

IN THE SUPREME COURT
OF THE
STATE OF OHIO

STATE OF OHIO	:	CASE NO. 2007-0595
	:	2007-0651
Plaintiff-Appellant/ Cross-Appellee	:	
vs.	:	on Appeal from the First District Court of Appeals For Hamilton County
FERNANDO CABRALES	:	
Defendant-Appellee/ Cross-Appellant	:	Court of Appeals Case No. C-0500682

CONSOLIDATED BRIEF IN SUPPORT OF CROSS-APPEAL AND RESPONSE TO
STATE'S BRIEF ON BEHALF OF DEFENDANT-APPELLEE/CROSS-APPELLANT
FERNANDO CABRALES

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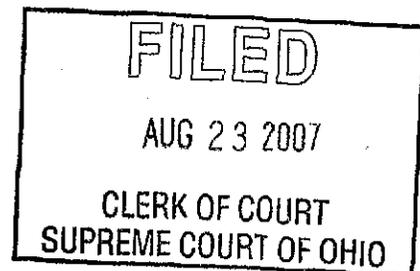


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STATEMENT OF THE CASE

1) PROCEDURAL POSTURE

This matter comes before the Court on appeal from the judgment of the Court of Appeals, First Appellate District of Ohio. Defendant, Fernando Cabrales, was indicted in Hamilton County, Ohio, under case number B-0403121-D, for trafficking in marijuana in excess of 20,000 grams (sell or offer to sell),¹ trafficking in marijuana in excess of 20,000 grams² (transportation), one count of possession of marijuana in excess of 20,000 grams,³ all felonies of the second degree, and one count of conspiracy,⁴ a felony of the third degree.

Defendant was convicted by a jury on June 30, 2005.⁵ On August 8, 2005, the court sentenced him to consecutive terms of 8 years on counts 1-3 and a concurrent term of 5 years on count 4.⁶ The First District Court of Appeals affirmed the convictions, but found that the possession and transportation counts were allied offenses and must be merged. Defendant's sentences were vacated pursuant to *Foster*, and he was remanded for resentencing.⁷ At the state's request, the court of appeals certified a conflict between its

¹R.C. § 2925.03(A)(1).

²R.C. § 2925.03(A)(2).

³R.C. § 2925.11(A).

⁴R.C. § 2923.01(A)(2).

⁵(T.p. 883-885)

⁶(T.p. 906, T.d. 86, Judgment Entry)

⁷(T.d. 22, Judgment Entry and Decision)

opinion regarding allied offenses and that of several other district courts,⁸ and the state filed the certification with this Court on April 4, 2007 with its Notice of Appeal docketed as case number 07-0595.⁹ Defendant cross-appealed on the remaining issues under case number 07-0651.¹⁰

On June 6, 2007, this Court determined that a conflict existed and ordered the parties to brief the issue certified by the First District.¹¹ The Court also accepted Defendant's appeal on Proposition of Law No. IV, and consolidated the appeals for briefing.¹²

2) FACTS

On or about March 26, 2004, a RENU agent working traffic interdiction on I-74 stopped a vehicle which was found to contain 300 pounds of marijuana. It was owned and driven by Sean Mathews who was accompanied by James Longenecker.¹³ These individuals agreed to cooperate with RENU in completing delivery of the contraband. They indicated that they were in cell phone contact with an individual in California known only as Boo Boo (also represented as Bobo, or BowBow) who was directing them to the site of the delivery. At the officers' direction, they placed phone calls to that individual which were taped by RENU.¹⁴ An undercover officer replaced Mathews as the driver, and attempted to complete

⁸(T.d. 27, Entry Granting Motion to Certify)

⁹(T.d. 29, Notice of Appeal)

¹⁰(T.d. 30, Notice of Appeal)

¹¹(T.d. 31, Order to Certify)

¹²(T.d. 33, Entry Accepting Appeal)

¹³(T.p. 286-293)

¹⁴(T.p. 352-356)

the delivery as directed over the phone.¹⁵ An individual later identified as Mundy Williams showed up at the designated meeting place, and engaged in some conversation with Longenecker and the officer, but refused to accept delivery at that location. When they refused to follow him to another location, he attempted to leave and was arrested. (T.p. 371-389)

When questioned further, Longenecker gave information about Boo Boo's description, residence, family and vehicles. RENU contacted police in Riverside, California, who decided that the information matched Fernando Cabrales. A photograph of Cabrales was e-mailed to Cincinnati where it was identified by Longenecker and Mathews as Boo Boo.¹⁶ Riverside police obtained a search warrant for Cabrales' residence and Hamilton County obtained an arrest warrant for his person. He was arrested on March 31, during a search of the residence. The search uncovered no drugs, paraphernalia, cash, packaging materials or sales records. Only a cell phone and personal papers were seized.¹⁷ When questioned, Defendant indicated that he was only acting as a translator for a friend, and was not involved in the transaction.

¹⁵(T.p. 363-368)

¹⁶(T.p. 259-263, 399-401)

¹⁷(T.p. 264-275)

ARGUMENT

PROPOSITION OF LAW NO. 1 (Certified conflict, Case No. 2007-0595)

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.

Defendant was charged with possession, trafficking (transportation) and trafficking (sell or offer to sell) of exactly the same marijuana, as well as conspiracy to commit those offenses. All trafficking and possession counts of the indictment specified an amount in excess of 20,000 grams. The testimony at trial makes it clear that the drugs that form the basis for these charges were all recovered from defendant Mathews' vehicle. No additional drugs were uncovered in the search of Defendant's residence, nor did that search uncover any evidence that he had ever possessed or sold additional drugs. In addition, no sale was ever completed because the attempt to deliver the drugs after the arrest of Mathews and Longenecker was unsuccessful. The trial court found that conspiracy merged in the trafficking and possession offenses, and imposed a concurrent sentence for that count, but gave maximum consecutive sentences for all remaining counts.

A) R.C. 2941.25(A), which forbids multiple convictions and sentences for allied offenses of similar import defines such offenses in terms of conduct, not merely by strict comparison of statutory elements.

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." (emphasis added) Despite the emphasis on conduct in the statute, certain language employed by this

Court in a 1999 decision delineating the test for allied offenses has focused attention instead on the statutory language defining elements of the offenses in question.¹⁸ Because that decision advocated comparing statutory elements “in the abstract” first, to determine if offenses were allied, before looking at conduct for evidence of separate acts or animus, some courts have read *Rance* as limiting allied offense analysis to statutes that on their face proscribed identical conduct, in identical language. This interpretation ignores the plain language of the statute, and gives *Rance* a far more restrictive scope than this Court intended, in light of its subsequent decisions.

Offenses are allied under *Rance* where the elements of the offenses correspond to such a degree that commission of offense A necessarily involves commission of offense B.¹⁹ Although this sounds like a simple standard, it has produced a great deal of misunderstanding in the lower courts. Decisions cited by the state illustrate this misunderstanding. A number of courts seem to believe that this analysis must be reversible in order to find that two offenses are allied. In other words, those courts require that commission of offense B also necessarily involved commission of offense A.²⁰ This is not a correct reading of *Rance* in light of more recent clarification from this Court, nor is it logical. There would be no need to create an allied offense statute if it only protected defendants from consecutive sentences for identical duplicate charges. The double jeopardy

¹⁸*State v. Rance* (1999), 85 Ohio St.3d 632, 638, 710 N.E.2d 699, 1999-Ohio-291.

¹⁹*Rance* at 638.

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

clause already clearly bars conviction for the same crime more than once, so the issue of multiple convictions and consecutive sentences would never arise if allied and duplicate meant the same thing.

The state's brief suggests that only "rogue judges" joined by defendants have looked to the underlying facts in determining whether offenses are allied since the *Rance* decision. That suggestion grossly misrepresents the decisions in this area. Though *Rance* has still not been definitively clarified or explicitly overruled, recent decisions from this Court indicate that strict comparison of statutory language is no longer the correct analysis for determining whether offenses are allied offenses of similar import, if it was ever intended to be. In *State v. Adams*²¹ the defendant's convictions for kidnapping and rape were held to be allied offenses of similar import under R.C. 2941.25 without any reference to *Rance*. Instead the opinion cited and applied the test announced in *State v. Logan* in 1979.²² The court discussed the particular facts of the case and determined that because there was no evidence that the defendant had moved or restrained the victim in any way other than what was necessary to rape and kill her, there was no separate animus to support the kidnapping conviction, even though the statutory elements of rape and kidnapping don't correspond when compared in the abstract.

Even more recently, this Court rejected a formulaic reading of the statutory elements while concluding that disorderly conduct can be a lesser included offense of domestic violence:

²¹*State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶89.

²²*State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345.

We conclude that distinguishing between the “physical” elements of domestic violence under S.H.C.O. 737.14(c) and the “mental” elements of disorderly conduct under R.C.2917.11(A)(1) is immaterial for purposes of the *Deem* analysis. The second prong of the *Deem* test merely states that an offense is lesser included if “the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed.” *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, at paragraph three of the syllabus. Thus, we agree with the court in *State v. Burgess*, which stated that “ “it is not significant that the common elements of these two offenses were not stated in identical language in the statutes, because these common elements are implicit in the conduct that constitutes the offenses.”

’ ”²³

While this Court has not addressed the precise trafficking and possession crimes charged here, it recently considered an analogous pair of offenses in *State v. Yarbrough*, where it found that theft and receiving stolen property are allied offenses, because theft cannot be committed without receiving the stolen property as that crime is defined by statute:

Although receiving stolen property is technically not a lesser included offense of theft, receiving stolen property and theft of the same property are clearly allied offenses of similar import. . . . Additionally, when the elements of each crime are aligned, the offenses “ `correspond to such a degree that the commission of one crime’ ” resulted “ `in the commission of the other.’ ” *State v. Rance* (1999), 85 Ohio St.3d 632, 638, 710 N.E.2d 699, quoting *State v. Jones* (1997), 78 Ohio St.3d 12, 14, 676 N.E.2d 80.²⁴

These decisions clearly establish that offenses may be allied even though the statutory elements don’t strictly correspond. Furthermore, this Court has specifically rejected a formulaic comparison of the language used to describe conduct, when it is apparent that the

²³*Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072 ¶ 19, citing *State v. Burgess*, 79 Ohio App.3d at 588, 607 N.E.2d 918, quoting *State v. Amos* (Jan. 15, 1988), Lake App. No. 12-088, 1988 WL 4622, quoting *State v. Roberts* (1982), 7 Ohio App.3d 253, 255, 7OBR 333, 455 N.E.2d 508.

²⁴*State v. Yarbrough*, 104 Ohio St.3d 1, 17, 2004-Ohio-6087 ¶199, 817 N.E.2d 699.

same conduct is involved in each offense being compared. The same standards should be used to compared the elements of the various trafficking and possession offenses involved in this case.

B) Simultaneous possession and transportation/preparation for distribution of the same drugs are allied offenses, because it is impossible to transport or prepare a drug for distribution without also possessing it as possession is defined by Ohio law.

As this Court pointed out in *Yarbrough*, one may receive stolen property without committing theft, but the opposite is not true. Every thief receives the property he steals, as receiving is defined by law. The same is true of possession and transportation or preparation of drugs. The lower court correctly concluded that commission of a trafficking offense under R.C. 2925.03(A)(2), would require possession of the controlled substance in violation of R.C. 2925.11(A):

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.²⁵

Although one may possess drugs without transporting or preparing them for distribution, one cannot transport or prepare the drugs for distribution without possessing them, as possession is defined by statute: "'Possess" or "possession" means having control over a thing or substance...."²⁶ The Revised Code specifically defines possession in terms of

²⁵*State v. Cabrales*, Hamilton App. No. C-050682, ¶36.

²⁶R.C. 2925.01 (K).

control, so even a complicitor who causes another to do the actual work of transporting or preparing the drugs has exercised control over them, thus constructively possessing them. The state's example of a middleman, who directs another to deliver the drugs without ever physically possessing them, ignores this definition of possession. Such a middleman could be, and often is, charged with possession of those drugs. If he has the power to control the movement of the drugs, he has constructively possessed them, even if the state cannot prove that they were ever in his grasp.

The cases cited by the state which have not found these offenses to be allied have either falsely postulated a middleman who could not be charged with possession, or engaged in the incorrect two-way analysis described earlier. Because possession does not require preparation or transportation, the courts have found these offenses not to be allied, without going on to consider that the reverse is not true, and that possession must always be involved in any transportation or preparation offense. These courts have simply failed to recognize that allied does not mean identical. Some of this confusion undoubtedly comes from the fact that most of these cases pre-date the *Yarbrough* decision, and did not benefit from the analysis in that case of a very similar pair of offenses.

Prior to this Court's decision in *Rance*²⁷ the First District definitively held that possession and transportation of precisely the same drugs, at the same time, is a single offense for purposes of conviction and sentence:

When charges of both possession and transportation of a controlled substance are based on a single transaction involving the same type and quantity of drugs, and the defendant did not possess any quantity in excess of the amount transported, he may be indicted for both possession and

²⁷*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699.

transportation of a controlled substance, but can be convicted of only one offense under R.C. 2941.25(A)."²⁸

Later, the First District conformed its opinions to what it perceived to be required by the *Rance* decision,²⁹ but the analysis in *Jennings* is clearly in line with *Yarbrough's* holding that theft and possession of the same stolen property are allied offenses, even under the strict comparison of the elements standard.

This Court has also recently reaffirmed the validity of pre-*Rance* decisions which hold that kidnaping can be an allied offense of either rape or robbery³⁰, even though a strict comparison of the elements could not support such a result. In analyzing a claim that child endangering and manslaughter were allied, the Court averred that "our approach has been to analyze the particular facts of each case before us to determine whether the acts or animus were separate."³¹ The court did not specifically overrule *Rance* in any of these decisions, but it clearly failed to apply it as the sole test for determining whether offenses were allied, and also cited with approval numerous pre-*Rance* decisions that utilized a comparison of the facts rather than the elements of the offenses. At the very least, these decisions establish that pre-*Rance* precedent has not been overruled, and may still be used to establish whether offenses are allied under R.C. 2941.25(A). Thus, *Jennings* should not be rejected as precedent because it predated the *Rance* decision.

²⁸*State v. Jennings* (Hamilton Co.1987), 42 Ohio App.3d 179, 537 N.E.2d 685.

²⁹*State v. Foster*, Hamilton App. No. C-050378, 2006-Ohio-1567, *State v. Salaam*, Hamilton App. No. C-020324, 2003-Ohio-1021, *State v. Gonzales*, 15 Ohio app.3d 10, 2002-Ohio-4937, 783 N.E. 2d 903.

³⁰*State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶89. *State v. Fears*, 86 Ohio St.3d 329, 1999-Ohio-111, 715 N.E.2d 136.

³¹*State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657.

Furthermore, the lower court concluded that the same result was justified even under a fair reading of *Rance*, because the ultimate test in *Rance* is still whether commission of one offense necessarily results in commission of both. Since the court concluded that transportation or preparation for distribution require the defendant to exercise control over the drug involved, possession is always established by such control. This decision is also in line with the greater weight of authority from other jurisdictions which have considered the relationship between simple possession and acts of delivery, manufacture, or preparation for distribution. As one state supreme court cogently stated:

Likewise, in *Hankins v. State*, 80 Md.App. 647, 659, 565 A.2d 686 (1989), we held that where the possession with intent to distribute cocaine and the distribution of cocaine emanate from the same transaction, "distribution includes and subsumes possession with intent to distribute because the evidence required to prove distribution includes control over the substance." *Id.*³²

Many other jurisdictions have found possession and possession with intent to distribute a controlled substance to be allied or included offenses.³³ These cases represent

³²*Manuel v. State* (1990), 581 A.2d 1287, 1290, 85 Md.App. 1, 9. See also *People v. Abiodun*, (Colo. 2005), 111 P.3d 462, 466 (Unlawful distribution, manufacturing, dispensing, sale, and possession all allied), *Mason v. State* (Ind. 1989), 532 N.E.2d 1169, 1172 (delivery & possession allied), *State v. Osborne* (Minn. 2006), 715 N.W.2d 436, 447 (interstate transportation and possession allied), *State v. Medina* (1975), 87 N.M. 394, 534 P.2d 486, 487 (distribution and possession), *Commonwealth v. Eicher* (Pa. 1991), 605 A.2d 337, 353 (distribution, possession w/intent to distribute and possession), *State v. Ahmadjian* (R.I. 1981), 438 A.2d 1070, 1087 (delivery and possession), *Sims v. State*, 2006 S.W.3d (Texas 10th App., 10-06-00082-CR) (delivery/manufacture and possession), *Spear v. Commonwealth* (1980), 221 Va. 450, 270 S.E.2d 737, 742 (manufacturing and possession), *State v. Thompson* (1986); 342 S.E.2d 268, 176 W.Va. 300, 308 (delivery and possession).

³³See *State v. Arce* (1971), 107 Ariz. 156, 483 P.2d 1395, 1397-1398, *United States v. Lucien* (5th Cir. 1995), 61 F.3d 366, 372-74, *United States v. King* (6th Cir. 2000), 230 F.3d 1361, *Gibbs v. State* (Fla. 1997), 698 So.2d 1206, *People v. Barraza* (1993), 626 N.E.2d 275, 280; 253 Ill.App.3d 850, *State v. Longo* (Iowa 2000), 608 N.W.2d 471, 472, *State v.*

the better reasoned line of authority in this area, and this Court should adopt that reasoning in the instant case.

- C) There is no clear expression of a legislative intent to permit multiple convictions and sentences for various possession and trafficking offenses committed as part of a continuous sequence in the sale of a single quantity of drugs.**

The state argues that the various incarnations of R.C. 2925 evidence a legislative intent to permit multiple convictions and punishments for possession and trafficking offenses, even when they involve the same conduct. That argument is disingenuous. The fact that an offense is defined in a separate code section, or included in a subsection, has never been held to control whether it is an allied offense. If that were true, the fact that transportation/preparation for distribution was moved from the trafficking statute, and then returned to the statute would establish an intention that it should not result in a separate conviction and sentence if the defendant was already convicted under another subsection of the trafficking statute, such as sale. Although Defendant argues for such a result in this case, for other reasons, the state finds no such legislative intent when it would benefit Defendant.

Furthermore, this Court has found offenses to be allied in many cases where the statutes involved are found in different code sections, or even different chapters of the code.

Francois (La. 2004), 874 So.2d 125, *Murray v. State* (Miss. 1994), 642 So.2d 921, 924, *Stae v. Cooper* (Tenn.Ct.App. 1987), 736 S.W.2d 125, 128, *State v. Wade* (1999), 989 P.2d 576, 98 Wn. App. 328, *State v. Hughes* (2001); 248 Wis.2d 133, 635 N.W.2d 661, 664-665.

Domestic violence and disorderly conduct³⁴, for example, or rape and kidnaping.³⁵ On the other hand, it has found that subsections of the same statute describe separate offenses for purposes of the allied offense analysis.³⁶ In fact, the existence of an allied offense statute which directs courts to determine whether the defendant's *conduct* constitutes two or more allied offenses before imposing multiple punishments, is the true expression of legislative intent in this regard. The legislature has clearly expressed an intent not to impose multiple punishments under those circumstances, and that intent should control in this case.

PROPOSITION OF LAW NO. 2 (Proposition No. IV from Defendant's cross-appeal, Case No. 2007-0651)

POSSESSION, TRANSPORTATION, AND SALE OF THE SAME DRUGS SIMULTANEOUSLY ARE ALLIED OFFENSES OF SIMILAR IMPORT, FOR WHICH DEFENDANT MAY RECEIVE ONLY A SINGLE CONVICTION AND SENTENCE.

- B) Simultaneous possession and sale or offer for sale of the same drugs are allied offenses when the state seeks to enhance the penalty by specifying an amount, because such an enhancement requires the state to prove a specific weight and the presence of a detectible amount of a specific drug were actually involved in any such sale or offer.**

Although the lower court's ruling barring multiple convictions and sentences extended only to possession and trafficking under R.C. 2925.03(A)(2), Defendant maintains that it should be extended to possession and the (A)(1) subsection of the statute, at least as charged in this indictment.

³⁴*Shaker Hts. v. Mosely, supra.*

³⁵*State v. Adams, supra.*

³⁶*State v. Nicholas* (1993), 66 Ohio St.3d 431, 613 N.E.2d 225. (Vaginal, oral and digital rape not allied offenses)

If the determination of allied offenses is to be made by analyzing the facts rather than the elements of the statutes involved, possession is an allied offense of R.C. 2925.03(A)(1) in this case. The state relied on either circumstantial evidence of an offer to sell the actual drugs which were seized, or complicity in a delivery of the drugs, to prove that Defendant sold or offered to sell this marijuana. (T.p. 804-824) Either theory is based on Defendant exercising control of the marijuana. Both theories postulate sale of the actual drugs seized, which were also the subject of the possession charge. Although an offender might offer to sell drugs without ever actually having the means to obtain or deliver them, this fact pattern is not before the court. In this case, Defendant is charged with possession of the drugs that the state claims he transported and sold or offered to sell. Both an offer to sell these drugs, and the act of delivering or causing them to be delivered, require proof that Defendant exercised control over the drugs in question. The ability to sell or deliver property to another is perhaps the ultimate expression of control over that property.

Even without reference to the facts of this case, possession and sale of these drugs are allied offenses because comparison of the statutory elements reveals that commission of the (A)(1) trafficking offense charged in this indictment necessarily requires commission of the possession offense charged. Courts which have found that possession and (A)(1) trafficking are not allied have based that decision on the fact that R.C. 2925.03(A)(1) forbids an offer to sell as well as an actual sale, and it is well established in Ohio that one who makes an offer to sell a controlled substance is guilty of this offense, even if the substance offered is counterfeit, if no substance is ever produced for sale, or if the offer is made by a 'middleman' who never had physical possession of the drugs.

The middleman or complicitor argument fails even under a strict comparison of

elements test, however, because R.C. 2925.11 does not require actual physical possession—only the ability to exercise control over the substance (constructive possession).

As the Court of Appeals for Jefferson county noted:

Employing this new abstract analysis, many appellate courts have held that trafficking and possession are not allied offenses of similar import. Their analysis generally reasons that, in the abstract, it is possible to obtain, possess or use drugs without selling or offering to sell them and it is possible to sell or offer to sell drugs without obtaining, possessing or using them. *State v. Sanders*, 11th Dist. No. 2003-P-72, 2004-Ohio-5629; *State v. Pena*, 10th Dist. No. 03AP-174, 2004-Ohio-350; *State v. Johnson* (2000), 140 Ohio App.3d 385, 390 (1st Dist.). See, also, *State v. Hankins* (1993), 89 Ohio App.3d 567 (3d Dist.). The latter proposition is usually explained by stating that one can traffic as a middleman or even as a "kingpin" without ever physically possessing the drugs. See, e.g., *State v. McGhee*, 4th Dist. No. 94CA15, 2005-Ohio-1585; *State v. Lyons*, 8th Dist. No. 84377, 2005-Ohio-392; *State v. Alvarez*, 12th Dist. No. CA2003-63-67, 2004-Ohio-2403. Such rationale ignores any theories of constructive possession.³⁷

The court went on to note that possession and (A)(1) trafficking were still separate offenses because one may offer to sell drugs without actually possessing anything. In fact, the drugs offered may be counterfeit or nonexistent. This rationale is only true, however, when the state fails to allege a specific amount in order to obtain an enhanced sentence.

The General Assembly has authorized a hierarchy of criminal penalties for drug trafficking based upon the identity and amount of the controlled substance involved. By the terms of the penalty statute for cocaine, R.C. 2925.03(C)(4), the substance involved in the violation is to *be* cocaine or, at the very least, "a compound, mixture, preparation, or substance *containing* cocaine." (Emphasis added.) This language presumes that a detectable amount of cocaine is present within the substance before the penalty enhancement applies.³⁸

Conviction of the enhanced felony charge of possession in excess of 20,000 grams

³⁷*State v. Simmons*, Jefferson App. No. 06 JE 4, 2007-Ohio-1570, ¶158-159.

³⁸*State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, ¶ 18.

requires Defendant to have exercised control over a substance containing an actual, detectable amount of marijuana. Thus, possession as charged in this indictment is an allied offense of transportation/preparation for distribution.

Trial counsel properly objected to consecutive sentences for these offenses and referred to the decision in *Adams*.³⁹ Even if no objection had been made, this is plain error affecting a substantial right⁴⁰ Since it was plain error for the trial court to impose separate convictions and sentences for possessing and transporting the same drugs, Defendant is entitled to have one such conviction and sentence vacated.

B) Convictions for two separate counts of trafficking under subsections (A)(1) and (A)(2) of R.C. 2925.03 when based on the delivery or attempted delivery of the same drugs offered for sale, are allied offenses when the state seeks to enhance the penalty by specifying an amount, because such an enhancement requires the state to prove a specific weight and the presence of a detectible amount of a specific drug were actually involved in any such sale or offer.

Delivery, in person or through an agent, is included in the definition of sale and is, therefore, encompassed in the offense of trafficking (transportation). "Sale" includes delivery, barter, exchange, transfer, or gift, or offer thereof, and each transaction of those natures made by any person, whether as principal, proprietor, agent, servant, or employee."⁴¹

The state's evidence included no proof that Defendant made any verbal offer to sell, and no transaction was ever completed. There is no evidence that Defendant participated

³⁹(T.p. 894)

⁴⁰*Jennings*, supra at 183, *Yarbrough*, supra at 17, ¶102.

⁴¹R.C. 3719.01 (AA).

in any discussion between buyer and seller, or even that he was aware of any such discussion. Defendant's entire alleged participation in this offense involves only the transportation and attempted delivery of the drugs.

Delivery and sale are the same, by statutory definition, and delivery necessarily involves some amount of transportation. Since a sale by delivery cannot be committed without transporting the drugs, Defendant could not commit one without committing the other. The state failed to establish any separate animus for the transportation of these drugs. The sole purpose of transporting the drugs was to facilitate delivery to the buyer. For that reason, these two offenses were allied, and Defendant should only be convicted of one such offense.

CONCLUSION

For all the reasons stated above, due process requires that the Defendant's convictions be reversed and remanded. Defendant must be remanded for resentencing under *Foster* in any event, but that prior to that resentencing, this court should vacate two of the allied offenses of trafficking or possession, or direct that the state elect one of those offenses for conviction and sentencing.

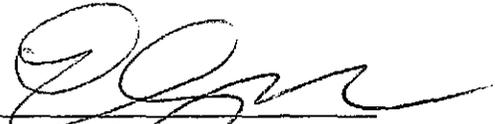


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Attorney for Defendant-Appellee/
Cross-Appellant

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing instrument was delivered to the office of the Prosecuting Attorney this 14th day of April, 2007.



ELIZABETH E. AGAR



D72922584

IN THE SUPREME COURT
OF THE
STATE OF OHIO

FILED
APR 12 2007
MARCIA J. MENDEL, CLERK
SUPREME COURT OF OHIO

07-0651

STATE OF OHIO

Case No. 2007-0595

Plaintiff-Appellant/
Cross-Appellee

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

FERNANDO CABRALES

Court of Appeals
Case No. C-0500682

Defendant-Appellee/
Cross-Appellant

B-0403121-D

FILED
COURT OF APPEALS

APR 17 2007

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

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

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

2007 APR 17 A 9:24

FILED

JOSEPH T. DETERS #0012084P
HAMILTON COUNTY PROSECUTOR

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Counsel for Defendant-Appellant/
Cross-Appellant
FERNANDO CABRALES

CLERK OF COURTS

APR 17 2007

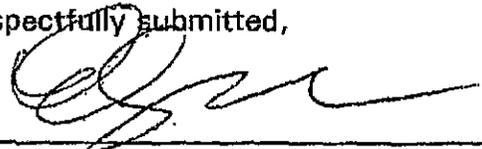
RECORDED & INDEXED

**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,

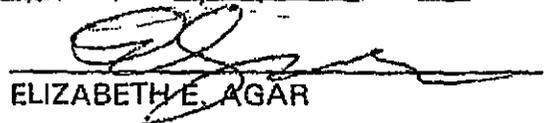


ELIZABETH E. AGAR, Counsel of Record
Supreme Court No. 0002766

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 10th day of April, 2007.



ELIZABETH E. AGAR



D72858304

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO.	07-0595
Plaintiff-Appellant	:	On Appeal from the Hamilton County	
vs.	:	Court of Appeals, First Appellate	
	:	District	
FERNANDO CABRALES	:	Court of Appeals	
Defendant-Appellee	:	Case Number C050682	
			B0403121-D

NOTICE OF CERTIFICATION OF CONFLICT

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FILED
COURT OF APPEALS

APR 10 2007

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH

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FILED

CLERK OF COURTS

APR 10 2007

FILED

APR 04 2007

MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE
SUPREME COURT OF OHIO

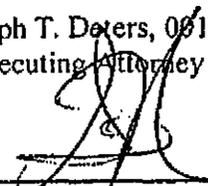
STATE OF OHIO : NO.
Plaintiff-Appellant :
vs. :
FERNANDO CABRALES : NOTICE OF CERTIFICATION OF
 : CONFLICT
Defendant-Appellee :

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,

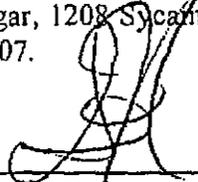
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Phone: 946-3227
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CERTIFICATE OF SERVICE

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 2nd day of April, 2007.



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney

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



STATE OF OHIO,

Plaintiff-Appellee,

vs.

FERNANDO CABRALES,

Defendant-Appellant.

APPEAL NO. C-050682
TRIAL NO. B-0403121-D

JUDGMENT ENTRY.



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

**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.	:	<i>DECISION.</i>
FERNANDO CABRALES,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
Defendant-Appellant.	:	MAR 02 2007

COURT OF APPEALS

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.

App. 7

MARK P. PAINTER, Judge.

{¶1} Defendant-appellant Fernando Cabrales appeals his convictions for two counts of trafficking in marijuana,¹ one count of possession of marijuana,² and one count of conspiracy.³ 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*,⁴ 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.

¹ R.C. 2925.03(A)(1) and (2).

² R.C. 2925.11(A).

³ R.C. 2923.01(A)(2).

⁴ 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

{¶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).

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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

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.⁵ 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.⁶ An appellate court must accept the trial court's findings of fact if they are supported by competent and credible evidence.⁷ But the appellate court must then determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard.⁸

{¶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.⁹ This standard of review grants a great deal of deference to the issuing magistrate.¹⁰

{¶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.¹¹ 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.¹²

{¶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

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

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

⁷ *Burnside*, supra, at ¶8.

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

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

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

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

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

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 marihuana 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.¹³

{¶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*,¹⁴ 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

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

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

OHIO FIRST DISTRICT COURT OF APPEALS

one conviction under R.C. 2941.25(A).¹⁵ Cabrales's reliance on *Jennings* is misplaced because it was superseded by the Ohio Supreme Court's decision in *State v. Rance*.¹⁶ 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."¹⁷ 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.¹⁸ 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.¹⁹

¹⁵ Id.

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

¹⁷ Id. at 638.

¹⁸ Id. at 638-39.

¹⁹ Id.

{¶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.²⁰ 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.”²¹ 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,²² for a person to commit a trafficking offense in

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

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

²² See *State v. Guzman*, 10th Dist. No. 02AP-1440, 2003-Ohio-4822; *State v. Alvarez*, 12th 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.”²³ 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.”²⁴ Thus the statute subsumes an attempt to traffick in a controlled substance within its definition—there does not need to be an actual delivery.

²³ 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.

²⁴ 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.²⁵

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

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

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

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

{¶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.²⁹

{¶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.³⁰ The possession statute forbids a person from knowingly obtaining, possessing, or using a controlled substance.³¹ And the conspiracy statute proscribes a person from facilitating and planning with another person the commission of trafficking in or possessing drugs.³²

{¶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.

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

²⁸ *Id.*

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

³⁰ R.C. 2925.03(A)(1) and (2).

³¹ R.C. 2925.11(A).

³² 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

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*,³³ 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.

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

{¶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."³⁴ 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*"³⁵ 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.³⁶

{¶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

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

³⁵ Id. at ¶67.

³⁶ Id. at ¶100.

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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.³⁷

{¶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*³⁸ 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.

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

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

§ 2941.25**Statutes & Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2941: INDICTMENT****2941.25 Allied offenses of similar import - multiple counts.**

2941.25 Allied offenses of similar import - multiple counts.

(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.

Effective Date: 01-01-1974

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APP. 28

(I) "Harmful intoxicant" does not include beer or intoxicating liquor but means any of the following:

(1) Any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefaction, paralysis, unconsciousness, asphyxiation, or other harmful physiological effects, and includes, but is not limited to, any of the following:

(a) Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, or other preparation containing a volatile organic solvent;

(b) Any aerosol propellant;

(c) Any fluorocarbon refrigerant;

(d) Any anesthetic gas.

(2) Gamma Butyrolactone;

(3) 1,4 Butanediol.

(J) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

(K) "Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

(L) "Sample drug" means a drug or pharmaceutical preparation that would be hazardous to health or safety if used without the supervision of a licensed health professional authorized to prescribe drugs, or a drug of abuse, and that, at one time, had been placed in a container plainly marked as a sample by a manufacturer.

(M) "Standard pharmaceutical reference manual" means the current edition, with cumulative changes if any, of any of the following reference works:

(1) "The National Formulary";

(2) "The United States Pharmacopeia," prepared by authority of the United States Pharmacopoeial Convention, Inc.;

(3) Other standard references that are approved by the state board of pharmacy.

(N) "Juvenile" means a person under eighteen years of age.

(O) "Counterfeit controlled substance" means any of the following:

(1) Any drug that bears, or whose container or label bears, a trademark, trade name, or other identifying mark used without authorization of the owner of rights to that trademark, trade name, or

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§ 2925.11**Statutes & Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2925: DRUG OFFENSES****2925.11 Possession of controlled substances.**

2925.11 Possession of controlled substances.

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

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

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(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the third degree or, if the offender previously has been convicted of a drug abuse offense, a misdemeanor of the second degree. If the drug involved in the violation is an anabolic steroid included in schedule III and if the offense is a misdemeanor of the third degree under this division, in lieu of sentencing the offender to a term of imprisonment in a detention facility, the court may place the offender under a community control sanction, as defined in section 2929.01 of the Revised Code, that requires the offender to perform supervised community service work pursuant to division (B) of section 2951.02 of the Revised Code.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), or (f) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

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(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty-five grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is

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guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred

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unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

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(f) If the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code and in addition to any other sanction that is imposed for the offense under this section, sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1)(a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of section 2929.18 of the Revised Code in accordance with and subject to the requirements of division (F) of section 2925.03 of the Revised Code. The agency that receives the fine shall use the fine as specified in division (F) of section 2925.03 of the Revised Code.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

(F) It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with section 2901.05 of the Revised Code, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

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(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of section 2925.03 of the Revised Code applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

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§ 2925.03**Statutes & Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2925: DRUG OFFENSES****2925.03 Trafficking, aggravated trafficking in drugs.**

2925.03 Trafficking, aggravated trafficking in drugs.

(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.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), (e), or (f) of this section, aggravated trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(1)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or

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exceeds the bulk amount but is less than five times the bulk amount, aggravated trafficking in drugs is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), (d), or (e) of this section, trafficking in drugs is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(2)(c), (d), or (e) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, trafficking in drugs is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, trafficking in drugs is a

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felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty times the bulk amount, trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds fifty times the bulk amount and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of trafficking in marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), or (g) of this section, trafficking in marihuana is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(3)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, trafficking in marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or

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exceeds twenty thousand grams, trafficking in marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds twenty thousand grams and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(g) Except as otherwise provided in this division, if the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor upon a first offense and a misdemeanor of the third degree upon a subsequent offense. If the offense involves a gift of twenty grams or less of marihuana and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a misdemeanor of the third degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), (f), or (g) of this section, trafficking in cocaine is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(4)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, trafficking in cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, trafficking in cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison

term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D. or a compound, mixture, preparation, or substance containing L.S.D., whoever violates division (A) of this section is guilty of trafficking in L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), (f), or (g) of this section, trafficking in L.S.D. is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(5)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or

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equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of trafficking in heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), (f), or (g) of this section, trafficking in heroin is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(6)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, trafficking in heroin is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the second degree, and there is a presumption for a prison term for the offense.

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(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, trafficking in heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of trafficking in hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, trafficking in hashish is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(7)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the

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amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(D) In addition to any prison term authorized or required by division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, and in addition to any other sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) If the violation of division (A) of this section is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent. Except as otherwise provided in division (H)(1) of this section, a mandatory fine or any other fine imposed for a violation of this section is subject to division (F) of this section. If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk of the court shall pay the forfeited bail pursuant to divisions (D)(1) and (F) of this section, as if the forfeited bail was a fine imposed for a violation of this section. If any amount of the forfeited bail remains after that payment and if a fine is imposed under division (H)(1) of this section, the clerk of the court shall pay the remaining amount of the forfeited bail pursuant to divisions (H)(2) and (3) of this section, as if that remaining amount was a fine imposed under division (H)(1) of this section.

(2) The court shall suspend the driver's or commercial driver's license or permit of the offender in accordance with division (G) of this section.

(3) If the offender is a professionally licensed person, the court immediately shall comply with section 2925.38 of the Revised Code.

(E) When a person is charged with the sale of or offer to sell a bulk amount or a multiple of a bulk amount of a controlled substance, the jury, or the court trying the accused, shall determine the amount of the controlled substance involved at the time of the offense and, if a guilty verdict is returned, shall

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return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance involved, and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is the requisite amount, or that the amount of the controlled substance involved is less than the requisite amount.

(F)(1) Notwithstanding any contrary provision of section 3719.21 of the Revised Code and except as provided in division (H) of this section, the clerk of the court shall pay any mandatory fine imposed pursuant to division (D)(1) of this section and any fine other than a mandatory fine that is imposed for a violation of this section pursuant to division (A) or (B)(5) of section 2929.18 of the Revised Code to the county, township, municipal corporation, park district, as created pursuant to section 511.18 or 1545.04 of the Revised Code, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender. However, the clerk shall not pay a mandatory fine so imposed to a law enforcement agency unless the agency has adopted a written internal control policy under division (F)(2) of this section that addresses the use of the fine moneys that it receives. Each agency shall use the mandatory fines so paid to subsidize the agency's law enforcement efforts that pertain to drug offenses, in accordance with the written internal control policy adopted by the recipient agency under division (F)(2) of this section.

(2)(a) Prior to receiving any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code, a law enforcement agency shall adopt a written internal control policy that addresses the agency's use and disposition of all fine moneys so received and that provides for the keeping of detailed financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure. The policy shall not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation. All financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure by an agency are public records open for inspection under section 149.43 of the Revised Code. Additionally, a written internal control policy adopted under this division is such a public record, and the agency that adopted it shall comply with it.

(b) Each law enforcement agency that receives in any calendar year any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code shall prepare a report covering the calendar year that cumulates all of the information contained in all of the public financial records kept by the agency pursuant to division (F)(2)(a) of this section for that calendar year, and shall send a copy of the cumulative report, no later than the first day of March in the calendar year following the calendar year covered by the report, to the attorney general. Each report received by the attorney general is a public record open for inspection under section 149.43 of the Revised Code. Not later than the fifteenth day of April in the calendar year in which the reports are received, the attorney general shall send to the president of the senate and the speaker of the house of representatives a written notification that does all of the following:

(i) Indicates that the attorney general has received from law enforcement agencies reports of the type described in this division that cover the previous calendar year and indicates that the reports were received under this division;

(ii) Indicates that the reports are open for inspection under section 149.43 of the Revised Code;

(iii) Indicates that the attorney general will provide a copy of any or all of the reports to the president of the senate or the speaker of the house of representatives upon request.

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(3) As used in division (F) of this section:

(a) "Law enforcement agencies" includes, but is not limited to, the state board of pharmacy and the office of a prosecutor.

(b) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(G) When required under division (D)(2) of this section or any other provision of this chapter, the court shall suspend for not less than six months or more than five years the driver's or commercial driver's license or permit of any person who is convicted of or pleads guilty to any violation of this section or any other specified provision of this chapter. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension; upon the filing of such a motion and the court's finding of good cause for the termination, the court may terminate the suspension.

(H)(1) In addition to any prison term authorized or required by division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, in addition to any other penalty or sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section may impose upon the offender an additional fine specified for the offense in division (B)(4) of section 2929.18 of the Revised Code. A fine imposed under division (H)(1) of this section is not subject to division (F) of this section and shall be used solely for the support of one or more eligible alcohol and drug addiction programs in accordance with divisions (H)(2) and (3) of this section.

(2) The court that imposes a fine under division (H)(1) of this section shall specify in the judgment that imposes the fine one or more eligible alcohol and drug addiction programs for the support of which the fine money is to be used. No alcohol and drug addiction program shall receive or use money paid or collected in satisfaction of a fine imposed under division (H)(1) of this section unless the program is specified in the judgment that imposes the fine. No alcohol and drug addiction program shall be specified in the judgment unless the program is an eligible alcohol and drug addiction program and, except as otherwise provided in division (H)(2) of this section, unless the program is located in the county in which the court that imposes the fine is located or in a county that is immediately contiguous to the county in which that court is located. If no eligible alcohol and drug addiction program is located in any of those counties, the judgment may specify an eligible alcohol and drug addiction program that is located anywhere within this state.

(3) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay any fine imposed under division (H)(1) of this section to the eligible alcohol and drug addiction program specified pursuant to division (H)(2) of this section in the judgment. The eligible alcohol and drug addiction program that receives the fine moneys shall use the moneys only for the alcohol and drug addiction services identified in the application for certification under section 3793.06 of the Revised Code or in the application for a license under section 3793.11 of the Revised Code filed with the department of alcohol and drug addiction services by the alcohol and drug addiction program specified in the judgment.

(4) Each alcohol and drug addiction program that receives in a calendar year any fine moneys under division (H)(3) of this section shall file an annual report covering that calendar year with the court of

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common pleas and the board of county commissioners of the county in which the program is located, with the court of common pleas and the board of county commissioners of each county from which the program received the moneys if that county is different from the county in which the program is located, and with the attorney general. The alcohol and drug addiction program shall file the report no later than the first day of March in the calendar year following the calendar year in which the program received the fine moneys. The report shall include statistics on the number of persons served by the alcohol and drug addiction program, identify the types of alcohol and drug addiction services provided to those persons, and include a specific accounting of the purposes for which the fine moneys received were used. No information contained in the report shall identify, or enable a person to determine the identity of, any person served by the alcohol and drug addiction program. Each report received by a court of common pleas, a board of county commissioners, or the attorney general is a public record open for inspection under section 149.43 of the Revised Code.

(5) As used in divisions (H)(1) to (5) of this section:

(a) "Alcohol and drug addiction program" and "alcohol and drug addiction services" have the same meanings as in section 3793.01 of the Revised Code.

(b) "Eligible alcohol and drug addiction program" means an alcohol and drug addiction program that is certified under section 3793.06 of the Revised Code or licensed under section 3793.11 of the Revised Code by the department of alcohol and drug addiction services.

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APP. 47

§ 3719.01**Statutes & Session Law****TITLE [37] XXXVII HEALTH -- SAFETY -- MORALS****CHAPTER 3719: CONTROLLED SUBSTANCES****3719.01 Controlled substances definitions.**

3719.01 Controlled substances definitions.

As used in this chapter:

(A) "Administer" means the direct application of a drug, whether by injection, inhalation, ingestion, or any other means to a person or an animal.

(B) "Drug enforcement administration" means the drug enforcement administration of the United States department of justice or its successor agency.

(C) "Controlled substance" means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V.

(D) "Dangerous drug" has the same meaning as in section 4729.01 of the Revised Code.

(E) "Dispense" means to sell, leave with, give away, dispose of, or deliver.

(F) "Distribute" means to deal in, ship, transport, or deliver but does not include administering or dispensing a drug.

(G) "Drug" has the same meaning as in section 4729.01 of the Revised Code.

(H) "Drug abuse offense," "felony drug abuse offense," "cocaine," and "hashish" have the same meanings as in section 2925.01 of the Revised Code.

(I) "Federal drug abuse control laws" means the "Comprehensive Drug Abuse Prevention and Control Act of 1970," 84 Stat. 1242, 21 U.S.C. 801, as amended.

(J) "Hospital" means an institution for the care and treatment of the sick and injured that is certified by the department of health and approved by the state board of pharmacy as proper to be entrusted with the custody of controlled substances and the professional use of controlled substances.

(K) "Hypodermic" means a hypodermic syringe or needle, or other instrument or device for the injection of medication.

(L) "Isomer," except as otherwise expressly stated, means the optical isomer.

(M) "Laboratory" means a laboratory approved by the state board of pharmacy as proper to be entrusted with the custody of controlled substances and the use of controlled substances for scientific and clinical purposes and for purposes of instruction.

(N) "Manufacturer" means a person who manufactures a controlled substance, as "manufacture" is defined in section 3715.01 of the Revised Code.

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(O) "Marihuana" means all parts of a plant of the genus *cannabis*, whether growing or not; the seeds of a plant of that type; the resin extracted from a part of a plant of that type; and every compound, manufacture, salt, derivative, mixture, or preparation of a plant of that type or of its seeds or resin. "Marihuana" does not include the mature stalks of the plant, fiber produced from the stalks, oils or cake made from the seeds of the plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from the mature stalks, fiber, oil or cake, or the sterilized seed of the plant that is incapable of germination.

(P) "Narcotic drugs" means coca leaves, opium, isonipecaine, amidone, isoamidone, ketobemidone, as defined in this division, and every substance not chemically distinguished from them and every drug, other than *cannabis*, that may be included in the meaning of "narcotic drug" under the federal drug abuse control laws. As used in this division:

(1) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves, that does not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(2) "Isonipecaine" means any substance identified chemically as 1-methyl-4-phenyl-piperidine-4-carboxylic acid ethyl ester, or any salt thereof, by whatever trade name designated.

(3) "Amidone" means any substance identified chemically as 4-4-diphenyl-6-dimethylamino-heptanone-3, or any salt thereof, by whatever trade name designated.

(4) "Isoamidone" means any substance identified chemically as 4-4-diphenyl-5-methyl-6-dimethylaminohexanone-3, or any salt thereof, by whatever trade name designated.

(5) "Ketobemidone" means any substance identified chemically as 4-(3-hydroxyphenyl)-1-methyl-4-piperidyl ethyl ketone hydrochloride, or any salt thereof, by whatever trade name designated.

(Q) "Official written order" means an order written on a form provided for that purpose by the director of the United States drug enforcement administration, under any laws of the United States making provision for the order, if the order forms are authorized and required by federal law.

(R) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. "Opiate" does not include, unless specifically designated as controlled under section 3719.41 of the Revised Code, the dextrorotatory isomer of 3-methoxy-N-methylmorphinan and its salts (dextro-methorphan). "Opiate" does include its racemic and levoratory forms.

(S) "Opium poppy" means the plant of the species *papaver somniferum* L., except its seeds.

(T) "Person" means any individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, or other legal entity.

(U) "Pharmacist" means a person licensed under Chapter 4729. of the Revised Code to engage in the practice of pharmacy.

(V) "Pharmacy" has the same meaning as in section 4729.01 of the Revised Code.

(W) "Poison" means any drug, chemical, or preparation likely to be deleterious or destructive to

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adult human life in quantities of four grams or less.

(X) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(Y) "Licensed health professional authorized to prescribe drugs," "prescriber," and "prescription" have the same meanings as in section 4729.01 of the Revised Code.

(Z) "Registry number" means the number assigned to each person registered under the federal drug abuse control laws.

(AA) "Sale" includes delivery, barter, exchange, transfer, or gift, or offer thereof, and each transaction of those natures made by any person, whether as principal, proprietor, agent, servant, or employee.

(BB) "Schedule I," "schedule II," "schedule III," "schedule IV," and "schedule V" mean controlled substance schedules I, II, III, IV, and V, respectively, established pursuant to section 3719.41 of the Revised Code, as amended pursuant to section 3719.43 or 3719.44 of the Revised Code.

(CC) "Wholesaler" means a person who, on official written orders other than prescriptions, supplies controlled substances that the person has not manufactured, produced, or prepared personally and includes a "wholesale distributor of dangerous drugs" as defined in section 4729.01 of the Revised Code.

(DD) "Animal shelter" means a facility operated by a humane society or any society organized under Chapter 1717. of the Revised Code or a dog pound operated pursuant to Chapter 955. of the Revised Code.

(EE) "Terminal distributor of dangerous drugs" has the same meaning as in section 4729.01 of the Revised Code.

(FF) "Category III license" means a license issued to a terminal distributor of dangerous drugs as set forth in section 4729.54 of the Revised Code.

(GG) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

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