

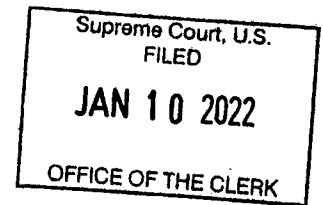
21-7059

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Timothy G. Muller, pro se — PETITIONER
(Your Name)

vs.

Michigan, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Michigan Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Timothy George Muller
(Your Name)

(LRF) 2500 South Sheridan Drive
(Address)

Muskegon Heights, MI 49444
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

I. IS MR. MULLER ENTITLED TO WITHDRAW HIS PLEA AND HAVE HIS CONVICTION FOR DELIVERY OF CONTROLLED SUBSTANCE CAUSING DEATH VACATED, BECAUSE BARRY COUNTY WAS NOT THE PROPER VENUE TO BRING THE CHARGES, WHERE THE DELIVERY ALLEGEDLY OCCURRED IN KENT COUNTY AND THE DRUGS WERE INGESTED BY THE DECEDENT IN KENT COUNTY.

Petitioner answers, "Yes".

II. WAS THIS ISSUE NOT WAIVED BY MR. MULLER'S NO CONTEST PLEA WHERE TRIAL COUNSEL'S FAILURE TO RAISE IT UNDERMINED THE VALIDITY OF THE PLEA ITSELF.

Petitioner answers, "Yes".

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	18

INDEX TO APPENDICES

APPENDIX A	Michigan Court of Appeals Opinion, May 20, 2021
APPENDIX B	Michigan Supreme Court Order, denying leave, Nov. 2, 2021
APPENDIX C	Presentence Investigation Report (PSIR), excerpt.
APPENDIX D	Preliminary Examination Transcript, Nov. 30, 2016, excerpt.
APPENDIX E	People v. McBurreus, 504 Mich 308 (2019)
APPENDIX F	Prosecution/Appellee Brief, filed on appeal by leave.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Barker v. Wingo</i> , 407 US 514 (1972) _____	15
<i>Douglas v. California</i> , 372 US 353 (1963) _____	13
<i>Evitts v. Lucey</i> , 469 US 387 (1985) _____	14
<i>Gideon v. Wainwright</i> , 372 US 335 (1963) _____	13
<i>Miranda v. Arizona</i> , 384 US 436 (1966) _____	11
<i>Olmstead v. United States</i> , 277 US 438 (1928) _____	17
<i>People v. Carines</i> , 466 Mich 750; 597 NW2d 130 (1999) _____	11
<i>People v. McBurrows</i> , 504 Mich 308; 934 NW2d 748 (2019) _____	9, 10, 13, 16, 17
<i>People v. Muller</i> , 2021 Mich App LEXIS 3168 _____	11, 12, 16
<i>People v. Riggs</i> , 223 Mich App 662; 568 NW2d 101 (1997) _____	10, 17
<i>People v. Watson</i> , 245 Mich App 572; 629 NW2d 411 (2001) _____	10, 17
<i>Pouncy v. Palmer</i> , 846 F.3d 144 (6th Cir. 2017) _____	15
<i>Strickland v. Washington</i> , 466 US 668 (1984) _____	13, 14
<i>Teague v. Lane</i> , 489 US 288 (1984) _____	16
<i>United States v. Cabrales</i> , 524 US 1 (1998) _____	9
<i>United States v. Cronin</i> , 466 US 648 (1984) _____	15

United States v. Olano, 507 US 725 (1993) _____	11
United States v. Rodriguez-Moreno, 526 US 275 (1999) _____	9, 17

STATUTES AND RULES

Mich. Court Rule 6.302 _____	12
Mich. Comp. Law 750.317a _____	13
Mich. Comp. Law 762.5 _____	13, 16
Mich. Comp. Law 762.8 _____	17

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was 11/02/2021.
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district within the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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

STATEMENT OF THE CASE

BACKGROUND

On October 6, 2017, Petitioner, Timothy G. Muller, entered into a plea of nolo-contendere to the charge of delivery of a controlled substance causing death, as a habitual second offender.

In keeping with its agreement, on November 16, 2017, the trial court sentenced Petitioner to a 10-year minimum term of imprisonment.

Although, under the charged statute, the crime here is delivery, the Felony Information in this case does not specify the alleged location as to where the crime took place. Contained within the Presentence Investigation Report (PSIR), however, is the Agent's Description of the Offense, which indicates that the transaction occurred in Kent County. According to the probation agent, text messages between Petitioner and the decedent, Ms. Miller, the night before she was found dead from a heroin overdose in Barry County, indicate that Ms. Miller arranged to purchase \$100.00 worth of heroin from Petitioner. According to those text messages, the meeting place for the purchase was initially Barry County. But later, Ms.

Miller changed the meeting place to Kent County, where she would make the purchase and use the "rig" to inject the heroin. (See PSIR, CFJ-284, p.2-6). (See Appendix C).

PRELIMINARY EXAMINATION

During the preliminary examination, a police officer testified to the fact that he questioned Petitioner at the Kent County Jail, where he was being held on other charges, about three months after Ms. Miller's death (Prelim, 11/30/16, p. 11-14). According to the officer, Petitioner first denied knowing Ms. Miller, but, when pressed, he admitted to serving as the middle-man in the delivery of heroin on May 14, 2016. Id. 11-12.

It should also be noted that, in order to use Petitioner's statements, the state must first meet the burden of corpus delicti; over such objection the case was bound over. Id. 27. Furthermore, the Court of Appeals stated in its opinion that neither Petitioner nor his trial counsel were even aware of a potential challenge as to venue; yet the magistrate stated that he found by preponderance that proper venue

had been established. *Id.*. Thus, strongly indicating that the state was, in fact, aware of the issue. (See Appendix D).

POST-CONVICTION

At a post-sentencing motion for plea withdraw hearing, neither the trial court nor prosecution disagreed with the fact that the delivery occurred in Kent County (PJM, 10/8/19, p. 1-20). In fact, the trial judge described the crime by stating Petitioner "supplied the deceased with the heroin, and gave it to her or sold it to her, actually, in Kent County. The deceased then ingested the substance and returned to Barry County where she died. *Id.* 20.

Note: There is no nexus in the package Petitioner gave Ms. Miller and her death.

COURT OF APPEALS

In its opinion, issued May 20, 2021, the Court of Appeals affirmed Petitioner's conviction and sentence. This opinion is what Petitioner now challenges in this Court. (See Appendix A).

The rationale of the Court of Appeals is flawed in many respects, beginning with waiver. The said appellate court contends that, because Petitioner did not object to the venue at the time of the plea, the matter has been waived. Further, it states, "[+]here is nothing on the record... to indicate that [Petitioner's] lawyer was aware that there was a potential challenge to venue." Therefore, counsel's performance was not deficient. And, because Petitioner's "venue argument is dependant upon our Supreme Court's decision in *McBurrows*¹, which was not decided until after [Petitioner] pleaded no contest in this case," counsel cannot be "deemed ineffective for failing to raise a novel issue." *People v. Timothy George Muller*, unpublished per curiam, issued May 20, 2021 (351280). (See Appendix E).

MICHIGAN SUPREME COURT

Petitioner filed a timely application for leave to appeal in the Mich. Supreme Court, where it was denied, Nov. 2, 2021. (See Appendix B).

¹ *People v. McBurrows*, 504 Mich 308; 934 NW2d 748 (2019).

REASONS FOR GRANTING THE PETITION

On appeal, appointed appellate counsel filed two issues:

- I. MR. MULLER IS ENTITLED TO WITHDRAW HIS PLEA AND HAVE HIS CONVICTION FOR DELIVERY OF CONTROLLED SUBSTANCE CAUSING DEATH VACATED; BECAUSE BARRY COUNTY WAS NOT THE PROPER VENUE TO BRING THE CHARGES. THE DELIVERY ALLEGEDLY OCCURRED IN KENT COUNTY AND THE DECEDENT INGESTED THE DRUGS IN KENT COUNTY.
- II. THIS ISSUE WAS NOT WAIVED BY MR. MULLER'S NO CONTEST PLEA AS THE FAILURE TO RAISE IT UNDERMINED THE VALIDITY OF THE PLEA.

To avoid being repetitive, Petitioner will address the Michigan Court of Appeals opinion, pertaining to both issues, as follows:

ISSUE PRESERVATION

Appellate counsel preserved this issue through a motion for plea withdraw and to vacate the conviction timely filed in the trial court; where it was denied on its merits, October 8, 2020.

DISCUSSION

Brought into question here is jurisdiction, venue; more specifically, locus delicti, the place of the wrong-doing. This Court has held that the "locus delicti [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it," by first "identify[ing] the conduct constituting the offense (the nature of the crime)" and then by discern[ing] the location of the commission of the criminal acts". United States v. Rodriguez-Moreno, 526 US 275, 279; 119 S.Ct. 1239; 143 L.Ed 2d 388 (1999), quoting United States v. Cabrales, 524 US 1, 6-7; 118 S.Ct. 1772; 141 L.Ed 2d 1 (1998).

Here, Petitioner was charged with delivery of a controlled substance causing death, as a habitual second offender. The Michigan Supreme Court held that, under the statute charged, locus delicti is the place where the drugs were delivered rather than where the resulting death was felt. See People v. McBurrows, 504 Mich 308; 934 NW2d 748 (2019).

The Court of Appeals is bound by its own published opinions made on or after November 1, 1990², as well as the holding of both state and federal Supreme Courts. See, eg, People v. Riggs, 223 Mich App 662, 675; 568 NW2d 101 (1997). Therefore, there are several flaws found in the Court of Appeals opinion upholding Petitioner's conviction by plea and subsequent sentence. Besides the fact all contracts made in a court without jurisdiction are null, such flaws include waiver, ineffective assistance of counsel, and appellate counsel's reliance upon McBurrows as "novel".

a. WAIVER OF CONSTITUTIONAL RIGHTS

In its own opinion, the Court of Appeals first correctly states that waiver is defined as "the intentional relinquishment or abandonment of a known right." Generally, an unconditional plea of guilt or no contest waives all "nonjurisdictional" defects in the proceedings. Therefore, after pleading no contest, a defendant "may raise on appeal only those defenses or rights which would preclude the

² People v. Watson, 245 Mich App 572, 597; 629 NW2d 411 (2001).

state from obtaining a valid conviction against the defendant." People v. Timothy George Muller, unpublished per curiam, issued May 20, 2021 (Docket No. 351280); 2021 Mich App LEXIS 3168, at 3-4. (internal citations omitted).

Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." United States v. Olano, 507 US 725, 733; 113 S.Ct. 1770; 123 L.Ed 2d 508 (1993), as cited in People v. Carines, 460 Mich 750, 762-63; 597 NW2d 130 (1999). Likewise, in Miranda, this Court held that it is not enough to merely inform an accused of his rights, he must also be informed of the consequences if he were to relinquish those rights in order to knowingly and intelligently waive such rights. Miranda v. Arizona, 384 US 436, 469; 86 S.Ct. 1602; 16 L.Ed 2d 694 (1966) ("This warning is needed in order to make him aware not only of the privilege, but also the consequences of forgoing it....").

Here, Petitioner did not know of this issue, and therefore could not by definition waive it. But the Court of Appeals opinion gets

skewed where it continues by stating,

" On the other hand, where the defense or right asserted by defendant relates solely to the state to prove defendant's factual guilt, it is subsumed by defendant's guilty plea. Stated differently, a no contest plea waives a defendant's right to challenge the sufficiency of the evidence because that defense goes only to the state's burden to show factual guilt and does not implicate the authority of the state to bring the defendant to trial. Venue does not relate to a state's authority to bring a defendant to trial. Rather, it is well established that venue is part of every criminal prosecution and must be proven by prosecution beyond a reasonable doubt. As a result, venue is a waivable issue, and, by pleading no contest, [Petitioner] waived his right to object to venue. Further, because [Petitioner's] waiver extinguished the error, there is nothing for [the appellate court] to review." [Muller, 2021 Mich App at 4].

Here, Petitioner contends that, like any other contract, he must be made aware of every clause, i.e., which rights he is specifically relinquishing. While entering a plea, the only waiver to "reasonable doubt" is to that of guilt - not venue. See Mich. Court Rule (MCR) 6.302 (B)(3)(c). But, again, without jurisdiction the contract is void.

Further, in its brief, prosecution relies wholly on Mich. Comp. Law (MCL) 762.5; a general provision for venue which the Michigan Supreme Court specifically held does not apply under the statute Petitioner was charged, MCL 750.317a. See McBurrows, 504 Mich at 327. Thus, prosecution cannot fulfill its burden beyond reasonable doubt, and must fail. (See Appendix F).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law'...."

U.S. Const. Am. VI

b. INEFFECTIVE ASSISTANCE OF COUNSEL

Through the post civil-war Fourteenth Amendment, Petitioner has the Sixth Amendment right to the assistance of counsel at both trial proceedings and on direct appeals; and such assistance must be effective. See, eg, Gideon v. Wainwright, 372 US 335 (1963); Douglas v. California, 372 US 353 (1963); Strickland v. Washington,

466 US 668 (1984); Ewitts v. Lucey, 469 US 387 (1985)

Here, in both Kent and Barry County, Petitioner expressed discontent with appointed counsel. After several replacements, both trial courts refused to grant any further replacement of counsel. The reasoning was that counsel of choice does not give a defendant the right to specifically choose his counsel. Though Petitioner agrees that he has no right to request specific counsel, he contends that the state and federal constitutions guarantee the "effective" assistance of counsel - no matter how many attorneys the court must go through to find such assistance. See Strickland, supra.

Furthermore, with counsel appointed in both said counties, Petitioner was transported from Kent County, where he was being detained on other charges, to Barry County for these proceedings. So, not only was he sent from the correct venue to the wrong venue, his Sixth Amendment right to a speedy trial in Kent County was violated because of it - a right Michigan also deems waived if not known to assert. A right deemed "fundamental", and therefore Petitioner's Fourteenth Amendment right to due process is implicated.

See Barker v. Wingo, 407 US 514; 92 S.Ct 2182; 33 L.Ed 2d 101 (1972).

Besides all of this, the fact that the judge in Barry County told each of Petitioner's appointed counsel to convey to him that if he took the matter to trial and lost he would be sentenced to a minimum of 20 years imprisonment. So, no attorney wanted to take the matter to trial, and Petitioner does not know enough of the law to represent himself. Thus, he had no choice but to enter into a plea. However, it is clearly established law that the choice between unprepared counsel and self-representation is no choice at all. See Pouncy v. Palmer, 846 F.3d 144 (6th Cir.2017). This brings serious questions as to objective standards of professional norms, et cetera. And prejudice must be presumed where counsel refuses to submit prosecution's case to "meaningful adversarial testing". See United States v. Cronin, 466 US 648, 656; 104 S.Ct 2039; 80 L.Ed 2d 657 (1984). But Michigan will not acknowledge this Court's holding in Cronin. Instead, the state places all burdens of proof upon defendants while excusing the deficiencies of its courts, prosecution and counsel alike. To further demonstrate this fact, the Court of

Appeals further stated in its opinion that "there is nothing on record ... to indicate that [Petitioner's] lawyer was aware that there was a potential challenge to venue," Muller, 2021 Mich App at 6; and that "our Supreme Court's decision in McBurrows" is "novel." Id.

There were two appointed attorneys, who combined were not aware of the venue issue. Which is to say they were unaware of the statute under which their client was charged. Hence the question of what type of defense could have been prepared.

C. PEOPLE v. MCBURROWS.

In Teague, this Court held that the retroactive application of law would hinge on whether or not it was "novel." Teague v. Lane, 489 US 288; 109 S.Ct. 1060; 103 L.Ed. 2d 334 (1984).

Here, in McBurrows, the Michigan Supreme Court did not create a new rule; rather, it delineated the history of the state constitution, legislative intent, and the application of general rules of venue to the statute under which Petitioner was charged. After which, the court held that general provisions to venue, specifically, MCL 762.5

shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes the law breaker, it breeds contempt for law)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Timothy J. Muller

Date: January 10th 2022