

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

Feronda Smith

Defendant-Appellant.

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Court of Appeals No. 304935

Lower Ct. No. 08-23581-FC

Supreme Ct. No.

DEFENDANT'S PRO PER BRIEF ON APPEAL  
PURSUANT TO ADMINISTRATIVE ORDER 2004-6 MINIMUM STANDARDSS FOR  
INDIGENT CRIMINAL APPELLATE DEFENSE SERVICES STANDARD 4  
(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Defendant-Appellant Feronda Smith was convicted in the Genesee County Circuit Court by Jury trial and a judgement of sentence was entered on the 24th of June 2011. A claim of Appeal was filed July 5, 2011 by the trial court, pursuant to the indigent defendant's request for the appointment of counsel dated June 24, 2011 as authorized by MCR 6.425(f)(3). On April 30, 2012 Appellate Counsel filed a brief and the Appellant filed a standard 4 Brief. The convictions were affirmed on 29th of October 2013. Now Jurisdiction belongs to the MICHIGAN SUPREME COURT according to MCR 7.302 as provided by the Constitution.

## STATEMENT OF QUESTIONS PRESENTED

WAS DEFENDANT-APPELLANT SMITH ENTITLED TO A NEW TRIAL BASED ON THE FACT THAT THE JURY WAS IMPROPERLY INSTRUCTED ON ALTERNATIVE THEORIES OF AIDING AND ABETTING AS WELL AS BEING THE PRINCIPAL PARTICIPANT, WHERE THE PROSECUTION'S ONLY THEORY WAS THAT MR. SMITH ACTED ALONE IN THE ARMED ROBBERY AND THE SHOOTING, THEREFORE IT IS IMPOSSIBLE TO DISCERN UPON WHICH THEORY OF GUILT THE JURY UNANIMOUSLY AGREED, THEREBY VIOLATING MR. SMITH'S DUE PROCESS RIGHT TO BE CONVICTED BASED ON AN UNANIMOUS JURY VERDICT. US CONST AMEND VI, XIV; Mich Const 1963, art 1, § 17, 20?

Court of Appeals answers "no"

Defendant-Appellant answers "yes"

DID THE TRIAL COURT ERR WHEN IT REFUSED TO GRANT A VERDICT OF DIRECT ACQUITTAL ON THE OFFENSES OF (A)FELONY MURDER AND (B)ARMED ROBBERY, WHEN THE JURY ACQUITTED MR. SMITH OF THE KEY ESSENTIAL ELEMENT OF BOTH OFFENSES. i.e. FIREARM OFFENSES, THEREBY MAKING THE EVIDENCE INSUFFICIENT TO SUSTAIN A CONVICTION AND VIOLATING MR. SMITH OF HIS DUE PROCESS RIGHT TO BE CONVICTED OF EACH ESSENTIAL ELEMENT OF A CHARGED OFFENSE AND A FAIR TRIAL. VI, XIV AMEND; Mich Const 1963 art 1 § 17, 20?

Court of Appeals answers "?"

Defendant-Appellant answers, "yes"

DID THE TRIAL COURT VIOLATE MR. SMITH'S DOUBLE JEOPARDY RIGHTS UNDER THE UNITED STATES AND MICHIGAN CONSTITUTIONS, WHERE THE COURT SENTENCED MR. SMITH FOR FIRST DEGREE FELONY MURDER AND THE UNDERLYING FELONY ARMED ROBBERY. VI, XIV AMEND; Mich Const 1963 art 1 § 17, 20?

Court of Appeals answers "?"

Defendant-Appellant answers, "yes"

## STATEMENT OF FACTS

Following a nine (9) day jury trial in the Genesee County Circuit Court, Mr. Smith was acquitted of three charges: felon in possession of a firearm<sup>1</sup>, carrying a concealed weapon<sup>2</sup> and felony firearm<sup>3</sup>. Trial Transcript Volume 9 (T 9), 8-9. He was convicted as charged of armed robbery<sup>4</sup> and first-degree felony murder<sup>5</sup> and sentenced to the mandatory term of life imprisonment for the murder conviction and 250 months to 35 years for the armed robbery conviction. Sentencing Transcript (ST), 10-11.

This case involved the murder of Larry Pass Jr., a drug dealer who died in his home in November 2005 as a result of being shot 8 times with a 9 millimeter weapon. T 4, 7, 11. Of note, is that although Mr. Pass was murdered in November 2005 the trial in this matter did not begin until May 2011, despite Mr. Smith being bound over on September 17, 2008.

The only evidence implicating Mr. Smith came from two witnesses. Mark Yancy testified he was present in the home when the incident took place and Terrance Lard, originally charged as a co-defendant, testified in exchange for a plea to unarmed robbery and manslaughter.

The prosecution's theory was that Mr. Smith shot Mr. Pass and that Mr. Lard and Mr. Yancy were in another room at the time of the shooting. T 1, 11-13; T2, 11-13. The defense theory was that Mr. Lard or Yancy shot Mr. Pass and Mr. Smith was not present or involved. T 1, 18; T 2 16-19.

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<sup>1</sup> MCL 750.224

<sup>2</sup> MCL 750.227

<sup>3</sup> MCL 750.227b

<sup>4</sup> MCL 750.529

<sup>5</sup> MCL 750.316

Two motions to dismiss were brought and denied during the pendency of the case. (12/7/09, 1/11/10, 2/25/10 pre trial hearing transcripts and 3/7/11 and 4/8/11 hearing transcripts.) The Court denied Mr. Smith's request for the appointment of appellate counsel to pursue an interlocutory appeal on the speedy trial motion. (4/8/11 hearing transcript)

On November 4, 2005 *Marquis Sanders* bought cocaine from Larry Pass a/k/a Country. T 2, 81-82. Mr. Sanders called Country later on to purchase more cocaine. Although Country did not answer his phone call, Mr. Sanders went to Country's home with Tywone Bonner and another individual. T 2, 82-83, 114-115. He entered after receiving no response to his knock on the door and saw the Complainant lying on the floor. T 2, 83-84. He did not call the police because he was high on cocaine (T 2, 94) and was in violation of his probation. T 2, 91. Instead he called the friend who had introduced him to the Complainant. T 2, 84-85. Mr. Sanders denied killing the Complainant. T 2, 89.

*Tywone Bonner* went with Marquis Sanders to Country's home on 11/5/05. After going to the door, Mr. Sanders returned to the car and said there was a dead guy in the house. T 2, 114-115.

At trial, Mr. Bonner testified that Mr. Sanders was in the home a very short time and he heard no gun shots. T 2, 116-117. However, he told the police that he had heard 3-4 shots when Mr. Sanders went to the house. At trial he stated that those shots were not from the house. T 2, 124-125.

*Sergeant Nelson* interviewed Mr. Bonner. Mr. Bonner told Sgt Nelson that he heard three shots when he was outside Country's home. T 3, 134-135.

Many people responded to the scene including EMS<sup>6</sup>, police<sup>7</sup> and evidence technicians<sup>8</sup>.

*Shaquana Kidd* and *Tracy Woodson* were friends. T 6, 63 (Kidd); T 4, 33-34 (Woodson). Ms. Kidd knew Mr. Bonner and purchased dope from Country. T 6, 64. On Friday night 11/4/05 she and Tracy went out and returned home around 6:00 am. T 6, 65; T 4, 36-38.

When they returned there was a message on the answering machine from Mr. Bonner. T 6, 65-66. After hearing the message she went to Country's home and found him dead. T 6, 66. Ms. Kidd told the police that the last people around Country were Mr. Bonner and Quis. T 6, 73-74.

*Mark Yancy*, who claimed to be at Country's home at the time of the incident, received, according to his testimony, \$4500.00 from the federal government. He testified that the payout had nothing to do with the current case. T 4, 74-75, 99.

However, Agent Harris testified at a pretrial hearing that Mark Yancy was paid \$4000 for information about Pierson-Hood<sup>9</sup> and the Larry Pass homicide, which specifically included information against Mr. Lard and Mr. Smith (10/6/10 at 14).

Mr. Yancy knew Country as the neighborhood drug dealer and frequented his house to buy drugs. T 4, 56-57. Mr. Yancy had known Mr. Smith and Mr. Lard for many years and testified that they were often together. T 4, 57-58.

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<sup>6</sup> EMS is used broadly to encompass firefighters, paramedics and anyone who rendered aid. Eric Imeron, firefighter/paramedic, T 2, 7-10.

<sup>7</sup> Officer Petrich, T 3, 47-57; Officer Tolbert, T 3, 60; Sergeant Coon, T 3, 67; Sergeant Collins T 5, 72; Sergeant Larrison, T 5, 81-83.

<sup>8</sup> Linda Anthony, evidence technician T 2, 31-59; T3, 16-30; Tonya Griffin, police terminal operator T 2, 69-71; Alona Smallwood, Crime scene technician, T 3, 39-41; Elaine Dougherty, T 5, 43-46.

On November 5, 2005 Mr. Yancy claimed he went to Country's home twice. The first time he purchased cocaine. T4, 59-60. The second time he played video games with Country. T4, 60-61.

According to Yancy, while playing video games there was a knock on the door and Country let into the house Mr. Smith and Mr. Lard. T4, 62. Country went into the bathroom to get cocaine for Mr. Smith and Mr. Lard and when he returned Mr. Yancy heard multiple gunshots. T 4, 66-67. Mr. Lard pulled a gun on him and asked him if he knew where the dope was. T 4, 68. He saw Mr. Smith with a gun and believes that Mr. Smith killed Country. T 4, 104-105, 108.

Mr. Yancy got the dope (an ounce of crack and an ounce of cocaine) and they all left the house together. T 4, 68-71. Mr. Yancy and Mr. Smith used the cocaine. T 4, 73.

Mr. Yancy admitted that shortly before the shooting he had a dispute with Mr. Smith over money. T 4, 79-80. Also, while at Country's home he snorted cocaine and smoked marijuana. T 4, 83.

According to *Detective Sergeant Ainslie*, who analyzed the firearms evidence, all the bullets were fired from one gun as were the casings. However, he was unable to determine if the bullets and casings came from the same weapon because he did not have a firearm. T 5, 35, 41. The weapon was a 9mm Luger caliber firearm. T 5, 42.

*Dishonder Williams*, who had children with Country, made the identification. T 5, 103. Country sold drugs and normally kept the door locked as he had a lot of enemies. T 5, 104-105, 107-108. He also carried a gun. T 5, 109.

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<sup>9</sup> Mr. Smith and many others were originally charged with conducting a continuing criminal enterprise allegedly connected to a gang referenced as Pierson-Hood. That charge was dismissed.

*Kathleen Boyer* of the Michigan State Police tested for fingerprints at Country's home and found nothing to indicate Mr. Smith had been at the home. T 6, 53.

Co-Defendant *Tarence Lard* testified in exchange for a plea deal to manslaughter and unarmed robbery. T 6, 102, 126, 129. According to Mr. Lard he and Mr. Smith went to Country's home on 11/4/05-11/5/05 (witness not sure on time T 6, 87) to buy drugs. T 6, 86-87. When they arrived Mr. Yancy was in the home sitting on the couch. T 6, 88.

Mr. Lard went into the living room with Mr. Yancy while Mr. Smith bought the cocaine from Country. T 6, 90-91. Mr. Lard testified that Country went into the bathroom twice and he then heard about 5-6 fast, repetitive shots. T 6, 92, 93.

According to Lard he did not have a gun and Country did not have a gun. T 6, 95. Mr. Lard told Mr. Yancy to get the dope, turned it over to Mr. Smith and they all left. T 6, 96. Mr. Lard knew Mr. Smith to carry a 9 mm handgun. T 6, 98

Sergeant Ellis, the Officer-in-Charge, received information that Mr. Yancy was in Country's home at the time of the shooting in July 2006. T 7, 25. At the same time he received information that Mr. Smith and Mr. Lard killed Country. T 7, 26.

Over defense counsel's objection, Sergeant Ellis responded to the prosecutor's question "is there any question in your mind that Feronda Smith killed Larry Pass", by saying "No." T 7, 42.

During closing arguments the prosecutor argued things like Sergeant Ellis had no doubt that Mr. Smith killed Country and "we are confident that it was the Defendant that killed Larry Pass." T 8, 27, 84, 88. Also during closing argument, over defense counsel's objection T 8, 127-129, the prosecutor engaged in a demonstration of the shooting. T 8, 88-91. This is Mr. Smith's *leave to appeal.*

I. DEFENDANT-APPELLANT SMITH IS ENTITLED TO A NEW TRIAL BASED ON THE FACT THAT THE JURY WAS IMPROPERLY INSTRUCTED ON ALTERNATIVE THEORIES OF AIDING AND ABETTING AS WELL AS BEING THE PRINCIPAL PARTICIPANT, WHERE THE PROSECUTION'S ONLY THEORY WAS THAT MR. SMITH ACTED ALONE IN THE ARMED ROBBERY AND THE SHOOTING, THEREFORE IT IS IMPOSSIBLE TO DISCERN UPON WHICH THEORY OF GUILT THE JURY UNANIMOUSLY AGREED; THEREBY VIOLATING MR. SMITH'S DUE PROCESS RIGHT TO BE CONVICTED BASED ON AN UNANIMOUS JURY VERDICT. US CONST AMEND VI, XIV; Mich Const 1963, art 1, § 17, 20.

#### **Issue Preservation And Standard of Review**

This Court reviews claims of instructional error *de novo*. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). Instructions must also be reviewed as a whole, to determine if the instructions were sufficient to protect a defendant's rights. *People v Moldenhauer*, 210 Mich App 158; 533 NW2d 9 (1995).

Here, these instructions were objected to as a whole and went as follows:

By Defense Attorney, MR. WHITESMAN: "Referring to Lexis Nexis abstract text pertaining to federal instructions. "It says in a case where the defendant is charged with aiding and abetting a crime against the United States it is important to supply the jury with concise yet detailed instructions explaining the elements of aiding and abetting that the government must prove beyond a reasonable doubt. Okay?"

"I take that and apply it here. He's not charged. So, yes, you're right under Michigan law and the case citations, there's some unpublished cases that cite an old published case, Lamson 44 MI App 447 which was reversed on other grounds, but recent unpublished cases are *People verses Jones*, 210 Westlaw 15184427, *People verses Murphy*, 210 Westlaw 4679582 but I'm just - I object to it, and I'm making the request, a good faith for modification of the law because I

think it's unfair. I think there's no reason for the People not to be able to give notice that they're going to be coming in on aiding and abetting. That's a totally new thing here".

THE COURT:--I would agree with you on both points. the status of the law and I think the law -.

MR. WHITESMAN: I think the law should change.

THE COURT:-- Should change as well. The federal cases have said there's no due process violation with this sort of thing under Michigan law, and as a result I'm obligated to follow Michigan law, but I agree. I think the people should be able to figure out if it's a they're charging somebody and proving somebody guilty as a principal or an aider and abetter, especially as the trial goes along, and obviously jury instructions come at the end of the trial, but I think I have no power to reject it, but you've made your record and I've made mine that I happen to agree with your position.

### **Discussion**

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every every element of the charged offense." *Carella v California*, 491 US 263, 265; 109 SCt 2419; 105 LEd2d 218 (1989). "Jury instructions relieving States of this burden violates defendant's due process rights." *Id.*

The United States Supreme Court establishes that, with respect to ambiguous jury instructions, " [i]n some instances... we have held that when a case is submitted to the jury on alternative theories[,] the unconstitutionality of the theories requires that the conviction be set aside." *Boyde v California*, 494 US 370; 110 SCt 1190; 108 LEd2d 316 (1990).

A defendant also has an absolute constitutional right to be convicted only upon a unanimous jury verdict, including consensus about the facts supporting that verdict. US Const amend VI, XIV; Const 1963, Art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994); *Schad v Arizona*, 501 US 624, 649-652 (1991) (Scalia, J., concurring). In order to protect that right, the trial court is obligated to instruct the jury properly regarding the unanimity requirement. Const 1963, art 1, §14, 20; MCR 6.410(B); *Cooks, supra*.

Michigan courts have long held that a trial court's failure to require a unanimous verdict results in reversible error if the evidence supporting one of the two prosecution theories is insufficient. *People v Olsson*, 56 Mich App 500, 505; 224 NW2d 691 (1974), lv app den, 394 Mich 772 (1975). In *Olsson*, the court reversed the defendant's first-degree murder conviction because (1) the jury was not required to decide whether the defendant was guilty of premeditated murder or of felony murder; and (2) the evidence was insufficient to support a conviction of felony murder. *Id* at 505-06. The court concluded that the jury's verdict was therefore not unanimous, in violation of MCR 6.410(B).

The Court of Appeals has repeatedly revisited *Olsson* over the years. In *People v Paintman*, 92 Mich App 412, 418; 285 NW2d 206 (1979), rev'd on other grounds, 412 Mich 518; 315 NW2d 418 (1982), cert den, 456 US 995 (1982), the court affirmed a conviction where the jury was not required to decide between alternate theories because "The evidence was sufficient to support guilt under either theory." See also *People v Burgess*, 67 Mich App 214; 240 NW2d 485 (1976).

In *People v Grainger*, 117 Mich App 740, 755; 324 NW2d 762 (1982), the court again reversed a weapons conviction because the jury had been instructed on two theories of guilt without being required to unanimously agree on one:

"Where one of two alternative theories of guilt is legally insufficient to support a conviction, and where it is impossible to tell upon which theory the jury relied, the defendant is entitled to a reversal of his conviction and a new trial." *Id.*

More recently, in *People v Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992), this Court held that reversal was necessary when the jury was not required to unanimously determine which sexual penetration supported defendant's conviction. *Yarger* distinguished the earlier case of *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991), in which this Court held that no error occurred when a trial court failed to instruct the jury to unanimously agree on the alternate theories presented as to the level of malice in a second-degree murder case. Here, Mr. Smith, unlike *Olsson* and *Grainger*, deals with alternative theories as to whether Mr. Smith fired the fatal shots which killed the decedent, after allegedly robbing him, or simply aided and abetted in committing the offenses.

This body of case law clearly stands for the proposition that the failure to require the jury to agree on one theory as to how the defendant could have committed the offense is reversible error if one of the prosecution's theories is supported by insufficient evidence. *Olsson* at 505; *Grainger* at 755. If the reviewing court cannot tell upon which theory the jury relied, the defendant is entitled to a reversal and a new trial. *Id.* at 755.

Here, in the present case, the prosecutor argued during opening statement that she would present testimonial evidence through two res geste witnesses that "Feronda Smith, in fact, killed

Larry Pass" ( TT Vol II pg. 12). She also stated that, "we ask you to listen to the evidence, and in the end of the trial you will see that it is clear that this defendant robbed Larry Pass, shot Larry Pass and left with the dope" ( TT Vol II pg. 13). The prosecutor went on to further state, the lead investigator "found that Feronda Smith killed Larry Pass" ( TT Vol II pg. 14). "And you will find that Feronda Smith robbed Larry Pass of cocaine, shot him eight times, and we've proven our case of felony murder and armed robbery" ( TT Vol II pg. 16).

The first res geste witness, Mark Yancy, provided testimony that "Mr. Pass went in the bathroom to get it for Mr. Smith, and when he came back out of the bathroom, that's when Mr. Smith shot him... Mr. Smith shot him. He was the only one in the house that could have done it" (TT Vol IV pg. 66). Upon further questioning, the witness was asked:

- Q: Who killed Larry Pass?
- A: Feronda Smith. (TT Vol IV pg. 104)
- Q: Who killed Larry Pass?
- A: Mr. Smith. (TT Vol IV pg. 108)

The other res geste witness, Terance Lard, provided testimonial evidence by stating:

- Q: Did the defendant shoot Larry pass?
- A: From what I seen yes. (TT Vol VI pg. 97)
- Q: Did you know that the defendant was going to shoot Larry Pass?
- A: No. (TT Vol VI pg. 98)

Throughout the continued testimony of Terance Lard, he denied any culpability that both he and Mark Yancy had regarding the actual shooting of Larry Pass.

- Q: Mr. Lard, did you shoot Larry Pass?
- A: No.
- Q: Did Mark Yancy shoot Larry Pass?
- A: No.

Q: Did the defendant kill Larry Pass?

A: Yes. (TT Vol VII Pg. 18)

During closing arguments, the prosecutor went on to argue the compounded evidence which she presented to prove that Mr. Smith was indeed the only shooter and the only principal participant in Larry Pass' death, and the armed robbery. By stating, "They both said the defendant Feronda Smith killed Larry Pass (TT Vol VIII pg. 12). "Mark Yancy indicated that he did not kill Larry Pass, that Lard did not shoot Larry Pass, and that, in fact, it was the defendant that killed Larry Pass" (TT Vol VIII pg. 19). " Terance Lard told us that he did not shoot Larry Pass and Yancy did not shoot Larry Pass" (TT Vol VIII pg. 24). "Felony murder says that the Defendant caused the death of the victim Larry Pass, we heard testimony that the defendant caused the death of Larry Pass" (TT Vol VIII pg. 28).

"When you think about the defendant's intent, think about what he did. He shot the victim while he was robbing him. How did he do it? He shot him multiple times" (TT Vol VIII pg. 32).

**" We talked about the aiding and abetting, and talked about if someone is a driver, and a lookout, and a mastermind, and a gunman, who is guilty and you all agreed with me all of them are. Well in this case we had that Lard and Yancy who are both guilty. Tarance Lard is taking responsibility and he is pleading to a lesser charge of Unarmed Robbery and Manslaughter for taking the defendant over to Larry Pass's house and not calling the police when he left. He said I didn't have anything to do with it, but he didn't stop it. Ladies and gentlemen, you've heard testimony from Tarence Lard and Mark Yancy. You've heard testimony from Sgt. Ellis. You've heard testimony that Lewis Nelson and Ty Quan Avery both said Feronda Smith is the one that killed Larry Pass" (TT Vol VIII pg. 32).**

"So ladies and gentlemen think about the evidence, look at the evidence, compare it, and you'll find that this defendant Feronda Smith killed Larry Smith" (TT Vol VIII pg. 90).

It is clear from the evidence put forth by the prosecution that the only theory she intended to pursue was that the Defendant Mr. Smith was the only person who robbed Larry Pass, and in doing so, killed Larry Pass throughout the course of that robbery. Nonetheless, theorizing that Mr. Smith was the sole principal participant of both those offenses.

The Trial Court instructed the jury that it could convict Mr. Smith based being the sole actual participant, as well as, on aiding and abetting. The court instructed: "The defendant is charged with first degree felony murder. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant caused the death of Larry Pass. That is that Larry Pass died as a result of shooting with a firearm. Okay"? (TT Vol VIII pg. 113).

The Trial court went on to also instruct the jury on alternative theory of aiding and abetting by stating: "Okay, all right. Now that is one of the counts, okay and let's also talk about the same charge. In this case the defendant is charged with felony murder through aiding and abetting or intentionally assisting someone else in committing the crime". (TT Vol VIII pg. 114).

As detailed in *People v Carines*, 460 Mich 750,757-758; 597 NW2d 130 (1999), "to support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." CJI2d 8.1.

"An aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995).

In this case, the prosecution presented no substantive evidence to support the theory that Mr. Smith aided and abetted another in the shooting death of Larry Pass. The only evidence presented went toward proving that Smith was the shooter. The prosecution pressed the point at the end of closing arguments: "the Defendant caused the death of the victim Larry Pass, we heard testimony that the defendant caused the death of Larry Pass". The evidence revealed that, "the defendant Feronda Smith killed Larry Pass".

In *People v Smielewski*, 235 Mich App 196; 596 NW2d 636 (1999). This Court held that, where both theories presented by the prosecution were supported by the evidence and encompassed the commission of a single offense, the trial court's instruction to the jury on alternative theories did not deprive defendant of his right to an unanimous verdict. *Id* at 198.

This case is distinguishable from *Smielewski*, based on the evidence in the *Smielewski* case, the jury could have believed that the defendant was an aider or abettor or a principal. Here, there was no evidence ever presented that Mr. Smith acted as an aider and abettor. Therefore, the the jury could not infer that Mr. Smith aided and abetted in the felony murder or the armed robbery, and the conviction can not be supported based on the aiding and abetting theory. This conviction is in strict violation of Mr. Smith's due process right to be convicted based on an unanimous verdict.

The trial court itself, was fully aware that this verdict one of compromise by the jury through its own admission on the record, by stating:

THE COURT: Actually what I thought is I think it was a compromise.

MR. MACRA: Yes.

THE COURT: And they wanted to get a verdict in. They may have wanted to get a verdict in. (TT Vol IX, pg. 14).

In *Mills v Maryland*, 486 U S 367; 108 S Ct 1860; 100 L Ed 2d 384(1988), the Supreme Court concluded that "[w]ith respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict". *Id* at 1860.

"When a defendant is convicted and one of the two grounds supporting the conviction cannot withstand constitutional scrutiny on the due process grounds, the trial court's mistake cannot be dismissed as harmless error". *Stirone v United States*, 361 U S 212, 217, 219; 80 S Ct 270; 4 L Ed 2d 252 (1960). This is one of those "instructional errors [that is] so serious that it amount[s] to [a] structural defect[], 'which def[ies] analysis by "harmless-error" standards.'" *Suniga v Bunnell*, 998 F2d 664, 667 (1993) (citing *Brecht v Abrahamson*, 507 US 619, 629; 113 SCt 1710; LEd2d 353 (1993)).

In *Suniga*, the 9th circuit considered whether the trial court erroneously instructed the jury of felony-murder when the prosecution's only theory was malice aforethought. The court observed the instruction was "an error that allowed the jury to convict *Suniga* on a theory of

Culpability that did not exist." The court therefore rejected the contention that harmless error was applicable by stating:

Neither can we, as the state suggest, based a harmless-error determination on the seemingly overwhelming weight of the evidence pointing to the petitioner's guilt of ... murder. Where two theories of culpability are submitted to the jury, one correct and the other incorrect, it is impossible to tell which theory of culpability the jury followed in reaching a general verdict. Here too, it is impossible to know what the (jury or some juror) did. Here, too, the writ should issue. Id at 670.

Here, it is unclear whether the jury found Mr. Smith guilty on a theory of aiding and abetting armed robbery and felony murder. Nevertheless, assuming the conviction was based on their belief that the direct actions were those of someone else or those directly of Mr. Smith, it must be reversed inasmuch as the judge's instruction on alternative theories on this critical point was legally insufficient.

The cause of this mis-carriage of justice was the Alternative Jury Instruction. This instruction was objected to by the defendant TT: Vol. VI pg. 156, TT: Vol VII pg. 206, 207, 208. This alternative Jury Instruction seriously prejudiced the defense right to due process. If the information had been known before trial, the defendant may have been able to prepare a defense to the alternative charge. But it was added at trial after both parties had rest. Defendant was thus left to rely on a defense to felony murder, armed robbery, carrying a concealed weapon, felon in possession and felony firearm, not aiding and abetting felony murder, armed robbery, carrying a concealed weapon, felon in possession and felony firearm. This lack of notice denied defendant of due process of law. There was never any mention of aiding and abetting during this 3 ½ year pending case, not in the felony information, search warrant of modis of

operandi. The only theory was the defendant acted alone and no one else knew he was going to do this.

As for the collection of facts stated by the Court of Appeals the defendant disagrees. The only evidence submitted by the prosecutor was that the defendant shot and killed Larry Pass while robbing him. Yancy and Lard both said they didn't commit the murder. Lard said he walked to the house TT: Vol VI pg.87, he said he was unarmed TT: Vol VII pg. 95. Lard pled guilty to manslaughter and unarmed robbery and his plea agreement was to identify the defendant as the shooter. Lard never said he dropped no guns off at his baby momma house either. There is no one who admits to the murder, so there is no principal being shown. Therefore, the defendant did not Aid or Abet anyone, and the defendant can't Aid or Abet himself. Therefore, since prejudice has been established concerning this alternative Jury instruction, Mr. Smith's convictions for felony murder and armed robbery must be reversed.

II. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A VERDICT OF DIRECT ACQUITTAL ON THE OFFENSES OF (A)FELONY MURDER AND (B)ARMED ROBBERY, WHEN THE JURY ACQUITTED MR. SMITH OF THE KEY ESSENTIAL ELEMENT OF BOTH OFFENSES. i.e. FIREARM OFFENSES, THEREBY MAKING THE EVIDENCE INSUFFICIENT TO SUSTAIN A CONVICTION AND VIOLATING MR. SMITH OF HIS DUE PROCESS RIGHT TO BE CONVICTED OF EACH ESSENTIAL ELEMENT OF A CHARGED OFFENSE AND A FAIR TRIAL. VI, XIV AMEND; Mich Const 1963 art 1 § 17, 20.

### **Issue Preservation and Standard of Review**

Insufficiency of evidence claims need not be raised at the trial court level in order to be preserved for appellate review. *People v Patterson*, 428 Mich 502, 514 (1987). Nevertheless, this issue was raised by Mr. Smith's trial attorney when he filed a Motion for Directed Verdict of Acquittal, Judgment Notwithstanding Of Verdict (JNOV) and Motion for Mistrial in The Alternative, on June 6, 2011. Trial counsel supplemented that motion on June 8, 2011. Trial counsel then filed a Defendant's Reply to the prosecutor's reply to the above stated motions on June 16, 2011. On June 17, 2011, the trial court issued its Opinion and Order denying Defendant's motion.

### **Discussion**

The Due Process Clause of US Const, Am XIV requires a prosecutor to prove the elements of a crime beyond a reasonable doubt in order to convict a defendant. See generally, *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). The existence of some evidence, no matter how minimal, no longer satisfies this requirement. The test is not simply whether there is any evidence to support the prosecutor's position regarding each element of the offense. Rather the question is

whether, viewed in the light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625 (1998); *People v Hampton*, 407 Mich 354, 377 (1979); *People v Hardiman*, 466 Mich 417, 421 (2002).

In the present case Mr. Smith was charged with the offenses of Felony Murder, MCL 750.316; Armed Robbery, MCL 750.529; Felony Firearm, MCL 750.227b; Felon in Possession of a Firearm, MCL 750.224f and Carrying a Concealed Weapon, MCL 750.227.

(A). The felony murder statute, MCL 750.316(1)(b), provides, in pertinent part:

The crime of felony murder requires that the murder be committed "in the perpetration [of], or attempt to perpetrate" an enumerated felony. The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], and (3) while committing, attempting to commit, or assisting in the commission of any of the enumerated felonies in MCL 750.316. *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993).

The standard criminal jury instructions outline the following as the essential elements of Felony Murder:

(1) The defendant is charged with first-degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant caused the death of [name deceased], that is, that [name deceased] died as a result of [state alleged act causing death].

(3) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he /

she] intended to do great bodily harm to [name deceased], or [he / she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his / her] actions.

(4) Third, that when [he / she] did the act that caused the death of [name deceased], the defendant was committing [(or) attempting to commit / (or) helping someone else commit] the crime of [state felony]. For the crime of [state felony], the prosecutor must prove each of the following elements beyond a reasonable doubt: [state elements of felony]."CJ2d 16.4.

(B). The armed robbery statute, MCL 750.529, provides, in pertinent part:

A person who engages in conduct proscribed under MCL 750.530 and who in the course of engaging in that conduct ... possesses a weapon, represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; and (3) while the defendant is armed with a weapon. *People v Carines*, 460 Mich. 750, 757 (1999).

Similarly, the standard criminal jury instructions outline the following as the essential elements of armed robbery:

(1) The defendant is charged with the crime of armed robbery. To prove this charge, the prosecutor must prove each following elements beyond a reasonable doubt.

(2) First, the defendant [used force or violence against / assaulted / put in fear] [the complainant].

(3) Second, the defendant did so while [he] was in the course of committing a larceny. A "larceny" is

the taking and movement of someone else's property or money with the intent to take it away from that person permanently.

(4) Third, [the complainant] was present while defendant was in the course of committing the larceny.

(5) Fourth, that while in the course of committing the larceny, the defendant: (a) possessed a weapon designed to be dangerous and capable of causing death or serious bodily injury; [or] (b) possessed any other object capable of causing death or serious injury that the defendant used as a weapon; [or] (c) possessed any [other] object used or fashioned in a manner to lead the person who was present to reasonably believe that it was a dangerous; [or] (d) represented orally or otherwise that [he] was in possession of a weapon. (6) Fifth, the defendant inflicted an aggravated assault or serious injury to another while in the course of committing the larceny. CJI 2d 18.1.

Here, in the present case, the prosecutor argued during opening statement that she would present testimonial evidence through two res geste witnesses that "Feronda Smith robbed Larry Pass of cocaine, shot him eight times, and we've proven our case of felony murder and armed robbery" (TT Vol II pg. 16).

The first res geste witness, Mark Yancy, provided testimony that "Mr. Pass went in the bathroom to get it for Mr. Smith, and when he came back out of the bathroom, that's when Mr. Smith shot him... He was the only one in the house that could have done it" (TT Vol IV pg. 66).

Upon further questioning, the witness was asked:

Q: Who killed Larry Pass?

A: Feronda Smith. (TT Vol IV pg. 104)

Q: Who killed Larry Pass?

A: Mr. Smith. (TT Vol IV pg. 108)

The other res geste witness, Terance Lard, provided testimonial evidence by stating:

Q: Did the defendant shoot Larry pass?

A: From what I seen yes. (TT Vol VI pg. 97)

Q: Did you know that the defendant was going to shoot Larry Pass?

A: No. (TT Vol VI pg. 98)

During closing arguments, the prosecutor further argued that she presented enough evidence to prove that Mr. Smith used a firearm in the commission of robbing and murdering Larry Pass. By stating, "When you think about the defendant's intent, think about what he did. He shot the victim while he was robbing him. How did he do it? He shot him multiple times" (TT Vol VIII pg. 32).

The trial court instructed the jury on the elements of Armed Robbery and Felony Murder, Felony Firearm, Felon in Possession of a Firearm and Carrying a Concealed Weapon. And in doing so, those instructions in regards to the challenged errors went as follows:

"The defendant is charged with First Degree felony murder. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First that the defendant caused the death of Larry Pass. That is Larry Pass died as a result of shooting with a firearm. Okay?" (TT VOL VIII, pg 113).

"For the crime of armed robbery the prosecutor must prove each of the following elements beyond a reasonable doubt. The prosecutor must prove there was a larceny, or an attempted larceny, and that the larceny was accomplished through either violence, force, or fear

which would make it a robbery, and that the defendant was armed at the time or let somebody reasonably believe that the person-- that he was armed." (TT VOL VIII pg. 114).

The judge later went on to further instruct that:

"The defendant is charged with the crime of carrying a concealed pistol. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant knowingly carried a pistol. It does not matter why the defendant was carrying the pistol, but to be guilty of this crime the defendant must have known that he was carrying a pistol."

"Second, that this pistol was concealed on or about the person of the defendant. Complete invisibility is not required. A pistol is concealed if it cannot easily be seen by those who come into ordinary contact with the defendant."

"A pistol is a firearm. A firearm includes any weapon from which a dangerous object can be shot or propelled by the use of explosive gas or air. The shape of the pistol is not important as long as it is 30 inches or less in length. Also, it does not matter whether or not the pistol is loaded."

"The defendant is also charged with a separate crime of possessing a firearm at a time he committed the crime of Felony Murder, Armed Robbery, and Felon in possession of a firearm. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, the defendant committed or attempted to commit the crime of felony murder, armed robbery, or felon in possession which has been defined for you or I will define for you. It is not necessary that the defendant be convicted of these crimes."

"Second, at the time the defendant committed or attempted to commit the crime he knowingly carried or possessed a firearm. It does not matter whether or not the gun was loaded. A firearm includes any weapon from which a dangerous object can be propelled by the use of explosive gas or air. A pistol as discussed is a firearm. A firearm does not include smooth bore rifles or handguns designed or manufactured exclusively for shooting BB's not exceeding .117 caliber by means of gas, or air."

"The defendant is charged with having possessed a firearm in the state after having been convicted of a specific felony. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, the defendant possessed a firearm in this state, Second , the defendant was convicted of a felony that precluded him from legally possessing the firearm. Third, that less than five years has passed since the – we'll simply say the defendant has not regained eligibility to possess the firearm. Fourth, the defendant's rights to possess a firearm has not been restored pursuant to Michigan law."

"The defendant is charged with the crime of armed robbery. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, the defendant used force or violence against a person, namely Larry Pass, and put that person in fear or assaulted that person."

"Second, the defendant did so while he was in the course of committing a larceny. A larceny is the taking and movement of someone else's property or money with the intent to take it away from that person permanently. In the course of committing a larceny, includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny or in flight or attempted flight after the commission of a larceny, or in an attempt to retain possession of the

property or money. Third, that Larry Pass was present while the defendant was in the course of committing the larceny."

"First, the defendant used force or violence against a person, namely Larry Pass, and put that person in fear or assaulted that person."

"Second, the defendant did so while he was in the course of committing a larceny. A larceny is the taking and movement of someone else's property or money with the intent to take it away from that person permanently. In the course of committing a larceny , includes acts that occur in an attempt to commit the larceny or during the commission of the larceny or in flight or attempted flight after the commission of a larceny, or in an attempt to retain possession of the property or money. Third, that Larry Pass was present while the defendant was in the course of committing the larceny."

"Fourth, that while in the course of committing the larceny, the defendant had or possessed a weapon designed to be dangerous and capable of causing death or serious bodily injury. Okay?"

"Now, that is the definition and those are the elements or armed robbery. You are to use those elements both for the armed robbery charge and for the felony murder charge because the felony murder charge for felony murder is armed robbery. So, you are to use those same elements for both, and with counsel's permission if the jury requests, can we send the elements in with them or do you want to wait until they ask." (TT Vol VIII pg. 117-120).

The jury, after deliberations rendered a verdict of "Guilty of Felony Murder, Guilty of Armed Robbery, Not Guilty of Felony Firearm, Not Guilty of Felon in Possession of a Firearm and Not Guilty of Carrying a Concealed Weapon.

THE CLERK: Reading from your form, what's your verdict as to count one?

JUROR FOREPERSON: Guilty.

THE CLERK: Of?

JUROR FOREPERSON: Guilty as charged of felony murder.

THE CLERK: What's your verdict as to count two?

JUROR FOREPERSON: Guilty as charged to armed robbery.

THE CLERK: What is your verdict as to count three?

JUROR FOREPERSON: Not guilty of carrying a concealed weapon.

THE CLERK: What is your verdict as to count four?

JUROR FOREPERSON: Not guilty of felon in possession.

THE CLERK: And what is your guilty – sorry what is your verdict as to count five?

JUROR FOREPERSON: Not guilty of felony firearm.

THE CLERK: Members of the jury who agree with the verdict, raise your right hand and listen to your verdicts as recorded. You and each of you do say upon oath that you find the defendant Feronda Smith as to count one, guilty of Homicide, felony murder, as to count two, guilty of armed robbery, as to count three not guilty, as to count four, not guilty, as to count five, not guilty, so say you members of the jury, so say you Madam Foreperson?

JUROR FOREPERSON: Yes.

JURORS: Yes. (JURY VERDICT Vol IX, Pg 8-9).

Here, the jury acquitted Mr. Smith of the First element of felony murder, the means by which the victim died, which is one of the key essential elements of felony murder. That Mr. Smith never possessed a weapon which killed Larry Pass. Moreover, an acquittal of the weapons element of that offense negates each essential element of the crime for Defendant Smith to be sufficiently guilty of the crime of felony murder.

A. Where There Was No showing That Defendant Possessed a Weapon To Cause The means By which The victim Died, There was No Evidence Presented Beyond A reasonable Doubt that Mr. Smith Committed a Felony Murder.

In the absence of proof beyond a reasonable doubt that Defendant Smith was in possession of a weapon at the time that the crimes were committed, there was insufficient evidence to have convicted him of either armed robbery or felony murder.

The jury also acquitted Mr. Smith of the fourth element, that Mr. Smith possessed a weapon. Possession of a weapon is the key essential element of armed robbery.

B. Where There Was No Showing That Defendant Was Armed, the Prosecutor Did Not Present Evidence From Which the Jury Could Find Beyond a Reasonable Doubt that Mr. Smith Committed An Armed Robbery.

As stated above, the acquittal of the firearm, which is the fourth element of the crime of armed robbery, that while in the course of committing the larceny, Defendant Smith never possessed a firearm. The firearm in this matter, is the key essential element of the crime of armed robbery. If there was never a possession of a firearm, then there in fact could be no Armed Robbery. Once again, Defendant Smith never possessed a weapon which was used to commit a larceny against Larry Pass. An acquittal of the weapons element of that offense, negates the key essential element of the crime for Defendant Smith to be sufficiently guilty of the offense of Armed Robbery.

In *People v Johnson*, 206 Mich App 122; 520 NW2d 672 (1994), this Court Reversed a conviction for the offense of armed robbery, and entered the lesser offense of unarmed robbery,

where the weapons element of the offense wasn't proven beyond a reasonable doubt and it was not shown that the defendant possessed a weapon throughout the course of a larceny.

Similarly, here as in *Johnson*, there was no evidence produced that Mr. Smith ever possessed a weapon throughout the course of the larceny. As evidenced by the jury's acquittal of all the firearm offenses in which Mr. Smith was charged. Where there was no showing that Appellant was armed, the prosecutor failed to present evidence beyond a reasonable doubt that a jury could sufficiently conclude that Mr. Smith committed a larceny from the deceased while armed with a gun, and committed a homicide with a firearm during the course of that larceny.

Mr. Smith was denied his due process right to be convicted of each essential element of the charged offenses under both the United States and Michigan Constitutions when he was convicted of armed robbery and felony murder based on legally insufficient evidence. (Based on a compromised verdict, See Issue I). US Const, Am VI, XIV; Const 1963, art 1, § 17. More particularly, as applicable here, the prosecutor had to prove, for the offenses of both armed robbery and felony murder, that Mr. Smith possessed a firearm.

Therefore, for the above stated reasons, Defendant-Appellant Smith, respectfully requests that this Court Vacate his conviction for Felony Murder and armed Robbery, Reverse and Remand for new trial, or any other remedy this Court deems necessary.

III. THE TRIAL COURT VIOLATED MR. SMITH'S DOUBLE JEOPARDY RIGHTS UNDER THE UNITED STATES AND MICHIGAN CONSTITUTIONS, WHERE THE COURT SENTENCED MR. SMITH FOR FIRST DEGREE FELONY MURDER AND THE UNDERLYING FELONY, ARMED ROBBERY. VI, XIV AMEND; Mich Const 1963 art 1 § 17, 20.

#### **Standard Of Review**

Double jeopardy issues involve a question of law, and therefore are reviewed de novo.

*People v Lugo*, 214 Mich App 699; 542 NW2d 921 (1995).

#### **Discussion**

The Double Jeopardy clause protects a defendant not only from multiple prosecutions, but also from multiple punishments for the same offense. *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). (overruled in part 602 F3d 356).

Mr. Smith was charged and convicted of felony murder based on a charge of armed robbery. He was also convicted of the underlying armed robbery charge. Mr. Smith's Armed robbery conviction and sentence must be vacated because it violates the prohibition on double punishment contained in the Double Jeopardy provision of the United States and Michigan Constitutions. US Const Ams V, XIV; Mich Const 1963, Art 1, § 15: See *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981).

These clauses protect a criminal defendant from both multiple punishments and multiple prosecutions. *People v Torres*, 452 Mich. 43, 64 (1996) (additional citations omitted).

In *Wilder, supra*, the defendant appealed his sentence where he was sentenced for both felony murder and the underlying offense of armed robbery.

The court held that:

"conviction and sentence for both first-degree felony murder and the underlying felony violates the state constitutional prohibition against double jeopardy, as the evidence needed to prove first-degree felony murder requires proof of the underlying lesser included felony." *Id.* at 342.

Here, Mr. Smith was convicted of felony murder and armed robbery, on the premise that he was either the sole culpable party, or as an aider and abetter. (Alternative theories, see Issue D). For the alleged death and robbery of Larry Pass, the trial court sentenced Mr. Smith as followed:

THE COURT: All right. Okay.

"Well the Court has no choice on count one. It is the judgment of sentence that the defendant Feronda Montrae Smith be remanded to the Michigan Department of Corrections to server a sentence of life."

"On count two, armed robbery, it is the judgment of sentence that the defendant be remanded to serve a prison sentence of not less than 250 months no more than 35 years." (ST pg.10).

Although the analysis for double jeopardy cases in the context of double prosecution has changed, *Wilder* remains good law in the double punishment context. See *People v Curvan*, 473 Mich 896 (2005)(denying leave to appeal after briefing)(Kelly, concurring). The *Wilder* Court held that one cannot be convicted and sentenced for both felony murder and the underlying felony of armed robbery, where the commission of armed robbery was an element of felony murder. *Id.* at 346. This decision was determined by the *Wilder* Court to be in line with federal authority. *Id.* at 348-349.

In contrast, in *People v Nutt*, 469 Mich 565 (2004), the Michigan Supreme Court noted that this state's jurisprudence strayed from a traditional federal analysis (detailed in the 1932 decision of *Blockburger v United States*, 284 US 299) in double jeopardy cases after the 1973 decision in *People v White*, 390 Mich 245 (1973), (Overruled). (as opposed to the "same offense" approach contemplated by the *Blockburger* decision, focusing on the elements, not the time, of the crime). Michigan now employs the federal model to analyze the elements of the crimes involved in multiple prosecutions. *Nutt, supra*. Although *White* was overruled in *Nutt*, the *White* decision never greatly impacted multiple punishment cases. As noted above, Michigan looked to federal courts for guidance in interpreting double jeopardy implications on multiple punishments for the "same offense." *Wilder, supra*, at 349 n.10 .

Under the unambiguous terms of the felony murder statute, a conviction for murder in the course of one of the enumerated felonies cannot stand without proving all the elements of the underlying felony; the felony serves as a necessary predicate for a conviction on the greater offense of first degree murder. Both Michigan and federal courts have consistently held that the legislature did not intend to impose punishments for both felony murder and the underlying felony. *People v Harding*, 443 Mich. 693, 711; 506 NW2d 482 (1993); *Harris v Oklahoma*, 433 US 682; 97 SCt 2912; 53 LEd2d 1054 (1977) (observing that when conviction of a greater crime cannot be had without conviction of the lesser crime, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction on the greater.

Thus, under *Wilder*, Mr. Smith's conviction and sentence for the Armed Robbery of Larry Pass must be vacated.

SUMMARY AND RELIEF AND REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant Smith asks that this Honorable Court Vacate his convictions, Reverse and Remand for further Juristic clarity on issues (2) & (3) or rule in conformity with STATE law to Remand with the granting a new trial, Order an Evidentiary/discovery so the Appellant may further substantiate his claims, or grant him such other relief as may be warranted.

Respectfully Submitted,

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