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 SUPPLEMENTAL BRIEF REGARDING PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

(Defendant-Appellee stipulates to the use of the Plaintiff-Appellant's Appendix)

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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. This Court ordered supplemental briefing on the question addressing whether venue is proper in Monroe County. Defendant-Appellee's supplemental brief is timely filed within 21 days of receiving the appellant's brief, pursuant to this Court's May 18, 2018, order.

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 and the trial court answer **YES.**

COUNTER-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. (32a). 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. (33a-34a)

They then proceeded to a laundromat in Detroit, where they consumed some of the heroin. (35a). 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. (36a). Around 10 pm on the evening of December 12, he and his wife Michelle Abraham consumed more of the heroin. (57a). Michelle passed out a few minutes later, and when she regained consciousness about four hours later found Nicholas passed out on the floor. (57a-58a) At approximately 2:40 am, she called 911, and Nicholas was pronounced dead at 3:25 am on the morning of December 13. (8a).

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). (90a-91a). At the preliminary examination, Detective Michael

[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.

McClain testified that heroin was often "cut" with fentanyl in order to increase potency of the dose. (83a-84a) 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, to which Defendant-Appellee timely answered.

This Court ordered supplemental briefing on whether venue was proper in Monroe County on May 18, 2018. Plaintiff-Appellant filed a supplemental brief on June 27, 2018. Defendant-Appellee timely responds within 21 days pursuant to the Court's order.

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

I. THE SOLE PROPER VENUE FOR THIS CASE IS 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 to this Honorable Court for leave to appeal that decision. This Court ordered supplemental briefing on whether venue was proper in Monroe County. 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.

There are five elements to the crime of Delivery of a Controlled Substance Causing Death (M Crim JI 12.2a):

> 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].

Finally, MCL 333.7105(1) defines "delivery" as follows:

> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.

This statute is significant because "delivery," the actual or constructive transfer of the heroin to Abraham, is the *actus reus* of the accused crime, and the single act of which the defendant is accused.

The state argues that since the fourth and fifth elements of the crime (consumption of the controlled substance and death) occurred in Monroe County, jurisdiction was proper there.[2] The state is wrong.

1. Acts perpetrated by the defendant are distinct from "elements" of the crime.

By conflating "acts" of the defendant with the "elements" of the crime, the state has misapplied MCL 762.8. As stated previously, the defendant is accused of a single act, the delivery of heroin to Abraham. That act is also an element of the crime. All parties agree that said delivery took place in Wayne County. Two other "elements" (as distinct from "acts"), Abraham's consumption of the heroin and his death, indeed took place in Monroe County. However, Abraham's consumption of the fentanyl was his own act, not the defendant's. Similarly, his death was not an act of either of them, but rather a direct consequence of Abraham's actions.

Michigan case law recognizes the distinction between acts and elements. In *People v. Jones,* 159 Mich. App. 758 (1987), the defendants sold a car to state police

[2] Plaintiff-Appellant's Supplemental Brief on Appeal (hereinafter "Appellant's Brief") at 3.

officers in Oakland County as part of an insurance scam, but reported the vehicle as stolen and made the insurance claim in Wayne County. The defendants argued that venue was improper in Oakland County. The Court of Appeals rejected that argument, holding that:

> "Defendants argue that the acts necessary to satisfy the elements of the crime of false pretenses all occurred in Wayne County, making MCL 762.8[] inapplicable. **However, MCL 762.8[] is concerned with the "acts" which culminate in a felony rather than the essential elements of the felony.** *Id.* at 761. (emphasis added).

Consider a hypothetical case of a resident of Monroe County who commits the crime of Driving While License Suspended while on I-75 in Oakland County. The elements of Driving While Suspended are:

> First, that the defendant was operating a motor vehicle. "Operating" means driving or having actual physical control of the vehicle.
>
> Second, that the defendant was operating that vehicle on a highway or other place open to the general public [or generally accessible to motor vehicles, including any area designated for the parking of motor vehicles].
>
> Third, that at the time the defendant's operator's license was suspended or revoked.
>
> Fourth, that the Secretary of State gave notice of the suspension or revocation by first-class, United States Postal Service mail addressed to the defendant at the address shown by the record of the Secretary of State at least five days before the date of the alleged offense. (M Crim JI 15.20)

Clearly, the sole proper jurisdiction for prosecution is Oakland County. This is irrespective of the fact that the second element (public accessibility of I-75) is true in any of 14 counties; the third element (suspension of the defendant's driver's license) is true throughout Michigan; and the fourth element (the Secretary of State's notice to the driver) can be said to have taken place either in Ingham County (where the notice presumably originated) or in Monroe County (where the notice was presumably delivered). In other words, what makes Oakland County the proper jurisdiction is the

fact that the defendant's *act* (his driving) took place there. The geography of the other elements is irrelevant.

The correct analysis, then, is to consider the acts of the defendant separately from any elements of the crime resulting from those acts. This is the approach taken by the Supreme Court in *People v. Houthoofd,* 487 Mich. 568 (2010). In *Houthoofd,* the defendant was tried for witness intimidation and solicitation to commit murder in Saginaw County. The Supreme Court held that since the intimidating phone call was placed in Bay County and received in Ogemaw County, jurisdiction was not proper in Saginaw County. The Supreme Court likewise held that since the solicitation to commit murder took place in Arenac County, that was the appropriate jurisdiction for prosecution; even though Saginaw County was where the murder was supposed to occur. The *Houthoofd* Court held:

> MCL 762.8 is unambiguous and clearly provides that when a felony consists of two or more acts, venue for prosecution of the felony is proper in any county in which any one of the acts was committed. The statute does not contemplate venue for prosecution in places where the effects of the act are felt, and we decline to extend the application of MCL 762.8 beyond the scope provided for in the statute. *Houthoofd, supra*, 487 Mich. 568, 583-84 (2010).

The *Houthoofd* court makes no mention of the "elements" of either solicitation to commit murder nor witness intimidation; and since effects of both those crimes are also elements of those crimes, by definition the location of any consequent effects does not confer venue. Indeed, the beginning of MCL 762.8 states that the statute applies "Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony[.]" But the crime of which the defendant is accused, Delivery of a Controlled Substance causing death, contains only one act "done in perpetration of

that felony:" the delivery (meaning the "actual or constructive transfer") of the heroin to Abraham. Thus, MCL 762.8 does not apply.

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

The state argues in its supplemental brief that "MCL 762.8 does not require the acts to be committed by the defendant."[3] The state provides no statutory or precedential support for this position, for the simple reason that there isn't any. The Michigan cases interpreting this issue focus only on the acts of the defendant.

For example, in *People v. Slifco,* 162 Mich. App. 758 (1987) the Court of Appeals held that

> "Because **defendant's** acts which culminated in the commission of third-degree sexual conduct and UDAA began in Detroit, the Recorder's Court properly had jurisdiction over the case under MCL 762.8[.]" *Id.* at 762. (emphasis added)

Similarly, the Court of Appeals held in *People v. Jones*, 159 Mich. App. 758 (1987) that

> "Since the **defendants'** meeting and subsequent sale of the car in Oakland County was the beginning or first act which culminated in the crime… 762.8[] applies and venue is proper in Oakland County." *Id.* at 761. (emphasis added)

Finally, in *People v. Belanger,* 120 Mich. App. 752 (1982), the Court of Appeals concluded

> Reading *Brooks* [405 Mich. 225 (1979)] together with MCL 762.8[], we conclude that a violation of MCL 750.415(2) [Concealing or Misrepresenting Identity of Motor Vehicle] may properly be prosecuted in a county where the alteration took place, in a county where **defendant** was in possession of a vehicle with an altered number, or in a county where an act of misrepresentation took place. An act of misrepresentation in Ottawa County took place when **defendant** consigned the vehicle with the altered number for sale at Grand Rapids Auto Auction.") (emphases added)

The state goes on to claim that two acts were committed by Abraham: the consumption of the drugs and his death.[4] To begin with, Abraham's death was not an

[3] Appellant's Brief at 3.
[4] Appellant's Brief at 3.

act at all. It was rather the result or effect of a different act, his consumption of fentanyl. However, Abraham's consumption of fentanyl was not an "act done in perpetration" of the felony.

This becomes clear when considering the agent noun *perpetrator* alongside the statute's action noun *perpretation*. In the context of criminal law, a *perpetrator* refers to a defendant, not a victim; or, more colloquially, someone who is guilty. The state 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.[5] But the state 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.

3. The final clause of MCL 762.8 is not applicable because the defendant did not intend his act to have any effect in Monroe County.

Houthoofd was decided in 2010, and at that time MCL 762.8 did not contain its final clause, "or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." That clause was added in 2013. However, the final clause of MCL 762.8 does not extend jurisdiction to <u>any</u> county in which the act had an effect, but only to those counties in which the defendant <u>intended</u> the act to have an effect.

Such is not the case here—the state makes no such allegation that McBurrows intended to kill Abraham, and Ingalls's testified at the preliminary examination that he

[5] Appellant's Brief at 3-4.

(Ingalls) received the heroin inside McBurrow's residence while Abraham remained in the vehicle. Therefore, there is no evidence that McBurrows was even aware Abraham was even involved in the transaction, let alone that he "intended" anything with respect to him. Indeed, common sense suggests that if McBurrows did actually deliver the fentanyl to Abraham, he would not have wanted him to die…if for no other reason than that McBurrows would have hoped for repeat business.

Since Abraham's consumption of fentanyl and his death were not "acts" of the defendant nor intended effects of his single act, MCL 762.8 does not apply.

4. 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" 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. 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 between McBurrows and Abraham to cause Abraham's death. In fact, there *cannot* have been such an agreement—the two of them never met, nor did McBurrows know what that Ingalls would give the heroin to Abraham. 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.

5. 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 takes great exception to the Court of Appeal's characterization of MCL 750.317a as a "sentencing enhancement" of MCL 333.7401 (Delivery of a Controlled Substance). It mistakenly suggests that this reasoning is equivalent to claiming that a

murder charge is a "sentencing enhancement" to the crime of assault.[6] The state is incorrect. In order to prove a murder charge stemming from an assault, the prosecutor must prove something additional: 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), 126a.

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).

[6] Appellant's Brief at 4.

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 missed the larger point that venue is properly laid where the *defendant* committed his act.

B. <u>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.</u>

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."[7] 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 argument that the sale of a controlled substance is the equivalent of the infliction of a mortal wound or other injury is without statutory or precedential authority. The case law interpreting MCL 762.5 focuses on questions of *where* the case should be tried. *See generally, People v. Duffield,* 387 Mich. 300, 197 NW 2d 25 (1972) and *People v. Starkey*, 20 Mich. App. 492, 174 NW 2d 141 (1969), both dealing with cases where a victim was injured in Michigan and later died in Indiana.

[7] Appellant's Brief at 5.

There is no case law or statute that defines "mortal wound," but the state's argument stretches the definition of those words beyond all meaning. Originally, the state was content to argue that since Abraham injected himself and died in Monroe County, jurisdiction was appropriate under MCL 762.8. In appellate litigation, the state went even further, and argued that MCL 762.5 conferred jurisdiction because *the delivery itself was the mortal wound.* The implications of that argument carry us into the realm of the ridiculous.

Consider a hypothetical case in which a defendant illegally sold a gun in Wayne County to a person who then shot himself in Monroe County. By the state's logic, the sale of the gun would be a mortal wound, meaning the defendant could be prosecuted in Monroe County for murder…even though the decedent shot himself. To carry the example even further, if the defendant purchased the ammunition in Macomb County, loaded the gun in Oakland County, delivered the gun to the decedent in Wayne County, and the decedent killed himself in Monroe County, under the state's reasoning venue would be proper in any of them.

The state cites *People v. Southwick*, 272 Mich. 258 (1935) in support of its position that the delivery of narcotics was a mortal wound. 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 state likens the delivery of drugs to a "ticking time bomb,"[8] arguing that defendant "[knew] it would shortly consumed and due to its inherent dangerousness, knew it could possibly cause the death of anyone consuming the drugs."[9] But consider another hypothetical situation in which every fact is precisely as the state alleges, except that Abraham did not die. In both the hypothetical and the actual cases, McBurrows is accused of identical acts: the delivery of fentanyl. It follows that since the alleged act in both cases is identical, by the state's logic the alleged delivery of fentanyl was a "mortal wound" regardless of what happened to Abraham…but that's absurd.

Clearly, it was some other fact, or some other action, beyond the alleged delivery that was the "mortal wound" that killed Abraham. However Abraham died, there was some intervening cause between the delivery and his death that actually killed him. That intervening cause was Abraham's consumption of fentanyl, which had nothing to do with the defendant.

Defendant denies that MCL 762.5 has *any* application to this case, and reiterates that in the context of MCL 762.5, the words "mortal wound" and "poison" refer to deliberate attempts to kill. To the extent there was any "mortal wound inflicted," it was inflicted by Nicholas Abraham, upon himself, in Monroe County. The defendant had nothing to do with it. Extending the term "mortal wound" to any event in the causal

[8] Appellant's Brief at 6
[9] Id.

chain that led to a death would justify a prosecution almost anywhere the state chose bring it. That would be an absurd result, and the state's application for leave to appeal should be denied.

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.[10] 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.[11] 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

[10] Appellant's Brief at 6.
[11] *Id.* at 7.

terms are redundant. This is exactly the sort of error that the rule against surplusage is meant to prevent.

The state goes on to argue that the defendant had no license to prescribe heroin nor fentanyl.[12] While true, this is a *non sequitur*. In the context of criminal law, *no* delivery of a controlled substance is done pursuant to a prescription. Even in cases where doctors or pharmacist are abusing their professional licenses, any "prescriptions" are fraudulent. However, the absence of a prescription does not magically convert a controlled substance into a "poison." By the state's reasoning, every drug deal is an attempted poisoning, and thus every drug dealer is an attempted murder who can be charged as such. While that position may make for effective rhetoric, it is an absurd legal conclusion and should be rejected.

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

In other words, the state is relying on the "administration of poison" clause to prosecute the defendant for a 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.

[12] *Id.* at 6.

C. MCL 762.1 restricts jurisdiction in criminal cases to the county where the crime was committed, absent specific statutory authorization to try the case elsewhere.

It is axiomatic that a court may not hear a case if venue is improper. Venue in criminal cases is governed by Chapter 762 of the Michigan Compiled Laws. In that chapter, the general rule is established by MCL 762.1:

> The various courts and persons of this state now having jurisdiction and powers over criminal causes, shall have such jurisdiction and powers as are now conferred upon them by law, except as such jurisdiction and powers may be hereinafter repealed, enlarged or modified.

It is an ancient principle that the default venue for a criminal is in the county where the crime was committed. In *People v. Gregory,* 30 Mich. 371 (1874), the defendant was prosecuted by a defective complaint, which made no mention of the date of the offense; and in the space meant to identify the county of offense, said only "Michigan." The Supreme Court, noting that there was no county called "Michigan" held that:

> The authority of a justice to hold trials in criminal cases is strictly defined and limited by the statute, and the proceedings should appear to be within, and in substantial accordance with, the provisions of law. The justice here had no power to hold a court to hear and determine a charge for assault and battery, **unless it was one which had arisen in his county[.]** *Id.* at 373. [emphasis added] [internal citations omitted].

This principle extended to cases involving the transportation of contraband between counties, where the defendant has no connection to the destination county. In *People v. Olson,* 293 Mich. 292 NW 860 (1940), the defendant, a resident of Benzie County, was prosecuted for shipping undersized fish to Newaygo County. The Supreme Court held that prosecution in Newaygo County was improper, holding that:

> After these fish were shipped by defendant he was not in Newaygo County and cannot, therefore, be prosecuted in that county upon any theory of constructive possession of the fish in Newaygo County. **There is no such thing as constructive criminal cases**. Defendant was entitled to a trial by a jury of the vicinage. *Id.* at 514. (emphasis added) [internal citations omitted].

The *Olson* court went so far as to say:

> "Constructive crimes -- crimes built up by courts with the aid of inference, implication, and strained interpretation -- are repugnant to the spirit and letter of English and American criminal law." Id. at 515 (quoting *Ex Parte McNulty*, 77 Cal. 164, 19 Pac 237).

and

> "We have not the slightest hesitation in declaring that the act … so far as it undertakes to authorize a trial in some other county than that of the alleged offense, is oppressive, unwarranted by the Constitution, and utterly void." *Id.* at 516 (quoting *Swart v. Kimball,* 43 Mich. 443 (1880)).

This principle was recently reaffirmed by the Supreme Court in *People v. Houthoofd*, 487 Mich. 568 (2010):

> The general venue rule is that defendants should be tried in the county where the crime was committed. "[E]xcept as the legislature for the furtherance of justice has otherwise provided reasonably and within the requirements of due process, the trial should be by a jury of the county or city where the offense was committed." (*Id.* at 579) (quoting *People v Lee*, 334 Mich. 217, 226; 54 NW2d 305 (1952)).

In examining the rest of Chapter 762, the Legislature has on several occasions "otherwise provided" for establishing jurisdiction in which crimes occur in multiple jurisdictions. Those provisions include:

1. MCL 762.2: relating to crimes that occurred across state boundaries.
2. MCL 762.3: relating to crimes that occurred near a county boundary line. As no part of the City of Detroit is within one mile of Monroe County, this statute does not apply.
3. MCL 762.4: relating to crimes that occurred near the boundaries of a court's jurisdiction whose boundaries do not coincide with county boundaries.
4. MCL 762.5: discussed *supra.*
5. MCL 762.6: relating to crimes occurring on the high seas or navigable rivers.
6. MCL 762.8: discussed *supra.*

7. MCL 762.9: relating to crimes occurring on moving vehicles.
8. MCL 762.10: relating to embezzlement.
9. MCL 762.10a: relating to telecommunications crimes.
10. MCL 762.10b: relating to computer crimes.
11. MCL 762.10c: relating to identity theft.

In other words, there are no fewer than eleven separate statutes that modify the general rule expressed in MCL 762.1, and every single one of them deals with crimes that potentially occur in multiple counties. Had the Legislature wished to address a situation in which drugs delivered in one county caused a death in a different county, it could have done so. Since that is not the case, the principle of *expressio unius est exclusio alterius* forecloses trying this case in Monroe County, unless jurisdiction can be artificially shoehorned into MCL 762.5 or MCL 762.8. That is exactly what the state is asking this Court to do: to ignore the plain meaning of the statutes, decades of precedent, and the canons of statutory interpretation to reach an unfair and illogical result.

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: July 17, 2018

Respectfully Submitted,

/s/ Noel Erinjeri

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