STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

No. 160968

KELLIE NICHOLE STOCK,
Defendant-Appellant.

Court of Appeals No. 340541
Wayne County Circuit Court No. 17-003509-01-FC

[On Appeal from the Court of Appeals,
Ronayne Krause, P.J. and Cavanagh and Shapiro, JJ.]

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF ON APPEAL FILED UNDER AO 2019-6.

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People concur with the Defendant-Appellant's statement of appellate jurisdiction. The Michigan Supreme Court has jurisdiction to hear this appeal pursuant to MCR 7.303(B)(1).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

Evidence is sufficient if a rational juror could find that all the essential elements of the crime were proven beyond a reasonable doubt. In this case, the Defendant attempted to flee from the police when they tried to pull her over for a traffic violation and the Defendant ran a red light and crashed her vehicle into the side of the decedent's vehicle, killing the driver of the other vehicle and seriously injuring herself and her passenger, while the Defendant had cocaine derivative in her system. Since MCL 257.625(8) forbids any amount of cocaine or its derivative from being in the system of a driver, was there sufficient evidence to convict the Defendant of violating MCL 257.625(4) and MCL 257.625(5)(1)?

The trial court would answer this question, "Yes."

The People answer, "Yes."

The Defendant answers, "No."

II.

Ineffective assistance of counsel requires two showings: that trial counsel's performance fell below an objective standard of reasonableness and that the serious mistake deprived the defendant of a fair trial. Here, there was no serious mistake made by trial counsel and the Defendant was not deprived of a fair trial since the applicable law forbids any amount of cocaine or its derivative from being in the system when driving and the Defendant had the presence of cocaine metabolite, a natural derivative of ingested cocaine, in her urine at the time of the crash. Therefore, has the Defendant proven she was provided ineffective assistance of counsel?

The trial court answered this question, "No."

The People answer, "No."

The Defendant answers, "Yes."

COUNTERSTATEMENT OF FACTS

The People do not dispute the Defendant's statement of facts. The Defendant was convicted following a jury trial of reckless driving causing death,[1] operating under the influence causing death,[2] operating with license suspended causing death,[3] fleeing and eluding first degree,[4] fleeing and eluding second degree,[5] reckless driving causing serious impairment of bodily function,[6] operating under the influence causing serious injury,[7] and operating with license suspended, revoked, or denied, causing serious injury,[8] following a jury trial held on July 19-24, 2017. The Defendant was found not guilty of the most serious charge against her, count 1, second degree murder.[9] On August 8, 2017, the Defendant was sentenced as a fourth-offense habitual offender to eight concurrent terms of 19-50 years of incarceration.[10] On appeal, the People conceded that there was no evidence that the Defendant's driver's license was suspended, revoked, or denied at the time of the crash (it was merely expired) so the Defendant's convictions under MCL 257.904(4) and (5) were reversed.

The circumstances behind the Defendant's convictions was that at around 2:15 p.m. on March 20, 2017, the Defendant drove a 1997 gold colored Dodge Intrepid the wrong way down a one-way street, Hollywood

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1 MCL 257.626(4).
2 MCL 257.625(4).
3 MCL 257.904(4).
4 MCL 257.602a(5).
5 MCL 257.602a(4)(a).
6 MCL 257.626.
7 MCL 257.625(5)(a).
8 MCL 257.904(5).
9 7/24/2017, 4.
10 8/07/2017, 21.

Street in Detroit.[11] Detroit Police Officers Howell and Jenkins, driving in a semi-marked police car, attempted to perform a traffic stop of the Defendant's vehicle by activating their lights and siren.[12] Instead of stopping for the police, the Defendant fled southbound down Woodward Avenue and at the intersection of State Fair Road and Woodward Avenue the Defendant ran a red light and crashed into the side of a red pickup truck which was turning left onto northbound Woodward Avenue, killing the driver of the pickup truck, Benny Simms, and severely injuring the Defendant's front seat passenger, Classie Butler, as well as herself.[13]

The Defendant did not have a valid driver's license (it was expired) and the car she was driving was reported stolen.[14] A search warrant was served on Henry Ford Hospital for the Defendant's medical records. An emergency toxicology report reflected that approximately four hours after the crash, the Defendant tested positive for "cocaine, metabolite, urine, 300 ng per ml cutoff, on March 20, 2017 at 6:45 p.m.."[15]

Following her conviction and sentence, the Defendant filed a motion for new trial in the trial court alleging ineffective assistance of counsel. Following a *Ginther*[16] hearing, that motion was denied by the trial court on August 24, 2018.[17] At the *Ginther* hearing, trial counsel admitted that he had not researched before trial what a cocaine metabolite was, nor did he know the difference between parent cocaine

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[11] 7/19/2017, 149-151; 7/20/2017, 99.
[12] 7/19/2017, 167; 7/20/2017, 23; 65, 68.
[13] Classie Butler suffered a broken vertebra, skull fracture, and lost the use of her hand. 7/19/2017, 151, 153; 7/20/2017, 54-55; 129.
[14] 8/07/2017, 20.
[15] 7/20/2017, 167.
[16] *People v Ginther*, 390 Mich 436 (1973).
[17] 8/24/2018, 118.

and cocaine metabolite.[18] This was despite the Defendant telling him that she had not used cocaine in "some amount of time or something."[19] Instead, he told her that if she hadn't used cocaine within 24 hours of the test, it wouldn't have appeared in her system.[20] Contrary to this testimony, appellate counsel had attached to his motion a document from the Mayo Clinic stating that cocaine metabolite could be detected in urine four days after ingestion. Appellate counsel did not, however, offer any scientific or medical testimony to that effect.[21] The trial court denied relief on all grounds, including the cocaine-metabolite issue, ruling (in that regard) that evidence distinguishing metabolite from parent cocaine would not have made a difference.[22]

The Defendant then appealed to the Court of Appeals. The Court of Appeals vacated the Defendant's two convictions for operating while license suspended, revoked, denied causing death and causing impairment but otherwise affirmed the Defendant's convictions and sentence in an unpublished per curiam opinion.[23] Judge Shapiro filed a concurring and dissenting opinion.[24] The Defendant then appealed to the Michigan Supreme Court on February 18, 2020.

In an order dated October 2, 2020, the Court ordered oral argument on the application for leave to appeal and supplemental briefing for the parties to address two issues: Whether (1) under *People v Feezel,* the prosecution failed to present sufficient evidence that the defendant had cocaine in her system at the time of crash based only on

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[18] 8/24/2018, 22.
[19] 8/24/2018, 44.
[20] 8/24/2018, 44.
[21] 8/24/2018, 99.
[22] 8/24/2018, 107.
[23] *People v Stock*, unpublished COA opinion no. 35041, dated December 26, 2019.
[24] *Id*.

the presence of a cocaine metabolite in the defendant's urine; and (2) whether trial counsel was ineffective for failing to challenge the use of cocaine metabolite to establish intoxication.[25]

Other facts will be referenced as necessary within the brief.

[25] Michigan Supreme Court Order dated October 2, 2020.

ARGUMENT

I. Evidence is sufficient if a rational juror could find that all the essential elements of the crime were proven beyond a reasonable doubt. In this case, the Defendant attempted to flee from the police when they tried to pull her over for a traffic violation and the Defendant ran a red light and crashed her vehicle into the side of the decedent's vehicle, killing the driver of the other vehicle and seriously injuring herself and her passenger, while the Defendant had cocaine derivative in her system. Since MCL 257.625(8) forbids any amount of cocaine or its derivative from being in the system of a driver, there was sufficient evidence to convict the Defendant of violating MCL 257.625(4) and MCL 257.625(5)(1).

Standard of Review

The People agree with the Defendant's statement of the standard of review. The standard of review is *de novo*.[26] In reviewing a claim that there was insufficient evidence to support a conviction, the reviewing court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[27] The reviewing court must make all reasonable inferences and credibility choices which will support the trier of fact's verdict, and the scope of review is the same whether the case involves direct or circumstantial evidence.[28] Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense.[29]

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[26] *People v Xun Wang,* 505 Mich 239, 251 (2020).
[27] *People v Nowack,* 462 Mich 392, 399 (2000)*; People v Petrella*, 424 Mich 221 (1985).
[28] *United States v Clark*, 741 F2d 1699 (5th Cir, 1984).
[29] *People v Nowack*, 462 Mich at 399 (2000), citing *People v Carines*, 460 Mich 750, 757 (1999).

Discussion

A. Ingested cocaine is partially processed through the kidneys and excreted in the urine as cocaine metabolite.

Any amount of the presence of cocaine or its derivative in the bodily system, and therefore, cocaine metabolite, would be sufficient to prove that the Defendant had a controlled substance in her system at the time of the crash for purposes of MCL 257.625(8). MCL 257.625(8) provides:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body *any amount of* a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368; MCL 333.7214.[30]

"Cocaine" is defined in MCL 333.7214(a)(iv) as:

> Coca leaves and any salt, compound, *derivative*, or preparation thereof, which is chemically equivalent to or identical with any of those substances, except that the substances do not include decocainized coca leaves or extraction of coca ecgonine. The substances include cocaine, its salts, stereoisomers, and salts and stereoisomers when the existence of the salts, stereoisomers, and salts of stereoisomers is possible within the specific chemical designation.[31]

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[30] MCL 257.625(8) (emphasis supplied).

[31] MCL 333.7214(a)(iv) (emphasis supplied).

"Metabolite" merely means a product of metabolism.[32] The primary metabolite of cocaine is benzoylecgonine.[33] The Henry Ford Hospital emergency toxicology screen reflects that the Defendant's urine tested positive for cocaine metabolite with 300 ng per ml cutoff.[34] According to the federal drug testing guidelines, in order to detect cocaine in the urine, the initial test analyte is "cocaine metabolites" and the confirmatory test analyte is benzoylecgonine.[35] Therefore, because the Defendant had a positive urine drug test for cocaine metabolite, this is proof that she had ingested cocaine before the crash and had still had some amount of cocaine (or its derivative) in her system. Cocaine is processed through the body and partially extracted in urine as the major cocaine metabolite (benzoylecgonine), while the rest of the cocaine is metabolized in the liver and plasma producing ecgonine methyl ester (EME).[36]

Pure cocaine itself is almost never detected in urine because it is rapidly chemically broken down (or metabolized) in the kidneys and the liver before it can be excreted in urine. Cocaine metabolite does not naturally appear in someone's urine without cocaine ingestion.

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[32] "Metabolite." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/metabolite. Accessed 8 Jan. 2021.

[33] Critical Issues in Alcohol and Drugs of Abuse Testing (Second Edition), Editor Amitava Dasgupta, Academic Press 2019, p. 215.

[34] People's Exhibit 11, 7/20/2017, 160; see page 23a of Defendant-Appellant's Appendix.

[35] 73 FR 71858, Section 3.4.

[36] In addition, there are five minor metabolites produced in the body: norcocaine, *p*-hydroxycocaine, *m*-hydroxycocaine, *p*-hydroxybenzoylecgonine (pOHBE), and *m*-hydroxybenzoylecgonine. *Kolbrich EA, Barnes AJ, Gorelick DA, Boyd SJ, Cone EJ, Huestis MA (October 2006). "Major and minor metabolites of cocaine in human plasma following controlled subcutaneous cocaine administration". Journal of Analytical Toxicology, p.* 501–10.

Therefore, the customary way someone could be found guilty of having cocaine in their system through a urine test would be to find that the urine contains cocaine metabolite. That is what the standard laboratory drug test detects.

Statutory language is given the reasonable meaning that best accomplishes the purpose of the statute.[37] There are currently only two common methods to detect controlled substances in a person's system, by blood or by urine. The legislature was surely aware of that when they wrote the statute. For cocaine to appear as positive in the blood or the urine and be detectible by a drug test, it first must be ingested and processed through the body. The result will commonly be a cocaine metabolite. This is in direct contrast to intoxicating liquor, which the body cannot fully metabolize or digest, so a small amount of alcohol (or more precisely ethanol) will be expressed in the urine after ingestion.[38]

The Defendant argues that cocaine metabolite is not a controlled substance and, therefore, the Defendant could not be found guilty under MCL 257.625(8). Under the Defendant' interpretation of MCL 333.7214(a)(iv), only those people with undigested coca leaves in their system, which would not show up in a urine toxicology screen, could be found guilty under the statute. This is an absurd result. Obviously, if the cocaine has not been digested, it would have no pharmacological effect on the person, and could not be converted to a metabolite. There is no reasonable way to interpret the statute to assume that only people who had undigested coca leaves in their stomachs, which were undetectable through normal laboratory drug tests, could be found

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[37] *Frankenmuth Mutual Insurance Co v Marlette Homes, Inc.*, 456 Mich 511, 515 (1998).

[38] https://www.medicalnewstoday.com/articles/319942#how-does-the-body-process-alcohol.

guilty under a driving statute. A statute should be construed to avoid results that are manifestly inconsistent with legislative intent.[39]

B. *People v Feezel* is distinguishable on its facts.

The Defendant further argues that her theory regarding cocaine metabolites not being a violation of the statute is valid because of the holding in *People v Feezel*, which involved only marijuana, a different schedule drug listed under a different statute than cocaine.[40] Cocaine is specifically listed in MCL 333.7214(a)(iv), whereas the active ingredient in marijuana, THC, is listed in MCL 333.7212. "Cocaine" is defined in MCL 333.7214(a)(iv) as:

> Coca leaves and any salt, compound, derivative, or preparation thereof, which is chemically equivalent to or identical with any of those substances, except that the substances do not include decocainized coca leaves or extraction of coca ecgonine. The substances include cocaine, its salts, stereoisomers, and salts and stereoisomers when the existence of the salts, stereoisomers, and salts of stereoisomers is possible within the specific chemical designation.

People v Feezel pointed out that the legislature specifically made a definition of marijuana in the Public Health Code that was to be consistent with the applicable federal law, that being active THC, or delta carboxy tetrahydrocannabinol.[41] This definition of marijuana did not include 11-carboxy-THC, which was the substance found in defendant Feezel's system in that case. 11-carboxy-THC, although

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[39] *Detroit International Bridge Co v Commodities Export Co.*, 279 Mich App 662, 674 (2008).

[40] *People v Feezel*, 486 Mich 184 (2010).

[41] The purpose of banning marijuana was to ban the euphoric effects produced by THC. *People v Feezel*, 486 Mich 208, quoting *United States v Sanapaw*, 366 F 3d 492, 495 (CA 7, 2004), citing *United States v Walton*, 168 US App DC 305, 306 (1975).

related to marijuana, has no known pharmacological effect on the body and relates poorly, if at all, to an individual's level of THC-related impairment.[42]

The holding of *People v Feezel* is specific to 11-carboxy-THC in marijuana, and does not relate to all metabolites of cocaine, which is defined differently in MCL 333.7214(a)(iv). In contrast, no Michigan case has ever held that the presence of cocaine metabolite would not be at least circumstantial evidence of cocaine ingestion for purposes of MCL 257.625(8).

The holding of *People v Feezel*,[43] while seemingly applicable to this case, can be distinguished from the instant case in several readily accessible ways. The first being that cocaine and marijuana are two very different drugs in different schedules.[44] In *People v Feezel*, the Defendant was found to have only 11-carboxy-THC in his system, but the main psychoactive ingredient of marijuana is delta 9 tetrahydrocannabinol, which can also be easily detected in the blood by a standard drug screening test.[45] In addition, there are multiple parts of the marijuana plant that have absolutely no psychotropic effect on the body and, therefore, should never be considered a drug of abuse.[46] Also, marijuana use, as least in Michigan, is now legal, for both recreational

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[42] *People v Feezel*, 486 Mich 184, 208 (2010).
[43] *People v Feezel*, 486 Mich 184 (2010).
[44] Marijuana is described in Schedule 1, unless it is Medical Marijuana, as defined in MCL 333.26423, in which case it is Schedule 2, whereas cocaine is described in Schedule 2.
[45] NIDA. What is Marijuana?. National Institute on Drug Abuse website. https://www.drugabuse.gov/publications/research-reports/marijuana/what-marijuana. April 13, 2020 Accessed February 26, 2021.
[46] Hemp for example.

and medical use. Therefore, it is much like alcohol, where the level of intoxication is necessary to prosecute under the OUIL statute.

But there is zero tolerance for cocaine. There is no safe limit of cocaine ingestion. Cocaine ingestion is not legal under either state or federal law. The Michigan statute makes clear that any amount of cocaine or its derivative in the system of a driver can result in prosecution and conviction under MCL 257.625(8).

Moreover, the definition of cocaine as a schedule two drug in the Michigan Public Health Code includes: "coca leaves and any salt, compound, *derivative*, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances does not include decocainized coca leaves or extraction of coca leaves which extractions do not contain cocaine or ecgonine."[47] Therefore, the definition of cocaine contained in the Public Health Code would include cocaine metabolites, which are a naturally produced derivative of cocaine when it is ingested by the body.[48]

The presence of cocaine metabolites in the Defendant's urine at the cutoff detection level of 300 ng/ml meant that the jury could properly consider whether or not the Defendant had any amount of cocaine in her body when she operated the motor vehicle, went the wrong way down a one-way street, evaded the police, sped down Woodward Avenue, ran a red light, and smashed into the side of another car, causing the death of Mr. Sims and seriously injuring her passenger, Cassie Butler.

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[47] MCL 333.7214(a)(iv), emphasis supplied.

[48] Cocaine metabolites are the product of cocaine after it has been broken down in the body. *People v Hardy*, 188 Mich App 305, 307 fn 1 (1991).

Indeed, the only way cocaine could ever usually express its presence in urine would be as a metabolite.[49] Surely the legislature did not intend every driver who uses cocaine and then kills someone while driving to evade prosecution under the statute because the urine laboratory test shows "cocaine metabolite" instead of pure coca leaves. This would be an absurd result.

MCL 333.1111(1) provides that the Public Health Code "is intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." Federal law defines cocaine in much the same way as Michigan law:

> (17) The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> **(A)** Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.
>
> **(B)** Poppy straw and concentrate of poppy straw.
>
> **(C)** Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.
>
> **(D)** Cocaine, its salts, optical and geometric isomers, and salts of isomers.
>
> **(E)** Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

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[49] This is in contrast to the blood, where pure cocaine can sometimes appear in the blood, for example, in the event of cocaine overdose. See *United States v Ewing*, 749 Fed Appx 317 (2018).

> **(F)** Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).[50]

Therefore, since the federal definition of cocaine is sufficiently broad enough to include ecgonine, and its derivatives, which would also include the major metabolites of cocaine, benzoylecgonine (BE) and ecgonine methyl ester (EME), the federal definition is consistent with including cocaine metabolite as a method of showing the existence of cocaine in the body for purposes of the Michigan statute, MCL 257.625(8).

C. Other states' treatment of the issue is unpersuasive since they have different statutory language than MCL 257.625(8).

The Defendant points out several cases from other states, none of which are particularly applicable to the instant case. Indeed, they all involve statues that do not mirror Michigan's statute. Moreover, its questionable if this state should make its determinations on its own legislative statutes by relying on the interpretation of another state.[51]

The Defendant cites to the Arizona case, *Leon v Marner*.[52] That case involved the Arizona statue titled: "Driving or actual control of

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[50] 21 USC §802(17) (Drug Abuse Prevention and Control, Definitions).

[51] "But these [other states'] statutes do not require us to conform to other states' interpretations of statutes with different language when such interpretations would be contrary to the plain language of our own statute. Nor do they require us to adopt other states' erroneous interpretations of their own substantially similar statutes. If this were the case, we would simply do a "head count" of decisions from other states and follow the majority of states regardless of whether those decisions are correct." *People v Thompson*, 477 Mich 146, 166–67 (2007).

[52] *Leon v Marner*, 244 Ariz 465 (2018); Defendant-Appellants' supplemental brief, p. 8.

vehicle while under the influence of an illegal drug or its Metabolite, ARS 28-1381(A)(3)."[53] That case held that due to an earlier decision, *State v Harris*,[54] statutory construction required considering "the policy behind the statute and the evil it was designed to remedy," and avoiding absurd results, therefore, the prohibition of driving with the metabolite of an illegal drug found in A.R.S. § 28-1381(A)(3) had to be read to limit criminal activity to driving with a psychoactive metabolite.[55] The court ruled that since it was conceded by the state that the cocaine metabolite found to be present in the blood of the defendant, benzoylecgonine, had no pharmacological effect, therefore, the state had not shown that the defendant was "under the influence" for purposes of the statute.[56]

In contrast, the Michigan statute does not require that the driver be "under the influence" to be found in violation of MCL 257.625(8). Indeed, MCL 257.625(8) forbids the driver to have *any* amount of the controlled substance or its derivative in their body. Therefore, the level of impairment caused by the controlled substance, in this instance cocaine, is irrelevant.

The Defendant also relies on the Georgia Court of Appeals case, *Head v State*, for the proposition that all cocaine metabolites have no pharmacological effect on the driver.[57] But that is not the test in Michigan. The standard in Michigan is if any derivative of cocaine is found in the system of the driver the driver can be found guilty of MCL 257.625(8). The level or extent of impairment is immaterial. Moreover,

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[53] Id at 465.
[54] *State v Harris*, 234 Ariz 343 (2014).
[55] *State v Harris*, 234 Ariz. 343, 345-46 (2014); *Leon v Marner*, 244 Ariz. 465, 469-71 (2018).
[56] *Leon v Marner*, 244 Ariz 465, 471.
[57] Defendant-Appellant's supplemental brief, p. 9; *Head v State*, 303 Ga App 475 (2010).

a close inspection of the holding of *Head v State* leads to the conclusion that the conviction was proper in the instant case and the case is not actually supportive of the Defendant's position.[58]

In *Head v State*, the Defendant was convicted of two crimes, driving under the influence, OCGA 40-6-391(a)(2) and driving with a controlled substance in his blood, OCGA 40-6-391(a)(6). Although the court felt that there was insufficient evidence of impairment for conviction for driving under the influence in OCGA 40-6-391(a)(2), they let stand the defendant's conviction for driving with a controlled substance (cocaine metabolite) in his blood, under OCGA 40-6-391(a)(6).[59]

OCGA 40-6-391(a)(6) reads as follows: "subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or a controlled substance, as defined in Code section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood." Georgia Code section 16-13-21(4) defines controlled substance as a drug, substance, or immediate precursor in schedule 1 through V of Code section 16-13-25 through 16-13-29 and Schedules I through V of 21 C.F.R. Part 1308."[60]

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[58] *Id.*

[59] *Head v State*, 303 Ga App at 478.

[60] *Head v State* further relied on an earlier case, *Keenum v State*, 248 Ga App 474 (2001), in rejecting a challenge to the defendant's conviction under 391(a)(6). In *Keenum*, the Georgia Court of Appeals held that there was a legal difference between marijuana and cocaine such that convictions for cocaine being in the blood or urine could be upheld where there was no legal use of the substance, as opposed to marijuana, which the use of could be legally sanctioned. *Keenum v State*, 248 Ga App at 475.

The People's position is that the Georgia statute forbidding a control substance from being in the driver's blood or urine without regard to impairment, OCGA 40-6-391(a)(6), is most like MCL 257.625(8). Therefore, citation to the full holding of *Head v State* is actually supportive of the People's position that there was sufficient evidence to convict the Defendant because there was evidence of cocaine being in the Defendant's body.

The Defendant next cites to a case from Mississippi, *Irby v State*.[61] That case dealt with a Mississippi statute, DUI Maiming, that requires the following elements: (1) that the defendant negligently caused the death, disfigurement, or permanent disability or destruction of the tongue, eye, lip, nose, or any of the limb, organ, or member of another, (2) while operating a motor vehicle under the influence of alcohol or a controlled substance which has impaired such person's ability to operate the motor vehicle.[62] In that case, the defendant driver had the presence of cocaine metabolite, Xanax (alprazolam), and opiate in his blood.[63] Whereas, the toxicologist opined that cocaine leaves the system quickly, in this case she opined that the presence of Xanax and opiate in the driver's system could have impaired his driving and could have caused the crash.[64]

The first distinction between that case and the instant case is that the statutes involved are obviously very different. The Mississippi statute involved in *Irby,* Miss. Code Ann. 63-11-30(5) requires proof of impairment, whereas the Michigan statute, MCL 257.625(8), does not. Also, the real issue in *Irby* was whether or not there was consent to

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61 *Irby v State*, 49 So3d 94 (Miss. 2010).
62 Miss Code Ann. Sec. 63-11-30(5).
63 *Irby v State*, 49 So3d at 98.
64 *Irby v State*, 49 So 3d 94, 104 (2010).

search given to take the defendant's blood (and not the presence of cocaine metabolite for purposes of impairment), an issue not present in the instant case since there was a valid search warrant to get the Defendant's urine toxicology results.

Lastly, the Defendant presents a case from Iowa, *State v Newton*.[65] But this case does not support the Defendant's position. Iowa's operating while intoxicated statute proscribes operating a motor vehicle while any amount of a controlled substance is present in the person, as measured in the person's blood or urine.[66] The defendant was charged with OWI 2nd offense and child endangerment.[67] The facts of the case were that in the early morning hours of September 3, 2014, a deputy sheriff discovered a sports utility vehicle and a detached trailer stuck in a muddy ditch near the driveway of a home.[68] Newton was in the driver's seat of the vehicle with the engine running. Newton's seat was in a reclined position and the driver's door was open. Newton's eleven-year-old son was standing just outside the vehicle.[69]

Newton displayed signs of intoxication or impairment to the deputy sheriff. Newton appeared oblivious to his surroundings and was disoriented. Defendant Newton was also confused, even about the day of the week. He could only vaguely describe how the vehicle and trailer had entered the ditch. Another deputy arrived shortly after the first deputy performed several field sobriety tests. Newton failed some of the tests and passed others. A preliminary breath test did not detect the presence of alcohol in his body, but the horizontal gaze nystagmus test and other roadside testing indicated to the deputy that Newton was

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65 *State v Newton*, 929 NW2d 250 (Iowa, 2019).
66 Iowa Code Ann 321J.2(1)(c).
67 *State v Newton*, 929 NW2d 250, 257 (Iowa, 2019).
68 *Id.*
69 *Id.*

under the influence of a substance. Additionally, the deputy had previously been told by another law enforcement officer that Newton was known to use drugs.[70]

The deputies invoked implied-consent procedures.[71] A urine sample was eventually obtained from Newton and analyzed at the State Department of Criminal Investigation laboratory. The sample was found to contain benzodiazepine, opiates, cocaine metabolites, marijuana metabolites, and tricyclics. A confirmatory test validated those results. Newton was subsequently charged with OWI, second offense, and child endangerment. He filed a motion to suppress the urine sample, claiming the deputy invoked the implied-consent procedures without having reasonable grounds to believe Newton was operating the vehicle while under the influence. The district court found that Newton displayed visible signs of impairment at the scene to support reasonable grounds for invoking the implied-consent testing procedures. It therefore denied the defendant's motion.[72]

On appeal, defendant Newton claimed that his conviction for OWI for any amount of a controlled substance was violative of due process because the statute was vague and not rationally related to the purpose of the statute.[73] In ruling against the defendant, the court surmised that whereas it was possible that a person could theoretically be driving and not have any evidence of impairment, the likelihood of a person being stopped by the police and then having their blood or urine tested under the applicable statute did not exist. At least in the defendant's case, there was more than enough evidence, apart from the urine test itself,

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70 *State v Newton*, 929 NW2d 250, 252.
71 *Id.*
72 *State v Newton*, 929 NW2d 250, 252–53 (Iowa, 2019).
73 *Id* at 253.

to evidence the defendant's impairment at the time of his arrest. The defendant failed some field sobriety tests, seemed to be unaware of his surroundings, and failed the HGN test. Therefore, the court was unwilling to rule on a question that did not apply to the defendant and let stand his conviction for OWI based on the presence of cocaine metabolite in his urine.[74] Thus, this case does not support the Defendant's position.[75]

In contrast, there are other states that have found that the presence of cocaine metabolite after a vehicular crash can constitute a violation of the applicable driving while intoxicated statute.[76] For example, the Pennsylvania case of *Commonwealth v DiPanfilo* held that

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[74] *State v Newton*, 929 NW2d 250, 259 (Iowa, 2019).

[75] The People point out that in the instant case there were several circumstances that could lead to the suspicion of being under the influence, such as driving the wrong way down a one way street, evading the police, running a stop sign, speeding, and crashing into a car without braking.

[76] The Pennsylvania statute at issue in that case was in relevant part as follows:

> (d) **Controlled substances**. An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1) There is in the individual's blood any amount of a:
>
> (i) Schedule I controlled substance, as defined in ... The Controlled Substance, Drug, Device and Cosmetic Act;

(ii) Schedule II or Schedule III controlled substance, as defined in The Controlled Substance, Drug, Device and Cosmetic Act, which has not been medically prescribed for the individual; or

(iii) metabolite of a substance under subparagraph (i) or (ii).

75 Pa C S §3802(d).

the presence of cocaine metabolite and the circumstances of the crash were sufficient to find the defendant guilty of driving under the influence.[77] The Superior Court further concluded that expert testimony was not required to establish that the *DiPanfilo*'s impairment was due to his use of cocaine and/or opiates, because the intoxicating effects of cocaine and opiates, like the intoxicating effects of alcohol, are widely known and commonly understood.[78]

Similarly, the state of Illinois, in *People v Hasselbring*, held that evidence of benzoylecgoinine (a major metabolite of cocaine) in the defendant's urine was sufficient to prove the defendant's guilt beyond a reasonable doubt of aggravated driving under the influence of a controlled substance.[79] In that case, the defendant argued that the state of Illinois had failed to show that the benzoylecgonine was a controlled substance under the Illinois Controlled Substance Act (Act) (720 ILCS 570/100 *et seq.).*[80] In Illinois, to prove a defendant committed aggravated DUI, the state must first establish that he or she committed misdemeanor DUI in that he or she drove or was in actual physical control of a vehicle and there was "any amount of a drug, substance, or compound in [her] breath, blood, or urine resulting from the unlawful use or consumption of a controlled substance listed in the Act," and that the defendant was involved in a motor vehicle accident that resulted in the death of another and the violation was a proximate cause of the death.[81]

The *Hasselbring* court held that under the Illinois aggravated driving statute the word "substance" (resulting from the consumption of

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77 *Commonwealth v DiPanfilo*, 993 A 2d 1262 (Pa Super Ct, 2010).
78 *Id.* at 1267
79 *People v Hasselbring*, 21 NE 3d 762 (Ill. 2014).
80 *Id.*
81 625 ILCS 5/11-501(a)(6) (West 2014).

a controlled substance) could include a cocaine metabolite: "[T]hroughout the statute, the term 'substance' is not defined. In the absence of a definition, an unambiguous term must be given its plain and ordinary meaning. 'Substance' is defined as, *inter alia*, 'matter of particular or definite chemical constitution.' [Citation.] Benzoylecgonine can be seen to fit within this definition."[82]

Similarly, Indiana also holds that the presence of cocaine metabolite in the urine can be sufficient evidence to convict under their operating with a controlled substance statute.[83] *Bennett v State* held that the statutory offense of operating a vehicle with a controlled substance in the motorist's body resulting in death was not unconstitutionally vague and thus the statute did not violate due process.[84] The defendant was driving a delivery truck when he disregarded a traffic signal and collided with a pickup truck. The driver of the pickup truck was ejected from his vehicle and died at the scene. The police transported the defendant to the hospital where the defendant provided urine and blood samples. The urine sample was transported to a testing laboratory, American Medical Laboratories, and found to contain the metabolite for marijuana and the metabolite for cocaine.[85]

The defendant had argued that his conviction for operating a vehicle with a controlled substance in the body resulting in death was not supported because the word "body" in the statute meant that the level of the controlled substance could only be found in the defendant's blood, not urine.[86] The court rejected that analysis. The court pointed

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[82] *People v Hasselbring*, 21 NE3d 762, 774 (Ill App Ct, 2014).
[83] *Bennett v State*, 801 NE 2d 170 (Ind. Ct. App. 2003).
[84] *Id.*
[85] *Id.*
[86] Id at 175.

out that there is no acceptable level of cocaine to measure impairment. "There is no level of an illicit drug use that can be combined with driving a vehicle because the established lethal consequence is too great."[87] The court further held that a *per se* prohibition provides an effective deterrent to the practice of driving after the ingestion of a controlled substance.[88]

The same reasoning should apply in the instant case. There is sufficient proof in the record that the Defendant tested positive for having cocaine in her system at a medically significant level, above the cutoff level of 300 ng/ml, that is, in a sufficient quantity that the emergency toxicology urine test alerted the treating physician to the presence of cocaine in the Defendant's system because it could affect how the Defendant would be medically treated. This was not a test performed by police, it was performed by the hospital so that the Defendant could safely get life-saving medical treatment that she required. Thus, the drug test result was also highly probative of her having cocaine or its derivative in her system when she crashed into the victim's car at a high rate of speed and her conviction should stand.

D. Legislative history suggests that the Michigan legislature did intend for any presence of cocaine in the body while driving to be a violation.

The Defendant also makes the unsubstantiated claim that the Michigan Legislature did not intend to include the presence of cocaine metabolites in the urine as a method to demonstrate "any amount" of cocaine in the system.[89] The Defendant presents no legislative history

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[87] *Bennett v State*, 801 NE2d 170, 176 (Ind Ct App, 2003).
[88] *Id*.
[89] "Since the Legislature did not intent to include cocaine metabolites as a schedule I or II offense, the prosecutor failed to present sufficient

to substantiate this claim. On the contrary, the legislative history of MCL 257.625(8) suggests that the Legislature wanted to prohibit anyone with any presence of a controlled substance in their system from driving a motor vehicle on public streets. This is in part because cocaine ingestion results in residual impairment effects, such as irritability, agitation, and lack of awareness and alertness, and a cocaine user's functioning becomes depressed and slower, and judgement remains impaired long after the simulative effects of the drug have worn off.[90] Also, the state has an obvious compelling reason to prevent drugged driving due to public safety risks. The fact that MCL 257.625(8) does not mention the word "metabolite," does not indicate an intent by the Legislature to exclude it as a scientific method of indicating the presence of cocaine in the urine. A statute need not contain every possible synonym to be properly understood.

The legislative history of the amendment of MCL 257.625 to add subsection 8, which began as HB 4247 and became Public Act 61 of 2003, denotes that the purpose of the legislation was to prohibit a person from operating a vehicle with any amount of a controlled substance in his or her body.[91] It was referred to in the Senate Fiscal Analysis as the new "bodily presence offense."[92] It was also part of a bill that provided for lowering the BAC from .10 to .08 as the per se standard for drunk driving. The following year brought Public Act 62 of 2004, which added a reference to Section 625(8) in various licensing provisions that

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evidence to sustain the convictions as the presence of the cocaine metabolite alone cannot sustain the convictions." Defendant-Appellant's brief, p. 11.

[90] *Tanks v Greater Cleveland Regional Transit Authority*, 739 F Supp 1113, 1121 (ND Ohio, 1990).

[91] House Legislative Analysis Section Summary of HB 5120 dated 10-2-03.

[92] Senate Fiscal Agency Bill Analysis of HB 5120, dated 1-20-04.

referenced a violation of the drunk driving provisions. This evidences an intent by the legislature that a violation of MCL 257.625(8) does not require any evidence of impairment, intoxication, or influence; it is a per se offense.

Conclusion

Due to the important safety interests in preventing traffic fatalities, and due to the fact that cocaine is an illegal controlled substance and a serious drug of abuse, this Court should decline to extend the holding of *People v Feezel* far beyond its scope and deny leave to appeal.[93]

[93] *People v Feezel*, 486 Mich 184 (2010).

II.

Ineffective assistance of counsel requires two showings: that trial counsel's performance fell below an objective standard of reasonableness and that the serious mistake deprived the defendant of a fair trial. Here, there was no serious mistake made by trial counsel and the Defendant was not deprived of a fair trial since the applicable law forbids any amount of cocaine or its derivative from being in the system when driving and the Defendant had the presence of cocaine metabolite, a natural derivative of ingested cocaine, in her urine at the time of the crash. Therefore, the Defendant has not proven that she was provided ineffective assistance of counsel.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. Following a *Ginther*[94] hearing, an appellate court reviews the trial court's findings of fact for clear error, and reviews the trial court's conclusions of law *de novo*.[95] The standard of review for ineffective assistance of counsel claims is whether defense counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.[96] In *People v Pickens,*[97] the Michigan Supreme Court adopted the standard set forth in *Strickland v Washington*.[98] The following must be established in order to mandate reversal under a Sixth Amendment claim of ineffectiveness of counsel:

- First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

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94 *People v Ginther*, 390 Mich 436 (1973).
95 *People v Russell*, 297 Mich App 707, 715 (2012).
96 *People v Picken*s, 446 Mich 298 (1994).
97 *Id*.
98 *Strickland v Washingto*n, 466 US 668 (1984).

was not functioning as 'counsel' guaranteed defendant by the Sixth Amendment.

- Second, defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.[4]

Discussion

A. Trial counsel was not ineffective for failing to challenge the use of cocaine metabolites to establish the crime because the statute only requires that the defendant have any amount of a controlled substance or its derivative in the body, which the Defendant had.

A plain reading of the statute involved would lead to the rational conclusion that cocaine metabolite in the urine was sufficient evidence for purposes of having any amount of cocaine in the system at the time of the crash, therefore, trial counsel was not ineffective for failing to make the novel argument that the presence of cocaine metabolite in the Defendant's urine was somehow not the result of previously ingesting cocaine. The applicable statute provides as follows:

> MCL 257.625(4) A person, whether licensed or not, who operates a motor vehicle in violation of section (1), (3), or (8), and by the operation of that motor vehicle causes the death of another person is guilty of the crime as follows
>
> (a) Except as provided in subdivision (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $100,000.00 or both. The judgement of sentence may impose the sanctions permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall

> order the vehicle immobilization under section 904d in the judgement of sentence.
>
> …
>
> (8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking of vehicles, within this state if the person in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 721.4(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

In deciding whether trial counsel was ineffective the reviewing court must determine whether counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, and that this prejudiced the defense, i.e. counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[99] No Michigan case has ever held that the presence of cocaine metabolite in the urine of a driver would not be evidence of cocaine ingestion for purposes of MCL 257.625(8). Therefore, it could not be ineffective assistance of counsel for counsel not to argue something that has never been held to be the law. "[T]he Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not guarantee infallible counsel."[100]

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[99] *People v LeBlanc*, 465 Mich 575, 583 (2002), quoting *Strickland,* 466 US at 687.

[100] *People v Mitchell,* 454 Mich 145, 171 (1997).

When addressing claims of ineffective assistance of counsel, the court must indulge a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. A defendant must first prove that "counsel's performance fell below an objective standard of reasonableness under prevailing professional norms."[101] Ineffective assistance is to be judged by the professional norms at the time of the trial, not with the benefit of hindsight.

At least since the creation of MCL 257.625(8), there is no known Michigan case challenging the use of the presence of cocaine metabolite in the urine as not constituting evidence of the presence of cocaine in the body. Nor has any case extrapolated the holding of *People v Feezel,* which dealt only with marijuana, to include cocaine.[102] The Defendant's argument on appeal is, therefore, a novel concept, and it is not an obvious idea or inevitable conclusion that MCL 257.625(8) should be read to treat cocaine and marijuana synonymously when they are treated very differently in other laws.[103]

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[104] In addition, reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[105] Moreover, "the performance inquiry must be whether counsel's assistance was reasonable considering all of the

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[101] *People v Riley*, 468 Mich 135, 140 (2003).
[102] *People v Feezel*, 486 Mich 184 (2010).
[103] For example, the use and possession of up to 2.5 ounces of marijuana by adults ages 21 and older is now legal in Michigan. Michigan Taxation and Regulation of Marihuana Act, MCL 333.27951 et seq. But the possession of cocaine less than 25 grams is still a four-year felony. MCL 333.7403(2)(a)(iv).
[104] *Strickland*, at 688.
[105] *Id*. at 690.

circumstances."[106] Counsel is not ineffective for failing to advance a meritless or unsupported position.[107] In applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[108] Cases decided under the *Strickland/Pickens* test require the defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' "[109] The Defendant did not do that in this case, as was shown by the *Ginther* hearing.

Those strategic decisions based on the proper investigation of the applicable law will be given the benefit of the doubt.[110] The proper investigation of the applicable law at the time of the Defendant's trial in July of 2017 would have revealed that the trial attorney was correct in his estimation that the presence of cocaine metabolite in the urine of a driver who had crashed her car into another driver such that the crash caused the other driver to die and her passenger to be partially paralyzed was sufficient proof of the presence of any amount of cocaine or its derivative in the Defendant's body for purposes of MCL 257.625(8).

The position that trial counsel was ineffective for failing to advance a completely novel argument expects too much and essentially requires that trial counsel be psychic. It would be akin to requiring the argument at sentencing that the sentence guidelines were advisory before this Court's decision was made in *People v Lockridge*.[111] If an attorney did argue that the legislative sentence guidelines were merely advisory at sentencing it surely would have fallen on deaf ears by the

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106 *Id.* at 688.
107 *People v Hawkins*, 245 Mich App 439, 457 (2001).
108 *Id.* at 689.
109 *Strickland* at 689; *People v LeBlanc*, 465 Mich 575, 578 (2002).
110 *Strickland*, 466 US at 668.
111 *People v Lockridge*, 498 Mich 358 (2015).

trial court before this Court's pronouncement on the subject and it certainly could not have been considered ineffective assistance of counsel to not argue that the sentence guidelines were advisory before this Court decided that they were. Much the same here, where no case or court in Michigan has ever held that the presence of cocaine metabolites in the driver's urine is not evidence of having ingested cocaine. Moreover, the trial judge stated in his opinion at the *Ginther* hearing that the argument that cocaine metabolite was not a controlled substance for purposes of MCL 257.625(8) would not have been an argument he would have entertained.[112] Thus, the argument would have been a futile gesture. The law does not require that trial counsel make frivolous arguments or make futile motions.[113]

The Defendant also claims that trial counsel was ineffective for failing to object to the prosecutor's argument that the Defendant was intoxicated at the time of the crash.[114] But this argument is beyond the scope of this Court's order, which focused only on whether trial counsel was ineffective for failing to challenge the use of cocaine metabolite to establish intoxication, not any potential prosecutorial error. Moreover, there is an obvious strategic reason why defense counsel would not object to such an argument since evidence of impairment or intoxication is irrelevant to a charge brought under MCL 257.625(8). Objecting to the argument would have likely highlighted this fact for the jury, which would not have been helpful to the Defendant's case.

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[112] 8/24/2018, 107.

[113] "Counsel is not ineffective for failing to advance a meritless position or make a futile motion." *People v Henry (After Remand)*, 305 Mich App 127, 141 (2014); *People v Head*, 323 Mich App 526, 539 (2018).

[114] Defendant-Appellant's supplemental brief, p. 16-17.

Conclusion

Pure cocaine or its derivative does not naturally appear in someone's urine and it can be used as evidence that the Defendant had the presence of cocaine or its derivative in her system at the time of the crash. Therefore, there is no merit to the Defendant's argument that testimony related to cocaine metabolites was in any way objectionable or that trial counsel was ineffective for failing to argue a theory that the Defendant had cocaine metabolites, as opposed to pure cocaine, in her system.

RELIEF REQUESTED

THEREFORE, the People respectfully request that this Honorable Court deny leave to appeal in this matter or in the alternative remand the case for further fact finding.

Respectfully submitted,

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Dated: March 1, 2021

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 9445 countable words.

/s/ *Deborah K. Blair*

DEBORAH K. BLAIR (P 49663)
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The People hereby stipulate to the use of the Defendant-Appellant's Appendix in this case. MCR 7.312(B)(1).