

ORIGINAL

In the
Supreme Court of Ohio

OLIVER LUCIEN GARR,

Petitioner,

v.

WARDEN, MADISON CORRECTIONAL
INSTITUTION,

Respondent.

: Case No. 2009-1323
:
:
: On Review of Certified Question from
: The United States District Court for the
: Southern District of Ohio
:
: U.S. District Court Case
: No. 1:08-cv-00293
:
:

MERIT BRIEF OF RESPONDENT WARDEN

TIMOTHY YOUNG
Ohio Public Defender

RICHARD CORDRAY
Attorney General of Ohio

KRISTOPHER A. HAINES* (0080558)
Assistant State Public Defender
**Counsel of Record*
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614-466-5394
614-752-5167 fax
kristopher.haines@opd.ohio.gov

Counsel for Petitioner
Oliver Lucien Garr

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
WILLIAM LAMB (0051808)
DIANE MALLORY (0014867)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Respondent
Warden, Madison Correctional Institution

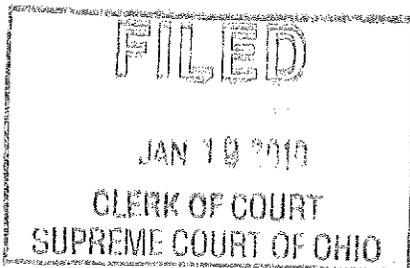


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS	3
A. Garr offered to sell high-quality cocaine to an informant, but the deal was never completed, and no substance was ever recovered.....	3
B. The state appeals court upheld Garr’s conviction and the MDO Penalty.....	3
C. Garr challenged his conviction in federal habeas proceedings, and the federal court has now asked this Court to clarify the Ohio law that applies to Garr’s case.....	4
ARGUMENT.....	6
 <u>Respondent Warden’s Proposition of Law:</u>	
 <i>A person may be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g) without necessarily offering direct scientific proof, such as lab testing of a recovered substance, that a substance offered for sale contained some detectable amount of the relevant controlled substance. No such proof is needed in 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, and where 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 the requisite amount. Any admissible evidence, including circumstantial evidence, may be used to establish the underlying offense of offering to sell a controlled substance under R.C. 2925.03(A)(1) and to establish the amount and identity of the drug involved to permit the application of R.C. 2925.03(C)(4)(g). (State v. Chandler, 2006-Ohio-2285, construed and applied.)</i>	
A. Ohio’s drug-trafficking laws define both offers to sell and actual sales as the same trafficking violation, subject to the same legal regime in all respects.	7
B. Ohio’s drug-trafficking laws define both the baseline offenses and sentencing enhancements in terms of the quantity involved in a trafficking violation, and that is no less true when the violation is based on an offer without a completed sale.	11
C. <i>Chandler</i> merely corrected an unsupportable factual conclusion; it did not broadly prohibit the use of all quantity-based provisions whenever no drug is recovered and testable.	15

D. Any admissible evidence, including circumstantial evidence, may be used to establish the amount of the drug offered.....18

E. Eliminating the availability of quantity-based provisions in all cases based on offers to sell will have harmful practical effects inconsistent with the General Assembly’s intent.19

CONCLUSION.....22

CERTIFICATE OF SERVICEunnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Dupps Co. v. Lindley</i> (1980), 62 Ohio St. 2d 305	8
<i>In re Winship</i> (1970), 397 U.S. 358	4
<i>Jackson v. Virginia</i> (1979), 443 U.S. 307	5
<i>Rice v. CertainTeed Corp.</i> (1999), 84 Ohio St. 3d 417	8
<i>State ex rel. Sears, Roebuck & Co. v. Ind. Comm'n of Ohio</i> (1990), 52 Ohio St. 3d 144	8
<i>State v. Chandler</i> , 109 Ohio St. 3d 223, 2006-Ohio-2285	<i>passim</i>
<i>State v. Garr</i> (1st Dist.), 2007-Ohio-3448	<i>passim</i>
<i>State v. Garr</i> , 115 Ohio St. 3d 1475, 2007-Ohio-5735	4
<i>State v. Jenks</i> (1991), 61 Ohio St. 3d 259	18
<i>State v. Jeter</i> (6th Dist.), 2004 Ohio App. Lexis 1177, 2004-Ohio-1332	10, 11, 13, 19
<i>State v. Kruse</i> (6th Dist.), 2006 Ohio App. Lexis 3075, 2006-Ohio-3179	10
<i>State v. Mitchell</i> (7th Dist.), 2008-Ohio-6920	5, 14, 19
<i>State v. Patterson</i> (1982), 69 Ohio St. 2d 445	9, 17
<i>State v. Pimental</i> (8th Dist.), 2005-Ohio-384	19
<i>State v. Pumpelly</i> (12th Dist. 1991), 77 Ohio App. 3d 470	9

State v. Scott (1982),
69 Ohio St. 2d 4399, 17

Truesdale v. Dallman (6th Cir. 1982),
690 F. 2d 769

Statutes, Rules and Provisions

R.C. 1.47(B).....8

R.C. 2925.034, 8, 17

R.C. 2925.03(A).....6, 8, 9, 18

R.C. 2925.03(B).....8

R.C. 2925.03(C)..... *passim*

R.C. 2925.37(B).....16

R.C. 2925.37(H).....16

R.C. 2941.1410(A).....4

Other Authorities

Lyman, Michael D., *Practical Drug Enforcement* (3d Ed. 2007)20

INTRODUCTION

This case involves the intersection of two well-established principles in Ohio's drug-trafficking laws. First, Ohio law defines an offer to sell drugs, or an actual drug sale, to constitute the same violation: trafficking in drugs. Second, Ohio law punishes drug trafficking more heavily based on the quantity of the drug involved in the violation. Taken together, these precepts mean that a conviction for trafficking in large amounts of drugs, and the "major drug offender" ("MDO") penalties provided for very high quantities ("MDO Penalty"), are treated the same regardless of whether the factual predicate for the trafficking violation was an actual drug sale or an offer to sell.

Thus, Petitioner Oliver Garr was properly convicted for trafficking in cocaine, with an MDO Penalty, after he was caught on tape offering to sell a police informant two kilograms of cocaine—even though the sale was never consummated (due to a payment dispute), and even though no drugs were ever discovered in Garr's possession. *State v. Garr* (1st Dist.), 2007-Ohio-3448 ("Garr State App. Op."), ¶¶ 1-2. As the state appeals court explained, the taped conversations were sufficient to support the jury's finding that Garr offered to sell such a large amount: Garr repeatedly stated the amount and assured his would-be buyer that the cocaine would be "high quality," and those reassurances were in the face of the informant-buyer's comment that he would refuse to pay for counterfeit drugs. *Id.* at 6.

Despite the appeals court's conclusion, the federal court hearing Garr's habeas case has asked this Court to address the effect on Garr's case, if any, of this Court's decision in *State v. Chandler*, 109 Ohio St. 3d 223, 2006-Ohio-2285. In *Chandler*, the Court held that a defendant who purported to sell crack cocaine, but actually sold 131 grams of baking soda, could not be subject to an MDO Penalty, because a "substance offered for sale must contain some detectable

amount of the relevant controlled substance” for an MDO Penalty to apply. *Id.* at syllabus. The federal court has asked whether this rule

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.

That is, the question is whether the rule applied to the fake-drug scenario in *Chandler* extends to cases where no drug is recovered at all, and the answer to that question is “no.”

Chandler was based on—and thus is properly limited to cases that also involve—the presence of a fake drug. The Court explained in *Chandler* that the “substance offered” there was undoubtedly not crack or any controlled substance, so it was a mistake of fact when “the jury found that 130.87 grams of baking soda equaled or exceeded 100 grams of crack cocaine.” *Id.* at ¶ 19. The Court corrected that unsupportable factfinding and invalidated Chandler’s MDO Penalty but upheld his conviction for trafficking. *Id.* at ¶¶ 9, 21.

In *Chandler*, the Court did not divide all offer-based cases from all sale-based cases, and it did not create a global rule forbidding the application of quantity-based considerations whenever no drugs are recovered. To the contrary, the Court re-affirmed that a trafficking conviction could rest on a stated offer to sell crack, even when the substance offered turned out to be baking soda—confirming that offers are still an independent form of trafficking.

After *Chandler*, offer-based convictions, and offer-based MDO Penalties, remain subject to the same evidentiary rules as sale-based convictions and MDO Penalties. When the presence of baking soda does not support an evidentiary conclusion that the requisite amount of crack was “the substance offered,” or “involved in the violation,” an MDO Penalty cannot stand, as in *Chandler*. But here, where no drugs were recovered, and the entire violation was based upon

Garr's statements offering cocaine for sale, the MDO Penalty was validly supported by circumstantial evidence that the substance he was offering—and would supply if the deal were consummated—would be a large quantity of real cocaine. Any other conclusion would contravene the General Assembly's decision to treat identically offers to sell and actual sales, and its decision to subject all violations—whether based on a sale or an offer to sell—to quantity-based enhancements.

Consequently, the Court should answer the federal court's question "no."

STATEMENT OF THE CASE AND FACTS

A. Garr offered to sell high-quality cocaine to an informant, but the deal was never completed, and no substance was ever recovered.

During a sting operation, Garr told a police informant that he would sell him two kilograms of cocaine for \$42,000. Garr State App. Op. at ¶ 2. Garr detailed the terms of the offer in conversations that were recorded and later played to the jury at trial. *Id.* at ¶¶ 2, 6. The amount of the cocaine was identified multiple times and was never less than two kilograms. *Id.* at ¶ 6. During one conversation, the informant indicated that he would not pay for the cocaine if it was counterfeit. *Id.* During another conversation, Garr assured the informant that the cocaine he intended to sell him was of high quality. *Id.* Because of a dispute over payment, the sale did not take place, and the cocaine was not recovered. *Id.* at ¶¶ 2, 6.

B. The state appeals court upheld Garr's conviction and the MDO Penalty.

Garr was arrested and charged with drug trafficking, although the sale was never completed, based on the recordings of his offer to sell cocaine. *Id.* at ¶¶ 1-2. The jury heard the evidence described above, and it found that Garr offered to sell more than 1000 grams of

cocaine. *Id.* at ¶ 7. Garr was convicted of drug trafficking as a first-degree felony with a corresponding MDO Penalty, and the court imposed the mandatory ten-year sentence. *Id.* at ¶ 1.¹

The state appeals court upheld both the conviction and the MDO Penalty with its ten-year sentence. *Id.* at ¶ 8. The appeals court reasoned that *Chandler* did not require the production of actual drugs, in the requisite quantity, in every penalty enhancement case. *Id.* at ¶¶ 4-5. Rather, the appeals court read *Chandler* as requiring *some* evidence that the “amount of the drug involved” in a sale or offer included some amount of real drugs, but it held that such evidence could be direct or circumstantial (just like proof in any other case). *Id.* at ¶ 5. It explained that the jury’s conclusion in *Chandler* was contradicted by the scientific evidence that the only substance the defendant planned to sell was purely baking soda, not cocaine or any other illegal drug. *Id.* at ¶ 4. Here, by contrast, Garr’s jury was able to conclude that he offered to sell real cocaine, based on his representations that the cocaine would not be counterfeit and would be high quality. *Id.* at ¶¶ 5-7.

This Court declined review. *State v. Garr*, 115 Ohio St. 3d 1475, 2007-Ohio-5735.

C. Garr challenged his conviction in federal habeas proceedings, and the federal court has now asked this Court to clarify the Ohio law that applies to Garr’s case.

Garr filed a federal habeas corpus petition, claiming that his Ohio conviction violates his federal constitutional rights. The federal Constitution requires that all state convictions be supported by proof beyond a reasonable doubt, *In re Winship* (1970), 397 U.S. 358—that every

¹ Garr’s MDO Penalty was different from an MDO “specification.” The MDO Penalty in R.C. 2925.03(C)(4)(g) is a mandatory sentence: If the amount of cocaine is 1000 grams or more (or 100 grams of crack cocaine), “trafficking in cocaine is a felony of the first degree, the offender is a major drug offender, and the court *shall impose* a mandatory prison term [of ten years].” (emphasis added). An MDO specification, on the other hand, allows a court to make an MDO finding; that specification must be stated in the indictment, and the specification law expressly distinguishes the MDO Penalties in R.C. 2925.03. See R.C. 2941.1410(A) (“Except as provided in section[] 2925.03 . . .”). Garr was indicted with such a specification, but the trial court invoked only the MDO Penalty, stating that “the Court is not imposing any additional time on the specification” See Tr. 914-16.

element of a crime be supported by sufficient evidence, *Jackson v. Virginia* (1979), 443 U.S. 307, 319. Federal habeas review in this type of challenge involves a mix of state and federal law: State law defines what the elements of a crime are to begin with, but federal law determines whether the federal sufficiency standard is met as to those elements. Thus, the parties and the federal district court agree that the federal court cannot resolve Garr's habeas petition without first resolving what proof Ohio law requires of the State in convicting someone of first-degree felony drug-trafficking with an MDO Penalty.

Garr argued to the federal court, and now argues to this Court, that Ohio law requires the State to establish the weight and identity of the substance he offered to sell, and he says that the absence of any actual substance means that the evidence was insufficient, as a matter of law, to support a first-degree felony conviction with a corresponding MDO Penalty. See Certification Order in *Garr v. Warden* (S.D. Ohio July 16, 2009), Case No. 1:08cv293 ("Federal Certification Order") (also filed in this Court, docketed July 22, 2009, in Case No. 2009-1323), at 1, 4. Thus, he insists that, at most, he could have been convicted of a fifth-degree felony, The Warden, by contrast, urges that the circumstantial evidence identified by the state appeals court is sufficient to show that Garr offered to sell real cocaine, and that the absence of any contradictory evidence—such as the presence of fake drugs, as in *Chandler*—leaves the circumstantial evidence sufficient.

The federal court determined that it was unclear how Ohio law applied to Garr's case. The federal court reviewed this Court's *Chandler* decision and the appeals court's decision in *Garr* distinguishing *Chandler*. It also reviewed *State v. Mitchell* (7th Dist.), 2008-Ohio-6920, which disagreed with the *Garr* appeals court and adopted a view similar to Garr's here. See Federal

Certification Order at 4-9. It concluded that this case warranted certification to this Court to address the issue. *Id.* at 7, 8.

Consequently, the federal district court asked this Court 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 (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.

Id. at 8. Both Garr and the Warden urged the Court to accept this question for review, and the Court agreed to do so. *Case Announcements*, 9/30/09. The Warden now urges the Court to answer it "no," and to explain that Garr was validly convicted under Ohio law.

ARGUMENT

Respondent Warden's Proposition of Law:

A person may be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g) without necessarily offering direct scientific proof, such as lab testing of a recovered substance, that a substance offered for sale contained some detectable amount of the relevant controlled substance. No such proof is needed in 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, and where 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 the requisite amount. Any admissible evidence, including circumstantial evidence, may be used to establish the underlying offense of offering to sell a controlled substance under R.C. 2925.03(A)(1) and to establish the amount and identity of the drug involved to permit the application of R.C. 2925.03(C)(4)(g). (State v. Chandler, 2006-Ohio-2285, construed and applied.)

The Court should answer the federal court's question the same way the state appeals court did when it reviewed Garr's case. That is, it should conclude that Ohio law does not require the State to provide a tested substance in every MDO case, such as when no substance is ever

recovered and circumstantial evidence supports a finding that the defendant offered to sell a real drug. That conclusion is mandated by the text, and the entire structure, of Ohio's drug trafficking laws, which are based on the premises that (1) offers and sales are equally valid factual predicates for a trafficking violation, and that (2) all violations—not merely sales-based ones—are punished more heavily when increased quantities are involved.

Nothing in *Chandler* mandates a contrary result. *Chandler* merely corrected unsupportable factfinding when the recovery of baking soda showed that it was unreasonable for a jury to conclude that a bag of baking soda was the requisite amount of cocaine. Where no drugs are recovered, by contrast, the quantity and authenticity of the drug “involved” in the offer may be established by circumstantial evidence, as in any case. Here, Garr's statements about the cocaine's amount and quality are enough to support a jury finding.

Garr's contrary view would improperly establish a bright-line distinction between offer-based violations and sales-based violations, and it would per se forbid any quantity-based enhancements whenever the trafficking violation is based on an offer rather than a sale. That change in law would undercut the General Assembly's approach to both principles, and it would consequently diminish the State's ability to stop and punish large drug deals before they are completed.

A. Ohio's drug-trafficking laws define both offers to sell and actual sales as the same trafficking violation, subject to the same legal regime in all respects.

Both the statutory text and the Court's cases—including *Chandler*—leave no doubt that Ohio law treats offers to sell drugs and actual sales of drugs as two alternative factual predicates for the same legal violation: trafficking in drugs. Garr's view contravenes that first principle.

The starting point of analysis, of course, is the text of the statute itself. The Court has long explained the need for adherence to both statutory text and to the underlying legislative intent

that the text embodies. Thus, in interpreting the language of a statute, a court must give effect to both the words used and their context. In giving effect to the words used, a court should not add or take away from those words. *Rice v. CertainTeed Corp.* (1999), 84 Ohio St. 3d 417, 419. Similarly, a court should not modify unambiguous language. *State ex rel. Sears, Roebuck & Co. v. Ind. Comm'n of Ohio* (1990), 52 Ohio St. 3d 144, 148. And a court should look at the entire statute in its context. R.C. 1.47(B); *Dupps Co. v. Lindley* (1980), 62 Ohio St. 2d 305, 307.

The General Assembly defined “trafficking in drugs” to include both selling and offering to sell controlled substances, and it put the two alternatives in the same line. Specifically, R.C. 2925.03, the drug trafficking statute, begins as follows:

(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.

R.C. 2925.03(A) (emphasis added). Thus, “sell” and “offer to sell” are alternative ways to commit the same violation. R.C. 2925.03(A)(2), meanwhile, is separate, and adds qualifiers specific to that violation, showing that preparing drugs for shipment, transporting them, and so on, are ways to commit a different violation.

Then, after R.C. 2925.03(B) defines certain exemptions (such as legal sales of controlled substances by doctors and pharmacists), R.C. 2925.03(C) declares that “[w]hoever violates division (A) of this section is guilty of one of the following,” and the remaining subdivisions all define various, particular acts as either “trafficking in drugs” or “aggravated trafficking in drugs.” That statutory structure further confirms that (A)(1) provides two ways to establish one violation.

The Court has repeatedly explained that this statutory text means that a violation may be based solely upon an offer, and that principle extends to all elements of the crime being measured in terms of the offer. See, e.g., *State v. Scott* (1982), 69 Ohio St. 2d 439; *State v. Patterson* (1982), 69 Ohio St. 2d 445. In *Scott*, the Court held that a trafficking violation is complete when the offer is made, and it rejected the claim that a transfer of a substance was required to support a conviction. *Scott*, 69 Ohio St. 3d at 440. In *Patterson*, the Court explained that “[k]nowingly” is an adverb which modifies the verb “offer,” thus, that “culpable mental state must exist with respect to the act of offering” in an offer-based case. 69 Ohio St. 3d at 447. The “knowing” requirement did not transfer to other elements, as long as the offer was knowing: “One’s understanding of the nature of the substance does not necessarily determine whether he or she knowingly offered to sell a controlled substance. We will not read the additional element of knowledge of the nature of the substance into R.C. 2925.03(A)(1), (5) or (7).” *Id.*

In *Chandler*, the Court re-affirmed that an offer alone constituted a trafficking violation, even without a consummated transaction or the recovery of any real drugs. The Court cited *Scott* and *Patterson* and restated that “[u]ndoubtedly, 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*, 2006-Ohio-2285, ¶ 9. Therefore, the Court explained, there was “no doubt that [Chandler’s and his co-defendant’s] convictions can stand despite the fact that the substance offered as crack cocaine was actually baking soda.” *Id.*

Lower-court cases further illustrate how a prosecution rooted in an offer to sell is based, in all respects, upon the offer. For example, venue is proper in a county where a defendant offered to sell drugs, *State v. Pumpelly* (12th Dist. 1991), 77 Ohio App. 3d 470, 480, even if the actual sale occurred in another county, *Truesdale v. Dallman* (6th Cir. 1982), 690 F. 2d 76, 78-79. Of

course, venue is also proper in the county where a sale ultimately occurred, if that sales is the basis for the prosecution, even if the arrangements were made elsewhere. *State v. Kruse* (6th Dist.), 2006 Ohio App. Lexis 3075, 2006-Ohio-3179, ¶¶ 21-22.

Likewise, if a defendant is convicted based on an offer rather than on a completed sale, and wishes to challenge the sufficiency of the evidence, he must attack the evidence that he *offered* to sell the drug at issue, and the court assesses the claim as to the offer. See *State v. Jeter* (6th Dist.), 2004 Ohio App. Lexis 1177, 2004-Ohio-1332. In *Jeter*, the defendant claimed that he “never intended to sell heroin but instead intended to steal the money” from the buyer, providing nothing in return. *Id.* at ¶ 27. The Sixth District explained that “intent is determined from the surrounding facts and circumstances,” and it concluded that Jeter’s words and actions, including using the jargon of heroin sales and pointing to a nearby car as the location of his supplier, supplied “more than adequate evidence . . . from which any rational trier of fact could have found that Jeter offered to sell heroin.” *Id.*

The defendant in *Jeter* alternatively argued that the evidence was insufficient to show that he intended to sell heroin in particular (as opposed to his claim that he did not intend to sell any drugs at all). *Id.* at ¶ 26. Jeter noted that he never used the word “heroin” or any slang equivalent in the conversation, and the terms he did use could refer equally to cocaine or marijuana. *Id.* The Sixth District explained that circumstantial evidence could support the conclusion that the disputed terms referred to heroin: It was common practice for “runners” such as Jeter not to be users of the drugs they sold, so the fact that Jeter and his companion used marijuana and cocaine, respectively, made it reasonable for a jury to conclude that the language of the offer indicated heroin rather than another drug. *Id.*

All of this shows not only that an offer to sell drugs is adequate to support a drug-trafficking conviction, but also that an offer-based violation is measured in all respects—whether venue, sufficiency of the evidence, or the identity of the drug at issue—in terms of the offer, not in terms of a never-completed sale. That principle combines with quantity-based provisions to mean that in a prosecution based solely on an offer, without a completed transfer, any challenge to the quantity involved is also weighed in terms of that offer. Just as circumstantial evidence may show the *identity* of the drug offered when no drug was recovered, see *Jeter*, *id.* at ¶ 26, so, too, can circumstantial evidence show the *quantity* of the drug offered.

B. Ohio’s drug-trafficking laws define both the baseline offenses and sentencing enhancements in terms of the quantity involved in a trafficking violation, and that is no less true when the violation is based on an offer without a completed sale.

Ohio’s drug-trafficking laws are based on the quantity involved in a violation, with a different multi-tiered scale provided for each particular drug or category of drugs. Those quantity-based steps are not merely provided as sentencing enhancements that are separated from the baseline offenses and contained solely in sentencing statutes. Rather, the quantities are built into defining the basic offense that is committed as “trafficking” or “aggravated trafficking,” and in setting the offense level as a felony of the first to fifth degree. See *Chandler*, 2004-Ohio-2285, ¶ 8 (identifying scales for different drugs); *id.* at ¶ 18 (“The General Assembly has authorized a hierarchy of criminal penalties for drug trafficking based upon the identity and amount of the controlled substance involved.”). Sentencing enhancements are part of the scheme, but they are integrated in the definitions of the crimes committed.

For example, where the drug involved is cocaine, R.C. 2925.03(C)(4) provides a step-by-step list of quantities with corresponding felony levels—further distinguishing different quantities for crack cocaine and non-crack cocaine—along with references to the appropriate sentencing provisions. (The cocaine subsection also includes non-quantity-based enhancements

for violations in the vicinity of a school or juvenile, along with layers of enhancements if a violation involved both a higher quantity and a school/juvenile.) The full subsection shows how carefully the General Assembly calibrated the levels, reflecting its commitment to the notion that trafficking at increasingly greater quantities warrants greater punishment, because it represents an increasing harm to the community. See *id.* A partial excerpt shows the level of detail:

(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.

Id. (emphasis added). Subsections (e) and (f) continue the pattern, establishing a second-degree felony for 100 to 500 grams (of non-crack cocaine), R.C. 2925.03(C)(4)(e), and a first-degree felony for 500 to 1000 grams, R.C. 2925.03(C)(4)(f).

Finally, subsection (g) ends the cocaine-based provisions, providing the MDO Penalty at issue in this case, for violations involving over 1000 grams, or one kilogram, of cocaine:

(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.

R.C. 2925.03(C)(4)(g) (emphasis added). These provisions show the General Assembly's deep commitment to the notion that drug-trafficking offenses and sentences should correlate to the quantity of the "drug involved in the violation" at issue.

Most important for this case, these quantity-based calibrations do not distinguish in any way between a violation based on a sale and a violation based on an offer; they are based on the amount of the drug involved *in the violation*, whatever the basis for the violation. This is perhaps best illustrated by comparing the question of the *quantity* involved to the question of determining the *identity* of the drug involved. The drug's identity triggers a drug-specific scale of quantities, so an offer of "ten grams" means nothing without resolving *what* was offered. In *Jeter*, for example, the defendant challenged whether he had offered to sell heroin as opposed to marijuana or cocaine. 2004-Ohio-1332, ¶ 26. The court did not require the presence of actual heroin to prove that the underlying offer was indeed intended to be heroin. *Id.* Instead, the court looked to the circumstantial evidence surrounding the offer and concluded that the jury reasonably concluded that heroin, not marijuana or cocaine, was the offered drug. *Id.*

Similarly, in *Mitchell*, when a defendant offered to sell one drug, but ultimately sold a different drug, the court properly separated the offer and the sale as two separate violations, and it properly applied a different subsection to each, based on the different drugs involved. 2008-Ohio-6920, ¶ 5. Specifically, the defendant in *Mitchell* offered to sell six 80-milligram tablets of Oxycontin to a buyer, but he had none on hand, and he proceeded to try to secure some to resell to his customer. After a day passed, and he had still not secured the Oxycontin, the buyer agreed to buy some crack cocaine instead, and that sale was consummated. The seller was then charged separately (1) for the Oxycontin *offer* and (2) for the crack *sale*. *Id.* In reviewing the challenge to a bulk-amount enhancement on the Oxycontin-offer charge, the court properly analyzed it in terms of that offer, looking to the facts and law involving Oxycontin and the quantity involved in *that* offer. *Id.* at ¶¶ 14-20, 34. It did not allow the facts of the consummated transaction, whether the identity of that drug as crack or the quantity of the crack sale, to cross over into its assessment of the Oxycontin charge. Although the court ultimately adopted the wrong view in disposing of the offer-of-Oxycontin count, the fact that it framed the question as it did confirms that counts based on offers are evaluated in terms of the offer, not in terms of what drugs are recovered or not, even when, as in *Mitchell*, some drug (the crack) was recovered apart from what was involved in the offer.

Consequently, the quantity-based provisions contain no justification for applying a different set of rules when an offer, as opposed to a sale, is involved. The only justification Garr offers for such a distinction is *Chandler*, and that case did not create a distinction where none exists in the statute.

C. *Chandler* merely corrected an unsupportable factual conclusion; it did not broadly prohibit the use of all quantity-based provisions whenever no drug is recovered and testable.

The Court's decision in *Chandler*, which invalidated MDO Penalties for two defendants who offered to sell cocaine but provided a large bag of baking soda, addressed the evidentiary problem unique to the "fake drug" scenario. In such cases, the scientific evidence shows that the substance involved in an offer was not a controlled substance in the requisite quantity. *Chandler*'s own language supports that view, as the appeals court in Garr's case found. Moreover, limiting *Chandler*'s reach to the fake-drug scenario, as opposed to the no-drug scenario, is the only approach consistent with the statutory structure and the entire body of Ohio case law on offer-based drug-trafficking violations. Garr's contrary approach seems to require the introduction at trial of an actual drug in *all* cases before invoking *any* quantity-based provisions. That requirement would not only eliminate the MDO Penalty, but it would also dismantle the entire quantity-based scale of offenses in all cases based on an offer to sell rather than an actual sale, despite the General Assembly's intent to equate offers and actual sales.

Several aspects of the Court's *Chandler* decision show that it is based on the *presence* of a fake drug and does not apply to offers involving the *absence* of any drugs. First, the Court stressed the jury's unsupportable factfinding, contrasting the jury's finding of cocaine and the reality of baking soda. The Court noted that lab tests showed that the substance that the defendant offered to sell, and indeed produced, was baking soda. *Chandler*, 2006-Ohio-2285, ¶ 3, 19. The Court contrasted that with the jury's factfinding: "In this case, the jury found that 130.87 grams of baking soda equaled or exceeded 100 grams of crack cocaine." *Id.* at ¶ 19.

Second, the *Chandler* Court tied its result to fake-drug cases, as opposed to no-drug cases, when it suggested that the activity there—selling fake drugs—should have instead been prosecuted under the separate statute prohibiting the sale of counterfeit controlled substances.

See *id.* at ¶ 20 (citing R.C. 2925.37(B)). The Court explained that the “General Assembly has already specifically proscribed the activity present in this case as trafficking in counterfeit controlled substances,” and it quoted R.C. 2925.37(B)’s prohibition against selling or offering “any substance that the person knows is a counterfeit controlled substance.” *Id.* The Court specifically noted that under that provision, “a conviction does not depend upon proof of the quantity of the fraudulent substance.” *Id.* (quoting R.C. 2925.37(H)). The Court’s reliance on that alternate path is critical, because that statute may be used as an alternative basis for prosecution *only* in “fake drug” cases, as in *Chandler*, not in “no drug” cases, as here.

Third, the Court in *Chandler* never discussed its ruling in terms of “direct” versus “circumstantial” evidence, showing that it did not establish a new “direct evidence” requirement for proving the identity and quantity of a drug offered for sale. As the *Garr* appeals court explained, the Court “noted that the jury had made a mistake of fact when it had concluded that baking soda was tantamount to crack cocaine,” *Garr* State App. Op. at ¶ 4 (citing *Chandler*, 2006-Ohio-2285, ¶ 19), so that the evidentiary conclusion was unwarranted on those facts. But as the *Garr* appeals court explained, *Chandler* did not change the rule that “the state may attempt to establish any element of any crime through circumstantial evidence,” and the *Garr* court saw “no reason to make an exception for the elements of R.C. 2925.03(C)(4)(g).” *Garr* State App. Op. at ¶ 5.

Fourth, the Court in *Chandler* re-affirmed the importance of both principles in Ohio’s drug-trafficking laws—namely, that an offer alone is a violation, and that the entire scheme is quantity-based—and it did not purport to reject either principle. As to quantity, the Court reiterated that the “General Assembly has authorized a hierarchy of criminal penalties for drug trafficking based upon the identity and amount of the controlled substance involved.” *Chandler*,

2006-Ohio-2285, ¶ 18. As to offers, the Court re-affirmed, in upholding the *Chandler* defendants' convictions, that an offer alone constituted a trafficking violation, citing *Scott* and *Patterson*. *Id.* at ¶ 9. And in singling out the MDO Penalty as pre-dating those cases, as part of its distinction of previous law, the Court implicitly suggested that *Chandler* is limited to the newer MDO Penalty (and perhaps the MDO specification, although that is not at issue here). *Id.* at ¶ 10. That reading would not affect the other, long-established quantity-based provisions in R.C. 2925.03—that is, the many drug-specific, step-by-step scales that establish the levels of offense for various quantities of drugs below the MDO level. But here, although Garr challenges an MDO Penalty, as in *Chandler*, the logic of his broad approach threatens all quantity-based provisions, and indeed, even those turning on the identity of the drug.

Extending *Chandler* to no-drug cases such as Garr's would essentially divide the entire body of offer-based cases from actual-sale-based cases, and it would gut Ohio's quantity-based scheme in all offer-to-sell cases. That approach would mean that those *planning* major drug sales could be convicted of no more than a fourth- or fifth-degree felony. Such an outcome would violate the General Assembly's twin, fundamental principles to establish a quantity-based scheme while treating offers to sell the same as actual sales.

In the alternative, if the Court concludes that *Chandler's* reasoning or language must logically extend to no-drug cases (and it need not so conclude), the Court should modify or overrule *Chandler* to whatever extent necessary to uphold MDO Penalties in cases such as Garr's. The General Assembly responded to *Chandler* by adding subsection (I) to R.C. 2925.03, reversing *Chandler's* result for future fake-drug cases by providing “[a]s used in this section, ‘drug’ includes any substance that is represented to be a drug.” While this amendment does not apply to Garr's case (as it became effective in 2008), the General Assembly's quick correction of

the *Chandler* outcome reflects its specific intent to have MDO Penalties apply to offers as well as to actual sales. There is no reason to believe that the General Assembly wished to clarify the law to increase penalties for those selling baking soda, but not for those arranging to sell actual drugs.

D. Any admissible evidence, including circumstantial evidence, may be used to establish the amount of the drug offered.

If the Court concludes, as it should, that *Chandler* does not create a new evidentiary standard for applying MDO penalties in no-drug cases, then resolving Garr's case is straightforward, for the reasons the appeals court provided. The State may establish any element of a crime through circumstantial evidence. State App. Op. at ¶ 5. Indeed, the Court has long "embraced the notion that there can be no bright-line distinction regarding the probative force of circumstantial and direct evidence." *State v. Jenks* (1991), 61 Ohio St. 3d 259, 272. Both "inherently possess the same probative value." *Id.* A conviction under R.C. 2925.03(A)(1) is proper if the elements are proven by either direct or circumstantial evidence. The elements necessary to prove the offense of drug trafficking are that a defendant knowingly sell or offer to sell a controlled substance. The enhanced penalty provisions apply if evidence proves that the controlled substance sold or offered for sale exceeds a certain amount.

The identity and the amount of the drug involved are the bases for the offense and for the enhanced penalty under R.C. 2925.03(C)(4)(g), and those elements, just like the elements of any other criminal offense, may be proven by any admissible evidence including circumstantial and direct evidence. No special evidentiary rule requires "direct evidence only" in such cases.

In this case, sufficient evidence was presented to support the jury's finding that Garr offered to sell over 1000 grams of cocaine, as he offered to sell two kilograms. Garr State App.

Op. at ¶¶ 6-7. That evidence was not contradicted by any other evidence, in contrast with the facts of *Chandler*. Garr State App. Op. at ¶ 4.

E. Eliminating the availability of quantity-based provisions in all cases based on offers to sell will have harmful practical effects inconsistent with the General Assembly's intent.

As explained above, Ohio's drug-trafficking laws reflect the General Assembly's twin goals of (1) equating offers to sell and actual sales and (2) increasing sentences based on the quantity of the drug involved in the violation. Thus, as a matter of principle alone, it would be inconsistent with that plain intent to adopt Garr's view and thereby eliminate all considerations of quantity whenever a violation is based on an offer to sell drugs. What is more, Garr's approach would also create harmful practical effects that the General Assembly could not have intended.

First, Garr's view would eliminate an important tool precisely when it is needed most. Drug sales in small amounts are often agreed to and consummated on the spot, because the dealer has the gram of cocaine or one pill readily available. But the larger the amount, the more likely it is that the dealer has his supply at another location, or, even more likely, that he does not even own the requisite amount, and will proceed to acquire it only after having an order placed. Case law is replete with examples of such "anticipatory drug trafficking," in which a dealer may not have, or plainly does not have, the amount that he is arranging to sell, or is acting as a broker or runner for someone who does have the drugs. See, e.g., *State v. Pimental* (8th Dist.), 2005-Ohio-384, ¶¶ 8, 22, 28 (upholding conviction for "'anticipatory' drug trafficking" with MDO specification for arranging sale of two to three kilograms of cocaine); *Jeter*, 2004-Ohio-1332, at ¶ 27 (noting that defendant brokering deal pointed to a circling car as that of the person holding the drugs, and upholding conviction for offer to sell over 28 grams of heroin); *Mitchell*, 2008-

Ohio-6920, at ¶¶ 4-5 (explaining seller's efforts to acquire large quantity of Oxycontin after committing to re-sell it).

This process, with time between the offer and the intended consummation of the deal, is of course more likely to lead to an offer-based prosecution, whether because law enforcement needs to move in without awaiting the transaction, or whether the transaction breaks down for any other reason. Whatever the cause, these types of cases plainly involve the type of larger-scale trafficking that the General Assembly meant to punish most severely. But if quantity-based enhancements are not available, these cases will trigger the lowest-level punishments.

Second, eliminating the availability of quantity-based enhancements in offer-based cases would put a premium on securing convictions based on sales instead—and that in turn could affect the safety of large drug-sale sting operations. The risks involved in consummating a drug deal are often greater than those involved in recording an offer to sell, for several reasons. No one doubts that the “first priority in an undercover drug transaction is *officer safety*.” Lyman, Michael D., *Practical Drug Enforcement* (3d Ed. 2007), 32. Thus, experts in law enforcement have studied virtually every aspect of sting operations, and standard operating procedure includes measures such as asking whether “surveillance [can] adequately cover the [undercover] officer,” whether the location was “chosen by the officer, the informant, and the suspect,” and so on. *Id.* at 31. Officers are specifically warned, “[d]on’t change locations in the middle of the deal!” *Id.* These precautions mean that seeing a deal through to completion may raise the degree of risk, such as when a suspect has already been recording committing to the offer, but he then insists on going elsewhere to consummate the deal. In such cases, the operation is often cut short, with the offer serving as the basis for prosecution. But if the only way to secure a longer-

term sentence, and thus to remove a big dealer from the community for a longer time, would be to see the deal through, officers might lean toward taking greater risks.

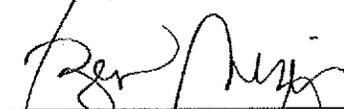
These practical effects demonstrate that the General Assembly could not have intended Garr's view to be the law. That common-sense conclusion, along with the statutory and other reasons discussed above, confirm that the Court should answer the federal court's question, "no," and it should explain that Garr and those like him are eligible for quantity-based sentencing when they offer to sell large amounts of drugs.

CONCLUSION

For the above reasons, Respondent Warden asks this Court to answer the certified question in the negative as set forth in Respondent's Proposition of Law.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)

Solicitor General

**Counsel of Record*

STEPHEN P. CARNEY (0063460)

Deputy Solicitor

WILLIAM LAMB (0051808)

DIANE MALLORY (0014867)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Respondent

Warden, Madison Correctional Institution

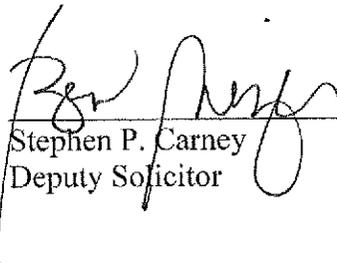
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Respondent Warden was served by U.S.

mail this 19th day of January, 2010 upon the following counsel:

Timothy Young
Ohio Public Defender
Kristopher A. Haines
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Counsel for Petitioner
Oliver Lucien Garr



Stephen P. Carney
Deputy Solicitor