STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-*vs*-

Supreme Court
No. 122183

TIMOTHY ZUBKE,
Defendant-Appellee.

Court of Appeals No. 234130
Detroit Recorder's Court No. 00-010443

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court's jurisdiction arises from MCL 770.12; MSA 28.1109, and from MCR 7.301-302.

The trial court entered its order of dismissal on March 26, 2001; the People filed a claim of appeal on May 1, 2001. The Court of Appeals affirmed the lower court's dismissal in an unpublished opinion on July 30, 2002. This Court granted the People's application for leave to appeal on December 26, 2002.

STATEMENT OF QUESTIONS

I. **Conspiracy is a different offense from any underlying substantive offense, and state law permits one to be convicted and punished for both a substantive offense and conspiracy to commit the offense. Here, Defendant pleaded guilty to a Federal drug conspiracy charge, while facing a state drug possession charge. Did the trial court err in dismissing the substantive cocaine possession charges against Defendant because he pleaded guilty to the Federal conspiracy charge?**

Trial Court said:	*No.*
Court of Appeals said:	*No.*
People say:	*Yes.*

STATEMENT OF FACTS

On August 10, 2000, Federal authorities indicted Defendant on multiple charges of conspiracy to possess with intent to distribute more than 100 kilograms of marijuana, and more than 5 kilograms of cocaine, in violation of 21 USC §841 of the Federal Code.[1] The Indictment alleged a conspiracy commencing in January, 1993 and continuing through August 10, 2000.[2] In January, 2001, Defendant pleaded guilty to a single count of a multi-count Indictment, the count alleging a conspiracy to distribute cocaine; the plea agreement acknowledged that "[d]uring the period of 1993 until 2000," Defendant and others "bought and sold various quantities of cocaine and marijuana."[3] Defendant was sentenced on or about May 14, 2001.[4]

In the meantime, state authorities charged Defendant with the instant charges on July 7, 2000, shortly after his arrest. The Information alleged that on July 6, 2000, Defendant possessed with intent to deliver more than 225, and less than 650 grams of cocaine, and that he possessed a firearm in the commission of the felony. He was bound over for trial on September 15, 2000,[5] and on February 26, 2001 he filed a motion to dismiss the state charges against him, claiming that prosecuting him violated the provisions of MCL 333.7409, since he had pleaded guilty to the Federal

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[1]104a; M, 3/23/01, 4.

[2]104a; M, 3/23/01, 4.

[3]26a-38a, PLEA AGREEMENT; 104a, M, 3/23/01, 4.

[4]104a; M, 3/23/01, 4; *see*, 9a, MOTION TO DISMISS, paragraph 2.

[5]67a.

conspiracy charge the preceeding month.[6] On March 23, 2001, the trial court granted Defendant's motion and dismissed all state charges against him, finding that the state prosecution would violate the provisions of MCL 333. 7409.[7]

The prosecution appealed as of right, and on July 30, 2002, the Court of Appeals affirmed the decision of the trial court in an unpublished opinion.[8] The case is now before this Court on leave granted.

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[6]9a-12a; MOTION TO DISMISS.

[7]107a-111a; M, 3/23/01, 7-11.

[8]4a; COA #234130, Unpublished Opinion of July 30, 2002.

ARGUMENT

I.

CONSPIRACY IS A DIFFERENT OFFENSE FROM ANY UNDERLYING SUBSTANTIVE OFFENSE, AND STATE LAW PERMITS ONE TO BE CONVICTED AND PUNISHED FOR BOTH A SUBSTANTIVE OFFENSE, AND CONSPIRACY TO COMMIT THE OFFENSE. HERE, DEFENDANT PLEADED GUILTY TO A FEDERAL DRUG CONSPIRACY CHARGE, WHILE FACING A STATE DRUG POSSESSION CHARGE. THE TRIAL COURT ERRED IN DISMISSING THE SUBSTANTIVE COCAINE POSSESSION CHARGES AGAINST DEFENDANT BECAUSE HE PLEADED GUILTY TO THE FEDERAL CONSPIRACY CHARGE.

Standard of Review

The sole issue in this appeal is whether the trial court erred in dismissing drug possession charges against Defendant, because he had pleaded guilty to conspiracy charges in Federal court. As the issue raises a question of law, this Court reviews the trial court's decision *de novo*.[9]

Discussion

At issue in this appeal is a question left open by this Court's split decision in *People v Hermiz*:[10] whether it violates MCL 333.7409, to prosecute Defendant for possession with intent to deliver more than 225 grams under MCL 333.7401, following his Federal conviction for conspiracy to distribute cocaine under 21 USA §841(a)(1). For a variety of reasons, it is clear that state law

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[9]While the trial court's findings of fact are entitled to deference unless clearly erroneous, MCR 2.613(C), the legal conclusion drawn from the facts presents a question of law. Therefore, the application of controlling legal principles to the instant facts presents a question of law, which this Court reviews *de novo*. *Cf, People v Carpentier,* 446 Mich 19 (1994).

[10]*People v Hermiz*, 462 Mich 71 (2000).

does not preclude substantive criminal charges when a defendant pleads guilty to a federal charge of conspiracy.[11]

At its core, however, the question in this case rests upon the language and meaning of two statutes — the Controlled Substances Act,[12] and the state conspiracy statute.[13] And an appropriate starting point is to consider the Court's function in construing the enactments of the Legislature, a co-equal branch of government.

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[11]As the Supreme Court noted in *People v Mezy,* 453 Mich 269, 285 (1996), under the "totality of circumstances" test applied to ordinary double jeopardy claims, the "same act" would appear to require a substantial identity of time, location, actors, acts, and offenses. *Cf, People v Wilson*, 454 Mich 421 (1997). In this case, the fact that the conspiracy involved different, albeit partially overlapping times, different people, and different overt acts, appears to militate against a finding that they were substantially the "same act" for purposes of applying MCL 333.7409; MSA 14.15(7409). And while it is theoretically possible for one, smaller conspiracy to be subsumed in a larger one, depending upon whether this is a single agreement to commit multiple crimes or multiple agreements to commit separate crimes, in most cases the "unit of prosecution" would appear to be within the prosecutor's discretion to determine, by charging them as separate crimes.

Removing the case from the realm of controlled substances for purposes of illustration, we see that John Wilkes Booth could properly be charged with conspiring to overthrow the United States Government by combining with others to assassinate various federal leaders. However — even assuming a local statute similar to MCL 333.7409 — he could also be charged separately under local law with murdering President Lincoln, since each involved different actors, different times and places, and different overt acts. *See, People v Hamp*, 110 Mich App 92 (1981)(No double jeopardy bar to convicting defendant for murder, as well as conspiracy to murder).

As with the case of Mr. Booth, in this case, the times were different, the places were different, the actors were different — and the overt acts were different. *Compare, People v Wilson, supra.* Moreover, as we see below, the crimes charged — conspiracy to commit an act, and the overt act itself — were completely different.

[12]*See*, MCL 333. 7401 et seq. For this case, the relevant statute is MCL 333. 7409.

[13]MCL 750.157a

A. Fundamentals of Statutory Construction

> *"[W]hile at times judges need for their work the training of economists or statements, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with — to read English intelligently...."*
>
> Justice Holmes, dissenting in *Northern Securities Co* v *United States*, 193 US 197, 401; 24 S Ct 436; 48 L Ed 679 (1904).

Statutes being the product of human endeavor, a Legislature's enactments will always suffer from the problems inherent in the use of language: words are, after all, merely the symbols we use to express our ideas, and Man being an imperfect creature, language will always be an imperfect means of communication. Unforeseen events, the uncertainties of existence, and the unavoidable ambiguity of rendering thoughts into language all contribute to problems of transmitting, translating, and understanding the expressed ideas of others. While careful attention to the limitations of language may help minimize the problem, the nature of language itself ensures that few communications will be entirely free of ambiguity — nor immune from attack by those with a vested interest in distorting the transmission.[14]

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[14]While the legal profession has, in the past, often found itself in the forefront of the modern movement to muddy, obfuscate, and render unintelligible most attempts at communicating ideas, it is not the only profession which is in a position to profit by confusing things. Practitioners of politics, advertising, deconstructionist philosophy, and the like all seem to devote considerable attention to perfecting the art of obfuscation, and have refined many of the techniques which the legal profession pioneered.

Given the limitations stemming from human language, our Legislature has adopted certain rules for interpreting and construing its statutes.[15] Over the years, courts, as well, have followed practical conventions for discerning the meaning of particular models of expression, in the apparent hope that the drafters of legislation could fashion their writings with an awareness of how its audience would understand them[16] — thereby helping the Legislature to develop its own conventions

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[15]MCL 8.3 *et seq*; MSA 2.212 *et seq*.

While often used interchangeably, the terms "interpretation" and "construction" do have different and distinct meanings, reflecting the difference between the "cognitive" and "creative" functions of the writer's audience: properly understood, one "interpreting" a statute is seeking to discern the meaning of the statutory language itself, within its proper context, while "construing" the statute takes the meaning of the words, looks to the particulars of the controversy before the court, and seeks to decide whether the rule of law at issue applies to the actual pattern of facts at issue. In this regard, while we may occasionally achieve "cognition" or "interpretation" largely as a focused response to the words used, much as Pavlov's dogs reacted to their bell, "construction" generally involves the more deliberate application of the language used to matters which are not so readily apparent — often because the drafter either did not anticipate the event in question, or sacrificed a wordy precision for a more elegant expressive form. But as statutes themselves often involve terms of art — and are usually written by lawyers, who themselves are prone to mistake the volume of language employed for precision of expression — even the task of "cognition" requires a careful consideration of context, and some authorities suggest use of the metaphor "quarrying" for the enterprise of careful, principled extraction of meaning from the ponderous prose of the typical statute. *See, generally*, Dickerson, *The Interpretation and Application of Statutes*, (1975), 13-28.

Of course, in its more extreme forms, a spurious "construction" of a statute can provide the cover needed for an ambitious or unprincipled judge to engage in judicial legislation, which tends to subvert the proper balance between our various branches of government. See, Const 1963, Art III, §2. However, careful attention to context, and due deference to the Legislature as the supreme policy-making institution of any unit of Government, generally suffices to guard against such dangers.

[16]The Legislative audience includes courts, the general public, and specific private concerns affect by particular legislation. *See*, Dickerson, *at* 35-39.

Often, the problem of interpretation is said to be a question of whose understanding should guide the court — that of the drafter, or the audience. But expressing the problem in this way presumes that confusion, rather than communication, is the intent of one or both, and seems to ignore Holmes' warning against holding the Law hostage of "every misinterpretation capable of occurring to intelligence fired with a desire to pervert" the clear meaning of a statute. *Paradiso v United States,* 207 US 368, 372; 28 S Ct 127; 52 L Ed 249 (1907). A good faith

of form. The interaction of these two sets of rules provides a basis for both draftsman and interpreter to operate with the assumption and understanding that each will execute his duties in good faith, and that the role of the judge will be to apply, rather than frustrate, the will of the legislator. And if we understand that "language" as a medium of communication relies upon the cultural interaction of draftsman and audience, we see that one seeking to discern the "true" meaning of a statute, as with any other piece of writing, must undertake to place the words in their proper cultural context in order to understand and interpret them. As one noted authority has written:

> On the one hand, we are interested in the intended meaning of the author in the sense that the process of communication makes no sense unless some intention can be attributed to him. Intended meaning, therefore, remains the ultimate object of search even though no method has yet been devised by which this meaning can be directly known. Because the author's subjective intent is knowable only through inferences drawn from his use of external signs, and because communication through external signs is possible only through established conventions, actual subjective intent is knowable...only by inference from those conventions as conditioned by context.
>
> The conventions of language, on the other hand, inhere in the cultural patterns shared by the author and his audience. Because we must generally assume that the author has not performed the futile act of trying to communicate by unfamiliar signs, the only reliable general key to meaning lies in the language habits of that audience. The notion of a predominating, observable pattern of usage it is convenient to personify in the "typical member of the audience to which the communication is addressed." Although like the "reasonable man" he is in a sense fictional, he is nonetheless useful. What the statute means to such a person is what the word "mean" means in the question "What does the statute mean?" and that is the only thing it can mean.[17]

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attempt to mine the meaning from the words, while not an inconsiderable task, is hardly an impossible one, and may often be avoided by the simple expedient of looking to see whether the meanings are all that different in the first place.

[17]Dickerson, *The Interpretation and Application of Statutes*, 36-37 (1975).

Humans being social animals, communication is an integral part of human existence. Yet at every level of human society, communication depends upon a common understanding of the symbols used. "Communication can take place," writes one noted authority, "because a speaker encodes a message using the same linguistic rules that his hearer uses to decode it."[18] In addition, owing to the differing perspectives of author and audience, "[s]uccessful communication involves a good deal of mutual adjustment, for the source must consider the backgrounds of the audience, and vice versa."[19] When we realize that language is essentially a "complex of social habits," and that the "meaning" of a word or phrase is determined by "the way in which they are habitually used in [a] particular cultural milieu,"[20] we see that true meaning will, by and large, be a question of fact, gleaned by observing how people use the language at the time a particular work is written.[21] And as words themselves take on additional meanings when used in conjunction with other words, we

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[18]Katz, *The Philosophy of Language*, 102 (1966).

[19]Nida, *Message and Mission*, 71-72 (1960).

[20]*Ibid* at 37.

[21]Unfortunately, the fact that meanings of particular words may change over time complicates this task. Let us consider, for example, a passage from *Twelfth Night*, in which Viola, disguised as a page named Cesario, is forced to address a host of young women as she tries to deliver a message of love from her employer, the Duke:

> "Most radiant, exquisite, and unmatchable beauty — I pray you tell me if this be the lady of the house, for I never saw her. I would be loath to cast away my speech, for besides that it is excellently well-penned, I have taken great pains to con it." Shakespeare, *Twelfth Night*, I, v, 181-185.

While today, the word "con" has many unsavory connotations — *eg*, "convict," "fraud," "cheat," and the like — we cannot understand this passage until we know that in Shakespeare's day, "con" was a synonym for "memorize," or "learn by heart."

must read them in their proper context to understand which of several meanings or connotations they carry in a given setting.[22]

This being said, the People suggest that the Court consider the following guidelines in interpreting or construing a legislative enactment, such as the one at issue in this case:

> ***The meaning of any word or phrase used in a statute, constitution, or other legal document must be taken as it was understood at the time of drafting.***

As we have seen above, the meaning of words can change over time. To avoid undercutting legislative supremacy in establishing law and policy, a court may not use such changes to effect a change in the law that amends the statute to bring it closer to the judge's own personal preference. And to ensure that statutory construction does not devolve into amendment by judicial decree, courts must make the effort to understand the original meaning of the language used at the time of enactment, and employ that meaning to the exclusion of any others. In the end, such a quest is one for historical fact, and may employ any resources that shed light on the meaning of the terms employed.

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[22]This may create a distinction between a word's literal meaning, and its implied meaning. For example, the aggregate meaning of the phrase "International House of Pancakes" — *ie*, a restaurant belonging to a chain of restaurants specializing in breakfasts — is far different than the combined literal meanings of the words would otherwise suggest. And an "implied" meaning in a statute, often based upon unique combinations of words, may well be far more subtle: the first paragraph of Michigan's concealed weapons statute, for example, prohibits one from carrying "a dagger, dirk, stilleto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon, except a hunting knife..., concealed on or about his or her person...." MCL 750.227(1); MSA 28.424(1). While the phrase "any other dangerous weapon" could literally include any item which could be used to carry out an assault, the implied meaning of the phrase, in the context of a paragraph which seems to address only various forms of knives, is actually "any other type of stabbing instrument." *See, eg, People v Brown*, 406 Mich 215 (1979); *People v Vaines*, 310 Mich 500 (1945); *People v Johnson*, 175 Mich App 56 (1989).

This does not, however, justify a routine inquiry into the subjective thoughts, intentions, and aspirations of the individual legislators who drafted or passed the statute under review: floor debates may be manipulated by those seeking to undo by judicial construction what the Legislature is trying to do by enactment; and the final product of the legislative process itself is apt to be a compromise among contending and often contradictory political forces, aims, and desires. As Justice Jackson noted in his concurring opinion in *Schwegmann Brothers v Calveri Distillers Corp*:[23]

> "[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. The Rules of the House and Senate...[are] intended to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation....For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation."

Thus, while occasionally useful in resolving otherwise immutable ambiguities, or determining the meaning of outmoded phrases that might otherwise be lost to history, courts should refrain from consulting such sources to discover — rather than merely to lay to rest — any uncertainties in the text of an enactment. And some courts, most notably the English, simply refuse to consider them in any way.[24] After all, as Justice Scalia has noted: "[W]e are a Government of laws, not of committee reports," and courts employing such reports may be tempted to use legislative history as "a forensic rather than an interpretive device, to be invoked when they support the decision

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[23]*Schwegmann Brothers v Calveri* Distillers Corp, 341 US 384, 395-396; 71 S Ct 745; 95 L Ed 1035 (1951)

[24]*See*, Dickerson, at 137-165.

and ignored when they do not."[25] If a statute is too poorly drafted to convey a clear meaning when its terms are considered in their proper context, then it is meaningless as a statement of Law; and in such circumstances, it would be an abuse of judicial power for the judge to redraft it in accordance with his own personal preferences, under the guise of construction.[26]

> ***In construing or interpreting a statute, courts should employ the common meaning of all words and phrases used, unless the context clearly demonstrates that the drafter intended a special meaning.***

Our Legislature has mandated that courts read the words in a statute the way most people would read them — in accordance with their common usage. MCL 8.3a provides that:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

This common sense approach to "read[ing] English intelligently,"[27] reflects a long judicial tradition of sensitivity to the nuances of language: simply put, in the ordinary course of life, we use words to communicate; therefore, courts generally read words and phrases "according to their generally accepted-meaning."[28] On the other hand, when human society has evolved to a measure

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[25] *Wisconsin Public Intervenor v Mortier*, 501 US 597, 621; 111 S Ct 2476; 115 L Ed 2d 532 (1991)(Scalia, J, concurring).

[26] *Cf, Const 1963*, Art III, §2.

[27] *Northern Securities Co v United States*, supra at 401,

[28] *Hawley v Snider*, 346 Mich 181, 185 (1956). *See also*, *People v Powell*, 280 Mich 699 (1937); *Jacobs v Michigan Mutual*, 106 Mich App 18 (1981); *People v Gregg*, 206 Mich App 208 (1994).

of complexity, language is often used to convey technical ideas; thus, where the context clearly suggests a technical meaning, courts will read them in their appropriate technical context.[29]

> ***The Legislature is presumed to know how the general population would interpret the words it chooses to employ in a statute; however, where the Legislature employs a technical term, or term of art, it is presumed to know the proper usage of that term among the specialized population to which its enactment appears directed.***

Just as the first duty of a construing court is to fulfill the intent of the enacting Legislature, the first duty of a legislative body is to render its enactments in an intelligible form: a statute is, after all, a public document, outlining public rights and duties, and subject to interpretation by lawyers and laymen alike. If drafted in an understandable manner, courts will construe a statute according to its plain terms; however, if poorly or analogously drafted, its meaning is subject to distortion, causing it to fail in its purpose.

Thus, as the burden of draftsmanship rests with the Legislature, that body may properly be held accountable for writing its enactments in intelligible English, and we may presume that the Legislature will write in a manner likely to be understood by the general public. This, in turn, means that the Legislature:

(1) Will use common English terms and phrases appropriately;

(2) Will be able to distinguish common words and phrases from specialized or technical jargon;

(3) Will avoid using technical jargon where it can; nevertheless,

(4) Will recognize and correctly use such technical terms of art where appropriate.

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[29]*See, eg, In re Public Service Commission*, 204 Mich App 350 (1994); *Krajewski v City of Royal Oak*, 126 Mich App 695 (1983). *Compare*, *Davidow v Wadsworth Manufacturing Co*, 211 Mich 90 (1920).

> ***The Legislature may rightly presume that a court construing a legislative enactment will read the language employed in accordance with its common meaning, unless the context clearly demonstrates otherwise; and where the Legislature employs terms of art, it may presume that a court will recognize the usage, and read the language in its proper context.***

Just as we presume that the Legislature uses language to communicate, rather than confuse, the Legislature may rightly presume a certain level of intelligence, sophistication, and good faith in its audience. Thus, it may presume that those reading its enactments will understand common English usage, be able to distinguish between common usage and technical terms of art, and read every statute in context.

Keeping this in mind, one might think the task of interpreting statutes to be relatively easy: assuming a writer intent on communicating, and an intelligent reader capable of understanding what is written, reading a statute should pose no particular problem to a court of law. However, given the human mind's ingenuity, rationalization, and nearly limitless capacity for mischief, we must add the caveat that:

> ***The Legislature cannot be presumed to anticipate every conceivable reading of language; however, it is presumed to anticipate the likeliest possibilities.***

Given the limitations of language, perfect clarity of expression is an impossible ideal. When we combine this practical limitation with human ingenuity, launched on flights of fancy by the spur of self-interest, it is not surprising that — whenever we transcend the limits placed upon communication by principles of deconstruction, and view language as a tool under the control of the audience, rather than an attempt to convey ideas by the writer — we see that there are few words,

phrases, or expressions that cannot be twisted beyond meaning by a determined interpreter: each word carries its own etymology, connotations, and history within its meaning; therefore, every word brings its own limitations and ambiguities to each effort at expression. If we multiply the words, we risk losing their essential meaning under a mountain of attempted precision: a provision in a statute containing 20 words may be marginally less precise than one containing 18,000, in which the drafter sought to anticipate and resolve each ambiguity, at the risk of the reader losing the thrust of the law amid a tangled forest of verbiage; and the very effort at anticipating each contingency may well mean that a court, confronted with the inevitably unanticipated actual case before it, may well conclude that the statute was designed only to cover the specific situations outlined, under the rule "*expressio unius est exclusio alterius*."[30]

Therefore, rather than contorting the language of a statute to see if a particular reading is theoretically possible, the role of the construing court should be both more modest, and more sensible — to take the words used in the likeliest mode possible, given their context, and discern from this the likeliest meaning intended.[31]

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[30]"The expression of one thing is the exclusion of another."

[31]*See, eg, Geraldine v Miller*, 322 Mich 85 (1948); *Roosevelt Oil Co v Alger*, 339 Mich 679 (1954); *Jones v Grand Ledge Schools*, 349 Mich 1 (1957); *City of Lansing v Lansing Twp*, 356 Mich 64 (1959).

The traditions of the legal profession notwithstanding, good writing favors simplicity and clarity over complexity and obfuscation.

Counsel for the People acknowledges his inability to find a published decision which has held in favor of this proposition. Even so, and however scandalous it may strike the typical attorney, it strikes the People as self-evident.[32]

In construing a legislative enactment, courts must allow sufficient leeway in form and composition for the drafter's effort to seek simplicity and clarity of expression.

This, counsel admits, is his own modest effort at vindicating the ideals of English Composition teachers everywhere.

Given the legal profession's long and proud history of spitting hairs, this proposition may appear startling at first blush. However, upon close analysis, we see that this is simply another way of stating that courts should, as a rule, construe words according to their common usage.[33] And as this Court itself has recognized that attempts at brevity of expression should be encouraged, rather than punished,[34] it does not conflict with prior case law.

Fortunately, in this case, we confront statutes which seem straightforward and direct — one, appearing in the Penal Code, dealing with conspiracy; and the other, appearing in the Public Health Code, dealing with controlled substances. And if we examine each, we see that they address

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[32] *Cf*, Strunk and White, *The Elements of Style (3d Ed)*, 79-80 (1979).

[33] *See, eg, People v Gregg*, 206 Mich App 208 (1994).

[34] *Cf, Elba Township v Gratiot County*, 287 Mich 372 (1939),

different social concerns — and that the Legislature has never intended the enforcement of one to preclude a prosecution under the other.

B. The Nature of Conspiracy

Though controversial enough to be thought a modern conception, and unknown at Common Law,[35] the crime of conspiracy first emerged during the reign of Edward I, stemming from three enactments which, ironically, sough to curb abuses inherent in the early rules of criminal procedure.[36] Under the ancient conception of conspiracy, however, the crime was defined narrowly, and limited to combinations to procure false indictments, bring false appeals, or maintain "vexatious" lawsuits.[37] Further narrowing the scope of the early conspiracy, the crime itself was not complete unless the person falsely accused was actually indicted and acquitted.[38]

The modern doctrine of conspiracy began to take root in England, in 1611, when Star Chamber considered the matter of a group of poulterers, who had gotten together to accuse an acquaintance of robbery. Because the case against the defendant was so manifestly contrived, the grand jury refused to indict him — but the poulterers were indicted for conspiring to lay false charges. The poulterers claimed that the failure of the plan meant that no real conspiracy took place

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[35]2 LaFave & Scott, *Substantive Criminal Law*, 60-61 (1986)("LaFave" below); *see also*, Winfield, *History of Conspiracy and Abuse of Legal Procedure*, 29-37 (1921).

[36]LaFave, 61.

[37]LaFave, 61; *see also*, Sayre, *Criminal Conspiracy*, 35 HARV L REV 393, 396 (1922)("Sayre" below).

[38]LaFave, 61; Sayre, 397.

— but the *Poulterers Case*[39] stands for the modern proposition that the gist of the conspiracy lies in the agreement, not the successful completion of any nefarious plans — and that the failure of the conspiracy itself is no defense to the charge. A century later, English courts further expanded the scope of conspiracy, by broadening the reach of the statute to include agreements to commit any criminal offense;[40] given the moralistic fervor of the courts of the day, with courts striving to find ways of punishing many acts which Society condemned as immoral,[41] if not technically illegal, the authorities of the day began to view the crime of "conspiracy" broadly, as including "all confederacies whatsoever, wrongfully to prejudice a third person...."[42] And finally, in 1832, Lord Denman penned a conception of conspiracy that crystalized nature of the crime for courts,[43] and is one which we recognize to this day — that a indictment for conspiracy involves "a conspiracy either to do an unlawful act or a lawful act by unlawful means."[44] Soon, by giving a broad reading to the term "unlawful," courts had completed their expansion of conspiracy to its modern scope; and the language of the early 19th Century decisions still seem modern in their conception:

> When it is said...that the means must be unlawful, it is not to be understood that those means must amount to indictable offenses, in order to make the offense of conspiracy complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense

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[39]*Poulterers Case*, 77 Eng Rep 813 (1611).

[40]Sayre, 400.

[41]LaFave, 61.

[42]! Hawkins, Please of the Crown 348 (6th Ed, 1787). *Cf, Rex v Journeymen Taylors of Cambridge*, 88 Eng Rep 9 (1721).

[43]Sayre, at 405.

[44]*Rex v Jones,* 110 Eng Rep 485 (1832).

> illegal, and it is in the combination to make use of such practices that the dangers of this offense [of conspiracy] exist.[45]

Thus, in its modern form, the crime of conspiracy requires a combination of two or more people, formed for the purpose of doing an unlawful act, or a lawful act in an unlawful manner. And thus, it is the agreement — not the act itself — which forms the basis for the crime; and it is the *intent to achieve the objective*, rather than to commit any overt act, which forms the required mental state.[46]

C. The Controlled Substances Act

More than thirty years ago, as part of an effort to bring consistency and uniformity to efforts to combat the drug trade, Michigan adopted the Controlled Substances Act of 1971,[47] incorporating the Uniform Controlled Substances Act into state law. State drug laws were further overhauled in 1978,[48] as the Legislature sought to enhance the penalties for major traffickers, and refine the state's approach to dealing with the growing problems of illicit substances.[49] Presently, reflecting the

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[45]*State v Burnham*, 15 NH 396 (1844).

[46]*See*, Lafave, 62.

[47]1971 PA 196.

[48]1978 PA 368.

[49]*See, eg, Dean v Department of Corrections,* 453 Mich 448, 455-460 (1996).
Over the years, the Legislature has altered the penalty provisions of the Act, in an effort to fine-tune its approach — with varying results. *See, eg, People v Primer*, 447 Mich 269 (1993); *People v Bullock*, 440 Mich 15 (1992). *See also*, 2002 PA 665(effective March 1, 2003) and 2002 PA 710 (effective April 1, 2003) for the Legislature's most recent efforts at refining the law.

nature of drug addiction as a public health concern,[50] the Controlled Substances Act appears as part of the Public Health Code,[51] with violations of Article Seven of the Act resulting in penalties ranging from administrative sanctions to imprisonment for life.[52] And recognizing the interstate nature of the drug trade, and to guard against the prospect of multiple jurisdictions prosecuting defendants for the same crimes, the Act also contains a provision barring prosecution following "a conviction or acquittal" in another jurisdiction for a violation of Article 7.[53]

At present, as applied to this case, MCL 333.7401 makes it a crime for someone to possess the controlled substance cocaine with intent to deliver it; if, as in the present case, the amount is more than 225 grams, but less than 650 grams, the Legislature mandates a penalty of 20-to-30 years imprisonment.[54] The elements of the offense are that the defendant knowingly possessed the drug, intended to deliver it to someone else, that he was not authorized by law to so, and that it weighed between 225 and 650 grams.[55]

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[50]*See,* MCL 333.7202.
State law presently strives to track Federal regulations concerning the designation of controlled substances. *See,* MCL 333.7204.

[51]*See*, MCL 333.7101 *et seq*.

[52]MCL 333.7311, .7401-.7408.
Some penalty provisions will change in early 2003, in ways unrelated to this appeal. *See*, 2002 PA 665 (effective March 1, 2003) and 2002 PA 710 (effective April 1, 2003).

[53]MCL 333.7409.

[54]MCL 333.7401(2)(a)(ii).
The upcoming amendments alter the threshold amounts, and also ends Michigan's experiment with mandatory minimum sentences for drug offenses

[55]*People v Crawford*, 458 Mich 376 (1998); *People v Hamp*, 170 Mich App 24 (1988) *vac in pt* 437 Mich 865 (1988).

D. A conspiracy is not a violation of the Controlled Substances Act.

1963 Const, Art I, sec 15 provides that "No person shall be subject for the same offense to be twice put in jeopardy...." The Legislature, codifying these principles in the context of a prosecution under the Controlled Substances Act, has further decreed that:

> "*If a violation of this article* is a violation of a federal law...a conviction or acquittal under federal law...for the same act is a bar to prosecution in this state."[56]

The law defines conspiracy as "a partnership in criminal purposes,"[57] and requires "a combination with others to do what is unlawful."[58] Michigan's own conspiracy statute, MCL 750.157a, provides that:

> "Any person who conspires together with 1 or more persons to commit an offense punishable by law, or to commit a legal act in an illegal manner, is guilty of the crime of conspiracy...."

As this Court noted in *People v Carter,*[59] a conspiracy is "a mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means," and requires the prosecution to establish two mental elements to sustain a conviction — an intent to combine with others, and an intent to accomplish an

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[56] MCL 333.7409. (Emphasis added).

[57] *United States v Kissel*, 218 US 601, 608; 31 S Ct 124; 54 L Ed 1168 (1910)

[58] *People v Atley,* 392 Mich 298, 310 (1974).

[59] *People v Carter,* 415 Mich 558, 567 (1982).

illegal objective.[60] A conspiracy may be proven by circumstantial evidence, provided that the circumstances are "within safe bounds of relevancy and...such as to warrant a fair inference of the ultimate facts."[61]

But under State law, conspiracy is a distinct crime from any underlying substantive offense:[62] each offense carries a separate and distinct punishment, which courts may punish separately;[63] and each offense raises a different set of potential defenses, which may excuse or mitigate responsibility. Abandonment, for example, while a defense to an underlying substantive charge, is no defense to conspiracy, because the latter crime is complete upon forming the agreement.[64] Moreover, simple logic tells us that conspiring to do an act is substantively, qualitatively, logically, and legally different from doing the actual act: State law recognizes conspiracy as a substantively different offense from the underlying act, in that one "conspires" to do an act by the *act of agreeing and combining* with someone else to undertake the act; on the other hand, one undertakes an act by actually *acting*. To illustrate the point by way of analogy, one "conspires" to play a game of baseball by combining with teammates and opponents in an agreement to meet and play the game; however,

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[60]*Carter*, at 568, citing Perkins, *Criminal Law (2d Ed)*, ch 6, sec 5, p 629. *See also*, *People v White* 147 Mich 31, 36 (1985); *People v Harding,* 163 Mich App 298, 322 (1987) *vac oth grds* 430 Mich 859 (1988).

[61] *People v Beller,* 294 Mich 464, 469 (1940); *People v Atley, supra. See also, People v Sutherlin,* 116 Mich App 494, 498 (1982); *People v Taurianen,* 102 Mich App 17, 31 (1980).

[62]*People v Scotts,* 80 Mich App 1, 14, (1977); *People v Braylock*, 118 Mich App 54 (1982).

[63]*People v Velasquez*, 125 Mich App 1 (1983)(No double jeopardy bar to conviction for aiding and abetting a delivery, and conspiracy to deliver a controlled substance).

[64]*People v Buck,* 197 Mich App 404 (1992); *People v Heffron,* 175 Mich App 543 (1988); *People v Juarez*, 158 Mich App 66 (1987).

the act of playing baseball consists of playing the game, not in the agreement to do so.[65] Similarly, Defendant's federal conviction for conspiracy to possess some controlled substance is complete upon the combination and agreement to do so, whether or not the conspiracy was ever successfully undertaken; the act of *possessing* cocaine is distinct and different, as a matter of logic and law, whether or not the possession also served to corroborate or further the conspiracy. Thus, it follows that the *acts* of conspiring and possessing are manifestly different — and courts err in treating them as indistinguishable . Moreover, state law on this point is entirely open: this Court's split-decision affirmance in *People v Hermiz*[66] leaves the point undecided; and with due respect to the Court of Appeals panel in this case, the Court of Appeals' decision in *People v Avila*[67] appears to be inapposite.

In *Hermiz*, the defendant claimed a violation of MCL 333.7409 when state authorities sought to prosecute him for the same drug conspiracy that formed the basis for his plea to Federal conspiracy charges. Though affirming the lower court's dismissal by an even division, three justices would have found the statute inapplicable since the charges did not involve a violation of Article 7 of the Public Heath Code — and a fourth would have found the statute applicable, but only because

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[65]The People also perceive a qualitative difference between conspiring to murder someone, MCL 750.157a, and actually murdering him, MCL 750.316 — doubtless to the relief of any victim lucky enough to survive. Moreover, counsel suspects that few would be so civic-minded as to give their lives merely to permit the prosecution to complete its proofs.

[66]*People v Hermiz*, 462 Mich 71 (2000).

[67]*People v Avila (On Remand)*, 229 Mich App 247 (1998).

In *Avila*, unlike here, the state prosecution did not involve the identical acts charged in the Federal prosecution; rather, in this case, the underlying drug possession charge was an minor, incidental aspect of the long-term Federal conspiracy case — which involved multiple acts done by multiple offenders, involving multiple controlled substances over an extended period of time.

"the facts suggest the existence of a single conspiracy."[68] By contrast, in this case the state charge stems not from the conspiracy, but from the *act of possession* — an act which the State could prosecute in addition to the conspiracy,[69] and which contains elements entirely distinct from those needed to prove a conspiracy. Thus, *Hermiz* provides no support for the lower court's ruling in this case, and the trial court gleaned the wrong lessons from the case.

In *People v Avila,*[70] which the lower courts cited as the basis for their rulings, the Court of Appeals confronted a situation similar to this case — a Federal conviction for conspiracy, and a state conviction for the substantive offense of possession with intent to deliver. However, the Court of Appeals noted that there was "no question that the state charge arose out of the same acts as those that formed the basis of the federal conviction,"[71] and appeared to assume the applicability of MCL 333.7409, without deciding the point.[72] In this case, by contrast, the application of the statute is directly before the Court — and it is clear that the Federal conspiracy alleged extended *well beyond* the same acts alleged in the state prosecution. Accordingly, it appears that *Avila* was wrongly decided.

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[68]*People v Hermiz, supra* at 91 (Weaver, J, concurring in affirmance).

[69]*People v Lalasquez, supra.*

[70]*People v Avila, supra.*

[71]*People v Avila, supra* at 251.

[72]*People v Douglas,* 191 Mich App 660 (1991).

In the present case, while the Federal prosecution was for conspiracy,[73] the State prosecution was for the substantive offense of possession with intent to deliver a controlled substance.[74] It follows as a matter of simple logic that the procedural bar contained in MCL 333.7409 can have no application to the case at bar — since by its very terms, the procedural bar applies only to violations of Article 7 of the Controlled Substances Act, and the crime of conspiracy would be a violation of Chapter 750 of the Penal Code.[75] Simply put, if the State could convict and punish Defendant in this case for both possessing controlled substances and conspiring to do so, it is a misreading of the applicable statue to bar Michigan from punishing him for *possession*, merely because a different jurisdiction punished him for the *conspiracy*. We can see that this is so by applying common sense to the construction of the statutory bar contained in MCL 333.7409:

- The simplest construction of the phrase "of this article" — which appears in Article 7 of the Controlled Substances Act — is that it refers to Article 7 of the Controlled Substances Act. As this is the only meaning that does not require a contorted, obscure, or counterintuitive reading of the English language, this is how most people would read the statute. As a result it is probably the meaning that the Legislature intended and, therefore, what the statute means.

- The statutory bar precluding state prosecutions for violations "of this article" which have been litigated in other jurisdictions cannot apply to the crime of conspiracy, since a conspiracy is not a violation of the Controlled Substances Act.

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[73]*See,* 21 USA 841(a)(1) for the Federal conspiracy statute. The Court will find Michigan's conspiracy statute at MCL 750.157a.

[74]The appropriate state statute for possession with intent to deliver more than 650 grams of cocaine is MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). *See, Braverman v United States,* 317 US 49. 54; 63 S Ct 99; 87 L Ed 23 (1942)(Noting that a "conspiracy" neither violates, nor arises under, the statute whose violation is its object).

[75]MCL 750.157a.

- As the crimes of conspiracy and possession have different elements, prosecution for one crime bears no relationship to a prosecution for the other — even if some of the proofs will overlap.

- Because an agreement to commit a crime is not the same conduct as possessing a controlled substance, the statutory bar would not bar prosecution, in any event — regardless of which jurisdiction punished which crime first.

Accordingly, the lower courts have erred in applying the provisions of MCL 333.7409 well beyond their proper scope, and this Court's proper course is to reverse.[76]

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[76]The trial court also dismissed the felony firearm charge against Defendant: While a felony firearm charge is a different substantive offense from the drug possession charge, *People v Carmouche*, 112 Mich App 325 (1982); *cf, People v Avant*, 235 Mich App 499 (1999) — and may stand alone, regardless of the resolution of any underlying substantive charge, *People v Wakeford*, 418 Mich 95 (1983) — there appears no compelling legal reason for the trial court's dismissal of the felony firearm charge, as well as the substantive drug possession count. Since it was the prosecutor who first suggested that the felony firearm count could not stand alone, however, (M, 3/23/01, 11-12), it would strike counsel as disingenuous to make this aspect of the trial court's actions the subject of the appeal in the present case. Rather, the People are content to treat the two counts as bound together — requiring, for the purposes of this case, reinstatement of both, or dismissal of both, depending upon this Court's resolution of the Double Jeopardy issue — and will leave the severability of the two counts for another day.

RELIEF

WHEREFORE, this Court should reverse the trial court's order of dismissal, and remand the cause for trial.

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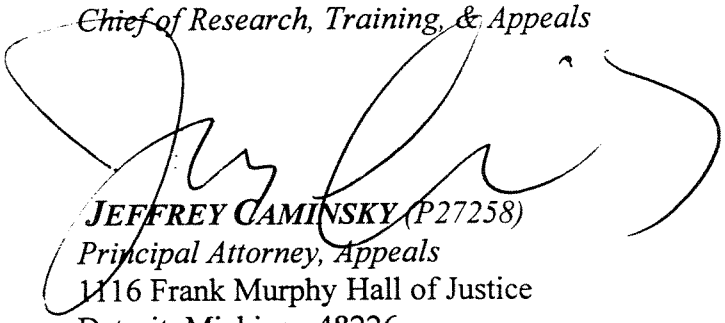

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Dated: February 11, 2003

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