STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2018AP53-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS BRANTNER,

Defendant-Appellant-Petitioner.

FIRST-BRIEF AND APPENDIX OF PETITIONER-APPELLANT-DEFENDANT

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Circuit Court for Fond du Lac County, the Honorable Peter L. Grimm Presiding.

Taylor Rens
State Bar No. 1098258
P.O. Box 14218
West Allis, WI 53214
(414) 810-2678
trens@krlawwi.com
Attorney for the Defendant-Appellant-Petitioner

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ISSUES PRESENTED

I. When an individual is arrested in one county with controlled substances on his person and transported in police custody to a different county where the substances are removed from the individual's person during the booking process, does a trial for possession of the controlled substances in the destination county violate the individual's rights under Article I, Section VII of the Wisconsin Constitution and Wis. Stat. § 971.19?

In its decision the court of appeals concluded that the rights to venue and to be tried by a jury of the vicinage were not violated because the criminal defendant could have dispossessed himself of the controlled substances prior to entering the adjudicating county by telling the police officers the substances were on his person. (App. 3-4).

II. Do the United States and Wisconsin Constitutional protections against double jeopardy bar the State from punishing a criminal defendant twice for violations of Wis. Stat. § 961.41(3g)(am) for possessing pills containing different doses of the same substance at the same time?

In its decision, the court of appeals concluded that possession of different sizes of pills at a single point in time suggests that the criminal defendant committed separate volitional acts to obtain the pills and therefore separate punishments for the possession of each pill did not violate either the Wisconsin or United States Constitution. (App. 5).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

STATEMENT OF THE CASE AND FACTS

The facts in this case are simple and largely undisputed. On March 27, 2015, Dennis Brantner exited a courtroom in the Kenosha County Courthouse to find two Fond du Lac County sheriff's deputies waiting in the hallway with a warrant for his arrest in connection with a homicide that occurred in 1990. (R.70: 124; App. 6).

Brantner and his attorney were leaving a hearing before Kenosha County Circuit Court Judge Chad G. Kerkman. The hearing was in a case that was filed about a year earlier after the Fond du Lac County Sheriff's Office discovered an in-operable antique hunting rifle while executing a search warrant at Brantner's home in Kenosha. (R.72: 25). The rifle was a family heirloom passed down to Brantner's fourteen-year old son who lived in the home along with his mother and longtime partner of Brantner, Diane Epping. (Id. at 24-25; R.70: 164). Based on the presence of the rifle in the home, Brantner was charged with felon in possession of a firearm. (R.70: 164).

The encounter in the hallway outside Judge Kerkman's courtroom was not the first time Brantner and his attorney met the arresting officers. (R.72: 20-21). For over a year Brantner had been cooperating in their homicide investigation, voluntarily appearing for multiple rounds of interviews and fingerprinting. (Id). He had also repeatedly provided assurances that he would voluntarily report to the Fond du Lac County jail upon receiving notice of a warrant for his arrest. (Id). Nonetheless, the Fond du Lac County Sheriff's Office sent deputies to Kenosha County to retrieve Brantner by force and surprise. (Id).

Upon exiting the courtroom, Brantner was immediately handcuffed with a belly belt, patted down, and then his pockets were searched. (R.70: 125-129; App. 7-11). He asked to briefly speak with attorney Powell before being transported away but was not allowed to. (Id. at 211). Instead, the officers escorted him out of the courthouse and into the backseat of their squad car. (Id. at 130; App. 12).

On the way to Fond du Lac, one officer sat next to Brantner in the backseat while the other office drove. (Id). Brantner remained in handcuffs for the entire drive. (Id. at 132; App. 14). When they arrived at the Fond du Lac County jail over two hours after their departure,

Brantner was ordered to remove his clothes as part of the booking process. (Id. at 132-33, 204; App. 14-15). He complied, and when he handed his left boot over to one of the officers, she immediately removed a plastic baggie containing an assortment of pills. (R.70: 77-78).

Roughly five months later, Brantner was returned to Judge Kerkman's courtroom for sentencing on the firearms charge and received a time served jail sentence of approximately eighty days. (R.72: 25). The following week, the Fond du Lac County District Attorney initiated this case with a ten-count criminal complaint. (R.72: 25).

The district attorney threw the book at Brantner, and then some. The complaint alleged a total of ten counts: five possession counts and five corresponding bail jumping counts. (R.1:1). Most notably here, the complaint charged Brantner with two counts of possession of oxycodone in violation of Wis. Stat. § 961.41(3g)(am). Count one charged Brantner with "possession of oxycodone pill, five milligram", while count three charged "possession of oxycodone pill, twenty milligram." All five possession counts also included a penalty enhancer under Wis. Stat. § 961.495 for possession of controlled substances within 1000 feet of the jail in Fond du Lac County. (Id.).

At the preliminary hearing, Judge Richard J. Nuss presiding, Brantner moved to dismiss all charges on the basis that prosecuting Brantner in Fond du Lac County violated his right to a trial in the county where the alleged crimes were committed. (R.67: 27-28). He argued that his possession of the pills terminated when he was taken into custody in Kenosha County, and therefore, it was improper to bring charges in Fond du Lac County. (Id.). Judge Nuss denied the motion and ordered Brantner bound over for trial. (Id. at 29-30). Brantner then filed a motion to dismiss for defective bind-over, again arguing that Fond du Lac was an improper venue. (R.10). Judge Peter L. Grimm held a hearing on the motion and denied it. (R.15, R.68).

No meaningful plea bargaining followed. (R.70: 5). The negotiations started and ended with a take-it or leave-it offer from the district attorney to dismiss all charges in this case in return for a guilty plea in the homicide case. (Id.). Brantner swiftly rejected the offer and the case proceeded to a trial, which was held on held on January 6 and

7, 2016. (Id.; R. 71). Just before voir dire started, the district attorney voluntarily dismissed the penalty enhancers under § 961.495 without explanation. (Id. at 28-30). The jury returned guilty verdicts on all counts. (R.28-37).

At the end of trial, defense counsel moved to dismiss counts one and two for being multiplicitous to counts three and four and to dismiss all charges due to lack of sufficient evidence to establish that Fond du Lac County was a proper venue. The court denied both motions. (R.70 at 214-221). On the venue issue, the court reasoned that there was sufficient evidence in the record such that a reasonable jury could conclude beyond a reasonable doubt that Brantner had "actual physical control" of the pills in Fond du Lac County. (Id. at 220-21).

On the multiplicity issue, the trial court reasoned that the State presented evidence showing distinct factual differences between the pills. The court noted that the evidence showed differences in "color, size, markings, and they [had] different milligrams thereto." (Id. at 217). The court went on to reason that the prosecution has wide discretion in charging crimes and that the differences between the five milligram and twenty milligrams pills were sufficient to support separate convictions. (Id. at 218).

Brantner was not sentenced until July 12, 2016, roughly seven months after trial and just after the State's thirteen-day homicide trial against Brantner ended in a hung jury. (R.72 at 19-20). On the morning of the hearing, the district attorney filed the transcript of the preliminary hearing in the homicide case and requested that Judge Grimm consider it in assessing Brantner's character for sentencing purposes. (Id. at 3).

Judge Grimm noted that he was not surprised by the district attorney's attempt to have Brantner punished in this case for the homicide charge since the district attorney had failed to obtain a conviction in that case. (Id. at 7). Judge Grimm explained that given "how [the district attorney] views this case vis-a-vis the other case and the State's posture of plea bargaining and motivations, it's been pretty obvious that this type of argument was going to come forward from the State, and I certainly expected it." (Id.). The court declined the

request to consider the homicide charge in sentencing Brantner. (Id. at 7, 55-56).

The district attorney began his sentencing argument by asking to court to find Brantner ineligible for the Substance Abuse Program while incarcerated because "there has been no description of him abusing controlled substances." (Id. at 11). Despite his acknowledgment that Brantner has no history of controlled substance abuse, the district attorney proceeded to recommend a thirty-three-year prison sentence comprised of sixteen years and one-month initial confinement plus seventeen years extended supervision, despite

Defense counsel argued for a 180-day jail sentence. (Id. at 28-29). He began his remarks by reiterating the circuit court's observations about the district attorney's motivations:

> Well, the State's recommendation I think is, frankly, a pretty transparent recommendation for this Court to substitute its sentence in this case for a case that the State hasn't been able to prove in a different courtroom. It is triple the PSI's recommendation, which I think is far in excess of what's necessary in this case.
>
> (Id. at 19-20).

The court sentenced Brantner as follows. For counts one, two, five, seven, and nine, Brantner received five consecutive prison sentences totaling thirteen years and seven months, including six years and seven months initial confinement and seven years extended supervision. (Id. at 58-59). For counts one (possession of oxycodone, twenty milligram pill) and five (possession of acetaminophen/hydrocodone) the court imposed consecutive sentences of one-year initial confinement followed by two years of extended supervision. (Id. at 58). On count two (bail jumping), the court sentenced Brantner to three years of initial confinement and three years of extended supervision. (Id. at 59). For count seven (possession of zolpidem) the court imposed a thirty-day jail sentence, and for count nine (possession of prescription) a sentence of one hundred-and-eighty days jail. (Id.)

For counts three, four, six, eight, and ten, the Court placed Brantner on probation for a total of eleven years, consecutive to the prison sentences. (Id. at 57). On counts three (possession of oxycodone, five-milligram pill) and four (bail jumping), the Court imposed and stayed sentences of one year of initial confinement with two years of extended supervision and one-year initial confinement with three years of extended supervision respectively. (Id. at 59). On the remaining three bail jumping counts, the court withheld sentencing. (Id.). All told, the Court ordered Brantner remain in DOC custody until the age of eighty-eight. *Compare* (R.3: 1) *with* (Id. at 59) (Id. at 59).

Brantner filed a post-conviction motion in the circuit court raising two issues. First, the multiple punishments imposed for possession of a single controlled substance violated his constitutional protections against double jeopardy. (R. 59 at 1). Second, Fond du Lac County was an improper venue under the Wisconsin Constitution and statues. (Id.). The circuit court denied the motion in a decision and order dated December 12, 2017 (R.61). With respect to the multiplicity issue, the circuit court reasoned that the charges were not multiplicitous because of the differences in the physical characteristics of the pills. (R.81 at 9-10; App. 15-16). The court went on to say:

> So this case is one of first impression and could be the first test case in the state and country on this point . . . If this is a test case to see whether the State can use this charging method to help stem the problem of addictions for opioids and overdoses, then we're going to find out. I think the State's arguments carry the day here, notwithstanding the traditional analysis of multiplicitous charges and violations of double jeopardy.
>
> (R.81: 15; App. 21).

With respect to the venue issue the circuit court reasoned that Fond du Lac County was a proper venue because Brantner knew that the pills were in his boot and did nothing to dispossess himself of the pills. (R.81:16; App. 22). Specifically, the court stated, "I'm not saying he has to confess to a crime, but he could have done oral statements

to avoid the predicament . . . After being arrested and cuffed, all the events that happened thereafter were all foreseeable." (Id.).

Brantner appealed the circuit court's ruling on the postconviction motion, again raising both the multiplicity and venue issues. (App. 1). The court of appeals affirmed the circuit court's decision in a summary disposition on January 2, 2019. (Id.). In its decision, the court of appeals reasoned that the oxycodone charges were not multiplicitous because the difference in the sizes of the pills "suggests that [Brantner] committed separate volitional acts to obtain them." (Id. at 5). The court did not cite any authority in support of its proposition, nor did it elaborate upon its reasoning. (Id.). Also, the court of appeals reasoned that Fond du Lac County was a proper venue because Brantner had the opportunity to tell the police that the pills were on his person. (Id. at 4).

Finally, Brantner asks the Court to take judicial notice that on February 2, 2018, the homicide case against Brantner, 15-CF-176, was resolved by a plea agreement under which Brantner entered an Alford plea to second degree reckless homicide. On March 2, 2019, he received a ten-year prison sentence under the sentencing scheme in effect in 1990, which was imposed consecutive to the sentence in this case.

Additional facts are incorporated into the Argument section below.

STANDARD OF REVIEW

I. The standard of review for whether there was sufficient evidence to establish that Fond du Lac County was a proper venue is *de novo*. This case involves application of undisputed facts to statutes and the constitutions of the United States and Wisconsin. Generally, the standard of review for issues regarding sufficiency of the evidence is extremely deferential to the trier of fact. *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). However, in this case all of the applicable facts are undisputed. When all of the material facts are undisputed, their application to the applicable law is solely an issue of law and is reviewed *de novo*. *State. v. Perry*, 215 Wis. 2d 696, 706, 573 N.W.2d 876 (Ct. App. 1997) ("challenging the trial court's

interpretation of a statute and its application to facts which are largely undisputed."); *State v. Seibel*, 163 Wis. 2d 164, 171-72, 471 N.W.2d 226 (1991) (when the material facts of a search are undisputed, the question of whether the search violated the Fourth Amendment is one of law); *State v. Williams*, 104 Wis. 2d 15, 21-22, 310 N.W.2d 601 (1981).

II. The standard of review for deciding whether counts one and two were multiplicitous to counts three and four in violation of the Double Jeopardy clause is also *de novo*. The issue involves the interpretation of the constitution and statutes as they apply to undisputed facts and is therefore an issue of law a subject to *de novo* review. *See Perry*, 215 Wis. 2d at 706.

ARGUMENT

I. The Judgement of Conviction Against Dennis Brantner Must be Vacated Because the Offenses Were Not Committed in Fond du Lac County as a Matter of Law.

Article I, Section VII of the Wisconsin Constitution states:

> In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, *to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.*

The italicized language above is nearly identical to the language used in the Sixth Amendment of the United States Constitution. The Sixth Amendment guarantees the right "to a trial by an impartial jury . . . of the *state and* district wherein the crime shall have been committed." (Emphasis added). The location of federal

criminal proceedings is also governed by Article III, Section II of the Constitution, which states, "The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." Art. III, § 2, cl. 3. *See also*, Federal Rule of Criminal Procedure 18. This provision operates as a jurisdictional limit on federal courts in criminal proceedings. *See* Blume, The Place of Trial of Criminal Cases: Constitutional Venue and Vicinage, 60 Mich. L. Rev. 59, 89-90 (1944).

The Sixth Amendment right to a trial by a jury "of the state or district wherein the offense shall have been committed" is one of the few rights included in the Bill of Rights that has not been incorporated onto the states through the Fourteenth Amendment. *See, e.g.*, Engel, The Public's Vicinage Right: A Constitutional Argument, 79 N.Y.U. L. Rev. 1658, 1706-07 (2000). Moreover, the Wisconsin Constitution does not include a corresponding limit on the jurisdiction of Wisconsin courts in criminal proceedings. However, the early decisions of this Court established that Art. I, Sec. VII "secures" the common law rights to be tried *in the county* where the offense was committed by a jury *of the county* where the offense was committed. *In re Elrod*, 46 Wis. 530, 1 N.W. 175, 183 (1879) ("The venue of indictments rests upon fundamental law, as old as the Magna Charta, entering to the provision of the constitution of the state."); *State v. Pauley*, 12 Wis. 537, 540 (1860) (The provision "was intended merely as the enactment of the general rule of the common law, that every offense shall be triable only in the county where committed."); *State ex rel. Brown*, 60 Wis. 587, 19 N.W. 2d 429 (1884) (The provision "defines and limits the locality from which a jury must be taken" and "secures [] the right of a trial within the same limits."); *Wheeler v. State*, 24 Wis. 52, 54 (1869) (The statute authorizing change of venue on prosecutor's motion over the defendant's objection "is in conflict with the constitution, and void."). Under Art. I, Sec. VII, the common law right to venue is inextricably intertwined with the right "a trial" and the right to "an impartial jury of the county;" *See id*; *see also* Blume, 60 Mich. L. Rev. at 89-90

(discussing constitutions of Wisconsin and the twelve other states which provided for trial in the "county or district."); *but see*, *State v. Mendoza*, 80 Wis. 2d 122, 138 n.3, 258 N.W. 2d 260 (1980) (dicta) (The provision "does not restrict venue. Rather, it restricts the locale from which the jury can be picked.").

The defendant's right to venue in criminal cases serves two separate policy functions. *See* Blume, The Place of Trial of Criminal Cases: Constitutional Venue and Vicinage, 60 Mich. L. Rev. 59, 59-67 (1944) (discussing the history of the defendant's right to venue in criminal proceedings.) The right to venue advances the defendant's interest in the fair administration of justice because the location where the crime was committed is the location where the offense was committed is the location where witnesses and evidence are most likely to be found. *See id*.; *United States v. Johnson*, 323 U.S. 273, 278-79 (1944). In a similar vein, the right protects the defendant against the additional costs and inconvenience that often exist when a defendant is forced to defend against charges at a far-off location from where he was arrested. *See id*.

The second policy is more well-know because of the role it played in sparking the Revolutionary War. *See United States v. Cabrales*, 524 U.S. 1, 6 (1998). The right to venue is also intended to prohibit the tyrannical, abusive government practice of forum selection in criminal cases. *See id*. It was the violation of this aspect of the right to venue by the British which led to the colonists to list the need for such a right in the Declaration of Independence. *See id*. The need to preclude the government from having any opportunity to adjust its actions or decision making in order to achieve a more favorable venue in criminal cases cannot be overstated. Allowing the government to choose the venue for criminal proceedings after-the-fact is, and always has been, counted among the greatest threats to individual liberty. *See id*.

Venue in Wisconsin criminal cases is also governed by statute. Under Wis. Stat. § 971.19 (2017-18), "Criminal actions shall be tried in

the county where the crime was committed, except as otherwise provided." Although venue is not an element of criminal offenses, the State bears the burden of proving that venue is proper beyond a reasonable doubt for each count charged. *Smazal v. State*, 31 Wis. 2d 360, 362-363, 142 N.W.2d 808 (1966).

The parties' disagreement in this case is over whether Brantner possessed controlled substances in Fond du Lac County.[1] Ultimately, the issue is whether Brantner's actions in Fond du Lac County constituted criminal conduct that the legislature intended to proscribe under § 961.41(3g)(am). Resolving the issue should involve interpreting the relevant statutory provisions in light of the policies underlying the constitutional right to venue in criminal proceedings. *See United States v. Anderson*, 328 U.S. 699, 703 (1946) (When "the statute does not indicate where Congress considered the place of committing the crime to be, the *locus delicti* must be determined from the nature of the crime alleged and the location of the acts or acts constituting it.") *citing Johnson*, 323 U.S. at 276; *United States v. Cabrales*, 524 U.S. 1, 7 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999); *see also*, *John v. State*, 96 Wis. 2d 183, 291 N.W.2d 502 (1980) (considering nature of the crime of failure to report a change in family status in light of the purposes of the policies underlying statute of limitations in determining whether legislature intended the crime to be a continuing offense.); *State v. Davison*, 2003 WI 89, ¶ 18, 263 Wis. 2d 145, 666 N.W.2d 1 (applying the "nature of the offense" prong of the four prong test applied to determine the number of offenses when resolving a multiplicity challenge).

Brantner lost possession of the pills when he was taken into custody in Kenosha County because that is when he lost control of the pills. Brantner concedes that the State could have appropriately filed this case in Kenosha County because that is the only location where

[1] For the purposes of brevity and clarity, this argument only speaks about the possession charges, not the bail jumping charges because each of the possession charges has a bail jumping charge connected with it.

Brantner obtained a controlled substance and the only location where he exercised control over a controlled substance. Furthermore, it is undisputed that Kenosha County is the only location where Brantner voluntarily kept the pills on his person. Brantner was involuntarily transported to Fond du Lac County by force and by surprise. And at all relevant times, Brantner was in the direct physical custody of multiple Fond du Lac County sheriff's deputies.

Brantner's position is supported by the plain meaning of possession and the policy goals underlying the individual's right to venue in criminal proceedings brought against him by the government. Brantner's position is further bolstered by the express statement of legislative intent contained in the Uniform Controlled Substances Act.

A. Brantner Did Not Possess the Substances in Fond du Lac County Because He Did Not Have Control of the Substances There.

The question is whether Brantner's conduct in Fond du Lac County constituted possession of a controlled substance under the meaning of § 961.41(3g)(am). The statutory interpretation analysis begins by considering the language of § 961.41(3g)(am). *See State Ex Rel. Kalal v. Circuit Court,* 2004 WI 633 ¶¶ 36-52, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is the best indication of legislative intent. *Id*. Ordinarily, statutes are interpreted according to the ordinary meaning of the words the legislature used. *Id*. If the language of a statutory provision is ambiguous on its face, textual clues taken from the broader statutory structure, the context provided by the surrounding statutes, and the underlying policy purposes can often be used to ascertain the plain, unambiguous meaning of the provision without any need to consider extraneous information about legislative intent, such as legislative history materials. *Id*.

The substantive criminal statutes at issue are §§ 961.41(3g) and 961.16(2)(a)(11). Under § 961.41(3g), "No person may possess or attempt to possess a controlled substance." The list of schedule II

controlled substances is codified at Wis. Stat. § 961.16(2)(a). Section 961.16(2)(a) includes a number of subsections, each of which lists a single substance. Oxycodone is the substance listed in subsection (11). Thus, reading sections 961.41(3g) and 961.16(2)(a)(11) together, the relevant statutory language is, "No person may possess or attempt to possess [oxycodone]."

The Controlled Substances Act does not define the term "possessed." At first blush, § 961.41(3g) appears to create a strict liability offense because there is no reference to any mental state. However, in *Schwartz v. State*, 192 Wis. 414, 212 N.W. 664, 665 (1927), the Court confirmed that in the criminal law context, the term "possess" has a specific legal meaning which includes both a control element and a mental state element. Thus, the Court held, the defendant could be convicted for possessing contraband found on his property when someone else left the contraband on the property without the defendant's knowledge. *Id*.

The Court has also cited with approval the definitions of possession contained in the Wisconsin Jury Instructions. *See State v. Peete*, 185 Wis. 2d 4, 16, 517 N.W.2d 149 (1999); *see also State v. Allbaugh*, 148 Wis. 2d 807, 436 N.W.2d 898 (Ct. App. 1989). The jury instructions define two formulations of possession:

> 1. 'Possession' means that the defendant knowingly had actual physical control of the item.
>
> 2. An item is also in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.

Wis. JI–Criminal 920 (2016).

In this case, the jury was instructed using the pattern instruction for possession of a controlled substance, Wis. JI-Criminal 6030, which incorporates the definition of possession from Wis. JI-Criminal 920. (R.71: 286). At trial, the evidence presented by the State

and the State's argument focused heavily on whether Brantner's acts during the booking process inside the jail amounted to having and exercising actual physical control over the pills in his boot. (R.70). Yet the language of the jury instructions is not the language of the statute. The jury instructions simply describe the types of relationships between a person and a tangible object that must exist for the person to possess the object. Absent extraordinary circumstances, when the facts of a case fit within either of the definitions in the jury instructions, the person can be said to have "possessed" the object in both the ordinary and the legal sense of the word.

However, as the Court pointed out in *Schwartz*, the term possess has a specific legal meaning under the criminal law. 192 Wis. at 665. This distinction is also found in the definitions of possession in Black's Law Dictionary. Black's Law Dictionary defines numerous formulations of possession. The first two definitions are similar to the definitions of "actual possession" and "constructive possession" contained in Wis. JI–Criminal 920. But Black's Law Dictionary also includes a definitions of "possession in fact" and "possession in law." Possession in fact is defined as, "Actual possession that may or may not be recognized by law." *Id.* Possession in law is defined as, "Possession that is recognized by the law either because it is a specific type of possession in fact or because the law for some special reason attributes the advantages and results of possession to someone who does not in fact possess." *Id.*

The thrust of Brantner's argument is that he did not have legal possession of the pills in Fond du Lac County, within the meaning of § 961.41(3g)(am) because he was in the direct physical custody of law enforcement officers, and therefore, he did not have any control of the pills to give rise to legal possession. If the situation had unfolded inside a friend's living room, with no law enforcement involvement whatsoever, then Brantner clearly would be exercising actual physical control over the pills by removing his boot and handing it to his

friend. Handing an object to someone is precisely the type of act that "actual physical control" refers to in ordinary circumstances.

The circumstances in this case are extraordinary though. The question is not whether Brantner exercised "actual physical control over the pills" within the plain meaning of those words. The question is whether Brantner "possessed" the pills within the plain legal meaning of "possessed" under Wis. Stat. § 961.41(3g)(am).

Brantner did not possess the pills inside the Fond du Lac County jail under the plain meaning of "possess" as it is used in § 961.41(3g)(am). To the extent that Brantner can be said to have had actual physical control of the pills by virtue of the fact that they were on his person, he did not have the type of control required to constitute possession under § 961.41(3g)(am). The type of control that is required under § 961.41(3g)(am) is the type of control that Brantner had over the pills in Kenosha County before he was arrested.

Brantner had no control over whether the pills entered Fond du Lac County, and he had no control over what happened to the pills after he was brought there. The evidence presented supports the inference that Brantner had physical control over the pills in Kenosha County earlier that day when he voluntarily brought them to the Kenosha County Courthouse. However, he lost his control over the pills when he was handcuffed, locked in the backseat of the police car, and driven to Fond du Lac. From the time he was arrested until the time the pills were removed from his person, he had no control over the pills. He could not ingest, sell, destroy or otherwise dispossess himself of them. He could not do anything except leave them right where they were. Conversely, before he was arrested, he could do anything he wanted with the pills.

Under any reasonable view of the evidence, all of the alleged criminal conduct in this case occurred in Kenosha County as a matter of law. Kenosha County is the only location where there were opportunities for the substances to be abused. That is where Brantner

kept the pills, where he knowingly exercised control over the pills, and the only place where he ever had an opportunity to abuse them. *See generally* (R.70). These are the behaviors the legislature intended to curb by prohibiting possession of controlled substances because these are the behaviors created the potential for substance abuse. *See* Wis. Stat. § 961.001.

As a final point, Wis. Stat. § 961.495 creates penalty enhancers for possession of a controlled substance within 1000 feet of a jail, public park, youth center, community center, school, multiunit public housing project, or public swimming pool. If a controlled substance on an individual's person at the time of arrest remains in his possession until it is removed during the booking process, then the penalties enhancers that apply may depend on nothing more than the route the officer took from the scene of the arrest to the jail. If the officer selects a route that takes the person past a school, then the person could be found to have possessed the substances within 1000 feet of a school. Under the plain meaning of possessed in § 961.41(3g)(am), which penalty enhances apply does not depend on which route the officer took from the scene of the arrest to the jail. The person in handcuffs in the backseat of the squad car has no control over the substances on his person and more than he has control over the route the officer takes to the jail.

It is undisputed that the government used the full force of its power against Dennis when it took him into custody. When a government bears down on an individual with such heavy force, the individual loses control of any substances on his person as a matter of law. Brantner did not possess a controlled substance in Fond du Lac County. Therefore, venue was not proper in Fond du Lac County, and the Court must vacated the judgment of conviction with respect to all counts.

B. Finding that Venue Was Proper in Fond du Lac County Would Undermine the Policy Goals of the Constitutional Right to Venue by Presenting Opportunities for the State to Forum Shop in Criminal Cases.

As noted above, the defendant's right to venue in criminal cases has deep roots in Western-style liberal democracy. The American Colonists listed the need for such a right in the Declaration of Independence, the debate over its inclusion in the United States Constitution was limited to arguments about how it could best be stated, and in Wisconsin, the right to considered to be so embedded in the right to "a trial" that it need not be specified. *See* Kershen, Vicinage, 29 Okla. L. Rev. 801, 808 (1976). The policies underlying the right to venue are well-established. The right protects the defendant's interest in presenting a defense, and it protects against the abusive practice of hauling an individual a long distance from where the to criminal conduct occurred to hold a trial in the government's preferred venue. *See* Blume, 60 Mich. L. Rev. at 59-65.

Finding that Fond du Lac County was an appropriate venue in this case would open the door to precisely the type of abusive practice governmental practice in Wisconsin that the right to venue is meant to prohibit. Brantner was arrested in Kenosha County, taken to Fond du Lac County against his will, and then prosecuted there for criminal conduct that occurred in the county where he was arrested. To allow venue to lie in the destination county under these circumstances would be to allow venue to turn exclusively on decisions of law enforcement.

For example, in an investigation conducted by a drug task force comprised of officers from multiple counties, they may decide to have officers from a certain county make an arrest of an individual who they suspect will be carrying drugs on his person in hopes of achieving a more favorable venue. The task force may decide to have Waukesha County officers make an arrest in Milwaukee County,

transport the person to the Waukesha County jail, remove the substances from the individual's person, and then prosecute the case in Waukesha County. This is the type of abusive government practice the Art. I, Sec. VII prohibits. Simply put, where venue lies must depend entirely on the voluntary conduct of the defendant and may not be influenced or manipulated through government decision making. *See Cabrales*, 524 U.S. at 6.

In short, the Court should conclude that venue was not proper in Fond du Lac County to avoid undermining the core policy goals of the individual's constitutional right to venue by opening the door to the exact type of abuse that the right is designed to protect against. *See Johnson*, 323 U.S. at 275-76.

II. Charging and Convicting Brantner Twice for Possessing Oxycodone Once Violated His Protections against Double Jeopardy Under the Wisconsin Constitution and the United States Constitution.

A. Punishing Brantner Twice for Possession of a Controlled Substance and the Associated Bail Jumping Charges Violates the Double Jeopardy and Due Process Clauses of the United States and Wisconsin Constitutions.

Dennis Brantner's constitutional protections against double jeopardy were violated because he was charged and convicted of multiple offenses for the single offense of possession of oxycodone, a schedule II controlled substance under Wisconsin law. U.S. Const. amend. VI; Wisc. Const. Art. I § 8; Wis. Stat. § 961.41(3g)(am); *State v. Derango*, 2000 WI 89, ¶ 26, 236 Wis. 2d 721, 613 N.W.2d 833.

The Fifth Amendment states that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb." Likewise, Art. I, Sec. VIII, of the Wisconsin Constitution guarantees that "no person for the same offense may be put twice in jeopardy of punishment." The Court has historically interpreted these two

constitutional provisions as "identical in scope and purpose. Consequently, the Court "accepts decisions of the United States Supreme Court as controlling interpretations of the double jeopardy provisions of both constitutions." *Davison*, 2003 WI 89 at ¶ 18.

"The double jeopardy clauses of the federal and state constitutions are 'intended to provide three protections: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense.'" *Derango*, 2000 WI 89 at ¶ 26, *quoting State v. Sauceda,* 168 Wis.2d 486, 492, 485 N.W.2d 1 (1992). Multiplicity challenges involving multiple convictions under identical statutory provisions, like the one Brantner raises here, are often referred to as "unit of prosecution challenges" and fall into the third category. *See id*.

Wisconsin courts apply a two-part test to determine whether imposing multiple punishments based on a single course of conduct is unconstitutional. The Court set forth a detailed explanation of the test in *Derango*:

> The first part consists of an analysis under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), to determine whether the offenses are identical in law and fact. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304. The second part, which we reach if the offenses are not identical in law and fact, is an inquiry into legislative intent.
>
> The Blockburger test requires us to consider whether each of the offenses in this case requires proof of an element or fact that the other does not. If, under this test,

> the offenses are identical in law and fact, then charging both is multiplicitous and therefore unconstitutional. If under the Blockburger test the offenses are different in law or fact, a presumption arises that the legislature intended to permit cumulative punishments for both offenses. This presumption can only be rebutted by clear legislative intent to the contrary.
>
> 2000 WI 89 at ¶¶ 29-30 (citations omitted).

Under the first prong of the *Blockburger* test, the two possession of oxycodone offenses in this case are identical in law because they arise under the same statutory provisions, §§ 961.41(3g)(am) and 961.16(2)(a)(11). As such, each count requires proof of the same elements. *State v. Anderson*, 219 Wis. 2d 739, 747, 580 N.W.2d 329 (1998).

Under the second prong of the *Blockburger* test, offenses that arise under the same statutory provision(s) are different in fact if each offense is "'either separated in time or significantly different in nature.'" *State v. Trawitzki*, 2001 WI 77, ¶ 28, 244 Wis. 2d 523, 6278 N.W.2d 801 *quoting Anderson*, 219 Wis. 2d at 750. The offenses in this case are not separated in time because the counts allege that Dennis possessed the pills at the same time on the same date. (R.1:1). Thus, the crux of the dispute under the *Blockburger* test is whether the offenses are different in nature. *See id*.

As Justice Roggensack recently noted in her concurrence in *State v. Pal*, 2017 WI 44, ¶ 46, 374 Wis. 2d 759, 893 N.W.2d 848, some commentators have argued that the *Blockburger* test should not apply to unit of prosecution multiplicity challenges, and the United Supreme Court has indicated support for this conclusion. Justice Roggensack's neatly summarized the rationale for this position in her concurrence without appearing to take any position on its correctness:

> Two convictions for violating the same statute will always be the same in law, but they will never be the same in fact. In charging two violations of the same statute, the prosecutor will always attempt to distinguish the two charges by dividing the evidence supporting each charge into distinct segments.
>
> *Id.*; *see also id.*, n.1 *quoting* Leslie, State v. Grayson, Clouding the Already Murky Waters of Unit of Prosecution Analysis in Wisconsin, 1993 Wis. L. Rev. 811, 824-25.

This reasoning is flawed. Under the second prong of the *Blockburger* test, offenses are significantly different in nature if each offense "*requires* proof of an *additional* fact that the other charges to do not." *See Trawitzski*, 2001 WI 77 at ¶ 28 (emphasis added). The question under this rule is not whether the State purportedly *proved* different facts under each count, the question is whether the state was *required to prove* an additional fact under each count. *See id*. The proposition that the *Blockburger* test does not apply in unit of prosecution cases is problematic because a prosecutor's selected unit of prosecution may be nothing more than additional element that is not included in the statutory definition of the offense. When a prosecutor separates single offense into multiple offenses by creating a new element of the offenses, the prosecutor violates the separation of powers doctrine. *See Brown v. Ohio*, 432 U.S. 161, 169 (1977); *Davison*, 2003 WI 89 at ¶ 31.

Under the constitutional doctrine of separation of powers, "the substantive power to prescribe crimes and determine punishments is vested with the legislature." *Davison*, 2003 WI 89 at ¶ 31 *quoting United States v. Wiltberger*, 5 Wheat. 76, 93 (1820). As a result, when the executive branch defines new offenses by splitting a single offense into multiple offenses contrary to legislative intent, it violates separation of powers, and thereby violates the individual's constitutional protection against double jeopardy. *See id*; *see also*,

Brown, 432 U.S. at 169 ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.").

In this case, the State did not obtain a multiple convictions based on a "unit of prosecution." It obtained multiple convictions by prosecuting Brantner for two crimes that do not exist under the statutes: possession of oxycodone, 5mg, and possession of oxycodone, 20 mg. The information reads as if § 961.41(3g)(am) prohibits possession of *a pill containing* a schedule I or schedule II controlled substance. The phrases "5mg pill" and "20 mg pill" simply constitute an element of the offense created by the prosecutor. If the statutes did in fact prohibit possession of "a pill containing oxycodone," then the State would be required to prove exactly what it claims it had to prove in this case—that Brantner possessed a blue pill containing oxycodone and a white pill containing oxycodone. However, the statutes prohibit possession of oxycodone, a fungible substance. The unit of prosecution is not "a pill," the unit of prosecution is "a controlled substance."

The multiplicity jurisprudence of this Court and the Supreme Court does not stand for the proposition that the State is always entitled to a presumption simply because it purportedly proved different facts under each offense. *See, e.g.*, *Trawitzski*, 2001 WI 77 at ¶ 28; *Anderson*, 219 Wis. 2d 739, 747; *Pal*, 2017 WI 44. Instead, in resolving a unit of prosecution multiplicity challenge, the *Blockburger* test should be applied to determine whether each offense "required proof of an additional fact" that the other offense did not. *See Id*.

Here, each count required proof of an additional fact that the other did not, but only because the State added an extra element to each offense. If each count in the information only included the statutory elements of the offense, then the State would not have been required to prove an additional fact under either count. Because defining criminal offenses is exclusively the prerogative of the

legislature, the *Blockburger* test applies to the offenses written into law by the legislature, not the offense written in the information by the district attorney. *Davison*, 2003 WI 89 at ¶ 31; *Pal*, 2017 WI 44 at ¶ 29.

The possession of oxycodone offenses in this case are identical in law and fact because neither count charged a statutorily defined offense that required proof of an additional fact that the other did not. *See Trawitzski*, 2001 WI 77 at ¶ 28. As a result, a presumption arises that the offenses in this case violated Brantner's constitutional protection against double jeopardy.

B. The Two Possession of Oxycodone Offenses are Identical in Law and Fact, and the Presumption that The Legislature Did Not Intend To Allow for Multiple Punishments Cannot be Overcome by Clear Legislative Intent to the Contrary.

Because the two possession of oxycodone offenses are identical in law and fact, a presumption arises that the legislature did not intend to permit cumulative punishments for both offenses. *Derango*, 2000 WI 89 at ¶ 30. This presumption can only be rebutted by "clear legislative intent to the contrary." *Id*. Legislative intent under a multiplicty analysis is determined by applying four factors: (1) statutory language; (2) legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments. *Anderson*, 219 Wis. 2d at 739. In this case, the State cannot overcome the presumption against it because the face of §961.41(3g)(am) clearly indicates that the legislature did not intend the unit of prosecution to be "a pill," and nothing about the relevant structure of the statute, the context provided by surrounding statutes, or the purpose of controlled substances act suggests otherwise.

The statutory language of §§ 961.41(3g)(am) and 961.16(2)(a) unambiguously designates the unit of prosecution. The unit of prosecution under § 961.41(3g)(am) is defined by the phrase "a controlled substance." The phrase "a controlled substance" is

analogous to the phrase "a firearm" in *Trawitzski*, and the phrase "any person" in *Pal*, and the phrase "any obscene material" in *Madison v. Nickel,* 66 Wis. 2d 71, 83-84, 233 N.W.2d 865 (1974) (upholding four convictions for distribution of obscene materials in one transaction because each count required proof that the images in the magazine were obscene). Under the reasoning of *Trawitzski*, *Madison*, and *Pal*, the unit of prosecution under § 961.41(3g)(am) is "a controlled substance." *See also*, *Melby v. State*, 70 Wis. 2d 368, 380-81, 234 N.W.2d 634 (1975) (upholding multiple convictions for possession of multiple substances under statute prohibiting possession of "a dangerous drug). Nothing about the statutory language indicates that the legislature clearly intended for pill dosage to be a unit of prosecution. *See* §§ 961.41(3g) 961.16(2)(a). The words "pill" and "milligrams" are nowhere to be found in the statutes. *Id.* The text of the statutes simply does not clearly indicate that the legislature intended for possession of a schedule I or schedule II controlled substance to be a Class I felony, 'unless the person possesses pills containing different dosages of a controlled substance, in which case the number of Class I felonies equals the number of different pill dosages possessed.' The text of the statutes clearly indicates the contrary intent.

Additionally, the fact that the prosecutor's "unit of prosecution" is actually a definition of an entirely new offense is evident from the extent to which it would upset the penalty scheme create by the legislature. First, the legislature created a uniform penalty scheme for possession of any schedule I or schedule II controlled substance. For example, under the Act, it is a Class I felony to possess methamphetamine, and it is a Class I felony to possess oxycodone; The penalty for possessing methamphetamine is the same as the penalty for possessing oxycodone. §§ 961.41(3g)(am) and 961.16(2)(a)(7) and 961.16(2)(a)(11). However, a few quick Google searches reveals that oxycodone is available in many more dosages and physical forms (pill and liquid) than methamphetamine. If the unit of prosecution is "a pill," the maximum potential penalty under

§§ 961.41(3g)(am) and 961.16(2)(a) varies with respect to each substance according to the number of dosages in which it is available.

Additionally, using "a pill" as the unit of prosecution fundamentally changes the nature of the offense of possession of a controlled substance. Considering the nature of an offense involves "an examination of the policy considerations" embedded in the applicable statutory scheme. *Id*. at ¶ 1. The relevant policy considerations underlying the offense of possession of a schedule I or II controlled substance are stated in the Declaration of Intent. § 961.001. The Act distinguishes between three categories of offenders: dealers and manufacturers, habitual users, and casual users. §§ 961.001 (1r)-(3). Each category of offender presents a different danger to society, and the severity of penalties created for each category of offender reflects the extent and nature of the danger they pose. *Id*. Thus, the Act is intended to penalize dealers and manufacturers more severely than users on the one hand and to penalized habitual users more severely than casual users on the other.

Yet the Act would not achieve these desired policy goals if the legislature had selected "a pill" as the unit of prosecution. The following hypothetical helps to illustrate this point. Person A, a first-time offender and casual drug user, is caught with one pill of each of the fifteen different dosages of oxycodone (521 mg total). Person B, a drug addict with two prior possession convictions, is caught with fifteen 100 mg oxycodone pills (1500 mg total), and Person C, a first-time offender and drug dealer, is caught with one hundred 20 mg pills of oxycodone (2000 mg total). Person A would face a maximum potential penalty of 52.5 years, person B a 7.5 year maximum sentence as a repeat offender, and person C a fifteen year sentence for possession with intent to distribute. *See* §§ 939.50(e),(i); 961.41(3g); 961.41(1m); 961.48(1)(b). In this scenario, the first-time offender casual drug user would be subject to a penalty more than four times longer than the drug dealer, even the dealer possessed over four times as much of the same substance. Such results would conflict with the

legislature's intent to penalize dealers more severely than users. *See* §§ 961.001(1r)-(3).

Finally, the surrounding penalty provisions provide relevant context. *See Trawitzski*, 2001 WI 77, ¶ 33. Reading §§ 961.41(3g)(am) and 961.16(2)(a)(7) in their broader statutory context further obstructs State's path to overcoming the presumption against its proposed unit of prosecution. The legislature did not clearly intend the create the type of graduated penalty scheme that the State's proposed unit of prosecution would create. Section 961.41(3g)(am) appears in the statutes just below the statutes establishing penalties for delivery and manufacturing related possession offenses. *See* §§ 961.41(1)-(3g)(am) For delivery and manufacturing related possession offenses, the legislature created a graduated penalty scheme under which the penalties are: (1) tied to the type of controlled substance possessed, and (2) directly correlated to the amount possessed. § 961.41(1)-(1q). Because the legislature explicitly created a graduated penalty scheme for delivery and manufacturing offenses, the absence of a graduated penalty scheme for users indicates that the legislature intended to create a uniform penalty scheme, not a graduated one. *See Davison*, 2003 WI 89, at ¶ 59.

In short, given that the unit of prosecution is expressly stated in § 961.41 (3g)(am), "a controlled substance," the State cannot overcome the presumption against its proposed unit of prosecution. The relevant structural, contextual, and policy considerations only serve to further undermine the State's position that the unit of prosecution is "a pill." Even if the Court concludes that the offenses are different in law in fact, the inclusion of an explicit unit of prosecution in §961.41(3g)(am) provides clear textual evidence that the legislature only intended to allow Brantner to be convicted once for possessing oxycodone once.

Brantner was charged, convicted, and sentenced twice for a single offense in violation of his constitutional protections against double jeopardy.

C. In Order to Satisfy the Requirements of The Double Jeopardy Clause, Brantner Must be Resentenced on All Counts.

The appropriate remedy for the violation of Brantner's double jeopardy rights in this case is resentencing on all counts. As a general rule, "when a defendant is convicted of and sentenced for two offenses which are later held to be the same offense, and when one conviction and sentence is vacated on double jeopardy principles, the validity of both punishments is implicated, the sentences for both offenses are illegal. *State v. Martin*, 121 Wis. 2d 670, 681, 360 N.W.2d 43 (1985). An exception to this rule exists when the invalidation of the multiplicitous sentences does not "disturb[] the overall sentence structure or frustrate[] the intent of the original dispositional scheme." *State v. Church*, 2003 WI 74, ¶26, 262 Wis. 2d 678, 665 N.W.2d 141. Whether to resentence a defendant after one of the defendant's convictions is dismissed as multiplicitous is within the sound discretion of the trial court. *State v. Sinks*, 168 Wis. 2d 245, 255, 483 N.W.2d 286 (1992).

In this case, vacating two of the four multiplicitous convictions for possession of oxycodone and bail jumping will disturb the overall sentence structure. Vacating two of the convictions necessarily requires the Court to vacate two sentences imposed consecutive to other sentences because the Court imposed consecutive sentences for each of the four multiplicitous counts. Brantner's period of confinement will be different depending on which of the multiplicitous convictions the Court vacates. Invalidating consecutive sentences will disrupt the overall sentencing structure, so the Court should grant Brantner's request to be resentenced on all counts. *See State v. Sherman*, 2008 WI App 57, ¶¶ 11-12, 310 Wis. 2d 248, 750 N.W.2d 500.

CONCLUSION

For the foregoing reasons, Brantner respectfully requests this Court REVERSE the Decision and Order of the Circuit Court and REMAND the case for further proceedings consistent with the Court's opinion.

Dated this 20th day of June, 2019.
Respectfully Submitted:

Taylor Rens
State Bar No. 1098258
Krug & Rens, LLC
P.O. Box 14218
West Allis, WI 53214
(414) 810-2678
trens@krlawwi.com
ATTORNEY FOR THE DEFENDANT

CERTIFICATIONS

Certification as to Form and Length

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 9991 words. See WIS. STAT. § 809.19(8)(c)1.

Taylor Rens

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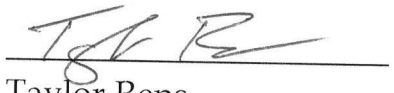

Taylor Rens