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INTRODUCTION

This case presents an ideal opportunity for the Court to reexamine the proper procedure for challenging venue in criminal proceedings. A line of this Court's decisions has suggested that proper venue in a criminal case is a question of fact to be decided by the jury. For multiple reasons, that conclusion is unsound and the Court should clarify that venue is a procedural matter to be determined by the court before trial.

First, the idea that criminal venue is a question of fact for the jury is wholly contrary to the purposes behind venue rules, which are to ensure trial in the county where the crime was committed, to protect the defendant from standing trial in a distant location, and to promote the convenience of both parties in obtaining evidence and securing witnesses. Putting off a finding of venue until *after* trial serves none of those goals. The question of where a trial must be conducted should be determined *before* the trial is held.

Second, other than when a statute might explicitly make location an element of the crime, venue has nothing to do with the substantive question of a defendant's guilt or innocence. Venue is therefore not within the province of the jury. It is a procedural question of law, just like the many procedural matters that fall within a trial court's dominion but that still require the court to consider underlying facts.

Third, and as illustrated by this case, treating venue as a question of fact threatens unjustified acquittals when a jury (or as here, a judge in a bench trial) acquits a defendant on grounds other than factual guilt or innocence. Such a venue-based acquittal makes even less sense given the very premise of improper venue: that the court should not be sitting in judgment in the first place.

Because no rationale supports the notion that criminal venue is a question of fact for the jury, clarification is in order, and the Court should hold that venue in criminal trials is a question of law for the court.

Finally, and regardless of whether venue is treated as a question for a judge or a jury, the Court should also hold that failure to assert a timely objection to venue waives the right. As countless courts have recognized, an objection to venue should generally be considered untimely—and the venue issue is waived—if not presented prior to the commencement of trial. Where an error in venue becomes apparent only after trial begins, however, the proper procedure is for the trial court to declare a mistrial or dismiss the case without prejudice, and pursuant to R.C. 2945.08, hold the defendant for a warrant from the proper county.

And waiver plainly applies here. The address where the alleged crimes took place was stated in Count Three of the indictment, and that address is in Fairfield County, not Franklin County. Because the venue defect was plain on the face of the indictment, Hampton waived any objection to venue when he failed to raise it before trial.

For all of these reasons, the Tenth District's decision should be reversed.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Ohio Attorney General has a strong interest in the proper procedure for addressing venue issues in criminal proceedings. The Attorney General has particularly strong interests in protecting the right of Ohio communities to decide cases within their borders, in conserving the resources of the State, and in guarding against unwarranted acquittals. Because objections to venue are procedural matters that should be raised and resolved before trial, the Attorney General supports the State of Ohio's request for this Court to reverse the judgment below.

STATEMENT OF CASE AND FACTS

On December 30, 2005, an armed intruder broke into the Woods' family apartment and shot Byron Woods in the chest four times. Detectives recovered the intruder's coat from the scene of the crime, and later matched DNA on the coat to a sample from Emmanuel Hampton. Byron then identified Hampton from a photo array as the intruder.

A Franklin County grand jury indicted Hampton on several charges arising from the violent home invasion, including attempted murder and aggravated burglary. The indictment stated the address where the aggravated burglary occurred and stated that the crime occurred "in Franklin County." *See* Indictment at 2-3. Hampton never objected to venue in Franklin County. Instead, he pled not guilty, waived his right to a jury trial, and proceeded to a bench trial.

At trial, testimony by the State's witnesses made clear that the address stated in the indictment is in Fairfield County, not Franklin County. After the State rested its case, Hampton moved for a Crim. R. 29 judgment of acquittal on the grounds that venue was improper and that there was insufficient evidence that Hampton committed the crimes. Hampton then rested his case without presenting any evidence and renewed his motion for a judgment of acquittal.

The State countered that Hampton had waived improper venue: Hampton failed to challenge venue before trial even though the indictment stated the address where the burglary took place. In the alternative, the State argued that the appropriate remedy for venue error would be a mistrial, not a judgment of acquittal.

After a hearing, the trial court entered a Crim. R. 29 judgment of acquittal "based strictly on the issue of [v]enue." Judgment Entry at 2. The court determined that Hampton had not waived improper venue, and denied the State's request to enter a mistrial instead of a judgment of acquittal. *Id.* The court also denied Hampton's motion for a judgment of acquittal "based on the underlying case facts and sufficiency of the evidence as to the issue of [i]dentification." *Id.*

On the State’s appeal, the Tenth District concluded that improper venue is grounds for a judgment of acquittal under Crim. R. 29 and that a judgment of acquittal based on venue is a final verdict. *State v. Hampton*, No. 10AP-1109, 2011-Ohio-3486, ¶ 20 (10th Dist.). Because the State cannot appeal a final verdict under R.C. 2945.67(A), the court denied the State’s motion for leave to appeal and dismissed the appeal. *Id.* ¶ 20-21.

This Court accepted jurisdiction over the State’s appeal.

ARGUMENT

Amicus Curiae Ohio Attorney General’s Proposition of Law No. I:

Venue is a question of law to be decided by the court prior to trial.

Without ever stating a rationale, a line of decisions from this Court has suggested that venue is a question of fact for the jury. *See e.g., State v. Headley*, 6 Ohio St. 3d 475, 477 (1983); *State v. Draggo*, 65 Ohio St. 2d 88, 90 (1981). At bottom, these cases offer little guidance for addressing venue problems in criminal proceedings. They never analyze the specific question, and their core assumption—that venue is a question of fact for the jury—is entirely conclusory. Accordingly, this case presents an opportunity for the Court to reassess that assumption.

For multiple reasons, the notion that venue presents a question of fact to be decided by the jury is wrong. Instead, criminal venue is a question of law for the court, to be decided prior to trial.

A. The idea that venue presents a question of fact for the jury is unsound.

The Ohio Constitution provides that a criminal defendant “shall be allowed . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed” Art. I, § 10. R.C. 2901.12 then fixes the rules for criminal venue, providing that a criminal trial shall generally take place in the county where “the offense or any element of

the offense was committed.” Nothing in those provisions suggests that criminal venue is a question of fact for the jury. And to the contrary, any such suggestion is wrong.

First, criminal venue rules serve a variety of important purposes, and treating venue as a question for the jury to decide at trial thwarts them all. From a defendant’s perspective, holding trial where the offense alleged took place protects him from standing trial in a distant and burdensome location, and protects against prosecutorial forum-shopping. *See United States v. Cores*, 356 U.S. 405, 407 (1958); *State v. Louks*, 28 Ohio App. 2d 77, 82 (4th Dist. 1971). How can a defendant be spared these hardships if venue is only considered *after* trial? In addition, situating venue in the place where the crime was committed promotes the convenience of both parties in obtaining evidence and securing witnesses. *See People v. Simon*, 25 P.3d 598, 607 (Cal. 2001). How are parties spared the burdens of conducting trial in the wrong place if venue is decided only *after* trial commences? Moreover, venue provisions protect the interests of the community in passing judgment on the crimes committed within its borders. *Id.* at 608; *see generally* Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. Rev. 1658 (2000); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. Cal. L. Rev. 1533 (1993). But how can a community vindicate this prerogative if—as in this case—venue-based acquittals are handed out in a territory that had no authority to issue judgment in the first place? Simply put, the question of *where* trial must be held should be determined *before* trial is held. Accordingly, venue is not properly a question for the jury.

Second, other than when a statute might explicitly make location an element of the crime, venue has nothing to do with the question of a defendant’s guilt or innocence. Indeed, the Court has repeatedly disavowed the suggestion that venue is an element of the offense: “Venue is not a material element of any offense charged. The elements of the offense charged and the venue of

the matter are separate and distinct.” *Draggo*, 65 Ohio St. 2d at 90; *Headley*, 6 Ohio St. 3d at 477; see *United States v. Tzolov*, 642 F.3d 314, 318 (2d Cir. 2011) (“[V]enue is not an element of a crime.”); *People v. Posey*, 82 P.3d 755, 765 (Cal. 2004); *Turner v. Commonwealth*, 345 S.W.3d 844, 846 (Ky. 2011). Venue implicates the conduct of the trial, not a defendant’s criminal liability as a substantive matter. Accordingly, venue is not the province of the jury.

Third, treating venue as a question of fact threatens unjustified acquittals by permitting a jury (or as here, a judge in a bench trial) to acquit a defendant on grounds other than guilt or innocence. *Posey*, 82 P. 3d at 767. On its own, that outcome—disembodying an acquittal from factual guilt or innocence—stretches the boundaries of criminal procedure. But it defies all logic to suggest that a court with no authority to issue judgment in the first place is somehow authorized to issue a judgment of acquittal.

In sum, there is no persuasive rationale for the notion that venue is a question of fact for the jury.

B. Venue is a procedural matter and therefore a question of law for the court.

Venue and its underlying facts simply establish the proper place for trial. “Venue is not a material element of any offense charged. The elements of the offense charged and the venue of the matter are separate and distinct.” *Draggo*, 65 Ohio St. 2d at 90; *Headley*, 6 Ohio St. 3d at 477. And, venue has nothing to do with a defendant’s guilt or innocence. *Posey*, 82 P. 3d at 763-65; *Simon*, 25 P. 3d at 618 n.18; *State v. Hutcherson*, 790 S.W.2d 532, 535 (Tenn. 1990).

Venue is a procedural matter—a question of law concerning the conduct of the trial for the court to decide. See *Posey*, 82 P. 3d at 765 (venue is a “procedural prerequisite” to a criminal trial) (quoting 4 LaFave et al., *Criminal Procedure* (2d ed. 1999), § 16.1(g), pp. 498-499); *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981) (“Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the

accused.”). This is true even if resolution of the procedural question requires the court to consider underlying questions of fact, and numerous other procedural matters decided by the court fit that bill. For instance, the trial court decides whether to dismiss an action for violation of a defendant’s speedy trial right, making the factual determinations whether there was prejudice from and good cause for the delay. *State v. Triplett*, 78 Ohio St. 3d 566, 568-71 (1997). The trial court also makes the preliminary determination whether to dismiss a criminal action for lack of probable cause. *State v. Green*, 90 Ohio St. 3d 352, 365 (2000); *State ex rel. Mancino v. Campbell*, 66 Ohio St. 3d 217, 219 (1993).

It is consistent with these practices to treat venue as a procedural question of law for the court, and significantly, other aspects of Ohio venue law seem to recognize this. For instance, Crim. R. 12(J) empowers the trial court to grant a motion to dismiss based on improper venue, and to order the defendant held in custody pending the filing of a new indictment. R.C. 2945.08—which prescribes what to do when improper venue becomes apparent at trial—also leaves venue decisions in the hands of the court. That provision instructs that “the court must direct the defendant” to be held pending a warrant from the proper county “[i]f it appears, on the trial of a criminal cause, that the offense was committed within the exclusive jurisdiction of another county of this state.” R.C. 2945.08.

Ohio’s change-of-venue provisions point the same way, treating venue as a question of law for the court. A trial court can change venue “when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.” Crim. R. 18(B). In deciding whether a change of venue is warranted, the trial court must make factual determinations about the effects of “prejudicial pretrial publicity” and the likelihood that a local jury will be fair and impartial. *State v. Johnson*, 88 Ohio St. 3d 95, 118 (2000). And, as this Court has emphasized, “[a] change

of venue rests largely in the discretion of the trial court.” *Id.* (internal quotation marks omitted) (alteration in original). That other venue procedures are properly recognized in Ohio as questions for the court confirms the need to reexamine the Court’s prior suggestion that proper venue is a factual question for the jury.

One final aspect of the Court’s prior venue decisions merits comment, and further underscores the need for reassessment. In *Headley*, the Court not only suggested that criminal venue is a matter for the jury, but it said that “the standard of proof” for criminal venue “is beyond a reasonable doubt.” 6 Ohio St. 3d at 477. This makes little sense. The U.S. Supreme Court has held that the due process clause of the Fourteenth Amendment requires the state to prove every element of a crime beyond a reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), and to prove beyond a reasonable doubt to the jury every fact (other than a prior conviction) that increases the punishment for a crime above the legislated maximum, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Venue, however, is generally not an element of any crime—the Court even recognized that in *Headley*, 6 Ohio St. 3d at 477; nor would the facts underlying venue serve to increase the punishment for any offense. Venue simply fixes the proper place for trial. The beyond-a-reasonable-doubt standard has no place in venue decisions. Yet its anomalous presence confirms that this area of the law is off track and calls out for clarification.

In sum, venue is not a factual issue to be proven at trial, but a procedural matter to be decided by the court.

Amicus Curiae Ohio Attorney General's Proposition of Law No. II:

Failure to assert an objection to improper venue before trial generally waives the right.

Regardless of whether venue is a question for the judge or the jury, a defendant waives any objection to venue when he fails to assert such an objection prior to the start of trial. Here, the venue defect was plain on the face of the indictment. Accordingly, Hampton waived any objection to venue when he failed to raise it before trial.

Although the U.S. Supreme Court has never directly addressed the issue, it pointed out in a somewhat analogous context that if a defendant were *not* required to raise such objections prior to trial “[s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.” *Davis v. United States*, 411 U.S. 233, 241 (1973) (addressing objections to the composition of the grand jury that returned the indictment).

It is well-established among the lower federal courts and many States that venue objections must be raised before trial and that waiver can result from the defendant’s inaction. *See, e.g., United States v. Delgado-Nunez*, 295 F.3d 494, 497 (5th Cir. 2002) (“[V]enue issue is waived when not raised before or during trial unless the defendant lacked notice of the venue defect in question.”); *United States v. Price*, 447 F.2d 23, 27 (2d Cir. 1971); *Hagner v. United States*, 54 F.2d 446 (D.C. Cir. 1931); *State v. Johanson*, 932 A.2d 848, 855-56 (N.H. 2007) (“[I]n the federal system and a substantial majority of states, . . . venue can be waived.”) (internal quotation marks omitted). Failure to object before trial results in waiver if, as here, the issue is apparent on the face of the indictment or the criminal defendant knows the facts underlying his objection to venue before trial. *See, e.g., United States v. Grenoble*, 413 F.3d 569, 573 (6th Cir. 2005) (“[O]bjections to defects in venue are usually waived if not asserted before trial,

[unless] . . . the defect is not apparent on the face of the indictment, and the defendant does not have notice of the defect through other means.”) (internal citations and quotations marks omitted); *United States v. Kelly*, 535 F.3d 1229, 1234 (10th Cir. 2008) (“A defendant can waive improper venue when it is apparent on the face of the indictment that the case should have been tried in another jurisdiction, and yet the defendant allows the trial to proceed without objection.”); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004) (same); *United States v. Ebersole*, 411 F.3d 517, 528 (4th Cir. 2005) (venue objection waived because “every fact giving rise to” that objection appeared on indictment); 4 LeFave et al., *Criminal Procedure* (2d ed. 1999), § 16.1(h), at 508 (“Where the indictment or information alleged events or results in the district that would not properly establish venue there even if proven, the defendant must object pretrial.”). *Cf. State v. McCorkell*, 822 P.2d 795 (Wash. Ct. App. 1992) (“[A] criminal defendant waives any challenge to venue by failing to present it by the time jeopardy attaches.”).

This Court should join the weight of authority in holding that objections to venue are generally waived if they are not raised before trial. Several Ohio courts of appeals have recognized this waiver rule already. *See State v. Bound*, No. 03 CA 21, 2004-Ohio-6530, ¶ 13 (5th Dist.); *State v. Kilton*, No. 80837, 2003-Ohio-423, ¶ 8 (8th Dist.); *State v. Otto*, No. 97-BA-57, 2001-Ohio-3193 (7th Dist.); *State v. Williams*, 53 Ohio App. 3d 1, 5 (10th Dist. 1988); *State v. Shrum*, 7 Ohio App. 3d 244, 245 n.2 (1st Dist. 1982).

This weight of authority comports with the general rationale behind the waiver doctrine, which is to encourage defendants to bring errors to the attention of the court in a timely manner. *See State v. Joseph*, 73 Ohio St. 3d 450, 455 (1995) (“An appellate court need not consider an error which was not called to the attention of the trial court at a time when such error could have been avoided or corrected by the trial court.”). Moreover, the fundamental purposes behind the

venue provisions underscore the importance of timely objections. The defendant's protection against being tried in a burdensome or distant location can only be fulfilled meaningfully if he objects to venue *before* trial begins. Similarly, the State's interest in conserving resources and not duplicating proceedings makes it appropriate to require timely objections. And certainly if the Court determines that venue should remain a factual question for the jury, the Court should at least insist on timely venue objections in order to protect the integrity of the criminal process from improper "sandbagging" by the defendant.

Furthermore, it comports with this Court's treatment of numerous other constitutional rights to rule that a defendant can waive objections to venue. A defendant waives his constitutional right to prosecution by indictment if he does not object before trial. *State v. Rohrbaugh*, 126 Ohio St. 3d 421, 423, 2010-Ohio-3286, ¶¶ 5-6; see *State ex rel. Beaucamp v. Lazaroff*, 77 Ohio St. 3d 237, 238-39 (1997). And merely by being absent, he waives his right to be present at court proceedings. *State v. White*, 82 Ohio St. 3d 16, 26 (1998). Other rights that a defendant can waive before trial include the right to counsel, *State v. Dean*, 127 Ohio St. 3d 140, 151, 2010-Ohio-5070, ¶ 67, the right to a jury trial, *State v. Newton*, 108 Ohio St. 3d 13, 28, 2006-Ohio-81, ¶ 81, the right to a speedy trial, *State v. O'Brien*, 34 Ohio St. 3d 7, 9 (1987), and the right to a public trial, *State v. Spivey*, No. 89 C.A. 172, 1998 Ohio App. LEXIS 560, at *15 (7th Dist. Feb. 11, 1998). Like these rights, venue can generally be challenged at the pretrial stage and is best resolved before trial.

Here, Hampton waived his right to proper venue when he failed to object before trial. Count Three of the Indictment provided the address where the alleged crimes took place, and it is in Fairfield County, not Franklin County. Because the facts alleged in the indictment failed to

establish proper venue, the defect was apparent on the face of the indictment. Accordingly, Hampton raised any objection to venue by failing to present it before trial.

Amicus Curiae Ohio Attorney General's Proposition of Law No. III:

When an error in venue becomes apparent only after trial begins, the trial court should declare a mistrial or dismiss the case without prejudice, and pursuant to R.C. 2945.08, hold the defendant for a warrant from the proper county.

Generally, objections to venue are waived if not raised before trial. Nonetheless, trial testimony may place venue in issue only after trial proceedings have begun. The General Assembly has outlined the procedure to be followed in that situation and the statute preserves venue as a procedural issue to be handled by the court.

In a section titled "Trial Proceedings," and a subsection titled "Prosecution in wrong county; proceeding," R.C. 2945.08 specifies the following: "If it appears, on the trial of a criminal cause, that the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed to await a warrant from the proper county for his arrest." R.C. 2945.08. The clerk shall then "forthwith notify the prosecuting attorney of the county in which such offense was committed, in order that proper proceedings may be had in the case. A defendant in such case shall not be committed nor held under bond for a period of more than ten days." *Id.* Thus, "the court *must* direct" that the defendant be held for up to ten days while the proper county commences proceedings against him. *Id.* (emphasis added).

This statutory provision confirms that acquittal is *not* contemplated when venue error becomes apparent during trial. Rather, the General Assembly intends for the proper county to have the opportunity to prosecute. And that makes sense. A defendant is not entitled to acquittal simply because he cannot be convicted on procedural grounds. *See United States v. Scott*, 437 U.S. 82, 96-97 (1978). Rather, an acquittal "represents a resolution, correct or not, of some or

all of the factual elements of the offense charged.” *State v. Ross*, 128 Ohio St. 3d 283, 287, 2010-Ohio-6282, ¶ 16 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). A Crim. R. 29 motion for acquittal is thus appropriate only if proof is lacking of “the essential elements of the crime.” *State v. Williams*, 74 Ohio St. 3d 569, 576 (1996) (internal quotation marks omitted); *see also Derry v. Commonwealth*, 274 S.W. 3d 439, 444 (Ky. 2008) (“Because venue and the determination of any facts related to it do not affect guilt, a court’s decision to terminate a trial for want of proper venue cannot amount to an acquittal.”); *United States v. Hernandez*, 189 F.3d 785, 792 n.5 (9th Cir. 1999) (rejecting defendant’s contention “that a judgment of acquittal is the appropriate remedy in the case of improper venue”).

Accordingly, a trial court faced with a venue error discovered during trial should enter a mistrial or dismissal without prejudice. *See, e.g., United States v. Salinas*, 373 F.3d 161, 170 (1st Cir. 2004) (issuing remand with instructions to dismiss the indictment without prejudice for lack of venue); *United States v. Brennan*, 183 F.3d 139, 151 (2d Cir. 1999) (dismissing mail fraud indictment against corporate defendants without prejudice for lack of venue). *Cf. United States v. Perez*, 280 F.3d 318, 335 n.13 (3d Cir. 2002) (when defense objects at close of the government’s case, trial court “has the discretion to allow the Government to reopen its case.”); *United States v. Stewart*, 256 F.3d 231, 235 (4th Cir. 2001) (vacating convictions and sentences due to improper venue). And in Ohio, the trial court must follow the statutory procedure in R.C. 2945.08 to facilitate the defendant’s indictment in the correct county.

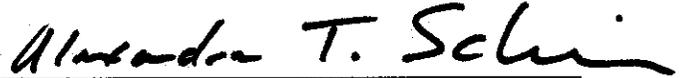
Thus, even if this Court determines that Hampton did not waive his objection to venue—although he did—the Court should reverse the Tenth District’s judgment of acquittal and direct the trial court to enter a mistrial or dismissal without prejudice.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General in Support of Appellant State of Ohio was served by U.S. mail this 30th day of January, 2012, upon the following counsel:

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