IN THE SUPREME COURT OF OHIO
2024

STATE OF OHIO, Plaintiff-Appellee, -vs- KENNETH BROWN, Defendant-Appellant.	Case No. 24-474 On Appeal from the Henry County Court of Appeals, Third Appellate District Court of Appeals No. 7-23-05

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

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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission includes assisting prosecuting attorneys in the pursuit of truth and justice and advocating for public policies that promote public safety and help secure justice for victims.

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the State. Venue is a recurring question in criminal prosecutions. But the legal standard for venue here also implicates the more-basic questions of how to measure the breadth of the crime of engaging in a pattern of corrupt activity and how to assess the scope of the participants' responsibility for the actions of other participants aiding the criminal enterprise. Given that R.C. 2901.12(A) provides that venue exists in any county in which any element of the offense was committed, the prosecution can be brought in any county in which the enterprise and those associated with it did business or committed any incident of corrupt activity.

In the present case, the question arises as to whether drug dealer Armijo's forays from Lucas County into Henry County were part of the engaging-in-corrupt-activity crime. According to the defense, Armijo was just a buyer receiving her supply of cocaine from the defendant's drug-trafficking enterprise in Lucas County, and she had complete control over what deals to make thereafter and where to consummate those deals. As the defense puts it, Armijo was just an independent "retailer" in relation to the defendant's drug-trafficking enterprise "wholesaler," and Armijo's own actions in Henry County were not part of the engaging-in-corrupt-activity offense, thereby depriving Henry County of its venue "hook" for bringing the prosecution.

The logic underlying the defense argument is rather quaint in its "wholesaler" and "retailer" characterizations. Drugs and armed violence go hand in hand in the illicit drug trade. *State v. Evans*, 67 Ohio St.3d 405, 413 (1993). "[G]uns are 'tools of the trade' in drug transactions," and "[t]he connection between drugs and violence is, of course, legendary." *United States v. Hardin*, 248 F.3d 489, 499 (6th Cir. 2001); *United States v. Arnott*, 758 F.3d 40, 45 (1st Cir. 2014). Concepts assuming arm's length business transactions between licit business actors are a poor fit in the context of a long-standing drug-trafficking enterprise that was known to be affiliated with a larger gang engaged in murder and other violent crimes. (Tr. 364-73) Judging the "independence" of Armijo as if she were a free-agent "retailer" in these transactions simply misses the mark, when any "dispute" with her suppliers and any delay in paying or repaying her suppliers could come with deadly consequences. It is not surprising that Armijo at one point stopped cooperating with investigators because of her fear of those involved in the defendant's drug-trafficking enterprise. (Tr. 260)

Instead of adopting an ill-fitting analogy to "wholesalers" and "retailers," this Court should recognize the realities of the relationship between Armijo and the enterprise in facilitating the distribution of large-quantity amounts of cocaine. This case did not involve a one-off drug deal, or a street-level customer obtaining only personal-use quantities. The enterprise had agreed to become Armijo's regular supplier, which created a symbiotic relationship between the enterprise and Armijo in which both would be interested in the repeat business that would be involved in even more future transactions. When Armijo obtained the 1.5 ounces of cocaine from the enterprise "on the front" on July 3, 2019, it came with the expectation that she would repay the enterprise directly

from the proceeds of the expected resale that occurred in Henry County. This was not an arm's length "credit" situation in which a "retailer" might have an account on which it would make payments to its supplier out of its general business funds on a recurring basis. Being a large-quantity drug supplier to a lower-level dealer is a commonly-recognized sign that the supplier and dealer are co-conspirators and not merely a seller and buyer of personal-use amounts. This is especially true when the supplier "fronts" the large quantity on credit, as occurred here.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's merit brief.

ARGUMENT

> **Amicus Proposition of Law**: For the crime of engaging in a pattern of corrupt activity through the affairs of an enterprise, a county has venue over the charge when any member of the enterprise conducted or participated in any of the enterprise's affairs in that county. A county also will have venue when one or more of the incidents of corrupt activity were committed by a non-member outsider in that county when the outsider did so in conspiracy with an enterprise member or as a result of being solicited by an enterprise member.

Under R.C. 2901.12(A), the commission of any element of the offense in a county is sufficient to create venue for the prosecution of the offense in that county. Venue for the crime of engaging in a pattern of corrupt activity through an enterprise would exist in any county in which the enterprise was formed or conducted its business or in which a

portion of the corrupt activity occurred. *State v. Sparks,* 2014-Ohio-1130, ¶ 37 (12th Dist.); *State v. Haddix*, 93 Ohio App.3d 470, 479 (12th Dist. 1994); *State v. Giffin,* 62 Ohio App.3d 396, 401 (10th Dist. 1991); *State v. Kozic*, 2014-Ohio-3807, ¶ 98 (7th Dist.). Venue exists in such counties even if the particular defendant who was involved in the enterprise and who is on trial is not alleged to have been active there. *State v. Mielke,* 2013-Ohio-1612, ¶ 22 (12th Dist.) (defendant "was not directly involved in the Warren County sales, [but] his association with the steroid enterprise extended into those areas where the tentacles of the criminal enterprise touched"); *State v. Yates*, 2009-Ohio-6622, ¶ 60 (5th Dist.) (same); *United States v. Persico,* 621 F.Supp. 842, 858 (S.D.N.Y. 1985) ("substantive RICO violation is properly venued in any district where the enterprise conducted business. . . . It is of no moment that any individual moving defendant was not in this District, so long as the government establishes that the defendant participated in an enterprise that conducted illegal activities in [this] District."; citations omitted).

A. The Crime of Engaging in a Pattern of Corrupt Activity

The crime includes a number of elements under R.C. 2923.32(A)(1):

> No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

Under R.C. 2923.31(C):

> "Enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. "Enterprise" includes illicit as well as licit enterprises.

R.C. 2923.31(E) defines "pattern of corrupt activity," as follows:

> "Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

R.C. 2923.31(I)(2)(c) in turn defines "corrupt activity" as including "engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in" a violation of R.C. 2925.03 or a violation of R.C. 2925.11 that is a fourth-degree felony or higher.

B. The Broad Reach of the Crime

These provisions cast a wide net, as this Court has recognized. The "enterprise" concept is "remarkably open-ended" and "obviously broad." *State v. Beverly*, 2015-Ohio-219, ¶ 8.

In assessing the reach of the "enterprise," it is important to note that the "enterprise" can consist of "any * * * group of persons associated in fact although not a legal entity" and can involve purely-illicit associations. "The term 'any' ensures that the definition has a wide reach, and the very concept of an association in fact is expansive." *Boyle v. United States*, 556 U.S. 938, 944 (2009) (citation omitted). "An association-in-fact enterprise has been defined as 'a group of persons associated together for a common purpose of engaging in a course of conduct.'" *Beverly* at ¶ 9. "[A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Id*. at ¶ 9, quoting *Boyle* at 948. "The concept of 'associat[ion]' requires both interpersonal relationships and a common interest." *Boyle* at 946. Evidence of a pattern of corrupt

activity can help prove the existence of an enterprise, and vice versa. *Beverly* at ¶ 9-11.

Such association-in-fact enterprises need not have a formal or distinct hierarchy or structure and can be ad hoc and informal. As stated in *Boyle*:

> [A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods – by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Boyle at 948.

As discussed infra, such illicit association-in-fact enterprises can come to include persons who heretofore were outsiders or third parties in relation to the group but who come to associate with the group. There is no requirement that the new member of the group be introduced or even be known to every other member.

In this way, the new member will have expanded the scope of the "enterprise" involved in the offense. When the new member thereupon begins undertaking activities related to the "enterprise" in other counties, the element of "enterprise" will have now been committed at least in part in those new counties, thereby providing venue for prosecution of the offense in those other counties.

Even if the outsider's association would be considered insufficient to make the outsider a member of the "enterprise," the outsider's activity could still serve to satisfy in whole or in part the "pattern of corrupt activity" involved. At least two incidents of corrupt activity would be required, and, as the statutory language makes clear, it is not required that an insider or core member of the enterprise personally commit those incidents. Instead, the enterprise could be responsible because one or more members of the enterprise conspired with an outsider to engage in the activity or solicited the outsider to engage in the activity. When the outsider conspires with a member, or is solicited by a member, to commit the incident(s) of corrupt activity, the incident(s) will be cognizable as part of the pattern-of-corrupt-activity element for the offense. And when the incident(s) occur in another county, they would be sufficient to create venue for the prosecution of the engaging-in-corrupt-activity offense there.

C. Armijo's Role

The defendant Brown concedes the existence of the drug-trafficking enterprise in which he and Anthony, Michael, and Omar Lawrence were involved. Defendant's Brief, at 14. But the defense contends that the enterprise and the incidents of corrupt activity were limited to Toledo and Lucas County and that Alexandria Armijo's actions in Henry County were independent of and separable from the enterprise. However, Armijo's role was more involved with the enterprise than the defense acknowledges.

The investigation began focusing on Armijo as a distributor of cocaine in March 2019. (Tr. 134) At the end of April, investigators used a confidential source to make a controlled buy of one-eighth of an ounce of cocaine, an "eight ball," from Armijo at her home for $300 in Toledo. (Tr. 134-35)

In the next transaction with Armijo in the beginning of May 2019, the confidential source sought to purchase a half-ounce quantity of cocaine for $700, and Armijo agreed to transport the amount to Napoleon in Henry County, where the source said he was now located. (Tr. 135) Investigators established surveillance on Armijo as she traveled to and parked in front of 808 Tecumseh in Toledo, the main distribution hub for the Lawrence-Brown trafficking enterprise. (Tr. 134-35, 139, 145-46, 397) Investigators saw her make an exchange with Anthony Lawrence and then saw her proceed to travel via State Route 24 to Napoleon, where she transferred a half-ounce amount of cocaine for $700 to the confidential source, thereafter returning to Toledo. (Tr. 135-36) Laboratory testing confirmed that Armijo delivered 13.22 grams of cocaine in this exchange. (Tr. 245-46)

Armijo made another half-ounce delivery to the confidential source in Napoleon in exchange for $700 a couple weeks later, (Tr. 136), and testing confirmed that she delivered 13.88 grams in this exchange. (Tr. 246-47)

An undercover officer had accompanied the confidential source during this latest transaction, and, for the next deal, the undercover officer sought to buy 1.5 ounces of cocaine, which Armijo again delivered in Napoleon, now in exchange for $2050. (Tr. 136-37) The amount transferred in this exchange was 43.24 grams. (Tr. 249)

After this delivery, investigators now conducted a traffic stop of Armijo's vehicle as she began her trip back to Toledo. (Tr. 137) She cooperated and identified Anthony Lawrence as her source of supply for cocaine at the 800 block of Tecumseh every time she brought cocaine out to Henry County. (Tr. 137) She described getting the cocaine "on the front," which, as explained by the investigator, meant that "you don't pay for it

up front so, um, your source gives you the drugs and then you sell it and then you use that money then to repay your source and you keep your profits." (Tr. 137) She got the latest amount from Anthony for an agreed price of $1550, which she then delivered in Henry County for $2050, seeking to make a $500 profit on that transfer. (Tr. 137) Upon being arrested, Armijo still owed Anthony $1550, and so the investigators allowed Armijo to make an undercover controlled payment to Anthony on that day for that amount. (Tr. 138)

Pursuant to her cooperation agreement, Armijo testified at trial and confirmed that Anthony had been her supplier for the deliveries she made in Henry County. (Tr. 253) She had come to know Anthony after learning from a mutual friend that Anthony had been selling drugs to the friend, so when she pulled up to Tecumseh on a prior occasion seeking drugs, Anthony recognized her – "I sort of have that recognizable face with him, I had met him a couple times prior, but, it was fairly easy for me." (Tr. 253-54) They reached an "agreement" that Armijo could get amounts of cocaine as needed from him. (Tr. 254)

Armijo admitted that, before the three incidents in which she traveled to Henry County, she had used Anthony as a supplier "[m]ore than possibly five [times] I would say," always traveling to the block on Tecumseh to get the cocaine. (Tr. 260-61) Another "bro" in the organization (not the defendant) provided her with cocaine on one occasion too. (Tr. 261, 265)

The deliveries from Anthony to Armijo were routinized, as she would need to call ahead to make sure he was available when she would need the cocaine. (Tr. 255) He would tell her where to go on Tecumseh, and, when she would arrive, she would let him

know and then he would come out to the car and he would give her the cocaine in exchange for the money. (Tr. 255) "I would let him know I'm there, exchange money, get the coke." (Tr. 255) This was how Armijo obtained the amounts involved in the first two Henry County incidents. (Tr. 255-57)

Armijo recalled that she received one-ounce amounts from Anthony ("like an ounce"), which cost her about $1250 per ounce. (Tr. 255, 258) Given that the first two Henry County incidents only transacted half-ounce amounts, it was plain that the one-ounce quantities she would receive from Anthony were being divvied up so Armijo could make additional resales beyond just these Henry County incidents.

For the third Henry County incident, Armijo testified that she could not pay for the larger 1.5-ounce amount upon delivery from Anthony. (Tr. 258) "I didn't have the money so he gave it to me on a credit." (Tr. 258) This meant that "I would then bring him back the money after I made my sale." (Tr. 258) Armijo acknowledged that this demonstrated his level of trust in her since he was allowing her to take the cocaine without paying for it first. (Tr. 258)

Armijo described a process in which, after she would receive the cocaine from Anthony, she would go home, weigh it out, and "cut it" with baking soda in order to arrive at the amount to be delivered in Napoleon. (Tr. 255-56, 257, 259) In arriving at the price to charge the Napoleon buyers, she mentioned that she aimed to add "probably about $500 extra" as a markup to what she had paid in order for her to make a profit. (Tr. 257)

Notably, though, the investigator's testimony had described the surveillance involved before and during the first Henry County incident, which indicated that Armijo

had not stopped off at her home before she headed to Napoleon after receiving the cocaine at Tecumseh.

After Armijo made the third Henry County delivery, she was pulled over by the police and reached a cooperation agreement with them, which included meeting up with Anthony and giving him the money she owed him. (Tr. 259) She continued to assist the police two or three more times, but she stopped "[b]ecause I feared that it just wasn't safe to keep doing" if she was exposed as cooperating. (Tr. 260) This fear related to those in the drug-trafficking organization. (Tr. 260)

Under cross-examination, Armijo insisted that, when she obtained cocaine from Anthony, her purpose was to make money for herself and to keep her profits. (Tr. 262-63) She never dealt with the defendant Brown. (Tr. 265)

Armijo also contended that she was a trafficker in her own right. (Tr. 263) However, there was other evidence that drug-trafficking organizations often cultivate multiple other dealers as part of a distribution network "because often a drug dealer doesn't only have one person that distributes for them, they have multiple . . .." (Tr. 139) Consistent with this observation, evidence of later controlled buys at 808 Tecumseh revealed multiple large-quantity one-ounce transactions there. (Tr. 139)

Other evidence showed what dollar amounts of cocaine a street-level customer might purchase for personal use, and these amounts ranged in the $20 to $75 range, but with an "eight ball" amount running about $160 to $300 in time periods not inflated by shortages related to COVID. (Tr. 134-35, 330, 334, 337, 343, 352, 355, 495) The quantities that Armijo received from the Lawrence-Brown enterprise and then delivered to Napoleon thus far exceeded what would qualify as personal-use amounts.

D. Venue Related to Armijo as New Member of Enterprise

All told, the evidence established that Armijo was not just a street-level customer engaging in purchases for personal use. Nor was her involvement with the Tecumseh drug-trafficking enterprise limited to a single one-off transaction. Instead, the evidence showed that Armijo became a significant outlet for the drug-trafficking enterprise's product. Armijo actually reached a supply agreement with Anthony Lawrence for this very purpose, thereby assuring her access to the sizeable quantities she would distribute and thereby assuring a concomitant continued flow of revenue to the enterprise. The evidence supports the conclusion that the enterprise was expanding into having multiple outlets for its product and that Armijo was participating in that network.

These circumstances tie the enterprise to the Henry County trafficking incidents. The evidence was sufficient to support the view that, with Armijo's supply agreement with Anthony, Armijo had become part of the enterprise as an associate-in-fact on a continuing basis with the enterprise. As the United States Supreme Court emphasized in *Boyle*, "decisions may be made on an ad hoc basis and by any number of methods" and there need not be any "established rules and regulations" or "chain of command" as to how the enterprise operates. *Boyle* at 948. As a result, Anthony Lawrence as an undoubted enterprise insider could make the decision to bring Armijo within the enterprise through the supply agreement. As *Boyle* also noted, there is no need for "induction or initiation ceremonies." *Id*.

Although there was no evidence that Armijo was given any say-so as to how the core members would operate, it is not necessary for every associate-in-fact to have a decision-making role. According to the jury instruction approved by this Court in

Beverly, "[p]articipate means to take part in and is not limited to those who have directed the pattern of corrupt activity. It encompasses those who have performed activities necessary or helpful to the operation of the enterprise whether directly or indirectly without an element of control." *Beverly*, 2015-Ohio-219, ¶ 19. "[T]he concepts of 'common purpose' and 'acting in concert' are included in the concepts of 'associating with an enterprise' and 'conducting or participating in the affairs of that enterprise.'" *State v. Griffin*, 2014-Ohio-4767, ¶ 10. Thus, Armijo's performing of activities helpful to the enterprise, even without control over how the others operated, was sufficient to associate with the enterprise.

Nor does it matter that Armijo's continuing participation in distributing the enterprise's product was not tied to a specific or tightly-controlled schedule. As already noted, an enterprise can operate on an ad hoc basis with the activities of the enterprise being marked by periods of activity and then periods of quiescence. Likewise, Armijo's involvement could run in fits and spurts and need not be constant, although there was certainly evidence that the enterprise as a whole operated on a daily basis.

It likewise makes no difference that Armijo never dealt with the defendant personally. The evidence showed that the defendant himself would hire helpers with his tasks related to the enterprise, such as providing transportation, running errands, and doing a delivery. (Tr. 333-36) It is unsurprising that Anthony Lawrence would engage others like Armijo in helping as well in distributing the enterprise's product. The enterprise need not be a legal entity such as a corporation or partnership; it may also be "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette,* 452 U.S. 576, 583 (1981).

Conspiracy law provides a helpful comparison in reaching the conclusion that there is no requirement that all enterprise members know each other. "It [is] not necessary to prove that [the defendant] had ongoing dealings with all of the conspirators." *United States v. Martinez,* 430 F.3d 317, 332 (6th Cir. 2005). "A person may be guilty as a co-conspirator even if he plays only a minor role, and he need not know all the details of the unlawful enterprise or know the exact number or identity of all the co-conspirators, so long as he knowingly participates in some fashion in the larger objectives of the conspiracy." *United States v. Westbrook,* 119 F.3d 1176, 1189 (5th Cir. 1997) (citations omitted). "[N]otwithstanding that there may be a large number of co-conspirators, a defendant's guilt can be established if his or her contact extends to only a few or even one of the co-conspirators so long as the agreement, with its concomitant knowledge of the general scope and purpose of the conspiracy and the defendant's intent to participate in achieving its illegal ends, is proven beyond a reasonable doubt." *United States v. Toler,* 144 F.3d 1423, 1427-28 (11th Cir. 1998). "It is irrelevant that particular conspirators may not have known other conspirators or participated in every part of the conspiracy; all that the government must prove to establish conspiracy liability is an agreement or common purpose to violate the law and intentional joining in this goal by the co-conspirators." *United States v. Lezcano,* 296 F.App'x 800, 806-807 (11th Cir. 2008) (quoting another case). "Indeed, a defendant may be a co-conspirator if he knows only one other member of the conspiracy . . .." *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008). "It is now generally accepted that when a number of people combine efforts to manufacture, distribute and retail narcotics, there is a single conspiracy, a 'chain conspiracy,' despite the fact that some of the individuals linking the conspiracy

together have not been in direct contact with others in the chain." *United States v. Rivera-Santiago*, 872 F.2d 1073, 1080 (1st Cir. 1989).

Armijo could join the conspiracy without ever knowing or dealing with the defendant Brown directly. Likewise, in defining the engaging-in-corrupt-activity offense, R.C. 2923.32(A) does not explicitly require that all associates of the enterprise be aware of each other. The statute expressly allows participation through indirect means, and "a RICO enterprise is broader than a traditional conspiracy." *United States v. Pepe*, 747 F.2d 632, 659 n. 43 (11th Cir. 1984).

The enterprise did not generally impose restraints on what terms Armijo would set in making resales and did not require a kick-back or "cut" of Armijo's profits. But it is an *association* that is required, not an employer-employee kind of agency in which all of the revenue would be expected to go into employer coffers. *United States v. Santoyo*, 2024 U.S. App. LEXIS 14664, at *21 (11th Cir. 2024) ("payment of kickbacks was not an essential element of the conspiracy"). The fact that the conspiracy and enterprise "did not know or care to know to whom [Armijo] sold the cocaine did not preclude the jury from finding that they both knew they were participating in a joint venture." *Martinez*, 430 F.3d at 333.

In addition, the absence of a "cut" after Armijo's resales is hardly critical when the enterprise was building its profit into its price on the front end of the distribution deal with Armijo. Letting Armijo keep her profits also helped incentivize her to make more deals and come back for more supply that would be purchased through the profits that Armijo had kept, and the enterprise was still committed to providing future supply to her. It is again helpful to draw a comparison to conspiracy here, since a conspiracy can

involve the supplier engaging in repeated transactions with the buyer and encouraging future transactions, with both seller and buyer having a continuing stake in future transactions and the profits to be gained by both from the repeat business of the buyer coming back for more. *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943).

Those who were originally "outsiders" can become associated with and participate in the enterprise's affairs and thereby fall within the scope of the offense. "The substantive proscriptions of the RICO statute apply to insiders *and outsiders* – those merely 'associated with' an enterprise – who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity." *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.1978). "[T]he RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise." *Id*. at 903. "This effect is enhanced by principles of conspiracy law also developed to facilitate prosecution of conspirators at all levels." *Id*. at 903.

The prohibition against participating in association-in-fact enterprises is fairly broad. "[O]ne may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them," as the statute is intended "to reach all who participate in the conduct of that enterprise, whether they are generals or foot soldiers." *United States v. Oreto*, 37 F.3d 739, 750-51 (1st Cir. 1994). A participant in the enterprise need not have a "managerial role" and can be a lower-level participant having broad discretion in deciding how such participation will take place. *United States v. Burden*, 600 F.3d 204, 219 (2d Cir.2010); *United States v. Posada-Rios*, 158 F.3d 832, 856 (5th Cir.1998) (participated in enterprise's affairs by deciding how much cocaine to buy and what prices and terms to charge to lower-level distributors to whom he

redistributed cocaine).

The Second District recently rejected a defendant's argument that he had merely been a "lone shark" dealer who did not form an enterprise with the lower-level dealers whom he dealt with.

> {¶121} Harrell argues that there was no enterprise or "association-in-fact" because he was a "lone shark" drug dealer who sold drugs to other independent drug dealers. However, "[t]he definition of 'enterprise' is remarkably open-ended." *Beverly*, 143 Ohio St.3d 258, 2015-Ohio-219, 37 N.E.3d 116, at ¶ 8. The Ohio Supreme Court has stated that "the existence of an enterprise, sufficient to sustain a conviction for engaging in a pattern of corrupt activity under R.C. 2923.32(A)(1), can be established without proving that the enterprise is a structure separate and distinct from a pattern of corrupt activity." *Id.* at syllabus. Notably, the same evidence can be used to prove both the existence of an enterprise and the associated pattern of corrupt activity. *Id.* at ¶ 7.
>
> {¶122} The evidence at trial established that Harrell was an upper-level drug supplier responsible for supplying lower-level drug dealers and users in Springfield with methamphetamine, but he was not a user himself and he did not buy methamphetamine from any of the people to whom he sold drugs. Harrell sold large quantities of methamphetamines to Barclay, Yeager, and Foster, knowing or having reasonable cause to believe that they would resell the drugs. Harrell's relationships and ongoing conduct with each of them sufficiently demonstrated an illicit enterprise of drug trafficking for profit.

State v. Harrell, 2024-Ohio-981, ¶ 121-22 (2d Dist.).

Adding to the evidence of Armijo's association-in-fact with the drug-trafficking group was the "fronting" of the 1.5-ounce amount of cocaine to her on credit for the third Henry County incident. The enterprise's underwriting of this resale *did* control Armijo's ability to make this resale by enabling it when she otherwise would have been unable to

deliver. Moreover, contrary to the defense argument, the "front" deal required more than Armijo paying the money back at some unspecified future time. As explained by the investigator and Armijo, the "front" deal required that Armijo pay the money directly out of the proceeds of the resale enabled by the "front" arrangement. This provides a ready explanation for why the controlled payment occurred on the same day – to keep up the appearance that the 1.5-ounce delivery had gone off without a hitch and to ensure that Armijo would have the ability to act undercover in relation to the drug-trafficking enterprise in the future. Keeping up such appearances also would have been essential to maintaining Armijo's safety since, otherwise, if she had reneged on or indefinitely delayed repayment, a violent response could very well be expected.

The defense touts Armijo's narrow view of her interests in claiming that she was working for herself and was independent of the Lawrence-Brown drug-trafficking enterprise. But her layman's view of her interests would not control the legal analysis of her actual involvement with the enterprise. A truly independent dealer would not have reached a continuing large-quantity supply agreement with the enterprise; "independent" dealers would cultivate multiple potential sources of product. Armijo's claim of independence especially rings hollow in light of her acceptance of the generous "front" terms which enabled the 1.5-ounce deal, as she was clearly "dependent" on the enterprise on supplying her product on credit. In any event, under sufficiency review, no one would be bound to accept Armijo's minimizations of her ties to the enterprise as otherwise shown by the evidence.

With the evidence being sufficient that Armijo was an associate-in-fact of the enterprise, the venue issue is resolved in a straight-forward fashion. Each time Armijo

went to Henry County, the "enterprise" was doing business there because member Armijo was doing business there, and therefore Henry County was a proper venue.

E. Venue Related to Incidents of Corrupt Activity in Henry County

The engaging-in-corrupt-activity crime also required proof of at least two instances of "corrupt activity," and the Henry County incidents supplied multiple acts of corrupt activity. Just one incident of corrupt activity occurring in Henry County would be enough to create venue in that county to prosecute the charge.

To be sure, it would usually be the case that the incidents of corrupt activity involved in the charge will have been committed by the defendant or another insider to the enterprise. As already indicated, Armijo qualified as a member of the enterprise in this way in committing all of the Henry County incidents.

Nevertheless, the statutory scheme makes it clear that the principal actor committing the incidents need not be an insider-member of the enterprise. The principal can be an outsider who conspires with those in the enterprise to commit the incident or who was solicited by an insider to commit the incident. R.C. 2923.31(I)(2)(c). Armijo did not need to be a part of the enterprise in order for her Henry County acts of trafficking to qualify as incidents of corrupt activity cognizable under this charge.

At the very least, Armijo's third Henry County incident would qualify as an incident of corrupt activity under this logic. Anthony Lawrence conspired with Armijo by underwriting the resale through supplying the large quantity of cocaine on credit and demanding the return of over 75% of the proceeds of the resale. Such actions also qualified as a solicitation to Armijo to proceed with the resale. "Solicit" means "to seek,

to ask, to influence, to invite, to tempt, to lead on, to bring pressure to bear." *State v. Skatzes*, 2004-Ohio-6391, ¶ 68.

Much of the defense argument is a byproduct of case law discussing what is considered to be the "buyer-seller" exception to conspiracy. The seller is guilty of selling/delivering the drug, and the buyer is guilty of the possession of the drug that ensues upon completion of the sale/delivery. But the agreement between the seller and buyer to carry out the transaction might also be considered a conspiratorial agreement by which each should also be guilty of a conspiracy to engage in the sale/delivery. But the case law precludes their sell-buy agreement from being sufficient unto itself to qualify as an agreement qualifying as a "conspiracy" as well.

This exception is related solely to the legal conclusion that the buyer should not be treated as a co-conspirator to the seller in the sale/delivery. This concept is discussed in *In re K.H.*, 2014-Ohio-2488, ¶ 25-26 (5th Dist.). Under the default principle embodied in "Wharton's Rule," when a crime is defined in terms of a built-in two-party transaction, the legislature's creation of the crime outlawing the sale is thought only to penalize the seller, making it inappropriate to treat the buyer as being a co-conspirator in the sale too based on that transaction alone.

But the exception is "narrow" and does not apply to conspiratorial agreements having additional features and circumstances going beyond a simple sell-buy deal involving a street-level customer only taking delivery on personal-use amounts. As stated by the federal Sixth Circuit:

> The Supreme Court has told courts to presume that Wharton's Rule applies to a conspiracy statute unless the text suggests otherwise. *Iannelli*, 420 U.S. at 786. This

presumption grounds the buyer-seller exception in a traditional conspiracy rule (and canon of construction) because the underlying crime of distribution entails the "actual, constructive, or attempted transfer" from one party to another. 21 U.S.C. § 802(8), (11); *United States v. Renfro*, 620 F.2d 569, 575 n.5 (6th Cir. 1980).

Understanding this source for the buyer-seller exception can also help us apply it in a principled way. Wharton's Rule shows, for example, that the buyer-seller exception might be "better named the 'transferor-transferee' exception" because its logic extends to any agreement (monetary or nonmonetary) the criminal object of which is a distribution from one person to the other. *Parker*, 554 F.3d at 235 n.3. (The distribution statute, § 841(a)(1), does not require a sale. *See United States v. Wallace*, 532 F.3d 126, 129 (2d Cir. 2008) (citing cases).)

Wharton's Rule also shows the buyer-seller exception's narrow domain. It requires only "an agreement to commit some other crime beyond the crime constituted by the agreement itself." *Lechuga*, 994 F.2d at 349 (plurality opinion); 4 Torcia, *Wharton's Criminal Law* § 684. So, for example, if two sellers cooperate to arrange a drug deal with a buyer, their agreement makes out a conspiracy even if they agree to just one sale. *See United States v. Price*, 258 F.3d 539, 544-46 (6th Cir. 2001). The agreement between the sellers is distinct from the crime that is their object (the distribution to the buyer). Likewise, a seller and buyer might agree not just to a transfer between them; they might agree to "other transfers, whether by the seller or by the buyer." *Parker*, 554 F.3d at 235. Distribution schemes often involve "chain" conspiracies in which a wholesaler sells to a retailer and the two have reached an agreement that the retailer will resell to end users. *See United States v. Henley*, 360 F.3d 509, 513-14 (6th Cir. 2004). Here too, the wholesaler-retailer exchange is distinct from the agreement that is the conspiracy's ultimate criminal object (the resale to the retailer's end users). *See id.*; *see also Direct Sales*, 319 U.S. at 711-15.

2. *What evidence permits a jury to find more than a buyer-seller agreement*? As with many crimes, the government often will not have direct evidence of a conspiracy. It thus may rely on circumstantial evidence to prove that a

defendant agreed to distribute drugs with at least one other person. *Hamm*, 952 F.3d at 736. But what evidence suffices? Because a transferor-transferee agreement does not qualify as a conspiracy, that exchange "is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction." *See id.* (quoting *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991)).

Our cases have, however, identified additional "factors" that allow a jury to find an agreement between a buyer and seller to go beyond their own sale. *United States v. Deitz*, 577 F.3d 672, 680-81 (6th Cir. 2009). Unlike some courts, *Loveland*, 825 F.3d at 562-63; *Johnson*, 592 F.3d at 755, we have held that a jury can infer a broader agreement if a buyer makes "repeated purchases of large quantities of drugs" from a seller, *United States v. Sills*, 662 F.3d 415, 417 (6th Cir. 2011). Our cases reason that these purchases allow a jury to conclude that the buyer and seller have reached a tacit agreement for the buyer to resell the drugs to downstream customers. *See United States v. Castro*, 960 F.3d 857, 865 (6th Cir. 2020); *United States v. Martinez*, 430 F.3d 317, 333 (6th Cir. 2005); *United States v. Anderson*, 89 F.3d 1306, 1311 (6th Cir. 1996); *United States v. Bourjaily*, 781 F.2d 539, 545 (6th Cir. 1986).

Other times, we have considered the method of payment for the buyer-seller transaction. A supplier often "fronts" drugs to a distributor through a sort of illegal consignment – in which a supplier gives the drugs on credit and the distributor generates the money to repay the supplier by selling the drugs to others. *See Robinson*, 547 F.3d at 641; *Henley*, 360 F.3d at 514. Because the supplier and distributor have agreed that the distributor will resell the drugs to satisfy the debt, that arrangement shows a resale agreement beyond their own exchange. *Gibbs*, 190 F.3d at 199-200. In other words, the seller is relying on the success of the buyer and has a stake in the buyer's successful resales. *See id.* at 200.

Still other times, we have considered evidence of an "enduring arrangement" suggesting that the buyer and seller have agreed to work toward a general distribution end. *United States v. Layne*, 192 F.3d 556, 568 (6th Cir.

> 1999). Their interactions might continue for a long time or reveal a level of trust that is unusual for a buyer-seller relationship alone. *See United States v. Thompson*, 758 F. App'x 398, 407 (6th Cir. 2018). A seller might, for example, teach the buyer how to "cut" the drugs to increase the number of doses that can be resold. *See id.* at 406-07. Or the seller and buyer might engage in "standardized" transactions, acting with a level of efficiency more inherent in a vertically integrated enterprise than in random "spot" sales. *See United States v. Thornton*, 822 F. App'x 397, 406 (6th Cir. 2020); *see also Townsend*, 924 F.2d at 1394-95.
>
> At day's end, whether an illegal agreement exists will turn on all of the circumstances. Yet the question's fact-specific nature should not make us lose sight of a critical element: that the conspiracy involve more than an agreement to transfer drugs from one party to another.

United States v. Wheat, 988 F.3d 299, 308-309 (6th Cir. 2021). The list of non-dispositive factors to be considered includes whether there was prolonged cooperation between the parties, evidence of advanced planning, the level of mutual trust involved, standardized dealings, sales on credit, the quantity of drugs involved, and multiple transactions involving large quantities. *United States v. Askew*, 403 F.3d 496, 502 (7th Cir. 2005); *Martinez*, 430 F.3d at 334 (connection to conspiracy "can be inferred from evidence that he was involved in repeat drug transactions with members of the conspiracy"); *United States v. Hamm*, 952 F.3d 728, 736-37 (6th Cir. 2020).

"The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy." *United States v. Medina*, 944 F.2d 60, 65 (2d Cir. 1991); *United States v. Hawkins*, 547 F.3d 66, 71-75 (2d Cir. 2008). Thus, the buyer-seller exception exists for

the narrow purpose of "prevent[ing] a single buy-sell agreement, which is necessarily reached in every commercial drug transaction, from automatically becoming a conspiracy to distribute drugs." *United States v. Delgado*, 672 F.3d 320, 333 (5th Cir. 2012). "The rule shields mere acquirers and street-level users, who would otherwise be guilty of conspiracy to distribute, from the more severe penalties reserved for distributers." *Id.* When a defendant participates in multiple narcotics transactions, however, "this exception cannot cover him." *United States v. Escajeda*, 8 F.4th 423, 426 (5th Cir. 2021). The seller-buyer exception "does not protect either the seller or buyer from a charge they conspired together to transfer drugs if the evidence supports a finding that they shared a conspiratorial purpose to advance *other* transfers, whether by the seller or by the buyer." *United States v. Parker*, 554 F.3d 230, 235 (2d Cir. 2009) (emphasis added). While evidence of "a buyer-seller relationship, *without more*, will not prove a conspiracy, one becomes a member of a drug conspiracy if he *knowingly participates in a plan to distribute drugs*, whether by buying, selling or otherwise." *Delgado*, 672 F.3d at 333 (cleaned up). The "'trust' involved in 'fronting' drugs under a delayed payment or credit arrangement 'suggests more than a buyer-seller arrangement between the parties.'" *United States v. Henley*, 360 F.3d 509, 514 (6th Cir. 2004).

As can be seen, courts apply various factors in distinguishing the simple buy-sell-and-personal-use deal from other transactions in which it is appropriate to recognize that the agreement is a conspiracy. In the present case, it is perfectly appropriate to treat Armijo's relationship with the enterprise as a conspiracy to engage in resales, including the resales in Henry County. When the "seller" is repeatedly delivering large-quantity amounts to the "buyer," in what appeared to be regular one-ounce standardized amounts,

and doing so with the knowledge that there will be resale(s) by the "buyer" to one or more third parties, it is a "chain" drug-distribution conspiracy between the "seller" and "buyer," and they are both considered to be on the "seller" side of the eventual resale(s) so that the seller-buyer exception is inapplicable. *Hawkins*, 547 F.3d at 75 ("Hawkins intentionally joined the Luna conspiracy by entering into a distribution agreement with Luna himself that afforded Hawkins a source of cocaine and Luna another outlet – albeit small – for his contraband.").

It makes no difference that Anthony was the co-conspirator and insider to the enterprise who made the supply and "front" deals with Armijo instead of the defendant. The defendant was conspiring with Anthony in operating their drug-trafficking enterprise, and Anthony's making of deals with Armijo fell well within the purposes and scope of their conspiracy and enterprise. As already discussed, it was not necessary to prove that the defendant was aware that Armijo had joined the conspiracy. Nor was it necessary to show any interaction between Armijo and the defendant. When a new members joins, all become responsible for the broadened membership of the conspiracy, including Anthony's solicitation to Armijo to engage in the "fronted" resale. In light of the foregoing, the single "fronted" drug deal would be enough to conclude that at least one of the elements of the engaging-in-corrupt-activity charge against the defendant had occurred in Henry County.

It is icing on the cake that the two earlier half-ounce deals also provided a venue "hook" for Henry County. Those were substantial large-quantity deals in their own right that were not for mere personal use by Armijo, and, regardless of any "fronting," the supply agreement between the conspiracy/enterprise and Armijo and their repeated

dealings provide ample reason to conclude that these resales were part of the conspiracy and do not fall within the seller-buyer exception. Even if Armijo were not considered to be a member of the enterprise, the evidence would still support the conclusion that there was a chain drug-distribution conspiracy between the defendant, Anthony, and Armijo to engage in the resale activity that occurred in the half-ounce resales in Henry County. These were two incidents of corrupt activity that occurred in Henry County and therefore were elements that made Henry County an appropriate venue for prosecution.

In paragraph 42 of its decision, the Third District contended that "not all of the drug sales [Armijo] engaged in were conducted on behalf of the enterprise . . ." but the "fronted" 1.5-ounce resale still showed that the enterprise reached into Henry County. Even so, the Third District's focus on the "fronted" resale would not preclude this Court from relying on the half-ounce resales as supporting venue in Henry County too. This Court is not "stuck" with the Third District's reasoning and is allowed to rely on additional grounds for affirmance, notwithstanding a lower court's failure or refusal to rely on such additional grounds. An appellate court "will not reverse a correct judgment simply because it was based in whole or in part on an incorrect rationale." *In re G.T.B.*, 2011-Ohio-1789, ¶ 7; *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 96 (1990); *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284 (1944). Even if the Third District ruled out reliance on the half-ounce resales as a basis for venue, this Court can still affirm on that basis. Moreover, to sustain the defendant's sufficiency challenge to venue, this Court would be required to consider *all* of the evidence anyway.

F. Conclusions as to Sufficiency and Manifest-Weight Analysis

At the time this brief is being submitted, this Court has venue-related issues

pending before it in *State v. Musarra,* Nos. 24-540/541. As discussed in OPAA's 9-30-24 amicus brief in those cases, a finding that the evidence was "insufficient" to support venue does not result in a "judgment of acquittal" and is not an "acquittal" that would bar the retrial of the defendant in a correct venue if the defendant prevails on the issue. The decision in *Smith v. United States,* 599 U.S. 236 (2023), demonstrates that a defendant prevailing on the venue issue on direct appeal can be retried in a jurisdiction having venue over the crimes charged. Venue is not an "element" or "defense" implicating the defendant's criminal culpability, and, as a result, a supposed insufficiency of the evidence on the issue of venue would not have the jeopardy-barring effects that would attend a failure to provide sufficient evidence on an element of the crime. As also discussed in the *Musarra* briefing, the holding in *State v. Hampton*, 2012-Ohio-5688, treating venue as an "acquittal" issue raisable under Crim.R. 29 should be overruled in light of *Smith v. United States*.

There are limits on the scope of sufficiency review as it would apply to the venue issue. As with sufficiency review generally, the evidence must be construed in the light most favorable to the prosecution. *State v. Jenks,* 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

"A jury, as a finder of fact, may believe all, part, or none of a witness's testimony." *State v. Antill,* 176 Ohio St. 61, 67 (1964). When there is conflicting evidence, "it [is] the function of the jury to weigh the evidence and assess the credibility

of the witnesses in arriving at its verdict." *Jenks* at 279. It is not the function of a trial or appellate court "to substitute its judgment for that of the factfinder." *Id.*

A court reviewing the sufficiency of the evidence must consider the totality of all the evidence, construing all of the evidence in the light most favorable to the prosecution. *Jackson* at 319; *Jenks* at 272 (jury weighs "all of the evidence"). "[U]pon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson* at 319 (emphasis sic). Sufficiency review "leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 566 U.S. 650, 655 (2012), quoting *Jackson* at 319. Courts reviewing for sufficiency are not permitted to engage in "fine-grained factual parsing." *Coleman* at 655. Such review merely inquires into whether the guilty verdict "was so insupportable as to fall below the threshold of bare rationality." *Id.* at 656.

This Court also recently reaffirmed that, "although venue must be proved beyond a reasonable doubt, venue 'need not be proved in express terms so long as it is established by all the facts and circumstances in the case.'" *State v. Smith*, 2024-Ohio-5030, ¶ 2, quoting *State v. Headley*, 6 Ohio St.3d 475, 477 (1983), citing *State v. Dickerson*, 77 Ohio St. 34 (1907), paragraph one of the syllabus. Accordingly, the issue of venue can be proven by way of circumstantial evidence. As described above, the evidence was sufficient to support venue in Henry County.

Assuming that the evidence was sufficient, the defendant argues that a venue determination can still be overturned as being against the manifest weight of the evidence. Defendant's Brief, at 21-23. But there is no basis to engage in such review.

This Court does not engage in manifest-weight review in a non-capital case. *State v. Tenace*, 2006-Ohio-2417, ¶ 36; *State v. Were*, 2008-Ohio-2762, ¶ 131; *State v. Sanders*, 92 Ohio St.3d 245, 254 (2001); *State v. Stewart*, 176 Ohio St. 156, 160 (1964); R.C. 2953.02. "This court is not required to, and ordinarily will not, weigh evidence. That is one of the functions of the Court of Appeals." *State v. Bradley*, 3 Ohio St.2d 38, 42 (1965) (citations omitted).

Moreover, once it is established that the evidence sufficiently supported venue in the county where the trial was prosecuted, the legal requirement of venue is fully satisfied for that trial. It is the appellant's burden is to show the existence of legal error, but when it is found that venue has already been sufficiently proven in the trial that is under review, there is no error and thus no basis to order any reversal on that basis.

The remedy that flows from a successful manifest-weight challenge is the order of a new trial, *see State v. Fips*, 2020-Ohio-1449, ¶ 9, a trial in which the State would be allowed to prove venue again. But, at most, the venue statute would impose on the State only the need to satisfy the venue requirement for the trial under review, not multiple times.

This Court has acknowledged the propriety of engaging in manifest-weight review when one of the elements is challenged or when an affirmative defense is raised. *See, e.g.*, *State v. Messenger*, 2022-Ohio-4562. "The 'manifest weight' standard is one that we have employed in the context of reviewing a factfinder's finding of guilt: we reverse a criminal conviction when it is not supported by the manifest weight of the evidence." *State v. Martin*, 2022-Ohio-4175, ¶ 2. The logic of engaging in manifest-weight review as to an element or affirmative defense can be considered to be an

ameliorative device related to the central issue of the defendant's criminal culpability for the offense. But, as discussed in the aforementioned briefing in *Musarra*, the decision in *Smith v. United States* demonstrates that the issue of venue stands apart from issues of criminal culpability. Venue is simply "different," and applying manifest-weight review to that issue makes little sense. Indeed, the "any element" venue provision plainly assumes that venue can exist in multiple counties, and it is indifferent as to which of those counties is selected as the county of prosecution. "Prosecutors often have wide choice of venue." *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 462 (7th Cir. 2006). When multiple venues would be proper, "the choice of venue is in the first instance a matter of prosecutorial discretion." *United States v. Walker*, 665 F.3d 212, 223 (1st Cir. 2011). The statute even allows venue to be changed based on convenience and the interests of justice, see R.C. 2901.12(K), which demonstrates the limited reach of the venue requirement. Manifest-weight review implicates the basic justice of the prosecution *because* it is directed at the element(s) and affirmative defense(s) that are applicable. The issue of venue lacks this key connection to criminal culpability that can justify manifest-weight review.

Cases can be found applying "manifest weight" review to the venue issue. *See, e.g.*, *State v. Lawrence*, 2024-Ohio-4792, ¶ 63-66 (8th Dist.); *State v. Shedwick*, 2012-Ohio-2270, ¶ 42 (10th Dist.); *State v. Wyatt*, 2005-Ohio-5743, ¶ 15-17 (6th Dist.). But it is doubtful that the propriety of engaging in such review was raised in those cases, and such decisions ultimately rejected the manifest-weight challenge on the merits anyway. Such cases would merely be assuming the applicability of manifest-weight review to venue, and, as a result, such cases would fail to squarely address the propriety of such

review. The "perceived implications" of an earlier decision are not precedential when the decision in question did not "definitively resolve" the issue and "never addressed the discrete issue . . .." *State v. Payne*, 2007-Ohio-4642, ¶ 10-12; *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129 (1952); *B.F. Goodrich v. Peck*, 161 Ohio St. 202 (1954); *In re Bruce S.*, 2012-Ohio-5696, ¶ 6. Manifest-weight review is inapt to the issue of venue.

In any event, for all of the foregoing reasons, the defendant's challenge to venue would fail under manifest-weight review. A manifest-weight analysis gives appellate judges some room to act as a "thirteenth juror," but this allowance is *very* limited. Under manifest-weight review, the appellate judges only can weigh the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, i.e., when "the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175. Even on manifest-weight review, appellate judges must be deferential to the trier of fact's verdict, since "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. "[A] prerequisite for any reversal on manifest-weight grounds is conflicting evidence, more specifically, evidence weighing heavily against the conviction, such that the jury clearly lost its way and created such a manifest miscarriage of justice." *State v. Tate*, 2014-Ohio-3667, ¶ 20 (internal quote marks omitted).

In the present case, the defense did not introduce countervailing evidence weighing heavily against a finding of venue. While the defense relies on Armijo's characterizations seeking to minimize her connection to the conspiracy/enterprise, her testimony as a whole is actually consistent with her associating-in-fact with the enterprise and as having a co-conspirator relationship with those in the enterprise when she engaged in the Henry County incidents of corrupt activity.

Ultimately, the analysis returns to the inapt nature of manifest-weight review on the question of venue. In the end, the defense cannot show that any "manifest miscarriage of justice" would occur in allowing a trial outcome to stand when sufficient evidence of venue was presented. The defense venue argument would "sink or swim" based on the sufficiency standard of review, and if the evidence is judged sufficient, the standard governing manifest-weight reversal itself shows that a reversal would be inappropriate since, by definition, allowing the outcome to stand is *not* a "manifest miscarriage of justice." The standard for manifest-weight reversal confirms why such reversal would be focused on issues of criminal culpability, i.e., the elements and the affirmative defenses, and would not apply to venue.

G. Miscellaneous Points

The defense mentions some side-issues that are not raised in the defense proposition of law and would make no difference anyway.

The defense mentions Armijo's testimony that it was the confidential source's idea that Armijo's resales would occur in Henry County. But there is no "entrapment" defense to venue by which a criminal might say she would have committed the crime in only one county instead of another. "There is no such thing as 'manufactured venue' or

'venue entrapment.'" *United States v. Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995); *United States v. Celaya Valenzuela*, 849 F.3d 477, 488-489 (1st Cir.2017). "[A]gents may influence where the . . . crime occurs, and thus where venue lies . . .. The entrapment doctrine protects the defendant against manufactured offenses (unless the defendant is predisposed); it does not limit venue." *Rodriguez-Rodriguez*, 453 F.3d at 462; *United States v. Sitzmann*, 893 F.3d 811, 823-24 (D.C.Cir. 2018) (collecting cases rejecting "venue entrapment" claims).

The text of the element-based venue provision confirms this point, as nothing in that language is concerned with the circumstances and "what if's" by which it came to be that an element was committed in one county as opposed to another. It is enough that any element *was* committed there. Moreover, there is no "entrapment" when a dealer is predisposed to making drug deals and eager to provide concierge service in making deliveries to other counties in order to collect the large sums of cash involved in such deals. *See State v. Doran*, 5 Ohio St.3d 187, 193 (1983). Nor is there anything constitutionally "extreme" in an undercover agent arranging a mutually-agreeable meeting place for a controlled buy. *United States v. Gonzalez*, 683 F.3d 1221, 1226 n. 6 (9th Cir. 2012). Notably, the defense did not seek a transfer of the trial to Lucas County because of such concerns. *Celaya Valenzuela*, 849 F.3d at 489 ("forum shopping" complaint would be handled, if at all, through transfer provision).

In any event, there would have been legitimate law-enforcement and safety reasons to create greater distance from Armijo's Tecumseh Street supply chain. Taking down Armijo in another county reduced the danger that the suppliers might learn of Armijo's arrest or her resulting cooperation. Had she been arrested at her home or in

another Toledo locale, the suppliers would have had a far greater chance of learning of these developments, with the attendant risks to the investigation and to Armijo's safety.

Equally unavailing is the defense observation that the jury sent a note to the court at one point asking "what if" the jurors were unable to agree on the venue issue. The note did not indicate that an impasse actually had been reached but, instead, asked what could happen if such an impasse arose. Regardless, the question of whether the evidence was sufficient to support venue is a question separate from how the jury actually chose to address the issue in the course of its deliberations.

The sufficiency standard construes the evidence in the light most favorable to the prosecution. But, in deliberating on and in returning its verdicts, the jury is exercising its plenary fact-finding authority and is not required to construe the evidence in the light most favorable to the prosecution. The sufficiency standard determines whether the issue should have gone to the jury in the first place. Deliberations on guilt or innocence, and verdicts rendered thereafter, are entirely *consistent* with the evidence having been "sufficient" to warrant such deliberations. This is why even an inconsistent not-guilty verdict on one count provides no basis for finding the evidence "insufficient" to support a guilty verdict under another count.

> The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder – if known.

Jackson, 443 U.S. at 319 n. 13; *United States v. Powell*, 469 U. S. 57, 67 (1984). As a matter of law, the supposed difficulties of the jury in *deciding* the venue issue are

irrelevant to the question of whether the evidence was *sufficient* to support venue to prosecute in Henry County.

Likewise, it is irrelevant that the defense purported to rely on inadmissible hearsay as to the jury's internal deliberations on venue in its later motion for new trial. The motion was untimely, having been filed 28 days after the jury's verdict, well-beyond the 14-day time limit, and the defense did not seek leave to file out-of-rule. The hearsay was inadmissible under Evid.R. 606(B) anyway in purporting to describe the jury's internal deliberations.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court affirm the Third District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on December 20, 2024, to the following counsel of record: Gwen Howe-Gebers, Henry County Prosecuting Attorney, 660 N. Perry St., Suite 101, Napoleon, Ohio 43545, prosecutor@henrycountyohio.gov, counsel for State of Ohio; Stephen P. Hardwick, Assistant Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, stephen.hardwick@opd.ohio.gov, counsel for defendant.

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