

IN THE SUPREME COURT OF OHIO  
2013

STATE OF OHIO,

Case No. 13-403

Plaintiff-Appellant,

-vs-

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

AMBER LIMOLI,

Court of Appeals  
Case No. 11AP-924

Defendant-Appellee

**REPLY BRIEF OF PLAINTIFF-APPELLANT**

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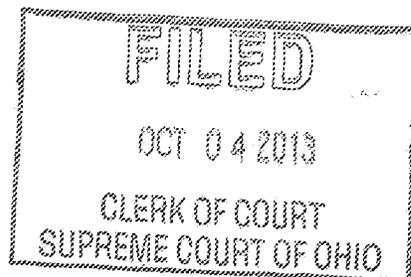
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## ARGUMENT

Proposition of Law. Under R.C. 1.58(B), House Bill 86's elimination of crack cocaine as a separate unit of prosecution does not benefit a defendant whose crack-cocaine offense occurred before September 30, 2011, even when that defendant is sentenced after that date.

The arguments of defendant and her amicus largely constitute a flight from the clear legislative language in Section 3 of H.B. 86, which specifically incorporated all of the elements of "division (B)" into the analysis of the problem, not merely the "if not already imposed" element that defendant can satisfy. For this and other reasons, the State stands by the arguments in its merit brief and responds to particular arguments here.

### A.

Defendant and her amicus subscribe to a categorical "defendant wins" approach, contending that it is clear from Section 3 of H.B. 86 that offenders like defendant would prevail merely because they were sentenced after the 9-30-11 effective date. Defendant likens Section 3 to the uncodified "notwithstanding" language discussed in *State v. Rush*, 83 Ohio St.3d 53, 697 N.E.2d 634 (1998), which was found to have overridden the application of R.C. 1.58(B) as to the Senate Bill 2 amendments effective in 1996.

As explained in the State's merit brief, there are significant problems with the categorical "defendant wins" approach. Unlike in *Rush*, in which the General Assembly clearly negated the application of R.C. 1.58(B) by the use of "notwithstanding" language, Section 3 of H.B. 86 expressly *incorporated* R.C. 1.58(B), stating that the amendments would apply "to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable." *Rush* is inapposite.

All of R.C. 1.58(B) applies, not just the part favorable to defendant. "Where one

statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute.” *Hassett v. Welch*, 303 U.S. 303, 314, 58 S.Ct. 559, 82 L.Ed. 858 (1938) (quoting treatise). “For this purpose the law referred to is, in effect, incorporated with and becomes a part of the one in which the reference is made, and so long as that statute continues, will remain a part of it.” *State ex rel. Fritz, v. Gongwer*, 114 Ohio St. 642, 649, 151 N.E. 752 (1926) (quoting another case); *Lessee of Stall v. MacAlester*, 9 Ohio 19, 22 (1839) (“These provisions became a part of the law \* \* \*, as fully as if they had been repeated verbatim in that law \* \* \*.”); see, also, Singer, *Sutherland Statutes and Statutory Construction* § 22:25 (6th ed. 2002) (“When a statute adopts the provisions of another statute by specific reference, the effect is as if the referenced statute had been incorporated into the adopting statute.”).

The legislature is also presumed to have been aware of this Court’s authoritative construction of R.C. 1.58(B) in *Kaplowitz* and to have adopted that construction. The legislature “is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change \* \* \*. So too, where, as here, [the legislature] adopts a new law incorporating sections of a prior law, [the legislature] normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.” *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

Given the legislative call to apply “division (B)” of R.C. 1.58, it is important to focus on the actual language of that subsection. Division (B) provides that:

If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

Thus, in order to benefit from “division (B),” a defendant must show that: (1) a “reenactment or amendment of a statute”; (2) “reduced”; (3) “the penalty, forfeiture, or punishment”; (4) for the “offense”; (5) “if not already imposed”.

Defendant and her amicus are attempting to truncate the application of these elements. They wish to focus on the “if not already imposed” element alone, thereby eliminating the other four elements of “division (B).” That is not what the General Assembly intended, since it incorporated all of “division (B),” not merely a part of it. Had the General Assembly intended to circumvent the other elements of R.C. 1.58(B), it would have worded Section 3 differently, such as:

Section 3. The amendments to sections 2925.01 \* \* \* and 2925.11 of the Revised Code \* \* \* that are made in this act apply to a person who commits an offense involving marihuana, cocaine, or hashish on or after the effective date of this act and to a person ~~to whom division (B) of section 1.58 of the Revised Code makes the amendments~~ applicable for whom sentence was not already imposed prior to the effective date of this act.

It would take a significant rewriting of Section 3 to have it read as suggested by defendant and her amicus. Of course, courts cannot rewrite Section 3. *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). Courts must faithfully apply R.C. 1.58(B) in full, not merely in the truncated way defendant wishes.

Defendant’s partial-incorporation approach also would mean that Section 3 would be unconstitutional. For many powder-cocaine offenses, the penalties were *increased*,

and those increased penalties cannot be applied to pre-amendment cocaine offenders because of the prohibitions against ex post facto and retroactive laws. The issue cannot solely turn on whether the sentence was imposed for “cocaine” after September 30, 2011.

Defendant would say that the other elements of R.C. 1.58(B) would guard against this unconstitutionality since R.C. 1.58(B) only makes a penalty amendment applicable to pre-amendment offenders if the amendment reduces the penalty for the offense. While this is true, it merely confirms that all of elements of R.C. 1.58(B) were incorporated, not just the “if not already imposed” element that is favorable to defendant.

Defendant states that “Section 3 of the Act directs courts and prosecutors to give offenders still awaiting sentencing the benefit of the penalty reductions.” (Defendant’s Brief, at 6) But Section 3 says nothing about “reductions.” The concept of reduced penalties is set forth in R.C. 1.58(B). Again, the import of Section 3 is that all of R.C. 1.58(B) applies, including the “reduced” element and the “offense” element.

B.

Defendant contends that, unless Section 3 was meant to change how R.C. 1.58(B) applied, the adoption of Section 3 was “meaningless” because R.C. 1.58(B) would have applied anyway. But Section 3 was not “meaningless.” It informs readers that the issue is controlled by R.C. 1.58(B) and not by any alternative approach (such as the categorical approach defendant proposes here).

To be sure, “no portion of a statute should be treated as superfluous unless it is manifestly necessary to do so,” “[b]ut surplusage does not always produce ambiguity, and the plain meaning of the statute is always preferred.” *State ex rel. Plain Dealer Co. v.*

*Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 40. Section 3's reference to "division (B) of section 1.58" provides an unambiguous indication that the issue is controlled by R.C. 1.58(B) in toto. Section 3's reference to R.C. 1.58(B) complements that provision; it does not negate it. *Plain Dealer*, ¶ 43 ("instead of nullifying these laws," statute "complements them").

C.

In opposing the State's argument that the elimination of "crack cocaine" changed the nature of the offense, defendant unwittingly makes key concessions. She contends that crack cocaine and powder cocaine are "two forms of the same drug," "two different forms of the same drug," are "different substances," and are not a "completely different substance." (Defendant's Brief, at 15-16, 17, 18) As these phrases show, there *are* differences, as the degree of offense depended on whether "crack cocaine" was involved.

Defendant concedes that, even after the federal Fair Sentencing Act, there is still a 18-1 "disparity" in federal law between prosecutions for "crack cocaine" and other "cocaine." These differential penalties could not be administered now under federal law unless there was some distinguishing basis to say that "crack cocaine," as opposed to "cocaine," was involved in the offense. The more defendant and her amicus decry the differential penalties that have existed and do exist for "crack cocaine," the more they confirm that there is in fact something called "crack cocaine" that is "different."

Defendant disputes whether "crack cocaine" was ever a proper unit of prosecution, contending that the differing penalties were based on "flawed science." But defendant concedes they are "two different forms" of the drug. There *was* a difference in

a “crack cocaine” prosecution and a “cocaine” prosecution. The elimination of “crack cocaine” necessarily changed the nature of the offense.

D.

Defendant attempts to distinguish *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, 797 N.E.2d 977, because *Kaplowitz* referred to “specifications,” and the present case does not involve a “specification.” But what *Kaplowitz* was referring to as a “specification” was the fact that the defendant was committing an OVI offense at the time of the aggravated-vehicular-assault offense. This “specification” increased the punishment for the pre-amendment offense by mandating prison and mandating a permanent license revocation. *Kaplowitz* held that “R.C. 1.58(B) does not apply to give a criminal defendant the benefit of a reduced sentence if, by applying it, the court alters the nature of the offense, including specifications to which the defendant pled guilty or of which he was found guilty.” *Id.* at syllabus.

The “specification” language of *Kaplowitz* actually supports the State’s position here. Under *Kaplowitz*, the drunk-driving “specification” did not increase the degree of the offense but did result in a mandatory minimum of prison and license revocation, and it was deemed “central” to the pre-amendment offense. Thus, a mere “specification” was considered part of the “nature of the offense” under the R.C. 1.58(B) analysis.<sup>1</sup>

In the present case, the “crack cocaine” fact and its weight were actually degree-raising elements and therefore were even more “central” to the pre-amendment offense.

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<sup>1</sup> Now, as a matter of constitutional doctrine, the drunk-driving “specification” discussed in *Kaplowitz* would be deemed an element that must be alleged in the indictment and proven at trial. *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

Since a mere penalty-enhancing “specification” defeated the defendant’s claim under R.C. 1.58(B) in *Kaplowitz*, it easily follows that the altering of degree-raising elements like “crack cocaine” and its weight would defeat defendant’s claim here.

E.

Defendant and her amicus make various policy arguments as to why the General Assembly would have wanted the amendments eliminating “crack cocaine” to be effective as soon as possible. But none of these arguments support defendant’s backwards reading of Section 3 as effecting only a partial incorporation of R.C. 1.58(B).

They invoke the tired and untrue contention that the differential penalties for crack cocaine are racist. There is no equal protection violation in penalizing crack cocaine more severely. *United States v. Wimbley*, 553 F.3d 455, 463 (6th Cir. 2009) (citing *United States v. Hill*, 79 F.3d 1477, 1488 (6th Cir.1996) (collecting cases)). Crack is different. *State v. Wilkerson*, 2nd Dist. No. 22693, 2008-Ohio-4750, ¶¶ 20, 22 (“more addictive”; “impact of crack is greater”; “higher levels of violence”). The General Assembly very likely disagreed with the race-based “withering” criticism of differential penalties since the General Assembly clearly left a large number of previous crack-cocaine offenders in prison, a result which would be unjust if there was “racism.”

Defendant and her amici also contend that the goal of H.B. 86 was to save money. But, again, the General Assembly invoked R.C. 1.58(B) and obviously was not using cost savings as a rationale to override the regular operation of R.C. 1.58(B). And if cost savings had been an overriding rationale, it would not have left prior crack-cocaine offenders in prison without a manner of redress.

Whatever the policy rationale(s) for eliminating differential treatment for “crack cocaine” and “cocaine,” the General Assembly’s sole expressed intent was that the courts would faithfully apply R.C. 1.58(B).

F.

Defendant and her amicus resort to R.C. 2901.04(A), which provides that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” But Section 3 is not a section of the “Revised Code”; it was uncodified law. In any event, Section 3 plainly refers the reader to R.C. 1.58(B). Although R.C. 1.58(B) is part of the Revised Code, it is not a section “defining offenses or penalties.” Rather, it regulates whether the penalties existing in other statutes as amended shall apply to pre-amendment offenders. The statutory rule of strict construction has no application here.

There is no ambiguity either. Strict construction is not necessary “merely because it [is] possible to articulate a construction more narrow than that urged by the Government.” *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). The rule of strict construction, also known as the rule of lenity, “is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.” *Chapman v. United States*, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)

(quote marks and brackets omitted); *State v. Sway*, 15 Ohio St.3d 112, 116, 472 N.E.2d 1065 (1984) (“not an obstinate rule which overrides common sense and evident statutory purpose”; “satisfied if the statutory language is given fair meaning”).

The General Assembly manifested its intent that courts would apply all of R.C. 1.58(B), not just the part favorable to defendant. As authoritatively construed in *Kaplowitz*, R.C. 1.58(B) precludes the applicability of penalty-reducing amendments to pre-amendment offenders when the amendments are also changing the nature of the offense, as occurred here.

G.

The State is not contending that “the General Assembly lacked the authority to do what it intended to do, or went about it incorrectly.” (Defendant’s Brief, at 12) There is no question that the General Assembly *could* have mandated that pre-amendment “crack cocaine” offenders receive the benefit of H.B. 86 changes. Rather, the question is what the General Assembly intended. By incorporating R.C. 1.58(B), the General Assembly here intended that courts faithfully apply that statute as construed by *Kaplowitz*.

Nor is the State contending that the General Assembly intended pre-amendment offenders to prevail but that the General Assembly “went about it incorrectly.” “[T]he intent of the law-makers is to be sought first of all in the language employed \* \* \*. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.” *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902).

H.

Defendant posits that the Franklin County Prosecutor cannot pursue these

arguments under R.C. 1.58(B) because this State’s appeal is not proceeding “[i]n conjunction with the Attorney General.” This contention fails for several reasons.

1.

Ohio law specifically allows the county prosecutor to pursue this appeal, including the particular issues supporting reversal, without the particular involvement of the attorney general. R.C. 2953.14 provides that the prosecutor alone can proceed:

Whenever a court superior to the trial court renders judgment adverse to the state in a criminal action or proceeding, the state, through either the prosecuting attorney or the attorney general, may institute an appeal to reverse such judgment in the next higher court. If the conviction was for a violation of a municipal ordinance, such appeal may be brought by the village solicitor, city director of law, or other chief legal officer of the municipal corporation. Like proceedings shall be had in the higher court at the hearing of the appeal as in the review of other criminal actions or proceedings. The clerk of the court rendering the judgment sought to be reversed, on application of the prosecuting attorney, attorney general, solicitor, director of law, or other chief legal officer shall make a transcript of the docket and journal entries in the action or proceeding, and transmit it with all papers and files in the action or proceeding to the higher court.

Several aspects of the statutory language deserve mention. First, and most importantly, R.C. 2953.14 specifically allows the prosecuting attorney alone to pursue the appeal. This language contemplates that *either* the prosecuting attorney *or* attorney general, individually, may proceed without the other.

Second, the direction of the appeal is cast immediately by the prosecutor, who, proceeding alone, can initiate the appeal seeking “to reverse” the judgment of the intermediate court. The statutory language does not contemplate that the direction of the

appeal will be changed or modified later. The prosecutor, and the prosecutor alone, can pursue an appeal “to reverse.”

Third, after initiation by the prosecutor, the case proceeds to hearing “as in the review of other criminal actions or proceedings.” This language eschews distinctions between the kinds of criminal appeals coming to the court; all criminal appeals proceed to hearing in the same way without qualifications or limitations on the ability of the appellant to continue seeking reversal as appropriate. For example, a criminal defendant seeking reversal does not need the consent of any other official or attorney to continue seeking reversal upon the hearing of his criminal appeal. Municipal prosecutors similarly can seek reversal without the consent of any other official or attorney. The statute provides that appeals by county prosecutors are heard in the same way as these other kinds of criminal appeals, i.e., without the consent of any other official or attorney.

Fourth, the statute specifically provides that, when it later comes time for transmission of the record, the prosecutor, alone, can seek its transmission from the clerk of the court “rendering the judgment sought to be reversed.” This language confirms that, even at the later time of transmission of the record, the prosecutor can still be proceeding alone and can still be seeking to reverse the lower court’s judgment.

In sum, the prosecutor can initiate an appeal and can decide to seek reversal, and the resulting appeal proceeds like any other criminal appeal. There is no provision for the attorney general to intervene later to cancel the appeal initiated by the prosecutor. There is no provision for the attorney general to intervene and thereby change the direction of the appeal from seeking reversal to seeking dismissal or affirmance. There is no

requirement that the attorney general intervene and thereby approve of the prosecutor's appeal. No such cumbersome intervention procedure is created. Instead, under the statute's "either \* \* \* or" language, the county prosecutor can pursue the appeal alone.

The statute reflects the concept of concurrent authority. "In many instances, the authority of the attorney general and that of the prosecuting attorney in a criminal case are concurrent." 7 Am.Jur.2d, Attorney General, § 16, at 19. "When the powers of the two offices coincide, they may be exercised either concurrently by both or independently by either." Id. § 15, at 18.

2.

Case law from this Court recognizes the ability of the county prosecutor to proceed alone in the appeal. In *State v. Gaskins*, 87 Ohio St. 128, 100 N.E. 324 (1912), the county prosecutor had filed a petition in error in the Supreme Court, and the defendant sought the dismissal of the appeal because the prosecutor had not sought leave of the Supreme Court to file the petition. Relying on G.C. 13764 (a predecessor of what is now R.C. 2953.14), the Supreme Court concluded that the prosecutor did not need leave of court, saying that the statute (which included the same "either-or" language as today) did not require leave of court. The Supreme Court stated in the syllabus that the statute "does not require that leave of this court shall be obtained by the prosecuting attorney or the Attorney General to file the petition in error which the section authorizes." As noted, the county prosecutor *or* the attorney general could file the petition.

In *State v. Sappienza*, 84 Ohio St. 63, 95 N.E. 381 (1911), the State had appealed through the county prosecutor. This Court noted that the State, "availing itself of section

13764 of the General Code, authorizing such proceedings, brings error in this court seeking a reversal of the judgment of the circuit court \* \* \*.” Id. at 63.

In *State v. Simmans*, 21 Ohio St.2d 258, 257 N.E.2d 344 (1970), the court of appeals had reversed the conviction on defective-indictment grounds. The court of appeals ordered the defendant discharged. The State appealed through the county prosecutor, who prevailed on the ground that the indictment was not defective.

In the process of sustaining the prosecutor’s appeal, this Court rejected the defendant’s argument that the appeal was defeated by the fact that the State had not obtained a stay of his discharge while the appeal was pending. This Court quoted the language from R.C. 2953.14 with a focus on the prosecutor’s ability to appeal under that statute; the quotation even omitted by ellipses the statute’s reference to the “attorney general” language. This Court further concluded that a stay had been unnecessary.

The correct propositions which emerge from the foregoing review of the statutes are: (1) The appeal to this court is *by the state, through the prosecuting attorney*, to reverse a judgment adverse to it in a criminal proceeding, pursuant to R. C. 2953.14; and (2) that judgment is automatically stayed without bond given by, or a specific request of, *the prosecuting attorney who is a public officer of a political subdivision of the state properly prosecuting the appeal* (‘suing’) in his representative capacity as such officer. \* \* \*

*Simmans*, 21 Ohio St.2d at 264 (emphasis added).

In *State v. Myers*, 26 Ohio St.2d 190, 271 N.E.2d 245 (1971), a city law director alone filed the appeal on behalf of the State seeking reversal in the Ohio Supreme Court. The defendant contended that the city law director could not proceed with the appeal without the consent of the county prosecutor. This Court rejected that argument, noting

that another statute gave the city law director the power to exercise the same duties as the county prosecutor, which included the ability under R.C. 2953.14 to appeal to the Supreme Court from an adverse judgment of the Court of Appeals. After quoting the “either-or” language of R.C. 2953.14, this Court held that the General Assembly would not have granted the law director this power only then to render the law director unable to prosecute the appeal: “We cannot believe that the General Assembly meant to vest this power in such an officer, only to render him impotent to prosecute an appeal.” *Myers*, 26 Ohio St.2d at 202-203. This Court held the law director “was a proper person to carry forth the state’s appeal to this court after a reversal by the Court of Appeals.” *Id.* at 203.

In *State ex rel. Corrigan v. Lawther*, 39 Ohio St.3d 157, 529 N.E.2d 1377 (1988), the county prosecutor had sought leave to appeal in the court of appeals from a suspension of sentence. When leave was denied, the prosecutor did not appeal to the Ohio Supreme Court. Instead, the prosecutor filed a mandamus action as relator in the court of appeals. The writ was denied, and this Court affirmed. This Court concluded that the county prosecutor had an adequate remedy at law because he could have appealed to the Supreme Court under R.C. 2953.14.

[A]ppellant could have appealed the denial of leave to appeal to this court. R.C. 2953.14 allows the state to seek review of an adverse judgment of a court of appeals:

“Whenever a court superior to the trial court renders judgment adverse to the state in a criminal action or proceeding, the state \* \* \* may institute an appeal to reverse such judgment in the next higher court. \* \* \* ”

Because appellant could have appealed under R.C. 2953.14, he had an adequate remedy at law. \* \* \*

*Corrigan*, 39 Ohio St.3d at 158.

As can be seen, the prosecutor is a proper official to fully prosecute a State's appeal in this Court under R.C. 2953.14. Under a General Code predecessor to R.C. 2953.14, *Gaskins* and *Sappienza* show that the county prosecutor *or* attorney general could pursue the State's appeal, thereby availing the State of its appeal remedy.

Under *Simmans*, the Court emphasized that the prosecutor was the public official properly prosecuting the State's appeal under R.C. 2953.14.

Under *Myers*, the city law director was found to be a "proper person" to carry forth the State's appeal. Since the law director's authority was derived from statutes governing the county prosecutor's powers, including R.C. 2953.14, it readily follows that, since the law director alone could carry forth the State's appeal, the county prosecutor was equally authorized to carry forth State's appeals as well. "We cannot believe that the General Assembly meant to vest this power in such an officer, only to render him impotent to prosecute an appeal." *Myers*, 26 Ohio St.2d at 202-203.

Finally, in *Corrigan*, this Court found that the relator-prosecutor had an adequate remedy at law because he, the prosecutor, could have appealed under R.C. 2953.14.

3.

Against this phalanx of statutory language in R.C. 2953.14 and case law based thereon, defendant relies on R.C. 309.08(A), which provides in pertinent part that, "[i]n conjunction with the attorney general, the prosecuting attorney shall prosecute in the supreme court cases arising in the prosecuting attorney's county \* \* \*." Defendant supposes that, while a county prosecutor can "initiate" the State's appeal, the appeal can

only be further pursued in “conjunction with” the attorney general.

There are several problems with this contention. First, it fails to note the plural reference, “cases.” The statutory language at most presupposes that the attorney general will work “in conjunction with” with the county prosecutor in handling “cases” from that county. This language would not require the involvement of the attorney general in any particular case, but, rather, would allow the attorney general to work in conjunction with the prosecutor overall to ensure that the county’s “cases” receive representation as needed. When the prosecutor has undertaken such representation and pursued an appeal to the Supreme Court under R.C. 2953.14, the case will have sufficiently received such representation and therefore the “conjunction” language would be inapposite.

The “conjunction” language represents an acknowledgment that, in particular cases, the attorney general very well would be the prosecuting official involved. The attorney general can be the prosecuting official in various kinds of cases, including organized crime (R.C. 109.83), crimes related to worker’s compensation (R.C. 109.84), crimes related to Medicaid (R.C. 109.85), crimes involving patient abuse (R.C. 109.86), and crimes involving election fraud (R.C. 109.95). In addition, the attorney general can prosecute other cases at the written request of the Governor. R.C. 109.02.

As can be seen, the “cases” arising to the Supreme Court from any particular county can consist of cases handled by the county prosecutor *and* cases handled by the attorney general. By using “in conjunction with” language, the General Assembly was merely acknowledging that the attorney general would be handling some cases arising from any particular county and would be handling such cases in the Supreme Court.

The word “conjunction” is consistent with the “either-or” language of R.C.

2953.14. A *conjunction* can be a part of speech “used to connect clauses or sentences, or to coordinate words in the same clause.” Oxford English Dictionary, Vol. III, at 740 (2nd Ed. 1989). “Conjunction” also can mean an association of persons or things. *Id.* Under R.C. 2953.14, *either* the prosecutor will prosecute the State’s appeal *or* the attorney general will prosecute the State’s appeal. This understood coordination of responsibilities does not require that both must act in a particular case. The prosecutor and attorney general are associated in their overall responsibility for the “cases” arising from that particular county, but each have sufficient authority without the other to act as needed.

Although defendant attempts to portray the “conjunction” language as a one-way street in which the attorney general can veto the prosecutor’s appeal, defendant’s interpretation would ironically bestow on county prosecutors the ability to veto an attorney general’s appeal as well. If the “conjunction” language requires involvement or agreement by both, then the attorney general could no more pursue an appeal alone than could the prosecutor. Of course, the “either-or” language in R.C. 2953.14 shows that each alone have the ability to pursue the State’s appeal.

Defendant also relies on R.C. 109.02, which provides that the attorney general shall appear for the state in the trial and argument of “criminal causes” in the Supreme Court. The use of the word “trial” suggests that the General Assembly was contemplating a form of original criminal jurisdiction in the Supreme Court and that the attorney general would appear in such matters. See, e.g., Article III, Section 4, Ohio Constitution of 1802 (“judges of the supreme court \* \* \* shall have complete criminal jurisdiction”); see, also,

R.C. 2705.05 (criminal contempts). But even if this language was meant to apply to criminal *appeals*, this provision must be read in *pari materia* with R.C. 2953.14. Under the latter, it is still clear that *either* the prosecutor *or* the attorney general can prosecute an appeal on behalf of the State in the Supreme Court. Understood in this light, the attorney general's entering of an appearance is not absolutely required in order for the appeal to proceed. The prosecutor's representation is sufficient to allow the appeal to proceed.

4.

Defendant errs in relying on the intermediate appellate decision in *State v. Market*, 158 Ind.App. 192, 302 N.E.2d 528 (1973). Defendant argues that the Indiana court conducted a "comprehensive" survey of state supreme court rulings and concluded that "[N]ot a single State permits the county Prosecuting Attorney to take an appeal from the trial court in a criminal case to the State Supreme Court on his own initiative." (Defendant's Brief, at 12, quoting *Market*, at 202) In fact, the Indiana court only reviewed the case law of eleven other states, *not including Ohio*. The court then expressly qualified its comment by stating that, "*Of the eleven States examined*, not a single state permits the county Prosecuting Attorney \* \* \*." (Emphasis added) It was misleading for defendant to quote from the *Market* case but omit the key language showing that its survey was not "comprehensive" but rather was limited to a small group of states and did not include Ohio.

Had the Indiana court surveyed Ohio law in 1973, it would have seen various Ohio cases, including *Simmans* and *Myers*, showing that the county prosecutor is a proper official to prosecute a State's appeal in the state Supreme Court. Of course, defendant

omits any reference to such Ohio cases here and instead relies on an Indiana decision.

Likewise, the decision in *Ex Parte Taylor*, 36 S.W.3d 883 (Tex. Crim.App. 2001), is inapposite, since that case involved a statutory scheme that created a specific statutory office (“state prosecuting attorney”) to exclusively handle appeals to the State’s highest court. Ohio could have established such a statutory office, but Ohio has not done so. R.C. 2953.14 shows that the county prosecutor has the authority to pursue such appeals.

5.

Decades of long-standing practice confirm the view that the county prosecutor has sufficient authority alone to pursue a State’s appeal in the Supreme Court. This Court’s various cases citing R.C. 2953.14 show that the prosecutor can pursue such appeals. Moreover, the long-standing practice of this Court has been to accept review of such appeals and to entertain the prosecutor’s arguments therein without any requirement that such arguments be approved by the attorney general.

Nor is there any indication that the attorney general has viewed it as an invasion of the attorney general’s prerogatives that prosecutors proceed without the attorney general joining in the appeal. Hundreds of State’s appeals by county prosecutors have proceeded without any involvement by the attorney general. And recent examples confirm that, when the attorney general has expressed views in such appeals, such views have come as *amicus curiae*. See, e.g., *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324; *State v. Jones*, 71 Ohio St.3d 293, 643 N.E.2d 547 (1994). There is no indication that the attorney general has insisted on being a co-representative of the State in prosecutor-initiated State criminal appeals to the Supreme Court. Notably,

in *Market*, the Indiana Attorney General was objecting to the prosecutor's appeal in that case. No such objection has been made in Ohio.

These long-standing practices and interpretations by the judicial and executive branch agencies involved should not be set aside unless judicial construction makes it imperative to do so. See *UBS Financial Servs., Inc. v. Levin*, 119 Ohio St.3d 286, 2008-Ohio-3821, 893 N.E.2d 811, ¶ 34.

Even under defendant's argument, he asserts that the argument is a "procedural" one. Given the long-established practice of entertaining prosecutor-initiated State's appeals here, and given the attorney general's acceptance of this practice, defendant has no standing to complain that the present appeal is proceeding via the prosecutor alone.

The State's proposition of law warrants relief.

### CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the Tenth District's judgment as to sentencing and remand the case to the common pleas court with instructions to reinstate the one-year mandatory sentence if defendant's motion to suppress is denied.

Respectfully submitted,



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Counsel for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 4<sup>th</sup> day of Oct, 2013, to Dennis C. Belli, Two Miranova Place, Suite 500, Columbus, Ohio 43215, counsel for defendant-appellee, and to E. Kelly Mihocik, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for amicus curiae Ohio Public Defender..

  
STEVEN L. TAYLOR