STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY GAYHEART,

Defendant-Appellant.

_____/

Supreme Court No. 139664

Court of Appeals No. 282690

St. Joseph Circuit Court
No. 07-014245-FC

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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Dated: April 28, 2010

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Questions Presented

I. Did the defendant preserve the issue regarding jurisdiction, in light of the proceedings in the trial court on October 11, 2007, during which the defendant, in the presence of his counsel, agreed to the jurisdiction of the trial court to hear his case?

Introduction

On March 12, 2010, this Court directed the Clerk of the Court to "schedule oral argument on whether to grant the application or take other peremptory action," and further ordered that the parties "shall address whether the defendant preserved the issue regarding jurisdiction, in light of the proceedings in the trial court on October 11, 2007, during which the defendant, in the presence of his counsel, agreed to the jurisdiction of the trial court to hear this case." This Court's order indicated that the parties may file supplemental briefs to address the question to be heard at oral argument.

Defendant not only informed the trial court in the presence of his trial counsel that he did not contest Michigan's jurisdiction to try him, but he also affirmatively consented to jurisdiction in Michigan. This normally would amount to a waiver of defendant's challenge to Michigan's jurisdiction to try him and the extinguishing of that claim on appeal. Because some types of jurisdictional claims have been determined never to be waivable, an issue to be resolved by this Court is whether territorial jurisdiction is a subset of subject matter jurisdiction—which is not waivable,—or personal jurisdiction—which is. The People contend that territorial jurisdiction is best viewed as a subset of personal jurisdiction to which a defendant can consent and waive. Accordingly, defendant's consent to be tried in Michigan waived (i.e., extinguished) all aspects of his jurisdictional claims.

Even assuming for purposes of argument that territorial jurisdiction is not waivable because it is considered subject matter jurisdiction, then only part of defendant's jurisdictional claim is preserved, namely, whether as a matter of law there are sufficient facts to confer jurisdiction in Michigan. Defendant's failure to contest jurisdiction and his specific consent to it

in Michigan, will preclude a jury determination of the jurisdictional facts despite the non-waivability of territorial jurisdiction.

Defendant presented his jurisdictional challenge on direct appeal in the Court of Appeals on the basis that the prosecution failed to present sufficient proof that the crime took place in Michigan. Defendant argued that without such proof, the circuit court tried defendant without jurisdiction and in violation of defendant's right to due process. Defendant neither objected to the trial court's jury instruction on territorial jurisdiction nor challenged the accuracy of that instruction in the Court of Appeals.

The Court of Appeals never addressed the issue of whether defendant had preserved or waived the issue regarding jurisdiction, or the issue regarding jurisdictional jury instructions. Nor did the Court of Appeals decide whether territorial jurisdiction was a subset of subject matter jurisdiction or of personal jurisdiction.

In the Court of Appeals, the People *assumed* for purposes of argument that extraterritorial jurisdiction fell within the subject matter jurisdiction of the circuit court and acknowledged that "it has been held that a defendant cannot waive it [subject matter jurisdiction] and may raise the jurisdictional claim at any time."[1] Nevertheless, because defendant did not contest jurisdiction at trial, the People contended in the Court of Appeals that defendant had waived his right to have a jury determination as to the question of jurisdiction. (Plaintiff-Appellee's brief on appeal in the Court of Appeals, p 2.) As will be more fully explicated later, the People's assumption that territorial jurisdiction fell within the subject matter jurisdiction of the circuit court and was not waivable does not prevent this Court from reaching the correct result; rather, territorial

[1] Plaintiff-Appellee's brief on appeal in the Court of Appeals, p 2, citing *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994).

jurisdiction is more properly viewed as a subset of personal jurisdiction and, therefore, can be waived.

The end result under any theory of territorial jurisdiction is that defendant's consent to Michigan jurisdiction removed any dispute as to the jurisdictional facts and operated as a stipulation to the facts the prosecution was required to prove beyond a reasonable doubt to the jury.[2] Defendant's consent to Michigan jurisdiction, at the very least, precluded the submission of the jurisdictional facts to a jury for its determination beyond a reasonable doubt, regardless of whether defendant could waive jurisdiction here.

In any event, there were sufficient jurisdictional facts present as a matter of law for Michigan to acquire territorial jurisdiction under MCL 762.2 because the prosecution proved that defendant had premeditated the victim's murder while in Michigan and also had kidnapped her while in Michigan; therefore the proofs established that at least one element of each offense was committed in Michigan. Regardless of whether defendant preserved the jurisdictional claim or not, defendant could not prevail on his substantive claim on appeal because there were sufficient territorial jurisdictional facts present as a matter of law to confer jurisdiction in Michigan.

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[2] The Court of Appeals in this case correctly determined that the territorial jurisdictional requirements under MCL 762.2 are not elements of the offense. *People v Gayheart*, 285 Mich App 202, 214-215; 776 NW2d 330 (2009). Hence, there was no Sixth Amendment requirement that the jury in this case had to decide the jurisdictional facts beyond a reasonable doubt. See *Apprendi v New Jersey*, 530 US 466, 494-496; 120 S Ct 2348; 147 L Ed 2d 435 (2000). But in fact, the trial court did submit the territorial jurisdictional issue to the jury for its determination beyond a reasonable doubt, even though it was not required to.

Counter-Statement of Facts

The Michigan Court of Appeals summarized the facts as follows:

> The evidence presented at trial established that the victim, Rosemary Reinel, had lived in an apartment complex in St. Joseph County, Michigan, since 2001. Defendant briefly lived in the same apartment complex with a roommate. At some point, the victim became interested in moving to Florida. Defendant apparently learned of this and asked the victim to allow him to drive with her in her car to Florida. Defendant wanted to go to Florida so that he could visit Teresa Mock, a woman with whom he had been romantically involved in the past. The victim initially agreed to allow defendant to drive with her to Florida, but later changed her mind when she learned that defendant was on parole for an unrelated offense.
>
> The victim was last seen on September 20, 2005. The police found the victim's white automobile in a Florida parking lot on September 29, 2005. Defendant was then arrested in Florida after breaking into Mock's home.
>
> On November 1, 2005, the victim's body was discovered in a cornfield in northern Indiana. The cornfield was less than 100 feet from the boundary between Michigan and Indiana. A witness testified that she had seen a white car similar to the victim's automobile parked in a lane leading to the cornfield in late September 2005. The witness remembered the event as unusual because she had never before seen an automobile parked in that lane. A friend of the victim identified certain items that were found near the victim's body as personal property of the victim, which had been stored in the victim's car. A forensic entomologist testified that his observations and calculations indicated that the victim had likely died between September 14, 2005, and September 21, 2005. Cellular phone records indicated that defendant had placed a phone call from the vicinity of the northern Indiana cornfield on the morning of September 20, 2005.
>
> Defendant's roommate testified that defendant had left the apartment "real early" on the morning of September 20, 2005, and that defendant appeared "agitated" when he returned home at about noon that day. When defendant returned, his roommate saw him washing and cleaning a pair of Channellock pliers. Defendant's roommate testified that "what [defendant] was wiping off was red" and that "there looked like pieces of hair" on the pliers. Defendant left the apartment shortly thereafter, but later called his roommate and asked him to "lie for him to the police." When the roommate saw defendant again a day or two later, defendant had "a whole wad of money," which was "quite . . . big" and consisted of "hundreds, fifties, [and] twenties."[2] Defendant's roommate never again saw the pair of Channellock pliers.

A maintenance man who worked for the apartment complex where defendant lived testified that sometime after September 20, 2005, he realized that a large pair of Channellock pliers was missing or had been stolen from a utility room on the premises. No one on the apartment complex maintenance staff could account for what had happened to the pliers, which were never seen again.

It was the prosecution's theory that defendant had taken the missing Channellock pliers and had used them to kill the victim by inflicting several blows to her head. Although the victim's body was partially decomposed when it was found, the evidence showed that she had sustained serious head trauma. On the basis of the pattern of skull fractures, it was determined that there had likely been between seven and nine individual blows to the head with a blunt object.

The jury was properly instructed with respect to the elements of both premeditated murder and felony murder.[3] The jury was further instructed, with respect to both charges, that "[i]n this case the prosecutor must also prove beyond a reasonable doubt that [the victim] was a resident of the State of Michigan, St. Joseph County, at the time of her death, and that the Defendant committed some act toward the commission of the crime while within the State of Michigan, County of St. Joseph . . . ." The verdict form contained in the lower court file indicates that the jury returned verdicts of guilty on both charges.[3]

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[2] A bank employee testified that the victim had withdrawn $ 2,970 in cash on the morning of September 16, 2005.

[3] The charge of felony murder was alternatively predicated on the alleged underlying felonies of kidnapping and larceny. The jury was properly instructed on the elements of both kidnapping and larceny.

Prior to trial, the prosecution had filed a motion in limine to seek the trial court's ruling on whether jurisdiction in Michigan was proper was "a jury question," and, if so, that "the jury must be instructed according to the standards set forth by Justice Holmes, either the intent to produce and the production of an effect in Michigan, St. Joseph County, or, an overt act which is and is intended to be a material step toward accomplishing the crime occurring in Michigan, St.

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[3] *People v Gayheart*, 285 Mich App 202, 204-207; 776 NW2d 330 (2009).

Joseph County." (Motion in limine, p 3-4.) The prosecutor's motion noted that either instruction was independently sufficient. (Motion in limine, p 4.) The trial court heard the prosecution's motion in limine on October 11, 2007.

During the hearing in the trial court on the motion in limine, defendant, in the presence of counsel, told the trial court that he was not opposing the prosecutor's jurisdictional motion in limine. (Motion hearing, October 11, 2007 pp 23-24.) Defendant further specifically agreed that Michigan could assume jurisdiction to try the present case. (Motion hearing, October 11, 2007 pp 23-24.) Both the prosecutor and the trial court, however, were of the belief that defendant could not stipulate to jurisdiction. Defendant's trial counsel responded by specifically noting that he was not stipulating to jurisdiction, but rather "merely not opposing it" either. (Motion hearing, October 11, 2007 p 24.) The trial court told the prosecutor to draft an order to the effect that defendant did not object to the motion in limine "but that a special instruction will be drafted between the parties and, with the agreement of the Court, presented to the jury containing the elements necessary for [MCL 762.2]." (Motion hearing, October 11, 2007 p 27.) The prosecutor responded that he would prepare a proposed version of the jury instruction and submit it with the proposed court order. (Motion hearing, October 11, 2007 p 27.)

Defendant appealed his convictions for premeditated murder and felony murder to the Court of Appeals. Defendant argued that the prosecution failed to produce sufficient evidence that the crime occurred in Michigan and that this claim was neither forfeited nor waived. (Defendant's brief in the Michigan Court of Appeals, pp 12-13.) Defendant did not challenge the adequacy of the trial court's jurisdictional jury instructions.

The Michigan Court of Appeals affirmed defendant's convictions and held that territorial jurisdiction existed under MCL 762.2 where the prosecution proffered evidence that at least one element of each offense had been committed in Michigan. In reviewing the evidence produced at trial, the Court of Appeals held that the proofs sufficiently showed that defendant premeditated and deliberated the victim's murder while he was physically present in Michigan. The Court of Appeals also noted that the proofs also would support a finding by a rational trier of fact that defendant either kidnapped the victim while in Michigan and then forcibly removed her to Indiana, or that he kidnapped her with the intent to extort her money or automobile. The Court of Appeals also held that the trial under Michigan's substantive criminal law did not violate due process where the proofs established that at least one element of each offense was committed in the State.

Argument

I. Defendant at trial specifically told the trial court that he was not contesting Michigan's jurisdiction to try him and also specifically consented to Michigan's jurisdiction to try him. By specifically consenting to Michigan jurisdiction, defendant failed to preserve the issue regarding jurisdiction, because territorial jurisdiction is a subset of personal jurisdiction to which a defendant can consent. Even if territorial jurisdiction is considered subject matter jurisdiction that is never waivable, defendant's consent to Michigan jurisdiction precludes a jury determination of territorial jurisdictional facts.

A. Preservation of Issue

This Court ordered the parties to address the issue of whether defendant had preserved his jurisdictional claim in light of his consenting to be tried in Michigan in the St. Joseph Circuit Court.

B. Standard of Review

The Court of Appeals applied a de novo standard of review for issues of constitutional and statutory interpretation, and all other questions of law.[4]

C. Analysis

Defendant not only informed the trial court in the presence of his trial counsel that he did not contest Michigan's jurisdiction to try him, but he also affirmatively consented to jurisdiction in Michigan. This normally would amount to a waiver of the claim on appeal that would be extinguished. But jurisdictional claims are sometimes not waivable and the issue to be resolved by this Court is whether territorial jurisdiction is a subset of subject matter jurisdiction—which is not waivable,—or personal jurisdiction—which is. The People contend that territorial jurisdiction is best viewed as a subset of personal jurisdiction to which a defendant can consent. Accordingly, defendant's consent to be tried in Michigan waived (i.e., extinguished) all aspects of his jurisdictional claims. Even assuming for purposes of argument that territorial jurisdiction

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[4] *People v Gayheart*, 285 Mich App 202, 207; 776 NW2d 330 (2009).

is not waivable, then only part of defendant's jurisdictional claim is preserved, namely, whether as a matter of law there are sufficient facts to confer jurisdiction in Michigan. The defendant's consent to jurisdiction will still preclude a jury determination of the jurisdictional facts despite the non-waivability of territorial jurisdiction.

Regardless of whether defendant had failed to preserve the jurisdictional claim or not, defendant can not prevail on his substantive claim on appeal because there were sufficient territorial jurisdictional facts present as a matter of law to confer territorial jurisdiction in Michigan under MCL 762.2 because the prosecution established that at least one element of each offense was committed in Michigan.

1. Defendant not only failed to dispute Michigan's jurisdictional basis but he also affirmatively consented to Michigan jurisdiction to try him.

The prosecution had filed a motion in limine to seek the trial court's ruling on whether jurisdiction in Michigan was proper was "a jury question," and, if so, that "the jury must be instructed according to the standards set forth by Justice Holmes, either the intent to produce and the production of an effect in Michigan, St. Joseph County, or, an overt act which is and is intended to be a material step toward accomplishing the crime occurring in Michigan, St. Joseph County." (Motion in limine, p 3-4.) The prosecutor's motion noted that either instruction was independently sufficient. (Motion in limine, p 4.) The trial court heard the prosecution's motion in limine on October 11, 2007.

During the hearing in the trial court on the motion in limine, defendant, in the presence of counsel, told the trial court that he was not opposing the prosecutor's jurisdictional motion in limine. (Motion hearing, October 11, 2007 pp 23-24.) Defendant further specifically agreed that Michigan could assume jurisdiction to try the present case. (Motion hearing, October 11, 2007

pp 23-24.) Both the prosecutor and the trial court, however, were of the belief that defendant could not stipulate to jurisdiction. Defendant's trial counsel responded by specifically noting that he was not stipulating to jurisdiction, but rather "merely not opposing it" either. (Motion hearing, October 11, 2007 p 24.)

Because defendant, in the presence of counsel, specifically "[w]aiv[ed] any claim or argument later that the Court does not have proper jurisdiction over this case," and agreed "to the jurisdiction of the Court to hear this case" (Motion hearing, October 11, 2007 p 23-24), the People submit that defendant had consented to be tried in Michigan and, thus, waived any challenge to the territorial jurisdiction of the St. Joseph Circuit Court.

The United States Supreme Court has recognized that even "[t]he most basic rights of criminal defendants are similarly subject to waiver."[5] In *United States v Olano*, the Court distinguished waiver from forfeiture, explaining "forfeiture is the failure to make the timely assertion of a right, [whereas] waiver is the 'intentional relinquishment or abandonment of a known right.'"[6]

Michigan's waiver doctrine is based upon the notion that a party cannot stipulate to an action and then claim error on appeal based upon it. Defendant is not allowed to assign error on appeal to something his own counsel deemed proper at trial.[7] "To do so would allow a defendant to harbor error as an appellate parachute."[8] Under the waiver doctrine, error is not simply forfeited on appeal but actually "extinguished." Where defense counsel specifically approves of

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[5] *Peretz v United States*, 501 US 923, 936; 111 S Ct 2661; 115 L Ed 2d 808 (1991) (citations omitted).
[6] *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).
[7] *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).
[8] *Green*, 228 Mich App at 691, citing *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

or expresses satisfaction with an action of the trial court, the defendant will be held to have waived his claim to challenge that action on appeal, and thus have extinguished any error.[9] This concept of waiver should be distinguished from the concept of forfeiture in which counsel fails to register an objection to preserve the claim of error on appeal, wherein such claimed error is not preserved for appellate review.[10] Where waiver occurs, "there is no 'error' to review." [11]

Nevertheless, there are some limitations to the waiver doctrine where jurisdiction is concerned. Certain jurisdictional bases such as subject matter jurisdiction are deemed never to be waivable. The People, however, contend that territorial jurisdiction should be considered as a subset of personal jurisdiction that the defendant can elect to waive. This is the subject of the next section.

2. Defendant's claim that Michigan lacked territorial jurisdiction is waivable because territorial jurisdiction is more properly viewed as a subset of in personam or personal jurisdiction that can be waived.

Jurisdiction is the power of a court to act.[12] The umbrella term "jurisdiction," has been susceptible of various meanings within the realm of criminal procedure, which has led to the confusion as to the nature of territorial jurisdiction.[13] Jurisdiction may refer to the authority of the court to try an offense of a certain kind (i.e., subject matter) or it may concern whether a particular court has authority to try a particular person (i.e., personal).[14]

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[9] *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).
[10] *Carter*, 462 Mich at 215.
[11] *Carter*, 462 Mich at 219. *See People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).
[12] *People v Johnson*, 427 Mich 98, 106, n 7; 398 NW2d 219 (1986).
[13] *See Porter v Commonwealth*, 276 Va 203, 228; 661 SE2d 415 (2008).
[14] *People v Eaton*, 184 Mich App 649, 652; 459 NW2d 86 (1990).

Jurisdiction of the subject-matter can neither be given by consent nor waived.[15] Personal jurisdiction, however, may be waived or consented to.[16]

One of the issues that this Court will need to address is whether territorial jurisdiction should be considered as a subset of subject matter jurisdiction or as subset of personal jurisdiction. If the former, it cannot be waived. If the latter, it can be waived. The "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary."[17]

The People contend that territorial jurisdiction is more properly viewed as a subset of personal jurisdiction and, therefore, can be waived. The rationale that territorial jurisdiction falls under personal jurisdiction is that it is more akin to the authority of a court to try a particular person than it is to the power of a court to try a class of cases. The exercise of territorial jurisdiction over defendant in the present case implicates not the power of the court to decide a class of cases in the abstract but rather the authority of the over persons or occurrences located in a defined geographic area. There appears to be no reason why a defendant could not subject himself to the court's personal jurisdiction.[18]

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[15] *In re Return of Forfeited Goods*, 452 Mich 659, 671; 550 NW2d 782 (1996); *People v Phillips*, 383 Mich 464, 469; 175 NW2d 740 (1970).
[16] *Phillips*, 383 Mich at 469-470; *In re Return of Forfeited Goods*, 452 Mich at 671, n 19.
[17] *Wills v Egeler*, 532 F2d 1058, 1059 (CA 6, 1976). *See Wright v Angelone*, 151 F3d 151, 158 (CA 4, 1998) (Petitioner's claim that state circuit court lacked jurisdiction over certain charges rested solely on an interpretation of state law and was therefore not cognizable on federal habeas review); *US ex rel Roche v Scully*, 739 F2d 739, 741 (CA 2, 1984) (observing that "'no federal court to our knowledge has ever granted a writ where a state court's asserted lack of jurisdiction resulted solely from the provisions of state law'"), quoting *United States v Mancusi*, 415 F2d 205, 209 (CA 2, 1969).
[18] *Phillips*, 383 Mich at 470 ("The procedural safeguards spelling out the method whereby a court obtains jurisdiction over the person of an accused are all designed for his protection. If he elects not to avail himself of the established procedural rights there appears to be none who should be heard to complain").

Moreover, it has been held that territorial jurisdiction is part of the due process restrictions on the power of a court to exercise its jurisdiction over a given person and is, therefore, an incident of personal jurisdiction that can be waived.[19]

"Personal jurisdiction deals with the authority of the court to bind the parties to the action."[20] One of the ways in which the circuit court acquires in personam [personal] jurisdiction is the filing of a proper return by the magistrate before whom the defendant has either waived preliminary examination or been examined.[21] Once a defendant is bound over for trial, the circuit court does not lose jurisdiction even if the information filed by the prosecutor was defective in some way.[22] In the present case, the St. Joseph Circuit Court acquired personal jurisdiction over defendant by the filing of an information by the prosecutor, based on evidence produced in the preliminary examination that demonstrated sufficient territorial jurisdiction in Michigan.

Because territorial jurisdiction is a subset of personal jurisdiction that can be waived, defendant's claim that Michigan was without territorial jurisdiction to try him is extinguished under Michigan's waiver doctrine and, thus, is not appealable.[23]

Subject matter jurisdiction, on the other hand, is "the right of the court to exercise jurisdiction over a class of cases."[24] Subject matter jurisdiction refers to the court's power to rule

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[19] See *State v Randle*, 252 Wis 2d 743, 751 n 4; 647 NW2d 324 (2002), citing *Insurance Corp of Ireland, Ltd v Compagnie*, 456 US 694, 701-03; 102 S Ct 2099; 72 L Ed 2d 492 (1982); *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 291-92; 100 S Ct 559; 62 L Ed 2d 490 (1980).
[20] *Eaton*, 184 Mich App at 652-653.
[21] *People v Curtis*, 389 Mich 698, 707; 209 NW2d 243 (1973); *Goecke*, 457 Mich at 458.
[22] *See Goecke,* 457 Mich at 459 ("Having once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed"); *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965) ("Jurisdiction, having once vested in the circuit court, was not lost by virtue of the granting of the motion to quash the information").
[23] *Carter*, 462 Mich at 219.
[24] *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998).

in the particular class of case in the abstract as opposed to the court's power in the particular case before the court.[25] The circuit court is a court of general jurisdiction with the power to rule in criminal cases.[26] There is no question in this case that the circuit court did not lack subject matter jurisdiction, apart from territorial jurisdiction, and defendant does not raise a challenge to such jurisdiction.

The Michigan Court of Appeals opinion in this case neither discussed nor decided the question of whether territorial jurisdiction is a subset of subject matter or personal jurisdiction. Nor did that opinion address whether defendant had waived his territorial jurisdictional claim on appeal by either not contesting it or also by his specific action of consenting to be tried in Michigan. The Court of Appeals decided defendant's claims on the merits without any discussion of issue preservation.

Because there is no controlling case law from this Court on whether territorial jurisdiction is a subset of subject matter jurisdiction or of personal jurisdiction, case law from other State courts that have addressed this question is instructive here. Court decisions from other States are split on whether territorial jurisdiction may be waived, although it is not an even split. Several courts from other States have held that territorial jurisdiction can be waived.[27] The majority of other States, however, have held that territorial jurisdiction is a subset of subject

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[25] *See Goecke*, 457 Mich at 458 n 16.
[26] Const 1963, art 6, § 13; MCL 600.151; MCL 600.601; *Goecke*, 457 Mich at 458.
[27] *Gordon v Commonwealth*, 38 Va App 818, 822; 568 SE2d 452 (2002) ("[d]efendant's claim that the trial court lacked territorial jurisdiction is generally waivable"); *State v Randle*, 252 Wis 2d 743, 751; 647 NW2d 324 (2002) (stating that territorial jurisdiction is an incident of personal jurisdiction that can be waived).

matter jurisdiction that cannot be waived and may be raised at anytime.[28] The rationale for the rule is that territorial jurisdiction "implicate[s] the authority of the court to consider and decide the criminal action."[29] Most of the cases in the majority view make the assumption that territorial jurisdiction falls within the ambit of subject matter jurisdiction, but provide little, if any, analysis of why this is so or why territorial jurisdiction is not considered as an aspect of personal jurisdiction.

In *People v Blume*, this Court explored the dimensions of Michigan territorial jurisdiction prior to the enactment of MCL 762.2.[30] This Court neither discussed nor decided whether territorial jurisdiction was a subset of subject matter or personal jurisdiction. In a dissenting opinion in *Blume*, Justice Boyle would hold that Michigan did have territorial jurisdiction, which she summarily assumed was "subject matter jurisdiction."[31]

If this Court determines that territorial jurisdiction is a subset of subject matter jurisdiction that cannot be waived, then defendant's pre-trial affirmative declarations not to contest but to also consent to jurisdiction would not operate as a waiver of his claim that Michigan lacked territorial jurisdiction. Nevertheless, as will be explicated in the next section, his declaration not to contest and his consenting to Michigan jurisdiction will still operate as a waiver of his right to have a jury determination of the jurisdictional question under MCL 762.2, despite defendant's inability to waive subject matter jurisdiction. In other words, while defendant could still present a sufficiency of the evidence argument regarding territorial

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[28] *See e.g.*, *People v McLaughlin*, 80 NY2d 466, 471; 606 NE2d 1357, 591 NYS2d 966, 968 (1992); *People v Betts*, 34 Cal 4th 1039, 1049; 23 Cal Rptr 3d 138; 103 P3d 883 (2005); *State v Baldwin*, 305 A2d 555, 558 (Me, 1973); *Lane v State*, 388 So 2d 1022, 1027 (Fla, 1980); *State v Willoughby*, 181 Ariz 530, 538 n 7; 892 P2d 1319 (1995); *State v Williams*, 53 Ohio App 3d 1, 4-5; 557 NE2d 818 (1988).
[29] *Betts*, 34 Cal 4th at 1049.
[30] *People v Blume*, 443 Mich 476; 505 NW2d 843 (1993).
[31] *Blume*, 443 Mich at 513 (Boyle, J, dissenting).

jurisdiction generally (as he has done on appeal), his declarations to the trial court have the effect of withdrawing any factual dispute as to territorial jurisdiction and, accordingly, there is no factual finding for the jury to make with regard tp territorial jurisdiction under MCL 762.2.

The holding by the Michigan Court of Appeals that the trial court's jury instructions regarding jurisdiction were in part erroneous (but nevertheless harmless), was, therefore, an unnecessary holding because defendant had waived his right to a jury determination of a factual dispute as to Michigan jurisdiction, even where territorial jurisdiction is considered to be subject matter jurisdiction that is not waivable.[32]

3. If jurisdictional facts are not contested, they are not in issue and, thus, the prosecution need not prove territorial jurisdiction beyond a reasonable doubt, even where territorial jurisdiction is considered to be subject matter jurisdiction.

Even where territorial jurisdiction is considered as a subset of subject matter jurisdiction that is not waivable, courts from other States have held that where the factual basis for defendant's jurisdictional claim is not in dispute, a defendant is not entitled to a jury determination of the jurisdictional claim. In the present case, defendant's affirmative declaration that he was not contesting Michigan's jurisdiction to try him, and, further, that he consented to be tried in Michigan, operated as waiver of his right to have the jury decide the jurisdictional question under MCL 762.2. This Court only needs to reach this issue if it determines that territorial jurisdiction is an unwaivable aspect of subject matter jurisdiction.

The leading case on this point is *People v Carvajal*.[33] In *Carvajal*, the defendant's lawyer decided not to contest the territorial jurisdiction of the State of New York and even withdrew defendant's request for a jury instruction on territorial jurisdiction. The trial court did not submit

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[32] *Gayheart*, 285 Mich App at 223, 223 n 11.
[33] *People v Carvajal*, 14 AD3d 165; 786 NYS2d 450 (2004), aff'd 6 NY3d 305; 845 NE2d 1225; 812 NYS2d 395 (2005).

the jurisdictional question to the jury because defense counsel withdrew his request. On appeal, defendant argued that the issue of territorial jurisdiction was non-waivable and should have been submitted to the jury, despite his counsel's concessions.

The New York Supreme Court held that where a defendant's trial counsel had decided not to contest the territorial jurisdiction of the New York courts under a statute similar to MCL 762.2, the defendant was held to have relinquished his opportunity to hold the prosecution to its burden of proving jurisdiction.[34] Furthermore, that court held that despite the fact that territorial jurisdiction is not waivable, the defendant's failure to dispute jurisdiction amounted to a stipulation of facts that the prosecution would otherwise have to prove beyond a reasonable doubt:

> Defendant now argues that the strategy adopted by defense counsel amounted to an impermissible waiver of the issue of territorial jurisdiction. We disagree. While the [*People v*] *McLaughlin* [80 NY2d 466, 471, 606 NE2d 1357, 591 NYS2d 966 (1992)] court remarked that territorial jurisdiction may never be waived, on the very next page it also recognized that *the point is not always put in issue*, and only when the State's right to prosecute is *disputed* must territorial jurisdiction be proved to the jury beyond a reasonable doubt, just like the elements of the crime itself (see 80 N.Y.2d at 472). In the present case, defense counsel made a considered decision not to submit the issue to the jury, thereby simply removing the issue of territorial jurisdiction from the dispute. This decision on the part of the defendants' attorneys is the equivalent of a stipulation to a fact that the People would otherwise have to prove beyond a reasonable doubt.[35]

The New York Court of Appeals affirmed the New York Supreme Court in *Caravjal*. The New York Court of Appeals held that the defendant had "relinquished his opportunity to hold the People to their burden of proof, and did not preserve his current contention that the jury should have decided whether the People proved jurisdiction beyond a reasonable doubt."[36] Nevertheless, the New York Court of Appeals held that despite defendant's waiver and failure to

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[34] *Carvajal*, 14 AD3d at 172-173.
[35] *Carvajal*, 14 AD3d at 172-173 (emphasis in the original).
[36] *People v Carvajal*, 6 NY3d 305, 311-312; 845 NE2d 1225; 812 NYS2d 395 (2005).

preserve the jury issue regarding jurisdiction, "that failure does not amount to waiver of the fundamental question whether—as a matter of law—this State has the power to hear the case."[37]

The defendant in *Carvajal* later filed a petition for a writ of habeas corpus in the United States District Court for the Southern Division of New York. The United States District Court denied habeas relief. Regarding the preservation claim decided by the New York courts, the Federal District Court adopted the magistrate's report and recommendation, which determined that defendant's claim was procedurally defaulted and, thus, barred by an adequate and independent State ground:

> To the extent that Carvajal also claims that, because jurisdiction is non-waivable, Justice Wittner erred by not submitting the jurisdictional issue to the jury, that claim is barred by an adequate and independent state ground because the New York Court of Appeals held that Carvajal failed to preserve the claim.[38]

Like the defendant in *Carvajal*, defendant Gayheart had specifically indicated on the record that he was not contesting jurisdiction and also affirmatively consented to Michigan jurisdiction. Defendant's concessions that he did not contest jurisdiction, as well as his consent to be tried in Michigan, amounted to a stipulation of jurisdictional facts that did not have to be presented to the jury for their determination beyond a reasonable doubt.

In the present case, defendant never contested Michigan's jurisdiction and never argued to the jury that the prosecution failed to prove that defendant committed acts in Michigan that would confer jurisdiction. The prosecution and the trial court, however, erroneously believed that since defendant could not waive jurisdiction, the jury had to be instructed to find that the

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[37] *Carvajal*, 6 NY3d at 312.

[38] *Carvajal v Artus*, unpublished report and recommendation of the United States Magistrate Judge of the United States District Court SDNY, issued October 10, 2008 (Docket no. 17-cv-10634 (CM) (AJP)), pp 80-81, n 18, adopted by *Carvajal v Artus*, unpublished supplemental memorandum of the United States District Court SDNY, issued January 9, 2009 (Docket no. 17-cv-10634 (CM) (AJP)),

prosecution proved jurisdiction beyond a reasonable doubt. (Motion hearing, October 11, 2007 pp 24, 27.) The People submit that where a defendant fails to contest territorial jurisdiction or consents to be tried in Michigan, the trial court need not submit the jurisdictional question to the jury.

The Michigan Court of Appeals in this case, however, neither discussed nor decided any issue of waiver or non-preservation with regard to the submission of jury instructions concerning jurisdiction, holding only that the determination of jurisdictional facts is a question for the jury to be determined beyond a reasonable doubt.

The holding of the New York Court of Appeals in *Carvajal*, if applied to the present case, would require the prosecution to demonstrate that, as a matter of law, there were at least minimal contacts to meet the requirements of Michigan's extraterritorial jurisdictional jurisprudence. The Michigan Court of Appeals in this case correctly required that this finding be made by the trial court alone as an initial matter.[39] The trial court in this case, however, did not make such finding; nevertheless, the Court of Appeals on de novo review concluded that the prosecution produced sufficient evidence to establish territorial jurisdiction in Michigan.[40]

The upshot of applying *Carvajal* to the present case is that while defendant's failure to contest jurisdiction and his consent to be tried in Michigan waived his claim to a jury determination of territorial jurisdiction, defendant neither waived nor failed to preserve the claim that there was insufficient evidence of territorial jurisdiction in Michigan—assuming for purposes of argument that territorial jurisdiction is a subset of subject matter jurisdiction. If this Court determines that territorial jurisdiction is a subset of personal jurisdiction that is waivable, then the People submit that defendant had also waived *any* challenge to the jurisdiction of the

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[39] *Gayheart*, 285 Mich App at 210-212, 219-220.
[40] *Gayheart*, 285 Mich App at 210-212, 217.

circuit court, either at trial or on appeal. The resolution of this issue depends on whether territorial jurisdiction falls within the category of either personal or subject matter jurisdiction.

Courts from other States have held similarly to *Carvajal*, noting that unless a defendant actually puts the jurisdictional matter into issue, a defendant is not entitled to a jury determination beyond a reasonable doubt but rather only to a determination by the trial court as a matter of law.[41]

This Court should adopt the reasoning of the New York Court of Appeals in *Carvajal* and the other similar State court decisions, and hold that defendant had failed to preserve any claim that the jury instructions in the present case were erroneous even if territorial jurisdiction is considered not waivable. Moreover, this holding would be an adequate and independent State ground that would bar habeas relief on this basis.

In any event, there were sufficient jurisdictional facts present as a matter of law for Michigan to acquire territorial jurisdiction under MCL 762.2 because the prosecution proved that defendant had premeditated the victim's murder while in Michigan and also had kidnapped her while in Michigan; therefore the proofs established that at least one element of each offense was committed in Michigan. Regardless of whether defendant preserved the jurisdictional claim or not, defendant could not prevail on his substantive claim on appeal because there were sufficient territorial jurisdictional facts present as a matter of law to confer jurisdiction in Michigan.

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[41] *See e.g.*, *State v Willoughby*, 181 Ariz 530, 548-549, 892 P2d 1319 (1995) (Because the factual basis for defendant's jurisdictional claim was not the subject of dispute, he was not entitled to a jury determination of that issue); *Butler v State*, 353 Md 67, 79-80, 724 A.2d 657 (1999) ("[w]hen evidence exists that the crime may have been committed outside Maryland's territorial jurisdiction and a defendant disputes the territorial jurisdiction of the Maryland courts to try him or her, the issue of where the crime was committed is fact-dependent and thus for the trier of fact"); *Commonwealth v Bighum*, 452 Pa 554, 559-560; 307 A2d 255 (1973), abrogated in part on other grounds by *Commwealth v Rivera*, 983 A2d 1211, 1227 n 17 (2009)(stating that where facts underlying jurisdiction are not in dispute, there is no duty by the trial court to instruct the jury regarding it).

Conclusion and Relief Sought

WHEREFORE, the People of the State of Michigan, Appellee, respectfully request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

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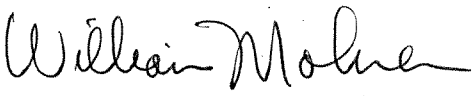

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Dated: April 28, 2010
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