ORIGINAL

**IN THE SUPREME COURT OF OHIO**

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| STATE OF OHIO | ) | CASE NO. 2011-1925 |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ALFRED JACKSON, III | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

BRIEF OF APPELLEE,
ALFRED JACKSON, III

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## STATEMENT OF THE CASE AND FACTS

On December 10, 2008, Alfred E. Jackson, III, was indicted by the Lorain County Grand Jury. Unfortunately, Mr. Jackson and his counsel still remain unclear what, exactly, he was indicted for[1]. Two crucial charges are dispositive of this case, specifically two counts of drug trafficking. Jackson was charged with "sell or offer to sell" under 2925.03(A)(1) and "prep to ship, etc." under 2925.03(A)(2) for the same transactions. The indictment specified that the amount of controlled substance was in excess of the bulk amount. The specific drug he allegedly trafficked, however, was unclear.

After his arraignment in December of 2008, Jackson filed motions for both discovery and a bill of particulars. Subsequently, the State provided Jackson with discovery, to include a Bill of Particulars specifying that the drug trafficked in was ecstasy, also known as methylenedioxymethamphetamine, or MDMA. Still later, the State provided lab reports concerning the controlled substances and later alleged that the controlled substance was benzylpiperazine, or BZP. The State never explained how the indictment split into two separate controlled substances.

Counsel for Jackson subsequently filed numerous motions to dismiss, the first alleging that BZP was not included as a Schedule I controlled substance under Ohio law and therefore, the disputed two (2) counts of the indictment failed to charge

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[1] The indictment included, generically, two (2) counts of Trafficking in Drugs, violations of R.C. 2925.03(A)(1) and (A)(2), respectively, felonies of the third degree; one (1) count of Trafficking in Drugs, a violation of R.C. 2925.03(A)(2), a felony of the fourth degree; one (1) count of Possession of Criminal Tools, a violation of R.C. 2923.24, a felony of the fifth degree; and one (1) count of Possession of Drug Paraphernalia, a violation of R.C. 2925.14, a misdemeanor of the fourth degree.

offenses under Ohio law. Subsequently, Jackson filed a second Motion to Dismiss arguing that the disputed two (2) counts of the indictment failed to charge offenses because the name of the specific substance alleged to be trafficked was also required to be in the indictment. The trial court denied both of Jackson's motions without explanation. The trial court then took judicial notice that BZP was, as a matter of law, on the schedule of controlled substance in the State of Ohio.

Jackson subsequently pled no contest, reserving the right to appeal these issues to the Ninth District Court of Appeals, who reversed Jackson's convictions on or about September 30, 2011. That court found that the indictment was insufficient to charge an offense under Ohio law, despite mirroring the language of the statute, because it did not specifically designate the controlled Schedule I or II substance involved. *State v. Jackson,* (9th Dist. 2011) 2011 Ohio 4998.

In November 2011, the State of Ohio filed a discretionary appeal with this Honorable Court. On February 22, 2012, this Court accepted jurisdiction over the instant appeal. Appellant now presents its Brief in response to the State's Merit Brief.

## LAW & ARGUMENT
## SOLE PROPOSITION OF LAW

**PURSUANT TO *STATE V. HEADLEY,* FOR AN INDICTMENT THAT ALLEGES A VIOLATION OF CHAPTER 2925 OF THE OHIO REVISED CODE TO BE CONSTITUTIONALLY VALID, THE INDICTMENT MUST TRACK THE LANGUAGE OF THE STATUTE, INCLUDING ONE OF THE EIGHT CATEGORIES OF CONTROLLED SUBSTANCES, AND DOES NOT REQUIRE THE SPECIFIC NAME OF THE CONTROLLED SUBSTANCE INVOLVED.**

*Introduction*

At first glance, this case concerns whether an indictment is constitutional so long as it includes the schedule the controlled substance falls into. Counsel for appellee

submits that the schedule is but one part of a constitutionally valid indictment. Going no further than the State's proposition of law, counsel for Appellee concedes – and has never opposed – that the indictment must track the language of the statute. In addition, the indictment should also set forth the controlled substance that the individual trafficked in. Without this protection, the defendant is not placed on proper notice as to the specific allegation. Without this protection, the defendant cannot know what, exactly, he is charged with. Without this protection, a criminal defendant may be forced to endure multiple trials for multiple substances. Without this protection, the State may be able to change the accusation without the grand jury needing to find an indictment – as happened in this case.

*Constitutionally Valid Indictment*

**Adequate Notice**

"'The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.'" *State v. Pepka (2010)* 125 Ohio St.3d 124, at ¶20, quoting *State v. Buehner* (2006) 110 Ohio St.3d 403, 2006-Ohio-4707, ¶7. "An indictment meets constitutional requirements if it first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." (Internal quotations and citations omitted.) *Pepka* at ¶20.

The right to a grand jury indictment is unquestioned. "Section 10 of Article I of the Ohio Constitution provides that, '* * * no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury ***.'

This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury." *State v. Headley (1983)* 6 Ohio St. 3d 475 at 478, citing *Harris v. State* (1932), 125 Ohio St. 257, 264. The indictment, then, should be an accurate reflection of the grand jury's deliberation and verdict.

In the instant case, the State alleged Jackson was charged with trafficking in a single controlled substance. However, the State alternated theories due to the insufficiency of the indictment, which could not have been an accurate reflection to the grand jury's findings and deliberations.[2] In the Bill of Particulars provided by the State of Ohio, the controlled substance alleged to have been trafficked in was ecstasy, also known as methylenedioxymethamphetamine, or MDMA. Both MDMA and BZP fall into different classifications. MDMA is currently listed as a Hallucinogen and BZP, ostensibly by way of the federal schedules, is a stimulant. As this fact is determinative of the bulk amount, it is an additional fact distinguishing the two which makes it even more difficult to make a double jeopardy argument.

**Protection from Further Prosecution**

Trafficking in ecstasy (MDMA) and trafficking in benzylpiperazine (BZP) are distinct and separate offenses. In *State v. Pitts* (4th Dist. 2000), 2000-Ohio-1986, the defendant was separately charged for trafficking in two separate controlled substances during the same transaction, both substances included in Schedule IV. The Fourth District rejected the proposition that the defendant could not be separately charged with

[2] Unless, of course, the grand jury determined that Jackson trafficked in two controlled substances at the same time, which did not appear anywhere in the record.

different crimes based on the same conduct because the identity of the drugs were different:

> R.C. 2925.03(A) states generally that: "No person shall knowingly sell or offer to sell a controlled substance." Thus, the gist of the offense is the sale of a "controlled substance," which is defined as any substance listed in Schedules I through V under R.C. 3719.41, 3719.43, and 3719.44. See R.C. 2925.01(A) and 3719.01(C). R.C. 2925.03(C) then provides for different penalties and distinct titles of the offenses depending on what type of drug is involved. The relevant subsection here is R.C. 2925.03(C) (2) (a), which provides that a person is guilty of "trafficking in drugs," a fifth-degree felony, if "the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V ***." Significantly, the statutory language defines the offenses in terms of "a controlled substance" and "the drug involved," indicating an offense based on *one* controlled substance. The statute therefore suggests that each drug, even if in the same schedule as another drug sold at the same time, "has a significance independent of every other drug." Under this interpretation, the appellant's sale of two different schedule IV substances constitutes separately-committed offenses for which multiple punishments may be imposed. See *id.* Our conclusion is bolstered by the rule that the specific identity of controlled substance involved must be alleged in the indictment and is considered an essential element of the crime. Thus, the state's proof that the appellant sold valium would not have been sufficient to prove that she sold xanax, indicating that the offenses are separate and distinct. (Internal citations omitted.)

MDMA, the government's drug of choice in the Bill of Particulars (Appendix A), is not the same as Benzylpiperazine, the government's choice of drug in the lab reports and subsequent argument to the trial court. Jackson would be subject to multiple prosecutions under the State's dual theory of MDMA/BZP. See also *State v. Polachek* (5th Dist. 2010) 2010 Ohio 5421 ("We find therefore, the trial court did not err in sentencing appellant to a prison term for possession of a Schedule III controlled substance and a separate prison term for possession of a Schedule IV controlled substance."); *State v. Barr* (4th Dist. 2008) 178 OhioApp.3d 318 (Complaint for drug abuse, alleging possession of a "controlled substance" does not prohibit further prosecution for separate controlled substances. "Because possession of methylphenidate and possession of marijuana require

the proof of a different fact – the possession of the particular controlled substance – to prove a violation of the ordinance, the constitute separate offenses.")

Again, Jackson challenged the sufficiency of the indictment. The State provided a Bill of Particulars. "This court has held that where the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars. Moreover, we expressly held that 'there is no requirement that the indictment demonstrate the basis for the grand jury's findings. The bill of particulars serves this function.'" *State v. Beuhner* (2006) 110 Ohio St. 3d 403, 405-406, quoting *State v. Skatzes* (2004) 104 Ohio St.3d 195 at¶ 30.

So, the function of a Bill of Particulars is to demonstrate the basis for the grand jury's findings. The State initially represented that the basis of the grand jury's findings was trafficking in ecstasy/MDMA. Subsequently, the State abandoned MDMA as the basis of the indictment and switched to BZP. The State changed the offense, altering the findings of the grand jury. The grand jury never found that Alfred Jackson trafficked in BZP, yet that is the charge to which he pled. If the State's proposition of law – that the schedule alone is sufficient to charge a drug trafficking offense – then the State will be free to pick and choose whichever controlled substance it desires, without regard for the finding of the grand jury.

**State v. Headley**

In *State v. Headley* (1983), 6 Ohio St.3d 475, 453 N.E. 2d 716, 1983 LEXIS 857, this Court held that, "[t]he type of controlled substance involved in the crime of aggravated trafficking under R.C. 2925.03 is an essential element which must be included

in the indictment, the omission of which cannot be cured by amendment under Crim. R. 7(D)." *Syllabus of the Court.*

The crux of the Headley opinion concerns not only the adequacy of notice to the defendant, but also the avoidance of a conviction on evidence different than that found by the grand jury. Of particular importance was Crim.R. 7(D) preventing amendments which would alter the name or identity of the offense. In the instant case, the State presented a Bill of Particulars stating that Jackson trafficked in ecstasy (MDMA)[3], though subsequently altered their theory of prosecution to relate to benzylpiperazine (BZP). The grand jury may have found one or the other, but nothing in the record shows that it found both.

"To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell v. United States* (1962), 369 U.S. 749, 770.

The State's argument, in its simplest terms, is that so long as the penalty can be ascertained from the indictment, then the indictment is constitutionally sufficient:

> Without identification of the category or schedule of the substance, the ultimate degree of the offense cannot be ascertained. However, as long as the amount and category of a controlled, scheduled substance is included in an indictment, a defendant has adequate, legal notice as to all the elements of the offense with which he or she has been indicted. The name of the actual controlled, scheduled substance is additional information that would be ascertained as part of the discovery process.

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[3] See *State v. Stewart* (3rd Dist. 2009) 2009 Ohio 3411, footnote 3.

This argument makes no regard for the notice required to be given to the defendant. This argument carries with it no protection against subsequent prosecution. This argument further has no regard for the facts of this case where the State had argued at separate times that Jackson trafficked in separate controlled substances. The discovery process only lead to further confusion and put the citizen in greater peril. A proper indictment can prevent all such problems.

**Indictment Jurisprudence**

The State believes that this Court's decisions in other cases command a certain result here. However, the cases cited by the State differ in important respects from the instant case. In *State v. Buehner,* 110 Ohio St.3d 403, 405, 2006 Ohio 4707, 853 N.E. 2d 1162, 1164, 2006 LEXIS 2901, the defendant was indicted for one (1) count of Ethnic Intimidation; the predicate offense for this charge was an act of Aggravated Menacing, an offense that was one (1) of five (5) enumerated offenses that could serve as a predicate offense for a charge of Ethnic Intimidation. The indictment listed only the Revised Code section for the predicate offense and not the actual elements of the underlying offense. Listing the specific controlled substance is akin to identifying the predicate offense by statute number. The defendant is on notice as to what the specific allegations are and cannot again be prosecuted for the same crime.

In *State v. Horner,* 126 Ohio St.3d 466, 2010 Ohio3830, 935 N.E. 2d 26, 2010 LEXIS 2184, the defendant was charged with a violation of Ohio's Aggravated Robbery statute. This Court found that, "when an indictment fails to charge *a mens rea* element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is,

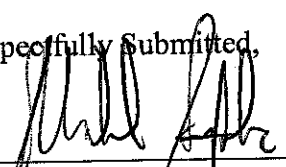
therefore, not defective." *Id.*, at 473. The Court reasoned, inter alia, that : "[t]he purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident." *Id.* Counsel cannot imagine a situation where someone would be subject to successive or multiple prosecutions based on differing mental states. This case is not analogous.

Finally, in *State v. Foust,* 105 Ohio St.3d 137, 143, 2004 Ohio 7006, 823 N.E.2d 836, 2004 LEXIS 3060, this Court stated that, "[t]he wording of the indictment tracked the language for aggravated burglary in R.C. 2911.11, and did not need to allege the particular felony that Foust had intended to commit." Again, if a defendant is convicted or acquitted of a burglary charge, they either did or did not have the intention to commit a felony. Further prosecutions based on differing felonies would not be possible.

CONCLUSION

Therefore, Jackson requests that this Honorable Court affirm the decision of the Ninth District Court of Appeals.

Respectfully Submitted,



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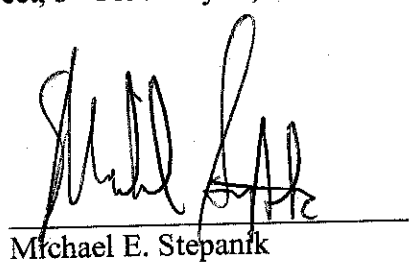
## CERTIFICATE OF SERVICE

A copy of the foregoing was hand-delivered to Lorain County Prosecutor Dennis P. Will or his representative at 225 Court Street, 3rd Floor Elyria, OH 44035 this 10th day of July, 2012.



Michael E. Stepanik

APPENDIX

A-1

Bill of Particulars

FILED
LORAIN COUNTY

2009 JAN 20 A 10: 19

CLERK OF COMMON PLEAS
RON NABAKOWSKI

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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|---|---|---|
| STATE OF OHIO, | ) | CASE NO. 08CR077144 |
| | ) | |
| Plaintiff, | ) | JUDGE CHRISTOPHER R. ROTHGERY |
| vs. | ) | |
| | ) | |
| ALFRED JACKSON | ) | STATE'S RESPONSE TO |
| | ) | DEFENDANT'S REQUEST |
| Defendant. | ) | FOR A BILL OF PARTICULARS |

Now comes the State of Ohio, by and through the office of the Lorain County Prosecuting Attorney and hereby provides the following as its Bill of Particulars in this matter:

On or about October 23, 2008, at McDonald's on Broad Street in the city of Elyria in Lorain County, Ohio, the defendant, Alfred Jackson III, did knowingly sell ten (10) pills of ecstasy for $100.00 of police buy money in a controlled buy to a confidential informant.

Following the controlled buy, officers observed the defendant fail to use his left turn signal as he was turning left onto East Bridge Street from Broad Street and initiated a traffic stop. As the vehicle pulled over, Officer observed defendant moving about the driver's seat and reaching toward the rear seats.

Defendant gave officers consent to search his person, and the $100.00 of police buy money was located in defendant's pants pocket.

Defendant was placed into custody and an inventory of the vehicle he was driving was done. Officers located a freezer bag of marijuana weighing approximately 242 grams and thirty five (35) ecstasy pills in a plastic bag.

For further details, see indictment.

Respectfully submitted,

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By:

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PROOF OF SERVICE

A copy of the foregoing *STATE'S RESPONSE TO DEFENDANT'S REQUEST FOR BILL OF PARTICULARS* has been sent by regular U.S. mail on this 20TH day of JANUARY, 2009 to: Jack W. Bradley, Counsel for Defendant, at 520 Broadway, 3rd Floor, Lorain, Ohio 44052.

CHRISTOPHER J. PIERRE
Assistant Prosecuting Attorney