

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2007-0595 and 2007-0651  
Plaintiff-Appellant/ : On Appeal from the Hamilton  
Cross-Appellee : County Court of Appeals, First  
 : Appellate District  
vs. :  
 : Court of Appeals  
FERNANDO CABRALES : Case Number C050682  
 :  
Defendant-Appellee/  
Cross-Appellant

**MERIT BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE**

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CABRALES

**Table of Contents**

Introduction ..... 1.

Statement of the Facts ..... 3.

Proposition of Law: Trafficking in a controlled substance, R.C. 2925.03(A)(2), and possession of a controlled substance, R.C. 2925.11(A), are not allied offenses of similar import. When the statutory elements of each offense are compared in the abstract their elements do not overlap. Therefore, it is possible to commit one offense without committing the other. Because the statutory elements are compared in the abstract, it does not matter if the same controlled substance is involved in both offenses ..... 6.

I. The Double Jeopardy Clause limits courts from imposing multiple convictions for the same crime. It does not prevent legislatures from allowing multiple convictions for similar conduct ..... 6.

II. Ohio’s multiple-count statute prevents trial courts from convicting defendants of allied offenses of similar import when the allied offenses are committed with a single animus. Courts determine which crimes are allied offenses of similar import by comparing the statutory elements of each crime in the abstract ..... 8.

A. The statutory elements of trafficking in marijuana, R.C. 2925.03(A)(2), and possession of marijuana, R.C. 2925.11(A), do not overlap. Therefore, the two crimes are not allied offenses of similar import ..... 9.

B. The Ohio appellate courts, including the First District, have found that trafficking and possession are not allied offenses of similar import ..... 11.

III. Comparing the statutory elements of crimes in the abstract allows courts to find the Legislature’s intentions behind the crimes they draft. A review of the legislative history behind the crime of trafficking a controlled substance shows that it was the Legislature’s intent that defendants who traffic and possess a controlled substance can be convicted of both offenses ..... 13.

Conclusion ..... 15.

Certificate of Service ..... 17.

Appendix ..... A-1.

Date stamped notices of appeal to the Supreme Court:

Notice of certification of conflict ..... A-2.

Date stamped notice of cross-appeal to the Supreme Court ..... A-5.

Judgement entry and decision of the First District Court of Appeals:

Judgement entry of the First District Court of Appeals ..... A-7.

Decision of the First District Court of Appeals ..... A-8.

Relied upon constitutional provisions and statutes:

Fifth Amendment, United States Constitution ..... A-29.

Section 10, Article I, Ohio Constitution ..... A-29.

R.C. 2925.03(A) [1994] ..... A-30.

R.C. 2925.03(A) [1996] ..... A-30.

R.C. 2925.03(A) [2000] ..... A-30.

R.C. 2925.03(A) ..... A-31.

R.C. 2925.11(A) ..... A-31.

R.C. 2941.25 ..... A-31.

## Table of Authorities

### Constitutions

Amend. V, US Const.	
Section 10, Article I, Ohio Constitution	6.

### Ohio Revised Code

R.C. 2925.03 (1994)	14.
R.C. 2925.03 (1996)	14.
R.C. 2925.03 (2000)	14.
R.C. 2925.03	9.
R.C. 2925.11.	9.
R.C. 2941.25.	8.

### United States Supreme Court Cases

<i>Albernaz v. United States</i> (1981), 450 U.S. 333, 340, 101 S.Ct. 1137, 67 L.Ed.2d 275	7.
<i>Blockburger v. United States</i> (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.	6, 7.
<i>Garrett v. United States</i> (1985), 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764.	7.
<i>Missouri v. Hunter</i> (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535	7.
<i>Ohio v. Johnson</i> (1984), 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425.	7.

### Ohio Supreme Court Cases

<i>State v. Blankenship</i> (1988), 38 Ohio St. 3d 116, 117, 526 N.E.2d 816.	1.
<i>State v. Jones</i> , 78 Ohio St. 3d 12, 13, 1997-Ohio-38, 676 N.E.2d 80	1, 8.
<i>State v. Moss</i> (1982), 69 Ohio St. 2d 515, 518, 433 N.E.2d 181	6, 7.
<i>State v. Rance</i> , 85 Ohio St. 3d 632, 636, 1999-Ohio-291, 710 N.E.2d 699	1, 2, 7, 8.

### Ohio Appellate Court Cases

<i>State v. Alvarez</i> , 12 <sup>th</sup> Dist. Case No. CA2003-03-067, 2004-Ohio-2483	12.
<i>State v. Bridges</i> , 8 <sup>th</sup> Dist. Case No. 80171, 2002-Ohio-3771	12.
<i>State v. Burnett</i> , 8 <sup>th</sup> Dist. Case No. 70618, 1997 WL 127176	12.
<i>State v. Cabrales</i> , 1 <sup>st</sup> Dist. No. C050682, 2007-Ohio-857	11.
<i>State v. Foster</i> , 1 <sup>st</sup> Dist. No. C-050378, 2006-Ohio-1567	2, 11.
<i>State v. Gonzales</i> , 151 Ohio App. 3d 160, 2002-Ohio-4937, 783 N.E.2d 903	11.
<i>State v. Greitzer</i> , 11 <sup>th</sup> Dist. Case No. 2003-P-0110, 2005-Ohio-4037	12.
<i>State v. Guzman</i> , 10 <sup>th</sup> Dist. Case No. 02AP-1440, 2003-Ohio-4822	12.
<i>State v. McCoy</i> , unreported, (Nov. 9, 2001), 1 <sup>st</sup> Dist. Case Nos. C000659 and C000660, 2001 WL 1386196	11.
<i>State v. McGhee</i> , 4 <sup>th</sup> Dist. Case No. 04CA15, 2005-Ohio-1585	12.
<i>State v. McIntosh</i> (2001), 145 Ohio App. 3d 567, 763 N.E.2d 704.	12.
<i>State v. Moore</i> , 6 <sup>th</sup> Dist. Case No. E-03-006, 2004-Ohio-685	12.
<i>State v. Ross</i> , 6 <sup>th</sup> Dist. Case No. E-92-24, 1992 WL 371887	12.
<i>State v. Salaam</i> , 1 <sup>st</sup> Dist. No. C020324, 2003-Ohio-1021	11.

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STATE OF OHIO	:	NO. 2007-0595 and 2007-0651
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Plaintiff-Appellant/ Cross-Appellee	:	
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vs.	:	<u>MERIT BRIEF OF PLAINTIFF-</u>
	:	<u>APPELLANT/CROSS-APPELLEE</u>
FERNANDO CABRALES	:	
	:	
Defendant-Appellee/ Cross-Appellant	:	

**Introduction**

Prior to 1999, this Court and the appellate courts of Ohio were in a quandary when it came to figuring out which crimes were allied offenses of similar import. Everyone knew the general test. Indeed, it's the same general test that is used today: "If the elements of the crimes 'correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.'"<sup>1</sup>

The problem was whether courts should look at the elements of the crimes in the abstract or factually on a case-by-case basis.<sup>2</sup> This Court resolved that dilemma in *State*

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<sup>1</sup>*State v. Rance*, 85 Ohio St. 3d 632, 636, 1999-Ohio-291, 710 N.E.2d 699 quoting *State v. Jones*, 78 Ohio St. 3d 12, 13, 1997-Ohio-38, 676 N.E.2d 80 and *State v. Blankenship* (1988), 38 Ohio St. 3d 116, 117, 526 N.E.2d 816.

<sup>2</sup>See *Rance*, supra, 85 Ohio St. 3d at 637-638.

*v. Rance*.<sup>3</sup> After reviewing the relevant law, this Court ruled that the proper way to determine what crimes were allied offenses of similar import was by looking at the statutory elements in the abstract.<sup>4</sup> Looking at the elements in the abstract allows courts to discern the Legislature's intent behind the laws.

But some courts have struggled against this Court's bright-line test set out in *Rance*, sometimes going so far as to claim that "*Rance* was always wrongly decided."<sup>5</sup> Defendants, such as Cabrales, were never far behind in joining these rogue judges in their struggle to return to the confusion that existed prior to *Rance*. This case is an example of that anti-*Rance* struggle.

In this case, the First District Court of Appeals ignored *Rance*'s requirement that statutory elements be compared in the abstract. Instead, they looked to the underlying facts of each of Cabrales' crimes. After looking at the facts, they found that because the same drugs were involved in both the trafficking and the possession offenses that the two had to be allied offenses of similar import.

This case presents this Court with the opportunity to do away with the quagmire that some people would have Ohio dragged back into. It offers solid ground for this Court to stand upon and to say that *Rance*'s bright-line test is good law that preserves the Legislature's intentions behind the laws it passes.

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<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 638-639.

<sup>5</sup>*State v. Foster*, 1<sup>st</sup> Dist. No. C-050378, 2006-Ohio-1567, ¶ 28.

### Statement of the Facts

Fernando Cabrales regularly paid James Longenecker to transport drugs for him, normally from California to Colorado.<sup>6</sup> When Cabrales contacted him about a new delivery opportunity from California to Ohio Longenecker knew he would need someone to help him with the drive, so he sought the help of Sean Matthews.<sup>7</sup>

Matthews and Longenecker met Cabrales at his California home and then went to the home of someone named Jessie.<sup>8</sup> Cabrales and Longenecker spoke to Jessie while Matthews waited in the car.<sup>9</sup> Eventually, Cabrales and Longenecker loaded the car with duffel bags full of marijuana.<sup>10</sup> Over 20,000 grams of marijuana was stuffed into the car.<sup>11</sup>

After getting some sleep, Longenecker and Matthews began a non-stop trip to Ohio.<sup>12</sup> As they approached Ohio, Cabrales – who constantly called them – informed them that the delivery was going to happen in Cincinnati.<sup>13</sup>

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<sup>6</sup>T.p. 431-432.

<sup>7</sup>T.p. 446.

<sup>8</sup>T.p. 453-454.

<sup>9</sup>T.p. 457-458.

<sup>10</sup>T.p. 458-460.

<sup>11</sup>T.p. 308, State's Exhibit 2.

<sup>12</sup>T.p. 470.

<sup>13</sup>T.p. 466, 579.

Shortly after entering Ohio, Matthews and Longenecker were pulled over due to erratic driving.<sup>14</sup> The officer smelled the marijuana.<sup>15</sup> The two were arrested and immediately began cooperating with the police.<sup>16</sup>

Longenecker and an undercover officer remained in contact with Cabrales.<sup>17</sup> Cabrales told Longenecker about where to go and whom to meet.<sup>18</sup> He ultimately navigated Longenecker to a hotel's parking lot.<sup>19</sup>

Eventually, Mundy Williams arrived at the hotel.<sup>20</sup> But he wanted to move things to a house.<sup>21</sup> Longenecker and the undercover officer refused.<sup>22</sup> All the while, Cabrales actively tried to smooth things over so the deal could take place.<sup>23</sup>

Williams was arrested as he tried to leave the parking lot and warrants were issued for Cabrales' arrest.

Cabrales was ultimately found guilty and convicted of two counts of trafficking in marijuana,<sup>24</sup> one count of possession of marijuana,<sup>25</sup> and one count of conspiracy.<sup>26</sup> The

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<sup>14</sup>T.p. 290.

<sup>15</sup>T.p. 293.

<sup>16</sup>T.p. 476.

<sup>17</sup>T.p. 363.

<sup>18</sup>T.p. 364-375.

<sup>19</sup>T.p. 354-365, 478-481.

<sup>20</sup>T.p. 373, 482.

<sup>21</sup>T.p. 373-374.

<sup>22</sup>T.d. 374.

<sup>23</sup>T.p. 375, 485, 496-512, 642-645.

<sup>24</sup>R.C. 2925.03(A)(1) and (2).

<sup>25</sup>R.C. 2925.11(A).

<sup>26</sup>R.C. 2923.01(A)(2).

First District affirmed the majority of this matter, but ruled that possession and trafficking of the same cocaine were allied offenses of similar import.

The First District found its decision was in conflict with other appellate districts. This Court agreed and accepted the conflict on the question: “Are the offenses of trafficking in a controlled substance in violation of R.C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?”

**Proposition of Law: Trafficking in a controlled substance, R.C. 2925.03(A)(2), and possession of a controlled substance, R.C. 2925.11(A), are not allied offenses of similar import. When the statutory elements of each offense are compared in the abstract their elements do not overlap. Therefore, it is possible to commit one offense without committing the other. Because the statutory elements are compared in the abstract, it does not matter if the same controlled substance is involved in both offenses.**

Generally, a defendant cannot be convicted of allied offenses of similar import. Multiple crimes are allied offenses of similar import only when their statutory elements, compared in the abstract, overlap to such a degree that committing one offense automatically results in the other. The elements of trafficking and possession of controlled substance do not overlap. Can a defendant be convicted of both offenses when both crimes involve the same drug?

**I. The Double Jeopardy Clause limits courts from imposing multiple convictions for the same crime. It does not prevent legislatures from allowing multiple convictions for similar conduct.**

Both the Ohio and United States Constitutions protect citizens against double jeopardy.<sup>27</sup> Though that protection shields people from a number of things, what matters in this case is the protection against cumulative punishments for the same offense.<sup>28</sup> The United States Supreme Court offered some guidance on what this protection entails in *Blockburger v. United States*.<sup>29</sup> The *Blockburger* test for determining whether two offenses are the same for double jeopardy purposes is whether each offense requires

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<sup>27</sup> Amend. V, US Const. and Section 10, Article I, Ohio Constitution.

<sup>28</sup> See *State v. Moss* (1982), 69 Ohio St. 2d 515, 518, 433 N.E.2d 181.

<sup>29</sup> *Blockburger v. United States* (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

proof of an element that the other does not.<sup>30</sup> If each statute requires proof of an additional fact which the other does not, then the two offenses are not the same.<sup>31</sup>

Still, a legislative body may prescribe the imposition of cumulative punishments for crimes that constitute the same offense without violating double jeopardy. “[W]here a legislature expresses its intent to permit cumulative punishments for such crimes, the *Blockburger* test must yield.”<sup>32</sup> Even though two offenses may be seen as the same offense under *Blockburger*, “when a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, application of *Blockburger* would be improper; the legislature’s expressed intent is dispositive.”<sup>33</sup>

In other words, in this situation the Double Jeopardy Clause does not limit legislative power, but instead limits judicial power: “[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”<sup>34</sup> “[W]hether punishments are ‘multiple’ is essentially one of legislative intent.”<sup>35</sup> “[T]he *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history.”<sup>36</sup>

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<sup>30</sup>*Id.* at 304.

<sup>31</sup>*Id.*

<sup>32</sup>*State v. Rance*, 85 Ohio St. 3d 632, 635, 1999-Ohio-291, 710 N.E.2d 699, citing *Albernaz v. United States* (1981), 450 U.S. 333, 340, 101 S.Ct. 1137, 67 L.Ed.2d 275.

<sup>33</sup>*Rance*, supra, 85 Ohio St. 3d at 635 citing *Ohio v. Johnson* (1984), 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425.

<sup>34</sup>*Rance*, supra, 85 Ohio St. 3d at 635 quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 and citing *State v. Moss* (1982), 69 Ohio St. 2d 515, 518, 433 N.E.2d 181.

<sup>35</sup>*Ohio v. Johnson* (1984), 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425.

<sup>36</sup>*Rance*, supra, 85 Ohio St. 3d at 635 quoting *Garrett v. United States* (1985), 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764.

In Ohio, the starting place for finding the Legislature's intent is in Ohio's multiple-count statute, which is found in R.C. 2941.25.

**II. Ohio's multiple-count statute prevents trial courts from convicting defendants of allied offenses of similar import when the allied offenses are committed with a single animus. Courts determine which crimes are allied offenses of similar import by comparing the statutory elements of each crime in the abstract.**

The multiple-count statute allows defendants to be punished for multiple offenses of dissimilar import.<sup>37</sup> But when two or more offenses are allied offenses of similar import, then it is the Legislature's intent that a defendant only be convicted of one of them, unless each crime was committed with a separate animus.<sup>38</sup>

In *Rance*, this Court ruled that the way to determine if two offenses were allied offenses of similar import was by looking at the elements of each offense in the abstract: "Courts should assess, by aligning the elements of each crime in the abstract, whether the statutory elements of the crimes 'correspond to such a degree that the commission of one crime will result in the commission of the other.'"<sup>39</sup>

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<sup>37</sup>R.C. 2941.25(B).

<sup>38</sup>R.C. 2941.25(A) & (B). See also *State v. Jones*, 78 Ohio St. 3d 12, 13-14, 1997-Ohio-38, 676 N.E.2d 80.

<sup>39</sup>*Rance*, supra, 85 Ohio St. 3d at 638 quoting *Jones*, supra, 78 Ohio St. 3d at 14.

**A. The statutory elements of trafficking in marijuana, R.C. 2925.03(A)(2), and possession of marijuana, R.C. 2925.11(A), do not overlap. Therefore, the two crimes are not allied offenses of similar import.**

Cabrales was found guilty of trafficking in marijuana, a violation of R.C. 2925.03(A)(2), and of possession of marijuana, a violation of R.C. 2925.11(A).

Trafficking in marijuana is defined as “[n]o person shall knowingly . . . [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.”<sup>40</sup>

Possession of marijuana is defined as “[n]o person shall knowingly obtain, possess, or use a controlled substance.”<sup>41</sup>

A comparison of each crime’s elements shows that they are not allied offenses of similar import. As the following chart demonstrates, only two elements of each crime overlap:

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<sup>40</sup>R.C. 2925.03(A)(2).

<sup>41</sup>R.C. 2925.11(A).

<b>Trafficking - R.C. 2925.03(A)(2)</b>	<b>Possession - R.C. 2925.11(A)</b>
knowingly	knowingly
	obtain
	posses
	use
prepare for shipment	
ship	
transport	
deliver	
prepare for distribution	
distribute	
controlled substance	controlled substance
intended for sale or resale	

The only elements that trafficking and possession have in common are the “knowingly” element and the need for a “controlled substance.”

A person can commit trafficking without committing possession and vice-versa. A person who has a controlled substance for their own personal use will only be guilty of possession. Yet a middle-man directing the distribution of a controlled substance without ever having possessed the drugs will only be guilty of trafficking.

So, compared in the abstract, trafficking and possession of a controlled substance are not allied offenses of similar import. The elements do not correspond to such a degree that the commission of one crime will result in the commission of the other.

The First District found otherwise. It found that “[f]or a person to prepare for shipment or transport drugs, that person would necessarily have to possess the drugs.”<sup>42</sup> But in coming to this conclusion the First District ignored not only its own precedent, but also the clear mandates of *Rance*.

**B. The Ohio appellate courts, including the First District, have found that trafficking and possession are not allied offenses of similar import.**

In deciding *Cabrales*, the First District found that it had never considered whether trafficking under R.C. 2903(A)(2) was an allied offense of possession. Instead, it insisted that it had never looked beyond R.C. 2903(A)(1), which prohibits selling or offering to sell a controlled substance.<sup>43</sup> That simply is not true.

The First District claimed that it had only compared the selling or offering to sell with possession in *State v. Foster*,<sup>44</sup> *State v. Salaam*,<sup>45</sup> and *State v. Gonzales*.<sup>46</sup> But only *Gonzales* involved the (A)(1) portion of the trafficking statute. Both *Foster* and *Salaam* involved a comparison of possession to trafficking under (A)(2).<sup>47</sup> And in both cases the

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<sup>42</sup>*State v. Cabrales*, 1<sup>st</sup> Dist. No. C050682, 2007-Ohio-857, ¶ 36.

<sup>43</sup>*Id.* at ¶ 34.

<sup>44</sup>*State v. Foster*, 1<sup>st</sup> Dist. No. C050378, 2006-Ohio-1567.

<sup>45</sup>*State v. Salaam*, 1<sup>st</sup> Dist. No. C020324, 2003-Ohio-1021.

<sup>46</sup>*State v. Gonzales*, 151 Ohio App. 3d 160, 2002-Ohio-4937, 783 N.E.2d 903.

<sup>47</sup>*Foster*, *supra*, 2006-Ohio-1567, ¶ 1; *Salaam*, *supra*, 2003-Ohio-1021, ¶ 3.

First District found they were not allied offenses of similar import.<sup>48</sup> They made the same finding in *State v. McCoy*<sup>49</sup> and *State v. McIntosh*.<sup>50</sup>

And the First District was not alone. The Fourth,<sup>51</sup> Sixth,<sup>52</sup> Eighth,<sup>53</sup> Tenth,<sup>54</sup> Eleventh,<sup>55</sup> and Twelfth Districts<sup>56</sup> have all found that trafficking under R.C. 2925.03(A)(2) is not an allied offense of similar import of possession under R.C. 2925.11(A).

And how did the First District come to the conclusion that trafficking and possession were allied offenses of similar import? By ignoring *Rance*'s mandate that the statutory elements be compared in the abstract. The First District, instead, took it upon itself to compare not the statutory elements, but the factual elements. But a review of the legislative history shows that a comparison of the statutory elements in the abstract preserves the Legislature's intentions behind the trafficking and possession offenses.

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<sup>48</sup>*Foster*, supra, 2006-Ohio-1567 at ¶¶ 13-16; *Salaam*, supra, 2003-Ohio-1021 at ¶¶ 3 and 16.

<sup>49</sup>*State v. McCoy*, unreported, (Nov. 9, 2001), 1<sup>st</sup> Dist. Case Nos. C000659 and C000660, 2001 WL 1386196, \*4-5.

<sup>50</sup>*State v. McIntosh* (2001), 145 Ohio App. 3d 567, 576, 763 N.E.2d 704.

<sup>51</sup>*State v. McGhee*, 4<sup>th</sup> Dist. Case No. 04CA15, 2005-Ohio-1585, ¶¶ 14-15.

<sup>52</sup>*State v. Moore*, 6<sup>th</sup> Dist. Case No. E-03-006, 2004-Ohio-685, ¶¶ 13-23; *State v. Ross*, 6<sup>th</sup> Dist. Case No. E-92-24, 1992 WL 371887, \*3.

<sup>53</sup>*State v. Bridges*, 8<sup>th</sup> Dist. Case No. 80171, 2002-Ohio-3771, ¶¶ 73-75; *State v. Burnett*, 8<sup>th</sup> Dist. Case No. 70618, 1997 WL 127176, \*4-5.

<sup>54</sup>*State v. Guzman*, 10<sup>th</sup> Dist. Case No. 02AP-1440, 2003-Ohio-4822, ¶¶ 22-23.

<sup>55</sup>*State v. Greitzer*, 11<sup>th</sup> Dist. Case No. 2003-P-0110, 2005-Ohio-4037, ¶ 30 (remanded for resentencing, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.)

<sup>56</sup>*State v. Alvarez*, 12<sup>th</sup> Dist. Case No. CA2003-03-067, 2004-Ohio-2483, ¶¶ 24-29.

**III. Comparing the statutory elements of crimes in the abstract allows courts to find the Legislature's intentions behind the crimes they draft. A review of the legislative history behind the crime of trafficking a controlled substance shows that it was the Legislature's intent that defendants who traffic and possess a controlled substance can be convicted of both offenses.**

Comparing the statutory elements in the abstract makes sense. It allows courts to determine the Legislature's intent. It forces courts to look at the words that the Legislature decided constituted a crime and to not twist them into something the Legislature never intended. And it makes the Legislature's job easier. It's not hard to compare statutory elements in the abstract. Thus, it is easy for the Legislature to purposely craft statutes that will or will not be considered allied offenses of similar import.

If courts were to look at individual facts, then the Legislature would be forced to draft statutes with exception after exception to make sure its true intents were always followed. The result would be a hodgepodge of exceptions and case law. That mess goes away when the statutes are looked at in the abstract.

Some courts may find the wisdom of the Legislature's intent questionable. But it is not for the courts to redraft the laws to become what they think they should be. And no matter what a few courts may think the law should be, a review of R.C. 2925.03's legislative history shows that the Legislature purposely made trafficking and possession crimes of dissimilar import.

Prior to July 1, 1996, a person could be found guilty of trafficking in a controlled substance by merely possessing it. Revised Code 2925.03(A)(4), (6), and (9) all prohibited possessing certain amounts of controlled substances.<sup>57</sup>

After July 1, 1996, the law changed and trafficking prohibited only “knowingly sell[ing] or offer[ing] to sell a controlled substance.”<sup>58</sup> The (A)(2) language related to shipping, transporting, and so on, which was in the law prior to this amendment, was removed.

And in March, 2000 – less than a year after this Court released *Rance* – the (A)(2) language was re-added to R.C. 2925.03.<sup>59</sup> The language remains in place today.

If the Legislature wanted trafficking and possession to be allied offenses of similar import then it could have left the pre-July 1996 language in place. And if it wants to make them allied offenses again then it can merge possession back into trafficking. But until it does so, trafficking and possession are not allied offenses of similar import.

Because trafficking and possession of a controlled substance are not allied offenses of similar import the trial court was vested with the power to convict Cabrales of both crimes. The First District was wrong when it ruled otherwise. Its attempt to thwart the Legislature’s intent should not be allowed to stand. Therefore, this Court should reverse the First District’s decision in this matter.

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<sup>57</sup>R.C. 2925.03(A) [1994].

<sup>58</sup>R.C. 2925.03(A) [1996].

<sup>59</sup>R.C. 2925.03(A) [2000].

## Conclusion

Double jeopardy prevents a court from convicting someone more than once for the same crime. The Ohio Legislature has codified this principal in R.C. 2941.25 – Ohio’s multiple-count statute. This statute prevents defendants from receiving multiple convictions for allied offenses of similar import when the crimes are committed with a single animus.

Courts determine whether two crimes are allied offenses of similar import by comparing the statutory elements of each crime in the abstract. Crimes will only be considered allied offenses of similar import when this comparison shows that committing one crime will always result in the commission of the other.

Trafficking in marijuana and possession of marijuana prohibit different things. Trafficking prohibits preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distribution of a controlled substance when the offender knows or has reasonable cause to believe that the controlled substance is intended for resale. Possession, on the other hand, prohibits obtaining, possessing, or using a controlled substance.

Only the “knowingly” and “controlled substance” elements of these two crimes overlap, thus these two crimes are not allied offenses of similar import. This makes sense because a person can distribute marijuana without possessing it when, for example,

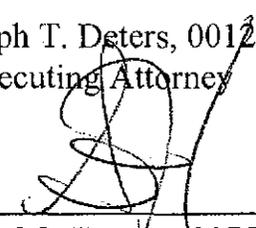
acting as a middle-man. And a person can possess marijuana without distributing it when, for example, by possessing the drug for personal use.

On top of the language of the statutes, the legislative history of the trafficking statute shows that the legislature has intended for courts to have the power to convict defendants of both trafficking and possession. This is evident from their changing the trafficking statute so that it no longer includes language about possessing controlled substances.

For these reasons, the First District erred when it found that trafficking and possession were allied offenses of similar import. Therefore, this Court should reverse that decision.

Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney

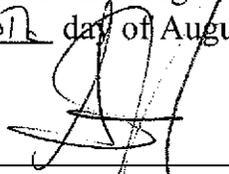


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Scott M. Heenan, 0075734P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
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Phone: 946-3227  
Attorneys for Plaintiff-Appellant/  
Cross-Appellee

**Certificate of Service**

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellant, by United States mail, addressed to Elizabeth E. Agar/1208 Sycamore Street, Cincinnati, Ohio 45202, counsel of record, this 8<sup>th</sup> day of August, 2007.



---

Scott M. Heenan, 0075734P  
Assistant Prosecuting Attorney

**Appendix**

Date stamped notices of appeal to the Supreme Court:

Notice of certification of conflict ..... A-2.  
Date stamped notice of cross-appeal to the Supreme Court ..... A-5.

Judgement entry and decision of the First District Court of Appeals:

Judgement entry of the First District Court of Appeals ..... A-7.  
Decision of the First District Court of Appeals ..... A-8.

Relied upon constitutional provisions and statutes:

Fifth Amendment, United States Constitution ..... A-29.  
Section 10, Article I, Ohio Constitution ..... A-29.  
R.C. 2925.03(A) [1994] ..... A-30.  
R.C. 2925.03(A) [1996] ..... A-30.  
R.C. 2925.03(A) [2000] ..... A-30.  
R.C. 2925.03(A) ..... A-31.  
R.C. 2925.11(A) ..... A-31.  
R.C. 2941.25 ..... A-31.

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. **07-0595**  
Plaintiff-Appellant : On Appeal from the Hamilton County  
Court of Appeals, First Appellate  
vs. : District  
FERNANDO CABRALES : Court of Appeals  
Defendant-Appellee : Case Number C050682

**NOTICE OF CERTIFICATION OF CONFLICT**

Joseph T. Deters (0012084P)  
Prosecuting Attorney

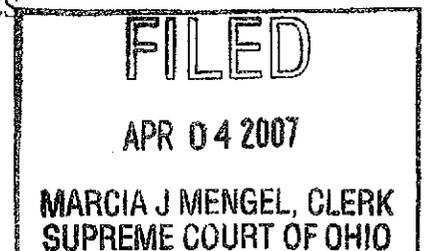
Scott M. Heenan (0075734P)  
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Counsel of Record

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(513) 946-3227  
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLANT, STATE OF OHIO

Elizabeth E. Agar  
Attorney at Law  
1208 Sycamore Street  
(513) 241-5670

COUNSEL FOR DEFENDANT-APPELLEE, FERNANDO CABRALES



IN THE  
SUPREME COURT OF OHIO

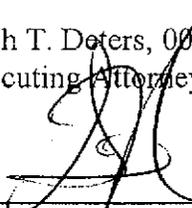
STATE OF OHIO : NO.  
Plaintiff-Appellant :  
vs. :  
FERNANDO CABRALES : NOTICE OF CERTIFICATION OF  
 : CONFLICT  
Defendant-Appellee :

Pursuant to Rule IV of the Ohio Supreme Court Rules of Practice, Plaintiff-Appellant the State of Ohio gives this Court notice that the First District Court of Appeals has certified a conflict to this Court. The issue certified is: Are the offenses of trafficking in a controlled substance in violation of R.C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?

Pursuant to Rule IV, copies of the entry certifying the conflict as well as copies of the decisions that the First District found itself to be in conflict with are attached to this notice.

Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney

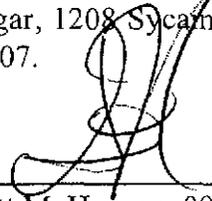


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Scott M. Heenan, 0075734P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Phone: 946-3227  
Attorneys for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

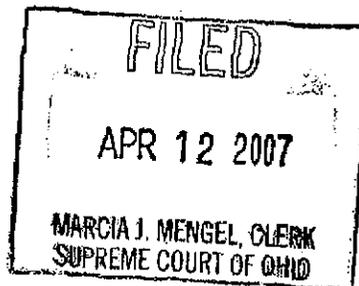
I hereby certify that I have sent a copy of the foregoing Notice of Certification of Conflict, by United States mail, addressed to Elizabeth E. Agar, 1208 Sycamore Street, Cincinnati, Ohio 45210, counsel of record, this 2<sup>nd</sup> day of April, 2007.



---

Scott M. Heenan, 0075734P  
Assistant Prosecuting Attorney

IN THE SUPREME COURT  
OF THE  
STATE OF OHIO



**07-0651**

STATE OF OHIO

Plaintiff-Appellant/  
Cross-Appellee

vs.

FERNANDO CABRALES

Defendant-Appellee/  
Cross-Appellant

Case No. 2007-0595

On Appeal from the First  
District Court of Appeals  
for Hamilton County

Court of Appeals  
Case No. C-0500682

NOTICE OF CROSS-APPEAL ON BEHALF OF  
DEFENDANT-APPELLANT, FERNANDO CABRALES

JOSEPH T. DETERS #0012084P  
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Counsel for Plaintiff-Appellant/  
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ELIZABETH E. AGAR #0002766

1208 Sycamore Street  
Olde Sycamore Square  
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(513) 241-5670 fax 241-5680

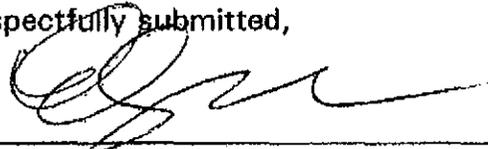
Counsel for Defendant-Appellant/  
Cross-Appellant  
FERNANDO CABRALES

**NOTICE OF APPEAL ON BEHALF OF  
DEFENDANT-APPELLEE/CROSS-APPELLANT, FERNANDO CABRALES**

Appellee, Fernando Cabrales, hereby gives notice of his cross-appeal to the Supreme Court of Ohio from the judgment of the First District Court of Appeals for Hamilton County, entered in Court of Appeals case number C-0500682 on March 2, 2007.

This case involves conviction of a felony offense, raises substantial constitutional questions and is one of public or great general interest. Furthermore, the Court of Appeals has certified a conflict on the issue of whether Defendant's convictions for possession and transportation of the same drugs constitute allied offenses.

Respectfully submitted,

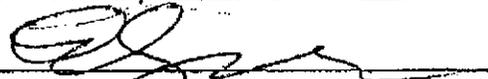


ELIZABETH E. AGAR, Counsel of Record  
Supreme Court No. 0002766

Counsel for Appellee/Cross-Appellant  
FERNANDO CABRALES

**PROOF OF SERVICE**

I certify that a copy of the foregoing Notice of Appeal was hand-delivered to counsel for Appellant-Cross-Appellee this 10<sup>th</sup> day of APRIL, 2007.

  
ELIZABETH E. AGAR

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO



STATE OF OHIO, : APPEAL NO. C-050682  
Plaintiff-Appellee, : TRIAL NO. B-0403121-D  
vs. : JUDGMENT ENTRY.  
FERNANDO CABRALES, :  
Defendant-Appellant. :



D72262051

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, sentence vacated, and cause remanded for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on March 2, 2007 per Order of the Court.

By:

Presiding Judge

[Cite as *State v. Cabrales*, 2007-Ohio-857.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-050682
	:	TRIAL NO. B-0403121-D
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
FERNANDO CABRALES,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentence Vacated, and Cause Remanded.

Date of Judgment Entry on Appeal: March 2, 2007

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Scott Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Elizabeth E. Agar*, for Defendant-Appellant.

*Please note:* This case has been removed from the accelerated calendar.

**MARK P. PAINTER, Judge.**

{¶1} Defendant-appellant Fernando Cabrales appeals his convictions for two counts of trafficking in marijuana,<sup>1</sup> one count of possession of marijuana,<sup>2</sup> and one count of conspiracy.<sup>3</sup> We affirm Cabrales's conviction, but sustain his challenge to part of his sentence, and remand to the trial court for resentencing.

***I. Six Assignments of Error***

{¶2} Cabrales argues that the trial court erred by (1) overruling his motion to suppress the evidence seized from his house in California; (2) convicting him when Ohio lacked jurisdiction to charge him with conspiracy; (3) sentencing him on allied offenses of similar import (possession of, transportation of, and offering to sell the same drugs); (4) refusing a jury instruction on the lesser-included offense of attempt under one count of trafficking; (5) allowing a conviction that was based on insufficient evidence and was against the weight of the evidence, and failing to grant his motion for an acquittal; and (6) imposing consecutive sentences.

{¶3} Because trafficking in violation of R.C. 2925.03(A)(2) and possession in violation of R.C. 2925.11(A) are allied offenses of similar import, we vacate the separate sentences for these offenses and remand so that the trial court can merge the offenses for a single sentence. And in light of the Ohio Supreme Court's decision in *State v. Foster*,<sup>4</sup> we must also vacate the remaining sentences and remand for resentencing. With respect to Cabrales's other assignments of error, they are without merit and overruled.

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<sup>1</sup> R.C. 2925.03(A)(1) and (2).

<sup>2</sup> R.C. 2925.11(A).

<sup>3</sup> R.C. 2923.01(A)(2).

<sup>4</sup> See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

***II. Smuggling Marijuana into Ohio***

{¶4} On March 26, 2004, Officer Thomas Canada of the Regional Narcotics Unit (“RENU”) stopped a car driven by Sean Matthews for crossing lane lines several times on Interstate 74. (RENU is a task force that is made up of officers from the Hamilton County Sheriff’s Department and the Cincinnati Police Department and that targets drug traffickers in Hamilton County.) Matthews’s car had just crossed the Indiana-Ohio border when Officer Canada noticed the erratic driving.

{¶5} Officer Canada approached the car and asked Matthews for his driver’s license. He noticed that Matthews was very tired and asked where he was coming from and where he was going. Matthews stated that he was coming from Arizona and going to Columbus, Ohio, to visit a friend. When Officer Canada asked who the friend was, Matthews was uncertain.

{¶6} Because people generally know whom they are visiting, Officer Canada’s suspicion was aroused by Matthews’s response. Officer Canada walked back to his vehicle to check Matthews’s license. When he approached Matthew’s car for a second time, he noticed a marijuana odor. Officer Canada then asked Matthews and his companion, James Longenecker, to get out of the car.

{¶7} At this time, Agent Arnold arrived with a drug-sniffing dog. When Officer Canada asked Matthews if he could search the car, Matthews responded, “If you wish.” Because Officer Canada did not get a clear affirmative answer to the search request, he asked Agent Arnold to walk his dog around the car. The dog indicated a scent on the left rear passenger door. In Officer Canada’s view, this gave him the probable cause he needed to investigate further.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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{¶8} Underneath a stack of clothes in the back seat was a black duffle bag that emitted a marijuana odor. A subsequent search of the entire car resulted in the confiscation of three duffle bags containing over 300 pounds of marijuana. Matthews and Longenecker were arrested and taken to a police station for questioning.

{¶9} During their questioning of Longenecker, the officers discovered that he had been delivering marijuana for a man known as Boo Boo (also known as Bow Bow). Both Matthews and Longenecker agreed to cooperate with RENU by attempting to complete the marijuana delivery. Because Longenecker had completed other deliveries for Boo Boo in the past (from California to Denver), and because it was Matthews's first experience transporting narcotics, the police asked Longenecker to place recorded phone calls to Boo Boo and to complete the delivery.

{¶10} Officer Steven Lawson, an undercover narcotics investigator with RENU, took Matthews's place as the driver of the vehicle. After Longenecker resumed contact with Boo Boo, he explained that rainy weather and traffic had delayed their arrival in Cincinnati. Boo Boo seemed to understand and instructed Longenecker to take the marijuana to a hotel parking lot in the Kenwood suburb. Boo Boo was recorded as stating that a man named Mundy, driving a silver Honda, would meet them and pick up the marijuana at the hotel parking lot.

{¶11} A person later identified as Mundy Williams eventually arrived at the hotel parking lot in a silver Honda, but refused to accept delivery at that location. He asked Longenecker and Officer Lawson to follow him to a nearby house to complete the delivery. But Officer Lawson refused to follow him to another location (for safety reasons and because the police were in position at the hotel parking lot).

**OHIO FIRST DISTRICT COURT OF APPEALS**

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{¶12} Williams became angry that Longenecker and Officer Lawson were not going to follow him to another location, and he attempted to leave. But RENU officers stopped and arrested him before he could exit from the parking lot.

{¶13} After Williams's arrest, Longenecker was further questioned about his trafficking activities. Longenecker told the police that he had transported drugs for Boo Boo approximately six to seven times over the previous year, and that he had typically driven the drugs from California to Colorado. When Boo Boo had contacted him about this transport from California to Ohio, Longenecker enlisted the help of Matthews because he knew it would require a long drive.

{¶14} Longenecker testified that he and Matthews had driven to Boo Boo's residence on March 24, 2004. They then went to the residence of a person whom he only knew by the name of Jessie. At this house, Longenecker and Boo Boo loaded the car that Matthews had borrowed from a friend with three duffle bags filled with marijuana. Two of the bags fit in the trunk, but the third had to be placed in the back seat.

{¶15} After getting some sleep, Longenecker and Matthews began to drive nonstop from California to Ohio on the morning of March 25. Throughout the trip, Longenecker kept in contact with Boo Boo by using Matthews's cellular phone. While the original route was supposed to end in Cleveland, Boo Boo called while Longenecker and Matthews were in Indiana, and instructed them to change the delivery to Cincinnati. Almost immediately after they crossed the Indiana-Ohio border on I-74, RENU officers stopped the vehicle based on Matthews's erratic driving.

{¶16} With the information Longenecker provided about Boo Boo's description, residence, family, and vehicles, RENU contacted the Riverside, California, police department. The Riverside police believed that the physical description matched Fernando Cabrales. Cabrales's picture was sent by e-mail to RENU officers, and both Longenecker and Matthews separately identified Fernando Cabrales as the "Boo Boo" they had been in contact with throughout the transaction.

{¶17} Riverside police obtained a search warrant, and Hamilton County obtained an arrest warrant for Fernando Cabrales. He was arrested on March 31, during a search of his residence. No drugs or cash was seized, but the cellular phone that was used to place the calls between Boo Boo and Longenecker was found in Cabrales's home and seized.

{¶18} Cabrales testified in his own defense at trial. He claimed that he had no idea what Longenecker had been delivering, but that he believed that the merchandise might have included clothing. While he admitted to being the voice on the recorded telephone calls, he claimed that he had merely been offering translation services between Longenecker and another party. The jury did not believe this defense and found Cabrales guilty on all charges. He was sentenced to 24 years' incarceration.

***III. Motion to Suppress***

{¶19} In his first assignment of error, Cabrales argues that the trial court erred by overruling his motion to suppress any evidence seized from the search of his residence on March 31, 2004. Cabrales maintains that the affidavit used to obtain a search warrant contained no probable cause to believe that either drugs or money

**OHIO FIRST DISTRICT COURT OF APPEALS**

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related to the alleged offenses would be found on the premises. Cabrales's assignment is without merit.

{¶20} Appellate review of a suppression ruling involves mixed questions of law and fact.<sup>5</sup> When ruling on a motion to suppress, the trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight of the evidence.<sup>6</sup> An appellate court must accept the trial court's findings of fact if they are supported by competent and credible evidence.<sup>7</sup> But the appellate court must then determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard.<sup>8</sup>

{¶21} In determining whether a search warrant was adequately supported by probable cause, the reviewing court's duty is merely to ensure that the issuing magistrate or judge had a substantial basis for concluding that probable cause existed.<sup>9</sup> This standard of review grants a great deal of deference to the issuing magistrate.<sup>10</sup>

{¶22} To establish probable cause to issue a search warrant, an affidavit must contain sufficient information to allow a magistrate to draw the conclusion that evidence is likely to be found at the place to be searched.<sup>11</sup> Probable cause exists when a reasonably prudent person would believe that there is a fair probability that the place to be searched contains evidence of a crime.<sup>12</sup>

{¶23} In the present case, the affidavits used to secure the search and arrest warrants were prepared after Longenecker and Matthews had been arrested and had

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<sup>5</sup> See *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8.

<sup>6</sup> See *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583.

<sup>7</sup> *Burnside*, supra, at ¶8.

<sup>8</sup> Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

<sup>9</sup> See *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640.

<sup>10</sup> See *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141.

<sup>11</sup> See *United States v. Ventresca* (1965), 380 U.S. 102, 85 S.Ct. 741.

<sup>12</sup> See *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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provided the police with detailed information about Cabrales. The affidavit for the search warrant accurately described Cabrales's primary residence. Both Longenecker and Matthews identified Cabrales's picture as the man they knew as "Boo Boo." They detailed how Cabrales had led them to Jessie's residence to pick up the marijuana and how they were in constant contact with Cabrales throughout their drive from California to Ohio. Longenecker also attested that Cabrales had directed him to deliver the drugs to a hotel parking lot in Kenwood, and that a person named Mundy in a silver Honda would be there to pick up the drugs.

{¶24} According great deference to the judge authorizing the search warrant, we hold that the incidents described in the affidavit provided a substantial basis to conclude that probable cause existed to issue the warrant. All of Cabrales's instructions demonstrated his intimate knowledge of the delivery of 300 pounds of marijuana from California to Ohio. Thus the trial court did not err in overruling Cabrales's motion to suppress, and his first assignment of error is overruled.

***IV. Jurisdiction***

{¶25} Cabrales's second assignment of error contends that the trial court erred by denying his motion to dismiss for lack of jurisdiction under R.C. 2901.11 and for failure to state an offense in count four of the indictment.

{¶26} Under R.C. 2901.11, a person is subject to criminal prosecution and punishment in Ohio if "while out of this state, the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in this state." While Cabrales argues that there was no evidence that he knew that drugs were being sold or offered for sale in Ohio, all the evidence pointed to the contrary: (1)

Longenecker and Matthews were constantly in contact with Cabrales by cellular phone; (2) Cabrales instructed Longenecker and Matthews where to deliver the marijuana; and (3) he provided a description of the person who would be waiting for the marijuana in Cincinnati, as well as the type of car that person would be driving. These facts illustrate that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶27} Additionally, the trial court did not err in overruling Cabrales's motion to dismiss count four for failure to state an offense. Count four of the indictment stated that Cabrales, "with purpose to commit or to promote or to facilitate the commission of aggravated trafficking and possession, agreed with another person or persons \* \* \* that one or more of them would engage in conduct that facilitate[d] the commission of any of the specified offenses, and subsequent to [their] entrance into such plan or agreement, a substantial overt act, to wit: the transport of marijuana from California to Hamilton County in furtherance of the conspiracy was committed by the defendant or another person or persons." (Marijuana is spelled with an "h" in the statute. We note that both spellings are acceptable.)

{¶28} Under R.C. 2921.01(A), conspiracy prohibits a person from purposely committing, promoting, or facilitating the commission of "felony drug trafficking, manufacturing, processing, or possession offense[s]." Thus the indictment incorrectly used the wording "aggravated trafficking and possession" instead of "felony drug trafficking, manufacturing, processing, or possession." The trial court granted the state's motion to amend the indictment to substitute the word "felony" for the word "aggravating" so that the charge would conform with R.C. 2923.01(A).

{¶29} Crim.R. 7(D) provides that “[t]he court may at any time before, during, or after a trial amend the indictment \* \* \* in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.” Here, the trial court could have amended the indictment so long as the amendment did not change the name or identity of the crime charged.<sup>13</sup>

{¶30} In this case, the trial court allowed the amendment merely to substitute the word “felony” for “aggravating.” This amendment did not alter the name or identity of the crime charged. The amendment did not add any additional elements that the state was required to prove. And Cabrales has been unable to show that he had been misled or prejudiced by the amendment. Cabrales had notice of both the offense and the applicable statute. Accordingly, the second assignment of error is overruled.

***V. Allied Offenses of Similar Import***

{¶31} In his third assignment of error, Cabrales argues that the possession of, transportation of, and offering to sell the same drugs are allied offenses of similar import under R.C. 2941.25(A), and that no separate animus existed for the commission of each of these crimes. As a result, Cabrales contends that he should not have been sentenced separately for each crime. In support of his argument, Cabrales relies on our decision in *State v. Jennings*,<sup>14</sup> where we held that a defendant may be indicted for both possession and trafficking, but that if the charges stem from a single transaction involving the same type and quantity of drugs, there can only be

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<sup>13</sup> Crim.R. 7(D); *State v. O'Brien* (1987), 30 Ohio St.3d 122, 125-26, 508 N.E.2d 144.

<sup>14</sup> See *State v. Jennings* (1987), 42 Ohio App.3d 179, 537 N.E.2d 685.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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one conviction under R.C. 2941.25(A).<sup>15</sup> Cabrales's reliance on *Jennings* is misplaced because it was superseded by the Ohio Supreme Court's decision in *State v. Rance*.<sup>16</sup> But Cabrales is correct that trafficking in drugs in violation of R.C. 2925.03(A)(2) and possession of drugs in violation of R.C. 2925.11(A) are allied offenses of similar import.

{¶32} R.C. 2941.25(A) provides, "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment \* \* \* may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶33} In *Rance*, the Ohio Supreme Court held that to determine whether crimes are allied offenses of similar import under R.C. 2941.25(A), courts must assess "whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other."<sup>17</sup> The *Rance* test requires a strict textual comparison of the statutory elements, without reference to the particular facts of the case, to determine if one offense requires proof of an element that the other does not. If the elements do correspond, the defendant may be convicted and sentenced for only one offense, unless the court finds that the defendant committed the crimes separately or with separate animus.<sup>18</sup> Therefore, we must determine whether the possession and trafficking counts involved allied offenses of similar import or whether the charged offenses were committed separately or with separate animus.<sup>19</sup>

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<sup>15</sup> Id.

<sup>16</sup> See *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291, 710 N.E.2d 699.

<sup>17</sup> Id. at 638.

<sup>18</sup> Id. at 638-39.

<sup>19</sup> Id.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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{¶34} Since *Rance*, we have held that possession and trafficking in the same type and quantity of a controlled substance are not allied offenses, because when the elements of each offense are compared in the abstract, each requires proof of a fact that the other does not.<sup>20</sup> But this analysis was restricted to trafficking in violation of R.C. 2925.03(A)(1)—selling or offering to sell a controlled substance—and did not involve trafficking in violation of R.C. 2925.03(A)(2)—preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance.

{¶35} A possession charge only requires proof that a defendant obtained, possessed, or used a controlled substance, while a trafficking charge under R.C. 2925.03(A)(1) requires proof that the defendant was either selling or offering to sell the controlled substance. The added mens rea of intending to sell or offering to sell the controlled substance is the differentiating element. As we have said previously, “It is possible to possess [marijuana] without offering it for sale, and it is possible to sell or offer to sell [marijuana] without possessing it, e.g., when one serves as a middleman.”<sup>21</sup> Accordingly, possession and trafficking in violation of R.C. 2925.03(A)(1) are not allied offenses of similar import.

{¶36} But Cabrales also claims that possession of drugs in violation of R.C. 2925.11(A) and trafficking in drugs in violation of R.C. 2925.03(A)(2) are allied offenses of similar import. We agree. Although the Tenth and Twelfth Appellate Districts have ruled otherwise,<sup>22</sup> for a person to commit a trafficking offense in

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<sup>20</sup> See *State v. Foster*, 1<sup>st</sup> Dist. No. C-050378, 2006-Ohio-1567; see, also, *State v. Salaam*, 1<sup>st</sup> Dist. No. C-020324, 2003-Ohio-1021, and *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903.

<sup>21</sup> *Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903.

<sup>22</sup> See *State v. Guzman*, 10<sup>th</sup> Dist. No. 02AP-1440, 2003-Ohio-4822; *State v. Alvarez*, 12<sup>th</sup> Dist. No. CA2003-03-067, 2004-Ohio-2483.

violation of R.C. 2925.03(A)(2), that person would also have to violate R.C. 2925.11(A)—possession of drugs. The trafficking statute prohibits a person from preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance when the defendant knows or reasonably believes that the controlled substance is intended for resale. For a person to prepare for shipment or transport drugs, that person would necessarily have to possess the drugs. The statutory elements of these crimes correspond to such a degree that the commission of one crime will result in the commission of the other.

{¶37} Thus, Cabrales's third assignment of error is sustained as to possession of drugs in violation of R.C. 2925.11(A) and trafficking in drugs in violation of R.C. 2925.03(A)(2). We reverse the sentences for these offenses and remand this case so that the trial court may resentence Cabrales in accordance with this decision—so that Cabrales is sentenced for only one of these offenses.

{¶38} We also note that Cabrales claims that the two counts of trafficking involved allied offenses, and that he should not have been sentenced separately for these offenses. But Cabrales was charged under two separate subsections of R.C. 2925.03(A). Subsection (1) forbids a person from selling or offering to sell a controlled substance, while subsection (2) prohibits a person from preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance when the defendant knows or reasonably believes that the controlled substance is intended for resale. Because Cabrales needed a separate animus to commit each crime—offering to sell and transporting—these crimes were not allied offenses of similar import.

**VI. Lesser-Included Offense**

{¶39} Cabrales's fourth assignment of error argues that the trial court erred by refusing his request for a jury instruction on the lesser-included offense of attempt under count one of the indictment—the trafficking count that prohibited him from selling or offering to sell a controlled substance. Cabrales contends that the jury could have found that he had not offered the drugs for sale, or had even known that a sale was involved, but that he knew or should have known that the drugs were being delivered. Cabrales further rationalizes that since the delivery was never completed, the jury would likely have found him guilty only of attempting to traffick in a controlled substance. Cabrales's argument is without merit.

{¶40} We note the oddity of this question—how does a person *attempt to offer to sell* a controlled substance? Doesn't a person merely offer to sell the drug, not attempt to offer to sell? It seems the answer is within the statute.

{¶41} R.C. 2925.03(A)(1) prohibits a person from selling or *offering to sell* a controlled substance. For purposes of R.C. 2925.03(A)(1), the phrase “ ‘offer to sell a controlled substance,’ simply means to declare one's readiness or willingness to sell a controlled substance or to present a controlled substance for acceptance or rejection.”<sup>23</sup> And for a person to be convicted of trafficking, the delivery of the narcotics need not be completed. As the Ohio Supreme Court has stated, “A person can ‘offer to sell a controlled substance’ in violation of R.C. 2925.03(A)(1) without transferring a controlled substance to the buyer.”<sup>24</sup> Thus the statute subsumes an attempt to traffick in a controlled substance within its definition—there does not need to be an actual delivery.

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<sup>23</sup> See *State v. Henton* (1997), 121 Ohio App.3d 501, 510, 700 N.E.2d 371, citing *State v. Patterson* (1982), 69 Ohio St.2d 445, 432 N.E.2d 802.

<sup>24</sup> See *State v. Scott* (1982), 69 Ohio St.2d 439, 440, 432 N.E.2d 798.

{¶42} Additionally, the state presented sufficient evidence at trial from which the jury could reasonably have inferred that Cabrales had acted as a conspirator in offering to sell a controlled substance in violation of R.C. 2925.03(A)(1). Cabrales was constantly in contact with Longenecker and Matthews by cellular phone, he instructed Longenecker and Matthews where to deliver the marijuana, and he provided descriptions of the person and the car that were to be waiting for the marijuana in Cincinnati. These facts illustrate that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶43} Accordingly, the trial court did not err in refusing to instruct the jury on attempt, and we overrule Cabrales's fourth assignment of error.

**VII. Sufficiency and Weight; Crim.R. 29 Motion for Acquittal**

{¶44} In his fifth assignment of error, Cabrales argues that there was insufficient evidence to convict him, that his conviction were against the manifest weight of the evidence, and that the trial court erred by denying his Crim.R. 29 motion for an acquittal.

{¶45} When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.<sup>25</sup>

{¶46} A review of the weight of the evidence puts the appellate court in the role of a "thirteenth juror."<sup>26</sup> We must review the entire record, weigh the evidence,

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<sup>25</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

<sup>26</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.<sup>27</sup> A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.<sup>28</sup>

{¶47} And the standard of review for the denial of a Crim.R. 29(A) motion to acquit is the same as the standard of review for the sufficiency of the evidence. A motion for a judgment of acquittal should not be granted when reasonable minds can reach different conclusions as to whether each element of the crime charged has been proved beyond a reasonable doubt.<sup>29</sup>

{¶48} Cabrales was found guilty of two counts of trafficking in a controlled substance, one count of possession of a controlled substance, and conspiracy. The trafficking statute prohibits a person from knowingly (1) selling or offering to sell a controlled substance, or (2) preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing a controlled substance that the person has reasonable cause to believe will be resold.<sup>30</sup> The possession statute forbids a person from knowingly obtaining, possessing, or using a controlled substance.<sup>31</sup> And the conspiracy statute proscribes a person from facilitating and planning with another person the commission of trafficking in or possessing drugs.<sup>32</sup>

{¶49} The state presented the testimony of coconspirators Longenecker and Matthews, as well as the testimony of RENU Officers Canada, Morgan, and Lawson, and of Riverside, California, Police Officer Robert Roggeveen.

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<sup>27</sup> Id., citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.

<sup>28</sup> Id.

<sup>29</sup> See Crim.R. 29; see, also, *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

<sup>30</sup> R.C. 2925.03(A)(1) and (2).

<sup>31</sup> R.C. 2925.11(A).

<sup>32</sup> R.C. 2923.01(A)(1).

{¶50} Longenecker testified that he had transported drugs several times for a man named “Boo Boo,” from California to Colorado. He stated that Boo Boo had contacted him in March 2004 to make a delivery to Ohio. Because of the nonstop driving that was involved in the drug delivery, Longenecker had enlisted the assistance of Matthews to make the drive from California to Ohio.

{¶51} Longenecker further testified that he and Matthews had met at Boo Boo’s residence on March 24. They then drove to another person’s home to pick up three duffle bags of marijuana weighing over 300 pounds. The following day, Longenecker and Matthews began the drive to Ohio. Along the journey, Boo Boo would regularly call to chart their progress. Once Longenecker and Matthews reached Indiana, Boo Boo instructed them to change their delivery destination from Cleveland to Cincinnati. Once they crossed the Indiana-Ohio border, RENU Officer Canada pulled them over for traffic infractions.

{¶52} Officer Canada testified that his suspicions had been aroused when Matthews had failed to answer questions competently. He also had noticed an odor of marijuana when he approached the car for a second time. When Officer Canada was not given a clear affirmative on his request to search the vehicle, he asked Agent Arnold and his drug-sniffing dog to walk around the car. The dog indicated a scent on the left rear passenger door. Officer Canada then searched the car where the dog had indicated, and he found a duffle bag containing marijuana. In all, there was over 300 pounds of marijuana in the vehicle.

{¶53} Longenecker and Matthews both testified that, after they were arrested, they had cooperated with the RENU officers. Officer Lawson sat in the place of Matthews and attempted to make the drug delivery with Longenecker. They

**OHIO FIRST DISTRICT COURT OF APPEALS**

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contacted Boo Boo again, and he instructed them to deliver the drugs to a hotel parking lot in Kenwood. Longenecker also testified that Boo Boo had told them that a person named Mundy would pick up the marijuana in a silver Honda.

{¶54} A person later identified as Mundy arrived in the hotel parking lot in a silver Honda, but refused delivery at that location. He wanted Longenecker and Officer Lawson to follow him to a nearby house, but they refused. When Williams became angry that Longenecker and Officer Lawson would not follow him to another location, he attempted to leave. But RENU officers arrested him before he could exit from the parking lot.

{¶55} Based on the information that Longenecker had provided about Boo Boo's description, residence, family, and vehicles, RENU contacted the Riverside, California, police department. The Riverside police believed that the physical description matched Fernando Cabrales. The Riverside police then e-mailed a picture to RENU officers. Both Longenecker and Matthews independently confirmed that Cabrales was the Boo Boo who had organized the transportation of over 300 pounds of marijuana from California to Ohio.

{¶56} Thus, the evidence demonstrated that Longenecker and Matthews were constantly in contact with Cabrales by cellular phone, that Cabrales instructed Longenecker and Matthews where to deliver the marijuana, and that he provided descriptions of the person and car that were to be waiting for the marijuana in Cincinnati. It is clear that Cabrales was actively involved in a conspiracy to transport over 300 pounds of marijuana into Hamilton County.

{¶57} We conclude that a rational factfinder, viewing the evidence in a light most favorable to the state, could have found that the state had proved beyond a

reasonable doubt that Cabrales had possessed, trafficked in, and conspired to deliver over 300 pounds of marijuana in Hamilton County. Therefore, the evidence presented was legally sufficient to sustain the convictions. And the trial court did not err in overruling Cabrales's Crim.R. 29(A) motion.

{¶58} Although Cabrales insists that he was merely translating instructions to Longenecker and Matthews, our review of the record does not persuade us that the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding Cabrales guilty of possession of a controlled substance, two counts of trafficking in a controlled substance, and conspiracy. Therefore, his convictions were not against the manifest weight of the evidence.

{¶59} We overrule Cabrales's fifth assignment.

### ***VIII. Sentencing***

{¶60} In Cabrales's sixth and final assignment of error, he challenges the trial court's imposition of consecutive sentences. He maintains that the sentences violated his rights to a jury trial and due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Sections Five and Sixteen, Article I, of the Ohio Constitution, because the sentences were made consecutive based on facts not determined by a jury or proved beyond a reasonable doubt. Cabrales also contends that the Ohio Supreme Court's decision in *State v. Foster*,<sup>33</sup> which held that the imposition of consecutive sentences based on judicial factfinding is unconstitutional, retroactively modifies a defendant's sentence in violation of the Ex Post Facto Clause of the United States Constitution.

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<sup>33</sup> See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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{¶61} In this case, the trial court imposed consecutive sentences after making findings under R.C. 2929.14(E)(4) that Cabrales’s crimes reflected a total disregard for the safety of the public. The court also determined that consecutive terms were necessary to protect the public from future crimes, since it believed that Cabrales had transported drugs into Colorado multiple times and that a return trip to Cleveland had been discussed.

{¶62} In *Foster*, the Ohio Supreme Court noted that “R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) require trial courts that impose consecutive sentences to make the statutorily enumerated findings and to give reasons at the sentencing hearing to support those findings for review on appeal.”<sup>34</sup> But because the “total punishment increases through consecutive sentences only after judicial findings beyond those determined by the jury or stipulated to by the defendant, R.C. 2929.14(E)(4) violates principles announced in *Blakely*”<sup>35</sup> and is therefore unconstitutional.

{¶63} The court’s remedy was to sever R.C. 2929.14(E)(4) as unconstitutional and to keep the remaining unaffected provisions of the sentencing statutes. After the severance, judicial factfinding is not required before a trial court imposes consecutive prison terms. Trial courts now have full discretion to impose a prison sentence within the statutory range and are no longer required to provide reasons for imposing a sentence involving consecutive prison terms.<sup>36</sup>

{¶64} In this case, the trial court imposed consecutive sentences for possession and the two trafficking offenses after it had made findings based on an unconstitutional statute. We must sustain the assignment of error, vacate the

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<sup>34</sup> Id. at ¶66, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

<sup>35</sup> Id. at ¶67.

<sup>36</sup> Id. at ¶100.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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consecutive sentences, and remand the case for resentencing in light of *Foster*. But Cabrales's other argument is without merit. We have previously held that the Ohio Supreme Court's decision in *Foster* does not violate ex post facto and due process principles.<sup>37</sup>

{¶65} For all the foregoing reasons, we hereby vacate the sentences imposed by the trial court and remand this case for resentencing in light of *Foster*<sup>38</sup> and for the imposition of only one sentence for the trafficking offense in violation of R.C. 2925.03(A)(2) and the possession offense in violation of R.C. 2925.11(A). In all other respects, the trial court's judgment is affirmed.

Judgment affirmed in part, sentence vacated, and  
cause remanded for resentencing.

**HENDON and WINKLER, JJ.**, concur.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.

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<sup>37</sup> See *State v. Bruce*, 1st Dist. No. C-060456, 2007-Ohio-175.

<sup>38</sup> *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

**Fifth Amendment, United States Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Section 10, Article I, Ohio Constitution**

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and the jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

**Ohio Revised Code 2925.03(A) (Effective July 21, 1994)**

(A) No person shall knowingly do any of the following:

- (1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount;
- (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe the controlled substance is intended for sale or resale by the offender or another;
- (3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;
- (4) Possess a controlled substance in an amount equal to or exceeding the bulk amount, but in an amount less than three times that amount;
- (5) Sell or offer to sell a controlled substance in an amount equal to or exceeding the bulk amount, but in an amount less than three times that amount;
- (6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount, but in an amount less than one hundred times that amount;
- (7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount, but in an amount less than one hundred times that amount;
- (8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell the controlled substances in amounts exceeding a bulk amount or for the purpose of violating division (A)(3) of this section;
- (9) Possess a controlled substance in an amount equal to or exceeding one hundred times the bulk amount;
- (10) Sell or offer to sell a controlled substance in an amount equal to or exceeding one hundred times the bulk amount;
- (11) Administer to a human being, or prescribe or dispense for administration to a human being, any anabolic steroid not approved by the United States food and drug administration for administration to human beings.

**Ohio Revised Code 2925.03(A) (Effective July 1, 1996)**

(A) No person shall knowingly sell or offer to sell a controlled substance.

**Ohio Revised Code 2925.03(A) (Effective March 23, 2000)**

(A) No person shall knowingly do any of the following:

- (1) Sell or offer to sell a controlled substance;
- (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

**Ohio Revised Code 2925.03(A) (Effective at the time of the offense; identical language exists in the current version)**

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship transport, deliver, prepare for distribution, or distribute a controlled substance when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

**Ohio Revised Code 2925.11(A)**

(A) No person shall knowingly obtain, possess, or use a controlled substance

**Ohio Revised Code 2941.25**

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.