STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

ROMON MCBURROWS,

Defendant-Appellee.

MSC Case #: 157200

COA Case #: 338552

Monroe County Circuit Court
Case #: 17-243452-FC

_____/

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DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION AND RELIEF SOUGHT

The Court of Appeals issued a published opinion on December 19, 2017, finding that venue in this case was not proper in Monroe County. The state applied for leave to appeal that decision to this Court. Defendant-Appellee's answer is timely filed within 28 days pursuant to Michigan Court Rule 7.305(D).

This Court has jurisdiction pursuant to Article I, Section 20 of the Michigan Constitution, as implemented by MCL 600.215 and MCR 7.303(B)(1).

Defendant-Appellee respectfully requests that this Court deny the Plaintiff-Appellant's application for leave to appeal.

STATEMENT OF QUESTION PRESENTED

I. IN A CASE OF DELIVERY OF CONTROLLED SUBSTANCE CAUSING DEATH, IS VENUE PROPER IN MONROE COUNTY WHEN THE DELIVERY OF THE CONTROLLED SUBSTANCE TOOK PLACE IN WAYNE COUNTY BUT THE RESULTING DEATH OCCURRED IN MONROE COUNTY?

Defendant-Appellant and the Court of Appeals answer **NO.**

Plaintiff-Appellee, the trial court, and amicus answer **YES.**

STATEMENT OF FACTS AND PROCEEDINGS

A: Factual Background

Defendant is charged with one count of Delivery of a Controlled Substance Causing Death, MCL 750.317a. The State alleges[1] that on the evening of December 12, 2016, Nicholas Abraham traveled from his home in Monroe County to Detroit (Wayne County), accompanied by his friend William Ingalls. Once in Detroit, they drove to a house on 23rd Street, where Ingalls purchased $100 worth of heroin from the defendant with money provided by Abraham, while Abraham remained in the vehicle.

They then proceeded to a laundromat in Detroit, where they consumed some of the heroin. They then returned to Monroe County, where Abraham gave some of the remaining drugs to Ingalls, dropped Ingalls off, and at some point returned to his own residence. Around 10 pm on the evening of December 12, he and his wife Michelle Abraham consumed more of the heroin. Michelle passed out a few minutes later, and when she regained consciousness about four hours later found Nicholas passed out on the floor. At approximately 2:40 am, she called 911, and Nicholas was pronounced dead at 3:25 am on the morning of December 13.

An autopsy was conducted by Dr. Leigh Hlavaty of the Office of the Wayne Medical Examiner, who opined that Abraham's death was caused by fentanyl toxicity (i.e., an overdose). At the preliminary examination, Detective Michael McClain testified

[1] Defendant maintains his factual innocence of these charges. However, for the purposes of arguing the venue question, this brief will be written as if the state's allegations are true.

that heroin was often "cut" with fentanyl in order to increase potency of the dose. Presumably (though there exists no evidence of this), the state's theory is that the heroin purchased from the defendant was laced with fentanyl, resulting in Abraham's overdose.

B: Trial Court Proceedings

Following a preliminary hearing on March 7, 2017, the matter was bound over to the Monroe County Circuit Court. Following a substitution of counsel, defendant filed a Motion to Dismiss for Lack of Jurisdiction, arguing that since the *actus reus* of the charge (the delivery of fentanyl from the defendant to Abraham) took place in Wayne County, the Monroe County court had no jurisdiction to hear this case. That motion was argued before the Hon. Daniel White of the Monroe County Circuit Court on May 12, 2017. At that hearing, Judge White denied the Motion to Dismiss, denied defendant's oral Motion to Stay Proceedings Pending Appeal, and signed an order to that effect on May 17, 2017.

C: Appellate Court Proceedings

Defendant filed an Interlocutory Application for Leave to Appeal, as well as a Motion for Stay and Immediate Consideration, on May 26, 2017. The Court of Appeals granted leave to appeal on July 13, 2017. Following briefing and oral arguments, the Court of Appeals issued a published opinion on December 19, 2017, holding that venue in this case was not proper in Monroe County.

D: Supreme Court Proceedings

The state filed an application for leave to appeal that decision to this Honorable Court on February 13, 2018, and the Prosecuting Attorneys Association of Michigan filed an amicus brief on February 16, 2018.

Defendant-Appellee respectfully requests that this Court deny the state's application for leave to appeal. This brief follows.

I. PROPER VENUE FOR THIS CASE LIES IN WAYNE COUNTY, BECAUSE THE ACTUS REUS OCCURRED THERE AND THERE IS NO STATUTORY AUTHORITY TO LAY VENUE ANYWHERE ELSE.

Issue Preservation / Standard of Review

Defendant litigated a Motion to Dismiss for Lack of Jurisdiction in the Monroe County Circuit Court, then appealed the denial of that motion to the Court of Appeals. The Court of Appeals reversed the Circuit Court, and the state applied for leave to appeal that decision. Defendant-Appellee timely responds.

Questions of statutory interpretation are reviewed de novo. *People v. Mitchell,* 301 Mich. App. 282, 291, 835 NW 2d 615 (2013).

A. MCL 762.8 does not apply to the case at bar, because the defendant is accused of a single act, which was allegedly committed entirely within Wayne County.

MCL 762.8 reads:

> Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect.

The state and amicus attempt to stretch the meaning of "acts done in perpetration" by conflating that phrase with "elements of the crime." MCL 750.317a (Delivery of a Controlled Substance Causing Death) consists of five elements (not "acts"):

> First, that the defendant delivered a controlled substance to another person. "Delivery" means that the defendant transferred the substance to another person knowing that it was a controlled substance and intending to transfer it to that person.
> Second, that the substance delivered was a controlled substance.
> Third, that the defendant knew he was delivering a controlled substance.
> Fourth, that the controlled substance was consumed by [state name of person who consumed].
> Fifth, that consuming the controlled substance caused the death of [state victim's name].
> (M. Crim. JI 12.2a)

In order to be found guilty, the defendant need only commit one act; namely, the delivery of the controlled substance. Finally, MCL 333.7105(1) defines "delivery" as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship."

Contrary to the assertion of the state and amicus, the decedent's consumption of the controlled substance is not an act "done in perpetration" of the felony, and his death is not an act at all.

1. "Acts done in perpetration" of a felony refers to acts of the defendant, not the alleged victim.

The state and amicus claim that Abraham's consumption of the controlled substance and his death are "acts done in perpetration" of the felony of delivery causing death. The state argues (without statutory or precedential authority) that "the acts committed under MCL 762.8 may be committed by anyone involved in the crime: the defendant, co-defendants, accessories, co-conspirators, and victims."[2] Amicus makes a similar argument, and goes on to state that "commission is a synonym for perpetration, and the commission—the perpetration—of an offense may be the culmination of multiple acts[.][3]"

First of all, Abraham's death was not an "act." It was rather the consequence of his own act, the consumption of fentanyl. Furthermore, since the consumption was his own act, it was not an act "in perpetration of the felony." This is clear if one considers

[2] Plaintiff-Appellant's Application for Leave to Appeal (hereinafter "Application") at 3.
[3] Brief of Amicus Curiae In Support of Leave to Appeal (hereinafter "Amicus Brief") at 6.

the noun *perpetrator* alongside the verb *perpetrate.* In the context of criminal law, a *perpetrator* refers to a defendant, not a victim; or, more colloquially, someone who is guilty. Amicus cites *U.S. v. Bryan*, 483 F 2d 88 (3rd Cir. 1973) for the proposition that defendants may be convicted for using innocent dupes to commit crimes.[4] But the state and amicus cannot have it both ways—Abraham cannot simultaneously be an "innocent dupe" and a guilty perpetrator. In other words, while Abraham may have *committed* the act of consumption, he did not *perpetrate* anything.

The Court of Appeals recognized that distinction when it held that

> There is no allegation that defendant committed any act in Monroe County. Because the alleged crime, with the exception of the sentencing enhancement for the death of Nicholas was complete at the point of the sale, *Plunkett,*[5] 485 Mich at 60, **there was no further act to be committed "in the perpetration of that felony."** MCL 762.8. It was only the **effect** of Nicholas's death that made defendant subject to the potential of the additional punishment provided by MCL 750.317a. (emphases added) *People v. McBurrows*, COA# 338552 (opinion below), slip op. at 5.

Defendant-Appellee urges this court to reject the conflation of the words "committed" and "perpetration" and find that MCL 762.8 is inapplicable.

2. MCL 750.317a (Delivery of a Controlled Substance Causing Death) is properly characterized as a sentencing enchancement to MCL 333.7401 (Delivery of a Controlled Substance).

The state and amicus take great exception[6] to the Court of Appeal's characterization of MCL 750.317a as a "sentencing enhancement" of MCL 333.7401 (Delivery of a Controlled Substance). They mistakenly suggest that this reasoning is equivalent to claiming that a murder charge is a "sentencing enhancement" to the crime

[4] Amicus Brief at 6, fn 7.
[5] *People v. Plunkett*, 485 Mich. 50, 780 NW 2d 280 (2010)
[6] Application at 3-4; and Amicus Brief at 4-5.

of assault. The state and amicus are both incorrect. In order to prove a murder charge stemming from an assault, the prosecutor must prove that the defendant *intended* to kill the victim, or *intended* to commit a predicate felony. However, as the Court of Appeals noted:

> In a prosecution under MCL 750.317a, it is not necessary for the prosecution to prove that a defendant intended for a death to occur, *Plunkett*, 485 Mich at 60, and there is no contention in this case that defendant harbored such an intent. *McBurrows* (opinion below), slip op. at 5.

The state and amicus go so far as to suggest that the appellate panel "misinterpreted"[7] or "over-read"[8] the *Plunkett* decision. Their concerns are misplaced. MCL 750.317a is in fact a sentencing enhancement, in that it prescribes a greater penalty for an identical act. Phrased another way, the defendant is subject to a greater penalty not because of anything to do with his *act,* (the delivery), but because of the *consequences* of his act (Abraham's death)—the very definition of a sentencing enhancement.

At any rate, the Court of Appeals reliance on *Plunkett* was not about penalties, but rather about the completion of the crime and distinguishing "acts" and "effects." The relevant portion reads as follows:

> Thus, MCL 750.317a is properly understood as providing a penalty enhancement when a defendant's criminal act—the delivery of a controlled substance in violation of MCL 333.7401—has the result or effect of causing a death to any other individual. It is also clear, however, that a defendant's criminal act is complete upon the delivery of the controlled substance. Criminal liability has attached at that point. The effects of that completed action merely determine the degree of the penalty that a defendant will face despite the fact that a defendant need not commit any further acts causing the occurrence of any specific result (such as a death by drug overdose). Based on the plain language of the statute, establishing a defendant's violation of MCL 750.317a requires the prosecution to prove (1) the defendant's *act* of delivering a controlled substance in violation of MCL 333.7401 and (2) the *effect* that a person died as a result of consuming the controlled substance. *Id.* at 4. (emphases original).

[7] Application at 4.
[8] Amicus Brief at 3.

In other words, the Court of Appeals cited *Plunkett* in order to explain how acts of the defendant are distinct from the effects of those acts, and how both are distinct from elements of the crime. By focusing on whether or not MCL 750.317a is a sentencing enhancement, the state and amicus missed the larger point that venue is properly laid where the *defendant* committed his act.

3. The state's argument regarding a "conspiracy" between the defendant and the decedent is untimely raised, and unsupported by the charges and evidence.

As a threshold matter, the state's contention that "the Delivery of a Controlled Substance constitutes a conspiracy[9]" was not raised before the Court of Appeals. Therefore, as the Court of Appeals did not rule on this issue, the state's attempt to insert this issue before this Honorable Court is untimely. "[O]rdinarily, this Court does not review arguments that were not presented below." *People v. Hermiz,* 462 Mich. 71, 76; 611 NW 2d 783 (2000).

That said, the state's argument regarding conspiracy fails on substantive as well as procedural grounds. To begin with, the defendant is not charged with conspiracy. Nor is anyone else. Obviously, the state cannot sustain a prosecution of MCL 750.317a by claiming that the defendant violated *a completely different statute,* MCL 750.157a (Conspiracy to Commit an Offense).

Furthermore, the likely reason that the defendant hasn't been charged with conspiracy is because the defining feature of a conspiracy is an *agreement.* Per M. Crim.

[9] Application at 3.

JI 10.1, in order to prove the crime of conspiracy, the prosecutor must prove "that the defendant and someone else knowingly **agreed** to commit [insert crime]." (emphasis added). Furthermore, a conspiracy requires two separate specific intents: the intent to combine with others, and the intent to accomplish an illegal objective. *People v. White,* 147 Mich. App. 31, 36; 383 NW 2d 587 (1985).

The record shows that Abraham obtained the heroin via an intermediary, William Ingalls, and that McBurrows was likely not even aware of Abraham's existence. Therefore, there was no intent "to combine with others." More importantly, there was no agreement (in fact, there *cannot* have been such an agreement) between McBurrows and Abraham to cause Abraham's death. By the state's reasoning, every time two teenagers pass a joint back and forth, it is a "conspiracy" between them and the person who sold the marijuana. Such an absurdity should not be countenanced, and defendant therefore respectfully requests that this Court find that MCL 762.8 is not applicable to the case at bar.

B. MCL 762.5 does not apply to the present case, as the sale of a controlled substance is neither the infliction of a mortal wound nor the administration of poison.

MCL 762.5 reads:

> If any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in 1 county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county.

The state argues that "the delivery of heroin/fentanyl was a mortal wound, injury, and is a poison."[10] It is none of them.

1. **The delivery of a controlled substance is not an infliction of mortal wound, violence, or injury.**

The state's argues that the sale of a controlled substance is the equivalent of the infliction of a mortal wound or other injury and cites *People v. Southwick,* 272 Mich. 158; 261 NW 320 (1935) for support.

In *Southwick*, a doctor performed an abortion (then illegal) in Jackson County, and the patient later died in Oakland County. The Supreme Court held that Oakland County was a proper venue for the doctor's manslaughter trial, based on a statute identical to MCL 762.5. However, *Southwick* is distinguishable from the case at bar, since Dr. Southwick *directly* administered the treatment that caused the patient's death. In the case at bar, the defendant is accused of giving drugs to an intermediary (Ingalls), who gave them to Abraham, and Abraham ingested the drugs himself. The Court of Appeals correctly drew this distinction in the opinion below when it held that:

> Quite unlike the facts in *Southwick* […] the record establishes that the fentanyl entered Nicholas's body and caused his death as a result of his own actions related to using heroin; there is no evidence that defendant put any drug into Nicholas. Rather, defendant provided Ingalls with a controlled substance that ultimately made its way to Nicholas. Therefore, unlike the circumstances in *Southwick*, there is no factual support here for this Court finding that defendant gave Nicholas a mortal wound or otherwise inflicted any injury *on him*. *McBurrows* (opinion below), slip. Op at 6-7 (emphasis original).

The Court of Appeals went on to hold that:

> Moreover, for purposes of establishing venue, the lesson from *Southwick* is that the mortal wound, injury, or poison must be inflicted on or administered to the victim *directly* in order for

[10] Application at 4.

> venue to be proper under MCL 762.5 when the death subsequently occurred in a different county. It is not enough to depend on a drug supply chain to link a defendant's act in one county to the death in another county of victim who had no contact with the defendant in order to rely on MCL 762.5 for establishing venue. *Id.* at 8 (emphasis original).

Therefore, defendant thus urges this Court to find that the "mortal wound" clause of MCL 762.5 does not apply.

2. Heroin and/or fentanyl are not "poisons" in the context of MCL 762.5.

The state argues that heroin and fentanyl (whichever caused Abraham's death) is equivalent to "poison" for the purposes of MCL 762.5. The state points out that "poison" is not defined in the statute nor in its attendant case law, and provides the dictionary definition for support. However, the state need not have gone so far afield in its attempt to define "poison." MCL 800.281(1), which deals with contraband in prisons, reads in its relevant part:

> [A] person shall not sell, give, or furnish, either directly or indirectly, any alcoholic liquor, **prescription drug, poison, or controlled substance** to a prisoner who is in or on a correctional facility[.]" (emphasis added).

Read *in pari materia,* MCL 800.281(1) indicates that "poison," "prescription drug," and "controlled substance" all have distinct meanings. "In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory." *People v. Bonilla-Machado,* 489 Mich. 412, 422, 803 NW 2d 217 (2011).

Regardless of dictionary definitions, the language of MCL 800.281 makes it clear that a "controlled substance" or a "prescription drug" is not the same thing as a "poison." The state is attempting to blur the distinction between the three, thereby suggesting the terms are redundant. This is exactly the sort of error that the rule against surplusage is meant to prevent.

The state also fails to address the other problem in its argument: even if the controlled substance in question could be considered a poison, the defendant did not "administer" it.

The Court of Appeals correctly analyzed the meaning of the "administration of poison" clause in the opinion below, when it held that:

> Nonetheless, even accepting the argument that a given controlled substance could be considered a poison in a particular case, that does not mean that MCL 762.5 is automatically satisfied such that this statute may be relied on to establish venue when the crime at issue is delivery of a controlled substance causing death. Examining the term poison in context, […], we note that this venue statute states that if "*any poison shall be administered in 1 county*..." MCL 762.5. This implies an *action* related to the poisoning. Considering the term poison when used as a verb rather than as a noun, we find that **"poison" or "poisoning" means "to injure or kill with poison."**
> […]
> Defendant has not been charged with any crime related to *poisoning* anyone. […] In this case, there is no support for the contention that defendant administered anything *to* Nicholas. *Id*. at 7-8 (*italicized* emphasis original, **bold** emphasis added) (internal citations omitted).

In other words, the state is relying on the "administration of poison" clause to prosecute the defendant for substance he did not administer, which was not a poison. Defendant therefore urges this Court to likewise hold that the "administration of poison" clause of MCL 762.5 does not apply.

Summary and Relief

MCL 762.5 and MCL 762.8 do not apply to the case at bar, therefore venue is improper in Monroe County. Trying this case in Monroe County would thus violate the defendant's rights to due process of law and to an impartial jury, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 17 and 20 of the Michigan Constitution.

WHEREFORE, for the reasons herein stated, defendant requests that this Honorable Court deny Plaintiff-Appellant's application for leave to appeal, affirm the

Court of Appeals, order the dismissal of all charges, and for such other relief this Court deems just and proper.

Dated: March 12, 2018

Respectfully Submitted,

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