IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Sup. Ct. No. 2020-0866
	)	
Plaintiff-Appellee,	)	Ct. App. No. 13-19-01
	)	
v.	)	On Appeal from the Seneca County
	)	Court of Appeals, Third Appellate
KELLY A. FOREMAN,	)	District
	)	
Defendant-Appellant.	)	

BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE, STATE OF OHIO

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INTRODUCTION

This is a possession case. And while the drugs in this case, primarily cocaine, were possessed in a somewhat atypical vessel, it does not change the fact that Kelly Foreman possessed those drugs in Seneca County—particularly at Tiffin Mercy Hospital.

The law surrounding this case—that of venue and possession—is well-settled statewide. What is novel here is how the drugs in this case were possessed in Seneca County; although, the holding that an individual can be convicted of drug possession, traditionally cocaine possession, where that individual tests positive for having cocaine metabolites in his or her system after a blood test or a urine screen is far from unheard of. *State v. Moyar*, 3rd Dist. Auglaize No. 2-06-10, 2006-Ohio-5974, ¶ 5, 13-17; *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2-*3; *State v. McGowan*, 8th Dist. Cuyahoga No. 63491 (Aug. 12, 1993), at *1-*2; *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993); *State v. Napper*, 3rd Dist. Marion No. 9-91-11, 1991 WL 256521 (Nov. 27, 1991), at *3; *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991). The fact that Foreman possessed cocaine metabolite in her and her newborn's umbilical-cord tissue as well as in her newborn's urine and meconium was a direct result of Foreman using cocaine shortly before she gave birth to her son. *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 2. Foreman, also, admitted to a caseworker from Seneca County Job and Family Services that she used cocaine repeatedly during her pregnancy, including in the days before her son's birth, which the location of the cocaine metabolite in this case illustrates. *Id.*, at ¶ 12.

Foreman, thus, possessed cocaine—in its metabolite form—in Seneca County when she gave birth to her son. So, in that regard, she satisfied the standard for a conviction under R.C. 2925.11: her and her baby's umbilical-cord tissue as well as her baby's urine and meconium

contained cocaine metabolite, and she admitted to using cocaine shortly before her son's birth. *See e.g., State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993). As a result, venue for Foreman's drug possession prosecution exits in Seneca County because that is the location where her and her baby's umbilical-cord tissue as well as her baby's urine and meconium tested positive for a substantial amount of cocaine metabolite, which is in-line with what appellate courts statewide have consistently held. *See State v. Moyar*, 3rd Dist. Auglaize No. 2-06-10, 2006-Ohio-5974, ¶ 5, 13-17; *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2-*3; *State v. McGowan*, 8th Dist. Cuyahoga No. 63491 (Aug. 12, 1993), at *1-*2; *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993); *State v. Napper*, 3rd Dist. Marion No. 9-91-11, 1991 WL 256521 (Nov. 27, 1991), at *3; *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991).

While it is unfortunate for a host of reasons that this case arose from Foreman's son's drug withdrawal in the hours following his birth, it does not change the reality that Foreman possessed cocaine in it metabolite form in Seneca County, as the tissue from her and her son's umbilical-cord illustrated. The same holds true for her son's urine and meconium, which she had exclusive control of—both literally and figuratively—up until his birth. It does not stretch credulity to surmise that Foreman's cocaine use in the days leading up to the birth of her son caused for cocaine in its metabolite form to be found where it was.

This Court should hold that venue was proper in Seneca County in this case based upon the situs of the cocaine metabolite, Foreman's presence in Seneca County at the time of the discovery of the cocaine metabolite, and her subsequent confessions to cocaine use—including in the days leading up to the birth of her son. The Third District's decision should, therefore, be affirmed on the basis of venue.

STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private non-profit membership organization that was founded for the benefit of the 88 county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to. It reads: "to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members."

And it is in the furtherance of justice to guarantee that the laws of the State of Ohio are faithfully executed. In that light, if Foreman's restriction of venue in drug possession cases is adopted by this Court, it would contravene the precedent established by appellate courts statewide stretching back thirty years. It would also create an unnecessary diminution of the ability to prosecute drug possession cases, particularly cocaine possession cases. In that regard, it would hamper the ability of the courts to mandate drug treatment for those individuals who are putting both their lives as well as the lives of their loved-ones in jeopardy by their actions.

The Third District Court of Appeals got it right when it found that Foreman's drug possession conviction was based upon sufficient evidence—including that venue existed for her prosecution in Seneca County. *See generally State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.). That holding, furthermore, is consistent with well-established precedent. *See e.g.*, *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2-*3; *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993); *State v. Napper*, 3rd Dist. Marion No. 9-91-11, 1991 WL 256521 (Nov. 27, 1991), at *3; *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991). This Court should endorse those holdings.

STATEMENT OF THE CASE & FACTS

The facts of this case are largely uncontested. In that regard, the Third District highlighted the facts, both procedural and substantive, that are pertinent to this appeal:

> Foreman gave birth to J.B. on March 15, 2018. (Nov. 26, 2018 Tr. at 10). After J.B. exhibited symptoms of neonatal-abstinence syndrome, he was tested for the presence of illegal substances. (Id. at 12-13). J.B.'s toxicology report revealed the presence of cocaine in his urine, cocaine in the umbilical-cord tissue, and cocaine, marijuana, amphetamines, and buprenorphine in his meconium. (Id. at 15). On July 25, 2018, the Seneca County Grand Jury indicted Foreman on one count of possession of cocaine in violation of R.C. 2925.11(A), (C)(4)(a), a fifth-degree felony. (Doc. No. 1). On July 27, 2018, Foreman appeared for arraignment and entered a plea of not guilty. (Doc. No. 6).
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> The case proceeded to a bench trial on November 26, 2018. (Nov. 26, 2018 Tr. at 1).
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> ***
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> At trial, the State presented the testimony of Dr. Christian Meade ("Dr. Meade"), a general pediatrician at Tiffin Mercy Hospital, who treated J.B. after his birth. (Id. at 10). Dr. Meade identified State's Exhibit 1 as a copy of J.B.'s toxicology-screening results. (Id. at 14); (Doc. No. 1). Dr. Meade testified that the results of J.B.'s toxicology-screening reflect that (as relevant to this case)

cocaine was discovered in J.B.'s umbilical cord, urine, and meconium. (Id. at 15-16). Dr. Meade further testified that the "[m]econium is the * * * first stool that a newborn passes. It's * * * retained by the fetus and accumulates substances for * * * several months, usually the second or third trimester, so it's more or less reflective of what the baby has been exposed to in the second or third trimester." (Id. at 16). Dr. Meade clarified that a fetus accumulates the substances "[t]hrough the placenta from the mother" and testified State's Exhibit 1 further reflects that "[d]etection of drugs in umbilical cord tissue is intended to reflect maternal drug use during pregnancy." (Id.); (State's Ex. 1).

Next, Megen Steyer ("Steyer"), a protective-services caseworker for Seneca County Job and Family Services, testified that she initiated an investigation after she was notified that J.B. was "born with illegal substances in [his] system." (Id. at 20). As part of her investigation, Steyer interviewed Foreman during the time that she was a patient at the hospital after giving birth to J.B. (Id. at 22). According to Steyer, Foreman reported the following: (1) "that she used cocaine 6 to 12 times throughout her pregnancy"; (2) "that she used every two to three weeks during her pregnancy"; (3) "that she used a week and a half to two weeks" prior to J.B.'s birth; (4) "that her fiancé did not know that she was using the cocaine as she

> would use it while he was at work"; (5) "that she never used it in front of her children" and (6) "that she did not use it in her home in Green Springs." (Id. at 22-23). Through her investigation, Steyer learned that Foreman resided in Green Springs, Seneca County, Ohio with her fiancé, Matthew Bucklew ("Bucklew"). (Id. at 21-25). Bucklew's "drug screen was positive for cocaine and THC"; however, Foreman refused a drug test from Steyer. (Id. at 23-24).
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> At the conclusion of all evidence, the trial court found Foreman guilty of the count of the indictment. (Doc. No. 24). On January 17, 2019, the trial court sentenced Foreman to three years of community-control sanctions. (Doc. No. 25).
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> *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 2-3, 11-12.

Foreman appealed her conviction on sufficiency grounds, which she lost. *See generally State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.). Foreman then sought the jurisdiction of this Court on July 16, 2020. This Court granted jurisdiction on September 29, 2020 on Foreman's proposition of law. The accepted proposition of law reads as follows: "Because a conviction for drug possession requires the state to prove that an offender 'ha[d] control over a thing or substance,' the mere presence of drug metabolites in a defendant's body, without more, does not suffice to establish venue in the charging county."

ARGUMENT

***Amicus Curiae*'s Proposition of Law:** Venue in drug possession cases, specifically those based upon the defendant's possession of cocaine in its metabolite form, is proper in the county where the blood or urine was collected.

Foreman advocates that this Court interpret both R.C. 2901.12, Ohio's venue statute, and R.C. 2925.01(K), the definition of possession as used in drug cases, in a much more narrow and restrictive way to eliminate prosecutions for drug possession cases where the drug possessed is cocaine in its metabolite form. That should not occur.

As stated above, Ohio appellate courts for the past thirty years have been uniform in sustaining convictions on both sufficiency and manifest weight grounds where the drug possessed by the defendant was cocaine in its metabolite form. Similarly, those cases have found venue to exist in any number of jurisdictions, including the jurisdiction in which the defendant's blood or urine sample was collected. *See e.g.*, *See State v. Moyar*, 3rd Dist. Auglaize No. 2-06-10, 2006-Ohio-5974, ¶ 5, 13-17; *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2-*3; *State v. McGowan*, 8th Dist. Cuyahoga No. 63491 (Aug. 12, 1993), at *1-*2; *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993); *State v. Napper*, 3rd Dist. Marion No. 9-91-11, 1991 WL 256521 (Nov. 27, 1991), at *3; *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991). The Third District Court of Appeals, here, followed that well-established precedent. *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 9-19. This Court should adopt that long-held precedent as well and affirm the holding of the Third District Court of Appeals in this case.

As it relates to venue, this Court held the following in *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 19-20:

The Ohio Constitution, Article I, Section 10 provides an accused the right to "a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." We have stated, "Section 10, Article I of the Ohio Constitution fixes venue, or the proper place to try a criminal matter * * *." *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983). We have also stated, "A conviction may not be had in a criminal case where the proof fails to show that the crime alleged in the indictment occurred in the county where the indictment was returned." *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947), paragraph three of the syllabus. We have also stated that "it is not essential that the venue of the crime be proven in express terms, provided it be established by all the facts and circumstances in the case, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment." *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907), paragraph one of the syllabus.

Under Article I, Section 10 and R.C. 2901.12, evidence of proper venue must be presented in order to sustain a conviction for an offense. *Headley* at 477, 453 N.E.2d 716, citing *State v. Draggo*, 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 (1981); *State v. Gribble*, 24 Ohio St.2d 85, 263 N.E.2d 904 (1970); *Nevius*, 147 Ohio St. 263, 71 N.E.2d 258.

That holding remains the standard for determining venue.

As it relates to how venue is proven by the State, the "standard to establish venue is whether 'appellant has significant nexus' with the county of venue." *State v. Hackworth*, 80 Ohio App.3d 362, 366, 609 N.E.2d 228 (6th Dist. 1992), citing to *State v. Draggo*, 65 Ohio St.2d 88, 92, 418 N.E.2d 1343, 19 O.O. 3d 294 (1981). In fact, "venue [is permitted] to be established by the totality of facts and circumstances of the case." *Toledo v. Taberner*, 61 Ohio App.3d 791, 793, 573 N.E.2d 1173 (6th Dist. 1989), citing *State v. Headley*, 6 Ohio St.3d 475, 477, 453 NE.2d 716, 6 O.B.R. 526 (1983); *State v. Gribble*, 24 Ohio St.2d 85, 89–90, 263 N.E.2d 904, 53 O.O.2d 222 (1970); and *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907), at paragraph one of the syllabus. More than that, "[t]he state may prove venue by either direct or circumstantial evidence under a totality of the circumstances standard." *State v. Wyatt*, 6th Dist. Wood No. WD-04-085, 2005-Ohio-5743, ¶ 11, citing *State v. Headley*, 6 Ohio St.3d 475, 477, 453 NE.2d 716, 6 O.B.R. 526 (1983). And an "'appellate court may take notice of jurisdictional limits.' *State v. Licciardi*, 18 Ohio App. 118 ([6th Dist.] 1924). This occurs most frequently for venue purposes. *State v. Giles*, 322 N.E.2d 362 (Ohio App. 1974)." *State v. Burkhalter*, 6th Dist. Lucas No. L-05-1111, 2006-Ohio-1623, ¶ 17. It should also be noted that this Court cemented the "any element" requirement to establishing venue in *State v. Draggo*, 65 Ohio St.2d 88, 89-92, 418 N.E.2d 1343, 19 O.O.3d 294 (1981). Finally, "[t]he trial court has broad discretion to determine the facts which would establish venue." *Toledo v. Taberner*, 61 Ohio App.3d 791, 793, 573 N.E.2d 1173 (6th Dist. 1989). Venue, in that regard, was illustrated by the facts of this case.

Statutorily speaking, in light of the facts here as well as theoretical arguments raised by both the dissent and by opposing counsel**,** this case turns primarily on four aspects of Ohio's venue statute, R.C. 2901.12:

(A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed.

* * *

(F) When an offense is considered to have been committed in this state while the offender was out of this state, and the jurisdiction in this state in which the offense or any material element of the offense was committed is not reasonably ascertainable, the offender may be tried in any jurisdiction in which the offense or element reasonably could have been committed.

(G) When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any of those jurisdictions.

(H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:

(1) The offenses involved the same victim, or victims of the same type or from the same group.

(2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.

(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

(4) The offenses were committed in furtherance of the same conspiracy.

(5) The offenses involved the same or a similar modus operandi.

(6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.

Of these sections, R.C. 2901.12 (A), (F), (G), and (H) are pivotal when viewing Foreman's possession of cocaine in metabolite form.

As it relates to the concept of possession in drug cases, the Third District Court of Appeals accurately held the following:

> " 'Possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K) (Sept. 29, 2017) (current version at R.C. 2925.01(K) (Oct. 17, 2019). "The issue of whether a person charged with drug possession knowingly possessed a controlled substance 'is to be determined from all the attendant facts and circumstances available.' " *State v. Brooks*, 3d Dist. Hancock No. 5-11-11, 2012-Ohio-5235, ¶ 45, quoting *State v. Teamer*, 82 Ohio St.3d 490, 492, 696 N.E.2d 1049 (1998).
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> *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 10.

That standard is sound. It also undergirds the holdings in decisions where a defendant possessed cocaine in its metabolite form. *See State v. Moyar*, 3rd Dist. Auglaize No. 2-06-10, 2006-Ohio-5974, ¶ 5, 13-17; *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2-*3; *State v. McGowan*, 8th Dist. Cuyahoga No. 63491 (Aug. 12, 1993), at *1-*2; *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993); *State v. Napper*, 3rd Dist. Marion No. 9-91-11, 1991 WL 256521 (Nov. 27, 1991), at *3; *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991). And that remains good law.

Those decisions, furthermore, contain a set of principles that guide courts, like the Third District Court of Appeals here, in determining whether a prosecution for drug possession is appropriate. First, cocaine metabolites "is a residual product of cocaine found in the body within 72 hours of ingestion." *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2. Therefore, the cocaine metabolites found in the umbilical-cord tissue in this case illustrate that cocaine was ingested by Foreman within 72 hours of her giving birth to her son at Tiffin Mercy Hospital. *See State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 11. She admitted to as much. *Id*., at ¶ 12. Second, "the 'when, where, and how' of ingestion is not required in order for the jury to find that [the individual] possessed cocaine and heroin beyond a reasonable doubt." *State v. Moyar*, 3rd Dist. Auglaize No. 2-06-10, 2006-Ohio-5974, ¶ 14. Third, "[t]he fact that the State did not find cocaine 'on' Appellant's person, does not negate the fact that the State found high levels of cocaine metabolites 'in' [Appellant's] person." *State v. McGowan*, 8th Dist. Cuyahoga No. 63491, 1993 WL 311372 (Aug. 12, 1993), at *2. Finally, "[w]hether that cocaine was in appellant's pocket or in his [or her] urine is of no effect." *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991), at *2. As the Third District Court of Appeals held: "Importantly, our sister appellate districts have concluded that it is of no consequence whether the controlled substance is discovered in a defendant's pocket or in any cellular matter expelled by his or her body." *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 16. This Court should embrace those principles, as it applies to "the presence of cocaine in [J.B.'s] urine, cocaine in the umbilical-cord tissue, and cocaine, marijuana, amphetamines, and buprenorphine in his meconium. (Id. at 15)." *Id*., at ¶ 2.

In a similar vein, the Fourth District Court of Appeals has held the following: "We cannot find based solely upon the presence of cocaine metabolites in appellant's urine that [the

appellant] knowingly used or possessed cocaine. *** We note no evidence exists regarding traces of the drug in an area under appellant's control, the presence of drug paraphernalia, or **incriminating statements made by appellant**." *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993)(Emphasis added). The decision then concludes by stating that "[w]e readily agree with appellee that in most instances it is very unlikely that a person ingests a controlled substance by accident, by mistake, or by involuntary means. Nevertheless, the fact that a person's urine contains cocaine metabolites does not, standing alone, constitute sufficient evidence that the person *knowingly* ingested the controlled substance." *Id*., at 756 (Emphasis in original). The key words, in that regard, are "standing alone", which is not the situation here. As required by the Fourth District, there are "incriminating statements made by appellant" in this case. *Id*., at 756. *Accord State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 12.

That is noteworthy, especially in light of Foreman's proposition of law. This is not a case where the prosecution was based upon the defendant's possession of cocaine metabolites in isolation. Here, in addition to possessing cocaine in its metabolite form, Foreman also admitted to a caseworker from Seneca County Job and Family Services that among other things: "(1) 'that she used cocaine 6 to 12 times throughout her pregnancy'; (2) 'that she used every two to three weeks during her pregnancy'; (3) 'that she used a week and a half to two weeks' prior to J.B.'s birth; ***" *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 12. Science and medicine, as appellate courts have held, indicate that Foreman very likely used cocaine in the days immediately preceding to the birth of her drug-addicted son. *See e.g., State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2. So under Foreman's proposed proposition of law as well as under the *Lowe* test, Foreman's prosecution for possession of drugs, specifically cocaine its metabolite form, was proper. This Court should hold likewise.

In that regard as well, the vast majority of the appellate decisions cited above also either expressly found venue to exist in similar situations, primarily in the county where the blood or urine was collected from the appellant, or implicitly found venue to be appropriate through their addressing the sufficiency of the evidence or manifest weight of the evidence claims raised by the appellant. *See State v. Moyar*, 3rd Dist. Auglaize No. 2-06-10, 2006-Ohio-5974, ¶ 5, 13-17; *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2-*3; *State v. McGowan*, 8th Dist. Cuyahoga No. 63491 (Aug. 12, 1993), at *1-*2; *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993); *State v. Napper*, 3rd Dist. Marion No. 9-91-11, 1991 WL 256521 (Nov. 27, 1991), at *3; *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991). The Third District Court of Appeals' determination that venue existed in this case is likewise well-founded. *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 13-18. This Court should also note that this was a bench trial; therefore, this Court should defer to the determination that sufficient evidence existed for Foreman's conviction and that venue existed in Seneca County. *Accord State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65, 44 O.O.2d 132 (1968); *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 12-13, 17-26; *State v. Smith*, 61 Ohio St.3d 284, 292, 574 N.E.2d 510 (1991), citing *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987) and *State v. Brewer*, 48 Ohio St.3d 50, 55, 549 N.E.2d 491 (1990).

Venue exists under R.C. 2901.12(A) because by possessing cocaine in its metabolite form at Tiffin Mercy Hospital satisfies the requirement that at least one element of possession of drugs under R.C. 2925.11(A) and R.C. 2925.11(C)(4)(a) occurred in Seneca County. Likewise, the court in *McGowan* expressly held that venue existed under R.C. 2901.12(G) when the cocaine was possessed in metabolite form in potentially more than one county. The same logic

would be apropos in light of venue being found under R.C. 2901.12(H) where, as here, the appellant admitted to using cocaine on multiple and repeated occasions. Similarly, under the dissent's Michigan and Indiana hypotheticals, by bringing a drug in its metabolite form into Seneca County venue would exist under R.C. 2901.12(F). (In that regard, with the change to the definition of hemp, there is a question as to whether the State has the ability prosecute an individual for possession of marihuana that exists only in metabolite form in that person's body. See R.C. 2925.01(AA); R.C. 3719.01(M); R.C. 928.01(C). Even so, that prosecution could only result in a minor misdemeanor conviction. See R.C. 2925.11(A) and R.C. 2925.11(C)(3)(a).) Also, the dissent's argument that was embraced by Foreman and *amicus* counsel that an individual should not be prosecuted for transporting something that is legal in one state into a place where that thing is illegal was refuted long ago by the Supreme Court of the United States in *Cohens v. Virginia*, 19 U.S. 264, 294-298, 330-351, 5 L.Ed. 257, 6 Wheat 264 (1821). Venue in this case exits, at the very least, where Foreman's bodily substances—which includes her newborn by extension—were collected: Tiffin Mercy Hospital. In that regard, Seneca County has the "best" claim to venue in this drug possession case because there is no question that Foreman possessed the cocaine in metabolite form in Seneca County. The same logic applies to other crimes based upon possession; for example, receiving stolen property under R.C. 2913.51.

In arguing for the unjust nature of Foreman's cocaine possession prosecution, the dissent as well as Foreman and *amicus* counsel have placed great emphasis on *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). However, the holding in *Robinson* is very narrow and prescriptive in its limited application:

> This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for

> antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.
>
> *Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

In that regard, the focus by the dissent, Foreman, and *amicus* counsel on two underage consumption cases is misplaced. *Accord Logan v. Cox*, 89 Ohio App.3d 349, 624 N.E.2d 751 (4th Dist. 1993); *State v. Barno*, 11th Dist. Portage No. 2000-P-0100, 2001-Ohio-4319. For it is not Foreman's status that resulted in her prosecution; rather, it is the fact that she possessed cocaine in metabolite form in Seneca County when she gave birth to her son that lead to her prosecution.

In fact, *Robinson* directly states that convictions related to drug possession or drug trafficking are permissible and the exclusive province of the several states. *Robinson v. California*, 370 U.S. 660, 664-667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). In addition, courts are wary of finding that a conviction is premised upon the status of the offender based on *Robinson*; instead of the conviction being caused by the act of the defendant. *See e.g., Powell v. Texas*, 392 U.S. 514, 532-536, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1986); *State v. Oher*, 9 Ohio App.3d 348, 349, 460 N.E.2d 320, 9 O.B.R. 617 (8th Dist. 1983); *Akron v. Neal*, 9th Dist. Summit No. 11847, 1985 WL 10687 (Apr. 17, 1985), at *1. This is not a case where old needle tracks were found on

Foreman's arms; rather, Foreman was found to have possessed cocaine in metabolite form when she gave birth to her drug-addicted baby as was evidenced by the umbilical-cord tissue that they shared along with the newborn's urine and stool samples. *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 2-3, 11-12, 17.

Briefly, *amicus* counsel has raised the argument that there would be a chilling effect on the doctor-patient privilege, if Foreman's conviction remains. That argument fails. Dr. Meade, who was the catalyst for the drug testing in this case, was the general pediatrician at Tiffin Mercy Hospital. So her patient was J.B., not Foreman. In that regard, Dr. Meade's testimony did not violate any confidence of her patient. Likewise, as noted by *amicus* counsel, Dr. Meade is a mandatory reporter statutorily speaking, so the legislature has already deemed that the doctor-patient privilege would not have been violated, had Foreman been Dr. Meade's patient. See generally R.C. 2921.22.

This Court, therefore, should not substantially change and artificially limit both R.C. 2901.12 as well as R.C. 2925.11(A) and R.C. 2925.11(C)(4)(a) by disallowing prosecutions for possession of cocaine in its metabolite form when, as here, there is testimony that "evidence exists regarding traces of the drug in an area under appellant's control, the presence of drug paraphernalia, or incriminating statements made by appellant." *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993). That result, furthermore, is in concert with prosecutions for drug possession based upon the appellant testing positive for cocaine metabolites, especially where the situs of the prosecution is in the county where the bodily samples were collected. *Accord State v. Moyar*, 3rd Dist. Auglaize No. 2-06-10, 2006-Ohio-5974, ¶ 5, 13-17; *State v. Scott*, 8th Dist. Cuyahoga No. 63234, 1994 WL 173716 (May 5, 1994), at *2-*3; *State v. McGowan*, 8th Dist. Cuyahoga No. 63491 (Aug. 12, 1993), at *1-*2; *State v. Napper*,

3rd Dist. Marion No. 9-91-11, 1991 WL 256521 (Nov. 27, 1991), at *3; *State v. Shrimplin*, 5th Dist. Knox No. 90-CA-32, 1991 WL 42504 (Mar. 25, 1991). When the Third District Court of Appeals held in accordance with that precedent, it was mindful of thirty years of consistent appellate decisons in that regard. *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 9-18. That was the right result. For to hold opposite would completely stymie drug possession prosecutions based upon the uncontested fact that the defendant possessed cocaine in its metabolite form. This Court should, therefore, affirm the decision from the Third District Court of Appeals finding Foreman guilty of possession of drugs.

CONCLUSION

This Court should take the opportunity to reaffirm the consistent holdings extending back thirty years in appellate courts statewide that a prosecution for drug possession, specifically possessing cocaine in its metabolite form, can originate from a positive drug test of bodily substances, which is reinforced by other evidence that illustrates that the defendant knowingly possessed the drug that he or she clearly used in the recent past. And that can be shown in many ways, including where "evidence exists regarding traces of the drug in an area under appellant's control, the presence of drug paraphernalia, or incriminating statements made by appellant." *State v. Lowe*, 86 Ohio App.3d 749, 755-756, 621 N.E.2d 1244 (4th Dist. 1993). Here, that evidence is Foreman's repeated admissions to chronic drug use while she was pregnant, which validates the evidence that showed "the presence of cocaine in [J.B.'s] urine, cocaine in the umbilical-cord tissue, and cocaine, marijuana, amphetamines, and buprenorphine in his meconium. (Id. at 15)." *State v. Foreman*, 155 N.E.3d 168, 2020-Ohio-3145 (3rd Dist.), ¶ 2. That illustrates that Foreman's conviction for possessing drugs was supported by sufficient evidence.

As a result, venue exists in this case because the samples of bodily substances there were collected in this case by the medical personnel at Tiffin Mercy Hospital were originally brought to Seneca County by Foreman when she was giving birth to her drug-addicted son. In that regard, venue exists under a number of sections of Ohio's venue statute including R.C. 2901.12(A), (F), (G), and (H). In fact, to prohibit venue in Seneca County would be, in all actuality, to prohibit venue being located in any of Ohio's counties. That result would frustrate the ends of justice and prohibit courts from providing treatment—as here—to individuals who are not only endangering their lives but also the lives of others, by their actions of possessing, then using, drugs—primarily cocaine. Therefore, this Court should reaffirm Foreman's conviction that arose out of her possessing drugs—in specific—cocaine in its metabolite form, refuse to adopt Foreman's proposition of law, and adopt the *Amicus Curiae*'s proposition of law.

Respectfully submitted,
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CERTIFICATION

The undersigned counsel certifies that a true and accurate copy of this *amicus curiae* brief was served via email to counsel of record for Defendant-Appellant Kelly A Foreman, Craig M. Jaquith, Assistant Public Defender, at craig.jaquith@opd.ohio.gov, David J. Carey, American Civil Liberties Union of Ohio Foundation, at dcarey@acluohio.org, and the counsel of record for Plaintiff-Appellee State of Ohio, Rebeka Beresh, Assistant Prosecuting Attorney, Seneca County Prosecutor's Office, at rberesh@senecapros.org, on this 2nd day of February, 2021.

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