ORIGINAL

IN THE SUPREME COURT OF OHIO

OLIVER LUCIEN GARR,	:	Case No. 2009-1323
Petitioner,	:	On Order from the United States District Court, Southern District of Ohio, Western Division, Certifying Question of State Law, No. 1:08cv293
v.	:	
WARDEN, MADISON CORRECTIONAL INSTITUTION,	:	
Respondent.	:	

MERIT BRIEF OF PETITIONER OLIVER LUCIEN GARR

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT 5

CERTIFIED QUESTION OF STATE LAW:

Whether the Supreme Court of Ohio's decision in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, as described in the syllabus of the court, to wit: "[a] substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under Ohio Revised Code § 2925.03(C)(4)(g)," extends to cases where the substance offered for sale was never observed, tested, or recovered to ascertain whether it contained a detectable amount of the controlled substance, but no affirmative evidence was presented to call into question the defendant's representation in his offer to sell, or to refute the jury's factual finding, that the substance was in fact a controlled substance in an amount that equaled or exceeded 1000 grams. 5

PETITIONER OLIVER LUCIEN GARR'S PROPOSITION OF LAW:

This Court's holding in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, which concluded that a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g), applies to cases where the substance offered for sale was never observed, tested, or recovered to determine whether the substance offered for sale contained a detectable amount of the controlled substance. 5

I. The General Assembly's plain language as expressed in R.C. 2925.03, and this Court's holding in *Chandler* interpreting that statute's plain language, compels this Court to answer the certified question in the affirmative. 6

II. Ohio appellate courts have applied the holding in *Chandler* in cases factually similar to Mr. Garr's. 9

III. The application of this Court's holding in *Chandler* to the facts of Mr. Garr's case accords with longstanding principles of due process, and is in accordance with sound public policy. 11

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDIX:

June 26, 2009, Order on Report and Recommendation A-1

July 16, 2009, Certification Order A-4

Mar. 2, 2009, Report and Recommendation A-13

State of Ohio v. Oliver L. Garr, Hamilton County Common Pleas Court, Case No. B0602631, Judgment Entry, Sept. 13, 2006 ..... A-40

State v. Garr, 1st Dist. No. C-060794, 2007-Ohio-3448, 2007 Ohio App. LEXIS 3179 ..... A-42

State v. Elliott, 8th Dist. No. 86461, 2006-Ohio-1092, 2006 Ohio App. LEXIS 1006 ..... A-45

State v. Mitchell, 7th Dist. No. 08 JE 5, 2008-Ohio-6920, 2008 Ohio App. LEXIS 5869 ..... A-48

State v. Scott, 5th Dist. No. WD-05-095, 2007-Ohio-564, 2007 Ohio App. LEXIS 524 ..... A-54

Fourteenth Amendment, United States Constitution A-57

R.C. 2925.03 ..... A-58

R.C. 2929.14 ..... A-67

TABLE OF AUTHORITIES

Page No.

CASES:

In re Winship (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 2,11

Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 2,11

Johnson v. Coyle, 200 F.3d 987 (6th Cir. 2000) 13

Newman v. Metrish, 543 F.3d 793 (6th Cir. 2008) 13

State v. Chandler, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234 ..... *passim*

State v. Elliott, 8th Dist. No. 86461, 2006-Ohio-1092,
2006 Ohio App. LEXIS 1006 ..... *passim*

State v. Garr, 1st Dist. No. C-060794, 2007-Ohio-3448,
2007 Ohio App. LEXIS 3179 ..... *passim*

State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492 8

State v. Mitchell, 7th Dist. No. 08 JE 5, 2008-Ohio-6920,
2008 Ohio App. LEXIS 5869 ..... *passim*

State v. Patterson (1982), 69 Ohio St.2d 445, 23 O.O.3d 394, 432 N.E.2d 808 12,14

State v. Scott, 5th Dist. No. WD-05-095, 2007-Ohio-564,
2007 Ohio App. LEXIS 524 12

Sullivan v. Louisiana (1993), 508 U.S. 275, 113 S.Ct. 2078,
124 L.Ed.2d 182 2,11

State v. Thompkins (1997), 78 Ohio St.3d 380, 678 N.E.2d 541 12

CONSTITUTIONAL PROVISIONS:

Fourteenth Amendment, United States Constitution 13

STATUTES:

R.C. 2925.03 ..... *passim*

R.C. 2929.14 3,6,7

INTRODUCTION

This Court has accepted the United States District Court for the Southern District of Ohio's request to clarify the impact of this Court's holding in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, upon individuals such as Mr. Garr, who was convicted of first-degree trafficking in cocaine and was subjected to sentencing as a major drug offender ("MDO"), despite the fact that the "substance" which was offered for sale was never observed, recovered, or tested. Specifically, this Court has agreed to answer the following question:

> Whether the Supreme Court of Ohio's decision in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, as described in the syllabus of the court, to wit: "[a] substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under Ohio Revised Code § 2925.03(C)(4)(g)," extends to cases where the substance offered for sale was never observed, tested, or recovered to ascertain whether it contained a detectable amount of the controlled substance, but no affirmative evidence was presented to call into question the defendant's representation in his offer to sell, or to refute the jury's factual finding, that the substance was in fact a controlled substance in an amount that equaled or exceeded 1000 grams.

This Court should answer the question in the affirmative. In *Chandler*, this Court held:

> 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.

Chandler at ¶18. This Court concluded: "We hold that the statute is clear and that a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g)." Id. at ¶21.

This Court's acknowledgment in *Chandler* of the General Assembly's plain language applies to the factual scenario presented in Mr. Garr's case. In Mr. Garr's case, while an offer to sell cocaine was made, no "detectable amount" of cocaine, whatsoever, was recovered. While the evidence brought forth by the State against Mr. Garr might support his conviction for an offer to sell drugs under R.C. 2925.03(C)(4)(a), a felony of the fifth degree, the evidence was insufficient to support his first-degree felony drug trafficking conviction and accompanying MDO classification. It is axiomatic that before the State may obtain a conviction for any offense, it must prove every element of that offense beyond a reasonable doubt. *Sullivan v. Louisiana* (1993), 508 U.S. 275, 277-78, 113 S.Ct. 2078, 124 L.Ed.2d 182; *Jackson v. Virginia* (1979), 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560; *In re Winship* (1970), 397 U.S. 358, 361-64, 90 S.Ct. 1068, 25 L.Ed.2d 368. Moreover, Ohio appellate courts have properly relied upon *Chandler* in cases that presented factual backgrounds similar to those presented in Mr. Garr's case, i.e., in which no detectable amount of a controlled substance was recovered. See, e.g., *State v. Mitchell*, 7th Dist. No. 08 JE 5, 2008-Ohio-6920, 2008 Ohio App. LEXIS 5869; *State v. Elliott*, 8th Dist. No. 86461, 2006-Ohio-1092, 2006 Ohio App. LEXIS 1006. Further, sound policy considerations compel the application of *Chandler*'s reasoning to the facts of Mr. Garr's case. Accordingly, this Court should answer the federal court's question in the affirmative.

STATEMENT OF THE CASE AND FACTS

I. Procedural Posture.

Mr. Garr was indicted in the Hamilton County Court of Common Pleas on one count of trafficking in cocaine in an amount that equaled or exceeded 1000 grams, a violation of R.C. 2925.03(A)(1). A major drug offender ("MDO") specification was returned under R.C. 2925.03(C)(4)(g) and R.C. 2929.14(D)(3)(a). Mr. Garr's trial counsel filed a pretrial motion to dismiss the MDO specification, arguing that there was insufficient evidence of a detectable amount of a controlled substance to sustain the MDO enhancement under *Chandler*. The motion was overruled and Mr. Garr was subsequently convicted on the trafficking charge and accompanying MDO specification. He was sentenced to a mandatory term of imprisonment of ten years under R.C. 2925.03(C)(4)(g) and R.C. 2929.14(D)(3)(a). Mr. Garr was acquitted on all other counts.

Mr. Garr timely appealed his conviction and sentence to the First District Court of Appeals, Hamilton County. The court of appeals overruled Mr. Garr's two assignments of error, which again attacked the trial court's failure to dismiss the MDO specification and the trial court's imposition of a mandatory sentence of ten years regarding the MDO specification. *State v. Garr*, 1st Dist. No. C-060794, 2007-Ohio-3448, 2007 Ohio App. LEXIS 3179, at ¶7-8.

Mr. Garr timely sought this Court's jurisdiction regarding the issues that were raised in the court of appeals. This Court denied Mr. Garr leave to appeal his conviction and sentence.

In April 2008, Mr. Garr filed a timely petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio, asserting the following grounds for relief:

> Ground One: The State of Ohio failed to present sufficient evidence to the jury to prove that Mr. Garr was a Major Drug Offender under Ohio law because no

> evidence was presented as to the weight or identity of the drug involved in the Trafficking Offense to which the Major Drug Offender attached.
>
> Ground Two: Under Ohio law, an Offer to Sale [sic] is a felony of the Fifth-Degree only punishable by 6-12 months, if the State of Ohio cannot prove beyond a reasonable doubt that the substance actually contained/involved a mixture of identifiable amount of cocaine exceeding the weight limits provided under Ohio law for a more serious offense.

On March 2, 2009, Magistrate Judge Black issued his Report and Recommendation, recommending that the State's motion to dismiss be denied, and that the question of law as to whether this Court's decision in *Chandler* applies to Mr. Garr's case be certified to this Court. (Mar. 2, 2009, Report and Recommendation, at 24-25, attached). As noted by Magistrate Judge Black, "The issues posed in the instant case are troubling." (Mar. 2, 2009, Report and Recommendation, at 17-18, attached). Both the trial court and the court of appeals held that *Chandler* applied to Mr. Garr's case. However, the court of appeals, relying on the "circumstantial evidence" in the form of Mr. Garr's statements to the police informant, determined that Mr. Garr's case was distinguishable from *Chandler*. As acknowledged by Magistrate Judge Black, however, there should be "serious concerns" regarding the circumstantial evidence which was relied upon by the court of appeals in upholding Mr. Garr's enhanced sentence. (Mar. 2, 2009, Report and Recommendation, at 21-22, attached).

On July 16, 2009, Chief Judge Dlott certified the question addressed herein to this Court. (June 26, 2009, Order on Report and Recommendation, attached; July 16, 2009, Certification Order, attached). On September 30, 2009, this Court agreed to answer the district court's question. (Sept. 30, 2009, Entry).

II. <u>The Facts Underlying Mr. Garr's Conviction and Sentence.</u>

As determined by the court of appeals, the facts underlying Mr. Garr's conviction and sentence were as follows:

> The facts of this case are largely undisputed. During a sting operation, Garr told police informant Robert Carr that he would sell him two kilograms of cocaine for $42,000. At trial, the state played a series of recorded conversations between Garr and Carr detailing the terms of this transaction, which included two discussions about the quality of the cocaine. Carr and Garr eventually met in a restaurant parking lot with the understanding that Garr was to deliver the cocaine to Carr, and that Carr would pay him for it later. But due to a disagreement over payment, the sale was not completed, and Garr never produced any cocaine. Police monitoring the scene allowed Garr to leave without incident. Garr was not arrested until several months later, and the state never recovered any substance offered for sale in connection with these events.

State v. Garr, 1st Dist. No. C-060794, 2007-Ohio-3448, 2007 Ohio App. LEXIS 3179, at ¶2.

ARGUMENT

This Court has agreed to answer the following, specific question:

> Whether the Supreme Court of Ohio's decision in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, as described in the syllabus of the court, to wit: "[a] substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under Ohio Revised Code § 2925.03(C)(4)(g)," extends to cases where the substance offered for sale was never observed, tested, or recovered to ascertain whether it contained a detectable amount of the controlled substance, but no affirmative evidence was presented to call into question the defendant's representation in his offer to sell, or to refute the jury's factual finding, that the substance was in fact a controlled substance in an amount that equaled or exceeded 1000 grams.

(Sept. 30, 2009, Entry). For the reasons discussed herein, this Court should answer the question in the affirmative.

PETITIONER OLIVER LUCIEN GARR'S PROPOSITION OF LAW

This Court's holding in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, which concluded that a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g), applies to cases where the substance offered for sale was never observed, tested, or recovered to determine whether the substance offered for sale contained a detectable amount of the controlled substance.

I. **The General Assembly's plain language as expressed in R.C. 2925.03, and this Court's holding in *Chandler* interpreting that statute's plain language, compels this Court to answer the certified question in the affirmative.**

In *Chandler*, this Court addressed the issue of whether a person can be subjected to the special penalty statute applicable to a major drug offender for a first-degree felony conviction when the substance that was offered for sale contained no detectable amount of the proscribed substance. This Court held:

> The penalty provision that relates to drug-trafficking cases, R.C. 2925.03(C)(4), states at the outset: "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 [setting forth the various penalties]." (Emphasis added.)
>
> Unless other specific portions of the section apply, trafficking in cocaine is a fifth-degree felony, and there is no presumption for a prison term. R.C. 2925.03(C)(4)(a). . . .
>
> * * *
>
> The penalty section at issue here, R.C. 2925.03(C)(4)(g), states: "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." (Emphasis added.) Thus, this section provides a specific penalty enhancement.
>
> The appellees were charged with violating R.C. 2925.03(A)(1), and the court of appeals properly held that the state was required to prove the identity of the substance as well as a detectable amount of that substance, not for conviction, but to impose the penalty enhancement of R.C. 2925.03(C)(4)(g). The jury's finding that the amount of the drug equaled or exceeded 100 grams of crack cocaine was contrary to fact, for the substance involved was 130.87 grams of baking soda.
>
> The major-drug-offender penalty that is referred to in R.C. 2925.03(C)(4)(g) is found in R.C. 2929.14(D)(3) and contains two parts. Subsection (a) states that if

> the offender violates R.C. 2925.03 and is classified as a major drug offender, "the court shall impose . . . a ten-year prison term" that may not be reduced by a judicial release. . . . As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed. Id.
>
> 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.

Chandler at ¶12-13, 15-18. This Court concluded: "**We hold that the statute is clear** and that **a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g)**." Id. at ¶21 (emphasis added).

The plain language of R.C. 2925.03 and this Court's reasoning in *Chandler* compel this Court to answer the certified question in the affirmative. As noted by this Court, the substance offered for sale is to **be** cocaine, or at least a substance **containing** cocaine. *Chandler* at ¶18. Because no controlled substance, whatsoever, was recovered or tested, and because the State's "proof" of the identity and amount of the controlled substance amounted to scant assertions by the accused that the controlled substance was of a particular amount and quality, Mr. Garr's MDO specification cannot stand.

Mr. Garr's case, like *Chandler*, is about the identity and quantity of the controlled substance offered for sale. *Chandler* was not just a case about counterfeit drugs. It was a case which addressed the question of what comprises sufficient evidence for enhanced drug trafficking penalties when no detectable amount of the controlled substance was recovered. In *Chandler*, the controlled substance that was offered for sale was affirmatively proven not to be a

controlled substance. But the fact remains that in Mr. Garr's case, no controlled substance, whatsoever, was recovered, tested, and presented to the trier of fact. As determined in *Chandler*, evidence sufficient for the imposition of an MDO specification must include a "detectable amount" of the controlled substance. In Mr. Garr's case, no detectable amount of a controlled substance was presented to the jury. As such, this Court's holding in *Chandler* applies to the facts of Mr. Garr's case.

The fact that the "drug" at issue in *Chandler* was determined to be counterfeit does not distinguish *Chandler* from cases in which no substance, whatsoever, was recovered. In considering the General Assembly's intent in creating a hierarchy of criminal penalties for drug trafficking, this Court properly noted: "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." *Chandler* at ¶18. Moreover, while the State may establish any element of a crime through circumstantial evidence, see *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492, this Court, in *Chandler*, determined that sufficient evidence for the imposition of the MDO specification requires a detectable amount of the controlled substance offered for sale. In a case such as Mr. Garr's, where the State's evidence supporting the identity and amount of the controlled substance offered for sale was built upon cursory assertions by the accused that the controlled substance was cocaine in excess of one kilogram, a "detectable amount" of the substance offered for sale was not proven beyond a reasonable doubt.

II. Ohio appellate courts have applied the holding in *Chandler* in cases factually similar to Mr. Garr's.

After this Court announced its holding in *Chandler*, Ohio appellate courts began to apply *Chandler*'s rationale in cases factually similar to Mr. Garr's case. In *State v. Mitchell*, 7th Dist. No. 08 JE 5, 2008-Ohio-6920, 2008 Ohio App. LEXIS 5869, the court of appeals held that there was insufficient evidence to support the defendant's conviction on a third-degree felony drug trafficking charge when the sale of the controlled substance was never completed because the defendant was unable to procure the controlled substance. Id. at ¶1. The court of appeals refused to distinguish *Chandler*, as the First District Court of Appeals did in Mr. Garr's case. The court of appeals expressed its disapproval of the court of appeals' holding in Mr. Garr's case:

> The First District has distinguished *Chandler* on the grounds that a counterfeit substance that has been tested is different than a substance that is offered to be sold but that is never delivered. *State v. Garr*, 1st Dist. No. 60794, 2007-Ohio-3448. They focused on the defendant's statement that the crack cocaine he intended to sell was high quality. Id. at P6. The court concluded that circumstantial evidence can be utilized to establish that there was "some detectable amount of the relevant controlled substance" as required by *Chandler*. Id. at P5.
>
> Even if the *Garr* court's interpretation and method of distinguishing *Chandler* were correct, which is highly debatable, *Garr* itself is distinguishable from the case at bar. Although appellant offered to sell the informant Oxycontin, there is no evidence circumstantial or otherwise that there was some detectable amount of Oxycontin in some drugs offered for sale. Rather, the only evidence was that appellant was attempting to find some Oxycontin and that he never did find any pills to purchase in order to resell them to the informant. In a case where a defendant is trying to find a drug for a buyer but never finds it, the penalty enhancement provision, which the Supreme Court has held requires some detectable amount, is not satisfied.
>
> Notably, there is an appellate case out of the Eighth District, which is contrary to the First District's *Garr* case and which was decided while the *Chandler* appeal was pending in the Supreme Court. *State v. Elliott*, 8th Dist. No. 86461, 2006-Ohio-1092. In *Elliott*, the defendant offered to sell a quarter of an ounce of crack cocaine for $200 to an undercover officer. The officer said that after he tried the

> crack that he had just purchased for $20 from the defendant, he may return for the quarter ounce. Id. at P7. The defendant was immediately arrested. The $20 rock turned out to be baking soda and the verbally offered quarter ounce of crack cocaine was never recovered.
>
> The defendant was convicted on the following counts: (1) trafficking in a counterfeit substance by selling the rock of baking soda; (2) offering to sell the quarter ounce of crack cocaine that was never produced; and (3) offering to sell the $20 worth of crack cocaine that turned out to be baking soda. It is the treatment of the second count that is relevant to our analysis. Regarding this count, the defendant's penalty was enhanced to a third degree felony upon the jury's finding that he offered to sell an amount equaling or exceeding five grams but less than ten grams.
>
> The Eighth District upheld the drug trafficking conviction for the offer to sell crack cocaine under count two. Id at P26, 29. However, the court held that the state did not provide sufficient evidence to sustain the penalty enhancement to a third degree felony. Id. at P26. Adopting the Fifth District's *Chandler* analysis as to the penalty enhancement, the Eighth District concluded that the state was required to prove a specific amount of the drug actually existed in order to obtain penalty enhancement. Id. at P27. Thus, the *Elliott* court modified the conviction for offering to sell the quarter ounce from a third degree felony to a fifth degree felony, which is the lowest crack cocaine penalty provided in R.C. 2925.03(C). Id. at P3, 27.
>
> * * *
>
> To conclude the analysis, the Supreme Court's *Chandler* case ruled that the penalty enhancement provisions in the drug trafficking statute cannot be used where there is no detectable trace of the alleged substance. Pursuant to this precedent, then we hold that where a defendant offers to sell six Oxycontin tablets but is unable to procure the pills for resale, the state has failed to show a detectable amount of a controlled substance as required for penalty enhancement. . . .

Id. at ¶27-31, 34; see, also, *State v. Elliott*, 8th Dist. No. 86461, 2006-Ohio-1092, 2006 Ohio App. LEXIS 1006.

Accordingly, Ohio appellate courts have determined that the holding in *Chandler* applies to cases in which the controlled substance that was offered for sale was never recovered or tested. While *Mitchell* and *Elliott* involved factual scenarios in which the accused could not, or did not, procure the drugs offered for sale, those cases are not materially distinguishable from

the facts of Mr. Garr's case. In those cases, as in Mr. Garr's case, no detectable amount of the controlled substance offered for sale was recovered. Moreover, in Mr. Garr's case, there was little circumstantial evidence supporting the identity and amount of the drugs offered for sale. Mr. Garr did not have the burden of showing why no drugs materialized. The State was required to prove their existence, in the form of a detectable amount, beyond a reasonable doubt. Ohio appellate courts have properly applied *Chandler*'s reasoning to cases factually similar to that of Mr. Garr. The courts' application of *Chandler* was proper because *Chandler* did not merely address the narrow issue of the offer to sell counterfeit controlled substances. Rather, as evidenced by the conclusion in *Chandler* itself, *Chandler* addressed whether a detectable amount of the relevant controlled substance was necessary to enhance drug trafficking penalties.

III. The application of this Court's holding in *Chandler* to the facts of Mr. Garr's case accords with longstanding principles of due process, and is in accordance with sound public policy.

Before the State may obtain a conviction for any offense, it must prove every element of that offense beyond a reasonable doubt. *Sullivan v. Louisiana* (1993), 508 U.S. 275, 277-78, 113 S.Ct. 2078, 124 L.Ed.2d 182; *Jackson v. Virginia* (1979), 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560; *In re Winship* (1970), 397 U.S. 358, 361-64, 90 S.Ct. 1068, 25 L.Ed.2d 368. A conviction based upon insufficient evidence must be overturned. *Jackson*, 443 U.S. at 315-18. When a verdict regarding a charge is not supported by sufficient evidence, the reviewing court must vacate the verdict and dismiss the charge. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

The State was required to prove beyond a reasonable doubt every element of the charge against Mr. Garr, including the identity and amount of the controlled substance alleged to have

been offered for sale for enhancement purposes. As discussed in *Chandler*, R.C. 2925.03(C)(4)(a) provides that "[u]nless other specific portions of the section apply, trafficking in cocaine is a fifth-degree felony, and there is no presumption for a prison term." Mr. Garr has not argued that he could not be validly convicted of a fifth-degree felony drug trafficking charge. "Undoubtedly, a person can be convicted for offering to sell a controlled substance in violation of R.C. 2925.03(A)(1) without actually transferring a controlled substance to the buyer." *Chandler* at ¶9 (citing *State v. Patterson* (1982), 69 Ohio St.2d 445, 23 O.O.3d 394, 432 N.E.2d 808; see, also, *State v. Scott*, 5th Dist. No. WD-05-095, 2007-Ohio-564, 2007 Ohio App. LEXIS 524. But in *Chandler*, this Court properly acknowledged the General Assembly's intent in creating a hierarchy of drug trafficking penalties 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." Id. at ¶18. Accordingly, sufficient evidence of a detectable amount of the controlled substance at issue must be presented if enhanced penalties are to be levied upon the accused.

Moreover, the application of the holding in *Chandler* to the facts of Mr. Garr's case makes sense. Magistrate Judge Black recognized that there should be "serious concerns" regarding the circumstantial evidence which was relied upon by the court of appeals in upholding Mr. Garr's enhanced sentence. (Mar. 2, 2009, Report and Recommendation, at 21-22, attached). For circumstantial evidence to meet the standard of due process under the Fourteenth Amendment, it must have been adequate for a rational trier of fact to have made a "permissible inference" of guilt, as opposed to a "reasonable speculation" of guilt. See

Newman v. Metrish, 543 F.3d 793, 796-97 (6th Cir. 2008) (quoting *Johnson v. Coyle*, 200 F.3d 987, 992 (6th Cir. 2000)).

Under *Chandler*, a substance offered for sale must contain "some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g)." *Chandler* at ¶21. By applying *Chandler* to the facts of Mr. Garr's case, this Court would adhere to the mandate that circumstantial evidence must present a "permissible inference" of guilt, as opposed to "mere speculation." Mr. Garr's few assertions regarding the identity and amount of the controlled substance could aptly be construed as efforts to defraud the potential buyer, or to express to the buyer that a controlled substance could be obtained, when it ultimately could not be obtained. See, generally, *State v. Mitchell*, 7th Dist. No. 08 JE 5, 2008-Ohio-6920, 2008 Ohio App. LEXIS 5869; *State v. Elliott*, 8th Dist. No. 86461, 2006-Ohio-1092, 2006 Ohio App. LEXIS 1006.

Moreover, as noted by Magistrate Judge Black:

> Certainly, as the Ohio Court of Appeals found, there were conversations between the parties about the quality and amount of cocaine involved in the offer to sell made by petitioner to the informant. However, the informant testified that he "never saw [petitioner] with cocaine," and that although he believed petitioner was bringing the cocaine to sell to the informant at their final meeting, he did not see any "dope or cocaine" in petitioner's black car where the parties met for "roughly" 30 minutes in an attempt to work out logistical problems with the sale. The investigator, who was present conducting surveillance at the scene, also testified that he did not believe the cocaine was in the black car, but rather was brought in another car parked at a nearby gas station. Tellingly, he stated: "That's what my belief is. It's nothing more than a belief."

(Mar. 2, 2009, Report and Recommendation, at 22 n.10, attached) (citations omitted).

Magistrate Judge Black's concerns are well founded. True, the evidence adduced at Mr. Garr's trial was sufficient to secure his conviction for a fifth-degree felony drug trafficking offense. However, applying a ten-year mandatory sentence for Mr. Garr's offer-to-sell

conviction, absent sufficient evidence of a detectable amount of cocaine, cannot be justified in light of *Chandler*.

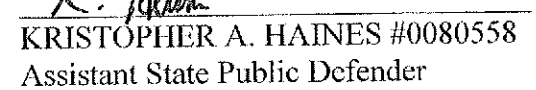
Moreover, applying *Chandler* to Mr. Garr's case will promote sound public policy. The majority in *Chandler* recognized that the statute's plain language expressed the General Assembly's policy that the State must prove that a detectable amount of a controlled substance is present before a court may impose the MDO penalty enhancement. *Chandler* at ¶18. This legislative policy decision must prevail over any speculative concern that creative drug dealers will create distance between themselves and their drugs. Indeed, while the legislature has an entirely appropriate interest in punishing those who engage in the sale of illegal substances, it also has a legitimate interest in setting the standards that the State must satisfy before a substantially enhanced sentence may be imposed on those who qualify as MDOs. Under the General Assembly's scheme, a person who merely offers to sell a controlled substance is guilty of trafficking in drugs, R.C. 2925.03(A)(1), and is subject to being convicted for fifth-degree felony drug trafficking. *Chandler* at ¶9 (citing *State v. Patterson* (1982), 69 Ohio St.2d 445, 23 O.O.3d 394, 432 N.E.2d 808). The *Chandler* decision reflected this Court's appreciation of the General Assembly's intention that in order for an individual to be subjected to enhanced penalties, a detectable amount of the controlled substance must have been present in the substance which was offered for sale. The application of *Chandler* to the facts of Mr. Garr's case further acknowledges that in order for enhanced drug trafficking penalties to apply, sufficient evidence, in the form of a detectable amount of a controlled substance, must be proven by the State beyond a reasonable doubt.

CONCLUSION

For the reasons discussed herein, this Court should answer the certified question in the affirmative.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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OLIVER LUCIEN GARR

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF PETITIONER OLIVER LUCIEN GARR has been sent via regular U.S. Mail to Benjamin C. Mizer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, on this 30th day of November, 2009.

KRISTOPHER A. HAINES #0080558
Assistant State Public Defender

COUNSEL FOR PETITIONER
OLIVER LUCIEN GARR

#310612

IN THE SUPREME COURT OF OHIO

OLIVER LUCIEN GARR,	:	Case No. 2009-1323
Petitioner,	:	On Order from the United States District Court, Southern District of Ohio, Western Division, Certifying Question of State Law, No. 1:08cv293
v.	:	
WARDEN, MADISON CORRECTIONAL INSTITUTION,	:	
	:	
Respondent.	:	

APPENDIX TO

MERIT BRIEF OF PETITIONER OLIVER LUCIEN GARR

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

OLIVER LUCIEN GARR,	:	
Petitioner,	:	Case Number: 1:08cv293
vs.	:	Chief Judge Susan J. Dlott
WARDEN, MADISON CORRECTIONAL INSTITUTION,	:	ORDER ON REPORT AND RECOMMENDATION
Respondent.	:	

This matter is before the Court pursuant to the Order of General Reference in the United States District Court for the Southern District of Ohio Western Division to United States Magistrate Judge Timothy S. Black. Pursuant to such reference, the Magistrate Judge reviewed the pleadings and filed with this Court on March 2, 2009 a Report and Recommendation (doc. 14). Subsequently, Respondent filed objections to such Report and Recommendation (doc. 22).

The Court has reviewed the comprehensive findings of the Magistrate Judge and considered de novo all of the filings in this matter. Upon consideration of the foregoing, the Court determines that Respondent's objections are well-taken and that the Magistrate Judge's Recommendations should be modified in part and adopted as modified.

Respondent did not object to the Magistrate Judge's recommendation that a certified question be presented to the Supreme Court of Ohio but suggested that the question be reframed. The Court agrees, and it will certify a question to the state high court in one of the forms suggested by Respondent. Respondent objects to the Magistrate Judge's recommendation that it be designated as the moving party with respect to the certified question, stating that Petitioner

Garr should be designated as the moving party for three reasons: (1) Garr is trying to get his conviction for a felony of the first degree vacated and reduced to a felony of the fifth degree and is thus in a similar posture to a criminal defendant who comes before the Supreme Court of Ohio appealing his conviction; (2) a habeas petitioner bears the burden of proof, and (3) it is practical to designate the respondent in this action as also the respondent before the Supreme Court of Ohio. This objection is well taken.

Accordingly, the Court **SUSTAINS** Respondent's Objections to the Report and Recommendation (doc. 22) and **ADOPTS** the Magistrate Judge's Report and Recommendation (doc. 14) as modified according to this Order. Consistent with the Magistrate Judge's Recommendation, Respondent's motion to dismiss (doc. 6) is **DENIED.** It is further **ORDERED** that this case is **STAYED** pending the Supreme Court of Ohio's consideration of the following state law question, which will be **CERTIFIED** to the state supreme court to answer in accordance with Rule XVIII of the Rules of Practice of the Supreme Court of Ohio:

> Whether the Supreme Court of Ohio's decision in *State v. Chandler,* 109 Ohio St. 3d 223, 2006 Ohio 2285 (2006), as described in the syllabus of the court, to wit: "[a] substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. § 2925.03(C)(4)(g)," extends to cases where the substance offered for sale was never observed, tested, or recovered to ascertain whether it contained a detectable amount of the controlled substance, but no affirmative evidence was presented to call into question the defendant's representation in his offer to sell, or to refute the jury's factual finding, that the substance was in fact a controlled substance in an amount that equaled or exceeded 1000 grams.

The Court will designate the Petitioner in this case as the moving party in the matter certified to the Supreme Court of Ohio.

IT IS SO ORDERED.

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

OLIVER LUCIEN GARR,	:	
	:	
Petitioner,	:	
	:	Case Number: 1:08cv293
vs.	:	
	:	Chief Judge Susan J. Dlott
WARDEN, MADISON CORRECTIONAL INSTITUTION,	:	CERTIFICATION ORDER
	:	
Respondent.	:	

Pursuant to the Rules of Practice of the Supreme Court of Ohio Rule XVIII, the Court hereby issues this Certification Order to be served upon all parties or their counsel of record and filed with the Supreme Court of Ohio.

A. CASE NAME

Oliver Lucien Garr v. Warden, Madison Correctional Institution, U.S. District Court, Southern District of Ohio, Case No. 1:08cv293.

B. STATEMENT OF THE CASE

1. FACTS

Habeas Petitioner Oliver L. Garr alleges that the evidence introduced at his state court trial was insufficient to establish beyond a reasonable doubt that (1) he committed a first-degree-felony instead of a fifth-degree-felony cocaine-trafficking offense under Ohio Revised Code ("O.R.C.") §§ 2925.03(A)(1) and 2925.03(C)(4)(g) and that (2) a mandatory ten-year sentence was required in this case under the major drug offense ("MDO") penalty provision set forth in O.R.C. § 2925.03(C)(4)(g).

On April 7, 2006, the Hamilton County, Ohio grand jury returned an indictment charging

Petitioner with one count of trafficking in cocaine "in an amount that equaled or exceeded 1000 grams," in violation of O.R.C. § 2925.03(A)(1), and one count of engaging in a pattern of corrupt activity in violation of O.R.C. § 2923.32(A)(1). (Doc. 6, Ex. 1.) An MDO specification was attached to the trafficking count. Petitioner's trial counsel filed a pretrial motion to dismiss the MDO specification on the ground that there was no evidence of any "detectable amount of a controlled substance." (*Id.*, Ex. 2.) The motion was overruled and the matter proceeded to trial. After a jury trial, Petitioner was found guilty on the trafficking charge and the attached MDO specification and was sentenced to a ten year mandatory prison term. (*Id.*, Ex. 5.)

Petitioner timely appealed to the Ohio Court of Appeals, raising two assignments of error.

> 1. The trial court erred in denying defendant's motions to dismiss the MDO specifications and for a verdict of acquittal on those specifications [because the MDO specification was not supported by sufficient evidence].
>
> 2. The trial court erred to defendant's prejudice in sentencing him to a mandatory term of ten years [because the evidence was insufficient to support an MDO conviction or sentence for a first-degree-felony cocaine trafficking offense].

(*Id.*, Ex. 6.) The Court of Appeals overruled the assignments of error and affirmed the trial court's judgment.

In its decision, the state appellate court made the following factual findings: that during a sting operation, Petitioner told a police informant that he would sell him two kilograms of cocaine; that Petitioner and the informant met in a parking lot with the understanding that Petitioner was to deliver the cocaine to the informant; that due to a disagreement over payment the sale was not completed; that Petitioner never produced any cocaine; that Petitioner was not

arrested until several months later; and that the state never recovered any substance offered for sale in connection with these events. (*Id.*, Ex. 8 at 2.)

Petitioner's counsel appealed to the Supreme Court of Ohio, which denied Petitioner leave to appeal and summarily dismissed the appeal as "not involving any substantial constitutional question." (*Id.*, Ex. 11.) Petitioner also filed various *pro se* pleadings challenging his conviction and sentence, all of which were denied.

2. CIRCUMSTANCES GIVING RISE TO THE QUESTION OF LAW

Petitioner asserts two grounds for relief in his petition for habeas corpus:

> **Ground One:** The State of Ohio failed to present sufficient evidence to the jury to prove that Mr. Garr was a Major Drug Offender under Ohio law because no evidence was presented as to the weight or identity of the drug involved in the Trafficking Offense to which the Major Drug Offender Attached.
>
> **Ground Two:** Under Ohio law, an Offer to Sale is a felony of the Fifth-Degree only punishable by 6-12 months, if the State of Ohio cannot prove beyond a reasonable doubt that the substance actually contained/involved a mixture of identifiable amount of cocaine exceeding the weight limits provided under Ohio . . . law for a more serious offense.

(Doc. 1 at 6, 8.)

The constitutional question to be resolved by the federal habeas court is whether the evidence presented at Petitioner's trial was sufficient to establish beyond a reasonable doubt the elements of the offense and penalty as defined by state law. At the sentencing hearing, Petitioner's trial counsel argued that under the Supreme Court of Ohio's recent decision in *State v. Chandler*, 109 Ohio St. 3d 223, 2006 Ohio 2285, 846 N.E.2d 1234 (2006), Petitioner could not be found guilty of the MDO specification because "there were no detectible amounts of a controlled substance here." (Doc. 13, Tr. 904.) The trial court proceeded to impose a

"mandatory minimum 10-year prison sentence," apparently because Petitioner was convicted of a first-degree felony offense involving an "offer to sell kilos of cocaine." (*Id.*, Tr. 906-07, 915.) However, the trial court refused to impose an additional prison term on the MDO specification given its interpretation of *Chandler* as specifically prohibiting an added MDO term based on the facts presented to the jury. (*Id.*, Tr. 915-16.)

In *Chandler*, the Supreme Court of Ohio considered "whether a person can be subject to the special penalty statute applicable to a major drug offender for a first-degree felony drug conviction when the substance offered as crack cocaine contains no detectable amount of the drug." 109 Ohio St. 3d at 224, 846 N.E.2d at 1235. The defendant in *Chandler* had been charged under O.R.C. § 2925.03(C)(4)(g), which provides that when 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, "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. . . ." In that case, the jury found that the amount of the drug equaled or exceeded 100 grams of crack cocaine. However, this finding was contrary to fact because the substance involved was 130.87 grams of baking soda. *Id.* at 227, 846 N.E.2d at 1238.

On appeal, the Supreme Court of Ohio upheld Chandler's trafficking conviction because "a person can be convicted for offering to sell a controlled substance in violation of R.C. 2925.03(A)(1) without actually transferring a controlled substance to the buyer." *Id.* at 226, 846 N.E.2d at 1236-37. However, the court found that O.R.C. § 2925.03(C)(4), the penalty provision relating to cocaine trafficking, did not apply when the substance offered as crack cocaine did not

actually contain *any* detectable amount of the drug. According to the court, O.R.C. § 2925.03(C)(4) "presumes that a detectable amount of cocaine is present within the substance before the penalty enhancement applies." *Id.* at 228, 846 N.E.2d at 1238-39. Because the substance the defendant offered for sale was baking soda, and thus did not contain a detectable amount of cocaine, the *Chandler* court held that the defendant could not be sentenced as a major drug offender under O.R.C. § 2925.03(C)(4)(g). *Id.*

Petitioner in this case relied on *Chandler* in his state direct appeal proceedings, contending that because the substance offered for sale to the informant was never recovered, the evidence was insufficient to establish that a detectable amount of cocaine was present within that substance for the purposes of establishing beyond a reasonable doubt Petitioner's guilt of a first-degree felony (as opposed to a fifth-degree felony) and automatic classification as a major drug offender under O.R.C. § 2925.03(C)(4)(g). (Doc. 6, Exs. 6, 9.) The First District Court of Appeals apparently conceded that the standards enunciated in *Chandler* governed the disposition of the sufficiency-of-evidence issue, acknowledging that the substance offered for sale was never recovered and thus could not be tested to determine if it contained a detectable amount of cocaine. *State v. Garr*, Appeal No. C-060794, at ¶ 4 (Ohio Ct. App. 1 Dist. July 6, 2007) (Doc. 6, Ex. 8). However, the appellate court distinguished *Chandler* based on circumstantial evidence presented at trial, concluding that statements made during conversations between Petitioner and the informant about the quality and amount of cocaine to be sold was sufficient to support the reasonable inference that the substance offered actually was cocaine. *Id.* ¶¶ 6-7.

Another Ohio appellate court came to the opposite conclusion in its interpretation of *Chandler*. In *State v. Mitchell*, No. 08 JE 5, 2008 WL 5412414, at *5 (Ohio Ct. App. 7 Dist. Dec. 16, 2008), the court upheld a trafficking conviction but found that there was insufficient evidence to support the defendant's enhanced penalty for offering to sell OxyContin in an amount that exceeded the bulk amount when there was no OxyContin recovered. According to the *Mitchell* court, *Chandler* stands for the proposition that the penalty enhancement provisions of the drug trafficking statute cannot be used where there is no detectable trace of the alleged substance. In reversing the defendant's conviction under the penalty enhancement, the Seventh District Court of Appeals refused to distinguish *Chandler* as the First District Court of Appeals had done in this case, finding "that there is no valid reason for us to distinguish appellant's offer to sell OxyContin resulting in no sale and Chandler's offer to sell crack cocaine resulting in the sale of baking soda." *Id.* at *5. Thus, there is a conflict among Ohio's appellate courts as to the proper interpretation of *Chandler* and whether a defendant is subject to the increased penalties of the drug trafficking statute based on the amount of the drugs offered for sale when no drugs are recovered and/or tested.

The standard of review established by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), governs the resolution of the constitutional sufficiency-of-evidence claims raised in the instant petition for writ of habeas corpus. Under this standard, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original). Federal habeas courts generally are bound by the state court's interpretation of state law that was "announced on direct appeal of the

challenged conviction." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (citations omitted). However, the highest court of the state is the final arbiter of the state-law issue. *West v. American Telephone & Telegraph Co.* 311 U.S. 223, 236 (1940). As Magistrate Judge Black observed in this case,

> [t]he parties have not cited, nor could the undersigned find, any state supreme court case addressing the specific issues that have arisen in applying *Chandler* to the unique factual circumstances of this case – *i.e.*, whether *Chandler* is limited to cases where evidence has been presented demonstrating that the substance offered for sale was counterfeit, unavailable for sale, or otherwise lacking a detectable amount of cocaine as represented by the defendant; or whether *Chandler* can otherwise be reasonably distinguished from the instant case, where it is undisputed that the substance was never observed or recovered and petitioner's guilt under the enhanced penalty provision can be inferred only from statements made by defendant in setting up the sales transaction with the informant regarding the quality and amount of cocaine involved in the proposed sale.

(Doc. 14 at 18.)

The Magistrate Judge further explained:

> The issues posed in the instant case are troubling. It appears from the record that both the trial court and the Ohio Court of Appeals were persuaded that *Chandler* applied to petitioner's case. Specifically, it appears that the trial court determined that because no cocaine was ever observed or recovered, *Chandler* applied to preclude any enhancement of petitioner's sentence on the MDO specification. However, the court apparently did not recognize the extent of the *Chandler* holding as prohibiting not only an "add-on" sentence based on petitioner's classification as a major drug offender, but also petitioner's conviction and sentence to a mandatory minimum ten-year term for a first-degree-felony cocaine-trafficking offense under Ohio Rev. Code § 2925.03(C)(4)(g).
>
> In contrast, apparently realizing that petitioner's conviction and mandatory ten-year sentence were also subject to reversal under the trial court's interpretation of *Chandler*, the Ohio Court of

> Appeals determined that the facts of this case were sufficiently distinguishable from *Chandler* to constitute circumstantial evidence sufficient to support the reasonable inference that the substance offered for sale to the informant actually was cocaine.

(*Id.* at 21.)

Furthermore, "[i]f the Ohio Court of Appeals had directly addressed and answered the unresolved state-law question posed herein in the State's favor, by holding as a matter of law that *Chandler* is distinguishable from and thus inapplicable to the case-at-hand, this Court would have been bound by the state court's determination upholding the petitioner's conviction and sentence on that state-law ground." (*Id.* at 23.)

To summarize, there remains an unresolved state-law question in this case which may moot the Court's consideration of the extremely close, fact-based sufficiency-of-evidence claim open to review under *Jackson* based on *Chandler*. Accordingly, this Court certifies the following question of law to be answered by the Supreme Court of Ohio.

3. THE QUESTION OF LAW TO BE ANSWERED

The question of law to be answered by the Supreme Court of Ohio is as follows:

> Whether the Supreme Court of Ohio's decision in *State v. Chandler,* 109 Ohio St. 3d 223, 2006 Ohio 2285 (2006), as described in the syllabus of the court, to wit: "[a] substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under Ohio Revised Code § 2925.03(C)(4)(g)," extends to cases where the substance offered for sale was never observed, tested, or recovered to ascertain whether it contained a detectable amount of the controlled substance, but no affirmative evidence was presented to call into question the defendant's representation in his offer to sell, or to refute the jury's factual finding, that the substance was in fact a controlled substance in an amount that equaled or exceeded 1000 grams.

C. NAMES OF THE PARTIES

Petitioner: Oliver Lucien Garr

Respondent: Warden, Madison Correctional Institution

D. COUNSEL FOR EACH PARTY

Petitioner's Counsel:
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E. DESIGNATION OF THE MOVING PARTY

Petitioner is the moving party.

RESPECTFULLY SUBMITTED,

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Oliver Lucien Garr,
Petitioner,

vs.

Case No. 1:08cv293
(Dlott, C.J.; Black, M.J.)

Warden, Madison Correctional Institution,
Respondent.

REPORT AND RECOMMENDATION

Petitioner, an inmate in state custody at the Madison Correctional Institution in London, Ohio, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on respondent's motion to dismiss and petitioner's "traverse" in response to the motion to dismiss, as supplemented. (Docs. 6, 9, 10).[1]

Factual And Procedural Background

On April 7, 2006, the Hamilton County, Ohio, grand jury returned an indictment charging petitioner with one count of trafficking in cocaine "in an amount that equaled or exceeded 1000 grams," in violation of Ohio Rev. Code § 2925.03(A) (1), and one count of engaging in a pattern of corrupt activity in violation of Ohio Rev. Code § 2923.32(A)(1). (Doc. 6, Ex. 1). A major drug offender ("MDO") specification was attached to the trafficking count. (*Id.*).

---

[1] By separate Order issued this date, the Court has granted respondent leave to supplement his "traverse" in opposition to the motion to dismiss "with relevant case authorities." (*See* Doc. 10). In addition, at the request of a clerk of the Court, respondent has filed a copy of the trial transcript for the Court's consideration in deciding whether or not to grant the motion to dismiss. (*See* Doc. 13).

Petitioner's trial counsel filed a pretrial motion to dismiss the MDO specification attached to the trafficking count on the ground that there was no evidence of any "detectable amount of a controlled substance." (*See id.,* Ex. 2). The motion was overruled on July 19, 2006, and the matter proceeded to trial. (*Id.,* Ex. 3).

After a jury trial, petitioner was found guilty on the trafficking charge and attached MDO specification, but was acquitted of engaging in a pattern of corrupt activity.[2] (*See id.,* Ex. 4). On September 13, 2006, petitioner was sentenced to a ten year mandatory prison term. (*Id.,* Ex. 5).

With the assistance of counsel who represented petitioner at sentencing,[3] petitioner timely appealed to the Ohio Court of Appeals, First Appellate District, raising two assignments of error:

> 1. The trial court erred in denying defendant's motions to dismiss the MDO specifications and for a verdict of acquittal on those specifications [because the MDO specification was not supported by sufficient evidence].
>
> 2. The trial court erred to defendant's prejudice in sentencing him to a mandatory term of ten years [because the evidence was insufficient to support an MDO conviction or sentence for a first-degree-felony cocaine trafficking offense].

(*See id.*, Ex. 6).

On July 6, 2007, the Court of Appeals overruled the assignments of error and affirmed the trial court's judgment. (*Id.,* Ex. 8). In its decision, the state appellate court made the following factual findings, which are presumed correct

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[2] It appears from the trial transcript that petitioner was also tried in the joint trial on cocaine possession, trafficking and conspiracy charges contained in a separate indictment returned in 2005. (*See* Doc. 13). Petitioner was acquitted of those charges. (*Id.,* Tr. 891-92).

[3] As petitioner has indicated in the petition, he was represented by different counsel at trial; Elizabeth Agar, who represented petitioner in the direct review proceedings, first appeared as petitioner's counsel at sentencing. (*See* Doc. 1, p. 14, ¶16).

under 28 U.S.C. § 2254(e)(1),[4] regarding the incident resulting in petitioner's conviction and sentence:

> The facts of this case are largely undisputed. During a sting operation, Garr told police informant Robert Carr that he would sell him two kilograms of cocaine for $42,000. At trial, the state played a series of recorded conversations between Garr and Carr detailing the terms of this transaction, which included two discussions about the quality of the cocaine. Carr and Garr eventually met in a restaurant parking lot with the understanding that Garr was to deliver the cocaine to Carr, and that Carr would pay him for it later. But due to a disagreement over payment, the sale was not completed, and Garr never produced any cocaine. Police monitoring the scene allowed Garr to leave without incident. Garr was not arrested until several months later, and the state never recovered any substance offered for sale in connection with these events.

(*Id.*, p. 2).

Petitioner's counsel timely appealed to the Supreme Court of Ohio. (*See id.*, Ex. 9). On October 31, 2007, the state supreme court denied petitioner leave to appeal and summarily dismissed the appeal "as not involving any substantial constitutional question." (*Id.*, Ex. 11).[5]

In the meantime, while his appeal was pending before the state supreme court from the Ohio Court of Appeals' direct appeal decision, petitioner filed various *pro se* pleadings challenging his conviction and sentence.

---

[4] Specifically, 28 U.S.C. § 2254(e)(1) provides that "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct" unless petitioner rebuts the presumption by "clear and convincing evidence." Petitioner has neither cited nor presented any evidence to rebut the Ohio Court of Appeals' factual findings quoted herein. Therefore, he has not shown that such findings are erroneous.

[5] It is noted that on October 9 and 11, 2007, while the appeal filed by counsel was still pending before the state supreme court, petitioner filed *pro se* motions to certify conflict with the Ohio Court of Appeals, First Appellate District. (*See* Doc. 6, Exs. 20-21). Specifically, petitioner argued that the Court of Appeals' direct appeal decision was "in conflict with . . . Fifth and Eighth Appellate District decisions." (*Id.*). On October 31, 2007, the Court of Appeals summarily denied these motions, which it found were "not well taken." (*Id.*, Ex. 26).

First, on August 6, 2007, petitioner filed a *pro se* application pursuant to Ohio R. App. P. 26(B) for reopening of the appeal with the Ohio Court of Appeals, First Appellate District. (*Id.,* Ex. 12). Petitioner alleged in the application that his appellate counsel was ineffective "for neglecting to raise an abuse of discretion claim within the original appellate brief." (*Id.*). On November 9, 2007, the Ohio Court of Appeals denied petitioner's application to reopen the appeal. (*Id.,* Ex. 15). Respondent states that petitioner did not pursue an appeal from this decision to the Supreme Court of Ohio. (*Id.,* Brief, p. 5).

Second, on September 7, 2007, petitioner filed a *pro se* petition for post-conviction relief with the Hamilton County Common Pleas Court. (*Id.,* Ex. 16). In the petition, petitioner alleged new claims that had not been raised on direct appeal of (1) prosecutorial misconduct; (2) ineffective assistance by trial counsel; (3) trial court error in failing to give a lesser-included-offense jury instruction; and (4) the denial of a fair trial under the "cumulative effect doctrine." (*Id.*). On September 28, 2007, the Common Pleas Court denied the petition as "untimely and not well taken." (*Id.,* Ex. 18).

Finally, on October 23, 2007, petitioner filed a *pro se* motion "to vacate voidable sentence[,] Civil Rule 60(B)" with the Hamilton County Common Pleas Court. (*Id.,* Ex. 22). Petitioner essentially alleged in this motion that his sentence was improperly enhanced "based upon factors determined by the judge" rather than the jury, in violation of his Sixth Amendment rights as recognized by the Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Blakely v. Washington,* 542 U.S. 296 (2004), and *United States v. Booker,* 543 U.S. 220 (2005). (*Id.*).

On November 1, 2007, the Common Pleas Court denied petitioner's motion to vacate sentence, reasoning in relevant part as follows:

> Attached to this entry is a copy of the jury's guilty verdict. The jury did make a specific finding of fact [that] the defendant offered to sell cocaine in an amount that DID (emphasis supplied) equal or exceed 1000 grams.
>
> Defendant's attention is further directed to R.C. 2925.03(C)(4)(g) which states in pertinent part as follows:
>
>> "If the amount of the drug involved equals or exceeds one thousand grams of cocaine . . ., 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. . ."
>
> It is hornbook law [that] ten years is the maximum period of confinement in the Department of Corrections for a felony of the first degree.
>
> Additionally, this ten year mandatory sentence the tr[ia]l court imposed was specifically addressed by the Court of Appeals and that appellate court affirmed the sentence of the trial court.

(*Id.*, Ex. 27).

Petitioner filed the instant federal habeas corpus petition in April 2008. (*See* Doc. 1). He asserts two grounds for relief, which essentially are the same claims that he raised in the state direct review proceedings:

> **Ground One:** The State of Ohio failed to present sufficient evidence to the jury to prove that Mr. Garr was a Major Drug Offender under Ohio law because no evidence was presented as to the weight or identity of the drug involved in the Trafficking Offense to which the Major Drug Offender attached.
>
> **Ground Two:** Under Ohio law, an Offer to Sale is a felony of the Fifth-Degree only punishable by 6-12 months, if the State of Ohio cannot prove beyond a reasonable doubt that the substance actually contained/involved a mixture of identifiable amount of cocaine exceeding the weight limits provided under Ohio . . . law for a more serious offense.

(*Id.*, pp. 6, 8).

In response to the petition, respondent has filed a motion to dismiss. (Doc. 6). Respondent contends that petitioner's claims for habeas relief "are not cognizable because both grounds related to a state law question interpreting a state statute." (*Id.*, p. 8).

Petitioner opposes the motion to dismiss. (Doc. 9). He argues that he has raised claims of a "direct violation of federal due process" because "the State of Ohio failed to prove all essential charging elements," specifically, the element necessary to establish the enhanced penalty for an "offer to sell more than and/or equal to 1000 grams of cocaine . . . as a felony of the first-degree." (*Id.*, p. 2). In support of this argument, petitioner has separately submitted a decision by the Ohio Court of Appeals, Eighth Appellate District, which he contends casts doubt on the decision rendered in this case by the Ohio Court of Appeals, First Appellate District. (Doc. 10, Appendix A).

OPINION

Respondent's Motion To Dismiss Should Be Denied; And The Critical Unresolved State-Law Question – Whether *State v. Chandler,* 846 N.E.2d 1234 (Ohio 2006), Applies To This Case – Should Be Certified To The Supreme Court Of Ohio

In the two grounds for relief alleged in the petition, petitioner essentially contends the evidence introduced at his trial was insufficient to establish beyond a reasonable doubt that (1) he committed a first-degree-felony instead of a fifth-degree-felony cocaine-trafficking offense under Ohio Rev. Code §§ 2925.03(A)(1) and 2925.03(C)(4)(g); and (2) a mandatory ten-year sentence was required in this case under the MDO-penalty provision set forth in Ohio Rev. Code § 2925.03(C)(4)(g) based on the jury's determination that petitioner was guilty of a first-degree-felony by offering to sell cocaine in an amount equal to or exceeding 1000 grams. (Doc. 1, pp. 6, 8; *see also* Doc. 6, Ex. 4).

As an initial matter, contrary to respondent's contention in the motion to dismiss, petitioner has asserted cognizable constitutional claims. Specifically, petitioner has alleged that his rights under the Fourteenth Amendment's Due Process Clause were violated because the State failed to meet its burden of proving beyond a reasonable doubt every fact necessary to convict and sentence him for a first-degree-felony cocaine-trafficking offense under Ohio Rev. Code § 2925.03(C)(4)(g), based on the identity and amount of the substance involved in the crime. *See In Re Winship,* 397 U.S. 358, 363-64 (1970); *see also State v. Chandler,* 846 N.E.2d 1234, 1236-37 (Ohio 2006).

As respondent points out (Doc. 6, Brief, pp. 13-14), the federal habeas court

must accept the Ohio courts' interpretation of the state statutory provisions under which petitioner was convicted and sentenced. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal court to reexamine state-court determinations on state-law questions"). However, the ultimate question whether the evidence presented was sufficient to establish beyond a reasonable doubt the elements of the offense and penalty as defined by state-law are of constitutional dimension and thus within the federal habeas court's authority to address. *See Sanford v. Yukins,* 288 F.3d 855, 860 (6th Cir.), *cert. denied,* 537 U.S. 980 (2002).

The standard of review established by the Supreme Court in *Jackson v. Virginia,* 443 U.S. 307 (1979), governs the resolution of the constitutional sufficiency-of-evidence claims raised in the instant petition for writ of habeas corpus.

Under this standard, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319 (emphasis in original). The inquiry does not involve consideration of the propriety of the jury instructions; indeed, the Supreme Court has noted that the matter is "wholly unrelated to the question of how rationally the verdict was actually reached," and thus does "not require scrutiny of the reasoning process actually used by the factfinder–if known." *See id.* at 318 & 319 n.13.[6]

In assessing whether the evidence of guilt satisfies due process under the *Jackson* standard, the State is not required to rule out every hypothesis except that

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[6] *Cf. United States v. Castano,* 543 F.3d 826, 835-36 (6th Cir. 2008) (in case involving errors in the verdict form and jury instructions, the Sixth Circuit cited *United States v. Lowe,* 172 Fed.Appx. 91, 94 (6th Cir. 2006) (not published in Federal Reporter), in support of its holding that although the evidence may "well have been sufficient to convict . . ., the errors and confusion that pervaded [the] trial 'deprived the jury of the opportunity to come to that verdict'"); *see also United States v. Korey,* 472 F.3d 89, 94-96 (3rd Cir. 2007) (recognizing that "there is an important difference between considerations of the sufficiency of evidence and propriety of jury instructions," the circuit court held that due process was denied when erroneous jury instructions were given which relieved the government of proving "beyond a reasonable doubt that there was a shared goal–a vital aspect of conspiracy" despite "ample evidence" that the defendant shared a common goal to advance the cocaine-trafficking scheme). Here, petitioner has never alleged a denial of due process due to error in the jury instructions; it appears that at this late juncture, any such claim would be dismissed as waived.

of guilt beyond a reasonable doubt. *Id.* at 326. Rather, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.*; *see also Walker v. Engle,* 703 F.2d 959, 969-70 (6th Cir.), *cert. denied,* 464 U.S. 951, 962 (1983). Consequently, the reviewing court is not permitted to make its own subjective determination of guilt or innocence or otherwise substitute its opinion for that of the trier of fact which convicted the petitioner. *Jackson* 443 U.S. at 318-19 & n.13; *see also York v. Tate,* 858 F.2d 322, 329 (6th Cir. 1988) (*per curiam*), *cert. denied,* 490 U.S. 1049 (1989).

Moreover, the *Jackson* standard "must be applied with explicit reference to the substantive elements of the criminal offense *as defined by state law.*" *Jackson,* 443 U.S. at 324 n.16 (emphasis added); *see also Sanford,* 288 F.3d at 860. In *Sanford,* the Sixth Circuit discussed the difficulty inherent in distinguishing "pure sufficiency claims from state law claims disguised as *Jackson* claims:"

> *Jackson* establishes that states must act on the basis of sufficient evidence. The principle seems unproblematic.... Implementing *Jackson* is not so easy as stating its principle, however. Judgments represent the application of law to fact. Evidence can be "insufficient" only in relation to a rule of law requiring more or different evidence. When a state court enters or affirms a conviction, it is saying that the evidence satisfies the legal norms. These norms are for the state to select. State law means what the state courts say it means. A claim that the state court misunderstood the substantive requirements of state law does not present a claim under § 2254.... The difference between unreviewable legal interpretations and factual claims open under *Jackson* establishes a formidable problem of implementation.

Sanford, 288 F.3d at 860 (quoting *Bates v. McCaughtry,* 934 F.2d 99, 102 (7th Cir.), *cert. denied,* 502 U.S. 915 (1991)).

The Sixth Circuit proceeded to lay out different scenarios discussed in *Bates* wherein a defendant may assert the evidence is insufficient to support his conviction. *Id.* at 860-61. Two of these scenarios involve the state courts' legal interpretations of state law, which are not subject to review by way of a back-door sufficiency-of-evidence challenge under *Jackson*:

> (1) Defendant believes that the combination of elements X, Y, and Z is an offense. The court disagrees, holding that the state need prove only X and Y. After a trial at which the prosecution introduces no evidence of Z, the court convicts the defendant.
>
> (2) State law defines the combination of elements X, Y, and Z as criminal. Defendant believes that element Z can be satisfied only if the state establishes fact Z', but the state court disagrees. After a trial at which the prosecution introduces some evidence of Z but does not establish Z', the court convicts the defendant.

Id.

On the other hand, the following scenario presents a fact-based claim that is open to review under *Jackson*:

> State law defines the combination of elements X, Y, and Z as criminal.... The prosecutor and the state courts concede that X, Y, and Z are elements of the crime and agree with the defendant on their meaning. Defendant contends that there is no basis on which the trier of fact could find Z. The state court disagrees and convicts.

Id.

In this case, petitioner was convicted as charged in the indictment of offering to sell cocaine "in an amount that equaled or exceeded 1000 grams" in violation of Ohio Rev. Code § 2925.03(A)(1). (*See* Doc. 6, Exs. 1, 4, 5; Doc. 13, Tr. 892). In addition, the jury explicitly found that petitioner offered to sell cocaine in an amount that "did equal or exceed 1000 grams."[7] (Doc. 6, Ex. 4; Doc. 13, Tr. 892).

At the sentencing hearing, petitioner's trial counsel argued that under the Supreme Court of Ohio's decision in *State v. Chandler,* 846 N.E.2d 1234 (Ohio

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[7] It appears from the record that the trial court did not instruct the jury about any requirements or factors to be considered in making this finding. (*See* Doc. 13, Tr. 825-63). The jury was instructed only as follows in considering the element of an "offer to sell" for purposes of establishing petitioner's guilt for trafficking under Ohio Rev. Code § 2925.03(A)(1): "The State need not prove that the controlled substance was actually transferred or that a controlled substance actually exists to be transferred. The offer to sell is sufficient." (*Id.*, Tr. 846).

2006), petitioner could not be found guilty of the MDO specification because "there were no detectible amounts of a controlled substance here." (Doc. 13, Tr. 904). Counsel further contended in pertinent part:

> And failing [the MDO specification], we are left with a felony of the first degree, which is what the jury found him guilty of.... I am satisfied under *Chandler* that the Court couldn't impose any more than 10 years.... The Supreme Court has spoken very clearly on that issue.
>
> And I would ask your Honor to consider something less than the 10 years and something along the lines of a minimum sentence for a felony of the first degree, in view of the fact that there are no controlled substances at all involved here and his lack of prior adult criminal history and his stability in the community.

(*Id.*, Tr. 904-05).

At that point, the trial judge asked defense counsel whether petitioner was nevertheless subject to a "mandatory 10 years" in prison based on the jury's finding that petitioner had "offered to sell more than a kilo of cocaine;" counsel responded: "Well, under *Chandler* I am not sure," and "I don't want to concede that." (*Id.*, Tr. 905-06). Counsel continued:

> My position is since *Chandler* – if there is no MDO then it defaults to an F1, a straight F1 where the sentence range would be from 3 to 10.... [T]hat it is a mandatory ... sentence of 10 years. I don't want to concede that. I would like the Court of Appeals to take a look at that issue.

(*Id.*, Tr. 906).

The prosecutor counter-argued:

> [T]his is a 10-year mandatory. Offer to sell over 1000 grams is a 10-year mandatory.
>
> The State's position is that the *Chandler* case doesn't apply here and that the specs, the MDO specs, still apply. And the reasoning behind

> that is that the ... Supreme Court kept an offer to sell as a violation of its own.

(*Id.*, Tr. 911). The prosecutor conceded in response to questions posed by the trial judge that "the *Chandler* case leaves more questions than answers," but that "it is still a major F1, mandatory 10." (*Id.,* Tr. 912-13).

After hearing counsel's arguments, the trial court proceeded to impose a "mandatory minimum 10-year prison sentence," apparently because petitioner was convicted of a first-degree-felony offense involving an "offer to sell kilos of cocaine." (*See id.,* Tr. 906-07, 915). However, the court refused to impose an additional prison term on the MDO specification given its interpretation of *Chandler* as specifically prohibiting an added MDO term based on the facts presented to the jury. (*Id.,* Tr. 915-16).

In *Chandler,* 846 N.E.2d at 1235, the Supreme Court of Ohio considered the issue raised in consolidated appeals "whether an person can be subject to the special penalty statute applicable to a major drug offender for a first-degree felony [cocaine trafficking] conviction when the substance offered ... contains no detectable amount of the drug." In that case, the court upheld the defendants' trafficking convictions, because "a person can be convicted for offering to sell a controlled substance in violation of R.C. 2925.03(A)(1) without actually transferring a controlled substance to the buyer." *Id.* at 1236-37 (citing *State v. Patterson,* 432 N.E.2d 802, syllabus (Ohio 1982)). However, the court held that the crucial question remained whether "R.C. 2925.03(C)(4)(g), the specific section relating to major-drug-offender penalties, provides a penalty for offering to sell ... cocaine when the substance offered as ... cocaine does not actually contain *any* detectable amount of the drug." *Id.* at 1237.

The court addressed this question in pertinent part as follows:

> The penalty provision that relates to drug trafficking cases, RC. 2925.03(C)(4), states at the outset: "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 [setting forth the various penalties]." (Emphasis added.)

Unless other specific portions of the section apply, trafficking in cocaine is a fifth-degree felony, and there is no presumption for a prison term. R.C. 2925.03(C)(4)(a). The penalty is raised one degree "if the offense was committed in the vicinity of a school or in the vicinity of a juvenile." R.C. 2925.03(C)(4)(b), (c), (d), and (e). 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 fourth-degree felony, and there is a presumption of a prison term. R.C. 2925.03(C)(4)(c). If the amount is ten grams or more but less than 100 grams of powder cocaine (or five grams or more but less than ten grams of crack cocaine), the offense is a third-degree felony with a mandatory prison term. R.C. 2925.03(C)(4)(d). If the amount is 100 grams or more but less than 500 grams of powder cocaine (or ten grams or more but less than 25 grams of crack cocaine), the offense is a second-degree felony with a mandatory prison term. R.C. 2925.03(C)(4)(e).

If the amount is 500 grams or more but less than 1,000 grams of powder cocaine (or 25 grams or more but less than 100 grams of crack cocaine), the offense is a first-degree felony, and the court shall impose a mandatory prison term. R.C. 2925.03(C)(4)(f).

The penalty section at issue here, R.C. 2925.03(C)(4)(g), states: "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 as 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." Thus, this section provides a specific penalty enhancement.

The appellees were charged with violating R.C. 2925.03(A)(1), and the court of appeals properly held that the state was required to prove the identity of the substance as well as a detectable amount of that

> substance, not for conviction, but to impose the penalty enhancement of R.C. 2925.03(C)(4)(g). The jury's finding that the amount of the drug equaled or exceeded 100 grams of crack cocaine was contrary to fact, for the substance involved was 130.87 grams of baking soda.
>
> The major-drug-offender penalty that is referred to in R.C. 2925.03(C)(4)(g) is found in R.C. 2929.14(D)(3) and contains two parts. Subsection (a) states that if the offender violates R.C. 2925.03 and is classified as a major drug offender, "the court shall impose *** a ten-year prison term" that may not be reduced by judicial release. The second part, R.C. 2929.14(D)(3)(b), provides, "The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years" under certain conditions. In *State v. Foster*, ... 845 N.E.2d 470 [(2006)], we held that R.C. 2929.14(D)(3)(b) is unconstitutional ... because it required judicial factfinding before an additional ten years of prison could be imposed.... We severed R.C. 2929.14(D)(3)(b) to remedy the constitutional violation.... As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed....
>
> 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.

Chandler, 846 N.E.2d at 1237-38.

Pursuant to this reasoning, the *Chandler* court held that because the substance offered for sale was baking soda, and thus did not contain a detectable amount of cocaine, the defendants could not be sentenced under Ohio Rev. Code § 2925.03(C)(4)(g). *Id.* at 1238-39. The court further affirmed the judgments of the lower courts of appeals, which had not only vacated both the mandatory and

add-on sentences imposed under Ohio Rev. Code § 2925.03(C)(4)(g), but also the defendants' underlying trafficking convictions based on the State's failure "to prove an essential element of the offense." *See State v. Chandler,* 813 N.E.2d 65, 69, 75-76 (Ohio Ct. App. 5 Dist. 2004) (holding that "in order to sustain a conviction pursuant to R.C. 2925.03(A) and (C)(4)(g)," the state must not only prove "a sale or offer to sell a controlled substance" but also "the identity of the controlled substance and a detectable amount of that substance"); *State v. Bledsoe,* No. 2003CA00403, 2004 WL 2002855, at *2-4 (Ohio Ct. App. 5 Dist. Sept. 7, 2004) (unpublished).

In the state direct review proceedings, petitioner relied on *Chandler* in challenging both his conviction for a first-degree-felony cocaine-trafficking offense and mandatory ten-year sentence under Ohio Rev. Code § 2925.03(C)(4)(g); essentially, he contended that because the substance offered for sale to the informant was never recovered, the evidence was insufficient to establish that a detectable amount of cocaine was present within that substance for purposes of establishing beyond a reasonable doubt petitioner's guilt of a first-degree felony (as opposed to a fifth-degree felony) and automatic classification as a major drug offender under § 2925.03(C)(4)(g). (*See* Doc. 6, Exs. 6, 9).

The Ohio Court of Appeals, which was the last state court to issue a reasoned decision addressing the merits of these claims, overruled petitioner's assignments of error; the court made factual findings, which are presumed correct under 28 U.S.C. § 2254(e)(1),[8] and reasoned in relevant part as follows:

> ....Garr's assignments of error turn on his contention that the state could not establish the weight or identity of the substance he had offered for sale without recovering and testing it. Absent this evidence, Garr argues, the state could not prove the MDO specification but only established that he had committed a fifth-degree-felony trafficking offense, for which he should have been sentenced accordingly.
>
> Garr cites the Ohio Supreme Court's decision in *State v. Chandler* as controlling authority for both assignments of error.... Unlike the present case, however, in *Chandler* the state had recovered, weighed, and tested the substance offered for sale. It was not crack cocaine. It

[8] *See supra* p. 3 n.4.

was instead 130.87 grams of baking soda. The issue before the *Chandler* court was whether a person could be subject to the penalty-enhancement provision in R.C. 2925.03(C)(4)(g) under these circumstances. In determining that such a penalty was improper, the court held that a substance offered for sale must contain "some detectable amount of the relevant controlled substance" before a person can be sentenced under R.C. 2925.03(C)(4)(g). The court noted that the jury had made a mistake of fact when it had concluded that the baking soda was tantamount to crack cocaine.

This case is different. The issue presented here is whether the state could establish "some detectable amount of the relevant controlled substance"–as required by *Chandler*–as well as the amount of the controlled substance, through circumstantial evidence. We hold that it could. It is beyond question that the state may attempt to establish any element of any crime through circumstantial evidence. We find no reason to make an exception for the elements of R.C. 2925.03(C)(4)(g).

And there is sufficient circumstantial evidence in the record to support [G]arr's conviction and sentence. At trial, the state played recorded conversations between Garr and Carr during which Garr offered to sell cocaine to Carr. The amount of cocaine that Garr had offered to sell was identified multiple times and was never less than two kilograms. During one conversation, Carr indicated that he would not pay for the cocaine if it was counterfeit. During another conversation, Garr represented to Carr that the cocaine he intended to sell him was of high quality.

Viewing this evidence in the light most favorable to the state, we hold that a rational trier of fact could have concluded beyond a reasonable doubt that Garr had offered to sell Carr 1000 or more grams of actual cocaine. We therefore hold that Garr's MDO-specification conviction was supported by sufficient evidence, and that the trial court properly sentenced Garr under R.C. 2925.03(C)(4)(g) as a first-degree felon and as a major drug offender.

(*Id.*, Ex. 8, pp. 3-5) (footnotes omitted).

In the usual case, a federal habeas petitioner is not entitled to relief unless the state court's adjudication of his constitutional claim resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d); *see also Williams v. Taylor,* 529 U.S. 362, 402-03 (2000) (O'Connor, J., writing for majority on this issue); *Harris v. Stovall,* 212 F.3d 940, 942 (6th Cir. 2000), *cert. denied,* 532 U.S. 947 (2001); *Harpster v. Ohio,* 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied,* 522 U.S. 1112 (1998).

A state court decision is "contrary to" clearly established federal law as determined by the Supreme Court under § 2254(d)(1) if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams,* 529 U.S. at 405-06 (O'Connor, J.); *Harris,* 212 F.3d at 942. An "unreasonable application" of Supreme Court precedent occurs (1) if the state court identifies the correct legal standard but unreasonably applies it to the facts of the case, or (2) if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams,* 529 U.S. at 407-08 (O'Connor, J.).

Under § 2254(d)(1)'s "unreasonable application" clause, a federal habeas corpus court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411 (O'Connor, J.); *see also Bell v. Cone,* 535 U.S. 685, 694 (2002); *McGhee v. Yukins,* 229 F.3d 506, 510 (6th Cir. 2000); *Harris,* 212 F.3d at 942.

The reasonableness inquiry is an objective one; it does not involve a subjective inquiry into whether or not reasonable jurists would all agree that the state court's application was unreasonable. *Williams,* 529 U.S. at 409-10 (O'Connor, J.); *see also Washington v. Hofbauer,* 228 F.3d 689, 698 (6th Cir. 2000); *Harris,* 212 F.3d at 942-43. Moreover, the writ may issue only if the application is objectively unreasonable "in light of the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision." *McGhee,* 229 F.3d at 510, 512 (citing *Williams,* 529 U.S. at 412).

In this case, although the Ohio Court of Appeals did not cite Supreme Court precedent in addressing petitioner's sufficiency of evidence claims, the court utilized the proper standard of review established by the Supreme Court in *Jackson* in assessing whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt the essential elements of a first-degree-felony cocaine-trafficking offense and MDO classification under Ohio Rev. Code §§ 2925.03(A)(1) and 2925.03(C)(4)(g). (*See* Doc. 6, Ex. 8, p. 4).

The Ohio Court of Appeals also properly recognized that "[c]ircumstantial evidence alone is sufficient to support a conviction." *Newman v. Metrish,* 543 F.3d 793, 796 (6th Cir. 2008) (quoting *Johnson v. Coyle,* 200 F.3d 987, 992 (6th Cir. 2000)). (*See also* Doc. 6, Ex. 8, p. 4). However, for such evidence to be meet the standard of due process, it must be enough for a rational trier of fact to make a permissible *inference* of guilt, as opposed to a reasonable *speculation* that the petitioner is guilty of the charged crime. *Newman,* 543 F.3d at 796-97 (and Sixth Circuit cases cited therein); *see also United States v. Slewa,* No. 06-20519, 2008 WL 5244353, at *6 (E.D. Mich. Dec. 16, 2008) (unpublished).

> There is no bright line test to determine when facts amount to only a reasonable speculation and not to sufficient evidence. However, where the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation [that an essential element has been proven], there is insufficient evidence to satisfy the *Jackson* standard.

Newman, 543 F.3d at 799.

In considering the sufficiency-of-evidence issue, the Ohio Court of Appeals distinguished *Chandler* based on certain circumstantial evidence presented at trial as well as the fact that, in contrast to *Chandler,* no evidence was introduced to refute the jury's factual finding that the substance offered for sale was cocaine. Apparently conceding that the standards enunciated in *Chandler* governed the disposition of the issue, the court acknowledged that the substance offered for sale was never recovered, and thus could not be tested to determine if it contained a detectable amount of cocaine; however, the court concluded that statements made during conversations between petitioner and the informant in setting up the transaction that ultimately fell through, about the quality and amount of the cocaine to be sold, was sufficient to support the reasonable inference that the substance

offered actually was cocaine. (*See id.*).

It is well-settled that federal habeas courts generally are bound by the state court's interpretation of state law that was "announced on direct appeal of the challenged conviction." *Bradshaw v. Richey,* 546 U.S. 74, 76 (2005) (citing *Estelle,* 502 U.S. at 67-68, and *Mullaney v. Wilbur,* 421 U.S. 684, 691(1975)). However, by the same token, the highest court of the state is the final arbiter of the state-law issue; therefore, "[w]hen it has spoken, its pronouncement is to be accepted by federal courts as defining state law." *West v. American Telephone & Telegraph Co.,* 311 U.S. 223, 236 (1940); *see also Hicks v. Feiock,* 485 U.S. 624, 629-30 & n. 3 (1988) (applying *West* standard in federal habeas case).

In the absence of prevailing authority from the state's highest court, the federal court must "ascertain from all available data what the state law is and apply it rather than ... prescribe a different rule, however superior it may appear from the viewpoint of the 'general law' and however much the state rule may have departed from prior decisions of the federal courts." *West,* 311 U.S. at 237. "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.* (and cases cited therein); *see also Hampton v. United States,* 191 F.3d 695, 701 (6th Cir. 1999) (citing *Hicks,* 485 U.S. at 630 n.3); *cf. Lawler v. Fireman's Fund Ins. Co.,* 322 F.3d 900, 903 (6th Cir. 2003).

Here, the parties have not cited, nor could the undersigned find, any state supreme court case addressing the specific issues that have arisen in applying *Chandler* to the unique factual circumstances of this case – *i.e.*, whether *Chandler* is limited to cases where evidence has been presented demonstrating that the substance offered for sale was counterfeit, unavailable for sale, or otherwise lacking a detectable amount of cocaine as represented by the defendant; or whether *Chandler* can otherwise be reasonably distinguished from the instant case, where it is undisputed that the substance was never observed or recovered and petitioner's guilt under the enhanced penalty provision can be inferred only from statements made by defendant in setting up the sales transaction with the informant regarding the quality and amount of cocaine involved in the proposed sale.

Recently, in an unpublished decision, another state appellate court expressed serious concerns about the Ohio Court of Appeals' decision in the instant case. *See*

State v. Mitchell, No. 08 JE 5, 2008 WL 5412414, at *5 (Ohio Ct. App. 7 Dist. Dec. 16, 2008) (unpublished). In *Mitchell,* the court held that the evidence was insufficient to support the defendant's conviction on a heightened, third-degree-felony trafficking charge, where the amount offered "was said to equal or exceed the bulk amount" under the enhanced penalty provision set forth in Ohio Rev. Code § 2925.03(C)(1)(c). In that case, the defendant accepted payment from an informant for the purchase of six 80 milligram tablets of Oxycontin, but the sale was never completed because the defendant was unable to procure the pills. *See id.* at *1.

In reversing the defendant's conviction under the penalty enhancement, the Seventh District Court of Appeals refused to distinguish *Chandler* as the Ohio Court Appeals had in the instant case, and instead determined "that there is no valid reason for us to distinguish appellant's offer to sell Oxycontin resulting in no sale and Chandler's offer to sell crack cocaine resulting in the sale of baking soda. *Id.* at *5. Finding it "highly debatable" that the "*Garr* court's interpretation and method of distinguishing *Chandler* were correct," the *Mitchell* court went on to distinguish *Garr* because no evidence had been introduced "circumstantial or otherwise that there was detectable amount of Oxycontin in some drugs offered for sale," but rather only evidence that "appellant was attempting to find some Oxycontin and that he never did find any pills to purchase in order to resell them to the informant." *Id.*

In so ruling, the court continued in dicta to criticize the Court of Appeals' decision in the instant case as follows:

> Notably, there is an appellate case out of the Eight[h] District, which is contrary to the First District's *Garr* case and which was decided while the *Chandler* appeal was pending in the Supreme Court. *State v. Elliot,* 8th Dist. No. 86461, 2006-Ohio-1092. In *Elliott,* the defendant offered to sell a quarter of an ounce of crack cocaine for $200 to an undercover officer. The officer said that after he tried the crack that he had just purchased for $20 from the defendant, he may return for the quarter ounce.... The defendant was immediately arrested. The $20 rock turned out to be baking soda and the verbally offered quarter ounce of crack cocaine was never recovered.
>
> The defendant was convicted on the following counts: (1) trafficking in a counterfeit substance by selling the rock of baking soda; (2)

offering to sell the quarter ounce of crack cocaine that was never produced; and (3) offering to sell the $20 worth of crack cocaine that turned out to be baking soda. It is the treatment of the second count that is relevant to our analysis. Regarding this count, the defendant's penalty was enhanced to a third degree felony upon the jury's finding that he offered to sell an amount equaling or exceeding five grams but less than ten grams.

The Eighth District upheld the drug trafficking conviction for the offer to sell crack cocaine under count two.... However, the court held that the state did not provide sufficient evidence to sustain the penalty enhancement to a third degree felony.... Adopting the Fifth District's *Chandler* analysis as to the penalty enhancement, the Eighth District concluded that the state was required to prove a specific amount of the drug actually existed in order to obtain the penalty enhancement.... Thus, the *Elliott* court modified the conviction for offering to sell the quarter ounce from a third degree felony to a fifth degree felony, which is the lowest crack cocaine penalty provided in R.C. 2925.03(C)....

Considering that we now have the benefit of the Supreme Court's *Chandler* decision in a baking soda case, the *Elliott* court's handling of the issue of a case involving drugs that were never produced or recovered has even more support. We note here the Ohio Attorney General's Amicus Brief in the Supreme Court's *Chandler* case specifically equated the defendant who sells a counterfeit substance with a defendant who does not have any substance. That brief stated:

> "This case, rather, turns on whether R.C. 2925.03 applies to individuals who offer to sell crack that turns out not to exist, either because it is fake *or because the defendant literally has nothing to sell.*" (Emphasis added).

To conclude this analysis, the Supreme Court's *Chandler* case ruled that the penalty enhancement provisions in the drug trafficking statute cannot be used where there is no detectable trace of the alleged substance. Pursuant to this precedent, then we hold that where a defendant offers to sell six Oxycontin tablets but is unable to procure the pills for resale, the state has failed to show a detectable amount of

> a controlled substance as required for penalty enhancement. There is no reason to distinguish between Chandler's baking soda that did not contain drugs and appellant's complete lack of drugs. This is especially true in a case where it is established that appellant unsuccessfully went looking for drugs to resell and kept meeting with the informant thereafter (as opposed to *Garr* where the court thought the defendant may have actually had [cocaine] to sell but merely failed to hand it over due to a failure to produce payment)....

Id. at *5-6.[9]

The issues posed in the instant case are troubling. It appears from the record that both the trial court and the Ohio Court of Appeals were persuaded that *Chandler* applied to petitioner's case. Specifically, it appears that the trial court determined that because no cocaine was ever observed or recovered, *Chandler* applied to preclude any enhancement of petitioner's sentence on the MDO specification. However, the court apparently did not recognize the extent of the *Chandler* holding as prohibiting not only an "add-on" sentence based on petitioner's classification as a major drug offender, but also petitioner's conviction and sentence to a mandatory maximum ten-year term for a first-degree-felony cocaine-trafficking offense under Ohio Rev. Code § 2925.03(C)(4)(g). *See Chandler,* 846 N.E.2d at 1239 (affirming appellate court decisions); *see supra* p. 14.

In contrast, apparently realizing that petitioner's conviction and mandatory ten-year sentence were also subject to reversal under the trial court's interpretation of *Chandler*, the Ohio Court of Appeals determined that the facts of this case were sufficiently distinguishable from *Chandler* to constitute circumstantial evidence sufficient to support the reasonable inference that the substance offered for sale to the informant actually was cocaine.

This case falls within the category of cases open to review under *Jackson* to the extent the Ohio courts agreed that *Chandler* applies as requiring proof beyond a reasonable doubt of a detectable amount of cocaine before petitioner could be subjected to the enhanced penalty provision set forth in Ohio Rev. Code § 2925.03(C)(4)(g), and petitioner claims that there is no basis on which the trier of

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[9] Petitioner has submitted a copy of the Eighth Appellate District's *Elliott* decision for this Court's consideration as an attached exhibit to his supplemental pleading in opposition to respondent's motion to dismiss. (*See* Doc. 10, Appendix A).

fact could have found that fact beyond a reasonable doubt. Upon close review of the trial transcript, the undersigned has serious concerns about the "circumstantial evidence" presented at petitioner's trial, which was relied on by the Ohio Court of Appeals in upholding petitioner's qualification for the enhanced penalty. An extremely close question is presented here as to whether such evidence is enough to support a permissible *inference*, as opposed to a reasonable *speculation*, that petitioner actually had the cocaine with him to sell to the informant if an agreement could have been reached regarding payment at their final meeting.[10]

On the other hand, upon review of the Ohio Court of Appeals' decision in this case, it appears that the court also sought to distinguish *Chandler* in light of the affirmative evidence presented in that case, which demonstrated that the jury was mistaken in finding under Ohio Rev. Code § 2925.03(C)(4)(g) that the substance offered for sale was cocaine. (*See* Doc. 6, Ex. 8, pp. 3-4). Although the Court of Appeals did not go so far as to conclude that *Chandler*'s holding is limited to cases where the jury's factual finding is refuted by the evidence, the distinction made does raise a state-law question which is highly pertinent to the disposition of this case because, if it is decided in the State's favor, the Court would not have to decide the extremely close, fact-based sufficiency-of-evidence claim open to review under *Jackson*.

It appears that no state court, including the Ohio Court of Appeals in the instant case, has directly considered the state-law issue posed herein – *i.e.*, whether *Chandler* extends to prohibit a conviction for a first-degree-felony cocaine-trafficking offense and mandatory ten-year sentence under the enhanced penalty provision of Ohio Rev. Code § 2925.03(C)(4)(g), where the actual substance offered for sale is never produced or recovered for purposes of establishing a

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[10] Certainly, as the Ohio Court of Appeals found, there were conversations between the parties about the quality and amount of cocaine involved in the offer to sell made by petitioner to the informant. However, the informant testified that he "never saw [petitioner] with cocaine," and that although he believed petitioner was bringing the cocaine to sell to the informant at their final meeting, he did not see any "dope or cocaine" in petitioner's black car where the parties met for "roughly" 30 minutes in an attempt to work out logistical problems with the sale. (Doc. 13, Tr. 682-83, 694-95, 699-700). The investigator, who was present conducting surveillance at the scene, also testified that he did not believe the cocaine was in the black car, but rather was brought in another car parked at a nearby gas station. (*Id.*, Tr. 724). Tellingly, he stated: "That's what my belief is. It's nothing more than a belief." (*Id.*).

detectable amount of cocaine, but also no affirmative evidence is presented to cast doubt on the petitioner's representations to the informant regarding the identity and weight of the substance or to otherwise refute the jury's finding that the substance offered for sale was cocaine in "an amount that did equal or exceed 1000 grams."

As discussed above, other state appellate courts have criticized the Court of Appeals' decision in this case and have concluded that *Chandler* extends to cases where the offer to sell does not result in an actual sale, and no illegal substance is produced or recovered. *See, e.g., Mitchell, supra,* 2008 WL 5412414, at *5-6; Doc. 10, Appendix A. Those cases, however, are also distinguishable from the case-at-hand because, as in *Chandler,* the affirmative evidence demonstrated that the defendants had not actually procured the drugs offered for sale and, therefore, lacked a detectable amount of the controlled substance required for a penalty enhancement. *See id.*

Both the Supreme Court of Ohio in *Chandler* and the Ohio Court of Appeals in the instant case emphasized that testing had revealed that the substance offered for sale in *Chandler* was baking soda, not crack cocaine. Indeed, the court in *Chandler* posited: "Holding that the penalty enhancement for a major drug offender applies when any substance over 100 grams–baking soda, face powder, powdered sugar, or the like–is represented to be 'crack cocaine' contradicts the statute." *Chandler,* 846 N.E.2d at 1238-39. The court went on to point out that the Ohio legislature had "already specifically proscribed the activity present in this case as trafficking in counterfeit controlled substances," the violation of which was classified only as a felony of the fourth or fifth degree. *Id.* at 1239.

As the prosecutor stated at petitioner's sentencing, *Chandler* presents more questions than answers, particularly in a case such as this where, in contrast to *Chandler*, there is no evidence in the record even remotely suggesting that petitioner did not have any cocaine to sell, or that he made false representations to the informant regarding the identity and weight of the substance he was offering to sell. If the Ohio Court of Appeals had directly addressed and answered the unresolved state-law question posed herein in the State's favor, by holding as a matter of law that *Chandler* is distinguishable from and thus inapplicable to the case-at-hand, this Court would have been bound by the state court's determination upholding petitioner's conviction and sentence on that state-law ground. *See Walker v. Timmerman-Cooper,* No. 1:05cv103, 2006 WL 3242101, at *8-9 (S.D. Ohio Oct. 5, 2006) (Report & Recommendation) (Black, M.J.) (unpublished)

(holding that although Ohio law was unclear regarding a certain element required to be proven by the State, the federal habeas court was bound by the Ohio appellate court's ruling on that state-law issue), *adopted,* 2006 WL 3803235 (S.D. Ohio Nov. 7, 2006) (Spiegel, S.J.) (unpublished); *see also Gimotty v. Elo*, 40 Fed.Appx. 29, 32 (6th Cir. Apr. 25, 2002) (not published in Federal Reporter) (citing *Davis v. Strack,* 270 F.3d 111, 123 n.4 (2nd Cir. 2001)), *cert. denied,* 537 U.S. 894 (2002); *Johnson v. Rosemeyer,* 117 F.3d 104, 108 (3rd Cir. 1997).[11]

Therefore, in the interest of comity, the undersigned concludes that the Supreme Court of Ohio should first be afforded the opportunity to consider the unresolved state-law question posed in this case, which may moot the Court's consideration of the extremely close, fact-based sufficiency-of-evidence claim open to review under *Jackson* based on *Chandler*.

Accordingly, in sum, respondent's motion to dismiss (Doc. 6) should be **DENIED**. In addition, the undersigned **RECOMMENDS** that the following question of Ohio law, which may be "determinative of the proceeding and for which there is no controlling precedent" in the Ohio courts, be certified to the Supreme Court of Ohio in accordance with the procedure set forth in Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, *see* Rule XVIII, § 1, of the Rules of Practice of the Supreme Court of Ohio:

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[11] *Cf. Estelle,* 502 U.S. at 67-68; *Warner v. Zent,* 997 F.2d 116, 133 (6th Cir. 1993) (absent a showing of "extreme circumstances where it appears that the [state court's] interpretation of [state law] is an obvious subterfuge to evade consideration of a federal issue," the federal habeas court is bound by the state court's determination of state law) (quoting *Mullaney,* 421 U.S. at 690-91), *cert. denied,* 510 U.S. 1073 (1994).

> Whether the Supreme Court of Ohio's decision in *State v. Chandler,* 846 N.E.2d 1234 (Ohio 2006), prohibiting a first-degree-felony cocaine-trafficking conviction and sentence under the enhanced penalty provision of Ohio Rev. Code § 2925.03(C)(4)(g) where the substance offered for sale does not contain a detectable amount of the drug, applies to this case; or, in other words, whether *Chandler*, which involved the sale of a counterfeit substance, extends to cases where the substance offered for sale was never observed, tested or recovered to ascertain whether it contained a detectable amount of cocaine, and no affirmative evidence was presented to call into question the defendant's representations, or to refute the jury's factual finding, that the substance in fact was cocaine in an amount equal to or exceeding 1000 grams.

Respondent, as the party requesting the dismissal of the federal habeas corpus petition on the ground that petitioner has asserted non-cognizable state-law claims, should be designated as the moving party. Moreover, nothing in the certification, including the particular phrasing of the foregoing question, should be deemed as limiting the Supreme Court of Ohio in its consideration of the state-law question presented herein.

IT IS THEREFORE RECOMMENDED THAT:

1. Respondent's motion to dismiss (Doc. 6) be **DENIED.**

2. **IT IS FURTHER RECOMMENDED** that this case be **STAYED** pending the Supreme Court of Ohio's consideration of the following state-law question, which the undersigned **RECOMMENDS** should be **CERTIFIED** to the state supreme court to answer in accordance with Rule XVIII of the Rules of Practice of the Supreme Court of Ohio:

Whether the Supreme Court of Ohio's decision in *State v. Chandler,* 846 N.E.2d 1234 (Ohio 2006), prohibiting a first-degree-felony cocaine-trafficking conviction and sentence under the enhanced penalty provision of Ohio Rev. Code § 2925.03(C)(4)(g) where the substance offered for sale does not contain a detectable amount of the drug, applies to this case; or, in other words, whether *Chandler*, which involved the sale of a counterfeit substance, extends to cases where the substance offered for sale was never observed, tested or recovered to ascertain whether it contained a detectable amount of cocaine, and no affirmative evidence was presented to call into question the defendant's representations, or to refute the jury's factual finding, that the substance in fact was cocaine in an amount equal to or exceeding 1000 grams.

Date: 3/2/09

cbc

s/Timothy S. Black
Timothy S. Black
United States Magistrate Judge

J:\BRYANCC\2009 habeas orders\08-293deny-MTD.SufficEvid-MDOstat-certstQOhSct.wpd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Oliver Lucien Garr,
Petitioner

vs

Case No. 1:08cv293
(Dlott, J.; Black, M.J.)

Warden, Madison Correctional
Institution,
Respondent

NOTICE

Attached hereto is a Report and Recommendation issued by the Honorable Timothy S. Black, United States Magistrate Judge, in the above-entitled habeas corpus action. Pursuant to Fed. R. Civ. P. 72(b), which may be applied in this action under Rules 1 and 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, any party may object to the Magistrate Judge's Report and Recommendation within ten (10) days after being served with a copy thereof. Such party shall file with the Clerk of Court and serve on all other parties written objections to the Report and Recommendation, specifically identifying the portion(s) of the proposed findings, recommendations, or report objected to, together with a memorandum of law setting forth the basis for such objection(s). Any response by an opposing party to the written objections shall be filed within ten (10) days after the opposing party has been served with the objections. *See* Fed. R. Civ. P. 72(b). A party's failure to make objections in accordance with the procedure outlined above may result in a forfeiture of his rights on appeal. *See Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 09/13/2006
code: GJEI
judge: 156

ENTERED
SEP 13 2006

Judge: DENNIS S HELMICK 9/20/06

NO: B 0602631

STATE OF OHIO
VS.
OLIVER L GARR

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **ELIZABETH E AGAR** on the **13th** day of **September 2006** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:
count 1: TRAFFICKING IN COCAINE WITH SPECIFICATION, 2925-03A1/ORCN,F1
count 2: ENGAGING IN A PATTERN OF CORRUPT ACTIVITY, 2923-32A1/ORCN, JUDGMENT ENTRY OF ACQUITTAL

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:
count 1: CONFINEMENT: 10 Yrs DEPARTMENT OF CORRECTIONS
TEN (10) YEARS IS MINIMUM MANDATORY SENTENCE.
DRIVER'S LICENSE SUSPENSION: 5 Yrs

DEFENDANT TO RECEIVE CREDIT FOR ALL JUSTICE CENTER TIME SERVED ON THIS MATTER.

FINE OF $20,000.00 IMPOSED OF WHICH $10,000.00 IS MANDATORY DRUG FINE.

DEFENDANT TO PAY THE COURT COSTS.

DEFENDANT TO PAY PUBLIC DEFENDER ATTORNEY FEES.

APPEAL BOND SET AT $5,000,000.00.

D70092425

APP. 1

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 09/13/2006
code: GJEI
judge: 156

Judge: DENNIS S HELMICK

9/20/06

NO: B 0602631

STATE OF OHIO
VS.
OLIVER L GARR

JUDGMENT ENTRY: SENTENCE: INCARCERATION

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

APP. 2

LEXSEE 2007 OHIO 3448

STATE OF OHIO, Plaintiff-Appellee, vs. OLIVER GARR, Defendant-Appellant.

APPEAL NO. C-060794

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

2007 Ohio 3448; 2007 Ohio App. LEXIS 3179

July 6, 2007, Date of Judgment Entry on Appeal

NOTICE:

THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Garr, 2007 Ohio 5735, 115 Ohio St. 3d 1475, 2007 Ohio 5735, 875 N.E.2d 628, 2007 Ohio LEXIS 2813 (Ohio, Oct. 31, 2007)*

PRIOR HISTORY: [**1]
Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-0602631.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a judgment from the Hamilton County Court of Common Pleas (Ohio), which convicted him of first-degree felony trafficking in drugs and of a corresponding major-drug-offender specification. The trial court imposed a mandatory term of imprisonment pursuant to *R.C. 2925.03(C)(4)(g)*.

OVERVIEW: During a sting operation, defendant told a police informant that he could sell him a large amount of cocaine. They met in a parking lot with an understanding that defendant would deliver the drugs and the informant would pay him later. However, a disagreement arose regarding payment, the sale was not completed, and defendant did not produce the cocaine. Defendant was not arrested until several months later and the drugs were never recovered. At trial, the State played a series of recorded conversations between defendant and the informant that detailed the terms of the transaction. Defendant was convicted and sentenced. On appeal, the court found sufficient circumstantial evidence to support the specification. Although the drugs were not recovered for purposes of determining a detectable amount of cocaine, there were multiple recorded conversations between the informant and defendant that referenced the amount of drugs that were to have been sold and the fact that they were of a high quality. As there was support for the conviction of the offense and the specification, the imposition of the mandatory sentence was proper.

OUTCOME: The court affirmed the judgment of the trial court.

HEADNOTES

SENTENCING - EVIDENCE - DRUGS

SYLLABUS

The jury could have properly relied on circumstantial evidence to support the defendant's conviction as a major drug offender for trafficking in an amount that equaled or exceeded 1,000 grams of cocaine: it was not necessary for the state to have recovered and tested the substance offered for sale in order to prove its weight and identity.

The trial court did not err in sentencing the defendant to ten years' mandatory incarceration based on the penalty-enhancement provision in *R.C. 2925.03(C)(4)(g)*: *State v. Chandler, 109 Ohio St.3d 223,*

2006 Ohio 2285, 846 N.E.2d 1234, was not applicable because the defendant had not offered to sell a counterfeit controlled substance, but had offered to sell over 1,000 grams of actual cocaine.

COUNSEL: Joseph T. Deters, Prosecuting Attorney, and Scott M. Heenan, Assistant Prosecuting Attorney, for Plaintiff-Appellee,.

Elizabeth E. Agar, for Defendant-Appellant.

JUDGES: LEE H. HILDEBRANDT, JR., Presiding Judge. DINKELACKER and WINKLER, JJ., concur. RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

OPINION BY: LEE H. HILDEBRANDT, JR.

OPINION

DECISION.

LEE H. HILDEBRANDT, JR., [**2] **Presiding Judge.**

[*P1] Following a jury trial, Oliver Garr was found guilty of a first-degree-felony trafficking offense and of a corresponding major-drug-offender ("MDO") specification. The trial court sentenced him to ten years' mandatory incarceration under the penalty provision in *R.C. 2925.03(C)(4)(g).* Garr now appeals the jury's verdict and the trial court's sentence. We affirm.

[*P2] The facts of this case are largely undisputed. During a sting operation, Garr told police informant Robert Carr that he would sell him two kilograms of cocaine for $ 42,000. At trial, the state played a series of recorded conversations between Garr and Carr detailing the terms of this transaction, which included two discussions about the quality of the cocaine. Carr and Garr eventually met in a restaurant parking lot with the understanding that Garr was to deliver the cocaine to Carr, and that Carr would pay him for it later. But due to a disagreement over payment, the sale was not completed, and Garr never produced any cocaine. Police monitoring the scene allowed Garr to leave without incident. Garr was not arrested until several months later, and the state never recovered any substance offered for sale in [**3] connection with these events.

[*P3] In his first assignment of error, Garr contends that his MDO specification was not supported by sufficient evidence. In his second assignment of error, Garr argues that the trial court erred in sentencing him to ten years' mandatory incarceration because the evidence did not support an MDO or first-degree-felony conviction. The MDO and sentencing provisions at issue are both contained in *R.C. 2925.03(C)(4)(g).* In pertinent part, that code section provides, "If the amount of the drug involved [in the trafficking offense] equals or exceeds one thousand grams of cocaine * * * 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." [1] Garr's assignments of error turn on his contention that the state could not establish the weight or identity of the substance he had offered for sale without recovering and testing it. Absent this evidence, Garr argues, the state could not prove the MDO specification but only established that he had committed a fifth-degree-felony trafficking offense, for which he should [**4] have been sentenced accordingly. [2]

1 *R.C. 2925.03(C)(4)(g);* see, also, *R.C. 2929.01(X)* (defining a major drug offender as a person convicted of selling 1000 or more grams of cocaine).
2 See *R.C. 2925.03(C)(4)(a).*

[*P4] Garr cites the Ohio Supreme Court's decision in *State v. Chandler* [3] as controlling authority for both assignments of error. In *Chandler*, the defendants had been convicted of trafficking in 100 or more grams of crack cocaine and had been sentenced as first-degree-felony major drug offenders under the same penalty-enhancement provision applied to Garr. [4] Unlike the present case, however, in *Chandler* the state had recovered, weighed, and tested the substance offered for sale. [5] It was not crack cocaine. It was instead 130.87 grams of baking soda. [6] The issue before the *Chandler* court was whether a person could be subject to the penalty-enhancement provision in *R.C. 2925.03(C)(4)(g)* under these circumstances. [7] In determining that such a penalty was improper, the court held that a substance offered for sale must contain "some detectable amount of the relevant controlled substance" before a person can be sentenced under *R.C. 2925.03(C)(4)(g).* [8] The court noted that the jury had made [**5] a mistake of fact when it had concluded that baking soda was tantamount to crack cocaine. [9]

3 *109 Ohio St.3d 223, 2006 Ohio 2285, 846 N.E.2d 1234.*
4 *Id. at P4.*
5 *Id. at P3.*
6 *Id. at P16.*
7 *Id. at P1.*
8 *Id. at P21*
9 *Id. at P19.*

[*P5] This case is different. The issue presented here is whether the state could establish "some detectable

amount of the relevant controlled substance"-as required by *Chandler*-as well as the amount of the controlled substance, through circumstantial evidence. We hold that it could. It is beyond question that the state may attempt to establish any element of any crime through circumstantial evidence. [10] We find no reason to make an exception for the elements of *R.C. 2925.03(C)(4)(g)*.

[*P6] And there is sufficient circumstantial evidence in the record to support Carr's conviction and sentence. At trial, the state played recorded conversations between Garr and Carr during which Garr offered to sell cocaine to Carr. The amount of cocaine that Garr had offered to sell was identified multiple times and was never less than two kilograms. During one conversation, Carr indicated that he would not pay for the cocaine if it was counterfeit. During another conversation, Garr represented to Carr [**6] that the cocaine he intended to sell him was of high quality.

[*P7] Viewing this evidence in a light most favorable to the state, we hold that a rational trier of fact could have concluded beyond a reasonable doubt that Garr had offered to sell Carr 1000 or more grams of actual cocaine. [11] We therefore hold that Garr's MDO-specification conviction was supported by sufficient evidence, [12] and that the trial court properly sentenced Garr under *R.C. 2925.03(C)(4)(g)* as a first-degree felon and as a major drug offender.

10 *State v. Jenks (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492.*

11 Id. at paragraph two of the syllabus.

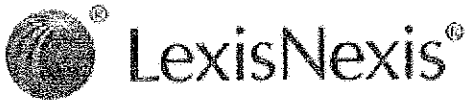
12 See *R.C. 2929.01(X)*.

[*P8] Both of Garr's assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

DINKELACKER and **WINKLER, JJ.**, concur.

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



LEXSEE 2006 OHIO 1092

STATE OF OHIO, Plaintiff-appellee vs. ANDRE ELLIOTT, Defendant-appellant

NO. 86461

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2006 Ohio 1092; 2006 Ohio App. LEXIS 1006

March 9, 2006, Date of Announcement of Decision

PRIOR HISTORY: [**1] CHARACTER OF PROCEEDING: Criminal appeal from Cuyahoga County Court of Common Pleas. Case No. CR-451285.

DISPOSITION: MODIFIED; AND AFFIRMED; REMANDED FOR RESENTENCING.

COUNSEL: For plaintiff-appellee: WILLIAM D. MASON, Cuyahoga County Prosecutor, PINKEY CARR, Assistant, Cleveland, Ohio.

For defendant-appellant: MARGARET AMER ROBEY, ESQ., Cleveland, Ohio.

JUDGES: KENNETH A. ROCCO, JUDGE. FRANK D. CELEBREZZE, JR., P.J. and COLLEEN CONWAY COONEY, J., CONCUR.

OPINION BY: KENNETH A. ROCCO

OPINION

JOURNAL ENTRY and OPINION

KENNETH A. ROCCO, J.:

[*P1] After a bench trial, defendant-appellant Andre Elliott was convicted of trafficking in a counterfeit controlled substance and two counts of drug trafficking.

[*P2] Elliott presents three assignments of error in which he appeals only his convictions and sentences on counts two and three, i.e., for drug trafficking. He first argues that this court should stay this appeal due to the Ohio Supreme Court's pending decision upon accepting review of *State v. Chandler, 157 Ohio App.3d 672, 2004 Ohio 3436, 813 N.E.2d 65*. Should this court decline to stay this case, Elliott further argues, based upon the appellate court's analysis in *Chandler*, that his [**2] convictions for drug trafficking in violation of *R.C. 2925.03* are unsupported by either sufficient evidence or the weight of the evidence.

[*P3] Upon a review of the record in conjunction with applicable legal authority, this court partly agrees with Elliott's arguments. Consequently, Elliott's conviction for drug trafficking on count three is affirmed, but his conviction on count two cannot be sustained as a third-degree felony. Therefore, his conviction on count two is modified to a felony of the fifth degree, and this case is remanded for resentencing in accordance with this opinion.

[*P4] Elliott's convictions result from a "reverse sting" operation conducted by the Cleveland Police Department's Sixth District Vice Unit on the night of March 26, 2004. As described by Detective James Cudo during his testimony at Elliott's trial, Cudo simply drove an unmarked vehicle slowly in the area of East 156th Street and Corsica Avenue, an area known for drug activity, watching for someone to make a gesture indicating drugs were for sale.

[*P5] At approximately 10:30 p.m., a man, whom Cudo later identified as Elliott, made such a gesture by giving [**3] him "the wave." Cudo nodded, pulled into a parking space, waited for Elliott to run to the vehicle, then rolled down the front passenger window.

[*P6] Elliott leaned into the car to ask Cudo "what [he] wanted." Cudo responded, "a 20", referring to a $ 20 rock of crack cocaine." Elliott proceeded to "spit from his mouth a plastic bag which had [what] appeared to be

one rock of crack cocaine into his hand and then handed it to" Cudo. The parties stipulated at trial that the substance of which the rock consisted, although it weighed .17 grams, was neither cocaine nor any other controlled substance. Cudo, in turn, handed Elliott a marked $ 20 bill.

[*P7] As Cudo did so, he asked Elliott "if he could handle any weight." Elliott asked Cudo "how much," and Cudo responded, "a quarter ounce." Elliott indicated he could "get some" for "$ 200." Cudo later testified the "normal price" for a quarter ounce was between "two and $ 300, depending on***the quality***." Cudo told Elliott that he would test what Elliott had given him, then asked how he could find Elliott again for the larger sale. Elliott answered that "his name [was] Pimple, and that he would be walking up and down [**4] East 156th Street all night."

[*P8] After Cudo drove away, Elliott was arrested by other officers who were taking part in the operation.

[*P9] Elliott subsequently was indicted on three counts: 1) trafficking in a counterfeit controlled substance, *R.C. 2925.37*; 2) trafficking in crack cocaine in an amount between five and ten grams, *R.C. 2925.03* (a third-degree felony); and, 3) trafficking in crack cocaine in an amount less than one gram, *R.C. 2925.03* (a fifth-degree felony). His case proceeded to a trial before the bench.

[*P10] The state presented the testimony of Cudo and one of his colleagues, together with the report that indicated the "rock" was not a controlled substance. Although Elliott moved for acquittal as to counts two and three, the trial court denied the motion.

[*P11] The trial court ultimately sentenced Elliott to concurrent terms of incarceration of one year on count two together with six months on counts one and three, which the court "merged" for sentencing purposes.

[*P12] Elliott has filed a timely appeal and challenges his drug trafficking convictions with [**5] the following three interrelated assignments of error:

[*P13] "I. The Ohio Supreme Court is poised to rule on a similar case involving a sale of counterfeit drugs charged under *R.C. 2925.03* as an "offer to sell" genuine drugs; this case should be stayed pending that decision, if not decided in Mr. Elliott's favor on other grounds.

[*P14] "II. The court's decision finding the defendant guilty of drug trafficking was not supported by sufficient evidence and was against the manifest weight of the evidence as Mr. Elliott never made an "offer to sell" a quarter ounce of cocaine.

[*P15] "III. Mr. Elliott's drug trafficking conviction and sentencing must be vacated because the sentencing provisions of *R.C. 2925.03* link the convictions and penalty to the identity and weight of the drug; no conviction and sentence can be upheld in the absence of any controlled substance and this conviction is therefore supported by insufficient evidence and against the manifest weight of the evidence."

[*P16] Elliott argues in his first assignment of error that this case should be stayed pending the Ohio Supreme Court's decision in [**6] its review of the Fifth Appellate District's opinion in *State v. Chandler, supra.* This court declines to do so.

[*P17] Therefore, Elliott's first assignment of error is overruled.

[*P18] In Elliott's second and third assignments of error, he essentially argues that his two convictions for violation of *R.C. 2925.03* are improper.

[*P19] Elliott contends that pursuant to the appellate court's analysis in *Chandler* of the interplay between *R.C. 2925.03*'s guilt and sentencing provisions together with the passage into law of *R.C. 2925.37*, the earlier Ohio Supreme Court decisions in *State v. Scott (1982), 69 Ohio St.2d 439, 432 N.E.2d 798* and *State v. Patterson (1982), 69 Ohio St.2d 445, 432 N.E.2d 802* have been completely superseded. This court, however, considers the circumstances of this case are distinguishable from those presented in *Chandler.* Elliott's argument is thus persuasive only in part.

[*P20] None of the counts of Elliott's indictment contained a specification. The appellate court in *Chandler,* on the other hand, was faced with a defendant who had [**7] been convicted of drug trafficking under an indictment which, in addition to the single base charge, contained a "Major Drug Offender" ("MDO") specification pursuant to *R.C. 2929.14(D)(3).* Since Chandler, who was acting as the go-between for his colleague Bledsoe on that occasion, had sold only baking soda, Chandler challenged his conviction for "drug" trafficking on the basis of the specification, arguing that he could not be lawfully convicted of the charge because the specification required an actual amount of a controlled substance. The appellate court agreed with this premise.

[*P21] The appellate court then further explained its analysis in *State v. Bledsoe, Stark App. No. 2003CA00403, 2004 Ohio 4764*, Chandler's companion case. The court examined the interplay between *R.C. 2925.03(C)(4)(g)*, which concerns significant amounts of drugs, and a specification brought under *R.C. 2929.14(D)(3)*, and determined the amount of "controlled substance" was material in such cases for purposes of the penalty to be imposed.

[*P22] The court determined that since, logically, a penalty cannot [**8] be imposed without a crime having been committed, if the facts of the case proved that no amount of "controlled substance" existed, the defendant in such a situation could be neither convicted nor sentenced under *R.C. 2925.03*. The statute thus restricted the state, and, on the count of his indictment that contained the specification, Bledsoe's conviction was sustained by neither sufficient evidence nor the weight of the evidence.

[*P23] The charges against Elliott, on the other hand, did not contain any specifications. Rather, he offered the item he spit from his mouth to Cudo and accepted Cudo's money in exchange for the item, which weighed .17 grams.

[*P24] Similarly, when Cudo inquired about "weight," Elliott did not respond negatively. Instead, he asked Cudo the quantity he desired, stated he could get it, quoted as his price the appropriate "street" price for a quarter ounce of crack cocaine, and told Cudo where he could be found upon Cudo's return for the drugs. Elliott apparently thus was "ready and willing to provide" to Cudo what he requested. *State v. Pimental, supra at P26-28, 33.*

[*P25] This court does not find it necessary [**9] strictly to follow the Fifth District's analysis because we recently held that "the proscribed conduct [under *R.C. 2925.03(A)(1)*] is the offer to sell, not the offering of a controlled substance." *State v. Pimental, Cuyahoga App. No. 84034, 2005 Ohio 384, P25*, citing *State v. Scott, supra at 440.*

[*P26] The trial court, therefore, did not err either in denying Elliott's motions for acquittal or in finding him guilty of drug trafficking. Nevertheless, the state did not provide evidence sufficient to sustain the third-degree felony offense alleged in count two.

[*P27] Based upon the circumstances of this case, examined in light of the Fifth Appellate district's analysis in *Chandler,* Elliott's conviction on count two falls, as did his conviction on count three, under *R.C. 2925.03(C)(4)(a)*, because the state failed to prove a specific amount of the drug actually existed. According to *R.C. 2925.03(C)(4)(a)*, trafficking in cocaine, "except as otherwise provided," is "a felony of the fifth degree."

[*P28] For the foregoing reasons, Elliott's second and third [**10] assignments of error are sustained only in part.

[*P29] Elliott's conviction on count three is affirmed, but his conviction on count two must be modified to reflect it was a felony of the fifth degree, and, as set forth in *R.C. 2925.03(C)(4)(a)*, the penalty must be adjusted accordingly.

[*P30] This case is remanded for proceedings consistent with this opinion.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been modified and affirmed as modified, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

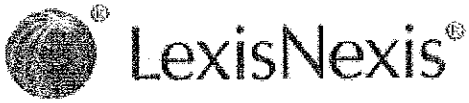
A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

KENNETH A. ROCCO

JUDGE

FRANK D. CELEBREZZE, JR., P.J. and COLLEEN CONWAY COONEY, J. CONCUR

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, [**11] *22(D)* and *26(A)*; *Loc. App.R. 22.* This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S.Ct.Prac.R. II, Section 2(A)(1).*



LEXSEE 2008 OHIO 6920

STATE OF OHIO, PLAINTIFF-APPELLEE, - VS - ROBERT MITCHELL, DEFENDANT-APPELLANT.

CASE NO. 08 JE 5

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, JEFFERSON COUNTY

2008 Ohio 6920; 2008 Ohio App. LEXIS 5869

December 16, 2008, Decided

PRIOR HISTORY: [**1]
Criminal Appeal from Common Pleas Court, Case No. 06CR169.

DISPOSITION: Convictions Affirmed; Sentence Vacated; Cause Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of the judgment of the Jefferson County Common Pleas Court (Ohio), which convicted him on three counts of drug trafficking, one of which dealt with an offer to sell Oxycontin, a third degree felony as the amount exceeded the bulk amount under *R.C. 2925.03(C)(1)(c)*. Defendant contended, in part, that insufficient evidence was presented to support the contention that the amount of Oxycontin exceeded the bulk amount.

OVERVIEW: An informant purchased crack cocaine from defendant on two occasions. On a third occasion, the informant asked defendant to sell her six 80 milligram tablets of Oxycontin. Defendant took the informant's money, and though he was not able to procure Oxycontin at the time, he held onto the money in anticipation that he would be able to fill the order for the informant in the future. Defendant was arrested for the two completed crack cocaine sales and for the offer to sell Oxycontin. The court noted that the penalty enhancement provisions in *§ 2925.03(C)* could not be used where there was no detectable trace of the alleged substance. Since defendant was unable to procure the six Oxycontin tablets for resale, the State had failed to show a detectable amount of a controlled substance as required for a penalty enhancement. The court rejected defendant's further contention that his convictions were against the manifest weight of the evidence. The testimony of the informant was not incredible, and the jury could properly find her version of the transactions to be credible.

OUTCOME: The court affirmed defendant's convictions but reversed his penalty enhancement resulting from the bulk amount finding. The court remanded the matter for resentencing on a fourth-degree felony as opposed to the third-degree felony on which his sentence was originally based.

COUNSEL: For Plaintiff-Appellee: Attorney Thomas Straus, Prosecuting Attorney, Attorney Jane Hanlin, Assistant Prosecuting Attorney, Steubenville, Ohio.

For Defendant-Appellant: Attorney Steven Stickles, Steubenville, Ohio.

JUDGES: VUKOVICH, J. Donofrio, J., concurs. Waite, J., concurs.

OPINION BY: VUKOVICH

OPINION

VUKOVICH, J.

[*P1] Defendant-appellant Robert Mitchell appeals from three drug trafficking convictions entered in the Jefferson County Common Pleas Court. He contends that there was insufficient evidence on what constitutes the

bulk amount of Oxycontin, and he urges that his convictions are contrary to the manifest weight of the evidence. For the following reasons, appellant's convictions are affirmed. However, his penalty enhancement resulting from the bulk amount finding is reversed, and the case is remanded for resentencing on a fourth degree felony as opposed to the third degree felony on which his sentence is currently based.

STATEMENT OF THE CASE

[*P2] Appellant was indicted for three counts of drug trafficking in violation of *R.C. 2925.03(A)(1)*. Counts one and three are the result of two different sales of [**2] crack cocaine and are fifth degree felonies under *R.C. 2925.03(C)(4)(a)*. Count two deals with an offer to sell Oxycontin, a third degree felony since the amount offered was said to equal or exceed the bulk amount under *R.C. 2925.03(C)(1)(c)*.

[*P3] At trial, the state called a forensic scientist to the stand, and the informant and the detective testified about each transaction. For instance, on October 23, 2006, the informant was searched by police, wired and provided with $ 100 in cash. The informant set up a meeting with appellant, who was her friend and supplier. A detective watched her enter appellant's place of employment. He waited for her to exit and hand over .63 grams of crack cocaine, which appellant had sold to her for $ 100.

[*P4] On October 24, 2006, the informant asked appellant to sell her six 80 milligram tablets of Oxycontin, which she said was for her friend. Appellant told the informant to come to his work where he then accepted $ 300 that had been provided to the informant by the police. Appellant left to retrieve the pills and was gone for over an hour. However, he was not able to procure Oxycontin at the time. He kept the money, apparently in anticipation that he would be [**3] able to fill the Oxycontin order for her in the future. Appellant gave the informant two methadone pills to "hold over" her friend.

[*P5] On October 25, 2006, the informant returned to appellant's work to inquire about the status of his search for Oxycontin. As he still had not procured the pills, she purchased .27 grams of crack cocaine from appellant for $ 50. The police then arrested appellant for the two completed crack cocaine sales and for the offer to sell Oxycontin. See *R.C. 2925.03(A)(1)* (no person shall knowingly sell or offer to sell a controlled substance).

[*P6] A jury convicted appellant on all three counts as charged. Upon convicting him for the offer to sell Oxycontin, the jury made an additional finding regarding this offense, which specified that the amount he offered to sell equaled or exceeded the bulk amount. This additional finding resulted in a penalty enhancement. Thus, rather than being convicted of a regular fourth degree felony, which has a discretionary sentencing range of six to eighteen months with no requirement of prison time, the offer to sell Oxycontin became a felony of the third degree for which the court was required to impose as a mandatory prison term one [**4] of the prison terms prescribed for a third degree felony. See *R.C. 2925.03(C)(1)(a),(c)*.

[*P7] In a January 30, 2008 judgment entry, appellant was sentenced to a minimum sentence of six months on the fifth degree felonies and a minimum but mandatory sentence of one year on the third degree felony. All sentences were ordered to run consecutively. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

[*P8] Appellant's first assignment of error provides:

[*P9] "THE DEFENDANT'S MOTION PURSUANT TO *CRIMINAL RULE 29* SHOULD HAVE BEEN GRANTED PERTAINING TO THE CHARGE OF VIOLATING *O.R.C. §2925.03(A)(1)&(C)(1)(c)* BECAUSE THE STATE OF OHIO OFFERED NO EVIDENCE SUBSTANTIATING THE 'BULK AMOUNT' REQUIREMENT AS ALLEGED."

[*P10] Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith (1997), 80 Ohio St.3d 89, 113, 1997 Ohio 355, 684 N.E.2d 668*. Thus, an appellate court reviews a denial of a *Crim.R. 29* motion for acquittal using the same standard that an appellate court uses to review a sufficiency of the evidence claim. *State v. Carter (1995), 72 Ohio St.3d 545, 553, 1995 Ohio 104, 651 N.E.2d 965*.

[*P11] Sufficiency of [**5] the evidence is a legal test dealing with adequacy, as opposed to weight of the evidence. *State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541*. In viewing a sufficiency of the evidence argument, a conviction will not be reversed unless the reviewing court determines, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could find that the elements of the offense were proven beyond a reasonable doubt. *State v. Goff (1998), 82 Ohio St.3d 123, 138, 1998 Ohio 369, 694 N.E.2d 916*. In other words, the evidence is sufficient if, after viewing the evidence in the light most favorable to the state, reasonable minds can reach different conclusions as to whether each element has been proven beyond a reasonable doubt. *Carter, 72 Ohio St.3d at 553*; *State v. Bridgeman (1978), 55 Ohio St.2d 261, 263, 381 N.E.2d 184*.

[*P12] Drug trafficking is committed when a person knowingly sells or offers to sell a controlled substance. *R.C. 2925.03(A)(1)*. The offense is considered aggravated drug trafficking if the drug involved is any compound, mixture, preparation or substance included in schedule I or schedule II, with the exception of marijuana, cocaine, L.S.D., heroin and hashish. *R.C. 2925.03(C)(1)*. Oxycodone [**6] is a schedule II narcotic that is an opiate or opium derivative. *R.C. 3719.41(A)(1)(n)*. See, also, *R.C. 2925.01(A)* (referring to *R.C. 3719.01* for the meaning of schedule II).

[*P13] Trafficking in such a substance is a fourth degree felony unless a penalty enhancement provision applies. *R.C. 2925.03(C)(1)(a)*. In particular, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, then aggravated trafficking 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. *R.C. 2925.03(C)(1)(c)*.

[*P14] The bulk amount of a compound, mixture, preparation or substance that is or contains any amount of a schedule II opiate or opium derivative is defined as an amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual. *R.C. 2925.01(D)(1)(d)*. A standard pharmaceutical reference manual is defined as including standard references that are approved by the state board of pharmacy. *R.C. 2925.01(M)(3)*.

[*P15] Here, it was established that Oxycontin is oxycodone. (Tr. 113). [**7] Further, it was demonstrated that appellant offered to sell the informant six 80 milligram tablets of Oxycontin for $ 300, which money the informant provided to appellant. The testimony of the informant and a detective, in addition to taped conversations, supported this claim. As appellant notes, the trial court instructed the jury on the relevant definition of the bulk amount. (Tr. 149-150, 179).

[*P16] Appellant's only argument here is that there was insufficient evidence presented to support the contention that the amount of Oxycontin contained in six 80 milligram tablets equals or exceeds the bulk amount in order to elevate count two to a third degree felony. He characterizes the testimony on this matter as murky. The state urges that they presented sufficient testimony that six 80 milligram tablets of Oxycontin equals or exceeds the bulk amount.

[*P17] At trial, a forensic scientist explained that the bulk amount depends on dosage and originally answered that she "believe[d]" the bulk amount of 80 milligram Oxycontin tablets to be six pills. (Tr. 109). Appellant seems to take issue with the fact that the expert used the word "believe" instead of using more definitive language.

[*P18] However, the [**8] expert thereafter continued to discuss how the bulk amount is set by the Ohio State Board of Pharmacy when they determine based upon dosage how much a person can ingest in one day. She repeated two more times without qualification that the bulk amount of 80 milligram Oxycontin tablets is six pills. (Tr. 112, 114). She also specified that the daily dosage provided by the state pharmacy board is ninety milligrams. She then applied the statutory definition in *R.C. 2925.01(D)(1)(d)* of five times the maximum daily dosage to arrive at 450 milligrams, which bulk amount threshold is less than the 480 milligrams contained in six 80 milligram tablets. (Tr. 114).

[*P19] After viewing the evidence in the light most favorable to the state, a reasonable person could conclude that six 80 milligram tablets of Oxycontin is more than the bulk amount. See, e.g., *State v. Fisher, 5th Dist. No. 05CAA04020, 2006 Ohio 2201, P21, 24-25*; *State v. Cole, 12th Dist. No. CA2004-01-007, 2005 Ohio 2274, P30*. Accordingly, appellant's specific argument on the bulk amount is without merit.

[*P20] However, since there did not actually exist any Oxycontin here, there is a different problem with the sufficiency of the evidence surrounding [**9] the bulk amount for purposes of penalty enhancement. It is well-established that drug trafficking can occur even where no drugs exist due to the statutory language "sell or offer to sell". See *State v. McKenzie (Sept. 12, 1996), 7th Dist. No. 06-JE-2, 1996 Ohio App. LEXIS 4002* (defendant took money to buy drugs and never returned). This is based upon the Ohio Supreme Court's defining "offer" as used in *R.C. 2925.03(A)(1)* as a declaration of one's readiness and willingness to sell drugs and their explanation that the offense entails an offer to sell drugs, not an offer of the drugs themselves. *See State v. Scott (1982), 69 Ohio St.2d 439, 440, 432 N.E.2d 798*. The use of "offer to sell" disjunctively with "sell" has been described as an attempt by the legislature to curtail the marketing phase of drug trafficking. *Id. at 441*. See, also, *State v. Patterson (1982), 69 Ohio St.2d 445, 447-448, 432 N.E.2d 802* (reiterating that failure to deliver is not a defense). Still, these cases merely dealt with the drug trafficking offense in *R.C. 2925.03(A)(1)* and did not involve the penalty enhancement provisions in *R.C. 2925.03(C)*.

[*P21] When it comes to enhancing the penalty, the Supreme Court has more recently stated that the statutory hierarchy of penalties [**10] based upon the identity and amount of the drug presupposes that a detectable amount of a controlled substance is present within the substance before the penalty enhancement

applies. *State v. Chandler, 109 Ohio St.3d 223, 2006 Ohio 2285, P18, 846 N.E.2d 1234*. In that case, the defendants pretended to sell crack but actually delivered only baking soda. They were convicted of drug trafficking and also received the highest penalty enhancement for offering to sell more than 100 grams of crack cocaine. *Id. at P19*. The defendants were not charged with the separate crime of trafficking in counterfeit drugs, which requires knowledge that the drugs are counterfeit. See *R.C. 2925.37*.

[*P22] The Supreme Court determined that the defendants' convictions of drug trafficking could stand under *Scott* and *Patterson* because they offered to sell drugs in violation of *R.C. 2925.03(A)(1)*, regardless of whether actual drugs were involved. *Id. at P9*. However, the Court reversed the penalty enhancement, ruling that the state was required to prove the identity of the substance as well as a detectable amount of that substance, not for conviction but to impose the penalty enhancement. *Id. at P16*.

[*P23] In formulating its rationale, the Supreme [**11] Court noted that by the terms of the penalty provisions in *R.C. 2925.03(C)*, the substance must be or contain the drug alleged. *Id. at P18*. "This language presumes that a detectable amount of cocaine is present within the substance before the penalty enhancement applies." Id. The Court reiterated that the statute is clear that a "substance offered for sale must contain some detectable amount of the relevant controlled substance" before a person can be sentenced under a penalty enhancement such as *R.C. 2925.03(C)(4)(g)*. *Id. at P21*.

[*P24] The Court concluded that the jury's finding that the amount of the drug equaled or exceeded 100 grams of crack cocaine was contrary to fact, for the substance involved was 130.87 grams of baking soda. *Id. at P16, 19*. Consequently, regardless of the fact that a defendant offers to sell crack cocaine, the penalty enhancement is inapplicable where there is no crack cocaine to be detected. The Court thus has separated the provisions of the drug trafficking statute into distinct rules regarding an offer to sell drugs: one regarding the conviction for the offer to sell, where proof of an actual drug is not required; and one regarding the bulk amount enhancement, [**12] where proof of an actual drug is required.

[*P25] We note that the dissenting justices in *Chandler* argued that the separate holdings allowing the conviction but then disallowing the penalty enhancement were contradictory and contrary to the statute's language. The dissent opined that the enhancement applies to the knowing offer to sell a certain amount of a controlled substance regardless of what was actually sold. *Id. at P35* (Resnick, J., dissenting); *P53-54, 56* (O'Connor, J., dissenting). It was noted that even the lowest penalty provisions use the "drug involved" language as different drugs involve different degrees of offenses. *Id. at P55* ("The 'amount of the drug involved' is more properly construed as the 'amount of the drug involved in the offer,' at which time the trafficking crime is complete").

[*P26] Nevertheless, their arguments were not persuasive to the majority. As such, the current state of law is that a penalty enhancement provision cannot be used where there were no detectable traces of the alleged substance. We could stop here and reverse appellant's enhancement on this basis; however, due to a First District case distinguishing *Chandler*, we shall continue our analysis. For the [**13] following reasons, we hold that there is no valid reason for us to distinguish appellant's offer to sell Oxycontin resulting in no sale and Chandler's offer to sell crack cocaine resulting in a sale of baking soda. Rather, if Chandler is entitled to have his penalty enhancement struck, then so is appellant.

[*P27] The First District has distinguished *Chandler* on the grounds that a counterfeit substance that has been tested is different than a substance that is offered to be sold but that is never delivered. *State v. Garr, 1st Dist. No. 60794, 2007 Ohio 3448*. They focused on the defendant's statement that the crack cocaine he intended to sell was high quality. *Id. at P6*. The court concluded that circumstantial evidence can be utilized to establish that there was "some detectable amount of the relevant controlled substance" as required by *Chandler*. *Id. at P5*.

[*P28] Even if the *Garr* court's interpretation and method of distinguishing *Chandler* were correct, which is highly debatable, *Garr* itself is distinguishable from the case at bar. Although appellant offered to sell the informant Oxycontin, there is no evidence circumstantial or otherwise that there was some detectable amount of Oxycontin in some [**14] drugs offered for sale. Rather, the only evidence was that appellant was attempting to find some Oxycontin and that he never did find any pills to purchase in order to resell them to the informant. In a case where a defendant is trying to find a drug for a buyer but never finds it, the penalty enhancement provision, which the Supreme Court has held requires some detectable amount, is not satisfied.

[*P29] Notably, there is an appellate case out of the Eight District, which is contrary to the First District's *Garr* case and which was decided while the *Chandler* appeal was pending in the Supreme Court. *State v. Elliott, 8th Dist. No. 86461, 2006 Ohio 1092*. In *Elliott*, the defendant offered to sell a quarter of an ounce of crack cocaine for $ 200 to an undercover officer. The officer said that after he tried the crack that he had just purchased for $ 20 from the defendant, he may return for the quarter ounce. *Id. at P7*. The defendant was immediately

arrested. The $ 20 rock turned out to be baking soda and the verbally offered quarter ounce of crack cocaine was never recovered.

[*P30] The defendant was convicted on the following counts: (1) trafficking in a counterfeit substance by selling the rock of [**15] baking soda; (2) offering to sell the quarter ounce of crack cocaine that was never produced; and (3) offering to sell the $ 20 worth of crack cocaine that turned out to be baking soda. It is the treatment of the second count that is relevant to our analysis. Regarding this count, the defendant's penalty was enhanced to a third degree felony upon the jury's finding that he offered to sell an amount equaling or exceeding five grams but less than ten grams.

[*P31] The Eighth District upheld the drug trafficking conviction for the offer to sell crack cocaine under count two. *Id at P26, 29*. However, the court held that the state did not provide sufficient evidence to sustain the penalty enhancement to a third degree felony. *Id. at P26*. Adopting the Fifth District's *Chandler* analysis as to the penalty enhancement, the Eighth District concluded that the state was required to prove a specific amount of the drug actually existed in order to obtain penalty enhancement. *Id. at P27*. Thus, the *Elliott* court modified the conviction for offering to sell the quarter ounce from a third degree felony to a fifth degree felony, which is the lowest crack cocaine penalty provided in *R.C. 2925.03(C)*. *Id. at P3, 27*.

[*P32] [**16] Considering that we now have the benefit of the Supreme Court's *Chandler* decision in a baking soda case, the *Elliott* court's handling of the issue of a case involving drugs that were never produced or recovered has even more support. We note here that the Ohio Attorney General's Amicus Brief in the Supreme Court's *Chandler* case specifically equated the defendant who sells a counterfeit substance with the defendant who does not have any substance. That brief stated:

[*P33] "This case, rather, turns on whether *R.C. 2925.03* applies to individuals who offer to sell crack that turns out not to exist, either because it is fake *or because the defendant literally has nothing to sell*." (Emphasis added).

[*P34] To conclude the analysis, the Supreme Court's *Chandler* case ruled that the penalty enhancement provisions in the drug trafficking statute cannot be used where there is no detectable trace of the alleged substance. Pursuant to this precedent, then we hold that where a defendant offers to sell six Oxycontin tablets but is unable to procure the pills for resale, the state has failed to show a detectable amount of a controlled substance as required for penalty enhancement. There is no reason to distinguish [**17] between Chandler's baking soda that did not contain drugs and appellant's complete lack of drugs. This is especially true in a case where it is established that appellant unsuccessfully went looking for drugs to resell and kept meeting with the informant thereafter (as opposed to *Garr* where the court thought the defendant may have actually had crack to sell but merely failed to hand it over due to a failure to produce payment). For all of the foregoing reasons, we hold that there is insufficient evidence to support the penalty enhancement provision.

ASSIGNMENT OF ERROR NUMBER TWO

[*P35] Appellant's second assignment of error contends:

[*P36] "THE DEFENDANT-APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

[*P37] Weight of the evidence deals with the inclination of the greater amount of credible evidence to support one side of the issue over the other. *Thompkins, 78 Ohio St.3d at 387*. The reviewing court determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id. Where the criminal case was tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict was against the manifest weight of the evidence. *Id. at 389*. [**18] This is only done in exceptional circumstances. *Id. at 387*.

[*P38] When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125*. Rather, we defer to the jury who was best able to weigh the evidence, draw rational inferences and judge the credibility of witnesses by viewing their demeanor, voice inflections and gestures. See *Seasons Coal Co. v. Cleveland (1994), 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273*; *State v. DeHass (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212*.

[*P39] After setting forth the law on weight of the evidence, appellant merely concludes that the jury was misguided and created a miscarriage of justice regarding all three counts. Appellant does not set forth any argument, cite to the record or mention any particular view of the evidence he wishes we would adopt. This is violative of *App.R. 16(A)(7)*, which provides that an appellant's brief shall contain an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, [**19] statutes, and parts of the record on which appellant relies. Pursuant to *App.R. 12(A)*, the court may disregard an assignment of error presented for review if the party rais-

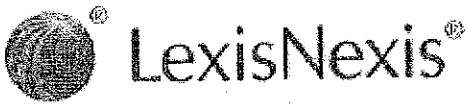
ing it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under *App.R. 16(A)*.

[*P40] In any event, the testimony of the informant is not incredible. Although the defense attempted to discredit her as being a drug addict who was looking to benefit herself and seek retribution on appellant's friend who had informed on her the previous spring, the jury could find her version of the transactions to be credible. The jury also heard taped conversations between the informant and appellant and heard the testimony of the detective who searched the informant prior to the sales and retrieved the drugs thereafter. Upon reviewing all of the evidence, we conclude that it was not a manifest miscarriage of justice to believe the testimony of the informant. This assignment of error is overruled.

[*P41] For the foregoing reasons, appellant's convictions are affirmed. However, the additional finding regarding the penalty enhancement, which elevated [**20] the offense from a fourth degree to a third degree felony, is reversed and this case is remanded for modification of the degree of the offense and for resentencing accordingly.

Donofrio, J., concurs.

Waite, J., concurs.



LEXSEE 2007 OHIO 564

State of Ohio, Appellee v. Lacone Scott, Appellant

Court of Appeals No. WD-05-095

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, WOOD COUNTY

2007 Ohio 564; 2007 Ohio App. LEXIS 524

February 9, 2007, Decided

PRIOR HISTORY: [**1] Trial Court No. 05-CR-395.

DISPOSITION: JUDGMENT REVERSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a judgment from the Wood County Court of Common Pleas (Ohio), which convicted him of aggravated trafficking in cocaine and trafficking in a counterfeit controlled substance, in violation of *R.C. §§ 2925.03(C)(4)(f)* and *2925.37(B)*. The trial court imposed concurrent terms of imprisonment.

OVERVIEW: Defendant travelled to a particular location for the express purpose of offering to sell crack cocaine. He engaged in counterfeit drug sales in order to support his own drug addiction by selling simulated crack cocaine to unsophisticated buyers who thought they were purchasing crack cocaine. The charges against defendant arose from his offer to sell crack cocaine to an undercover narcotics officer, and his intent to sell the officer a counterfeit substance which was a Midol-based substance containing no crack cocaine. Defendant was indicted and after a jury trial, he was convicted as charged and sentenced. On appeal, it was noted that defendant only appealed the conviction for aggravated trafficking in cocaine. The court relied on analogous caselaw and found that as defendant offered to sell crack cocaine to the officer, he violated *R.C. § 2925.03(A)*. However, because the substance that he offered for sale was counterfeit, he could not be convicted for aggravated trafficking of a specific amount of crack cocaine under *§ 2925.03(C)(4)(f)*. An assignment of error relating to the sentence imposed was rendered moot by the court's disposition of the conviction.

OUTCOME: The court reversed and vacated the conviction and sentence imposed on the trafficking in cocaine conviction, and the matter was remanded for resentencing based on a fifth degree felony of trafficking in cocaine, in violation of *§ 2925.03(C)(4)(a)*. The remainder of the trial court judgment was affirmed.

COUNSEL: Raymond Fischer, Wood County Prosecuting Attorney, and William M. Connelly, Jr., Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

JUDGES: OSOWIK, J. Mark L. Pietrykowski, P.J., William J. Skow, J., Thomas J. Osowik, J., CONCUR.

OPINION BY: Thomas J. Osowik

OPINION

DECISION AND JUDGMENT ENTRY

OSOWIK, J.

[*P1] This is an appeal from a judgment of the Wood County Court of Common Pleas. Appellant was found guilty of one count of aggravated trafficking in cocaine in violation of *R.C. 2925.03(C)(4)(f)*, and one count of trafficking in a counterfeit controlled substance in violation of *R.C. 2925.37(B)*. Appellant was sentenced to concurrent terms of incarceration of five years and one

year. We note for clarity that appellant is not appealing his conviction for trafficking in a counterfeit controlled substance. For the reasons set forth below, this court reverses and remands for resentencing appellant's trafficking in cocaine conviction.

[*P2] Appellant, Lacone Scott, sets forth the following three assignments of error:

[*P3] "I. The evidence [**2] was not sufficient to support appellant's conviction for aggravated trafficking.

[*P4] "II. Appellant's conviction for aggravated trafficking is against the manifest weight of the evidence.

[*P5] "III. It constituted error to sentence appellant under an unconstitutional statute."

[*P6] The following undisputed facts are relevant to the issues raised on appeal. On July 21, 2004, appellant traveled to Bowling Green, Ohio, for the express purpose of offering to sell two ounces of crack cocaine. Appellant engaged in counterfeit drug sales in order to support his own drug addiction. Appellant would sell simulated crack cocaine to unsophisticated buyers who erroneously believed they were purchasing crack cocaine.

[*P7] On July 21, 2004, appellant offered to sell two ounces of crack cocaine for $ 1,700 to a buyer whom, unbeknownst to appellant, was an undercover narcotics agent. Appellant and the sham buyer arranged to meet at a gas station near Findlay, Ohio. The undercover narcotics agent was performing a sting operation in the course of his employment with the Ohio Bureau of Criminal Investigations.

[*P8] Appellant was arrested after offering to sell two ounces [**3] of crack cocaine to the undercover narcotics agent. Appellant does not dispute that he offered to sell crack cocaine. Appellant does not dispute that the actual substance he was prepared to sell was a modified over-the-counter Midol counterfeit concoction.

[*P9] On May 5, 2005, appellant was indicted on one count of aggravated trafficking in cocaine in violation of *R.C. 2925.03(C)(4)(f)* and one count of trafficking in a counterfeit controlled substance in violation of *R.C. 2925.37(B)*. A jury trial was conducted on October 4, 2005. Appellant was convicted on both counts. Appellant limits his appeal to his conviction of aggravated trafficking in cocaine.

[*P10] In his first assignment of error, appellant contends the evidence was insufficient to support his trafficking in cocaine conviction. In his interrelated second assignment of error, appellant claims the jury verdict finding him guilty of trafficking in cocaine was against the manifest weight of the evidence. Appellant's first and second assignments of error similarly involve weight and sufficiency of the evidence in this case. Thus, for expediency, we will consider [**4] them simultaneously.

[*P11] A criminal conviction may be overturned on appeal if it is against the manifest weight of the evidence or because there is insufficient evidence. When examining whether a conviction is against the manifest weight of the evidence, the appellate court serves as a "thirteenth juror" to conclude whether the trial court lost its way so significantly as to create a manifest miscarriage of justice necessitating that the conviction be overturned. *State v. Thompkins (1997), 78 Ohio St.3d 380, 387, 1997 Ohio 52, 678 N.E.2d 541.*

[*P12] In reaching this decision, we must review and consider the record, weigh the evidence, reasonable inferences, and consider witness credibility. Id. The trial court directly observes and is presented with the witnesses and the evidence. Because the trial court's role enables it to directly assess witnesses and evidence in reaching its conclusion, we grant substantial deference to trial court determinations. *State v. Mickles, 6th Dist. No. L-05-1206, 2006 Ohio 3803, P 46.*

[*P13] In conjunction with manifest weight analysis, we must simultaneously consider the sufficiency of the evidence presented to the trial court. [**5] We must conclude whether the evidence submitted was legally sufficient to establish the elements of the charged offense. *Thompkins, 78 Ohio St. 3d 386-387.* We must ascertain whether the evidence presented, if believed, would satisfy an average person of the defendant's guilt beyond a reasonable doubt. *State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.*

[*P14] In our application of the above review standards and principles to the present case, we note that the factual scenario of this case is unconventional in comparison with standard sufficiency and manifest weight arguments. In support of his first two assignments, appellant does not deny that he offered to sell crack cocaine. That act is, in and of itself, criminal. Rather, appellant asserts in support of these assignments that his conviction of trafficking in cocaine cannot stand because the actual substance appellant intended to sell was not crack cocaine. The compound appellant falsely represented to be crack cocaine was, ironically, a Midol-based concoction prepared by appellant in order to simulate the appearance of crack cocaine.

[*P15] In order for us to determine [**6] the propriety of appellant's first two assignments, we must determine whether we are persuaded by appellant's position that the counterfeit composition of the substance necessarily undermines the validity of appellant's trafficking conviction.

[*P16] In this case, appellant's disputed conviction and sentencing was done pursuant to an enhanced penalty section set forth in *R.C. 2925.03(C)(4)(f)*. That statute provides "if the amount of the drug involved equals or exceeds 500 grams but is not less than 1,000 grams of cocaine that is not crack cocaine or equals or exceeds 25 grams but is less than 100 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." Thus, appellant was convicted under an aggravated portion of the trafficking statute, rendering the conviction a first degree felony. It is undisputed that appellant offered to sell an undercover narcotics agent two ounces of crack cocaine. In actuality, the substance was over-the-counter Midol which appellant modified to mimic the appearance of crack cocaine.

[*P17] [**7] The Supreme Court of Ohio recently considered a case in which the critical underlying facts were analogous to the case at hand. In *State v. Chandler (2006), 109 Ohio St.3d 223, 2006 Ohio 2285, 846 N.E.2d 1234*, the appellant was challenging his crack cocaine trafficking conviction based upon the fact that the substance he was actually offering to sell was baking soda. In *Chandler*, the Supreme Court of Ohio determined that because the substance offered as crack cocaine did not actually contain any detectable amount of the drug, it was not proper to convict and sentence pursuant to the penalty enhancement provision of *R.C. 2925.03(C)(4)(g)*. The court ruled that the impropriety stemmed from the fact that the enhanced provision dictates that specified amounts of the named drug be involved. This portion of the statute becomes inapplicable in instances of counterfeit drugs.

[*P18] The analysis relied upon and cited by the Supreme Court of Ohio in *Chandler* connected to *R.C. 2925.03(C)(4)(g)* is analogous to the disputed conviction at issue in this case connected to *R.C. 2925.03(C)(4)(f)*. In *Chandler*, the Supreme [**8] Court concluded that appellant's underlying conviction for trafficking in a controlled substance in violation of *R.C. 2925.03(A)(1)* could properly stand given that the appellant did offer to sell the prohibited controlled substance.

[*P19] The general trafficking in a controlled conviction does not require the actual transfer of the prohibited substance to the buyer. The Supreme Court of Ohio determined that although the enhanced sentencing of the appellant applying the aggravated-level penalty provisions must be reversed given the counterfeit nature of the actual substance, the underlying conviction is not invalidated. This result is dictated by the Ohio Supreme Court holding in *State v. Patterson (1982), 69 Ohio St.2d 445, 432 N.E.2d 802*, which found one can be properly convicted of aggravated trafficking without actually transferring a controlled substance to the buyer.

[*P20] We find the above discussed case law analogous to and determinative of the outcome in this case. It is undisputed that appellant offered to sell crack cocaine. Appellant violated *R.C. 2925.03(A)*. Appellant committed a fifth degree felony of trafficking [**9] in cocaine.

[*P21] Because the substance offered for sale proved to be counterfeit, we must reverse appellant's sentence for commission of a first degree felony pursuant to *R.C. 2925.03(C)(4)(f)* and remand to the trial court so that appellant may be resentenced for commission of a fifth degree felony pursuant to *R.C. 2925.03(C)(4)(a)*. We find appellant's first assignment of error not well-taken and second assignment of error well-taken.

[*P22] In his third assignment of error, appellant asserts this case must be remanded for resentencing as the judge made findings pursuant to *R.C. 2929.14(B)* and *R.C. 2929.14(D)(2)(a)*, statutes now deemed unconstitutional by *State v. Foster (2006), 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470*. Given our holding in response to the first two assignments of error, we find appellant's third assignment of error moot.

[*P23] The judgment of the Wood County Court of Common Pleas is reversed and remanded for resentencing. Appellee is ordered to pay the costs of this appeal pursuant to *App.R. 24*. Judgment for the clerk's expense [**10] in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*.

Mark L. Pietrykowski, P.J.

William J. Skow, J.

Thomas J. Osowik, J.

CONCUR.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

LEXSTAT ORC 2925.03

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH NOVEMBER 10, 2009 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 28, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2925. DRUG OFFENSES
CORRUPTING; TRAFFICKING

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ORC Ann. 2925.03 (2009)

§ 2925.03. 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 de-

gree, 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, 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 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 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 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.

(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 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 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.

(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 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.

(I) As used in this section, "drug" includes any substance that is represented to be a drug.

HISTORY:

136 v H 300 (Eff 7-1-76); 141 v S 67 (Eff 8-29-86); 143 v H 215 (Eff 4-11-90); 143 v H 261 (Eff 7-18-90); 143 v H 266 (Eff 9-6-90); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v S 174 (Eff 7-31-92); 144 v H 591 (Eff 11-2-92); 145 v H 377 (Eff 9-30-93); 145 v H 391 (Eff 7-21-94); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 147 v S 164 (Eff 1-15-98); 147 v S 66 (Eff 7-22-98); 148 v S 107 (Eff 3-23-2000); 148 v H 241 (Eff 5-17-2000); 148 v H 528. Eff 2-13-2001; 149 v S 123, § 1, eff. 1-1-04; 151 v S 154, § 1, eff. 5-17-06; 151 v H 241, § 1, eff. 7-1-07; 152 v H 195, § 1, eff. 9-30-08.

LEXSTAT ORC ANN. 2929.14

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH NOVEMBER 10, 2009 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 28, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.14 (2009)

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section or in division (D)(6) of *section 2919.25 of the Revised Code* and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section, in *section 2907.02, 2907.05*, or *2919.25 of the Revised Code*, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in *section 2919.25 of the Revised Code*, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D) (1) (a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141 [2941.14.1]*, *2941.144 [2941.14.4]*, or *2941.145 [2941.14.5] of the Revised Code*, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 [2941.14.4] of the Revised Code* that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 [2941.14.5] of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 [2941.14.1] of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (D)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 [2923.16.1] of the Revised Code* or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 [2941.14.6] of the Revised Code* that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 [2923.16.1] of the Revised Code* or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 [2941.14.11] of the Revised Code* that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.12* or *2923.123 [2923.12.3] of the Revised Code*. The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 [2923.12.2] that involves a deadly weapon that is a firearm other than a dangerous ordnance, *section 2923.16*, or *section 2923.121 [2923.12.1] of the Revised Code*. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.13 of the Revised Code* unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 [2941.14.12] of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer as defined in *section 2941.1412 [2941.14.12] of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (D)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2) (a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of *section 2929.01 of the Revised Code*, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) (a) Except when an offender commits a violation of *section 2903.01* or *2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03* or *2925.11 of the Revised Code* and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161 [3719.16.1], 4729.37, or 4729.61, division (C) or (D) of section 3719.172 [3719.17.2], division (C) of section 4729.51, or division (J) of *section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 [2941.14.10] of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any

duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under *section 2929.16* or *2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code* and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 [2941.14.14] of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section 2935.01 of the Revised Code*, or an investigator of the bureau of criminal identification and investigation, as defined in *section 2903.11 of the Revised Code*, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1415 [2941.14.15] of the Revised Code* that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 [2941.14.15] of the Revised Code*, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(7) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323 [2907.32.3], or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 [2941.14.22] of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised.

(b) The prison term imposed under division (D)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of *section 2903.11*, *2903.12*, or *2903.13 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1423 [2941.14.23] of the Revised Code* that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the same degree as the violation.

(E) (1) (a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (D)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates *section 2917.02*, *2917.03*, *2921.34*, or *2921.35 of the Revised Code*, if an offender who is under detention at a detention facility commits a felony violation of *section 2923.131 [2923.13.1] of the Revised Code*, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of *section 2921.34 of the Revised Code*, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of *section 2911.01 of the Revised Code*, a violation of division (A) of *section 2913.02 of the Revised Code* in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of *section 2921.331 [2921.33.1] of the Revised Code*, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to *section 2929.16*, *2929.17*, or *2929.18 of the Revised Code*, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code*. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code.*

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) or division (J)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of *section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) The court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section 2907.02 of the Revised Code*, or division (B) of *section 2907.02 of the Revised Code* provides that the court shall not sentence the offender pursuant to *section 2971.03 of the Revised Code.*

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19]*, or *2941.1420 [2941.14.20] of the Revised Code.*

(4) A person is convicted of or pleads guilty to a violation of *section 2905.01 of the Revised Code* committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code.*

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022 [2929.02.2], division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of *section 2929.06 of the Revised Code* requires the court to sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code.*

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of *section 2929.02 of the Revised Code* requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code.*

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the *Revised Code, section 2929.142 [2929.14.2] of the Revised Code,* or *section 2971.03 of the Revised Code,* or any other provision of law, *section 5120.163 [5120.16.3] of the Revised Code* applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.142 [2941.14.2] of the Revised Code* that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) (1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.143 [2941.14.3] of the Revised Code* that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2) (a) If an offender is convicted of or pleads guilty to a felony violation of *section 2907.22, 2907.24, 2907.241 [2907.24.1],* or *2907.25 of the Revised Code* and to a specification of the type described in *section 2941.1421 [2941.14.21] of the Revised Code* and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (J)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of *section 2907.22, 2907.23, 2907.24, 2907.241 [2907.24.1],* or *2907.25 of the Revised Code* and also was convicted of or pleaded guilty to a specification of the type described in *section 2941.1421 [2941.14.21] of the Revised Code* regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (J)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (J)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of *section 2907.22, 2907.24, 2907.241 [2907.24.1],* or *2907.25 of the Revised Code* and any residential sanction imposed for the violation under *section 2929.16 of the Revised Code.* A sanction imposed under this division shall be considered to be a community control sanction for purposes of *section 2929.15 of the Revised Code,* and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under *section 5120.031 [5120.03.1] of the Revised Code* or for placement in an intensive program prison under *section 5120.032 [5120.03.2] of the Revised Code,* disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2] of the Revised Code,* whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2] of the Revised Code*, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2] of the Revised Code* and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A) (1) of *section 2903.06 of the Revised Code* and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to *section 2929.142 [2929.14.2] of the Revised Code.*

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 88 (Eff 9-3-96); 146 v H 445 (Eff 9-3-96); 146 v H 154 (Eff 10-4-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 2 (Eff 1-1-99); 148 v S 1 (Eff 8-6-99); 148 v H 29 (Eff 10-29-99); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 130. Eff 4-7-2003; 149 v S 123, § 1, eff. 1-1-04; 150 v H 12, §§ 1, 3, eff. 4-8-04*; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 137, § 1, eff. 7-11-06; 151 v H 137, § 3, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 184, § 1, eff. 9-9-08; 152 v S 220, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09.