

ORIGINAL

IN THE SUPREME COURT OF OHIO  
2013

STATE OF OHIO,

Plaintiffs-Appellee,

-vs-

MATTHEW KARESKI,

Defendant-Appellant.

Case Nos. 2012-1242

On Appeal from the  
Summit County Court  
of Appeals, Ninth  
Appellate District

Court of Appeals  
Case No. 25705

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTING  
ATTORNEY RON O'BRIEN IN SUPPORT OF APPELLEE STATE OF OHIO**

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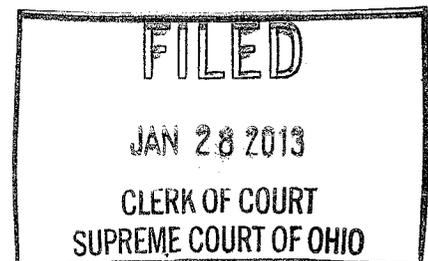
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## INTRODUCTION

Franklin County Prosecuting Attorney Ron O'Brien offers this amicus brief to urge this Court to overrule an outlier decision in its Double Jeopardy jurisprudence and to reaffirm the standard for when a criminal defendant may be retried after a conviction is vacated.

A criminal conviction may be vacated for one of two reasons: "trial error," or lack of sufficient evidence. When a conviction is vacated for insufficient evidence, no retrial is permitted. But when a conviction is vacated for trial error, a retrial is permitted so long as the evidence admitted at trial was sufficient to prove guilt. And in *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), the United States Supreme Court held that, when a conviction is vacated for trial error, the reviewing court must consider all the evidence admitted at trial—even improperly-admitted evidence—in determining whether a retrial is permitted.

*Lockhart's* "all evidence" standard is easy to apply and is grounded in sound policy and logic. But in *State v. Lovejoy*, 79 Ohio St.3d 440, 683 N.E.2d 1112 (1997), this Court deviated from *Lockhart*. In *Lovejoy*, the defendant's conviction was vacated on appeal due to the trial court improperly taking judicial notice of a fact. This Court held that no retrial was permitted because the "remaining evidence" was insufficient to prove guilt. *Id.* at 450. The "remaining evidence" standard in *Lovejoy* directly contradicts *Lockhart's* "all evidence" standard. Adding to the confusion, since *Lovejoy* this Court has twice adhered to *Lockhart's* "all evidence" standard. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 80. Attempts to distinguish *Lovejoy* on the facts have not solved the problem. The only solution is to overrule *Lovejoy*.

Accordingly, Franklin County Prosecutor Ron O'Brien respectfully requests this Court overrule *Lovejoy* and hold that *Lockhart's* "all evidence" standard is the *only* standard that applies in determining whether retrial is permitted after a conviction is vacated for trial error. As

it pertains to this case, the trial court's improper taking of judicial notice is a trial error, and the Ninth District properly considered the judicially-noticed fact (that Bud Light is "beer") in concluding that a remand for retrial was permitted. Application of the "all evidence" standard does not depend on when in the trial the error occurred. Nor does it depend—as Kareski claims—on whether there is affirmative evidence in the record that the State relied to its detriment on the trial court's erroneous evidentiary ruling. Simply put, the "all evidence" standard applies *anytime* a conviction is vacated due to trial error.

### STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of felony cases every year, which includes representing the State in direct-appeal proceedings and in post-trial collateral proceedings. Franklin County Prosecutor Ron O'Brien therefore has a strong interest in preserving the State's ability to retry a defendant after a conviction is vacated for trial error.

### STATEMENT OF THE FACTS

Franklin County Prosecutor incorporates the description of the facts contained in the Ninth District's opinion below. *State v. Kareski*, 9th Dist. No. 25705, 2012-Ohio-2173, ¶¶ 2-3.

### ARGUMENT

**First Proposition of Law:** A trial court's improper taking of judicial notice is a "trial error," and the judicially-noticed fact must be considered in determining whether all the evidence admitted at trial is sufficient to permit a retrial.

**Second Proposition of Law:** The "all evidence" standard applies anytime a conviction is vacated due to trial error. (*State v. Lovejoy*, 79 Ohio St.3d 440, 683 N.E.2d 1112 (1997), overruled).

The Ninth District below held that the trial court erred in taking judicial notice that Bud Light is "beer." Kareski argues that the Ninth District erred in considering this judicially-noticed fact in concluding that the evidence admitted at trial was sufficient to permit retrial. Kareski's

arguments essentially follow two tracks: (1) that errors relating to judicial notice are not “trial errors” that would permit retrial, because judicial notice is not “evidence”; and (2) that the judicially-noticed fact should not be considered in determining whether a retrial is permitted because there is no evidence in the record that the State detrimentally relied on the trial court’s taking judicial notice.

This Court should reject both arguments. Moreover, this Court should overrule *Lovejoy* and hold that a reviewing court must consider all evidence admitted at trial—even improperly-admitted evidence—in determining whether a retrial is permitted.

**I. REVERSAL FOR TRIAL ERROR DOES NOT PRECLUDE RETRIAL, SO LONG AS ALL THE EVIDENCE ADMITTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE CONVICTION.**

“[T]he United States Supreme Court has long recognized that double jeopardy will not bar retrial of a defendant who successfully overturns his conviction on the basis of trial error, through either direct appeal or collateral attack.” *Brewer* at ¶ 16, citing *Lockhart*, 488 U.S. at 38. This rule is a “well-established part of our constitutional jurisprudence” and is “necessary in order to ensure the ‘sound administration of justice.’” *Lockhart*, 488 U.S. at 38, quoting *United States v. Tateo*, 337 U.S. 463, 465-466, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). “[I]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.” *Brewer* at ¶ 16, quoting *Tateo*, 337 U.S. at 466.

There is an exception to this general rule: “[W]hen a defendant’s conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury’s verdict, the Double Jeopardy Clause bars a retrial on the same charge.” *Lockhart*, 488 U.S. at 39, citing *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). A reversal for insufficiency of the evidence “is in effect a determination that the government’s case against

the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to the jury.” *Lockhart*, 488 U.S. at 39, citing *Burks*, 437 U.S. at 16-17. That the judgment of acquittal is made by the reviewing court rather than the trial court does not affect its double jeopardy consequences; “to hold otherwise ‘would create a purely arbitrary distinction’ between defendants based on the hierarchical level at which the determination was made.” *Lockhart*, 488 U.S. at 39, quoting *Burks*, 437 U.S. at 11.

But “a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary ‘trial errors’ as the ‘incorrect receipt or rejection of evidence.’” *Lockhart*, 488 U.S. at 40, quoting *Burks*, 437 U.S. at 14-16. A reversal for insufficient evidence “is in effect a finding ‘that the government has failed to prove its case’ against the defendant,” while a reversal for “trial error” is a determination that the defendant “has been convicted through a judicial *process* which is defective in some fundamental respect.” *Lockhart*, 488 U.S. at 40, quoting *Burks*, 437 U.S. at 15 (emphasis in *Lockhart*).

The Court in *Lockhart* held that, in conducting a sufficiency review, a reviewing court must consider all the evidence admitted at trial—even improperly-admitted evidence. “[W]here the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.” *Lockhart*, 488 U.S. at 34. “A trial court in passing on [a motion for acquittal] considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.” *Id.* at 41-42; see, also, *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 672, 175 L.Ed.2d 582 (2010).

“*Lockhart*’s holding recognizes that the state may rely upon the trial court’s evidentiary rulings in deciding how to present its case”:

“If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal [sic] and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case.”

*Brewer* at ¶ 19, quoting *State v. Wood*, 596 S.W.2d 394 (Mo. 1980). Thus, “[w]hen evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial.” *Brewer* at syllabus; see, also, *Yarbrough* at ¶ 80 (following *Lockhart*).

## **II. IMPROPERLY TAKING JUDICIAL NOTICE IS A TRIAL ERROR, AND THE JUDICIALLY-NOTICED FACT MUST BE CONSIDERED IN DETERMINING WHETHER RETRIAL IS PERMITTED.**

Apparently attempting to avoid the “trial error” label, Kareski’s proposition of law states that the improper taking of judicial notice cannot be considered “evidence” for purposes of determining whether sufficient evidence exists to permit retrial. Kareski maintains that “[a] judicially-noticed fact is not evidence, it is the absence of evidence.” Appellant’s Brief, 10.

But the mere fact that the judicial-notice provisions appear in the Rules of Evidence, Evid.R. 201, is enough to defeat Kareski’s argument that a trial court’s taking of judicial notice is not evidence. Like any other evidence, judicial notice is used to prove “adjudicative facts; i.e., the facts of the case.” Evid.R. 201(A). (Judicial notice of law is governed by Crim.R. 27 and

Civ.R. 44.1.) Indeed, even *Lovejoy* describes the judicially-noticed fact in that case as “evidence.” *Lovejoy*, 79 Ohio St.3d at 449 (“erroneous evidence was admitted”); *id.* (“evidence of conviction was erroneously considered”); *id.* at 459 (Cook, J., dissenting) (“admitted evidence erroneously”). As with other forms of evidence, a judicially-noticed fact must be submitted to the factfinder, and in criminal cases the jury “may, but is not required to, accept as conclusive any fact judicially noticed.” Evid.R. 201(G). Although judicial notice is a substitute for testimony and other forms of formal evidence, it still falls under the rubric of evidence.

Thus, this case is not, as Kareski claims, a “sufficiency of the evidence case.” Appellant’s Brief, 10. Rather, improperly taking judicial notice of a fact—like any other error involving the admission of evidence—is a trial error. That is to say, a reversal based on an improper taking of judicial notice “does not constitute a decision to the effect that the government has failed to prove its case” and “implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.” *Burks*, 437 U.S. at 15. In short, a reversal based on improper judicial notice relates to how—not whether—the State proved the defendant’s guilt.

And like any other trial error involving the improper admission of evidence, when a trial court improperly takes judicial notice of an adjudicative fact, the reviewing court must consider the judicially-noticed fact in determining whether the evidence is sufficient to permit retrial. *Lockhart*, 488 U.S. at 34; *Brewer* at syllabus. Indeed, the two rationales behind the rule announced in *Lockhart* apply equally to errors relating to judicial notice.

First, *Lockhart*'s analogy to Crim.R. 29 motions is equally apt to judicially-noticed facts. A trial court relies on judicially-noticed facts in considering a Crim.R. 29 motion. So "to make the analogy complete," *Lockhart*, 488 U.S. at 42, a reviewing court must consider a fact the trial court judicially notices—even if the trial court erred in doing so—in determining whether the evidence is sufficient to permit retrial. Second, the reliance interest recognized in *Lockhart* and applies equally to judicially-noticed facts. The State may rely on a trial court's taking of judicial notice just as much as any other evidentiary ruling. In Kareski's words, a judicially-noticed fact is, like any other evidence, "representative of other, cumulative evidence the State could have put into evidence if not for a trial error." Appellant's Brief, 11.

The Colorado Court of Appeals in *People v. Cooper*, 104 P.3d 307 (Colo. App.2004), recognized that an improperly judicially-noticed fact must be considered in a reviewing court's sufficiency review. There, the defendant was convicted of three habitual-criminal counts. *Id.* at 310. The court held that the trial court committed reversible error by taking judicial notice of the defendant's presentence report, which was used to prove the defendant's identity for two prior convictions. *Id.* at 311. With respect to one of the habitual criminal counts, the court stated that "the evidence was sufficient with the presentence report, but insufficient without it." *Id.* The court, citing *Lockhart*, nonetheless remanded for a new sentencing hearing. *Id.* at 312.

The Missouri Court of Appeals reached a similar result in *State v. Cullen*, 646 S.W.2d 850 (Mo. App.1982). In that case, the trial court improperly took judicial notice of a prior conviction. The appellate court held that the error was a trial error and remanded for resentencing. *Id.* at 857-858, citing *Wood*, 596 S.W.2d at 389-399. The court noted that "the prosecutor was justified in relying on the court's ruling that a basis for the sentence enhancement had been established. He should not have been expected to offer more evidence of defendant's

prior convictions, anticipating that the judicial notice may later prove defective and without it, the evidence would be insufficient.” *Cullen*, 646 S.W.2d at 858.

Kareski states that it is “hornbook law” that a trial court may not take judicial notice of an element of the offense. Appellant’s Brief, 10. But this point is immaterial. This appeal does not concern the standards for when it is proper for a court to take judicial notice. After all, the State did not cross-appeal the Ninth District’s holding that the trial court erred by judicially noticing that Bud Light is “beer.” Rather, the issue in this appeal is whether an improperly judicially-noticed fact must be considered in determining whether the evidence is sufficient to permit retrial. Because a trial court’s error in taking judicial notice is a trial error, and because the two rationales behind the *Lockhart* decision apply equally to judicial notice, the answer is yes.

While Kareski states that he is unable to find any instances in which an appellate court considered in a sufficiency review a trial court’s taking judicial notice of an element of the offense, Appellant’s Brief, 11, there are in fact plenty examples. *Cooper* and *Cullen* are two. See, also, *State v. Raymond*, 10th Dist. No. 08AP-78, 2008-Ohio-6814, ¶¶ 15-21 (court judicially noticed prior conviction in concluding that evidence sufficiently supported repeat-violent-offender specification). Another example is when an appellate court considers judicially-noticed facts relating to venue. See, e.g., *State v. Edwards*, 3rd Dist. No. 9-03-63, 2004-Ohio-4015, ¶ 17; *State v. Barr*, 158 Ohio App.3d 86, 2004-Ohio-3900, 814 N.E.2d 79, ¶¶ 13-25 (7th Dist.); *Village of Linndale v. Krill*, 8th Dist. No. 81881, 2003-Ohio-1535, ¶ 8. Although not a “material element,” venue must be proven beyond a reasonable doubt in all criminal cases, and a failure to prove venue is grounds for an acquittal under Crim.R. 29. *State v. Hampton*, \_\_\_ Ohio St.3d \_\_\_, 2012-Ohio-5688, \_\_\_ N.E.2d \_\_\_, ¶¶ 22-24.

Even if not an element, a court may judicially notice a fact that is crucial to the State's case. For example, in speeding cases, courts often take judicial notice that a speed-detection device is reliable. *State v. Yaun*, 3rd Dist. No. 8-07-22, 2008-Ohio-1902, ¶¶ 17-18; *State v. Jamnicky*, 9th Dist. No. 03CA009, 2004-Ohio-324, ¶¶ 7-12; Although the reliability of the speed-detection device is not an element of the offense, it is a foundational prerequisite to admit evidence of the device's measurement of the defendant's speed. Another example is *State v. Gonzalez*, 43 Ohio App.3d 59, 539 N.E.2d 641 (6th Dist.1987). In that case, the defendant was charged with following too closely, and the Sixth District took judicial notice that an average person's reaction time is three-quarters of a second. *Id.* at 63.

In short, judicial notice is not the "absence of evidence." To the contrary, it is evidence that is submitted to the jury to prove a fact. Like errors relating to the admission of other forms of evidence, an error relating to judicial notice is a trial error, and the judicially-noticed fact must be considered in determining whether the evidence is sufficient to permit retrial.

### **III. TO PERMIT A RETRIAL, THE RECORD NEED NOT AFFIRMATIVELY SHOW THAT THE STATE RELIED ON THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULING.**

Kareski argues further that in determining whether retrial is permitted a reviewing court may consider improperly-admitted evidence only if the record affirmatively shows that the State relied to its detriment on the trial court's admission of the evidence. According to Kareski, the State must "decline[] to present cumulative evidence on the same point." Appellant's Brief, 5. Kareski states that "[t]here was no offer, proffer, or other indication that the State declined to put on cumulative evidence [showing that the liquid in the bottle was beer] in reliance upon the trial court's ruling." *Id.* at 9-10.

But the State's reliance on the trial court's evidentiary rulings is one of the *reasons* for the rule in *Lockhart*; it is not a *prerequisite* to the rule. *Lockhart* itself proves this point. In that

case, there was no indication in the trial record that the State relied on the trial court's admission of the defendant's prior conviction by deliberately choosing not to present other evidence to prove this fact. It was not until federal habeas proceedings—*after* the federal district court declared that the state court erred in considering the prior conviction—that the State announced its intent to prove the prior conviction with other evidence. *Lockhart*, 488 U.S. at 33.

Kareski's desire for proof of detrimental reliance would undermine the logic behind *Lockhart*'s reliance rationale. As noted above, the reliance interest in *Lockhart* prevents the State from having to "assume every ruling by the trial court on the evidence to be erroneous and marshal [sic] and offer every bit of relevant and competent evidence," which would "adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case." *Brewer* at ¶ 19, quoting *Wood*, 596 S.W.2d at 389-399. But under Kareski's proposed rule, every time the trial court admits evidence, the State would have to affirmatively indicate on the record that it is declining to present cumulative evidence that it has "waiting in the wings." Appellant's Brief, 11. It would not be enough for the State to simply say that it *has* cumulative evidence; the State would have to proffer the other evidence so that a reviewing court can assess the State's reliance. Even when the defense does not object to the admission of evidence, the State would still need to proffer cumulative evidence, just in case a reviewing court finds plain error. To fully preserve its retrial rights, the State would need back-up evidence on every element of every offense. The whole point of *Lockhart*'s reliance rationale is to promote the orderly administration of justice. Yet requiring the State to affirmatively explain on the record that it is not presenting cumulative evidence can be every bit as inefficient and time consuming as requiring the State to present cumulative evidence.

Requiring proof of detrimental reliance would also present logistical problems. A defendant's conviction may be vacated either on direct appeal or by collateral attack. *Lockhart*, 488 U.S. at 38. When a conviction is challenged collaterally, the State may make a record of what evidence it could have presented in lieu of the erroneously-admitted evidence. Indeed, that is what happened in *Lockhart*. The State's reliance on an evidentiary ruling, however, will rarely appear in the trial record, and the State has no opportunity to develop the record to prove its reliance when a conviction is challenged on direct review. *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. The State's ability to secure a retrial should not depend on the nature of the proceeding in which the conviction is vacated.

There is yet another reason why proof of detrimental reliance is unnecessary. *Lockhart's* holding that a reviewing court must consider all the evidence—whether erroneously or not—is premised on equating the reviewing court's sufficiency review with the trial court's consideration of a Crim.R. 29 motion. “[A] reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence.” *Lockhart*, 488 U.S. at 41. Because there is no reliance inquiry when a trial court considers a Crim.R. 29 motion, there should be no such inquiry when a reviewing court determines whether the evidence is sufficient to permit retrial.

*Lockhart* adopted a bright-line, easy-to-follow rule: When a conviction is vacated because of trial error, retrial is permitted if the evidence admitted at trial—including any improperly-admitted evidence—is sufficient to prove guilt. *Id.* at 34. Thus, the “touchstone question” is not, as Kareski claims, whether the record shows that the State detrimentally relied on the trial court's evidentiary ruling. Appellant's Brief, 7. Rather, the touchstone question—the *only* question—is whether all the evidence admitted is sufficient to support the conviction.

Whether the record affirmatively shows that the trial error caused actual detrimental reliance by the State plays no role in the analysis.

**IV. LOVEJOY WAS WRONGLY DECIDED AND SHOULD BE OVERRULED.**

Kareski's reliance on this Court's decision *Lovejoy* is unpersuasive. In *Lovejoy*, the defendant's weapon-under-disability charge was tried to the bench. The Tenth District remanded for a new trial on that charge, finding that the trial court erred by *sua sponte* reopening the State's case after closing argument and taking judicial notice of a fact relating to the defendant's prior conviction. This Court reversed, stating: "After determining that the evidence of the conviction was erroneously considered by the trial judge, the appellate court should have reviewed the remaining evidence to determine whether it was sufficient to support a conviction." *Lovejoy*, 79 Ohio St.3d at 450. Citing the Tenth District's observation that without the trial court's taking judicial notice the evidence offered by the State was insufficient to prove that the defendant was under a disability, this Court held that the weapon-under-disability charge had to be dismissed. *Id.* The three-justice dissent in *Lovejoy* stated that the Tenth District "acted correctly in remanding the case for a new trial after determining that the trial court erred in its use of judicial notice." *Id.* at 459 (Cook, J., dissenting).

The *Lovejoy* majority's focus on whether the "remaining evidence" was sufficient to permit retrial directly contradicts *Lockhart*'s command that reviewing courts look to all the evidence admitted, including any improperly-admitted evidence. *Lockhart*, 488 U.S. at 34. Although the Tenth District cited *Lockhart* in remanding for a new trial, *State v. Lovejoy*, 10th Dist. No. 95AP-849 (Feb. 8, 1996), this Court's majority opinion did not mention *Lockhart* at all. As former Chief Justice Moyer stated in his dissent in *Brewer*: "[T]he holdings of *Lovejoy* and *Lockhart* appear to offer conflicting holdings regarding whether evidence that was improperly

admitted may be considered when reviewing a sufficiency-of-the-evidence claim.” *Brewer* at ¶ 30 (Moyer, C.J., dissenting). “[T]he majority in *Lovejoy* did not apply *Lockhart*.” *Id.* at ¶ 36 (Moyer, C.J., dissenting).

Chief Justice Moyer’s *Brewer* dissent—while acknowledging that *Lovejoy* conflicted with *Lockhart*—nonetheless argued that *Lovejoy* “implicitly held” that the “remaining evidence” standard applies under the Ohio Constitution. *Id.* at ¶¶ 31-34 (Moyer, C.J., dissenting). But the Ohio Constitution question was directly before this Court in *Brewer*. *Id.* at ¶ 12; *id.* at ¶ 31 (Moyer, C.J., dissenting). The *Brewer* majority rejected this argument, explicitly finding that *Lockhart*’s “all evidence” standard applies under the Ohio Constitution. *Id.* at syllabus; see, also, *id.* at ¶¶ 25-26. And for good reason, given that *Lovejoy* did not purport to rely on the Ohio Constitution, and given that “Ohio courts have historically treated the protections afforded by the Double Jeopardy Clauses of the Ohio Constitutional and the United States Constitution as coextensive.” *State v. Gustafson*, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996).

The *Brewer* majority distinguished the facts of that case from *Lovejoy*. *Brewer* at ¶¶ 21-24. This Court noted that, unlike in *Lovejoy*, the trial error in *Brewer* did not occur after the trial court had “erroneously reopened the case to take judicial notice of a necessary element of the crime after closing arguments.” *Id.* at ¶ 24. Rather, “[r]elying on the trial court’s erroneous evidentiary ruling, the state elected to rest its case after it introduced, and the trial court admitted, sufficient evidence to sustain its burden of proof.” *Id.* The Ninth District below similarly distinguished this case from *Lovejoy*. In its decision on reconsideration, the Ninth District stated that “the timing of the trial court’s judicial notice in *Lovejoy* was critical.” 6-25-12, Journal Entry, p. 2 (attached to Appellant’s Brief at App’x, pp. 12-13), citing *Brewer* at ¶¶ 24-25.

The Ninth District was correct in concluding that the facts of this case align more with *Brewer* than *Lovejoy*. But distinguishing *Lovejoy* was unnecessary in *Brewer* and is unnecessary now. Whether a reviewing court should consider improperly-admitted evidence in determining whether a retrial is permitted does not depend on when the trial error occurred. The only issue is whether all the evidence admitted was sufficient to support the conviction.

Amicus respectfully submits that rather than distinguish *Lovejoy*, this Court should overrule it. Even applying the three-prong test announced in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, to this constitutional case, *Lovejoy* should be abandoned. First, *Lovejoy* was wrongly decided. As the dissents in *Lovejoy* and *Brewer* recognized, *Lovejoy*'s "remaining evidence" standard directly conflicts with *Lockhart*. And since *Lovejoy*, this Court has twice reaffirmed *Lockhart*'s "all evidence" standard. *Brewer* at syllabus; *Yarbrough* at ¶ 80.

Second, *Lovejoy* defies practical workability. Whereas the "all evidence" standard in *Lockhart* is easy to follow, leaving *Lovejoy* in place puts reviewing courts in the difficult position of deciding when to apply *Lockhart* and when to apply *Lovejoy*. If the timing of the trial error is what matters, it is unclear as to exactly when in the proceedings a trial error would trigger *Lovejoy* as opposed to *Lockhart*. If proof of detrimental reliance by the State is what matters, for the reasons explained above this would result in inefficient and time-consuming trials. Also, it is unclear as to exactly how much proof of detrimental reliance is needed before a reviewing court may consider the improperly-admitted evidence in its sufficiency review. The better approach is to apply *Lockhart*'s "all evidence" to all cases in which a conviction is vacated for trial error.

Finally, overruling *Lovejoy* would create no undue hardship for criminal defendants. *Lovejoy* does not set forth any standard of conduct, but rather concerns the purely procedural

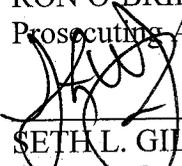
issue of what evidence a reviewing court must consider in determining whether a retrial is permitted. Thus, no criminal defendants have relied on *Lovejoy* in conducting their affairs. *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶ 31, citing *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715, 719 (2nd Cir.1955). If anything, prosecutors have relied on *Lockhart*, *Brewer*, and *Yarbrough* in declining to present cumulative evidence. Upholding *Lovejoy* would require “readjustment and dislocation” in that prosecutors in deciding what evidence to present must guess as to whether the reviewing court will apply the “all evidence” standard or the “remaining evidence” standard if the conviction is later vacated. *Ruther v. Kaiser*, \_\_\_ Ohio St.3d \_\_\_, 2012-Ohio-5686, \_\_\_ N.E.2d \_\_\_, ¶ 30.

### CONCLUSION

Like any other error involving the admission of evidence, the improper taking of judicial notice is a trial error. And like any other evidence, a fact that is improperly-judicially noticed must be considered by a reviewing court in determining whether the evidence admitted at trial is sufficient to permit trial. Moreover, there is no reason that reviewing courts must navigate between the “all evidence” standard and the “remaining evidence” standard. Instead, this Court should overrule *Lovejoy* and hold that *Lockhart*’s “all evidence” standard applies anytime a conviction is vacated due to trial error.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day,

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