OF APPEALS, EASTERN DISTRICT, TRANSFERRED THE ENTIRE CASE FILE IN ACCORDANCE WITH THE ORDER OF THIS COURT DATED DECEMBER 20, 2022. THE FILE CONSISTS OF THE NOTICE OF APPEAL, RECORD ON APPEAL (LEGAL FILE AND TRANSCRIPT), APPELLANT'S BRIEF, RESPONDENT'S BRIEF, APPELLANT'S REPLY BRIEF, AND CASE RELATED DOCUMENTS.

App Sustnd/Cause Ordered Tran

APPELLANT'S APPLICATION FOR TRANSFER FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, SUSTAINED AND CAUSE ORDERED TRANSFERRED. MANDATE SENT TO CLERK, MISSOURI COURT OF APPEALS, EASTERN DISTRICT, VIA ELECTRONIC MAIL AND TO COUNSEL OF RECORD VIA THE MISSOURI EFILING SYSTEM.

Associated Entries: 11/17/2022 -

Appl for Tran SC Filed in SC

+

11/17/2022

Suggestions in Support

Amicus Suggestions in Support of Transfer; Electronic Filing Certificate of Service.

Filed By: JOSEPH CHARLES WELLING

On Behalf Of: CHAD FLANDERS

Filing Info Sheet eFiling

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

Appl for Tran SC Filed in SC

Appellant's Application for Transfer from the Missouri Court of Appeals, Eastern District; Opinion of Court of Appeals; Application for Transfer Filed in Court of Appeals; Order Denying Application for Transfer; Proof of Notice to Court of Appeals.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

Associated Entries: 12/20/2022 -

App Sustnd/Cause Ordered Tran

+

Transfer Summary - Form 15

Form No. 15 - Cover Page to Appellant's Application for Transfer.

Filed By: NINA MCDONNELL

On Behalf Of: SYLVESTER ONYEJIAKA JR.

Sustained

Order Issued: Appellant's motion for leave to proceed in forma pauperis sustained. Appellant's motion for leave to file application for transfer one day out of time sustained. Appellant's application for transfer from the Missouri Court of Appeals, Eastern District, ordered filed on November 17, 2022.

Associated Entries: 11/17/2022 -
Mot to File Trans Out of Time
+
Associated Entries: 11/17/2022 -
Mot to Proc in Forma Pauperis
+
Mot to Proc in Forma Pauperis

Appellant's Motion for Leave to File Application for Transfer in Forma Pauperis; Order to Proceed in Forma Pauperis Filed in 1922-CR01088-01 to Proceed in ED109930.

Filed By: NINA MCDONNELL
On Behalf Of: SYLVESTER ONYEJIAKA JR.
Associated Entries: 11/17/2022 -
Sustained
+
Mot to File Trans Out of Time

Appellant's Motion for Leave to File Application for Transfer in the Supreme Court of Missouri One Day Out of Time.

Filed By: NINA MCDONNELL
On Behalf Of: SYLVESTER ONYEJIAKA JR.
Associated Entries: 11/17/2022 -
Sustained
+

U.S. Const. amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title XXXVII CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC DEFENDERS

Chapter 571

Effective 01 Jan 2017 to 28 Aug 2021

571.030. Unlawful use of weapons – exceptions – penalties.

– 1. A person commits the offense of unlawful use of weapons, except as provided by sections 571.101 to 571.121, if he or she knowingly:

(1) Carries concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapons readily capable of lethal use into any area where firearms are restricted under section 571.107; or

(2) Sets a spring gun; or

(3) Discharges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in section 302.010, or any building or structure used for the assembling of people; or

(4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner; or

(5) Has a firearm or projectile weapon readily capable of lethal use on his or her person, while he or she is intoxicated, and handles or otherwise uses such

firearm or projectile weapon in either a negligent or unlawful manner or discharges such firearm or projectile weapon unless acting in self-defense; or

(6) Discharges a firearm within one hundred yards any occupied schoolhouse, courthouse, or church building; or

(7) Discharges or shoots a firearm at a mark, at any object, or at random, on, along or across a public highway or discharges of shoots a firearm into any outbuilding; or

(8) Carries a firearm or other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof; or

(9) Discharges or shoots a firearm at or from a motor vehicle, as define in section 301.010, discharges or shoots a firearm at any person, or at any other motor vehicle, or at any building or habitable structure, unless the person was acting in self-defense; or

(10) Carries a firearm, whether loaded or unloaded, or any other weapon readily capable of lethal use into any school, onto any school bus, or onto the

premises of any function or activity sponsored or sanctioned by school officials or the district school board; or

(11) Possesses a firearm while also knowingly in possession of a controlled substance that is sufficient for a felony violation of section 579.015.

. . .

8. A person who commits the crime of unlawful use of weapons under:

(1) Subdivision (2), (3), (4), or (11) of subsection 1 of this section shall be guilty of a class E felony;

(2) Subdivision (1), (6), (7), or (8) of subsection 1 of this section shall be guilty of a class B misdemeanor, except when a concealed weapon is carried onto any private property whose owner has posted the premises as being off-limits to concealed firearms by means of one or more signs displayed in a conspicuous place of a minimum size of eleven inches by fourteen inches within the writing thereon in letters of not less than one inch, in which case the penalties of subsection 2 of section 571.017 shall apply;

(3) Subdivision (5) or (10) of subsection 1 of this section shall be guilty of a class A misdemeanor if the firearm is unloaded and a class E felony if the firearm is loaded;

(4) Subdivision (9) of subsection 1 of this section shall be guilty of a class B felony, except that if the violation of subdivision (9) of subsection 1 of this section results in injury or death to another person, it is a class A felony.

. . .

Title XXXVIII CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC DEFENDERS

Chapter 579

Effective – 28 Aug 2016, 2 histories

579.015. Possession of a controlled substance – penalty.

– 1. A person commits the offense of possession of a controlled substance if he or she knowingly possesses a controlled substance, except as authorized by this chapter or chapter 195.

2. The offense of possession of any controlled substance except thirty-five grams or less of marijuana or any synthetic cannabinoid is a class D felony.

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. SC99871
	)	
SYLVESTER ONYEJIAKA, JR.,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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ATTORNEY FOR APPELLANT

INDEX

TABLE OF AUTHORITIES

Cases

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JURISDICTIONAL STATEMENT

In the Circuit Court of St. Louis, Cause No. 1922-CR01088-01, the State of Missouri charged that the appellant, Sylvester Onyejiaka, Jr., committed possession of a controlled substance, in violation of § 579.015, RSMo[1] (Count I); and unlawful use of weapons – subsection 11 – possessing a firearm while also in possession of a controlled substance, in violation of § 571.030, RSMo (Count II).[2]

A jury found Mr. Onyejiaka guilty of both charged offenses. On June 15, 2021, the Honorable Bryan L. Hettenbach, Judge of Division 11, sentenced Mr. Onyejiaka to concurrent terms of three years' imprisonment in the Missouri Department of Corrections on each count. The court suspended execution of the sentences and placed Mr. Onyejiaka on supervised probation for two years. Mr. Onyejiaka timely filed his notice of appeal on June 25, 2021.

On September 27, 2022, the Missouri Court of Appeals held in Cause No. ED109930 that the two convictions and sentences entered against Mr. Onyejiaka were not for the same offense and thus did not violate his right to be free from double jeopardy, and that the offense of unlawful use of a

[1] All statutory citations are to RSMo (2016) unless otherwise stated.
[2] Appellant will cite to the system-generated legal file in this appeal by document and page number, per Rule 84.04(e) as "[D# p.#]," and to the transcript as "[Tr. #]."

weapon does not include possession of a controlled substance for double jeopardy purposes.

On October 12, 2022, Mr. Onyejiaka filed with the Missouri Court of Appeals his application for transfer to the Supreme Court of Missouri, which the appellate court denied November 1, 2022.

On November 16, Mr. Onyejiaka filed with this Court his application for transfer, which this Court sustained on December 20, 2022. This Court has jurisdiction over this appeal, pursuant to Mo. const., art. V, § 10 and Rule 83.04.

STATEMENT OF FACTS

On January 28, 2019, officers patrolling in the City of St. Louis pulled over Mr. Onyejiaka for a traffic stop [Tr. 134]. One of the officers saw a gun between the driver's seat and the center console [Tr. 135; 173]. The officer instructed Mr. Onyejiaka to not reach for the gun [Tr. 174]. Mr. Onyejiaka volunteered to get out of his car [Tr. 135; 174]. He consented to the car being searched [Tr. 136]. The search produced an off-white substance wrapped in cellophane, later identified of .33 grams of cocaine base [Tr. 139-141; 169]. Mr. Onyejiaka was arrested [Tr. 142; 177].

Mr. Onyejiaka was charged with violating section 571.015.1, RSMo (possession of a controlled substance) and with violating section 571.030.1, RSMo (unlawful use of weapons – subsection 11 – possessing a firearm while also in possession of a controlled substance). [D3]. Specifically, the state alleged Mr. Onyejiaka "knowingly possessed a handgun, a firearm, while also possessing cocaine base, a controlled substance. [D3 p. 1-2]. The .33 grams of cocaine based wrapped in cellophane seized by officers during the stop was used to form the convictions of both sections 571.015 and 571.030 [Tr. 184-186; 198-].

A jury found Mr. Onyejiaka guilty of both charges [D10 p. 1]. On June 15, 2021, the trial court sentenced Mr. Onyejiaka to concurrent terms of three years' imprisonment in the Missouri Department of Corrections on each

count, but suspended the execution of sentence and ordered supervised probation for three years [D2 p. 2].

This appeal follows.

POINT RELIED ON

The trial court plainly erred in entering convictions and sentences for both possession of a controlled substance (Count I) and unlawful use of weapons – subsection 11 – possessing a firearm while in possession of a controlled substance (Count II), because the entering of multiple convictions exceeded the authority of the trial court in violation of Mr. Onyejiaka's right to be free from double jeopardy under the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, in that the legislature did not specifically authorize or intend cumulative punishments for these two offenses.

Whalen v. United States, 445 U.S. 684 (1980)

Blockburger v. United States, 284 U.S. 299 (1932)

U.S. CONST., amend V

ARGUMENT

The trial court plainly erred in entering convictions and sentences for both possession of a controlled substance (Count I) and unlawful use of weapons – subsection 11 – possessing a firearm while in possession of a controlled substance (Count II), because the entering of multiple convictions exceeded the authority of the trial court in violation of Mr. Onyejiaka's right to be free from double jeopardy under the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, in that the legislature did not specifically authorize or intend cumulative punishments for these two offenses.

Preservation

"Double jeopardy claims are questions of constitutional rights subject to *de novo* review." *State v. Andrews*, 643 S.W.3d 497, 499 (Mo. banc 2022). Mr. Onyejiaka concedes this claim is not properly preserved because the defense failed to cite with specificity to the Double Jeopardy Clause during his motion to dismiss Count I during trial and did not properly preserve the issue in the motion for new trial [Tr. 198; D7].

However, the convictions and sentences entered on Counts I and II violated his right to be free from double jeopardy and resulted in a manifest

injustice and miscarriage of justice that is determinable from the face of the record. Mr. Onyejiaka therefore requests plain error review under Rule 30.20.

Standard of Review

"[T]he right to be free from double jeopardy is a constitutional right that goes 'to the very power of the State to bring the defendant into court to answer the charge brought against him.'" *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012) (quoting *Blackledge v. Perry*, 417 U.S. 21, 20 (1974)). "[A] double jeopardy allegation determinable 'from the face of the record is entitled to plain error review on appeal.'" *Id.* (quoting *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007) and citing *State v. McTush*, 827 S.W.2d 184 (Mo. banc 1992)). "'Under plain error review, the defendant must prove the error so substantially affected his rights that 'manifest injustice or miscarriage of justice has resulted therefrom.'" *Id.* (quoting *State v. Couts*, 133 S.W.3d 52, 54 (Mo. banc 2004), quoting Rule 30.20).

Argument

"The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also 'against multiple punishments for the same offense.'" *Whalen v. United States*, 445 U.S. 684, 688 (1980) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (overruled on other grounds)). "But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are

unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Id*. (citing *Blockburger v. United States*, 284 U.S. 299, 305 (1932)).

"If a [sentencing] court exceeds its own authority by imposing multiple punishments not authorized by [the legislature], it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers[3] in a manner that trenches particularly harshly on individual liberty." *Id*. at 689. If a conviction cannot be had without proving all the elements of another conviction, imposing sentences on both violates the protections of the Double Jeopardy Clause. *See Id*. at 693-694.

This Court should vacate Mr. Onyejiaka's conviction for possession of a controlled substance because a conviction for unlawful use of weapons – section 11 – possessing a firearm while also in possession of a controlled substance, cannot be had without proving the element required in possession of a controlled substance, and the imposition of sentences on both charges

[3] U.S. CONST. art. I, § 1; art. II, § 1; and art. 3, § 1. The Missouri constitution defines the separation of powers in art. II, § 1, which reads: "The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collections of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

violates double jeopardy's constraint of the court's authority to impose a sentence not authorized by the state legislature. To do otherwise would directly contradict the precedent of the Supreme Court of the United States.

In *Whalen*, the defendant was convicted of two charges: rape and of killing the same victim in the perpetration of rape. *Whalen v. United States*, 445 U.S. 684, 685 (1980). The latter charge made the killing of a human in the course of six specified felonies – including rape, arson, robbery, and kidnapping – a felony murder offense which did not require proof of intent to kill, as usually required in first-degree murder. *Id*. at 686.

The Court elected to review the case because, although the question was one of statutory interpretation, the defendant's "claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory interpretation," because "[t]he Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also 'against multiple punishments for the same offense.'" *Id*. at 688 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (overruled on other grounds)). Because "the question whether multiple punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized," the

Court had to determine whether or not the statutes clearly authorized cumulative punishments. *Id*. at 688-689. The Court explained:

> The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework, the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly within the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.

Id. at 689.

The Court turned its attention to the District of Columbia statute § 23-112, which codified the rule of statutory interpretation stated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). That is, "that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense 'requires proof of a fact which the other does not.'" *Id*. (quoting *Blockburger*, 284 U.S. at 304). The Court explained that the assumption is that Congress does not usually intend to punish the same offense under two different statutes. *Id*. at 692-693. "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." *Id.*; *Blockburger*, 284 U.S. at 304 (holding: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.").

The Government argued that rape and felony murder in the commission of the rape were not the same offense because the felony murder statute "proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnapping *or* arson, etc." *Id.* at 694 (emphasis in original). In short, the Government argued that the Court should look at the statute as a whole, rather than how it was charged, to determine whether or not rape was included in the offense of felony murder. The Court rejected this argument. *Id.* It explained that had the killing been committed in the course of a robbery, and there had also been a rape committed during the robbery, a defendant could be punished for both the felony murder and the rape under *Blockburger*. *Id.* But, because in *Whalen* "proof of rape [was] a necessary element of proof of the felony murder," the Court explained it was

> unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included

> offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe to none of it.

Id.

The Court also rejected the dissent's contention that the Court was applying the *Blockburger* rule to a particular indictment. *Id*. at n.8. Instead, the Court explained, it had "simply concluded that, for purposes of imposing cumulative sentences under D.C. Code § 23-112, Congress intended rape to be considered a lesser included offense within the offense of a killing in the course of rape." *Id*. "A conviction for killing in the course of a rape cannot be had without proving all the elements of rape." *Id*. at 693-694.

Finally, the *Whalen* Court explained that if Congress wanted to fashion exceptions to its lesser-included statute, it could; however, the Court could not. *Id*. at 695. It explained that "it would seriously offend the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment if this Court were to fashion a contrary rule with no more to go on than this case provides." The Court reversed and remanded. *Id*. at 695.

Here, Mr. Onyejiaka was convicted of one count of possession of a controlled substance, in violation of section 579.015.1, RSMo (Count I), and

one count of unlawful use of weapons, committed by knowingly possessing a gun while knowingly in possession of a controlled substance, in violation of section 571.030.1(11), RSMo (Count II). It is undisputed that the .33 grams of cocaine base wrapped in cellophane seized by the officers during the traffic stop was used to form the convictions of both the possession of a controlled substance and unlawful use of weapons from possession of a gun while in possession of a controlled substance.

As in *Whalen*, to determine legislative intent, Missouri courts must first look at the statutes at issue to see if the legislature "clearly expressed" an intent to apply cumulative punishments for the same conduct. *State v. Flenoy*, 968 S.W.2d 141, 144 (Mo. banc 1998). If the statutes "specifically authorize" cumulative punishments, no double jeopardy issue exists. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992); *see Missouri v. Hunter*, 459 U.S. 359, 368 (1983). If, however, the statutes are silent as to cumulative punishments, courts look to section 556.041, RSMo, known as the "general intent" statute, to determine if multiple convictions may be entered for the same offense. *McTush*, 827 S.W.2d at 187.

It is clear that sections 579.015 and 571.030 do not specifically authorize cumulative punishments. The statutes are silent as to cumulative punishments.

An example of a statute that expressly authorizes cumulative punishments is found in the offense of armed criminal action, which provides that "[t]he punishment imposed pursuant to this subsection shall be in addition to and consecutive to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a deadly instrument or deadly weapon." § 571.015.1, RSMo; *See Hunter*, 459 U.S. at 368.[4]

In *Hunter*, the Supreme Court of the United States explained that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366. The *Hunter* Court distinguished the facts before it from those in *Whalen* because "the result in *Whalen* turned on the fact that the Court saw 'no clear indication of contrary legislative intent.'" *Id*. at 367. Contrastingly, in *Hunter*, the statutes were not silent. There, the defendant was convicted of robbery in the first degree and armed criminal action. *Id*. at 361. He was sentenced to 10 years' imprisonment for the robbery and 15 years for the armed criminal action. *Id*. at 362.

[4] In *Missouri v. Hunter*, the Supreme Court of the United States considered an older version of the armed criminal action statute; however, the only difference is that the current version specifies that the punishment imposed under the ACA statute will be consecutive to the underlying felony.

Unlike the statutes in question in *Whalen*, Missouri's armed criminal action statute specifically authorizes the sentencing courts to impose a sentence for armed criminal action in addition to robbery in the first degree, even though the elements were the same in both statutes. *Id*. at 368. "The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent." *Id*. The Court held:

> [w]here, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statues proscribe the 'same' conduct under *Blockburger* a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Id. at 368-369.

Thus, the difference between *Whalen* and *Hunter* in the context of double jeopardy turns simply on whether a sentencing court has exceeded its authority under the Double Jeopardy Clause by imposing multiple punishments where the legislature has not authorized it to do so.

Here, as explained above, sections 579.015 and 571.030 do not specifically authorize the sentencing court to impose multiple punishments. The statutes are silent. Therefore, the constraint double jeopardy places on the sentencing court on its authority to impose multiple sentences for the

same offense is still in play. *See* U.S. CONST., art I, § 1, art. II, § 1, and art. III, § 1; Mo. Const., art. II, § 1. If, under Missouri statutes, section 579.015 is included in section 571.030, the sentencing court exceeded its authority in imposing sentences on both offenses, because they contain the same offense.

Section 556.041, Missouri's general intent statute, provides

> [w]hen the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense. Such person may not, however, be convicted of more than one offense if . . . one offense is included in the other, as defined in section 556.046.

§ 556.041(1).

Section 556.046, similar to the D.C. statute considered in *Whalen*, is the Missouri statute which codifies *Blockburger*'s "same element" test. *State v. Daws*, 311 S.W.3d 806, 808 n.3 (Mo. banc 2010). Section 556.046 provides in relevant part:

> A person may be convicted of an offense included in an offense *charged in the indictment or information*. An offense is so included when:
> (1) It is established by proof of the same or less than all the facts required to establish the commission of *the offense charged*; or
> (2) It is specifically denominated by statute as a lesser-included offense of *the offense charged*; or
> (3) It consists of an attempt to commit *the offense charged* or to commit *an offense otherwise included* therein.

§ 556.046.1(1)-(3), RSMo. (emphasis added).[5]

"'The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language.'" *Moore v. Bi-State Dev. Agency*, 609 S.W.3d 693, 696 (Mo. banc 2020) (quoting *Bateman v. Rinehard*, 391 S.W.3d 441, 446 (Mo. banc 2013)). "'When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.'" *Moore*, 609 S.W.3d at 696 (quoting *Bateman*, 391 S.W.3d at 446) (quoting *State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc 2002)). "A court applies rules of statutory construction only to resolve an ambiguity when the legislative intent cannot be determined from the plain statutory language." *Id.* (citing *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. Of Pharmacy*, 208 S.W.3d 907, 910 (Mo. banc 2006)).

The plain language of section 556.046 states that an offense is included "in an offense charged in the indictment or information" if "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." § 546.046.1(1). As this Court has explained since its 1957 opinion in *Amsden*,

[5] In Missouri, "[w]hen the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense. Such person may not, however, be convicted of more than one offense if: (1) One offense is included in the other, as defined in section 556.046…" § 556.041, RSMo.

> The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, and that the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense.

State v. Smith, 592 S.W.2d 165, 166 (Mo. banc 1979) (quoting *State v. Amsden*, 299 S.W.2d 498, 504 (Mo. 1957)).

In its 2017 opinion in *Sanders*, this Court explained that, when determining whether an offense is included so as to receive a jury instruction on the included offense,

> [t]he phrase "the offense charged" in section 556.046.2, RSMo Supp. 2002, refers back to the phrase 'an offense charged in the indictment or information' as used in section 556.046.1 RSMo Supp. 2002." *State v. Hibler*, 5 S.W.3d 147, 150 (Mo. banc 1999). The fact that section 556.046.2 refers back to the offense charged in the indictment or information means "the lesser crime must be included in the higher crime *with which the accused is specifically charged*, and that the averment of the inducement describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense." *Id.* (quoting *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979)) Section 556.046, RSMo Supp. 2002, is, therefore, consistent with the majority rule holding "that a lesser crime is an included offense when it consists of legal elements which must always be present for the greater crime to have been committed *in the matter in which the greater crime is charged in the accusatory pleading*." *Id.* (quoting Jerrold H. Barnett, *The Lesser-Included*

> *Offense Doctrine: A Present Day Analysis For Practitioners*, 5 CONN. L. REV. 255, 291 (1972)) (*cited in* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, sec. 1.07, at 130 & n. 109 (1985)); *see also State v. Ballard*, 394 S.W.2d 336, 340 Mo. 1965) ("A lesser offense may only be established where it is necessarily included in the greater offense actually charged[.]")

State v. Sanders, 552 S.W.3d 212, 217 (Mo. banc 2017) (emphasis in original).

"In sum, 'for an offense of a lesser degree to be an included offense, for purposes of section 556.046, RSMo Supp. 2002, *it must be based on the criminal conduct that is alleged in the information or indictment as to the greater/charged offense*." *Id.* (quoting *State v. Collins*, 154 S.W.3d 486, 495 (Mo. App. 2005) (emphasis added).

Requiring courts to look to the offense charged to determine lesser included offenses makes sense, especially here, where, without the indictment, it is impossible to determine which offense of unlawful use of weapons was committed.[6] The substitute information in lieu of indictment filed lists the charges against Mr. Onyejiaka. Under the section titled "Charge(s)," Count II is described as "Unlawful Use of Weapon – Subsection

[6] For this very reason, due process requires the indictment sufficiently inform a defendant of the exact alleged offense he or she charged as having committed. *See State v. Goddard*, 649 S.W.2d 882, 889 (Mo. banc 1983) ("[A] defendant, as a matter of due process, is entitled to notice of the charges against him and may not be convicted of any offense for which the information or indictment does not give him fair notice.").

11 – Possess Weapon/felony Control Substance." [D3. P. 1]. Under the heading "Information in Lieu of Indictment," the information reads in relevant part:

> The Circuit Attorney of the City of St. Louis, State of Missouri, upon information and belief, charges that:
>
> Count I: The defendant, in violation of Section 579.015, RSMo, committed the class D felony of possession of a controlled substance . . . in that . . . the defendant knowingly possessed cocaine base, a controlled substance, knowing of its presence and nature.
>
> Count II: The defendant, in violation of Section 571.030, RSMo, committed the class E felony of unlawful use of a weapon . . . in that . . . the defendant knowingly possessed a handgun, a firearm, while also possessing cocaine base, a controlled substance, knowing of its presence and nature.

[D 3 p. 1-2].

There are eleven separate ways a person can commit unlawful use of weapons. § 571.030.1(1)-(11), RSMo. Each subsection is a separate offense. *See State v. Couts*, 133 S.W.3d 52, 55 n.5 (Mo. banc 2004) ("As of 1981, multiple offenses pertaining to the unlawful use of a weapon were combined into section 571.030.1."); *Yates v. State*, 158 S.W.3d 798, 802 (Mo. App. 2005) (explaining that if a person fired a single shot from a vehicle into a house, that person could be prosecuted and convicted under section 571.030.1(3) – shooting from a vehicle – and section 571.030.1(9) – shooting into a house –

because shooting from a car and shooting into a house are separate offenses, citing *Blockburger*); and *State v. Haynes*, 564 S.W.3d 780, 784 (Mo. App. 2018) (explaining that section 571.030.1(3) – shooting into a motor vehicle – is a different offense than section 571.030.1(9) – shooting at a motor vehicle).

Any question as to whether each subsection of 571.303.1 is a separate offense under one statute can be answered through the facts of *Blockburger*. In *Blockburger*, the Supreme Court of the United States determined that the defendant had committed two separate offenses in one statute – the Hatch Narcotics Act – despite the defendant's completion of only one illegal sale of drugs. *Blockburger v. United States*, 284 U.S. 299, 303-304 (1932). The Court determined that even though there was only one sale, two separate offenses contained within the one statute were violated, as each offense required proof of a different element. *Id*. at 304.

In *Blockburger*, the defendant violated the first section of the statute by selling drugs outside of the original, stamped package, and the second section by selling the drugs without a written order of the person to whom the drugs were sold. *Id*. at 303-304. The Court explained that despite the fact the defendant committed only one sale, two separate offenses within the same statute were violated:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of

> two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not.

Id. at 304.

As the defendant in *Blockburger* violated different provisions of the Hatch Narcotics Act (a statute) at the same time, a person can violate different provisions of § 571.030.1, RSMo, at the same time. For example, if an intoxicated person is riding in a car with a knife, a gun, and fentanyl concealed in their pocket, and shoots the gun into a house 50 yards away of an occupied school building, they could be charged as follows: one count of § 571.030.1(1) (carrying a concealed knife readily capable of lethal use); one count of § 571.030.1(11) (possessing a firearm while in possession of a controlled substance); one count of §571.030.1(5) (discharging a firearm while intoxicated); one count of § 571.030.1(3) (shooting a firearm into a dwelling house); one count of § 571.030.1(6) discharging a firearm within one hundred yards of an occupied schoolhouse. Not only could that person be convicted of each separate offense, they could be sentenced on each separate offense, because none are lesser-included offenses of the other and, therefore, the imposition of the sentences would not offend the Double Jeopardy Clause.

In *Hardin*, this Court held that violating a protection order is not a lesser included offense of aggravated stalking and that convictions and

sentences of both did not violate double jeopardy. *State v. Hardin*, 429 S.W.3d 417, 424 (Mo. banc 2014). In doing so, this Court rejected what it called an "indictment-based application" of the definition of what constitutes a lesser included offense. *Id*. at 424. Instead, courts were directed to consider the entire statute. *Id*. Therefore, if there exist different ways to commit an offense contained in one statute, the offense alleged to be a lesser included offense must also include all of the other ways the offense can be committed. *Id*. Thus, although a person could commit aggravated stalking by violating a protective order, violating a protective order was one of many ways to commit the offense of aggravated stalking. *Id*. Instead of considering only the offense of which the defendant was charged, convicted, and sentenced on, courts were directed to see if the lesser included offense was also an element of each of the other, uncharged and unproven ways the offense could have been committed. *Id*.

The *Hardin* Court relied on its opinion in *Smith* to explain that an "indictment-based application" of the definition of a lesser included offense had been "expressly rejected." *Id*. This Court explained, "[i]n *Smith*, this Court held that the definition of a lesser-included offense . . . called for courts to 'compare the Statute of the greater offense with the factual and legal elements of the lesser offense,' not 'compare the Charge or averment of the greater offense with the legal and factual elements of the lesser offense.'" *Id*,

(quoting *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979) (quoting *State v. Amsden*, 299 S.W.2d 498, 504 (Mo. 1957))).

But in *Smith*, this Court cited the analysis by the Missouri Court of Appeals in *Friedman*, which "properly interpreted *Amsden* to hold 'that to be a necessary included lesser offense, it is essential that the greater offense include All of the legal and factual elements of the lesser . . ..'" *Smith*, 592 S.W.2d at 166 (citing *State v. Friedman*, 398 S.W.2d 37, 40 (Mo. App. 1965). In adopting *Friedman*'s interpretation of *Amsden*, this Court considered a statute which could be proven by one set of elements, so the statutory elements test as applied did not address how to analyze a greater offense statute which encompassed separate offenses of a crime contained in one statute. *Id*. But *Friedman* did.

In *Friedman*, the court considered whether section 561.460, a misdemeanor of which the defendant was convicted, was a lesser included of section 561.450, a felony, of which the defendant was charged. *Friedman*, 398 S.W.2d at 38. The defendant argued that the misdemeanor offense was not a lesser included of the felony offense. *Id*.

In its analysis, the *Friedman* court explained that the defendant was "charged with having, with intent to defraud, given a check to [victim], drawn upon a bank in which defendant knew he had no funds, an offense made a felony. . .." *Id*. The case was tried to the court, which found the defendant

guilty of "draw[ing] and deliver[ing], with the intent to defraud, a check upon a bank which the drawer knows he has insufficient funds in or credit with such bank for the payment of the check in full," a misdemeanor. *Id.*

The *Friedman* court explained that the felony statute also specified and prohibited other "various means of cheating and defrauding, *State v. Scott*, Mo., 230 S.W.2d 764, with only one of which we here are concerned." *Id.* The court's citation to *Scott* helps explain those other ways the same felony of which defendant was accused of committing could be committed.

In *Scott*, the defendant was convicted of obtaining money, with intent to cheat and defraud, by giving a check drawn upon a bank in which he knew he had no funds, just as in *Friedman*.[7] *State v. Scott*, 230 S.W.2d 764, 766 (Mo. 1950). The *Scott* Court was tasked with determining whether the evidence adduced supported the conviction. *Id.* The *Scott* Court explained the statute at issue in the following:

> We agree with the Attorney General that while Sec. 4694 *provides that obtaining of money, property or other valuable thing by other methods (i.e. trick or deception, artifice and confidence game) is also prohibited by that section and made a felony*, that under this information the State had to prove that defendant obtained money from [victim] with intent to cheat and defraud, by means of a check drawn on a bank in which defendant knew he had no funds, and

[7] The statute numbers are different, but it is clear from the context, and *Friedman*'s pointed direction to *Scott*, that they were the same offense, only the statute numbers had been revised.

> that [victim] believed and relied on defendant's representation. *Under this statute of obtaining of money, property or other valuable thing, with intent to cheat and defraud, by use of the different methods therein named are prohibited. Only one of those different methods is charged in this information.* Only one method need be charged. But the State must prove the particular method to cheat and defraud which is prohibited by statute and which is charged in the information.

Id. at 766-767 (emphasis added).

Therefore, when the *Friedman* court limited the question of whether or not the misdemeanor of which the defendant was convicted was included in the felony offense, the court limited its analysis *to the offense charged*. There were, as is the case here in section 571.030, distinct and different ways for the offense to be committed, and the court correctly limited its analysis to the one offense that the defendant had been charged, not all of the offenses named under the single statute. The *Friedman* court adopted the "statutory element" test, on which *Smith* relied, by comparing the statutory elements of the offense charged to the lesser offense, and did not include the elements such as "trick or deception artifice and confidence game."

The appropriate question before this Court is a statutory element test question: is the statutory element of the offense of section 579.015, possession of a controlled substance – that is, if a person "knowingly possesses a controlled substance – contained in the statutory elements of the offense of

unlawful use of weapons, subsection 11 – that is, if a person "knowingly possesses a firearm while also knowingly in possession of a controlled substance that is sufficient for a felony conviction of § 579.015."?

Hardin and *State v. Collins*, 648 S.W.3d 711, 713 (Mo. banc 2022) (which relied on *Hardin*) misapply the lesser included offense test adopted by this Court in 1957 in *Smith*, which came from *Friedman*, which is contextualized in *Scott*. Both should be overruled, or at least limited to their facts. The statutes in question in *Hardin* and *Collins* are not the statutes in question here, and arguably those statutes are distinct from section 571.030 in how they were drafted by the legislature. But section 571.030 closely resembles the statute in question in *Friedman* and *Scott* because, like that statute, section 571.030 defines multiple different offenses under one statute. If *Hardin* and *Collins* are to stand, they should not apply here.

The plain language of the lesser included statute directs a court that "[a] person may be convicted of an offense included in an offense charged in the indictment or information" and that "[a]n offense is so included when it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." As explained above, the state charged in the indictment and subsequent information in lieu of an indictment of "Unlawful Use of Weapon – Subsection 11 – Possess

Weapon/felony Control Substance." [D3. P. 1]. That charge is described in the information and subsequent information in lieu of an indictment as follows:

> The defendant, in violation of Section 571.030, RSMo, committed the class E felony of unlawful use of a weapon . . . in that . . . the defendant knowingly possessed a handgun, a firearm, while also possessing cocaine base, a controlled substance, knowing of its presence and nature.

[D 3 p. 1-2].

Under the plain language of section 556.046 and section 571.030.1(11), possession of a controlled substance is included in section 571.030. This conclusion is supported by *Whalen*, *Blockburger*, and this Court's own precedents, excluding *Hardin* and *Collins*. By sentencing Mr. Onyejiaka on both Counts II and II, the trial court exceeded its authority authorized by the legislature and violated Mr. Onyejiaka's right to be free from double jeopardy. *Whalen* and *Blockburger* are controlling precedents of the Supreme Court of the United States. This Court should reverse Mr. Onyejiaka's conviction on Count I and remand to the trial court for any further proceedings this Court deems necessary.

CONCLUSION

WHEREFORE, based on his argument in the Point Relied On of this brief, Appellant Sylvester Onyejiaka, Jr., requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 103.08, I hereby certify that on this 31st day of January, 2022, a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, kristen.johnson@ago.mo.gov, via the Missouri e-filing system, care of Ms. Kristen Johnson, Office of the Attorney General.

/s/ Nina McDonnell
Nina McDonnell

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Century Schoolbook 13-point font, and does not exceed the word and page limits for an appellant's brief in this Court. The word-processing software identified that this brief contains 6376 words, not including the cover page, signature block, certificates of service and of compliance, and appendix (filed separately). The brief is 35 pages. It is in searchable PDF form.

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IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. SC99871
	)	
SYLVESTER ONYEJIAKA, JR.,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the jurisdictional statement from his substitute brief as if set forth fully herein.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the statement of facts from his substitute brief as if set forth fully herein.

REPLY ARGUMENT

The trial court plainly erred in entering convictions and sentences for both possession of a controlled substance (Count I) and unlawful use of weapons – subsection 11 – possessing a firearm while in possession of a controlled substance (Count II), because the entering of multiple convictions exceeded the authority of the trial court in violation of Mr. Onyejiaka's right to be free from double jeopardy under the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, in that the legislature did not specifically authorize or intend cumulative punishments for these two offenses.

In its response, Respondent argues that *Whalen* is not controlling case law because the Supreme Court of the United States lacks jurisdiction to review a state court's interpretation of a state statute; and that Missouri's historical understanding of lesser-included offenses, as well as the Missouri Legislature's definitions of lesser-included offenses, utilize a statute-based approach. Both arguments fail, requiring Mr. Onyejiaka's reply.

Whalen controls here and the Supreme Court of the United States is not jurisdictionally barred from reviewing a state court's interpretation of a state statute or from reviewing a state statute

Respondent claims the Supreme Court of the United States of America is without jurisdiction to review Missouri's statutes and that because *Whalen* interpreted federal statutes, the case is inapplicable here.

Respondent is correct that when considering whether or not it had the authority to review the federal offenses of the District of Columbia, the Court explained that it was "not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute." *Whalen v. United States*, 445 U.S. 684, 687–88 (1980). Prior to *Whalen*, the Court had given the District of Columbia Court of Appeals deference when it interpreted a state statute. *Id*. However, the Court determined that because the petitioner's claims involved a claim of double jeopardy, the constitutional question could not be entirely separated from the statutory construction question. *Id*.

In July of 1983, the Court explained that it has jurisdiction to review a state court judgment if the decision "appears to rest primarily on federal law, or to be interwoven with the federal law," or if the "adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

In November of 1983, the *Hunter* Court reviewed Missouri's robbery in the first degree and armed criminal action statutes. *Missouri v. Hunter*, 459 U.S. 359, 361 (1983). Chief Justice Burger (who joined Justice Rehnquist's dissent in *Whalen*) explained with respect to the cumulative punishments imposed in a single trial, that the Double Jeopardy Clause's protection against multiple punishments only prevents the sentencing court from prescribing greater punishment than the legislature intended. *Id*. at 366. The majority opinion cites *Whalen* eight times. *Id*. at 364–69. The Court held that where a legislature specifically authorizes cumulative punishments under two statutes (which Missouri's armed criminal action statute does so specify), regardless of whether those two statutes proscribe the same conduct under the *Blockburger* test, the court's task of statutory construction is at an end and sentences on both offenses may be imposed. *Id*. at 368–69.

The Court has consistently reviewed cases involving a state statute or local ordinance question that implicates a federal constitutional issue. *See Ohio v. Johnson*, 467 U.S. 493 (1984) (reviewing Ohio's murder, aggravated robbery, stealing, and theft statutes; Justice Rehnquist writing for the majority); *United States v. Dixon*, 509 U.S. 688 (1993) (reviewing multiple District of Columbia statutes; Justice Scalia writing for the majority); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (reviewing the District of Columbia's municipal gun control statutes; Justice Scalia writing for the

majority); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (reviewing Chicago's city ordinance and Oak Park's village code, both prohibiting the possession and use of a handgun in the home; Justice Alito writing for the majority); and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022) (reviewing New York state's gun licensing scheme; Justice Thomas writing for the majority).

Whalen, *Blockburger*, and the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution control in this case. Sections 579.015 and 571.030.1(11) do not specifically authorize cumulative punishments. By sentencing Mr. Onyejiaka on both Counts I and II, the trial court exceeded its authority authorized by the legislature and violated Mr. Onyejiaka's right to be free from double jeopardy. Mr. Onyejiaka prays this Court reverse his conviction of possession of a controlled substance and remand to the trial court for any further proceedings this Court deems necessary.

Missouri's historical understanding of lesser-included offenses, as well as the Missouri Legislature's definition of lesser-included offenses, utilize an as-charged approach, opposed to a statute-based approach

Contrary to Respondent's argument, Missouri's historical understanding of lesser-included offenses, including its case law interpreting the statutes governing lesser-included offenses and its Rules, require a reviewing court to consider the offense charged rather than the entire offense statute when determining whether an offense is an included offense to the offense so charged. This Court's departure from over 100 years of case law and statutory law in *Smith* (1979), which resulted in the *Hardin* and *Collins* opinions, should be corrected here.

In *Amsden*, this Court considered whether carnal knowledge of a female between the ages of sixteen and eighteen was a lesser-included of forcible rape. *State v. Amsden*, 299 S.W.2d 498, 503 (Mo. 1957). There, the defendant was charged with forcible rape under section 559.260. *Id*. at 504. That statute provided:

> Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, **or** by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.

Section 559.260, RSMo (1949) (emphasis added).

The defendant complained after being convicted of rape under section 559.260, RSMo (1949), that the court failed to instruct on the offense denounced by section 559.300, RSMo (1949). That statute provided:

> If any person over the age of seventeen years shall have carnal knowledge of any unmarried female, of previously chaste character, between the age of sixteen and eighteen years, he shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term of two years, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than one month or more than six months, or by such fine and imprisonment, in the discretion of the court.

Section 559.300, RSMo (1949).

The Court summed up the defendant's complaint:

> Defendant's motion further complains of the failure to instruct, as part of the law of the case, on the offense denounced by § 559.300 (carnal knowledge of an unmarried female of previously chaste character between the ages of 16 and 18 by a person over the age of 17 years), this on the theory that such offense is necessarily included in *that charged in the case at bar, namely, rape by forcibly ravishing a woman of the age of 16 years.*

Amsden, 229 S.W.2d at 503–04 (emphasis added).

The Court explained that paragraph (c) of then Missouri Court Rule 27.01,[1] "which provided that a defendant 'may be found guilty of an offense

[1] Rule 27.01(c): "The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense

necessarily included in the *offense charged*,' etc., does not change the principle embodied in the former governing statute, § 556.230 [.]"[2] *Id.* at 504. (emphasis added). The pertinent portion of that statute provided

> . . .; and in all other cases, whether prosecuted by indictment or information, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that *charged against him*.

Section 556.230, RSMo (1949) (emphasis added).

The Court then quoted American Jurisprudence, Indictments and Informations:

> The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with *which the accused is specifically charged*, and that the [a]verment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense. If the greater of the two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater.

charged or an offense necessarily included therein, if the attempt is made an offense by statute, but the jury shall specify in their verdict the offense of which the defendant is guilty." RSMo Cumm. Supp. (1951).

[2] The "former governing statute" refers to then Rule 36 providing the authority of the Rules in criminal procedure. RSMo Cumm. Supp. (1951). Today, that principle is addressed in Rule 19.02.

Id. (quoting 27 Am.Jur., Indictments and Informations, § 194) (emphasis added).

Using Rule 27.01, the lesser-included statute section 556.230, and the above quote from American Jurisprudence, the *Amsden* Court concluded:

> Tested by these principles, it is readily apparent that an offense under § 559.300 is not necessarily included in *a charge of forcible rape* under § 559.260. Necessary elements under the former which are not included in the greater (latter) offense are these: The person must be over the age of 17 years; the woman must have been unmarried, of previously chaste character, and between the ages of 16 and 18. The court did not err in failing to instruct on the lesser, because it was not an included offense.

Id. (emphasis added).

The *Amsden* Court clearly considered only what offense of rape the defendant was charged with; it did not include in its analysis the offense of rape by having sex with a female child under the age of sixteen.

The *Amsden* Court did not break new ground in its decision on how to determine a lesser-included offense. As early as 1881, this Court has recognized that a "party may be found not guilty of the offense charged, and guilty of the commission of any offense necessarily included in that whereof *he is charged*." *State v. Davidson*, 73 Mo. 428, 430 (1881) (emphasis added).

The *Davidson* Court relied on section 1655, a new section included in the 1879 statutes, which reads in pertinent part:

> …; and in all other cases, whether prosecuted by indictment, information or before a justice of the peace, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charged against him. (New section.)

R.S. 1879, § 1655.

By the time the *Amsden* Court considered whether carnal knowledge of a female between the age of sixteen and eighteen was a lesser-included offense of forcible rape, the Missouri Legislature had provided for lesser-included offenses for over seventy-five years.[3] Crucially, the Missouri Legislature has always required courts to look at the crime charged in the indictment or information to determine whether an offense is a lesser-included offense of that charged offense.

This begs the question: where did the idea that the entire statute of the greater offense must be considered in determining its lesser-included offense(s) originate? As was clear in *Amsden*, courts had considered only what offense the defendant was charged with – there, forcible rape – and ignored any other offense defined in the same statute – there, rape by carnal and unlawful knowing of any female under the age of sixteen – to determine

[3] For a detailed list of the cases concerning lesser-included offenses from the enactment of section 1655, RSMo 1879, to section 556.230, RSMo 1949, see pages 2345–46 of the Revised Statues of the State of Missouri, 1949, Vol. 3.

whether another statute – there, carnal knowledge of a female between sixteen and eighteen years – was a lesser-included offense.

This idea appears to have originated in December of 1979, over 100 years after the first general lesser-included statute was enacted by the Missouri Legislature. In *Smith*, this Court directly cited the *Amsden* quote of American Jurisprudence[4] and referred to this as the "*Amsden* test." *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979). Strangely, rather than scribe the quote as one paragraph, as did the *Amsden* Court, the *Smith* Court separated the two sentences as though they did not go together. The *Smith* Court stated that the "*Amsden* test" was confusing "because it speaks of both 'averment of the indictment,' and 'legal and factual elements.'" *Id.*

But, the *Amsden* Court used the American Jurisprudence quote to *support* Missouri's laws (section 566.230, RSMo (1949), and its predecessors)

[4] "The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with *which the accused is specifically charged*, and that the [a]verment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense. If the greater of the two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater." *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979) (quoting *Amsden*, 299 S.W.2d at 504) (quoting 27 Am.Jur., Indictments and Informations, § 194) (emphasis added).

and its Court's Rule (27.01(c)). Missouri statutes since 1879 had required courts to look at the indictment or information to determine what offense particularly a defendant was charged as violating.

The American Jurisprudence quote supported how Missouri courts had interpreted the lesser-included statutes. The quote required that the averment (the formal statement by the prosecution of a fact or circumstance which the prosecution offers to prove the defendant committed;[5] (from aver: to allege as fact in a pleading or prove to be true))[6] describe the way the greater charged offense was committed. The averment must contain the law and factual elements to describe the offense charged. If the averment of the indictment's description of the manner of the greater offense contained "allegations essential" to support the charge of the lesser offense, then the lesser offense was included in the greater offense. The quote then went on to explain that if the greater of the two offenses included all of the legal and factual elements of the lesser (still talking about the averment), the greater offense included the lesser offense. It is the charging document which must include legal and factual elements of both offenses for one to be the lesser of another.

[5]https(colon)//www(dot)macmillandictionary(dot)com/us/dictionary/american/averment#:~:text=%E2%80%8Bnoun%E2%80%8Blegal,offers%20to%20prove%20or%20substantiate.

[6] https(colon)//www(dot)dictionary(dot)com/browse/averred.

The *Smith* Court was incorrect that the two sentences of the American Jurisprudence quote were in conflict with one another. It did not help that the Court separated the two sentences as if they were not part of the same continuous quote. The "offenses" discussed in the second sentence of the quote – the sentence quoted as the test from *Smith* to *Hardin* and *Collins* – were the same offenses discussed in the first sentence; that is, the offense charged and the lesser-included offense. For one offense to be a lesser-included offense, the indictment must contain the necessary facts to establish the greater *and* the lesser offense.

Instead, the *Smith* Court presented it as two separate paths: "(1) compare the statute of the greater offense with the factual and legal elements of the lesser offense or (2) compare the Charge or averment of the greater offense with the legal and factual elements of the lesser offense." *Smith*, 592 S.W.2d at 166. This treatment of the American Jurisprudence quote as two separate and distinct methods of determining what constitutes a lesser-included offense does not comport with the actual quote, was dicta in *Amsden*, and the *Smith* Court's reliance on it as a test was in error.

It appears that the *Smith* Court also failed to consider the facts in *Amsden*. Perhaps that is because it is not readily apparent from the *Amsden* opinion that the offense of rape, section 559.260, RSMo (1949), included within it two separate and distinct offenses of rape. The *Amsden* Court did

not consider the first way one could commit rape (by carnally and unlawfully knowing any female under the age of sixteen) in determining whether section 559.300, RSMo (1949), was a lesser-included offense of rape. The Court only looked at the offense "charged in the case at bar, namely, rape by forcibly ravishing a woman of the age of 16 years." *Amsden*, 299 S.W.2d at 504 ("It is readily apparent that an offense under § 559.300 is not necessarily included in a charge of forcible rape.").

The *Smith* Court also ignored the lesser-included offense statutes. *Smith* was decided in December of 1979. In January of 1979, the Missouri Legislature's 1978 revision of the statutes went into effect. Sections 556.041 and 556.046, the same statutes used today, were enacted. The new statutes not only incorporated section 556.230, but also incorporated the long-standing statute that offenses separated by degrees are included in one another (e.g. section 556.230, RSMo (1949), which can be traced to Crimes and Punishments, art. IX, section 14, RSMo (1835)).

None of the statutes – the historical or the newly enacted 1978 statutes sections 556.041 or 556.046 – are mentioned at all in *Smith*. Rather than look to the Missouri Legislature's lesser-included statute, which provided the definition of a lesser-included offense, the *Smith* Court simply used dicta from *Amsden*: a sentence from American Jurisprudence, *out of context*, to create its own definition of lesser-included offenses. And, it stuck.

In *Hardin*, this Court rejected the defendant's argument that a lesser-included offense is determined by how the greater offense "is indicted, proved, or submitted to the jury." *Hardin*, 429 S.W.3d at 423. In doing so, this Court abrogated *State v. Smith*, 370 S.W.3d 891 (Mo. App. 2012). *Id.* at 423 n.5, and required that the entire statute of the greater offense must be considered when determining whether another offense was necessarily included in the greater, directly opposite of what the *Amsden* Court held.

The *Hardin* Court explained

> [The defendant's] assumption does not comport with this Court's historical understanding of lesser-included offenses. Prior to section § 556.046.1(1) enactment, Missouri courts used a definition of lesser-included offenses that is similar to the statute's language:
>
> > If the greater of two offenses includes all of the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater.

Id. at 424.

The Court's citation for the quote included *Smith* (1979) and *Amsden*, but did not include American Jurisprudence as the original source. Further, the Court's statement that the second sentence from the American Jurisprudence quote was the "Court's historical understanding of lesser-

included offenses," ignored the fact that the legislature had given the definition of lesser-included offenses as far back as 1879, as well as over seventy years of case law, from the 1881 *Davidson* decision to the *Amsden* decision in 1957.

Finally, the *Hardin* Court explained that section 556.046.1(1) "codified" *Smith*'s definition of a lesser-included offense. But, again, a "lesser-included offense" was defined in 1879 and the same definition held for 100 years until section 556.046 was enacted in 1979. Section 556.046 did not change the definition, but it did perhaps explain it more clearly.[7]

The plain language of the lesser-included statutes, the original and the most current, require courts to look at the offense charged in the indictment or information to determine whether the purported lesser-included offense is

[7] *Cf.* Section 1655, RSMo (1879):

> …; and in all other cases, whether prosecuted by indictment, information or before a justice of the peace, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charged against him. (New section.)

Section 556.046, RSMo (2022):

> A person may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when: (1) it is established by proof of the same of less than all the facts required to establish the commission of the offense charged.

included in the offense charged. In 143 years, the Missouri Legislature has not wavered from its language and requirement that it is the offense charged that determines a lesser-included, not the entire statute of the offense.

Respondent's argument of Mr. Onyejiaka's contention that both *Hardin* and *Collins* "misapply the lesser included offense test" is "incorrect" because those cases "are solidly founded in double-jeopardy principles and Missouri case law," fails [Resp. Br. at 30]. Its argument fails to acknowledge the 100 years of statutes and case law prior to the 1979 *Smith* opinion, as well as the current version of the lesser-included statute, section 556.046, RSMo, which codifies *Blockburger v. United States*, 284 U.S. 299 (1932).

Mr. Onyejiaka respectfully requests this Court reverse his conviction for possession of a controlled substance as a lesser-included offense to the offense of unlawful use of a weapon by possession of a firearm while in possession of a controlled substance; and overturn *Hardin* and *Collins*, or, in the alternative to overturning those cases, limit those cases to the statutes those cases concern.

CONCLUSION

WHEREFORE, based on his argument in the Point Relied On of his substitute brief and substitute reply, Appellant Sylvester Onyejiaka, Jr., requests that this Court reverse his conviction and sentence on Count I and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 103.08, I hereby certify that on this March 23, 2023, a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, kristen.johnson@ago.mo.gov, via the Missouri e-filing system, care of Ms. Kristen Johnson, Office of the Attorney General.

/s/ Nina McDonnell
Nina McDonnell

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Century Schoolbook 13-point font, and does not exceed the word and page limits for an appellant's brief in this Court. The word-processing software identified that this brief contains 4075 words, not including the cover page, signature block, certificates of service and of compliance, and appendix (filed separately). It is in searchable PDF form.

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IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. ED109930
	)	
SYLVESTER ONYEJIAKA,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE BYRAN L. HETTENBACH, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Cause No. 1922-CR01088-01, the State of Missouri charged that the appellant, Sylvester Onyejiaka Jr., committed possession of a controlled substance, in violation of § 579.015, RSMo (Count 1) and unlawful use of weapons, in violation of § 571.030, RSMo (Count 2).[1]

Following a trial, the jury found Mr. Onyejiaka guilty of both charged offenses. On June 15, 2021, the Honorable Bryan L. Hettenbach, Judge of Division 11, sentenced Mr. Onyejiaka to concurrent terms of 3 years' imprisonment in the Missouri Department of Corrections on each count. The Court further suspended execution of these sentences, and placed Mr. Onyejiaka on a period 2 years' supervised probation. Mr. Onyejiaka timely filed his notice of appeal on June 25, 2021.

This appeal does not involve any issues reserved for the exclusive jurisdiction of the Supreme Court of Missouri; therefore, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Mo. Const., Art. V, § 3; § 477.050, RSMo.

[1] All statutory citations are to RSMo (2016) unless otherwise stated. Mr. Onyejiaka will cite to the legal file by document and page number, e.g., "[D6, p.3]" per Rules 84.04(c) and (e); and to the trial and sentencing transcript as "[Tr.]".

STATEMENT OF FACTS

The State charged Mr. Onyejiaka with one count of possession of a controlled substance under § 579.015, RSMo, and one count of unlawful use of a weapon by possessing a firearm while in possession of a controlled substance under § 571.030(11). RSMo ("UUW-Possession") [D3]. Specifically, the State alleged that Mr. Onyejiaka "knowingly possessed a handgun, a firearm, while also possessing cocaine base, a controlled substance" [D3, p. 1-2]. The case proceeded to a jury trial. At trial, the following evidence was adduced:

On January 28, 2019, members of the St. Louis Metropolitan Police Department's "Mobile Reserve Unit" were patrolling "Hayden Triangle" in the City of St. Louis [Tr. at 131]. While doing so, the officers noticed a silver Nissan sedan with a heavily tinted windshield [Tr. at 132]. Officers Smith, Rothlisberger, Lucas, and Shaw pulled the vehicle over to conduct a traffic stop [Tr. at 134]. Mr. Onyejiaka was the sole occupant of the vehicle [Tr. at 135]. As Officer Shaw approached the vehicle, he noticed a firearm positioned between the driver's side seat and the center console of the vehicle [Tr. at 173]. Officer Shaw instructed Mr. Onyejiaka not to reach for the firearm, and Mr. Onyejiaka volunteered to step out of the vehicle [Tr. at 174]. Once out of the vehicle, Mr. Onyejiaka gave Officer Smith consent to search the car [Tr. at 136]. Officer Smith removed the firearm from the vehicle before conducting his search [Tr. at 137]. While looking through the center console, Officer Smith found a "cellophane wrapper" which had "an off-white chunk in it" [Tr. at 139-140]. Officer Smith believed this to be an illegal narcotic [Tr. at 142] and placed Mr. Onyejiaka under arrest "for possession of a

controlled substance and UUW Subsection 11" [Tr. at 142]. The officers testified that Mr. Onyejiaka stated the baggie contained "mo" [Tr. at 144]. Officer Smith understood this to mean "primo" which is a mix of marijuana and crack cocaine [Tr. at 142]. The State read the following stipulation to the jury: "[t]he plastic baggie of suspected controlled drugs seized as evidence in this case was later tested by the crime lab and would prove to be cocaine base with a gross weight of point three, three grams" [Tr. at 169].

The jury found Mr. Onyejiaka guilty of both charged offenses [D10, p. 1]. On June 15, 2021, the trial court sentenced Mr. Onyejiaka to concurrent terms of 3 years' imprisonment in the Missouri Department of Corrections on each count [D10, p. 2]. The trial court suspended execution of these sentences and placed Mr. Onyejiaka on a term of 2 years' supervised probation [D10, p. 2].

This appeal follows [D13]. To avoid unnecessary repetition, additional facts may be set forth in the Argument portion of this brief.

POINT RELIED ON

I. The trial court plainly erred in accepting guilty verdicts for both possession of a controlled substance (Count 1) and UUW-Possession (Count 2), in entering judgment of conviction on both counts, and in sentencing Mr. Onyejiaka for both counts, in violation of Mr. Onyejiaka's right to be free from double jeopardy under the Fifth Amendment to the United States Constitution in that Counts 1 and 2 constituted "the same offense" for double jeopardy purposes and the legislature did not specifically authorize or intend cumulative punishments for these two offenses.

State v. McTush, 827 S.W.2d 184 (Mo. banc 1992);

State v. Sanders, 522 S.W.3d 212 (Mo. banc 2017);

§§ 556.041, 556.046, 571.030, and 579.015, RSMo;

Rule 30.20; and

U.S. Const. amends. V and XIV.

ARGUMENT

I. The trial court plainly erred in accepting guilty verdicts for both possession of a controlled substance (Count 1) and UUW-Possession (Count 2), in entering judgment of conviction on both counts, and in sentencing Mr. Onyejiaka for both counts, in violation of Mr. Onyejiaka's right to be free from double jeopardy under the Fifth Amendment to the United States Constitution in that Counts 1 and 2 constituted "the same offense" for double jeopardy purposes and the legislature did not specifically authorize or intend cumulative punishments for these two offenses.

Standard of Review

Missouri courts review preserved double jeopardy claims *de novo*. *See e.g.*, *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010). Here, although the defense did request that Count 1—the possession of a controlled substance charge—be dismissed at the close of the State's evidence [Tr. at 198], the defense did not specifically cite to the Double Jeopardy Clause, nor was the claim of error included in the motion for new trial [D7]. Accordingly, Mr. Onyejiaka concedes this error is unpreserved. Mr. Onyejiaka requests plain error review as his two convictions and sentences resulted in a manifest injustice and miscarriage of justice that is determinable from the face of the record. *See State v. Liberty*, 370 S.W. 537, 546 (Mo. banc 2012) (acknowledging that "because the right to be free from double jeopardy is a constitutional right that goes to the very power of the State to bring the defendant into court to answer the charge brought against him, a double

jeopardy allegation determinable from the face of the record is entitled to plain error review") (internal citations and quotations omitted).

"Plain error review is a two-step process." *State v. Todd*, 613 S.W.3d 92, 105 (Mo. App. W.D. 2020). First, this Court must "determine whether the record facially establishes substantial grounds to believe plain error occurred, which is error that is evident, obvious, and clear, resulting in manifest injustice or a miscarriage of justice." *State v. Sullivan*, 640 S.W.3d 149, 159 (Mo. App. E.D. 2022) (citing *State v. Davis*, 580 S.W.3d 26, 32 (Mo. App. E.D. 2016)) If so, this Court must "then consider whether the error actually resulted in manifest injustice or a miscarriage of justice." *Id.*

Analysis

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST amend. V. The Clause is applicable to the States through the Fourteenth Amendment, *Brown v. Ohio* 432 U.S. 161, 164 (1977), and offers two distinct protections for criminal defendants: "(a) protection from successive prosecutions for the same offense after either an acquittal or a conviction and (b) protection from multiple punishments for the same offense." *State v. Flenoy*, 968 S.W.2d 141, 143 (Mo. banc 1998). When the protection against multiple punishment is implicated, double jeopardy analysis is limited to whether cumulative punishments were intended by the legislature. *Id.* at 144; *State v. Blackman*, 968 S.W.2d 138, 140 (Mo. banc 1998).

To determine legislative intent, courts must first look at the statutes at issue to see if the legislature "specifically authorized" cumulative punishments for the same conduct. *Id.* If so, then there is no double jeopardy issue. *See Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). If not—if the statutes are "silent" or "do not expressly authorize multiple punishments"—then courts must look to § 556.041, RSMo, "which expresses the legislature's general intent with regard to cumulative punishments," including four instances where cumulative punishments are prohibited. *State v. Horton*, 325 S.W.3d 474, 479 (Mo. App. E.D. 2010).

Here, the record demonstrates the trial court plainly erred in accepting guilty verdicts for both possession of a controlled substance (Count 1) and UUW-Possession (Count 2), in entering judgment of conviction sentences for both counts. The statutes for UUW-Possession and possession of a controlled substance do not specifically authorize cumulative punishments, so the double jeopardy analysis must be guided by § 556.041. Under § 556.041(1), it is clear that possession of a controlled substance is an included offense to UUW-Possession, and thus, cumulative punishments are not permitted. Accordingly, this Court should vacate Mr. Onyejiaka's conviction and sentence for either Count 1 or Count 2.

A. The statutes themselves do not specifically authorize cumulative punishments, so the legislative intent expressed in the general cumulative punishment statute, § 556.041, controls.

As stated above, double jeopardy analysis starts with looking at the text of the statutes at issue to see if the legislature "specifically authorized" cumulative punishments for the same conduct. *State v. Hardin*, 429 S.W.3d 417, 421 (Mo. banc 2014). When

looking at the text of § 579.015 and § 571.030.1(11) as instructed, there is no mention of cumulative punishments. Section 579.015 provides that "[a] person commits the offense of possession of a controlled substance if he or she knowingly…[p]ossesses a controlled substance." Meanwhile, § 571.030.1(11) provides that "[a] person commits the offense of unlawful use of weapons…if he knowingly…[p]ossesses a firearm while also knowingly possessing a controlled substance that is sufficient for a felony violation of section 579.015." Accordingly, these statutes do not include the type of express authorization of multiple punishments that have been found necessary in other statutes. *See Blackman*, 968 S.W.2d at 140 (finding that because the armed criminal action statute expressly stated that punishment shall be "in addition to" to other punishment the defendant may receive, "it clearly establishe[d] the legislature's intent to provide for successive punishment for those crimes").

B. Applying the general cumulative punishment statute, it is clear that the legislature did not intend for UUW-Possession and possession of a controlled substance to be punished cumulatively.

Because neither statute specifically authorizes cumulative punishments, analysis must turn to § 556.041. Although § 556.041 generally allows for multiple punishments for the same offense, § 556.041(1) provides that a person cannot be subject to multiple punishments or convictions "if…[o]ne offense is included in the other, as defined in section 556.046[.]" Section 556.046.1(1), in turn, defines an included offense as one that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" Application of this statute is straightforward: "The elements of each offense are gleaned from the statutes or common law definitions and

then compared." *McTush*, 827 S.W.2d at 188 (citing *State v. McLemore*, 782 S.W.2d 127, 128-129 (Mo. App. E.D. 1989)). When it is "impossible to commit" the first offense "without necessarily committing" the second offense, the second offense is included within the first. *State v. Sanders*, 522 S.W.3d 212, 216 (Mo. banc 2017).[2]

Applying this "straightforward" approach, it is clear that possession of a controlled substance is included within UUW-Possession. This is obvious, as UUW-Possession is expressly predicated on committing all of the elements of possession of a controlled substance. *See* § 571.030.1(11). It is therefore impossible to commit UUW-Possession without also committing possession of a controlled substance when—as here—the same controlled substance is the basis for both charges. Thus, possession of a controlled substance is a "nested lesser-included offense" of UUW-Possession. *See Sanders*, 522 S.W.3d at 216 (noting that a lesser-included offense in § 556.046.1 "is called a 'nested lesser included'" because "it consists of a subset of elements of the greater offense and is separated from the greater offense by a differential element for which the state bears the burden of proof").

Conclusion

The record clearly shows that dual convictions and sentences for UUW-Possession and possession of a controlled substance violated Mr. Onyejiaka's rights to be free of

[2] This Missouri Supreme Court has recognized that § 556.046.1(1) effectively codified the same-elements test laid out in *Blockburger v. United States*, 284 U.S. 299 (1932). *See Daws*, 311 S.W.3d at 808 n.3.

double jeopardy under the Fifth Amendment to the United States Constitution. The trial court plainly erred in accepting guilty verdicts for both counts, in entering judgment of conviction on both counts, and in sentencing Mr. Onyejiaka for both counts. It was a manifest injustice for the trial court to have convicted and sentenced Mr. Onyejiaka under both § 579.015 and § 570.030.1(11) , since this violated the Double Jeopardy Clause. Mr. Onyejiaka therefore respectfully requests this Court vacate his conviction for either Count 1 or Count 2.[3]

[3] Generally, where the two sentences are ordered to run concurrent with each other, appellate courts "can cure the [double jeopardy] violation by ordering that the shorter of the [two] sentences be vacated." *State v. Elliott*, 987 S.W.2d 418, 422 (Mo. App. W.D. 1999); *see also State v. Polson*, 145 S.W.3d 881, 897 (Mo. App. W.D. 2004) (same). Here, Mr. Onyejiaka received the same concurrent sentence (3 years) on both counts. Thus, vacating either of the convictions and sentences is appropriate. *See* Rule 84.14.

CONCLUSION

WHEREFORE, based on his argument in Points I of his brief, Appellant Sylvester Onyejiaka Jr. requests that this Court vacate his conviction and sentence for either Count 1 or Count 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 103.08, I hereby certify that on this 7th day of April, 2022, a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, evan.buchheim@ago.mo.gov, via the Missouri e-filing system, care of Mr. Evan Buchheim, Office of the Attorney General.

/s/ *Abraham P. Copi*
Abraham P. Copi

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13-point font, and does not exceed the word and page limits for an appellant's brief in this court. The word-processing software identified that this brief contains 2751 words, and 16 pages including the cover page, signature block, and certificates of service and of compliance. It is in searchable PDF form.

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ATTORNEY FOR APPELLANT

STATE of Missouri, Respondent,

v.

Kartez HARDIN, Appellant.

No. SC 93555.

Supreme Court of Missouri,
En Banc.

April 29, 2014.

Background: Defendant was convicted in the Circuit Court of the City of St. Louis, Angela Turner Quigless, J., of forcible rape, aggravated stalking, and five counts of violating a protective order, and was sentenced to 50 years' imprisonment for rape. Defendant appealed.

Holdings: On transfer from the Court of Appeals, the Supreme Court, Mary R. Russell, C.J., held that:

(1) forcible rape statute authorized two sentencing options, namely, life imprisonment or unlimited term of years not less than five years, abrogating *State v. Williams*, 828 S.W.2d 894, and *State v. Anderson*, 844 S.W.2d 40;

(2) rule of lenity did not apply to entitle defendant to reduction of his sentence for rape;

(3) violating a protective order is not a lesser included offense of aggravated stalking; and

(4) convictions of aggravated stalking and violating a protective order did not violate double jeopardy.

Affirmed.

1. Criminal Law ⚿1042.3(1)

Being sentenced to a punishment greater than the maximum sentence for an offense constitutes manifest injustice or miscarriage of justice meriting plain error review. V.A.M.R. 30.20.

2. Sentencing and Punishment ⚿11

To determine what punishment is authorized by a sentencing statute, the supreme court looks first for the legislature's intent as reflected in the plain and ordinary meaning of the statute's words, giving each word or phrase meaning if possible.

3. Criminal Law ⚿12.7(2)

If the plain language of a criminal statute is ambiguous, it will be construed in the defendant's favor.

4. Rape ⚿64

Forcible rape statute authorized two sentencing options, namely, life imprisonment or unlimited term of years not less than five years; abrogating *State v. Williams*, 828 S.W.2d 894, and *State v. Anderson*, 844 S.W.2d 40. V.A.M.S. § 566.030(2).

5. Statutes ⚿1081, 1139

Court enforces statutes as they are written, not as they might have been written.

6. Rape ⚿64

Statute requiring that sentence of life imprisonment be calculated as 30 years for parole eligibility purposes did not require finding that defendant's sentence of 50 years' imprisonment for forcible rape exceeded statutory maximum, where forcible rape statute authorized sentence of life imprisonment or unlimited term of years not less than five years. V.A.M.S. §§ 558.019(4), 566.030(2).

7. Statutes ⚿1318

Rule of lenity applies only when a statute is ambiguous.

8. Rape ⚿64

Rule of lenity did not apply to entitle defendant to reduction of his sentence of 50 years' imprisonment for forcible rape, where applicable sentencing statute unambiguously authorized life sentence or sentence of unlimited term of years not less than five years. V.A.M.S. § 566.030(2).

9. Criminal Law ⚿1030(2)

Alleged double jeopardy violation that may be determined from the face of the record is entitled to plain error review. U.S.C.A. Const.Amend. 5.

10. Criminal Law ⚿1186.6

Parties cannot stipulate to legal issues, and the supreme court is not bound by the Attorney General's confession of error in a criminal case.

11. Double Jeopardy ⚿5.1

Federal double jeopardy clause provides two basic protections: (1) it protects defendants from successive prosecutions for the same offense after acquittal or conviction; and (2) it protects defendants against multiple punishments for the same offense. U.S.C.A. Const.Amend. 5.

12. Double Jeopardy ⚿29.1

With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. U.S.C.A. Const.Amend. 5.

13. Double Jeopardy ⚿29.1

Double jeopardy analysis regarding multiple punishments is limited to determining whether cumulative punishments were intended by the legislature. U.S.C.A. Const.Amend. 5.

14. Sentencing and Punishment ⚿545

Legislature generally intends to impose cumulative punishments for the same conduct of a person establishing the commission of more than one offense, unless the offenses at issue fall into one of the statutory exceptions to cumulative punishment. V.A.M.S. § 556.041.

15. Double Jeopardy ⚿161

Determination of whether one offense is a lesser-included offense of another for double jeopardy purposes requires application of an elements test, under which the elements of the offenses at issue are gleaned from the statutory provisions and compared; if each offense requires proof of a fact that the other does not, then the offenses are not lesser included offenses, notwithstanding a substantial overlap in the proof offered to establish the crimes. U.S.C.A. Const.Amend. 5; V.A.M.S. § 556.046(1)(1).

16. Double Jeopardy ⚿161

Offense is a lesser included offense for double jeopardy purposes if it is impossible to commit the greater without necessarily committing the lesser. U.S.C.A. Const. Amend. 5.

17. Threats, Stalking, and Harassment ⚿33

Person commits the offense of aggravated stalking if he commits the offense of stalking and his course of conduct includes one of five statutory aggravators.

18. Double Jeopardy ⚿162

Violating a protective order is not a lesser included offense of aggravated stalking for purposes of double jeopardy analysis; aggravated stalking requires proof of a course of conduct composed of two or more acts, while a protective order violation may be proven by a single act of abuse in violation of the protective order, and a protective order violation requires proof that the defendant's act violated an existing order of protection, while aggravated stalking may be proven without demonstrating a protective order violation. U.S.C.A. Const.Amend. 5; V.A.M.S. §§ 455.085, 565.225(2).

19. Double Jeopardy ⚿162

Convictions of aggravated stalking and violating a protective order did not violate double jeopardy, as violating a protective order was not lesser included offense of aggravated stalking. U.S.C.A. Const.Amend. 5; V.A.M.S. §§ 455.085, 565.225(2).

Jessica M. Hathaway, Public Defender's Office, St. Louis, for Hardin.

Timothy A. Blackwell, Attorney General's Office, Jefferson City, for State.

MARY R. RUSSELL, Chief Justice.

Appellant Kartez Hardin appeals from his convictions for forcible rape, aggravated stalking, and violating a protective order, claiming that his sentence for forcible rape exceeds the maximum sentence for that offense and that his convictions for aggravated stalking and violating a protective order violate double jeopardy. The judgment is affirmed.

Factual and Procedural Background

In November 2010, Hardin's wife, H.H., obtained an ex parte order of protection after repeated instances of domestic violence. Hardin was served with notice of the protective order. Then, on December 4, Hardin abducted H.H. and her son and raped her. After Hardin was arrested, he violated the protective order five times by calling or writing H.H. from jail.

Hardin was charged with 14 offenses, including one count of forcible rape, one count of aggravated stalking, and five counts of violating a protective order. He was convicted and sentenced on all counts. He now appeals.[1]

Sentence for Forcible Rape

[1] Hardin was sentenced to a 50–year term of imprisonment for forcible rape under section 566.030.2, RSMo Supp.2009, which provides that "[f]orcible rape . . . is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years. . . ." He claims his sentence exceeds the maximum sentence for this offense. Although he failed to preserve the issue for appeal by not objecting at the sentencing hearing, being sentenced to a punishment greater than the maximum sentence for an offense constitutes manifest injustice or miscarriage of justice meriting plain error review. *See* Rule 30.20; *State v. Severe,* 307 S.W.3d 640, 642 (Mo. banc 2010).

[2, 3] Hardin contends that section 566.030.2 authorizes a range of punishment from 5 years to life imprisonment. His proposed reading, however, is inconsistent with the statute's plain language. To determine what punishment is authorized by the statute, this Court looks first for the legislature's intent as reflected in the plain and ordinary meaning of the statute's words. *Severe,* 307 S.W.3d at 643. Each word or phrase must be given meaning if possible. *State v. Moore,* 303 S.W.3d 515, 520 (Mo. banc 2010). If the plain language of a criminal statute is ambiguous, it will be construed in the defendant's favor. *State v. Liberty,* 370 S.W.3d 537, 547 (Mo. banc 2012).

[4] Section 566.030.2 authorizes a sentence of "life imprisonment or a term of years not less than five years." The two phrases describing the authorized term of imprisonment—"life imprisonment" and "a term of years not less than five years"—are separated by the word "or." The plain and ordinary meaning of "or" is disjunctive, and its use indicates the legislature's intent that sentencing courts may sentence defendants to *either* life imprisonment *or* a term of years not less than five years. *See Council Plaza Redevelopment Corp. v. Duffey,* 439 S.W.2d 526, 532 (Mo. banc 1969) ("The disjunctive 'or' . . . in its ordinary sense marks an alternative which generally corresponds to the word 'either.' ").

1. This Court granted transfer after an opinion by the court of appeals. Mo. Const. art. V, sec. 10.

[5] Hardin's proposed reading is inconsistent with this plain language. He would rewrite section 566.030.2 to read "life imprisonment *to* a term of years not less than five years," inserting the preposition "to" where the legislature used the disjunctive "or." But "[t]his Court enforces statutes as they are written, not as they might have been written." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667–68 (Mo. banc 2010). Further, if the legislature intended to authorize a sentence of a limited term of years, it could have done so. *See, e.g.*, section 589.425, RSMo Supp. 2006 (authorizing a sentence "of not less than ten years and not more than thirty years"). It could have also authorized a sentence of life imprisonment *or* a sentence of a limited term of years. *See* section 558.011.1(1), RSMo 2000 (authorizing a sentence of "a term of years not less than ten years and not to exceed thirty years, or life imprisonment"). Here, however, the legislature chose two types of sentences—(1) life imprisonment and (2) a term of years limited only by a statutory minimum—and linked them by the word "or." The plain and ordinary meaning of this language in section 566.030.2 provides sentencing courts with two options: life imprisonment or an unlimited term of years not less than five years. *See State v. Maples*, 306 S.W.3d 153, 157 & n. 4 (Mo. App.2010).

Hardin argues that this reading of section 566.030.2 renders the phrase "life imprisonment" meaningless. The crux of his argument is that "life imprisonment" and an unlimited term of years are identical sentences. This may be true in some cases; for example, a 100–year sentence and a sentence of life imprisonment may both result in the prisoner being incarcerated for the remainder of his life. But this is not true with every sentence of a term of years not less than five years. For example, a sentence of 40 years could result in the prisoner being released during his lifetime. A life sentence and a sentence of a term of years also have different consequences for parole. Under section 558.019.4, RSMo 2000, for parole purposes, a life sentence is calculated to be 30 years, while any sentence greater than 75 years is calculated to be 75 years. Regardless, the plain and ordinary meaning of the statute indicates that the legislature intended to give sentencing courts two options—life imprisonment or an unlimited term of years not less than five years—and this plain meaning is supported by the differences between the two options.

Hardin points out that court of appeals decisions have stated that life imprisonment is the maximum sentence authorized by section 566.030. He relies principally on *State v. Williams*, 828 S.W.2d 894 (Mo. App.1992), in which the court of appeals held that a 100–year sentence exceeded the statutory maximum because "[t]he maximum sentence authorized for forcible rape ... under section 566.030 is life imprisonment." *Id.* at 903. *See also State v. Anderson*, 844 S.W.2d 40, 42 (Mo.App. 1992).[2] *Williams* and *Anderson*, however, offered no reasoning to support their holdings. In light of the plain language of section 566.030.2, these cases are unpersuasive. Insofar as they suggest that section 566.030.2 does not authorize a sentence of an unlimited term of years, they should no longer be followed.[3]

2. *Williams* and *Anderson* cite to *State v. Charron*, 743 S.W.2d 436, 438 (Mo.App.1987), and *Toney v. State*, 770 S.W.2d 411, 414 (Mo.App. 1989), both of which remarked, without further analysis, that section 566.030 authorizes a maximum punishment of life imprisonment. Neither case, however, specifically stated that the statute does not authorize a sentence of an unlimited term of years or held that a sentence of a term of years exceeded the statutory maximum.

3. Hardin also quotes the statement in *State v. Davis*, 867 S.W.2d 539, 542 (Mo.App.1993), that under section 566.030.2, "the unclassified felony of forcible rape is punishable by

[6] Hardin further argues that "life imprisonment" should be construed to mean 30 years; thus, his 50–year sentence exceeds the statutory maximum. He bases this argument on section 558.019.4, RSMo 2000, which provides that "[a] sentence of life shall be calculated to be thirty years" for parole eligibility purposes. This argument is without merit: first, because the plain language of section 566.030.2 authorizes a sentence of an unlimited term of years and, second, because section 558.019.4 is not applicable in this case. Section 558.019 is a parole eligibility statute, and by its own terms it does not apply to section 566.030.

[7, 8] Finally, Hardin contends that the rule of lenity requires this Court to construe section 566.030.2 in his favor. But the rule of lenity applies only when a statute is ambiguous. *Liberty,* 370 S.W.3d at 547. Here, the plain meaning of section 566.030.2 is clear. It unambiguously authorizes a life sentence or a sentence of an unlimited term of years not less than five years. Hardin's claim is without merit.

Double Jeopardy

[9, 10] Hardin next claims that his convictions of five protective order violations and aggravated stalking based on the same conduct violated double jeopardy. While he also failed to preserve this issue, an alleged double jeopardy violation that may be determined from the face of the record is entitled to plain error review. *State v. Neher,* 213 S.W.3d 44, 48 (Mo. banc 2007). The record here permits such review.[4]

[11] The federal double jeopardy clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. It provides two basic protections: it protects defendants from successive prosecutions for the same offense after acquittal or conviction and it protects defendants against multiple punishments for the same offense. *Brown v. Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

[12, 13] Hardin's case implicates this second protection because he was convicted of aggravated stalking and violating a protective order at a single trial. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). "Double jeopardy analysis regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature." *State v. McTush,* 827 S.W.2d 184, 186 (Mo. banc 1992).

[14] This inquiry begins with the statutes under which Hardin was convicted and sentenced. *Id.* at 186. As is often the case, however, the statutes defining the offenses of aggravated stalking, section 565.225.3, RSMo Supp.2009, and violating

life imprisonment or a term of years not less than five years and not greater than thirty years.'' This statement, however, refers to a prior version of the statute. *See* section 566.030.2, RSMo Supp.1993 (authorizing a sentence of ''life imprisonment or a term of years not less than five years *and not greater than thirty years* '') (emphasis added).

4. The State conceded this point in its brief. Nevertheless, parties cannot stipulate to legal issues, and this Court is not bound by the Attorney General's confession of error. *Junior College Dist. of St. Louis v. City of St. Louis,* 149 S.W.3d 442, 446 n. 1 (2004); *State v. Tipton,* 307 Mo. 500, 271 S.W. 55, 61 (1925). After this Court determined this issue deserved further consideration, the parties were given the opportunity to file supplemental briefs.

a protective order, section 455.085.2, RSMo 2000, are silent as to whether the legislature intended cumulative punishments for these offenses. In the absence of an offense-specific indication of legislative intent, the legislature's general intent regarding cumulative punishments is expressed in section 556.041, RSMo 2000. *Id.* at 187. It provides:

> When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (1) One offense is included in the other, as defined in section 556.046; or
>
> (2) Inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
>
> (4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Section 556.041 expresses the legislature's general intent to impose cumulative punishments unless the offenses at issue fall into one of the statute's exceptions. *McTush,* 827 S.W.2d at 188.

Hardin contends that the first exception, for "included" offenses, applies in this case. That exception points to section 556.046.1, RSMo Supp.2001, which sets out three situations in which one offense is "included" in another:

> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (2) It is specifically denominated by statute as a lesser degree of the offense charged; or
>
> (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.

Turning again to the offenses at issue in this case, it is clear that subdivisions (2) and (3) do not apply. Neither aggravated stalking nor violating a protective order is denominated a lesser degree of the other, and neither offense consisted of an attempt to commit the other. Hardin's claim rests on subdivision (1).

[15, 16] Section 556.046.1(1) sets forth the definition of a lesser-included offense. *State v. Derenzy,* 89 S.W.3d 472, 474 (Mo. banc 2002). It sets up an elements test, under which the elements of the offenses at issue are gleaned from the statutory provisions and compared. *See State v. Williams,* 313 S.W.3d 656, 659 (Mo. banc 2010); *Derenzy,* 89 S.W.3d at 474; *McTush,* 827 S.W.2d at 188. "If each offense requires proof of a fact that the other does not, then the offenses are not lesser included offenses, notwithstanding a substantial overlap in the proof offered to establish the crimes." *McTush,* 827 S.W.2d at 188. "An offense is a lesser included offense if it is impossible to commit the greater without necessarily committing the lesser." *Derenzy,* 89 S.W.3d at 474.

[17] Analysis begins with the statutes under which Hardin was convicted and sentenced. Aggravated stalking is, essentially, an aggravated form of stalking. A person commits the offense of stalking if he "purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person." Section 565.225.2. A person commits the offense of aggravated stalking, on the other hand, if he commits the offense of stalking

and his course of conduct includes one of five aggravators:

> A person commits the crime of aggravated stalking if he or she purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person, and:
>
> (1) Makes a credible threat; or
>
> (2) At least one of the acts constituting the course of conduct is in violation of an order of protection and the person has received actual notice of such order; or
>
> (3) At least one of the actions constituting the course of conduct is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal; or
>
> (4) At any time during the course of conduct, the other person is seventeen years of age or younger and the person harassing the other person is twenty-one years of age or older; or
>
> (5) He or she has previously pleaded guilty to or been found guilty of domestic assault, violation of an order of protection, or any other crime where the other person was the victim.

Section 565.225.3. For purposes of both offenses, "harass" means "to engage in a course of conduct directed at a specific person that serves no legitimate purpose, that would cause a reasonable person under the circumstances to be frightened, intimidated, or emotionally distressed." Section 565.225.1(3). A "course of conduct" requires proof of "a pattern of conduct composed of two or more acts." Section 565.225.1(1).

Section 455.085 sets out the elements needed to prove a violation of an order of protection. A person commits the crime of violating an order of protection when "a party, against whom a protective order has been entered and who has notice of such order entered, has committed an act of abuse in violation of such order." Section 455.085.2.

[18] Under a straightforward application of section 556.046.1(1)'s lesser-included offense definition, violating a protective order is not "included" in the offense of aggravated stalking. Aggravated stalking requires proof of a course of conduct composed of two or more acts, while a protective order violation may be proven by a single act of abuse in violation of the protective order. A protective order violation, on the other hand, requires proof that the respondent's act violated an existing order of protection, while aggravated stalking may be proven without demonstrating a protective order violation. Each offense requires proof of an element the other does not.

Hardin, however, urges that it is impossible to commit aggravated stalking without violating the order of protection. He is incorrect. It *is* possible to commit aggravated stalking without violating an order of protection: a defendant may commit aggravated stalking by making a credible threat, for example, or by violating a condition of his probation or parole. Hardin assumes that, for purposes of lesser-included offense analysis, the elements of aggravated stalking include one of the five aggravators listed in section 565.225.3, namely the aggravator on which the State relied to establish the offense, and *only* that aggravator. In other words, he assumes that whether the offense of violating a protective order is included in the offense of aggravated stalking depends on how the latter offense is indicted, proved, or submitted to the jury.[5]

5. Hardin relies principally upon *State v. Smith,* 370 S.W.3d 891 (Mo.App.2012), which made this same assumption. *See id.* at 895. For the reasons stated in this opinion, this assumption is erroneous, and *Smith* should no longer be followed.

Hardin's assumption does not comport with this Court's historical understanding of lesser-included offenses. Prior to section 556.046.1(1)'s enactment, Missouri courts used a definition of lesser-included offenses that is similar to the statute's language:

> If the greater of two offenses includes all of the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater.

State v. Smith, 592 S.W.2d 165, 166 (Mo. banc 1979) (quoting *State v. Amsden,* 299 S.W.2d 498, 504 (Mo.1957)). This definition focused on the elements of the statutes defining each offense. *Id.* Further, an indictment-based application of this definition has been expressly rejected. In *Smith,* this Court held that the definition of a lesser-included offense quoted above called for courts to "compare the Statute of the greater offense with the factual and legal elements of the lesser offense," not "compare the Charge or averment of the greater offense with the legal and factual elements of the lesser offense." *Id.* Section 556.046.1(1) effectively codifies this definition, along with its "statutory elements" test. *State v. Baker,* 636 S.W.2d 902, 904 (Mo. banc 1982); *Smith,* 592 S.W.2d at 166.[6]

[19] This long-running understanding of lesser-included offenses directs the analysis in this case. Aggravated stalking requires proof that the defendant purposely engaged in a course of conduct harassing (or intending to harass) another person. Thus, aggravated stalking includes the offense of stalking because stalking also requires proof of those same facts and no others. On the other hand, aggravated stalking *may* be established by proof of a protective order violation, but it may also be established by proof of other facts. A protective order violation is not a fact proof of which is required to establish commission of aggravated stalking. Aggravated stalking does not, therefore, include the offense of violating a protective order. Hardin's convictions for aggravated stalking and violating a protective order did not violate double jeopardy.

Conclusion

The trial court's judgment is affirmed.

All concur.

6. Section 556.046.1(1) also closely tracks the language of the lesser included defense definition developed by the United States Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). That Court also uses the *Blockburger* test to determine whether two offenses are the "same offense" for double jeopardy purposes. *United States v. Dixon,* 509 U.S. 688, 704, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). With respect to cumulative punishments imposed at a single trial, however, the *Blockburger* test is merely a tool of statutory construction to determine legislative intent. *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

STATE of Missouri, Respondent,

v.

Joshua Steven COLLINS, Appellant.

No. SC 99211

Supreme Court of Missouri,
en banc.

Opinion issued May 17, 2022

Opinion Modified on Court's Own Motion August 30, 2022

Background: Defendant was convicted in the Circuit Court, Greene County, Thomas E. Mountjoy, J., of tampering with a judicial officer and second-degree harassment of his probation officer. Defendant appealed.

Holdings: The Supreme Court, en banc, Draper, J., held that:

(1) statute governing second-degree harassment is limited to conduct wholly outside of the First Amendment's protection and is not overly broad;

(2) statute governing second-degree harassment applies to both conduct and communication; and

(3) second-degree harassment was not a lesser-included offense of tampering with a judicial officer, and thus defendant's right to be free from double jeopardy was not violated.

Affirmed.

1. Criminal Law ⚿1139

The Supreme Court reviews the constitutional validity of a statute de novo.

2. Constitutional Law ⚿990, 996

The Supreme Court will presume a statute is valid and will not declare a statute unconstitutional unless it clearly contravenes some constitutional provision.

3. Constitutional Law ⚿996, 1002, 1030

The Supreme Court will not invalidate a statute unless the challenger meets his burden of proving the statute clearly and undoubtedly violates some constitutional provision.

4. Constitutional Law ⚿667

Generally, a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court.

5. Constitutional Law ⚿855

Missouri courts permit First Amendment challenges in which litigants are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. U.S. Const. Amend. 1.

6. Constitutional Law ⚿1140.2

The overbreadth doctrine restricts statutes that prohibit not only unprotected behavior, but also constitutionally protected behavior.

7. Constitutional Law ⚿1141

The overbreadth doctrine may apply when criminal statutes make unlawful a substantial amount of constitutionally protected conduct even if they also have legitimate application.

8. Constitutional Law ⚿1142

The overbreadth doctrine is strong medicine and must be employed with hesitation, and then only as a last resort.

9. Constitutional Law ⚿1140.2

The first step in the overbreadth analysis is to construe the challenged statute.

10. Constitutional Law ⚿1018

Courts may use a narrowing construction when the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish. U.S. Const. Amend. 1.

11. Constitutional Law ⚿1016

In the context of the overbreadth analysis, a narrowing construction is the preferred remedy in First Amendment cases in that a statute is construed so as to be in harmony with the constitution and upheld. U.S. Const. Amend. 1.

12. Constitutional Law ⚿1143(23), 1827
Threats, Stalking, and Harassment ⚿5

Statute governing the crime of second-degree harassment requires a defendant to act without good cause and with a purpose to cause emotional distress, so that statute is limited to conduct wholly outside of the First Amendment's protection of free speech and is not overly broad. U.S. Const. Amend. 1; Mo. Ann. Stat. § 565.091.

13. Threats, Stalking, and Harassment ⚿22, 32

Statute governing crime of second-degree harassment applies to both conduct and communication. Mo. Ann. Stat. § 565.091.

14. Threats, Stalking, and Harassment ⚿23, 32

Statute governing the crime of second-degree harassment contains a scienter requirement that one acts with the purpose to cause emotional distress, not that the victim actually suffer emotional distress. Mo. Ann. Stat. § 565.091.

15. Constitutional Law ⚿1559

Offensive language can be statutorily prohibited, without violating the First Amendment, only if it is personally abusive, addressed in face-to-face manner to specific individual, and uttered under circumstances such that words have direct tendency to cause immediate violent response by reasonable recipient. U.S. Const. Amend. 1.

16. Criminal Law ⚿1144.13(1), 1159.2(9)

When judging the sufficiency of the evidence to support a conviction, appellate courts do not weigh the evidence but accept as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore all contrary evidence and inferences.

17. Criminal Law ⚿1159.2(3)

In determining whether the evidence was sufficient to support a conviction, the Supreme Court asks only whether there was sufficient evidence from which the trier of fact reasonably could have found the defendant guilty.

18. Threats, Stalking, and Harassment ⚿21, 32

Acts done without good cause and with the purpose to cause emotional distress punish actions that, by their very occurrence, inflict injury or tend to incite an immediate breach of the peace, so as to constitute the crime of second-degree harassment. Mo. Ann. Stat. § 565.091.

19. Criminal Law ⚿1139

The Supreme Court reviews double jeopardy claims de novo. U.S. Const. Amend. 5.

20. Double Jeopardy ⚿5.1

The Fifth Amendment Double Jeopardy Clause, made applicable to the states through the Fourteenth Amendment, protects a defendant both from successive prosecution for the same offense and from multiple punishments for the same offense. U.S. Const. Amends. 5, 14.

21. Double Jeopardy ⚿29.1

With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. U.S. Const. Amend. 5.

22. Double Jeopardy ⚿29.1

Double jeopardy analysis regarding multiple punishments is limited to determining whether the legislature intended cumulative punishments. U.S. Const. Amend. 5.

23. Double Jeopardy ⚿135

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, for double jeopardy purposes, is whether each provision requires proof of a fact which the other does not. U.S. Const. Amend. 5.

24. Double Jeopardy ⚿135

If each crime requires proof of a fact the other does not, and the defendant is convicted of both, double jeopardy is not violated. U.S. Const. Amend. 5.

25. Double Jeopardy ⚿133

Multiple punishments are permissible, for double jeopardy purposes, if the defendant has in law and in fact committed separate crimes. U.S. Const. Amend. 5.

26. Double Jeopardy ⚿162

Indictments and Charging Instruments ⚿821, 832

Second-degree harassment was not a lesser-included offense of tampering with a judicial officer, and thus defendant's right to be free from double jeopardy was not violated when the trial court imposed a separate sentence for each of these offenses; tampering with a judicial officer could be established with proof of a purpose to harass, but could also be established with proof of the purpose to influence a judicial officer when a defendant offered, conveyed, or agreed to convey any benefit direct or indirect upon such judicial officer or such judicial officer's family, which differed from an act committed without good cause for the purpose to cause emotional distress under the second-degree harassment statute. U.S. Const. Amend. 5; Mo. Ann. Stat. §§ 556.041.1(1), 565.091, 575.095.

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, The Honorable Thomas E. Mountjoy, Judge

Collins was represented by Christian E. Lehmberg of the public defender's office in Columbia, (573) 777-9977.

The state was represented by Garrick Aplin of the attorney general's office in Jefferson City, (573) 751-3321.

GEORGE W. DRAPER III, Judge

Joshua Steven Collins (hereinafter, "Collins") appeals the circuit court's judgment after a jury found him guilty of tampering with a judicial officer and second-degree harassment of his probation officer, A.G. Collins asserts a facial overbreadth challenge to the second-degree harassment statute, section 565.091 [1] and challenges the sufficiency of the evidence to support his second-degree harassment conviction. Collins also argues the circuit court violated his right to be free from double jeopardy when it sentenced him to both tampering with a judicial officer and second-degree harassment because he believes second-degree harassment is a less-

1. All statutory references are to RSMo 2016 unless otherwise indicated.

er-included offense of tampering with a judicial officer.

This Court holds section 565.091 is not overbroad, there was sufficient evidence to support Collins' conviction for second-degree harassment, and sentencing him for both tampering with a judicial officer and second-degree harassment did not violate his right to be free from double jeopardy. The circuit court's judgment is affirmed.[2]

Factual and Procedural Background

In January 2019, probation and parole officer A.G. began supervising Collins for his felony fourth-degree assault conviction.[3] Part of A.G.'s duties required her to monitor Collins' romantic status and dating activity. Collins also was required to use an alcohol monitor that alerted A.G. if he consumed alcohol.

In May 2019, A.G. was alerted Collins consumed alcohol, and she contacted him by telephone. A.G. described Collins as "very angry" during their conversation. Collins mentioned A.G.'s Facebook account and stated he left her a voicemail message at her office. A.G. directed Collins to stay home until the monitor indicated he had no alcohol in his system or she spoke to him again. After hanging up, A.G. checked her Facebook account and discovered Collins sent her a friend request and several direct messages. These messages stated:

> Hey[.] I hired a P.I. Omg you should see what I found[.] Decided too [sic] check you out like you check me out[.] You should call me cause your sons this [sic] selling meth[.] I got pics[.] She's doing blow jobs too[.] Lol[.] I have so much to give Jones[.][4]

A.G. has three adult children: two sons and a daughter. A.G. never discussed her children with Collins. The Facebook messages repeated what Collins told her when they spoke on the telephone. A.G. immediately contacted her children to inform them about Collins' messages, to see if he sent them Facebook friend requests, and to advise them to make their Facebook accounts as secure as possible. A.G. contacted her supervisor and sent him copies of Collins' messages. Upon her supervisor's advice, A.G. contacted the police.

A.G. went to her office the next morning and listened to Collins' voicemail message, which repeated the information he conveyed during their telephone conversation and in the Facebook messages. Collins reiterated his accusation her son was involved with drugs and stated her other son was a "date raper [sic]." Collins told A.G. he had a "P.I.," stated, "you follow me, I follow you," and called her a bitch. After receiving the Facebook and voicemail messages, A.G. was "scared, nervous, anxious, worried, and concerned," particularly for her children because she was supervising Collins for a violent offense and was uncertain about his intentions. A.G. had supervised approximately 250 to 300 offenders previously, and none of them attempted to

2. The Missouri Court of Appeals, Southern District, ordered this case transferred to this Court prior to opinion pursuant to article V, section 11 of the Missouri Constitution because this case presents a challenge to the constitutional validity of a statute over which this Court has exclusive jurisdiction. Mo. Const. art. V, sec. 3.

3. Section 565.076.2 enhances the penalty for fourth-degree domestic assault from a class A misdemeanor to a class E felony after a defendant is convicted of two or more offenses. Collins was on probation for a third or subsequent offense when A.G. began supervising him.

4. "Jones" referred to the Honorable David Jones, the judge who placed Collins on supervised probation.

contact her through Facebook or make threats or accusations involving her family.

Collins was charged with tampering with a judicial officer and first-degree harassment. He filed motions to dismiss the charges, asserting overbreadth challenges to the constitutional validity of both statutes and alleging his right to be free from double jeopardy was violated. The circuit court overruled both motions. A jury found Collins guilty of tampering with a judicial officer and second-degree harassment, which was submitted to the jury as a lesser-included offense of first-degree harassment. Collins renewed his constitutional arguments in his motion for new trial, which the circuit court overruled. Collins appeals.

Facial Challenge to the Constitutional Validity of Section 565.091

In his first point on appeal, Collins argues the circuit court erred in overruling his motion to dismiss the second-degree harassment charge on constitutional grounds. Collins contends section 565.091 is unconstitutionally overbroad in violation of the First and Fourteenth amendments to the United States Constitution and article I, sections 8 and 10 of the Missouri Constitution because it infringes on constitutionally protected acts.

[1–3] "This Court reviews the constitutional validity of a statute *de novo*." *Donaldson v. Mo. State Bd. of Registration for the Healing Arts*, 615 S.W.3d 57, 62 (Mo. banc 2020). "This Court will presume the statute is valid and will not declare a statute unconstitutional unless it clearly contravenes some constitutional provision." *Alpert v. State*, 543 S.W.3d 589, 595 (Mo. banc 2018). This Court will not invalidate a statute unless Collins meets his burden of proving the statute "clearly and undoubtedly violates some constitutional provision." *State v. S.F.*, 483 S.W.3d 385, 387 (Mo. banc 2016).

[4, 5] "Generally[,] 'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.' " *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973)). Missouri courts permit an exception to this rule for First Amendment challenges in which litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* (quoting *Broadrick*, 413 U.S. at 612, 93 S.Ct. 2908).

[6–8] Collins contends section 565.091 is overbroad. "The overbreadth doctrine restricts statutes that prohibit not only unprotected behavior, but also constitutionally protected behavior." *State v. Roberts*, 779 S.W.2d 576, 579 (Mo. banc 1989). "The overbreadth doctrine may apply when criminal statutes 'make unlawful a substantial amount of constitutionally protected conduct . . . even if they also have legitimate application.' " *State v. Pribble*, 285 S.W.3d 310, 316 (Mo. banc 2009) (alteration in original) (quoting *State v. Moore*, 90 S.W.3d 64, 66 (Mo. banc 2002) (citation omitted)). "[T]he overbreadth doctrine is strong medicine and must be employed with hesitation, and then only as a last resort." *State v. Helgoth*, 691 S.W.2d 281, 285 (Mo. banc 1985) (internal quotations omitted) (quoting *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982)).

[9–11] "The first step in the overbreadth analysis is to construe the challenged statute." *Vaughn*, 366 S.W.3d at 518. "[C]ourts may use a narrowing construction when 'the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish.' " *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 741 (Mo. banc 2007) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985)). "A narrowing construction is the preferred remedy in First Amendment cases" in that "a statute is construed so as to be in harmony with the constitution and upheld." *Id.*

Collins was convicted of second-degree harassment pursuant to section 565.091.1, which states, "A person commits the offense of harassment in the second degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person." "Emotional distress" is defined as "something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living." Section 565.002(7).

[12] In *Vaughn*, this Court considered an overbreadth challenge to the prior harassment statute, section 565.090, RSMo Supp. 2008.[5] *Vaughn*, 366 S.W.3d at 519-22. This Court first examined subdivision (5) of section 565.090, which criminalized "[k]nowingly mak[ing] repeated unwanted communication to another person," and held that subdivision was overbroad because it criminalized protected communication. *Id.* at 520. This Court upheld subdivision (6), however, after applying narrowing constructions. *Id.* at 522. Section 565.090(6) provided a person committed harassment if he or she

> [w]ithout good cause engage[d] in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated or emotionally distressed, and such person's response to the act is one of a person of average sensibilities considering the age of such person.

Id. at 516 n.2 (quoting section 565.090(6)).

Both parties urge this Court to apply *Vaughn*'s narrowing constructions to section 565.091, but to different effect. Collins believes section 565.091 is unconstitutional when applying *Vaughn*'s first two narrowing constructions, while the third narrowing construction, "fighting words," does not apply here. The state contends *Vaughn*'s narrowing constructions support the statute's validity because section 565.091 contains substantially similar language to subdivision (6), including requiring the defendant to act "without good cause" and with "the purpose to cause emotional distress . . . ."

[13] *Vaughn* first determined "subdivision (6)'s ban of 'any other act' applie[d] only to conduct," while the other five subdivisions proscribed communications. *Id.* at 521. When applying this narrowing construction to section 565.091, Collins and the state contend section 565.091 proscribes both conduct and communication because, it does not contain multiple subdivisions nor does it contain the "any other act" language from subdivision (6). This Court agrees section 565.091 applies to both conduct and communication; however, this construction does not render section 565.091 overbroad so long as the statute

5. All statutory references to the harassment statute construed in *Vaughn* are to RSMo Supp. 2008.

applies to a limited core of unprotected conduct and communication. *Vaughn* recognized that, while subdivision (6)'s language applied only to conduct, "[t]his still [left] the potential for expressive conduct" and continued its analysis. *Id.*; *see also Moore*, 90 S.W.3d at 67 (analyzing a sexual misconduct statute which "involve[d] both conduct, which the state can declare to be a crime, and speech" to determine if it was overbroad).

Vaughn next determined, "[b]ecause the legislature intentionally excluded the sort of acts for which there could be good cause, both the intended and the resulting effects must be substantial." *Id.* at 521. *Vaughn* defined "good cause" to mean "a cause or reason sufficient in the law: one that is based on equity or justice or that would motivate a reasonable [person] under all the circumstances." *Id.* (quoting *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971)). This Court found "the exercise of constitutionally protected acts clearly constitutes 'good cause . . . .'" *Id.* Hence, the legislature's use of the "without good cause" language signals its intent to criminalize only conduct unprotected by the constitution.

Collins concedes implementing *Vaughn*'s "without good cause" narrowing construction "arguably helps save the statute," especially when considering section 565.091 no longer requires the victim actually to suffer emotional distress to prove the defendant committed second-degree harassment. Nevertheless, Collins contends the "without good cause" language, standing alone, does not save the statute because good cause is implied in every statute. This contention fails because section 565.091 specifically requires the defendant to act without good cause as an element of the offense, which "gives notice to potential actors as well as provides a sufficiently concrete standard, so as to mitigate the potential for arbitrary enforcement." *Id.* at 522. Collins further contends this Court would not have applied the other narrowing constructions in *Vaughn* if the "without good cause" language was sufficient, in and of itself, to save subdivision (6). Yet, *Vaughn* did not state or hold all of its narrowing constructions were necessary to uphold subdivision (6).

[14] Collins also argues the statute cannot be construed narrowly to apply to unprotected expression because it does not require the victim actually to suffer emotional distress like the predecessor statute. *Vaughn* determined, however, subdivision (6) did "not predicate culpability on the subjective reaction of the victim." *Id.*; *see also State v. Koetting*, 616 S.W.2d 822, 824 (Mo. banc 1981) (stating "the criminality of the conduct is measured in the [harassment] statute not by the unpredictable effect upon third persons, but by the mental state of the actor"). "Rather, subdivision (6) utilize[d] a reasonable person standard and, thus, place[d] the public on notice of the level at which conduct creates culpability." *Vaughn*, 366 S.W.3d at 522. Here, section 565.091 contains a scienter requirement that one acts *with the purpose* to cause emotional distress, not that the victim actually suffer emotional distress.

[15] Finally, Collins alleges the third narrowing construction finding "fighting words" were contemplated does not apply because section 565.091 does not include conduct constituting "fright" or "intimidation" that would provoke a violent reaction. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" which include "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*,

315 U.S. 568, 571-72, 62 S. Ct. 766, 769, 86 L.Ed. 1031 (1942). This Court recognizes generally "such offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient." *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. banc 1983). Yet, this Court rejected an overbreadth challenge even when the alleged fighting words were not addressed in a face-to-face manner nor caused an immediate violent response by the recipient. *See Koetting*, 616 S.W.2d at 826 (upholding a harassment statute against an overbreadth challenge even though its application was not limited to obscenities or fighting words when the defendant made harassing telephone calls to the victim); *State v. Wooden*, 388 S.W.3d 522, 527 (Mo. banc 2013) (rejecting an as applied challenge to a harassment statute in which the defendant sent e-mails containing personally offensive language and references to weapons, assassinations, and domestic terrorism). Moreover, *Vaughn* stated acts done "with the purpose to ... cause emotional distress punishes actions which *by their very occurrence* inflict injury or tend to incite an immediate breach of the peace." *Vaughn*, 366 S.W.3d at 521 (emphasis added) (internal quotations omitted).

Because a defendant is required to act without good cause and with a purpose to cause emotional distress, section 565.091 as construed is limited to conduct wholly outside of the First Amendment's protection and is not overly broad. Collins' facial challenge to section 565.091 fails.

Sufficiency of the Evidence

[16, 17] Collins' second and third points challenge the sufficiency of the evidence to convict him of second-degree harassment. "When judging the sufficiency of the evidence to support a conviction, appellate courts do not weigh the evidence but accept as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore all contrary evidence and inferences." *Wooden*, 388 S.W.3d at 527. "In determining whether the evidence was sufficient to support a conviction, this Court asks only whether there was sufficient evidence from which the trier of fact reasonably could have found the defendant guilty." *Id.* (quoting *State v. Latall*, 271 S.W.3d 561, 566 (Mo. banc 2008)).

Collins does not contest he acted without good cause and with the purpose to cause A.G. emotional distress. Further, Collins does not contend his particular acts were constitutionally protected or that section 565.091 is unconstitutional as applied to him. Instead, Collins' second point presumes this Court would construe section 565.091 to apply only to conduct and characterize his Facebook and voicemail messages as communications, thus rendering them protected speech. Because this Court determined section 565.091 applies to both communication and conduct, this argument fails.

[18] Likewise, Collins' third point is premised upon this Court construing section 565.091 to require a defendant to use "fighting words" with the purpose to cause emotional distress to the victim, and he contends his Facebook messages and voicemail did not constitute fighting words. In applying *Vaughn*, this Court determined, acts done without good cause and with the purpose to cause emotional distress punish actions that, by their very occurrence, inflict injury or tend to incite an immediate breach of the peace. This claim, therefore, fails. The circuit court did not err in overruling Collins' motion for judgment of ac-

quittal and entering judgment on this count because there was sufficient evidence to support Collins' conviction for second-degree harassment.

Double Jeopardy

In his final point, Collins argues the circuit court erred in punishing him for both tampering with a judicial officer and second-degree harassment because this violated his right to be free from double jeopardy. Collins believes second-degree harassment is a lesser-included offense of tampering with a judicial officer because it is impossible to commit the crime of tampering with a judicial officer without also committing second-degree harassment.

[19–22] This Court reviews double jeopardy claims *de novo*. *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010). "The Fifth Amendment Double Jeopardy Clause, made applicable to the states through the Fourteenth Amendment, protects a defendant 'both from successive prosecution for the same offense and from multiple punishments for the same offense.' " *State v. Bazell*, 497 S.W.3d 263, 265-66 (Mo. banc 2016) (quoting *Mallow v. State*, 439 S.W.3d 764, 771 (Mo. banc 2014)). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *State v. Hardin*, 429 S.W.3d 417, 421 (Mo. banc 2014) (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983)). "Double jeopardy analysis regarding multiple punishments is limited to determining whether the legislature intended cumulative punishments." *Bazell*, 497 S.W.3d at 266.

[23–25] The statutes criminalizing tampering with a judicial officer and second-degree harassment are silent as to whether the legislature intended cumulative punishments for these offenses. "In the absence of an offense-specific indication of legislative intent, the legislature's general intent regarding cumulative punishments is expressed in section 556.041." *Hardin*, 429 S.W.3d at 422. Section 556.041.1(1) provides in relevant part:

> When the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense. Such person may not, however, be convicted of more than one offense if [o]ne offense is included in the other, as defined in section 556.046.

Section 556.046.1(1) states an offense is a lesser-included offense when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" Section 556.046.1 essentially codified the "same elements" test articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932), to determine if two crimes constitute the same offense for double jeopardy purposes. *Daws*, 311 S.W.3d at 808 n.3. "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180. "If each crime requires proof of a fact the other does not, and the defendant is convicted of both, double jeopardy is not violated." *State v. Smith*, 456 S.W.3d 849, 853 (Mo. banc 2015). "[M]ultiple punishments are permissible if the defendant has in law and in fact committed separate crimes." *State v. Sanchez*, 186 S.W.3d 260, 267 (Mo. banc 2006).

As stated previously, Collins was charged under section 565.091, which provides a defendant commits second-degree harassment "if he or she, without good

cause, engages in any act with the purpose to cause emotional distress to another person." Section 575.095 provides a defendant commits tampering with a judicial officer

> if, with the purpose to harass, intimidate or influence a judicial officer in the performance of such officer's official duties, such person:
>
> (1) Threatens or causes harm to such judicial officer or members of such judicial officer's family;
>
> (2) Uses force, threats, or deception against or toward such judicial officer or members of such judicial officer's family;
>
> (3) Offers, conveys or agrees to convey any benefit direct or indirect upon such judicial officer or such judicial officer's family;
>
> (4) Engages in conduct reasonably calculated to harass or alarm such judicial officer or such judicial officer's family, including stalking pursuant to section 565.225 or 565.227.

For the tampering offense, Collins was charged with acting with a purpose to harass A.G., a probation officer, by engaging in conduct reasonably calculated to harass or alarm her.

Collins maintains the words "harass" and "alarm" are alternative ways to define harassment, and it is impossible to harass or alarm someone without causing them emotional distress. Hence, Collins believes second-degree harassment is a lesser-included offense of tampering with a judicial officer.

This Court addressed this precise issue in *Hardin*, a case in which the defendant was charged and convicted of fourteen offenses, including one count of aggravated stalking and five counts of violating a protective order. *Hardin*, 429 S.W.3d at 419. The defendant argued on appeal that the aggravated stalking and protective order violation convictions were based on the same conduct and, therefore, violated double jeopardy. *Id.* at 421. The defendant further argued it was impossible to commit aggravated stalking without violating a protective order and, as such, violating a protective order was a lesser-included offense of aggravated stalking. *Id.* at 423. The defendant's argument was premised on how the latter offense was indicted, proved, or submitted to the jury to determine if it was a lesser-included offense. *Id.* This Court noted, however, "an indictment-based application of this definition [of lesser-included offenses] has been expressly rejected." *Id.* at 424. Instead, the reviewing court is required to " 'compare the [s]tatute of the greater offense with the factual and legal elements of the lesser offense,' not 'compare the [c]harge or averment of the greater offense with the legal and factual elements of the lesser offense.' " *Id.* In applying this test, this Court compared the aggravated stalking statutory elements contained in section 565.225.2, RSMo Supp. 2009, with the protective order violation statutory elements contained in section 455.085.2, RSMo 2000. *Id.* at 423. This Court held "aggravated stalking *may* be established by proof of a protective order violation, but it may also be established by proof of other facts" contained in section 565.225.2; therefore, aggravating stalking did not include the protective order violation offense. *Id.* at 424 (emphasis in original).[6]

6. In his reply brief, Collins argues *Hardin*'s holding departs from *State v. McTush*, 827 S.W.2d 184 (Mo. banc 1992), and *Peiffer v. State*, 88 S.W.3d 439 (Mo. banc 2002), because the state's charging document controlled the same elements analysis when determining whether double jeopardy was violated. Specifically, Collins alleges those opinions mentioned the statutory elements of the charged offense and contained foot-

[26] Here, just as in *Hardin*, tampering with a judicial officer *may* be established with proof of a purpose to harass, but it also may be established with proof of the purpose to influence a judicial officer when a defendant "[o]ffers, conveys or agrees to convey any benefit direct or indirect upon such judicial officer or such judicial officer's family," which differs from an act committed without good cause for the purpose to cause emotional distress under the second-degree harassment statute. Hence, contrary to Collins' claim, it is possible to commit tampering with a judicial official without also committing second-degree harassment. Collins committed separate crimes when he tampered with a judicial officer and engaged in second-degree harassment. Accordingly, second-degree harassment is not a lesser-included offense of tampering with a judicial officer. Collins' right to be free from double jeopardy was not violated when the circuit court imposed a separate sentence for each of these offenses.

Conclusion

The circuit court's judgment is affirmed.

All concur.

notes surmising the outcome may have been different if the state had elected to charge the defendants with different conduct under those same statutes. To the extent *McTush* and *Peiffer* are construed to embrace an indictment-based approach to analyzing double jeopardy claims, they should no longer be followed.

STATE of Missouri, Respondent,

v.

Daviune C. MINOR, Appellant.

No. SC 99469

Supreme Court of Missouri,
en banc.

Opinion issued June 14, 2022

Rehearing Denied August 30, 2022

Background: Defendant was convicted in the Circuit Court, Jackson County, Patrick W. Campbell, J., of three counts of first-degree statutory sodomy and three counts of incest. Defendant appealed.

Holdings: The Supreme Court, Draper, J., held that:

(1) defendant could not establish manifest injustice or a miscarriage of justice resulted from the admission of the witnesses' testimony or the exhibits, as required for defendant to obtain a new sodomy and incest trial due to plain error;

(2) the state's closing argument did not constitute an impermissible ad hominem attack not supported by the record;

(3) trial court designation of child protection center forensic interviewer as an expert witness regarding the disclosure process, including delayed disclosure, was supported by the evidence; and

(4) evidence was sufficient to establish defendant engaged in deviate sexual intercourse with child.

Affirmed.

Powell, J.,concurred in a separate opinion in which Wilson, C.J., Russell, Breckenridge, and Ransom, JJ., concurred.