ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

DE'ARGO GRIFFIN

Defendant-Appellee.

Case No. 2013-1129
2013-1319

On Appeal from the Montgomery County Court of Appeals, Second Appellate District

Court of Appeals Case No. 24001

MERIT BRIEF OF APPELLANT, THE STATE OF OHIO

MATHIAS H. HECK, JR.
Prosecuting Attorney
KIRSTEN A. BRANDT (0070162)
(COUNSEL OF RECORD)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-5027

ATTORNEY FOR THE STATE OF OHIO, APPELLANT

DARRELL L. HECKMAN
Reg. No. 0002389
One Monument Square, Suite 200
Urbana, OH 43078

COUNSEL FOR APPELLEE, DE'ARGO GRIFFIN

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STATEMENT OF THE CASE

On April 10, 2009, a Montgomery County Grand Jury indicted Appellant De'Argo Griffin, Anthony James Franklin, and Daeshawn J. Foster for possession of heroin in an amount equaling or exceeding ten grams but less than fifty grams. A "B" indictment was subsequently filed, charging Griffin, Franklin, and Foster, with five counts of possession of criminal tools and one count of engaging in a pattern of corrupt activity.

Griffin and Franklin were tried jointly. After presentation of all of the evidence, the jury found both defendants guilty as charged. The trial judge sentenced Griffin to a total of five years in prison, a $15,000 fine, and a six-month driver's license suspension.

Griffin appealed. The Second District Court of Appeals affirmed his convictions on February 10, 2012. *State v. Griffin*, 2nd Dist. No. 24001, 2012-Ohio-503, at ¶ 60. Thereafter, he filed an application for reopening, claiming ineffective assistance of appellate counsel. The Court of Appeals reopened the appeal for new appellate counsel to challenge the court's jury instructions on "enterprise" and any other error which counsel believed to have merit.

On May 31, 2013, the Court of Appeals reversed in part, affirmed in part, and remanded for further proceedings. (Final Entry of the Second District Court of Appeals, Appendix C) Specifically, the Court of Appeals reversed Griffin's conviction for engaging in a pattern of corrupt activity and his sentences on four of the five counts of possession of criminal tools. (Opinion of the Second District Court of Appeals, at ¶ 69, 114, Appendix D)

The State did not challenge the Court of Appeals' decision concerning possession of criminal tools. However, the State did challenge the Court of Appeals' conclusion that the trial court's jury instruction on "enterprise" was insufficient to convey the law on enterprise.

Because the Court of Appeals' decision on that issue was in conflict with the judgment rendered in *State v. Habash*, 9th Dist. No. 17073, 1996 WL 37752 (Jan. 31, 1996), the State asked the Court of Appeals to certify a conflict. On July 17, 2013, the Court of Appeals found that a conflict existed and certified the following issue:

> In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, is an instruction sufficient to convey the law on the element of "enterprise" when the instruction states the elements of the offense, provides the statutory definitions of "enterprise" and "pattern of corrupt activity," and informs the jury that it has to find both beyond a reasonable doubt?

In the meantime, the State also filed a timely notice of appeal and memorandum in support of jurisdiction asking this Court to invoke its appellate and discretionary jurisdiction over the same issue. This Court accepted the State's jurisdictional appeal in Case No. 2013-1129 and ordered it consolidated with the certified conflict case in Case No. 2013-1319. Both causes are now before this Court.

STATEMENT OF FACTS

Griffin's conviction for engaging in a pattern of corrupt activity was based on multiple acts of possessing and selling crack cocaine and heroin between May 13, 2006 and April 2, 2009. The specific details of those drug-related acts are set forth more fully in Griffin's co-defendant's case, *State v. Franklin*, 2nd Dist. Nos. 24011, 24012, 2011-Ohio-6802, at ¶ 11-33.

Prior to trial, the State filed a detailed bill of particulars describing the facts underlying the offenses and the predicate acts making up the charge of engaging in a pattern of corrupt activity. (Summary of the Docket, Entry # 6) At trial, the State presented testimony about each

drug-related incident, how the defendants participated in those incidents, and how the organization generally conducted its drug sales.

At the close of the State's case, Griffin's counsel joined in the request made by Franklin's counsel for an instruction "that would provide the jury additional guidance as to law in the State of Ohio," as set forth in the Second District Court of Appeals' case of *State v. Fritz*, 178 Ohio App.3d 65, 2008-Ohio-4389, 896 N.E.2d 778 (2nd Dist.) and the federal case of *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). (Tr. 1366-69) In particular, counsel wanted the judge to instruct the jury that, to establish the defendants' guilt of the charge of engaging in a pattern of corrupt activity, "the State's evidence should show that a group of persons associated together for the common purpose of engaging in a course of criminal conduct, that there was an ongoing organizational entity whose members functioned as a continuing unit, and that would be sufficient to demonstrate the existence of an enterprise. And in addition, that the pattern of corrupt activity was a series of corrupt acts involving a specific instance of illegal activity." (Tr. 1366) The defense further wanted the instruction to state that "an association in fact enterprise under RICO must have a structure." (Tr. 1368)

The judge overruled the request and instructed the jury in the language of the statute – R.C. 2923.31 and 2923.32. (Tr. 1370, 1411-12, 1418) The judge provided the following instructions to the jury:

> Now in case number 2009-CR-1117, Mr. Griffin is also charged with engaging in a pattern of corrupt activity. So before you can find the defendant guilty you must find beyond a reasonable doubt * * * that the defendant, from on or about the 13th day of May 2006 to on or about the 2nd day of April 2009, and in Montgomery County, Ohio, while employed by or associated with an enterprise,

conducted or participated in directly or indirectly the affairs of the enterprise through a pattern of corrupt activity[.]

Now enterprise includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency or other legal entity, or any organization, association or group of persons associated in fact, although not a legal entity. Enterprise includes illicit as well as licit enterprises.

Participate in. Participate means to take part in, and is not limited to those who have directed the pattern of corrupt activity. Participate encompasses those who have performed activities necessary or helpful to the operation of the enterprise, whether directly or indirectly, without an element of control.

Corrupt activity means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing or intimidating another person to engaging in any of the following conduct:

Possession of one gram or more of cocaine, possession of one gram or more of crack cocaine, possession of one gram or more of heroin, trafficking in heroin, trafficking in cocaine, trafficking in crack cocaine.

Now pattern of corrupt activity means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

Thus, when deciding this matter of engaging in a pattern of corrupt activity, I would suggest that you first determine if the State has met its burden of proving a pattern of corrupt activity beyond a reasonable doubt.

* * *

> Now if you decide that there are two or more incidents of corrupt activity, then you must further decide beyond a reasonable doubt if they occurred while Mr. Griffin was employed by or associated with an enterprise, conducted or participated in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity. Again, each of these incidents must be considered separate and apart from each other. Now if you find the State failed to prove beyond a reasonable doubt any one of the essential elements of the offense of engaging in a pattern of corrupt activity, your verdict must be not guilty as to that charge.

(Tr. 1411-12, 1418)

ARGUMENT

Issue Certified for Review:

In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, is an instruction sufficient to convey the law on the element of "enterprise" when the instruction states the elements of the offense, provides the statutory definitions of "enterprise" and "pattern of corrupt activity," and informs the jury that it has to find both beyond a reasonable doubt?

Proposition of Law:

In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, a jury instruction which states the elements of the offense, provides the statutory definitions of the elements, and informs the jury that it has to find both an "enterprise" and a "pattern of corrupt activity" beyond a reasonable doubt is sufficient to convey the law on the element of "enterprise." The court is not required to instruct the jury using language from federal case law on the element of "enterprise."

The issue certified for review in the certified conflict case in Case No. 2013-1319 and the State's proposition of law in the jurisdictional appeal in Case No. 2013-1129 involve the same issue. To avoid duplication of argument, the State will address both together in this brief.

The issue is this: In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, whether a jury instruction is sufficient to convey the law on the element of "enterprise" when it states the elements of the offense, provides the statutory definitions of "enterprise" and "pattern of corrupt activity," and informs the jury that it has to find both elements beyond a reasonable doubt. The answer is yes. This conclusion is supported by this Court's case law on the adequacy of the jury instructions and the United States Supreme Court's decision in *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

I. Introduction

In Griffin's trial for engaging in a pattern of corrupt activity, Griffin's counsel asked the judge to instruct the jury on the federal requirements for proof of an enterprise, as set forth in the

Second District Court of Appeals' case of *State v. Fritz*, 178 Ohio App.3d 65, 2008-Ohio-4389, 896 N.E.2d 778 (2nd Dist.), and the United States Supreme Court case of *Boyle*. (Tr. 1366-69) In particular, he requested an instruction that would tell the jury that "the State's evidence should show that a group of persons associated together for the common purpose of engaging in a course of criminal conduct, that there was an ongoing organizational entity whose members functioned as a continuing unit," and "an association in fact enterprise under RICO must have a structure." (Tr. 1366, 1369)

The judge rejected Griffin's request because language in *Fritz* suggested that the federal definition of "enterprise" was not the law in the Second District. *See Fritz* at ¶ 46-48, quoting *State v. Owen*, 2nd Dist. No. 98 CA 17, 1999 WL 76826 (Feb. 19, 1999), at *4-5. Indeed, in an earlier discussion about whether federal law on enterprise applied, the judge stated that "our Second District Court of Appeals specifically in *Fritz* did not adopt" the federal standard. (Tr. 1275-76)

Notwithstanding what the Court of Appeals had said in *Fritz*, when the issue of the adequacy of the jury instruction on "enterprise" was raised in Griffin's co-defendant's appeal, the Court of Appeals held that "the trial court should have instructed the jury, consistent with the federal law on 'enterprise' outlined in [*United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)] and *Boyle*." *State v. Franklin*, 2nd Dist. Nos. 24011, 24012, 2011-Ohio-6802, at ¶ 105. The Court of Appeals explained that "[w]e have never specifically rejected the application of federal law, and, in fact, have both impliedly and expressly applied federal law to Ohio RICO cases when deciding questions of sufficiency of the evidence." *Id.* The Court of Appeals further determined that "'it is prejudicial error in a criminal case to refuse to administer a requested charge which is pertinent to the case, states the law correctly, and is not covered by

the general charge.' The definitions outlined in *Turkette* and *Boyle* are pertinent, and state the law correctly. They are also not covered by the general charge, which contained only the statutory definition of enterprise. Although there is evidence in the record that could support a finding of an enterprise, the jury was not properly instructed on the point." *Franklin* at ¶ 106.

Because Franklin and Griffin were tried jointly, the jury received the same instruction on "enterprise" for both defendants. In deciding Griffin's appeal, the Court of Appeals expressed its disagreement with its previous holding in *Franklin*. (Opinion of the Second District Court of Appeals, at ¶ 26, Appendix D) In particular, the Court of Appeals stated that it agreed with the State's argument that the instruction the trial court submitted to the jury adequately conveyed all the information needed to determine whether Griffin was associated with an enterprise under Ohio law. (*Id.* at ¶ 25) However, the Court of Appeals indicated that it was bound by *stare decisis* to adhere to *Franklin* and reverse Griffin's conviction on the same grounds. (*Id.* at ¶ 26) The Court of Appeals recognized the conflicting opinions and interpretations amongst the districts and urged this Court "to examine and clarify the law on what constitutes a proper instruction on the definition of enterprise." (*Id.*)

The State does not challenge the Court of Appeals' holding that the federal definition of "enterprise" applies to Ohio prosecutions for engaging in a pattern of corrupt activity. The sole issue before this Court is -- assuming that the federal definition does apply, which the State does not concede -- whether an instruction that states the elements of the offense, provides the jury with the statutory definitions of "enterprise" and "pattern of corrupt activity," and informs the jury that it has to find both elements beyond a reasonable doubt is adequate to convey the substance of the federal definition.

II. Law and Argument

Generally, a trial court is required to give all instructions that are relevant and necessary for the jury to weigh evidence and discharge its duty as fact-finder. *State v. Joy*, 74 Ohio St.3d 178, 181, 657 N.E.2d 503 (1995). To that end, this Court has explained that "[i]t is prejudicial error to refuse a requested charge that is pertinent to the case, states the law correctly, and is not covered by the general charge." *State v. Madrigal*, 87 Ohio St.3d 378, 394, 721 N.E.2d 52 (2000), citing *State v. Hicks*, 43 Ohio St.3d 72, 77, 538 N.E.2d 1030 (1989).

However, even when a requested charge is a correct statement of law and pertinent, a defendant is not prejudiced by the court's decision not to give the charge where the substance of the requested charge is conveyed to the jury. This is clear from *Madrigal*.

Madrigal's aggravated murder case was tried after this Court released *State v. Brooks*, 75 Ohio St.3d 148, 661 N.E.2d 1030 (1996), which held that a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. *Madrigal* at 394. Madrigal's counsel asked the court to instruct the jury in accordance with *Brooks*. *Id.* at 393. The trial court did not include a *Brooks* instruction in the jury instructions. *Id.* at 394. Instead, the court instructed the jury consistent with R.C. 2929.03(D)(2):

> You shall recommend the sentence of death if all 12 jurors find * * * by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not unanimously find that the aggravating circumstances outweigh the mitigating factors, you shall unanimously recommend either a life sentence with

parole eligibility after serving 20 years of imprisonment or a life sentence with parole eligibility after serving 30 years of imprisonment.

Id. at 394-95.

On appeal, Madrigal argued that he was entitled to a reversal of his death sentence due to the trial court's failure to include the *Brooks* instruction. *Id.* at 394. This Court disagreed. *Id.* at 395.

The *Brooks* instruction requested by Madrigal's counsel was a correct statement of law — this Court had suggested in *Brooks* that "[j]urors from this point forward should be so instructed." *Id.* at 393, quoting *Brooks* at 162. But that fact alone did not mean that the trial court's failure to give the instruction required reversal. *Madrigal* at 395. Reversal was the remedy only when the court's instructions did not provide the jury with the information it needed. *Id.*

When reviewing the charge given in *Madrigal*, this Court noted that the trial court's instruction regarding unanimity was "not quite as clear as the one requested." *Id.* More troublesome was the fact that the trial court failed to tell the jury that a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. *Id.* Significantly, however, the instruction was consistent with R.C. 2929.03(D)(2). *Id.* at 395. This Court explained, "Although the jury in this case did not receive the exact instruction from *Brooks*, the jury received the information it needed in the charge given, and the trial court did not commit the *Brooks* error by telling the jury it had to unanimously find that death was inappropriate before considering a life sentence. *Id. See, also, State v. Jones*, 91 Ohio St.3d 335, 350, 744 N.E.2d 1163 (2001) ("[i]n advising juries of the need

for a unanimous verdict, no specific language has to be used as long as the 'substance' of what the jury must determine is included in the charge given").

Just as in *Madrigal*, Griffin's counsel requested an instruction that the Court of Appeals found was pertinent and a correct statement of the law in Ohio. However, as *Madrigal* demonstrates, the court's decision not to give the requested instruction and instead provide the statutory definition of "enterprise" did not prejudice Griffin unless the statutory definition – which was also a correct statement of law – was not adequate to convey the substance of the requested instruction. If the jury received the information it needed in the charge given, then Griffin was not entitled to reversal.

The judge's instruction in Griffin's case set forth the elements of engaging in a pattern of corrupt activity found in R.C. 2923.32, provided the jury with the statutory definitions of "enterprise" and "pattern of corrupt activity" in R.C. 2923.31, and expressed to the jury that the "enterprise" and the "pattern of corrupt activity" were separate elements, both of which the jury had to find established before rendering a guilty verdict. (Tr. 1411-12, 1418) A review of the instruction reveals that it adequately conveyed the substance of the federal definition of "enterprise." The United States Supreme Court's discussion in *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009) confirms this conclusion.

Boyle addressed what was required under the federal RICO statute to establish the existence of an enterprise, as well as the adequacy of the court's jury instructions on that element. In clarifying the elements of an enterprise under federal law, the United States Supreme Court looked to the language of the RICO statute, 18 U.S.C. § 1962(c). *Id.* at 944.

RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or

participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.*, quoting 18 U.S.C. § 1962(c). The definition of "enterprise" in RICO is very similar to the one in R.C. 2923.31(C), and "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.*, quoting 18 U.S.C. § 1961(4).

The United States Supreme Court explained that, "*[f]rom the terms of RICO, it is apparent* that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. As we succinctly put it in [*United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)], an association-in-fact enterprise is 'a group of persons associated together for a common purpose of engaging in a course of conduct.'" (Emphasis added.) *Boyle* at 946. The Court set forth its rationale for the three structural features as follows:

> That an "enterprise" must have a purpose is apparent from meaning of the term in ordinary usage, *i.e.*, a "venture," "undertaking," or "project." Webster's Third New International Dictionary 757 (1976). The concept of "associat[ion] requires both interpersonal relationships and a common interest. See *Id.*, at 132 (defining "association" as "an organization of persons having a common interest"); Black's Law Dictionary 156 (rev. 4th ed.1968) (defining "association" as a "collection of persons who have joined together for a certain object"). Section 1962(c) reinforces this conclusion and also shows that an "enterprise" must have some longevity, since the offense proscribed by that provision demands proof that the

enterprise had "affairs" of sufficient duration to permit an associate to "participate" in those affairs through "a pattern of racketeering activity."

Boyle at 946. The Court rejected Boyle's argument that the structure of the association-in-fact enterprise had to be ascertainable or have a hierarchical structure, role differentiation, a unique modus operandi, a chain of command, and other additional structural attributes. *Id.* at 947-48. And it repeated what it had said in *Turkette* that the existence of an enterprise is a separate element from the "pattern of racketeering activity." *Id.* at 947. It clarified, however, that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise "may in particular cases coalesce," meaning that the existence of an enterprise could in some cases be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity. *Id.*

Most significant to the issue in this case is the United States Supreme Court's analysis in determining the requirements of an enterprise. It is clear from the language of the decision that the structural features of an association-in-fact enterprise are based on the ordinary meaning of terms used in the RICO statute. *Boyle* at 946. The Court repeatedly referred to the terms of RICO and recognized only structural attributes "that we think can be fairly inferred from the language of the statute." *Id.* at 946, 948, 951. Where there was "no basis in the language of RICO for the structural requirements" that Boyle asked the Court to adopt, it rejected those requirements. *Id.* at 948. Because the Court recognized only structural features that were apparent from the terms of RICO, it follows that a jury instruction that contains only those terms and their statutory definitions is sufficient to convey the substance of the structural features.

The instruction that was challenged in *Boyle* provided more information about the structural attributes of an enterprise. It informed the jury that the government had to prove the

existence of an enterprise, that "enterprise" was a separate element from the pattern of racketeering activity, and that the enterprise had to have the structural attributes that the Supreme Court said could be inferred from the statutory language. *Id.* at 951. The Supreme Court found that the instruction was correct and adequate. *Id.*

But the fact that the instruction in *Boyle* was more detailed than the one in Griffin does not mean that a less detailed instruction is inadequate. The Supreme Court based its conclusion on the instruction it was asked to review. Indeed, the Court stated that "[a]lthough an association-in-fact enterprise must have these structural features, it does not follow that a district court must use the term 'structure' in its jury instructions. A trial judge has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed." *Boyle* at 946.

The instruction in Griffin's case did not expressly set forth the structural features of an enterprise, *i.e.*, a group of persons associated together for a common purpose of engaging in a course of conduct. Nevertheless, the instruction adequately conveyed the substance of those structural features. As in *Boyle*, the instruction informed the jury that the State had to prove the existence of an enterprise, which was separate from the element of the pattern of corrupt activity. (Tr. 1411-12, 1418) It also provided the jury with the elements of engaging in a pattern of corrupt activity, as set forth in R.C. 2923.32, and the statutory definitions of "enterprise" and "pattern of corrupt activity" in R.C. 2923.31. (Tr. 1411)

Specifically, the judge told the jury that the State had to prove that Griffin, from May 13, 2006 to April 2, 2009, while employed by or associated with an enterprise, conducted or participated in directly or indirectly the affairs of the enterprise through a pattern of corrupt activity. (Tr. 1411) The judge stated that "enterprise includes any individual, sole

proprietorship, partnership, limited partnership, corporation, trust, union, government agency or other legal entity, or any organization, *association or group of persons associated in fact,* although not a legal entity." (Emphasis added.) (*Id.*) He defined "participate" as encompassing "those who have performed activities necessary or helpful to the operation of the enterprise," and "pattern of corrupt activity" as "two or more incidents of corrupt activity * * * that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." (Tr. 1411-12)

The fact that the instruction set forth the elements of the offense and defined the elements in the language of the statute is significant. The wording of R.C. 2923.31(C) and 2923.32 is similar to the wording of the federal RICO statute. *See* 18 U.S.C. §§ 1961(4) and 1962. Because the Supreme Court found in *Boyle* that the structural requirements of an association-in-fact enterprise are apparent from the ordinary meaning of the terms used in the RICO statute, then an instruction in the language of R.C. 2923.31 and 2923.32, which lays out the elements the State has to prove and defines "enterprise" and "pattern of corrupt activity," is adequate to convey the substance of those requirements to the jury.

Other courts that have addressed this issue have found the statutory language adequate for the jury to determine the existence of an enterprise. In *State v. Habash*, 9th Dist. No. 17073, 1996 WL 37752 (Jan. 31, 1996), the defendants argued on appeal that the trial court erred in failing to give their requested instruction on the element of "enterprise." *Id.* at *7. That instruction, if provided, would have told the jury that an enterprise is an entity which is separate from the activity in which it engages, and one which has continuity and an organizational structure. *Id.* Instead, the court provided the statutory definition of "enterprise." *Id.* The court

of appeals upheld the trial court's refusal to give any further elaboration of the statutory definition. *Id.*

A trial court's reliance on the statutory definition in its jury instructions was also upheld in *United States v. Frampton*, 382 F.3d 213 (2nd Cir.2004). In that appeal from a federal conviction for willfully causing the commission of a violent crime in aid of racketeering, Frampton challenged the district court's jury instruction, asserting that the court failed to provide the jury with the definition of "enterprise" and "racketeering activity" as set forth in *Turkette*. *Id.* at 222, fn. 8. The court of appeals found no error in the instruction. *Id.* The court of appeals noted that, in charging the jury on the elements of the offense, the district court provided the statutory definitions of "enterprise" and "racketeering activity." *Id.* It further stated: "In fact, the definitions in *Turkette* to which Frampton refers were themselves merely a paraphrasing of the relevant statutory language." *Id.*

The same conclusion is appropriate here. The instruction requested by Griffin's counsel on the federal requirements of an enterprise was pertinent and correct, but the trial court's refusal to give the requested instruction was not prejudicial to Griffin. This is because the instruction that was given provided the jury with all the information it needed to determine whether Griffin was associated with an enterprise under Ohio law. The instruction that was given correctly informed the jury of the elements of the offense of engaging in a pattern of corrupt activity, included the statutory definitions of "enterprise" and "pattern of corrupt activity," and told the jury that "enterprise" and "pattern of corrupt activity" were separate elements. A jury instruction that contains all of that information – the statutory elements of the offense, the statutory definitions of "enterprise" and "pattern of corrupt activity," and a statement that the jury must find both an "enterprise" and a "pattern of corrupt activity" before it can find the defendant

guilty -- is adequate to convey the substance of the structural features of an enterprise that the United States Supreme Court recognized in *Boyle*.

CONCLUSION

In view of the foregoing law and argument, it is respectfully requested that this Court hold that, in a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, a jury instruction which states the elements of the offense, provides the statutory definitions of the elements, and informs the jury that it has to find both an "enterprise" and a "pattern of corrupt activity" beyond a reasonable doubt is sufficient to convey the law on the element of "enterprise."

Respectfully submitted,

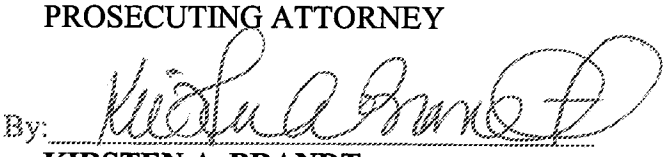
MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY _____
KIRSTEN A. BRANDT
Reg. No. 0070162
Assistant Prosecuting Attorney
Appellate Division

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class mail on this 20TH of December, 2013, to the following: Darrell L. Heckman, One Monument Square, Suite 200, Urbana, OH 43078 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 
KIRSTEN A. BRANDT

Appendix A

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

DE'ARGO GRIFFIN

Defendant-Appellee.

Case No. 2013-1129

On Appeal from the Montgomery County Court of Appeals, Second Appellate District

Court of Appeals Case No. 24001

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

MATHIAS H. HECK, JR.
Prosecuting Attorney
KIRSTEN A. BRANDT (0070162)
(COUNSEL OF RECORD)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-5027

ATTORNEY FOR THE STATE OF OHIO, APPELLANT

DARRELL L. HECKMAN
Reg. No. 0002389
One Monument Square, Suite 200
Urbana, OH 43078

COUNSEL FOR APPELLEE, DE'ARGO GRIFFIN

FILED
JUL 15 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

The State of Ohio, gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. De'Argo Griffin,* Case No. 24001. The Court of Appeals issued an opinion and entered a final entry on May 31, 2013.

This felony case presents a substantial constitutional question and a question of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

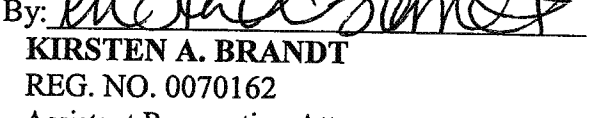
BY
KIRSTEN A. BRANDT
REG NO. 0070162
Assistant Prosecuting Attorney
APPELLATE DIVISION

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by first class mail on this 15th day of July, 2013, to the following: Darrell L. Heckman, One Monument Square, Suite 200, Urbana, OH 43078 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 
KIRSTEN A. BRANDT
REG. NO. 0070162
Assistant Prosecuting Attorney
APPELLATE DIVISION

IN THE SUPREME COURT OF OHIO

13-1319

STATE OF OHIO

Plaintiff-Appellant,

vs.

DE'ARGO GRIFFIN

Defendant-Appellee.

CASE NO. 2013-

ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT

COURT OF APPEALS CASE NO: 24001

NOTICE OF CERTIFIED CONFLICT

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY
By **KIRSTEN A. BRANDT** (COUNSEL OF RECORD)
REG. NO. 0070162
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 West Third Street - Suite 500
Dayton, Ohio 45422
(937) 225-4117

COUNSEL FOR APPELLANT, STATE OF OHIO

Darrell L. Heckman
One Monument Square
Suite 200
Urbana, OH 43078

COUNSEL FOR APPELLEE, DE'ARGO GRIFFIN

FILED
AUG 15 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice, in accordance with S.Ct. Prac. R. 8.01, of a certified conflict to the Supreme Court of Ohio of the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. De'Argo Griffin*, Case No. 24001. The court of appeals order certifying a conflict was filed on July 17, 2013 pursuant to Article IV, Sec. 3(B)(4) of the Ohio Constitution. The issue certified by the court of appeals is:

> In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, is an instruction sufficient to convey the law on the element of "enterprise" when the instruction states the elements of the offense, provides the statutory definitions of "enterprise" and "pattern of corrupt activity," and informs the jury that it has to find both beyond a reasonable doubt?

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By
KIRSTEN A. BRANDT
REG NO. 0070162
Assistant Prosecuting Attorney
APPELLATE DIVISION

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Certified Conflict was sent by first class mail on or before this 14th day of August, 2013, to the following: Darrell L. Heckman, One Monument Square, Suite 200, Urbana, OH 43078 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

KIRSTEN A. BRANDT
REG NO. 0070162
Assistant Prosecuting Attorney
APPELLATE DIVISION

Case: CR 024001
DRT: CHORDE

FILED
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GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO *Plaintiff-Appellee* v. DE'ARGO GRIFFIN *Defendant-Appellant*	Appellate Case No. 24001 Trial Court Case No. 09-CR-1117/3

DECISION and ENTRY
July 17th, 2013

PER CURIAM

This matter is before the court on a motion to certify a conflict pursuant to App.R. 25(A). Plaintiff-Appellee, the State of Ohio, contends that a conflict exists between the decision we recently rendered in this case and the decision of the Eighth District Court of Appeals in *State v. Habash*, 9th Dist. Summit No. 17073, 1996 WL 37752, (Jan 31, 1996). Griffin filed a memorandum in opposition to the motion to certify on June 19, 2013, and the matter is ready for decision.

The standards for certifying conflicts are well-established:

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted

> conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis in original.) *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

The alleged conflict case, *Habash,* involved defendants who had been convicted of engaging in a pattern of corrupt activity in connection with food stamps that were purchased at a discounted price and later redeemed for face value. *Habash,* 9th Dist. Summit No. 17073, 1996 WL 37752, at *1-2. On appeal, the Ninth District made the following observations concerning the defendants' sixth assignment of error:

> Defendants' sixth, seventh, and tenth assignments of error each assign error to the trial court's failure to give certain instructions to the jury. A defendant is entitled to have his requested instructions included in the jury charge only if they are a correct statement of the law, pertinent, and not included in the substance of the general charge. *State v. Snowden* (1982), 7 Ohio App.3d 358, 361.
>
> In their sixth assignment of error, defendants contend that the trial court erred in failing to include their requested instruction which defined the term "enterprise" as an entity which is separate from the activity in which it engages, and one which has continuity and an organizational structure. The requested instruction was to be given in addition to the

statutory definition given by the trial court. Defendants insist that their elaboration was necessary to clearly define "enterprise."

The trial court "should limit definitions, where possible, to those definitions provided by the legislature in order to avoid unnecessary confusion and needless appellate challenges." *State v. Williams* (1988), 38 Ohio St.3d 346, 356 fn. 14. Amplification of the statutory definitions is generally inadvisable, as it is likely to introduce error. *State v. Mahoney* (1986), 34 Ohio App.3d 114, 119.

The trial court instructed the jury on the term "enterprise" as it has been clearly defined in R.C. 2923.31(C). The trial court did not err in refusing to give any further elaboration of this statutory definition. Moreover, as we explained in our discussion of defendants' fifth assignment of error, an "enterprise" encompasses informal, unstructured associations and even a single individual. "Enterprise" has not been defined to include any requirement of formal structure, continuous existence, or existence separate from the criminal activity in which it engages. Therefore, as defendants' requested instruction was not a correct statement of Ohio law, the trial court properly refused to include it in its jury charge. *Habash,* 9th Dist. Summit No. 17073, 1996 WL 37752, at *6-7.

Before we decided Griffin's current appeal, we had previously decided a case involving Griffin's co-defendant, Anthony Franklin, who was tried with Griffin. *See State v. Franklin*, 2d Dist. Montgomery Nos. 24011, 24012, 2011-Ohio-6802. In *Franklin*, we

noted that " 'R.C. 2923.32 ("the Ohio RICO Act") is patterned after the Federal RICO Act, Section 1962, Title 18, U.S.Code. * * * Consequently, Ohio courts often look to federal case law for guidance in applying Ohio's RICO Act.' " (Citations omitted). *Id.* at ¶ 91.

We observed that Ohio appellate districts had applied a three-part test used by federal courts for deciding if an enterprise exists. *Id.* This test, taken from *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), indicated that:

> [I]n order to establish the existence of an 'enterprise' under Ohio's RICO Act, there must be some evidence of: (1) an ongoing organization, formal or informal; (2) with associates that function as a continuing unit; and (3) with a structure separate and apart, or distinct, from the pattern of corrupt activity. *Franklin* at ¶ 91, quoting *State v. Teasley*, 10th Dist. Franklin Nos. 00AP-1322, 00AP-1323, 2002-Ohio-2333, ¶ 53.

We further noted in *Franklin* that the Supreme Court of Ohio had previously refused to certify a conflict between the Ninth District Court of Appeals and the Sixth District Court of Appeals on this point. *Franklin*, 2d Dist. Montgomery Nos. 24011, 24012, 2011-Ohio-6802, at ¶ 92, fn. 4. In addition, we observed that the Ninth District Court of Appeals, itself, had taken inconsistent positions. Before taking the position outlined in *Habash*, the Ninth District previously "had applied *Turkette's* definition of an association-in-fact as having been demonstrated by an ongoing organization that is formal or informal, and by evidence that the associates function as a continuing unit." *Id.* at ¶ 93, fn. 5, citing *State v. Davis*, 9th Dist. Lorain No. 94CA005964, 1995 WL

434385 (July 19, 1995).

Finally, in *Franklin*, we discussed *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009), which "reiterated its holding in *Turkette* that 'the existence of an enterprise is a separate element that must be proved.' " *Id.* at ¶ 97, quoting *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524, 69 L.Ed.2d 246. We noted that in *Boyle*:

> [T]he Supreme Court concluded that the district court did not err in refusing the requested jury instructions, and had adequately instructed the jury about the elements of an enterprise, because the instructions made clear that the existence of an enterprise was a "separate element from the pattern of racketeering activity." The Court also stressed that the jury had been instructed that the government "was required to prove that there was 'an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives' and that 'the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose.' " (Citation omitted.) *Franklin* at ¶ 100, quoting from *Boyle* at 951.

We, therefore, concluded in *Franklin* that the trial court had erred to Franklin's prejudice by failing to instruct the jury in a manner consistent with the definitions outlined in *Turkette* and *Boyle*. *Id.* at 105-106. In particular, we stated that:

> As we noted, the Supreme Court of Ohio has said that "it is prejudicial error in a criminal case to refuse to administer a requested charge which is pertinent to the case, states the law

> correctly, and is not covered by the general charge." *Scott*, 26 Ohio St.3d 92, 101. The definitions outlined in *Turkette* and *Boyle* are pertinent, and state the law correctly. They are also not covered by the general charge, which contained only the statutory definition of enterprise. Although there is evidence in the record that could support a finding of an enterprise, the jury was not properly instructed on the point. *Franklin*, 2d Dist. Montgomery Nos. 24011, 24012, 2011-Ohio-6802, at ¶ 105-106, citing *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524, 69 L.Ed.2d 246,and *Boyle*, 556 U.S. 938,129 S.Ct. 2237, 173 L.Ed.2d 1265.

Subsequently, we allowed Franklin's co-defendant, De'Argo Griffin, to reopen his appeal. We then followed *Franklin* on the basis of stare decisis, even though two members of the panel disagreed with the *Franklin* decision. *See State v. Griffin*, 2d Dist. Montgomery No. 24001, 2013-Ohio-2230, ¶ 26 and ¶ 116. In this regard, a majority of the panel stated that:

> This court has held in *Franklin* and other cases (*e.g. State v. Beverly*, 2d Dist. Clark No.2011-CA-64, 2013-Ohio-1365) that the OJI instruction is not sufficient on this issue, but acknowledged that it is not beyond legitimate debate. Given the conflicting opinions and interpretations in the districts, we urge The Supreme Court of Ohio to examine and clarify the law on what constitutes a proper instruction on the definition of enterprise. *Id.* at ¶ 26.

In *Habash*, the Ninth District held that law elaborating on the definition of

"enterprise" should not be included in jury instructions. Conversely, in the case before us, we held that the same law should be included. This is a disagreement on the same question and on a rule of law, not facts. Because our opinion conflicts with the decision of the Ninth District Court of Appeals in *State v. Habash*, 9th Dist. Summit No. 17073, 1996 WL 37752, (Jan 31, 1996), the State's motion to certify a conflict is granted.

In view of this conflict between our district and the Ninth Appellate District, we hereby certify the record of this case to the Supreme Court of Ohio for review and final determination on the following question:

> In a trial for engaging in a pattern of corrupt activity under R.C. 2923.32, is an instruction sufficient to convey the law on the element of "enterprise" when the instruction states the elements of the offense, provides the statutory definitions of "enterprise" and "pattern of corrupt activity," and informs the jury that it has to find both beyond a reasonable doubt?

SO ORDERED.

JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

JEFFREY M. WELBAUM, Judge

Copies to:

Mathias H. Heck, Jr.
Kirsten A. Brandt
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
P.O. Box 972
301 W. Third St.
Dayton, Ohio 45422

Darrell L. Heckman
One Monument Square
Suite 200
Urbana, Ohio 43078

Case: CA 024001
01019215
Dkt: CAORD

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO Plaintiff-Appellee v. DE'ARGO GRIFFIN Defendant-Appellant	Appellate Case No. 24001 Trial Court Case No. 2009-CR-1117/3 (Criminal Appeal from Common Pleas Court)

. . . . . .

OPINION

Rendered on the 31st day of May, 2013.

. . . . . .

MATHIAS H. HECK, JR., by KIRSTEN A. BRANDT, Atty. Reg. #0070162, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DARRELL L. HECKMAN, Atty. Reg. No. 0002389, One Monument Square, Suite 200, Urbana, Ohio 43078
Attorney for Defendant-Appellant

. . . . . .

WELBAUM, J.

{¶ 1} Defendant-Appellant, De'Argo Griffin, appeals from his conviction and sentence, after a jury trial, on one count of possession of heroin in an amount between ten

and fifty grams, in violation of R.C. 2925.11(A); five counts of possession of criminal tools in violation of R.C. 2923.24(A); and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). We originally affirmed Griffin's conviction in February 2012. See *State v. Griffin*, 2d Dist. Montgomery No. 24001, 2012-Ohio-503. In April 2012, Griffin filed a motion to reopen his appeal, based on a claim of ineffective assistance of appellate counsel. We granted the motion to reopen in May 2012, and appointed appellate counsel for Griffin, who is indigent.

{¶ 2} In his reopened appeal, Griffin contends that the trial court erred in failing to give Griffin's requested jury instruction on "enterprise." Griffin also maintains that the evidence is insufficient to establish that gel caps found in the vehicle in which he was a passenger were separate from the heroin also found in the vehicle. In addition, Griffin contends that the trial court erred in sentencing him for possession of criminal tools when the items in question (a razor, gel capsules, a plate, and a baggie) are drug paraphernalia. Griffin also contends that the court erred in sentencing him for possession of criminal tools when the items in question are cell phones. Finally, Griffin contends that the trial court erred in overruling his motion to suppress and in instructing the jury on complicity, over his objection, where the bill of particulars identified Griffin as the principal offender.

{¶ 3} We conclude that the trial court committed reversible error in failing to give Griffin's requested jury instruction on "enterprise." The trial court also erred in sentencing Griffin for possession of items that are properly classified as drug paraphernalia rather than criminal tools. The trial court did not err in classifying a cell phone as a criminal tool and in sentencing Griffin accordingly. Further, the evidence was sufficient to establish that the gel capsules were separate items and were not part of the heroin also found in the vehicle.

Finally, the trial court did not err in overruling Griffin's motion to suppress or in instructing the jury on complicity. Accordingly, Griffin's conviction for Engaging in a Pattern of Corrupt Activity will be reversed, the judgment, insofar as the sentence on four of five Possession of Criminal Tools is concerned, will be reversed, and the cause will be remanded for further proceedings. In all other respects, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 4} Griffin and his co-defendant, Anthony Franklin, were tried together before a jury in March 2010, and were convicted as charged. A full recitation of the factual background of the case can be found in *Griffin*, 2d Dist. Montgomery No. 24001, 2012-Ohio-503, ¶ 1-4 (affirming Griffin's conviction), and *State v. Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, ¶ 1-33 (affirming Franklin's conviction in part, and reversing as to Franklin's conviction for Engaging in a Pattern of Corrupt Activity). Those factual findings are incorporated for purposes this opinion, and will not be detailed further, except where necessary for the resolution of issues pertinent to this opinion.

{¶ 5} Franklin's appeal was decided in December 2011, and Griffin's was decided in February 2012. Griffin's appellate attorney did not raise the issue upon which Franklin's reversal of the conviction for Engaging in Pattern of Corrupt Activity was based. Accordingly, Griffin filed a motion to reopen his appeal, and we granted the motion, indicating that Griffin could raise this error as well as any other error deemed to have merit. We also appointed appellate counsel for Griffin, who filed a brief raising six additional assignments of error, including an assignment of error directed toward the failure to give

a requested jury instruction on "enterprise."

II. Did the Trial Court Err in Failing to Give an Instruction on Enterprise?

{¶ 6} Under this assignment of error, Griffin notes that he and co-defendant Franklin asked the trial court to give the jury a separate instruction on "enterprise" as an element of Engaging in a Pattern of Corrupt Activity, but the court refused. Griffin contends that his conviction for this crime should be reversed, based on our opinion in *Franklin*, which extensively considered the issue and concluded that the trial court had committed reversible error in failing to give the same instruction on "enterprise." Despite any disagreement of the majority of this panel with *Franklin*, it is direct precedent in this case and we will abide by it in accordance with *stare decisis*.

{¶ 7} In *Franklin*, Griffin's co-defendant argued that "the trial court's instructions to the jury were prejudicial in three respects: (1) the court erroneously instructed the jury on the definition of the term 'participate in,' as used in R.C. 2923.32(A)(1); (2) the court erroneously denied Franklin's request to instruct the jury on precedent in this appellate district regarding the standard to be used to convict defendants of engaging in a pattern of corrupt activity; and (3) the court erred when it denied Franklin's request to instruct the jury on applicable federal law, as required in this appellate district." *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 69.

{¶ 8} We rejected the first argument, but agreed with Franklin's latter two contentions, which we discussed together. *See, id.* at ¶ 80-106. After discussing pertinent case law in our district, other Ohio appellate districts, and the federal courts, we stated that:

In light of the preceding discussion, we agree with Franklin that the trial court should have instructed the jury, consistent with the federal law on "enterprise" outlined in *Turkette* and *Boyle*. We have never specifically rejected the application of federal law, and, in fact, have both impliedly and expressly applied federal law to Ohio RICO cases when deciding questions of sufficiency of the evidence.

As we noted, the Supreme Court of Ohio has said that "it is prejudicial error in a criminal case to refuse to administer a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge." *Scott*, 26 Ohio St.3d 92, 101. The definitions outlined in *Turkette* and *Boyle* are pertinent, and state the law correctly. They are also not covered by the general charge, which contained only the statutory definition of enterprise. Although there is evidence in the record that could support a finding of an enterprise, the jury was not properly instructed on the point. *Franklin* at ¶ 105-106, citing *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), and *Boyle v. United States*, 556 U.S. 938,129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

{¶ 9} After making these remarks, we reversed Franklin's conviction for Engaging in a Pattern of Corrupt Activity and remanded the case for further proceedings. *Franklin* at ¶ 107.

{¶ 10} The State concedes in its brief that Griffin and Franklin were tried together, and that the same jury instruction was provided for both Griffin and Franklin. In arguing that the same result should not occur here, the State advances several points.

{¶ 11} The State's first argument is that Griffin's counsel failed to file the proposed jury instructions on "enterprise" prior to trial, and that Griffin's counsel failed to subsequently request the instruction in writing, as required by Crim.R. 30(A).

{¶ 12} As a preliminary matter, we note that neither the State nor the defense filed proposed jury instructions prior to trial, and neither side filed requested instructions in writing. At the close of evidence, the court provided the parties with copies of proposed instructions for their review, and indicated that the instructions would be discussed the following morning, so that any amendments or corrections could be made. Trial Transcript, Volume VI, p. 1289.

{¶ 13} Crim.R. 30(A) provides for waiver regarding jury instructions, by stating that:

> On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

{¶ 14} Griffin did object before the jury retired, and specifically stated the grounds of his objection. The trial court and the attorneys also discussed the instructions extensively before closing arguments, and some changes were made. *See* discussion at Trial Transcript, Volume VII, pp. 1303-1304 (referring to a two-hour discussion that had taken place earlier that day).

{¶ 15} After closing arguments occurred, and before the case was submitted to the jury, the defense objected to various parts of the instructions, and requested an instruction on "enterprise" under *State v. Fritz*, 178 Ohio App.3d 65, 2008-Ohio-4389, 896 N.E.2d 778

(2d Dist.), and *Boyle*, 556 U.S. 938,129 S.Ct. 2237, 173 L.Ed.2d 1265. *Id.* at pp. 1363-1369. Accordingly, Griffin did not waive the objection. *See, e.g.*, *State v. Williford*, 49 Ohio St.3d 247, 247-248, 551 N.E.2d 1279 (1990), paragraph three of the syllabus (noting that "[w]here the trial court fails to give a complete or correct jury instruction on the elements of the offense charged and the defenses thereto which are raised by the evidence, the error is preserved for appeal when the defendant objects in accordance with the second paragraph of Crim.R. 30(A), whether or not there has been a proffer of written jury instructions in accordance with the first paragraph of Crim.R. 30(A).") *Accord*, *State v. Mack*, 82 Ohio St.3d 198, 199-200, 694 N.E.2d 1328 (1998).

{¶ 16} The State's second argument is that there was no form or specificity to the defense request. Again, we disagree. We noted in *Franklin* that the defense "extensively argued the application of the law in *Boyle*, when jury instructions were being considered." *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 83. The defense also specifically discussed the elements of "enterprise" that it wanted included in the instruction, and this was sufficiently detailed for the trial court to fashion an appropriate instruction. See Trial Transcript, Volume VII, p. 1366.

{¶ 17} The State's next argument is that the trial court did not abuse its discretion by failing to instruct the jury on enterprise. In this regard, the State first argues that the trial court could not have possibly exercised "perversity of will," or passion, or bias, because the court had to choose between including the requested instruction and committing error based on prior authority in this district, or refusing the instruction and committing error that was subsequently found reversible in *Franklin*.

{¶ 18} In *State v. Wolons*, 44 Ohio St.3d 64, 541 N.E.2d 443 (1989), the Supreme

Court of Ohio held that decisions to refuse a particular instruction are reviewed by a standard of whether the refusal "was an abuse of discretion under the facts and circumstances of the case." *Id.* at 68. We have followed this rule. *See, e.g., State v. Collier*, 2d Dist. Montgomery No. 20131, 2005-Ohio-119, ¶ 25.

{¶ 19} " 'Abuse of discretion' has been described as including a ruling that lacks a 'sound reasoning process.' " *State v. Morris,* 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *Id.*

{¶ 20} However, as was noted in *Franklin*, *de novo* review applies to the issue of whether the jury instructions correctly state the law. *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 82. The Supreme Court of Ohio has characterized appellate review of jury instructions in this situation as presenting "a question of mixed law and fact, where a mixed de novo and abuse-of-discretion standard of review would be appropriate." *Morris* at ¶ 21, citing *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995).

{¶ 21} An issue of fact would involve a determination of issues like whether the facts in a particular case warrant a particular instruction. For example, in *Wolons*, the issue was whether the evidence at trial warranted a jury instruction on intoxication. Applying an abuse of discretion standard, the Supreme Court of Ohio concluded that the trial court did

not act arbitrarily or unconscionably in refusing the instruction, because the facts fell "short of negating a conscious awareness of the circumstances and events that transpired on the night of the stabbing." *Wolons*, 44 Ohio St.3d at 69, 541 N.E.2d 443.

{¶ 22} In contrast, *Kokitka* involved an instruction to the jury to give no weight to expert testimony if the jury found facts that were different from those assumed by the expert. *Kokitka* at 92. The Supreme Court of Ohio concluded that the instruction usurped the jury's role in evaluating the testimony, and the Supreme Court, therefore, gave no deference to the trial court's decision. *Id.*

{¶ 23} In the case before us, the issue is not factual, meaning that the argument is not whether an instruction on "enterprise" was factually warranted under the circumstances of the case. Instead, the issue is whether the instruction that was given correctly states the applicable law. The analysis, therefore, is not based on abuse of discretion, as the State suggests, and *de novo* review, which we used in *Franklin*, is the appropriate method for evaluating the trial court's action.

{¶ 24} As a further matter, we noted in *Franklin* that "[w]e have never specifically rejected the application of federal law, and, in fact, have both impliedly and expressly applied federal law to Ohio RICO cases when deciding questions of sufficiency of the evidence." *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 105. Notwithstanding this court's prior use of federal law to test the sufficiency of the evidence, the critical issue is whether the trial court's instruction following the statutory language was deficient in a way that prejudiced Griffin.

{¶ 25} The State contends that the failure to give the requested instruction did not prejudice Griffin. In this regard, the State argues that the instruction the trial court submitted

to the jury adequately conveyed all the information needed to determine whether Griffin was associated with an enterprise under Ohio law. In its instruction the trial court defined "enterprise" and "pattern of corrupt activity" and instructed the jury that both needed to be proven beyond a reasonable doubt.

{¶ 26} Essentially, the State is asking us to reconsider our decision in *Franklin*. Although this author agrees with the State on this point, we must decline the invitation. The doctrine of *stare decisis* binds this panel of the court to adhere to *Franklin* "in order to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry." (Citation omitted.) *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. ¶ 19, n. 2. Adherence to *stare decisis* will avoid the inconsistent application of federal law in corrupt activity cases within and between some appellate districts which were fully articulated in *Franklin* at ¶ 89-95. This court has held in *Franklin* and other cases (e.g. *State v. Beverly*, 2d Dist. Clark No. 2011-CA-64, 2013-Ohio-1365) that the OJI instruction is not sufficient on this issue, but acknowledged that it is not beyond legitimate debate. Given the conflicting opinions and interpretations in the districts, we urge The Supreme Court of Ohio to examine and clarify the law on what constitutes a proper instruction on the definition of enterprise.

{¶ 27} As a final argument, the State contends that the facts of the case support no other conclusion but that Griffin, Franklin, and others were engaged in a pattern of corrupt activity. This court noted in *Franklin* that "[a]though there is evidence in the record that could support a finding of an enterprise, the jury was not properly instructed on the point." *Id.* at 106. Again, although this author disagrees with the *Franklin* decision on this issue, we again defer to this court's prior decision under the doctrine of *stare decisis*.

{¶ 28} Accordingly, Griffin's First Assignment of Error is sustained. The conviction for Engaging in a Pattern of Corrupt Activity will be reversed, and this cause will be remanded for further proceedings.

III. Was the Evidence Insufficient Regarding Gel Caps?

{¶ 29} Griffin's Second Assignment of Error is as follows:

The Evidence Was Insufficient as a Matter of Law to Establish the Gel Caps were Criminal Tools.

{¶ 30} Under this assignment of error, Griffin contends that the gel caps were part of the heroin that was found, and cannot be considered a separate criminal tool. Alternatively, Griffin contends that his conduct in possessing both the gel caps and the heroin contained in the gel caps were allied offenses of similar import.

{¶ 31} The original indictment, filed on April 10, 2009, charged Griffin with possession of heroin in an amount equaling or exceeding ten grams, but less than fifty grams, in violation of R.C. 2925.11(A). Re-indictment "B" was filed on October 26, 2009, charging Griffin in Count One of possessing capsules with purpose to use them criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Two, with possession of a razor with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Three with possession of a plate with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Four with possession of cell phone(s) with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Five with possession of plastic baggie(s) with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); and in Count Six

with having been engaged in a pattern of corrupt activity between the dates of May 13, 2006 through April 2, 2009, with at least one incident of corrupt activity being possession of heroin in amount between 10 and 50 grams on April 1, 2009, in violation of R.C. 2923.32(A)(1).

{¶ 32} After the jury found Griffin guilty on all counts, the trial court sentenced him to five years of imprisonment for possession of heroin in an amount more than 10 grams but less than 50 grams; five years of imprisonment for engaging in a pattern of corrupt activity, and twelve months of imprisonment on each count of possession of criminal tools, all to be served concurrently for a total term of incarceration of five years. The sentence for the capsules, thus, was a twelve-month sentence, to be served concurrently with the other sentences.

{¶ 33} The State argues that Detective House found both heroin and empty gel caps in the white conversion van in which Griffin was seated, and that Griffin was properly charged separately with possession of the gel caps.

{¶ 34} Our prior opinion noted that on April 1, 2009, Griffin was arrested while sitting in the front passenger seat of a grey and white conversion van that was parked in the parking lot of a convenience store. *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 28-29. The following evidence was recovered from the van: a bag of heroin containing about 27 grams of heroin in a pocket on the back of the seat where Griffin was sitting; and two baggies that were sitting in a cup holder behind the driver's seat. One of the baggies in the cup holder held 27 gel capsules of what appeared to be heroin, and the other contained a four-gram chunk of heroin. *Id.* at ¶ 30. In addition, a large bag of unused gel capsules was lying on the center console immediately to Griffin's left. *Id.*

Finally, other bags containing unused gel capsules and baggies containing what appeared to be heroin residue were found in storage pouches behind Franklin's seat. *Id.* See, also, Trial Transcript, Volume VI, pp.1144-1151. Testimony at trial also indicated that the gel caps are used in the packaging and sale of heroin. *Id.* at p. 1161.

{¶ 35} The State correctly points out that the weight of the heroin found in the chunks of heroin and the gel caps containing heroin, exclusive of the empty gel caps, accounts for the 33.19 grams mentioned in the indictment for possession of heroin. See Trial Transcript, pp. 887-893. As a result, Griffin could be separately charged and convicted for possession of the empty gel caps as well for as the heroin and gel caps that contained heroin. These are not the same offenses.

{¶ 36} R.C. 2941.25(A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court of Ohio stated that "[u]nder R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct." *Id.* at ¶ 47. The court went on to note that:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is

sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

* * *

Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Johnson* at ¶ 48-51.

{¶ 37} R.C. 2923.24(A) provides that "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." In contrast, R.C. 2925.11(A) states that "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

{¶ 38} Under the circumstances of this case, the offenses were not committed with the same conduct. Griffin's position is based on the contention that his conviction for possession of criminal tools was based on the capsules that surrounded the heroin. However, this is incorrect. The conviction was based on the empty gel capsules, which are used in packaging and selling heroin. For reasons that will follow, we conclude that Griffin should have been sentenced for the gel capsules as drug paraphernalia rather than as criminal tools, but Griffin's argument that these items were subsumed within the possession

of the possession of heroin charge is incorrect.

{¶ 39} Griffin's Second Assignment of Error is overruled.

IV. Did the Trial Court Err in Sentencing Griffin for Possession of Criminal Tools?

{¶ 40} Griffin's Third Assignment of Error is as follows:

> The Trial Court Erred in Sentencing Defendant for Possession of Criminal Tools that Were Drug Paraphernalia.

{¶ 41} Griffin contends under this assignment of error that the gel capsules, razor, baggies, and plate are "drug paraphernalia" rather than criminal tools. Accordingly, Griffin maintains that he should have been sentenced under R.C. 2925.14 for a fourth degree misdemeanor, rather than R.C. 2923.24, which elevates the crime to a fifth degree felony if the article is intended for use in the commission of a felony. In support of his argument, Griffin relies on *State v. Susser*, 2d Dist. Montgomery No. 12745, 1992 WL 41834 (March 2, 1992), and *State v. Wagner*, 6th Dist. Sandusky No. S-93-40, 1994 WL 590537 (Oct. 28, 1994), which followed *Susser*.

{¶ 42} R.C. 2925.14 (C)(1) prohibits any person from knowingly using or possessing with purpose to use, drug paraphernalia. Under R.C. 2925.14(A) "drug paraphernalia" is defined as:

> [A]ny equipment, product, or material of any kind that is used by the offender, intended by the offender for use, or designed for use, in propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or

otherwise introducing into the human body, a controlled substance in violation of this chapter.

{¶ 43} R.C. 2925.14(A)(1)-(13) also provides a non-exclusive list of various equipment, products or materials that could be classified as drug paraphernalia. This list includes items like kits for cultivating controlled substances, scales or balances for weighing or measuring controlled substances, testing equipment for identifying the strength of controlled substances, hypodermic syringes, separation gins for removing twigs and seeds from marijuana, and so forth. In addition, the list includes these items:

(9) A blender, bowl, container, spoon, or mixing device for compounding a controlled substance;

(10) A capsule, balloon, envelope, or container for packaging small quantities of a controlled substance; [and]

(11) A container or device for storing or concealing a controlled substance.

{¶ 44} In comparison, R.C. 2923.24(A), which prohibits individuals from possessing or using criminal tools, states that "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 45} R.C. 2925.14 and R.C. 2923.24 have consisted in essentially the same format since they were enacted in 1989 and 1974, respectively. *Susser* involved two appeals to our court that were decided in 1990 and 1992.

{¶ 46} In the first appeal, we noted that the defendant had been convicted of several charges, including possession of cocaine in violation of R.C. 2925.11(A), and possession of criminal tools in violation of R.C. 2923.24. *State v. Susser*, 2d Dist. Montgomery No. CA 11787, 1990 WL 197958, *1 (Dec. 5, 1990), *abrogated in part on other grounds, State v.*

Teamer, 82 Ohio St.3d 490, 696 N.E.2d 1049 (1998) (*Susser I*). During a search of the defendant's house, officers recovered narcotics-type items in the defendant's bedroom, including "a pipe, a vial containing white residue, a brass type funnel, and a brown bottle containing white residue." *Id.* at * 6. In a kitchen drawer, an officer also recovered "a cut drinking straw next to a glass bottle containing a white residue he believed to be cocaine residue. [The officer] explained that cocaine is often ingested by a cut straw. He also recovered an aluminum nail with the same white residue." *Id.*

{¶ 47} We reversed the conviction for drug abuse, concluding that the minute trace amounts of cocaine discovered on the drug paraphernalia could not satisfy the requirement that the defendant had "knowingly" possessed the cocaine. *Id.* at *11.[1] However, we affirmed the conviction for possession of criminal tools under R.C. 2923.24. We noted that R.C. 2925.12 could not apply, because it pertained only to hypodermic needles or syringes as the relevant drug instrument included in the statute. *Id.* We also rejected the application of R.C. 2925.14, which covered other implements, because that statute was not enacted until November 2, 1989, which was after the defendant had been charged with possession of criminal tools. *Id.*

{¶ 48} After we reversed and remanded the case, Susser was sentenced to consecutive sentences of 18 months in prison for possession of criminal tools, and one year in prison for violating his probation in a prior case. *State v. Susser*, 2d Dist. Montgomery No. 12745, 1992 WL 41834 (March 2, 1992) (*Susser II*). In *Susser II*, the defendant contended that he should have been sentenced under the lesser penalty for a violation of

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[1]This particular conclusion was later rejected in *Teamer*, 82 Ohio St.3d 490, 491-492, 696 N.E.2d 1049, after another district had certified a conflict with *Susser I*.

R.C. 2925.14, rather than the more severe penalty in R.C. 2923.24. *Id.* at *3. We agreed, concluding that there could be "no doubt that the 'criminal tools' that Susser was found to have possessed were 'drug paraphernalia' as defined in R.C. 2925.14(A)." *Id.* at *3-4. We noted the provision in R.C. 1.51 that:

> "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *Id.* at *4.

{¶ 49} Based on this statute, we concluded that:

> It is clear that "drug paraphernalia" is a subcategory of "criminal tool" and that R.C. 2925.14(C)(1) specially proscribes the possession of drug paraphernalia whereas R.C. 2925.24(A) generally proscribes the possession of any criminal tool. *Id.*

{¶ 50} Because R.C. 2925.14 was in effect when Susser was sentenced in 1991, we held that he was entitled to the benefit of the penalty provisions in R.C. 2925.14. *Id.* Our opinion also cited a decision of the Supreme Court of Ohio – *State v. Volpe*, 38 Ohio St.3d 191, 527 N.E.2d 818 (1988) – as well as *State v. Chandler*, 54 Ohio App.3d 92, 560 N.E.2d 832 (8th Dist.1989).

{¶ 51} In *Volpe*, the defendants were charged with gambling, operating a gambling house, and possession of criminal tools. The criminal tools charge, brought under R.C. 2923.24, was based on two gambling machines that were found at a game room operated

by the defendants. *Volpe* at 191-192. After being convicted of the charges, the defendants appealed, challenging "R.C. 2923.24 on the grounds that in enacting R.C. 2915.02, the General Assembly clearly stated a specific intent to charge with a misdemeanor, not a felony, first-time gambling offenders who engage or use a tool in gambling." *Id.* at 193.

{¶ 52} After examining R.C. 1.51, R.C. 2915.02, and R.C. 2923.24, the Supreme Court of Ohio held that:

> R.C. 2915.02(A)(5) and 2923.24 are irreconcilable. R.C. 2915.02(A)(5), in conjunction with R.C. 2915.02(F), treats possession of a gambling device as a first degree misdemeanor. As such, a person convicted of violating R.C. 2915.02(A)(5) could receive no prison sentence or a prison sentence of up to six months. See R.C. 2929.21. R.C. 2923.24 makes possession of criminal tools, arguably such instruments as gambling devices, a fourth degree felony, carrying a minimum prison sentence of six months and a maximum prison sentence of five years. See R.C. 2929.11. Therefore, since R.C. 2915.02 and 2923.24 provide for different penalties for the same conduct, they cannot be construed to give effect to both. R.C. 2915.02 and 2923.24 were enacted effective January 1, 1974, as part of the modern Ohio Criminal Code. Therefore, under R.C. 1.51, the general law, R.C. 2923.24, does not prevail as being the "later adoption." Further, the fact that the General Assembly enacted R.C. 2915.02(A)(5) to reach possession and control of gambling devices indicates that it did not intend for R.C. 2923.24 to reach possession and control of such devices. (Footnotes omitted.) *Volpe* at 193-194.

{¶ 53} Subsequently, in *Chandler*, the Eighth District Court of Appeals applied the reasoning in *Volpe*, and concluded that "alleged possession of syringes could not be punished as anything other than a misdemeanor under R.C. 2925.12 and could not constitute possession of criminal tools under R.C. 2923.24." *Chandler*, 54 Ohio App.3d at 93-94, 560 N.E.2d 832.

{¶ 54} Our decision in *Susser II* was subsequently followed by the Sixth District Court of Appeals in *Wagner*, 6th Dist. Sandusky No. S-93-40, 1994 WL 590537 (Oct. 28, 1994), at *3. In *Wagner*, the Sixth District Court of Appeals concluded that the defendant could only have been found guilty of violating R.C. 2925.14, not R.C. 2923.24, when the property seized was a tool chest and two freezers in which marijuana had been stored, and scales used to weigh marijuana. *Id. Accord, State v. Kobi*, 122 Ohio App.3d 160, 181-182, 701 N.E.2d 420 (6th Dist.1997) (holding that possession of "(1) a radio frequency interference detector, (2) digital scales, (3) Harley Davidson coffee mug, (4) one clear glass jar and one black and white vase with a lid, and (5) numerous books amounting to instruction manuals on successful drug trafficking" could only be used to convict the defendant of possession of drug paraphernalia under R.C. 2925.14, not possession of criminal tools under R.C. 2923.24).

{¶ 55} As was noted, R.C. 2923.24 was enacted in 1974, and R.C. 2925.14 was enacted later, in 1989. Although R.C. 2925.14 has been amended a number of times, it has remained in essentially the same form since its enactment.

{¶ 56} In a recent decision, we concluded that a jury could properly conclude that a small plastic baggie in which cocaine was found could be a criminal tool. *State v. Moulder*, 2d Dist. Greene No. 08-CA-108, 2009-Ohio-5871, ¶ 8 (affirming convictions for

possession of cocaine and possession of criminal tools, and reversing conviction for tampering with evidence.) The case that we cited for this proposition is *State v. Wilson*, 77 Ohio App.3d 718, 603 N.E.2d 305 (8th Dist.1991). *Id.*

{¶ 57} Subsequently, we relied on *Moulder* to find that a plastic baggie used to transport cocaine is a "criminal tool." *State v. Smith*, 2d Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 22 (finding evidence legally sufficient to sustain conviction for possession of criminal tools).

{¶ 58} In *Wilson*, the defendant was convicted of possessing criminal tools in violation of R.C. 2923.24 and drug abuse in violation of R.C. 2925.11. *Wilson* at 719. The facts in the opinion are sparse, but the criminal tools charge apparently arose from the defendant's possession of plastic baggies. *Id.* at 722. The opinion does not say what types of drugs may have been involved. The defendant argued on appeal that he should have been convicted under R.C. 2925.12, for possession of drug abuse instruments, rather than under R.C. 2923.24, for possession of criminal tools. In responding to this argument, the Eighth District Court of Appeals stated as follows:

> This court finds plastic baggies held by the appellant in the case *sub judice* meet the definition set forth in R.C. 2923.24 for possession of criminal tools. Plastic baggies do not fall within the parameters of R.C. 2925.12 because they are used in the drug industry for containing and packaging the drugs, and not primarily as an aid for administering or ingesting the drugs. *Wilson* at 722.

{¶ 59} The court's comment in *Wilson* was accurate, so far as it went, because R.C. 2925.12 deals solely with hypodermics or syringes used by an offender to unlawfully

administer a dangerous drug other than marijuana. A plastic baggie clearly would not fit within this statute, since it is not a hypodermic or syringe.

{¶ 60} Nonetheless, in *Wilson*, the court failed to consider the appropriate statutory provision, R.C. 2925.14, which does deal with items used to contain and package drugs. If the court had considered that point, it would have gone on to decide, as we did in *Susser II*, whether a defendant is properly charged with having violated R.C. 2925.14 or R.C. 2923.24 when he or she is in possession of items that fall within the meaning of drug paraphernalia in R.C. 2925.14. *Susser II*, 2d Dist. Montgomery No. 12745, 1992 WL 41834, *3-4 (March 2, 1992).

{¶ 61} Accordingly, reliance on *Wilson* would be misplaced. *Susser II* is the appropriate authority on drug paraphernalia in this district. On the other hand, *Susser II* did not consider the effect of the Supreme Court of Ohio's decision in *State v. Chippendale*, 52 Ohio St.3d 118, 556 N.E.2d 1134 (1990). *Chippendale* established a framework for deciding whether R.C. 1.51 applies. According to the Supreme Court of Ohio, a court must first determine if the statutes are "general, special, or local. If the statutes are general and do not involve the same or similar offenses, then R.C. 1.51 is inapplicable." *Id.* at 120.

{¶ 62} In the case before us, R.C. 2923.24 is general, and R.C. 2925.14 is specific, and the statutes involve similar offenses. The analysis, therefore, proceeds to the next step, which *Chippendale* describes as follows: "if one of the statutes is general and one specific and they involve the same or similar offenses, we must then ask whether the offenses constitute allied offenses of similar import." *Id.*

{¶ 63} The subject of how to approach allied offenses has been debated for many years. In *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme

Court of Ohio gave the following explanation of its most recent permutation of the allied offense analysis:

> In determining whether two offenses should be merged, the intent of the General Assembly is controlling. We determine the General Assembly's intent by applying R.C. 2941.25, which expressly instructs courts to consider the offenses at issue in light of the defendant's conduct. We have long held that the statute's purpose is to prevent shotgun convictions, as explained in the statute's Legislative Service Commission comments. *Geiger*, 45 Ohio St.2d at 242, 74 O.O.2d 380, 344 N.E.2d 133. With these considerations in mind, we adopt the following approach to determination of allied offenses.
>
> Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.
>
> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses

correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. *Johnson at* ¶ 46-50.

{¶ 64} In the case before us, it is possible to commit both offenses (possession of criminal tools and possession of drug paraphernalia) with the same conduct. R.C. 2923.24 is a very broad statute, and covers the possession of "any substance, device, instrument, or article, with purpose to use it criminally." R.C. 2925.14 is more specific, but it also covers possession, with intent to use drug paraphernalia. As we pointed out in *Susser II*, this is a "subcategory" of "criminal tool." *Susser II*, 2d Dist. Montgomery No. 12745, 1992 WL 41834, *4 (March 2, 1992). The offenses in this case were also committed by the same conduct, being a single act, and were committed with a single state of mind. All that occurred here, to form the offense, was simple possession of a forbidden object.

{¶ 65} Under *Chippendale*, after the offenses have been determined to be of similar import, they must also not have been crimes committed separately or with a separate animus in order for R.C. 1.51 to apply. *Chippendale*, 52 Ohio St.3d 118, 556 N.E.2d 1134, at 120-121. Again, the razor, gel capsules, plate, and baggies involved only simple

possession of the forbidden items, and there is no indication that a separate animus was involved. Thus, R.C. 1.51 would apply.

{¶ 66} Regarding the application of R.C. 1.51, the Supreme Court of Ohio noted in *Chippendale* that:

> Where it is clear that a general provision of the Criminal Code applies coextensively with a special provision, R.C. 1.51 allows a prosecutor to charge on both. Conversely, where it is clear that a special provision prevails over a general provision or the Criminal Code is silent or ambiguous on the matter, under R.C. 1.51, a prosecutor may charge only on the special provision. The only exception in the statute is where " * * * the general provision is the later provision and the manifest intent is that the general provision prevail." Thus, unless the legislature enacts or amends the general provision later in time and manifests its intent to have the general provision apply coextensively with the special provision, the special provision must be the only provision applied to the defendant. *Chippendale* at 121.

{¶ 67} R.C. 2923.24 was enacted in 1974, and R.C. 2925.14 is the later statute, having been enacted in 1989. R.C. 2923.24 has been amended only once, in 1995, and the amendments do not indicate that the statute is to be applied co-extensively with any other statute. R.C. 2925.14 has been amended a number of times, but has remained in essentially the same form since it was originally enacted. R.C. 2925.14 provides the more specific provision, and resort to that statute must be made in situations involving items that could be classified as drug paraphernalia under R.C. 2925.14. Thus, *Susser II* retains validity, even though it did not use the analysis mandated by *Chippendale*.

{¶ 68} As was noted, R.C. 2925.14(C)(1) prohibits any person from knowingly using or possessing with purpose to use, drug paraphernalia. As pertinent to this case, R.C. 2925.14(A) defines "drug paraphernalia" as "any equipment, product, or material of any kind that is used by the offender, * * * in * * * preparing, * * * packaging, repackaging, storing, containing, [or] concealing, * * * a controlled substance in violation of this chapter." The non-exhaustive list of equipment and products that could be classified as drug paraphernalia includes items like bowls, spoons, and other implements used for compounding controlled substances; items like capsules, balloons, envelopes, or containers for packaging small quantities of a controlled substance; and containers or devices for storing or concealing controlled substances. R.C. 2925.14(A)(9)-(11).

{¶ 69} Under these definitions, the items in question were drug paraphernalia – the razor and plate (which contained drug residue) were used to prepare and cut the drugs, and the gel capsules and baggies were used for packaging and storing the drugs. See Trial Transcript, Volume VI, pp. 1155-1159, and pp. 1160-1161. Accordingly, Griffin should have been sentenced for a violation of R.C. 2925.14(C)(1) rather than for possession of criminal tools.

{¶ 70} Based on the preceding discussion, the Third Assignment of Error is sustained.

V. Were the Cell Phones Drug Paraphernalia?

{¶ 71} Griffin's Fourth Assignment of Error states that:

> The Trial Court Erred in Sentencing Defendant Appellant for Possession of Criminal Tools for Possessing Cellular Telephones.

{¶ 72} Under this assignment of error, Griffin contends that the cell phones found

in the area of the drugs should also be considered drug paraphernalia rather than criminal tools. We disagree. The cell phones do not fit within the definition of "drug paraphernalia" in R.C. 2925.14(A). Although the cell phones were used to facilitate drug sales, they were not used to prepare, conceal, store, or repackage controlled substances, and the connection is too attenuated for the cell phones to be considered drug paraphernalia. Instead, the cell phones fit within R.C. 2923.24(A), as devices or instruments that an individual intends to use criminally.

{¶ 73} Accordingly, the Fourth Assignment of Error is overruled.

VI. Did the Trial Court Err in Overruling the Motion to Suppress?

{¶ 74} Griffin's Fifth Assignment of Error is as follows:

The Trial Court Erred in Overruling Defendant Appellant's Motion to Suppress.

{¶ 75} Under this assignment of error, Griffin contends that the trial court erred in overruling his motion to suppress evidence. According to Griffin, the flight of one individual (Franklin) from the van did not justify the detention and search of the other persons in the vehicle. In response, the State maintains that police officers had reasonable suspicion to stop and make contact with the occupants of the van. In addition, the State argues that a search of the van was justified under the automobile exception to the warrant requirement.

{¶ 76} The standards for reviewing decisions on motions to suppress indicate that the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford*, 93 Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994), citing *State v. Clay*, 34 Ohio St.2d

250, 298 N.E.2d 137 (1972). Accordingly, when an appellate court reviews suppression decisions, "we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id.*

{¶ 77} Griffin filed several motions to suppress evidence. One motion asked the court to suppress evidence obtained from an illegal search and seizure on April 1, 2009. Docket # 14. The other motions involved suppression of statements that Griffin made to police on various occasions and are not being challenged on appeal.

{¶ 78} The trial court held a suppression hearing in June 2009 and received testimony from Dayton Police Detective David House, Dayton Police Sergeant Eric Steckel, and Dayton Police Officer Kevin Phillips.

{¶ 79} Detective House testified that on March 31, 2009, he was working as a narcotics detective and was using a cell phone number that he had gotten from another officer for individuals who were selling heroin in Dayton. After calling the number, House arranged to purchase heroin. Upon arriving at the location where he had been directed, House noticed a grey and white Chevrolet conversion van parked along the curb. The lights on the van were off, and the driver of the van quickly flashed his headlights at House, signaling that the van contained the individuals to whom House had been speaking. House pulled up next to the driver's side, and the driver told him to pull forward and turn around. The van had a temporary tag. As soon as House started to pull off and turn around, the van took off at a high rate of speed.

{¶ 80} House called the cell phone again and was told to go to a McDonald's

restaurant on Free Pike. When House called the number again, the subjects informed House that they had recognized him and actually called him Detective House. House was not able to apprehend the individuals that evening.

{¶ 81} The next day, House spotted a grey and white Chevrolet conversion van that appeared to be the same van. He again tried to obtain the license plate number, but only saw a temporary tag. After the van passed House, it turned into the east end of the parking lot of the AM/PM market on Salem Avenue, and backed into a parking spot. This was a high drug crime area and House had made numerous arrests in the general area for drugs. He had also done buy/bust operations in the parking lot of the market, when individuals would meet at that location to sell drugs.

{¶ 82} House lost sight of the van for a moment and then began to watch it. It appeared that the occupants of the van had gotten out and had gone into the convenience store. House then saw two individuals (later identified as DeShawn Foster and De'Argo Griffin) come out of the market, walk to the back door of the passenger side, and get into the vehicle.

{¶ 83} By this time, House had contacted uniformed officers to ask if they could assist. The uniformed officers arrived in a marked cruiser and turned into the AM/PM parking lot. The lights were not activated and the officers had not made contact with the van. As the cruiser was getting close to the van, the back door on the passenger's side was flung open, and Franklin jumped out of the van. Franklin then fled on foot. At that time, House could see that there were at least two other individuals in the van.

{¶ 84} House and two other officers ran after Franklin. House eventually apprehended Franklin on the street to the south that bordered the parking lot. After placing

Franklin in handcuffs and patting him down, House removed about $3,500 from one of Franklin's pockets.

{¶ 85} Officer Eric Steckel remained at the van and made contact with the occupants. Steckel exited his cruiser and drew his weapon for his safety, because he was not sure what was going on. He was also the only one there, since his partner was involved in a foot chase. Steckel told the two occupants in the van to raise their hands. One occupant (later identified as Griffin) was in the front passenger seat of the van, and the other (later identified as Foster) was seated in the rear bench seat of the van.

{¶ 86} The van door from which Franklin had fled was still open, but Steckel was not able to see into the van through that door. As he walked to the front of the van, he could see inside the van. The van contained two captain seats in the front for the driver and passenger, two more captain seats in the middle, and a third row of seating that had a bench seat.

{¶ 87} Steckel asked Griffin to step from the vehicle because he was by himself and wanted to place Griffin in the rear of his cruiser for his safety. When Griffin exited the van, Steckel could see a plastic bag containing several gelatin caps on the front console between the driver's and passenger's seats. He patted Griffin down and placed him in the rear of the cruiser. Griffin had $264 in his pocket. When Steckel felt the wad of money in Griffin's pocket and saw that Griffin had gelatin caps, he concluded that a drug crime was in progress.

{¶ 88} Steckel then returned to the van and ordered Foster out. As Foster was exiting from the rear of the van, Steckel looked down at the rear pocket of the passenger side seat. He could see in plain view a baggie containing what looked like a chunk of heroin.

{¶ 89} By then, Officer Saunders had returned from the foot chase and helped Steckel pat Foster down for officer safety and weapons. Saunders found $262 in Foster's pant pockets and a cell phone. According to Steckel, the two men were not being placed under arrest at that point. They were being detained for Detective House's investigation.

{¶ 90} After Saunders took control of Foster, Steckel went inside the van where he saw another plastic baggie in the cup holder on the driver's side of the van, behind the driver's seat. Steckel was conducting a search for drugs at that point. When officers find drugs in a vehicle, they are eventually going to tow the vehicle pursuant to Dayton Police policy.

{¶ 91} When House returned to the van, Officer Steckel pointed out several items in the van. Standing at the open passenger side door from which Franklin had jumped, House could see a baggie containing about one ounce of heroin in the pocket behind the front passenger seat, directly in front of where Franklin had been sitting. House stated that he could see the plastic baggie without opening the pocket. The bag was clear and House could see large chunks of a brown substance, which in his experience appeared to be heroin.

{¶ 92} House could also see a baggie in a molded cup holder that contained gel caps of heroin. Gel capsules are the most common packing material that is used for heroin.

{¶ 93} House stated that all three individuals were then placed under arrest. Felony drugs were obviously inside the van, and it was going to be towed due to the arrest. The officers did an inventory search of the van prior to the tow.

{¶ 94} After hearing the evidence, the trial court overruled the motion to suppress evidence. The trial court concluded that all the factors, including the attempted drug

evidence. The trial court concluded that all the factors, including the attempted drug transaction the night before and the similarity of the van, provided suspicion for the stop. The court further held that Officer Steckel was entitled to draw his gun for officer safety, and that when Griffin opened the door to leave the van, the drugs in plain sight on the console permitted the arrest and searches of the defendants. Transcript of Proceedings for May 7, 2009, June 19, 2009, July 9, 2009, and March 2, 2010, p. 125.

{¶ 95} In *State v. Roberts*, 2d Dist. Montgomery No. 23219, 2010-Ohio-300, we noted that:

> The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. *State v. Martin*, Montgomery App. No. 20270, 2004-Ohio-2738, at ¶ 10, citing *Terry, supra*; *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, at ¶ 10. A police officer may lawfully stop a vehicle, motorized or otherwise, if he has a reasonable articulable suspicion that the operator has engaged in criminal activity, including a minor traffic violation. See *State v. Buckner*, Montgomery App. No. 21892, 2007-Ohio-4329, ¶ 8. *Roberts* at ¶ 14.

{¶ 96} "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." (Citation omitted.) *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph one of the syllabus. In the case before

us, the totality of the circumstances indicate that the decision to conduct an investigative stop was proper. We agree with the trial court that Detective House had a reasonable articulable suspicion that criminal activity was afoot when the officers attempted to briefly detain the occupants of the van to investigate. Detective House had been involved in an attempted drug transaction with a very similar van the evening before, and thought the van was the same one. The area was also a high drug crime area, and House had previously made arrests in the parking lot where the van stopped. However, before the officers had a chance to stop and question the occupants of the van, Franklin ran from the van, further heightening the officers' suspicion that criminal activity was involved.

{¶ 97} The police also did not violate Griffin's rights by ordering him out of the van. "[A] police officer may order a motorist to get out of a car, which has been properly stopped for a traffic violation, even without suspicion of criminal activity." *State v. Evans*, 67 Ohio St.3d 405, 407, 618 N.E.2d 162 (1993), citing *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). Although no traffic violation was involved in the case before us, the investigatory stop was lawful, and the officer acted reasonably in ordering Griffin to exit the vehicle. In *Evans*, the Supreme Court of Ohio stressed that:

> [T]he order to step out of the vehicle is not a stop separate and distinct from the original traffic stop. It is so minimal and insignificant an intrusion that the *Mimms* court refused to apply the requirements for an investigatory stop. Unlike an investigatory stop, where the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion," *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906, a *Mimms*

order does not have to be justified by any constitutional quantum of suspicion. *Evans* at 408.

{¶ 98} Officer Steckel was also justified in drawing his weapon. " Use of a firearm during an investigatory stop may be permissible if the force is reasonable." *Columbus v. Dials*, 10th Dist. Franklin No. 04AP-1099, 2005-Ohio- 6305, ¶ 24, citing *Wells v. Akron*, 42 Ohio App.3d 148, 150, 537 N.E.2d 229 (9th Dist.1987), and *State v. Gaston*, 110 Ohio App.3d 835, 842, 675 N.E.2d 526 (11th Dist.1996). "In determining whether the use of force was reasonable, it is necessary for us to consider the totality of the circumstance surrounding the drawing of the weapon." *Id.* "The question is whether, under the circumstances, the officer's use of force was reasonably necessary to ensure his safety and whether the use of force was limited in scope and duration." (Citations omitted.) *State v. Dunson*, 2d Dist. Montgomery No. 20961, 2006-Ohio-775, ¶ 17.

{¶ 99} Officer Steckel briefly drew his weapon for his safety because he was alone at the scene with at least two individuals in a car who were suspected of drug activity. Steckel was also not sure what was going on. Under the circumstances, it was reasonable for Steckel to arm himself briefly while he ascertained who was in the car and also assured himself that the individuals were not armed and a threat to his safety.

{¶ 100} Once Griffin opened the door to the van, Steckel observed evidence of drug activity in plain view. House also saw various drugs and drug-related items in plain view when he returned to the van, by looking through the door that Franklin left open when he fled.

{¶ 101} The plain view doctrine "authorizes the seizure, without the necessity of a search warrant, of an illegal object or contraband that is immediately recognizable as such

when it is in plain view of a law enforcement official." *State v. Moore*, 2d Dist. Montgomery No. 20198, 2004-Ohio-3783, ¶ 17, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 465-466, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and *State v. Davie*, 86 Ohio App.3d 460, 464, 621 N.E.2d 548 (8th Dist. 1993). " 'Under [the plain view] doctrine, an officer may seize an item without a warrant if the initial intrusion leading to the item's discovery was lawful and it was "immediately apparent" that the item was incriminating.' " *Moore* at ¶ 17, quoting *State v. Waddy*, 63 Ohio St.3d 424, 442, 588 N.E.2d 819 (1992).

{¶ 102} Finally, the search of the automobile was justified by the automobile exception to the Fourth Amendment's warrant requirement, which allows police to "conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains contraband, and exigent circumstances necessitate a search or seizure." *State v. Moore*, 2d Dist. Montgomery No. 24934, 2012-Ohio-4315, ¶ 13, citing *State v. Mills*, 62 Ohio St.3d 357, 367, 582 N.E.2d 972 (1992) and *Chambers v. Maroney*, 399 U.S. 42, 48, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). In *Moore*, we noted that:

> A vehicle's mobility is the traditional exigency for this exception to the warrant requirement. *Mills* at 367; *California v. Carney*, 471 U.S. 386, 393, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment * * * permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996). The automobile exception does not have "separate exigency requirement" beyond the vehicle's mobility. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S.Ct. 2013, 144 L.E.2d 442 (1999). Moreover, "[t]he immobilization of the vehicle or low

probability of its being moved or evidence being destroyed does not remove the officers' justification to conduct a search pursuant to the automobile exception." *State v. Russell*, 2d Dist. Montgomery No. 19901, 2004–Ohio–1700, ¶ 34. *Moore* at ¶ 13.

{¶ 103} In light of the preceding discussion, the trial court did not err in overruling Griffin's motion to suppress evidence. The Fifth Assignment of Error is overruled.

VII. Did the Trial Court Err in Instructing on Complicity?

{¶ 104} Griffin's Sixth Assignment of Error is as follows:

> The Trial Court Erred in Instructing the Jury on Complicity over Objection Where the Bill of Particulars Identified the Defendant as the Principal Offender.

{¶ 105} Under this assignment of error, Griffin objects to the fact that the trial court gave a complicity instruction when Griffin was led to believe that he was a principal offender in the bill of particulars that the State filed regarding each of Griffin's indictments. Griffin concedes that accomplices are punished the same as principal offenders, but argues that he should have been entitled to rely on the bill of particulars.

{¶ 106} In response to this argument, the State notes, citing Volume VII, pp. 1406-1410 of the Trial Transcript, that the trial court, in fact, identified Griffin as the principal offender when it instructed the jury.

{¶ 107} We have reviewed the citation to the Trial Transcript, and find nothing regarding complicity at the place Griffin cites in his brief (Trial Transcript, Volume VII, p. 1387.) At that point in the jury instructions, and for several pages before and after, the court

was discussing the charges and verdict forms pertaining to Griffin's co-defendant, Anthony Franklin. *Id.* at pp. 1383-1406.

{¶ 108} During the discussion of jury instructions, there were objections to the inclusion of language on aiding and abetting, because both Griffin and Franklin had been charged as principals. Trial Transcript, Volume VII, pp. 1377-1378. The State's response at that point was that the aiding and abetting statute placed the defendants on notice. *Id.* at p. 1377. The trial court noted the objection, and did charge the jury with regard to aiding and abetting in connection with Griffin's alleged offenses. *Id.* at pp. 1414-1418.

{¶ 109} The indictments charge Griffin as a principal offender, and the State's response to Griffin's request for a bill of particulars does not mention aiding and abetting. See Doc. #22 and Doc. #44.

{¶ 110} The Supreme Court of Ohio addressed a similar argument in *State v. Herring*, 94 Ohio St.3d 246, 762 N.E.2d 940 (2002). In *Herring*, the indictment charged the defendant with having been a principal offender in the aggravated murder of the victim, but the trial court instructed the jury that it could convict the defendant of aggravated murder either as the principal offender or as an aider and abettor. After the jury found the defendant guilty as an aider and abettor, the defendant appealed, contending that the instruction violated his Sixth Amendment right " 'to be informed of the nature and cause of the accusation.' " *Id.* at 251. Specifically, the defendant argued that "because the bill of particulars indicated that he was the principal offender on Count One, he lacked notice that the trial court would instruct on accomplice liability as to that count." *Id.*

{¶ 111} The Supreme Court of Ohio rejected the defendant's argument, noting that:

> R.C. 2923.03(F) states: "A charge of complicity may be stated in terms

of this section, or in terms of the principal offense." Thus, a defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is "stated * * * in terms of the principal offense" and does not mention complicity. R.C. 2923.03(F) adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. See *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929, 946, citing *Hill v. Perini* (C.A.6, 1986), 788 F.2d 406, 407–408. *Herring* at 251.

{¶ 112} The Supreme Court of Ohio also found no prejudice to the defendant because the defendant failed to "indicate how he could have defended himself differently, given notice that complicity would also be an issue * * *." *Id.* at 251-252. The same comment applies here, since Griffin has not suggested how he would have defended himself differently if he had known that the jury would be instructed on complicity.

{¶ 113} Based on the preceding discussion, the Sixth Assignment of Error is overruled.

VIII. Conclusion

{¶ 114} Griffin's First and Third Assignments of Error having been sustained, and the Second, Fourth, Fifth and Sixth assignments of error having been overruled, Griffin's conviction for Engaging in a Pattern of Corrupt Activity is Reversed, and the judgment, insofar as it sentences Griffin to 12 months in prison on four of the five counts of Possession of Criminal Tools, is reversed and remanded for further proceedings. In all other respects, the judgment is Affirmed.

FROELICH, J., concurs in judgment only.

HALL, J., concurring:

{¶ 115} De'Argo Griffin is a co-defendant of Anthony Franklin, and they were tried together. This court reversed Franklin's conviction for Engaging in a Pattern of Corrupt Activity, holding that a jury instruction on the term "enterprise," fashioned from federal case law on the subject, should have been given. *State v. Franklin*, 2d Dist. Montgomery Nos. 24011, 24012, 2011-Ohio-6802.

{¶ 116} I too am of the opinion that the jury instruction giving Ohio's statutory definition of "enterprise" was adequate, and I would not have required a jury instruction on the expanded federal definition if I were deciding the case in the first instance. Nevertheless, *State v. Franklin* is part of the jurisprudence of this court. The principle of stare decisis commands that a court should not lightly overrule its precedential authority. Moreover, internal consistency between co-defendants tried together further requires that we adhere to the *Franklin* decision. Accordingly, I concur with the lead opinion.

. . . . . .

Copies mailed to:

Mathias H. Heck
Kirsten A. Brandt
Darrell L. Heckman
Hon. Steven K. Dankof

Case: CA 024001
Date: 05/31/2013
Dkt: CRIMFE

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO Plaintiff-Appellee v. DE'ARGO GRIFFIN Defendant-Appellant	Appellate Case No. 24001 Trial Court Case No. 2009-CR-1117/3 (Criminal Appeal from Common Pleas Court) **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 31st day of May, 2013, the judgment of the trial court is Reversed in part, Affirmed in part, and Remanded for further proceedings.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

JEFFREY M. WELBAUM, Judge

Copies mailed to:

Mathias H. Heck, Jr.
Kirsten A. Brandt
Montgomery County Prosecutor's Office
P.O. Box 972
301 West Third Street
Dayton, OH 45422

Darrell L. Heckman
One Monument Square, Suite 200
Urbana, OH 43078

Hon. Steven K. Dankof
Montgomery County Common Pleas Court
41 N. Perry Street
Dayton, OH 45422

1996 WL 37752
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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Ninth District, Summit County.

STATE of Ohio, Appellee,
v.
Elias HABASH and Sami Habash, Appellants.

No. 17073. | Jan. 31, 1996.

Appeal from Judgment entered in the Common Pleas Court County of Summit, Ohio.

Attorneys and Law Firms

Maureen O'Connor, Philip D. Bogdanoff, Akron, OH.

James Burdon, Akron, OH.

Opinion

DECISION AND JOURNAL ENTRY

REECE, Judge.

*1 Appellants, Elias and Sami Habash ("Defendants") appeal from their convictions in the Summit County Court of Common Pleas. We affirm the convictions, but reverse Sami Habash's sentence for the offense of conspiracy to engage in a pattern of corrupt activity.

This case arose as a result of a wide-scale investigation of food stamp fraud in the Akron area. Acting on information discovered in the process of another investigation, the Summit County Central Tactical Unit began an investigation of several small grocery stores which were purportedly in the business of buying food stamps at a discounted price and redeeming them for face value, at a profit of approximately twenty-five to thirty percent.

The purchase of food stamps for cash constitutes the crime of trafficking in food stamps. As part of the investigation, government informants sold food stamps to several area retailers at seventy to seventy-five percent of their face value. In an effort to prosecute crimes beyond the initial purchase, the investigators attempted to trace the food stamps through the redemption process. The food stamps were later stamped "paid" with a store authorization number, indicating that the food stamps were properly accepted by these retailers for the purchase of food in accordance with the Food Stamp Act. This conduct of endorsing the food stamps, which had in fact been purchased by the retailers at a discounted price, constituted a forgery.

Finally, the food stamps were taken to the retailer's bank where they were redeemed. The bank, which had been authorized to accept food stamp deposits from that retailer, would immediately credit the retailer's account for the face value of the food stamps. The act of redeeming the food stamps for cash constituted an additional crime, theft by deception from the federal government.

Informants also sold a large quantity of manufacturer's cigarette coupons to Sami Habash at twenty percent of their face value. Those sales were not illegal, but the future redemption was. Both R.J. Reynolds and Phillip Morris had agreed to redeem these coupons to retailers only if the coupons had been accepted as partial payment for purchases of the correct brand, style, and quantity of cigarettes. The coupons were traced back to R.J. Reynolds and Phillip Morris where they were eventually redeemed. Consequently, Sami was charged with theft by deception from R.J. Reynolds and Phillip Morris.

In a five-hundred-thirty-six-count indictment, defendants and sixty-one others, including their brothers Saleem and George, were charged with various offenses relating to the illegal purchase, use, and redemption of food stamps. Some were indicted for crimes relating only to the initial purchase of the food stamps, trafficking in food stamps. Others were indicted for crimes committed throughout the redemption process: trafficking in food stamps, forgery, and theft. As many of the retailers committed repeated criminal acts, several were also indicted for engaging in a pattern of corrupt activity and conspiracy to engage in a pattern of corrupt activity.

*2 Elias Habash was indicted on charges of engaging in a pattern of corrupt activity, conspiracy to engage in a pattern of corrupt activity, three counts of petty theft, theft, two counts of trafficking in food stamps, and four counts of forgery. Sami Habash was indicted on charges of engaging in a pattern of corrupt activity, conspiracy to engage in a pattern of corrupt activity, five counts of trafficking in food stamps, six counts

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of grand theft, four counts of theft, two counts of petty theft, and nine counts of forgery.

During the course of the investigation, several businesses and residences had been searched pursuant to a search warrant. Each of the four Habash brothers moved to suppress the evidence seized pursuant to the search warrant, alleging that the affidavit supporting the warrant was too broad and that the warrant was defective as a general warrant, leaving unfettered discretion in the hands of the law enforcement officers. The trial court denied each brother's motion to suppress.

Defendants and one of their brothers moved to dismiss the charges of conspiracy to engage in a pattern of corrupt activity, alleging that the indictment failed to specify the overt act which allegedly formed the basis of the conspiracy. The state opposed these motions to dismiss and moved to amend the indictment with the bill of particulars which did specify the overt acts. The trial court allowed the state to amend the indictment, and denied each of the motions to dismiss.

Defendants were tried before a jury along with their two brothers. Prior to trial, Elias' petty theft charges were merged with the charge of theft, and Sami's grand theft, petty theft, and theft charges were merged into two counts of grand theft. Elias was convicted of all the remaining counts except conspiracy to engage in a pattern of corrupt activity. Sami was convicted of the remaining charges.

Defendants appeal separately from their two brothers and raise fifteen assignments of error.

In their first assignment of error, defendants contend that the trial court erred in failing to dismiss the charge of conspiracy against Sami, because the indictment failed to allege "a substantial overt act." R.C. 2923.01(B) provides:

> "No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired, subsequent to the accused's entrance into the conspiracy. * * * ."

The indictment alleged that Sami or one of his co-conspirators committed "a substantial overt act" in furtherance of the conspiracy. Sami moved to dismiss the indictment, contending that it failed to specify the overt act which he allegedly committed. Consequently, upon motion, the state was permitted to amend the indictment to specify that the overt act was "to endorse the food stamp coupons in order for the coupons to be redeemed by the federal reserve." The state also incorporated by reference all overt acts listed in the bill of particulars for the forgery and theft counts. The bill of particulars set forth specific details regarding each theft and forgery count. Sami contends that the indictment was defective, and could not be cured by the amendment.

*3 We rejected this same argument in *State v. Dapice* (1989), 57 Ohio App.3d 99. In *Dapice,* as here, the indictment alleged that the defendant had committed "a substantial overt act" in furtherance of the conspiracy, without setting forth the specific act. Because the state specified the act in the bill of particulars, however, we held that Dapice was given sufficient notice of all the elements of the conspiracy charge against him. *Id.* at 102-103. The first assignment of error is overruled.

In their second and third assignments of error, defendants argue that the trial court erred in denying their motions for acquittal on the theft charges. Defendants were convicted of theft by deception for redeeming the discounted food stamps from the federal government. Sami was also convicted of theft by deception for redeeming cigarette coupons from R.J. Reynolds and Phillip Morris.

Theft by deception is a violation of R.C. 2913.02(A)(3), which provides: "No person, with purpose to deprive the owner of property * * * shall knowingly obtain or exert control over * * * the property * * *[b]y deception [.]" Defendants argue that the state failed to establish the element of deception.

Defendants argue that the alleged victims, the federal government, R.J. Reynolds, and Phillip Morris, could not have been actually deceived because they supplied the food stamps and cigarette coupons for purposes of this investigation. Because these entities knew that defendants probably would improperly redeem the food stamps and cigarette coupons, defendants argue, there was no deception. Their argument, based on principles of agency law, is that if one person in the federal government or cigarette company was aware of the circumstances under which the food stamps or coupons might be redeemed, that awareness was attributed to the entire entity.

We need not determine whether this agency principle applies in a criminal setting, or whether it is even possible for an

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entity to be deceived, to resolve the issue before us. A conviction of theft by deception requires that the property be acquired through the deception of someone, and that someone need not be the alleged victim of the theft.

"Deception" is defined in R.C. 2913.01(A) as:

> "knowingly deceiving *another* or causing *another* to be deceived by any false or misleading representation * * * or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in *another* * * *." (Emphasis added.)

The person who actually redeemed each food stamp or cigarette coupon was the person at the bank or redemption center who was presented with the food stamps or cigarette coupons for payment. There was no evidence that these individuals had any prior knowledge of the true conditions under which the redemptions were made. Those individuals had no prior knowledge that defendants might try to redeem food stamps or cigarette coupons which had not been accepted from customers in connection with an acceptable purchase of food or cigarettes. Those individuals were clearly deceived as to the circumstances under which the redemptions occurred, and authorized payment of the face value of the cigarette coupons solely due to that deception.

*4 Sami further argues that the state presented insufficient evidence that he committed theft by deception from the cigarette companies because there was no evidence that he actually redeemed any of the coupons or that the coupons were not redeemed in connection with the sale of cigarettes.

The evidence established that, prior to purchasing the cigarette coupons, Sami told the informant that he could use whatever quantity of cigarette coupons he could supply him. He was interested in large quantities with total face values of $20,000 or more. Sami paid over $5,000 to this informant for over $26,000 worth of cigarette coupons. Although these purchases themselves were not illegal, they took place in secretive locations such as inside the informant's van in a parking lot. Based on the coupons which were eventually redeemed, Sami was convicted of theft by deception. Although the state presented no direct evidence that Sami himself redeemed any of these coupons, it was reasonable for the jury to infer that Sami at least aided and abetted in the illegal redemption.

Sami points to the fact that most of the cigarette coupons were redeemed through stores he did not own. It was reasonable for the jury to infer, however, that as the direct evidence established was his practice in the redemption of food stamps, he also channelled the coupons through other retailers to avoid detection. Because he was redeeming such a high volume of cigarette coupons, he needed to spread this volume to other stores which sold cigarettes.

Sami's suggestion that these coupons might have been legitimately redeemed in connection with the sale of cigarettes is simply not believable. To infer that the coupons had been legitimately redeemed, the jurors would have to believe that although Sami had paid over $5,000 for cigarette coupons, the coupons somehow found their way into the hands of thousands of customers who used them to purchase cigarettes at stores other than his.

Because reasonable minds could conclude that both defendants were guilty of their respective theft charges, the trial court did not err in denying their motions for acquittal. The second and third assignments of error are overruled.

Defendants' fourth assignment of error is that the trial court erred in denying their motion for acquittal on the charges of forgery. They raised a legal argument which is twofold: (1) the alleged acts did not constitute forgery; and (2) they should have been charged instead with the crime of falsification.

Defendants contend that their alleged acts of stamping "paid" with a store authorization number on the face of a food stamp did not, as a matter of law, constitute the crime of forgery because the food stamps were genuine. Defendants rely on a "general rule" that a forgery requires a false document. Defendants ignore, however, the full scope of Ohio's forgery statute.

Forgery is prohibited by R.C. 2913.31(A), which provides, in pertinent part:

> *5 "(A) No person, with purpose to defraud, or knowing that he is facilitating a fraud, shall do any of the following:
>
> " * * *.
>
> "(2) Forge any writing so that it purports to be genuine when it is actually spurious * * * or to have been executed at a time or place or with terms different from what was in fact the case * * *[;]
>
> "(3) Utter, or possess with purpose to utter, any writing which he knows to have been forged."

"Forge" is defined in R.C. 2913.01(G) as:

> " * * * to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct."

The Committee Comments following R.C. 2913.31 explain that the crime of forgery represents an expansion of the crime as it was defined in the former law. The comments explain that the subject of a forgery includes "any symbol of value, right, privilege, license, or identification produced by any means, such as credit cards, ID cards, trademarks, and others." It is further explained that "forge" includes "all forms of falsification purporting to authenticate a writing." The Ohio Supreme Court has held that this broad forgery statute also includes the act of altering a lottery ticket to create the impression that it has never been redeemed. *State v. Ferrette* (1985), 18 Ohio St.3d 106, 109.

Given the broad range of conduct contemplated by the forgery statute, we conclude that it applies to the situation before us. The act of endorsing a food stamp which has not been properly received as payment for food, but has been purchased for cash, constitutes a forgery pursuant to R.C. 2913.31(A)(2).

Defendants further argue that they should have been charged with the "more specific" misdemeanor offense of falsification, rather than the felony of forgery. Falsification is prohibited by R.C. 2921.13, which provides, in part:

> "(A) No person shall knowingly make a false statement * * * when any of the following applies:
>
> " * * *.
>
> "(4) The statement is made with purpose to secure the payment of * * * benefits administered by a governmental agency or paid out of a public treasury."

We are not persuaded that the falsification statute applies more specifically to this conduct. In fact, this conduct does not necessarily constitute falsification. The terms "statement" and "benefits" are not defined. Although food stamps themselves may constitute a benefit to the person who applies for and receives the stamps from the government, it is not so clear that a retailer who redeems the food stamp coupon is securing the payment of any benefit by means of a false statement.

Moreover, even if both statutes apply to defendants' conduct, it was within the state's discretion to determine which statute to indict upon. Because these statutes clearly prohibit different conduct, there was no requirement that one statute take precedence. The mere fact that defendants' conduct violated more than one statute did not force the state to prosecute under the lesser statute. *State v. Cooper* (1990), 66 Ohio App.3d 551, 553. The fourth assignment of error is overruled.

***6** In their fifth assignment of error, defendants contend that the trial court erred in denying their Crim.R. 29 motion for judgment of acquittal on the charges of conspiracy and engaging in a pattern of corrupt activity because there was no evidence that they were part of an "enterprise."

> "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

State v. Bridgeman (1978), 55 Ohio St.2d 261, syllabus.

For a conviction of the crimes of conspiracy to engage in a pattern of corrupt activity and engaging in a pattern of corrupt activity, the state was required to prove that defendants were part of an enterprise that engaged in the underlying offenses of theft and forgery. Specifically, R.C. 2923.32(A)(1) provides:

> "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt."

Despite defendants' suggestion that an enterprise must be a formal, structured organization, the legislature defined this term broadly to encompass even a single individual. "Enterprise" is defined in R.C. 2923.31(C) to include "any individual, sole proprietorship, partnership * * * or any

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organization, association, or group of persons associated in fact although not a legal entity."

The state presented ample evidence to establish the existence of an enterprise headed by Sami Habash, and that Elias participated in this enterprise. The brothers operated several stores which served as fronts for their primary business of food stamp trafficking. Each of Sami's brothers worked at one or more of the stores, as assigned by Sami. It is true that trafficking in food stamps does not constitute a "corrupt activity" pursuant to R.C. 2923.31(I). The evidence established, however, that the affairs of the enterprise, and Sami and Elias' involvement, did not end there. The food stamps were collected from each store by Sami, either by him visiting the stores or by his brothers or others delivering them to his house. Sami, with the assistance of others, would then endorse and redeem the food stamps.

Although the actual acts of forgery and theft were committed by Sami, and not Elias, the evidence established that Elias assisted in the purchase of the food stamps and delivery to Sami and that he shared substantially in the profits which were realized upon redemption. These profits were the direct result of repeated acts of forgery and theft. The fifth assignment of error is overruled.

Defendants' sixth, seventh, and tenth assignments of error each assign error to the trial court's failure to give certain instructions to the jury. A defendant is entitled to have his requested instructions included in the jury charge only if they are a correct statement of the law, pertinent, and not included in the substance of the general charge. *State v. Snowden* (1982), 7 Ohio App.3d 358, 361.

***7** In their sixth assignment of error, defendants contend that the trial court erred in failing to include their requested instruction which defined the term "enterprise" as an entity which is separate from the activity in which it engages, and one which has continuity and an organizational structure. The requested instruction was to be given in addition to the statutory definition given by the trial court. Defendants insist that their elaboration was necessary to clearly define "enterprise."

The trial court "should limit definitions, where possible, to those definitions provided by the legislature in order to avoid unnecessary confusion and needless appellate challenges." *State v. Williams* (1988), 38 Ohio St.3d 346, 356 fn. 14. Amplification of the statutory definitions is generally inadvisable, as it is likely to introduce error. *State v. Mahoney* (1986), 34 Ohio App.3d 114, 119.

The trial court instructed the jury on the term "enterprise" as it has been clearly defined in R.C. 2923.31(C). The trial court did not err in refusing to give any further elaboration of this statutory definition. Moreover, as we explained in our discussion of defendants' fifth assignment of error, an "enterprise" encompasses informal, unstructured associations and even a single individual. "Enterprise" has not been defined to include any requirement of formal structure, continuous existence, or existence separate from the criminal activity in which it engages. Therefore, as defendants' requested instruction was not a correct statement of Ohio law, the trial court properly refused to include it in its jury charge.

Defendants' seventh assignment of error is that the trial court erred in denying their request that the jury be instructed on the law of attempt relative to the charges of theft. Based on the argument they presented in their second and third assignments of error, they contend that, because they could not actually deceive their alleged victims, they could only be guilty of attempt to commit theft by deception.

Under R.C. 2945.74 and Crim.R. 31(C), the jury must be instructed on three groups of lesser offenses when supported by the evidence adduced at trial: (1) attempts to commit the crime charged, if such attempt is a crime; (2) inferior degrees of the crime charged; or (3) lesser included offenses. *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph one of the syllabus. An instruction on the lesser offense is required only where the evidence would reasonably support both an acquittal of the crime charged and a conviction of the lesser offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus.

Even if the trial court committed error in failing to instruct the jury on the offense of attempt, any such error was harmless. Because the jury found beyond a reasonable doubt that defendants were guilty of theft by deception, it would have convicted them of that offense even if an instruction on the lesser offense of attempt had been given. See *State v. Allen* (1995), 73 Ohio St.3d 626, 637.

***8** In their tenth assignment of error, defendants argue that the trial court should have instructed the jury that defendants' property would be forfeited, and the police officers' trust fund would consequently receive the proceeds, only if defendants were convicted of engaging in a pattern of corrupt activity.

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Defendants apparently wanted the jury to have knowledge of this fact, and thus be able to infer the potential bias of the police officers involved in this case. Defendants cite Evid.R. 616 which provides that bias or prejudice may be shown to impeach a witness "either by examination of the witness or by extrinsic evidence."

Defendants fail to indicate where in the record they introduced any evidence of this fact or cross-examined the police officers on the witness stand concerning their potential bias due to the forfeiture funds. Therefore, defendants have failed to convince us that they had any basis for the requested instruction. Moreover, the trial court is not required to include proposed jury instructions that would simply serve to confuse the jury as to the issues in the case. *State v. Williams* (1991), 75 Ohio App.3d 102, 117. Because the forfeiture of defendants' property was not at issue in this trial, an instruction relating to this issue would only tend to confuse the issues and mislead the jury. The sixth, seventh, and tenth assignments of error are overruled.

Defendants' eighth assignment of error is that the trial court erred in its charge on the term "value" as it related to the charges of theft by deception. The trial court instructed the jury that the face value of the food stamps and manufacturer's cigarette coupons was the value to be ascribed to the thefts. Defendants contend that this instruction was erroneous because it failed to account for the fact that defendants purchased these food stamps and cigarette coupons at a discounted rate. Their argument is that, because they paid informants seventy to seventy-five percent of the face value of the food stamps and twenty percent of the face value of the cigarette coupons, at most they committed thefts of the remaining twenty-five to thirty percent and eighty percent respectively.

Defendants cite no authority for this value set-off argument, and we find it unpersuasive. Similar to their deception argument, they attempt to convince us that they committed a lesser crime due to the involvement of government informants. The theft crime remains the same regardless of where or how they acquired the food stamps or cigarette coupons originally. That they purchased them from government informants, who surrendered the purchase price to law enforcement officers, does not inure to their benefit. At the time they committed the thefts by deception, defendants were unaware that they had purchased the food stamps and cigarette coupons from government informants. Their purpose at that time was to deprive the owners of the full face value of each food stamp and cigarette coupon, and this was knowingly accomplished by deception. The fact that a portion of this money had already been recovered is irrelevant. Therefore, the trial court did not erroneously instruct the jury on the term "value." The eighth assignment of error is overruled.

***9** In the ninth assignment of error, Sami Habash contends that the trial court committed prejudicial error by admitting a tape-recorded telephone conversation between James Jackson and him. Jackson was an informant who sold Sami cigarette coupons and food stamps. During their brief conversation, Jackson asked Sami about a friend of his who had been spreading rumors on the street about Jackson. Jackson asked Sami whether he knew someone who could "take care of" this problem or "whack" this person. Sami contends that this conversation prejudiced him by suggesting to the jury that he might want to "whack" this person.

In response to Jackson's comments about this individual spreading rumors, however, Sami responded that he did not care about the rumors, and that the matter was over. Sami refused to discuss Jackson's notion of "whacking" this person then or in the future. Thus, it would be unreasonable to infer from this brief discussion that Sami wanted to "whack" anyone. Sami has failed to convince us that he was unduly prejudiced by the introduction of this conversation. The ninth assignment of error is overruled.

In their eleventh assignment of error, defendants contend that they were improperly convicted of both forgery and theft by deception because those crimes are allied offenses of similar import. R.C. 2941.25(A) prohibits conviction of multiple offenses only "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import."

Defendants' forgery convictions were based on their acts of endorsing the food stamps. Their theft convictions, on the other hand, were based on the acts of redeeming the food stamps for cash. Therefore, as the forgery and theft convictions were not based on the "same conduct" by defendants, R.C. 2941.25(A) in inapplicable.

Even if we were to assume that R.C. 2941.25(A) applies, forgery and theft by deception are not allied offenses of similar import because the commission of one offense does not result in the commission of the other. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

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Forgery, as prohibited by R.C. 2913.31(A) requires: (1) purpose to defraud, or knowingly facilitating a fraud, and (2)(a) forgery of a writing, or (b) uttering, or possessing with purpose to utter, any writing known to have been forged. Theft by deception, pursuant to R.C. 2913.02(A)(3) quoted above, includes: (1) purposely depriving an owner of property, (2) knowingly obtaining property, by (3) deception.

Comparing the elements of these two crimes, a theft does not involve a writing or a purpose to defraud someone with that writing. Forgery does not require one to obtain the property of another by any means. Therefore, forgery and theft by deception are not allied offenses of similar import. The eleventh assignment of error is overruled.

Defendants' twelfth assignment of error is that the trial court incorrectly denied their motion for judgment of acquittal on all charges except trafficking in food stamps. Defendants' argument is that because they were convicted of the specific offense of trafficking in food stamps, they should not have also been convicted of the general crimes of theft and forgery, and that those crimes improperly formed the basis of their convictions of engaging in a pattern of corrupt activity and Sami's conviction of conspiracy to engage in a pattern of corrupt activity. Citing *State v. Volpe* (1988), 38 Ohio St.3d 191, defendants argue that because the legislature enacted a specific statute prohibiting trafficking in food stamps, they could not be charged under the general theft and forgery statutes for "incidental aspects" of this specific crime.

***10** The issue in *Volpe* was whether possession and control of gambling devices could be prosecuted as a felony, possession of criminal tools, when there was a misdemeanor statute which prohibited that specific conduct. Applying the general rule of statutory construction that specific statutes prevail over conflicting general ones, the *Volpe* court held that possession of gambling devices must be prosecuted under the statute which prohibited that specific conduct. In *State v. Chippendale* (1990), 52 Ohio St.3d 118, 120, the Court explained that this rule of construction is applied only when there is an actual conflict between two statutes. The general and a special provision must constitute allied offenses of similar import and must not constitute crimes committed separately or with a separate animus. To be allied offenses, the elements of the offenses must correspond to such a degree that the commission of one crime will result in the commission of the other. *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, syllabus.

Trafficking in food stamps, pursuant to R.C. 2913.46(A), involves knowingly possessing, buying, selling, using, altering, accepting, or transferring food stamps "in any manner not authorized by the 'Food Stamp Act of 1977,' 91 Stat. 958, 7 U.S.C.2011, as amended."

Forgery, as prohibited by R.C. 2913.31(A), requires proof of: (1) purpose to defraud, or knowingly facilitating a fraud, and (2)(a) forgery of a writing "so that it purports to be genuine when it is actually spurious * * * or to have been executed at a time or place or with terms different from what was in fact the case," or (b) uttering, or possessing with purpose to utter, any writing known to have been forged.

Theft by deception requires the following elements: (1) purpose to deprive owner of property, (2) knowingly obtain or exert control over the property, and (3) by deception. R.C. 2913.02(A)(3).

A comparison of the elements of forgery with those of trafficking in food stamps reveals that they do not correspond. The only forgery-type acts which constitute trafficking in food stamps are the altering of a food stamp in an unauthorized manner or the possession or transferring of such a food stamp. Such conduct does not necessarily constitute forgery, however, because it need only be done knowingly. There is no requirement of a purpose to defraud or that the alteration constitute a forgery.

Comparing the elements of theft with trafficking in food stamps, there is even less similarity. Trafficking in food stamps does not include the act of redeeming food stamps. The only conduct that could arguably correspond with theft by deception is the act of transferring a food stamp in an unauthorized manner. This unauthorized transfer need only be done knowingly. There is no requirement of deception or a purpose to deprive an owner of property or that the actor obtain the property of another.

As the commission of one of these crimes does not necessarily result in the commission of the other, they are not allied offenses of similar import. Therefore, defendants could be charged with and convicted of theft and forgery as well as trafficking in food stamps. The trial court did not err in denying defendants' motion for acquittal on that basis. The twelfth assignment of error is overruled.

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*11 The thirteenth assignment of error is that the trial court imposed fines in violation of R.C. 2929.14(A), which provides:

> "In determining whether to impose a fine for a felony and the amount and method of payment of a fine, the court shall consider the nature and circumstances of the offense; the victim impact statement prepared pursuant to section 2947.051 * * * of the Revised Code; the history, character, and condition of the offender; any statement by the victim pursuant to section 2930.14 of the Revised Code; and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on him."

Defendants contend that the trial court failed to take any evidence of defendants' resources or ability to pay these fines and failed to examine the burden which the fines would impose upon defendants. We are unable to determine from the record before us, however, what the trial court did and did not consider when it assessed fines against defendants. Absent an affirmative demonstration in the record to the contrary, we must presume that the trial court imposed fines in compliance with R.C. 2929.14. *State v. Morgan* (1992), 80 Ohio App.3d 150, 156. There is likewise nothing in the record to suggest that defendants lacked the ability to pay their fines. See *State v. Horton* (1993), 85 Ohio App.3d 268, 270-271. The thirteenth assignment of error is overruled.

Defendants' fourteenth and fifteenth assignments of error relate to the trial court's denial of two suppression motions. In the fourteenth assignment of error, Sami argues that the trial court erred in denying his motion to suppress evidence seized pursuant to an alleged consent search of one of his stores. Sami does not dispute the validity of the consent, but instead argues that the scope of the search exceeded the consent granted. He argues that the search was so broad that it constituted impermissible "general exploratory rummaging."

In their fifteenth assignment of error, defendants contend that the trial court erred in denying their motion to suppress evidence. Defendants moved to suppress all evidence seized pursuant to the search warrant, contending that the warrant failed to describe with particularity the items to be seized.

On appeal, defendants contend that the trial court committed reversible error by denying both of their motions to suppress. They fail to indicate, however, whether any of the property seized was even introduced into evidence against them at trial. Defendants have failed to indicate where in the record this alleged error is reflected as required by App.R. 16(A). It is not the duty of this court to search through the twenty-volume transcript of proceedings and two hundred seventy-seven state's exhibits for evidence to support defendants' argument as to this alleged error. *State v. McGuire* (Dec. 14, 1994), Summit App. Nos. 16423/16431, unreported, at 8. Therefore, even if we were to find that the warrant was defective, defendants have failed to make the requisite showing of prejudice. The fourteenth and fifteenth assignments of error are overruled.

*12 At oral argument, the state drew the court's attention to a sentencing error not raised by defendants. For Sami's conviction of conspiracy to engage in a pattern of corrupt activity, which the trial court identified as a first degree felony, he was sentenced to an indefinite term of four to twenty-five years and fined $10,000.

Conspiracy is a first degree felony, however, only when the object of the conspiracy is murder or aggravated murder. R.C. 2923.01(J)(1). R.C. 2923.01(J)(4) provides that, when the most serious offense that is the object of the conspiracy is a felony of the first, second, or third degree, conspiracy is a felony of the next lesser degree. Engaging in a pattern of corrupt activity is a felony of the first degree. R.C. 2923.32(B)(1). Therefore, conspiracy to engage in a pattern of corrupt activity is a felony of the second degree.

R.C. 2929.11(B)(5) and 2929.11(C)(2) provide that the maximum sentence on second degree felony is two, three, four, or five to fifteen years and that the maximum fine is $7,000. The trial court sentenced and fined Sami in excess of the statutory maximum. Therefore, that aspect of his sentence is reversed and this cause is remanded to the trial court for resentencing of Sami.

Judgment affirmed in part, reversed in part, and the cause remanded.

The Court finds that there were reasonable grounds for this appeal.

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We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellants.

Exceptions.

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Appendix C

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Case: CA 024001

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO Plaintiff-Appellee v. DE'ARGO GRIFFIN Defendant-Appellant	Appellate Case No. 24001 Trial Court Case No. 2009-CR-1117/3 (Criminal Appeal from Common Pleas Court) **FINAL ENTRY**

. . . . . .

Pursuant to the opinion of this court rendered on the 31st day of May, 2013, the judgment of the trial court is Reversed in part, Affirmed in part, and Remanded for further proceedings.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

JEFFREY M. WELBAUM, Judge

Copies mailed to:

Mathias H. Heck, Jr.
Kirsten A. Brandt
Montgomery County Prosecutor's Office
P.O. Box 972
301 West Third Street
Dayton, OH 45422

Darrell L. Heckman
One Monument Square, Suite 200
Urbana, OH 43078

Hon. Steven K. Dankof
Montgomery County Common Pleas Court
41 N. Perry Street
Dayton, OH 45422

Appendix D

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Case: CR 024001
DET: CADRO

2013 MAY 31 AM 9:02

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	
Plaintiff-Appellee	Appellate Case No. 24001
v.	Trial Court Case No. 2009-CR-1117/3
DE'ARGO GRIFFIN	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	

. . . . . .

OPINION

Rendered on the 31st day of May, 2013.

. . . . . .

MATHIAS H. HECK, JR., by KIRSTEN A. BRANDT, Atty. Reg. #0070162, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DARRELL L. HECKMAN, Atty. Reg. No. 0002389, One Monument Square, Suite 200, Urbana, Ohio 43078
Attorney for Defendant-Appellant

. . . . . .

WELBAUM, J.

{¶ 1} Defendant-Appellant, De'Argo Griffin, appeals from his conviction and sentence, after a jury trial, on one count of possession of heroin in an amount between ten

and fifty grams, in violation of R.C. 2925.11(A); five counts of possession of criminal tools in violation of R.C. 2923.24(A); and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). We originally affirmed Griffin's conviction in February 2012. See *State v. Griffin*, 2d Dist. Montgomery No. 24001, 2012-Ohio-503. In April 2012, Griffin filed a motion to reopen his appeal, based on a claim of ineffective assistance of appellate counsel. We granted the motion to reopen in May 2012, and appointed appellate counsel for Griffin, who is indigent.

{¶ 2} In his reopened appeal, Griffin contends that the trial court erred in failing to give Griffin's requested jury instruction on "enterprise." Griffin also maintains that the evidence is insufficient to establish that gel caps found in the vehicle in which he was a passenger were separate from the heroin also found in the vehicle. In addition, Griffin contends that the trial court erred in sentencing him for possession of criminal tools when the items in question (a razor, gel capsules, a plate, and a baggie) are drug paraphernalia. Griffin also contends that the court erred in sentencing him for possession of criminal tools when the items in question are cell phones. Finally, Griffin contends that the trial court erred in overruling his motion to suppress and in instructing the jury on complicity, over his objection, where the bill of particulars identified Griffin as the principal offender.

{¶ 3} We conclude that the trial court committed reversible error in failing to give Griffin's requested jury instruction on "enterprise." The trial court also erred in sentencing Griffin for possession of items that are properly classified as drug paraphernalia rather than criminal tools. The trial court did not err in classifying a cell phone as a criminal tool and in sentencing Griffin accordingly. Further, the evidence was sufficient to establish that the gel capsules were separate items and were not part of the heroin also found in the vehicle.

Finally, the trial court did not err in overruling Griffin's motion to suppress or in instructing the jury on complicity. Accordingly, Griffin's conviction for Engaging in a Pattern of Corrupt Activity will be reversed, the judgment, insofar as the sentence on four of five Possession of Criminal Tools is concerned, will be reversed, and the cause will be remanded for further proceedings. In all other respects, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 4} Griffin and his co-defendant, Anthony Franklin, were tried together before a jury in March 2010, and were convicted as charged. A full recitation of the factual background of the case can be found in *Griffin*, 2d Dist. Montgomery No. 24001, 2012-Ohio-503, ¶ 1-4 (affirming Griffin's conviction), and *State v. Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, ¶ 1-33 (affirming Franklin's conviction in part, and reversing as to Franklin's conviction for Engaging in a Pattern of Corrupt Activity). Those factual findings are incorporated for purposes this opinion, and will not be detailed further, except where necessary for the resolution of issues pertinent to this opinion.

{¶ 5} Franklin's appeal was decided in December 2011, and Griffin's was decided in February 2012. Griffin's appellate attorney did not raise the issue upon which Franklin's reversal of the conviction for Engaging in Pattern of Corrupt Activity was based. Accordingly, Griffin filed a motion to reopen his appeal, and we granted the motion, indicating that Griffin could raise this error as well as any other error deemed to have merit. We also appointed appellate counsel for Griffin, who filed a brief raising six additional assignments of error, including an assignment of error directed toward the failure to give

a requested jury instruction on "enterprise."

II. Did the Trial Court Err in Failing to Give an Instruction on Enterprise?

{¶ 6} Under this assignment of error, Griffin notes that he and co-defendant Franklin asked the trial court to give the jury a separate instruction on "enterprise" as an element of Engaging in a Pattern of Corrupt Activity, but the court refused. Griffin contends that his conviction for this crime should be reversed, based on our opinion in *Franklin*, which extensively considered the issue and concluded that the trial court had committed reversible error in failing to give the same instruction on "enterprise." Despite any disagreement of the majority of this panel with *Franklin*, it is direct precedent in this case and we will abide by it in accordance with *stare decisis.*

{¶ 7} In *Franklin*, Griffin's co-defendant argued that "the trial court's instructions to the jury were prejudicial in three respects: (1) the court erroneously instructed the jury on the definition of the term 'participate in,' as used in R.C. 2923.32(A)(1); (2) the court erroneously denied Franklin's request to instruct the jury on precedent in this appellate district regarding the standard to be used to convict defendants of engaging in a pattern of corrupt activity; and (3) the court erred when it denied Franklin's request to instruct the jury on applicable federal law, as required in this appellate district." *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 69.

{¶ 8} We rejected the first argument, but agreed with Franklin's latter two contentions, which we discussed together. *See, id.* at ¶ 80-106. After discussing pertinent case law in our district, other Ohio appellate districts, and the federal courts, we stated that:

In light of the preceding discussion, we agree with Franklin that the trial court should have instructed the jury, consistent with the federal law on "enterprise" outlined in *Turkette* and *Boyle*. We have never specifically rejected the application of federal law, and, in fact, have both impliedly and expressly applied federal law to Ohio RICO cases when deciding questions of sufficiency of the evidence.

As we noted, the Supreme Court of Ohio has said that "it is prejudicial error in a criminal case to refuse to administer a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge." *Scott*, 26 Ohio St.3d 92, 101. The definitions outlined in *Turkette* and *Boyle* are pertinent, and state the law correctly. They are also not covered by the general charge, which contained only the statutory definition of enterprise. Although there is evidence in the record that could support a finding of an enterprise, the jury was not properly instructed on the point. *Franklin* at ¶ 105-106, citing *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), and *Boyle v. United States*, 556 U.S. 938,129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

{¶ 9} After making these remarks, we reversed Franklin's conviction for Engaging in a Pattern of Corrupt Activity and remanded the case for further proceedings. *Franklin* at ¶ 107.

{¶ 10} The State concedes in its brief that Griffin and Franklin were tried together, and that the same jury instruction was provided for both Griffin and Franklin. In arguing that the same result should not occur here, the State advances several points.

{¶ 11} The State's first argument is that Griffin's counsel failed to file the proposed jury instructions on "enterprise" prior to trial, and that Griffin's counsel failed to subsequently request the instruction in writing, as required by Crim.R. 30(A).

{¶ 12} As a preliminary matter, we note that neither the State nor the defense filed proposed jury instructions prior to trial, and neither side filed requested instructions in writing. At the close of evidence, the court provided the parties with copies of proposed instructions for their review, and indicated that the instructions would be discussed the following morning, so that any amendments or corrections could be made. Trial Transcript, Volume VI, p. 1289.

{¶ 13} Crim.R. 30(A) provides for waiver regarding jury instructions, by stating that:

> On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

{¶ 14} Griffin did object before the jury retired, and specifically stated the grounds of his objection. The trial court and the attorneys also discussed the instructions extensively before closing arguments, and some changes were made. *See* discussion at Trial Transcript, Volume VII, pp. 1303-1304 (referring to a two-hour discussion that had taken place earlier that day).

{¶ 15} After closing arguments occurred, and before the case was submitted to the jury, the defense objected to various parts of the instructions, and requested an instruction on "enterprise" under *State v. Fritz*, 178 Ohio App.3d 65, 2008-Ohio-4389, 896 N.E.2d 778

(2d Dist.), and *Boyle,* 556 U.S. 938,129 S.Ct. 2237, 173 L.Ed.2d 1265. *Id.* at pp. 1363-1369. Accordingly, Griffin did not waive the objection. *See, e.g., State v. Williford,* 49 Ohio St.3d 247, 247-248, 551 N.E.2d 1279 (1990), paragraph three of the syllabus (noting that "[w]here the trial court fails to give a complete or correct jury instruction on the elements of the offense charged and the defenses thereto which are raised by the evidence, the error is preserved for appeal when the defendant objects in accordance with the second paragraph of Crim.R. 30(A), whether or not there has been a proffer of written jury instructions in accordance with the first paragraph of Crim.R. 30(A).") *Accord, State v. Mack,* 82 Ohio St.3d 198, 199-200, 694 N.E.2d 1328 (1998).

{¶ 16} The State's second argument is that there was no form or specificity to the defense request. Again, we disagree. We noted in *Franklin* that the defense "extensively argued the application of the law in *Boyle*, when jury instructions were being considered." *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 83. The defense also specifically discussed the elements of "enterprise" that it wanted included in the instruction, and this was sufficiently detailed for the trial court to fashion an appropriate instruction. See Trial Transcript, Volume VII, p. 1366.

{¶ 17} The State's next argument is that the trial court did not abuse its discretion by failing to instruct the jury on enterprise. In this regard, the State first argues that the trial court could not have possibly exercised "perversity of will," or passion, or bias, because the court had to choose between including the requested instruction and committing error based on prior authority in this district, or refusing the instruction and committing error that was subsequently found reversible in *Franklin.*

{¶ 18} In *State v. Wolons*, 44 Ohio St.3d 64, 541 N.E.2d 443 (1989), the Supreme

Court of Ohio held that decisions to refuse a particular instruction are reviewed by a standard of whether the refusal "was an abuse of discretion under the facts and circumstances of the case." *Id.* at 68. We have followed this rule. *See, e.g.*, *State v. Collier*, 2d Dist. Montgomery No. 20131, 2005-Ohio-119, ¶ 25.

{¶ 19} " 'Abuse of discretion' has been described as including a ruling that lacks a 'sound reasoning process.' " *State v. Morris,* 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *Id.*

{¶ 20} However, as was noted in *Franklin*, *de novo* review applies to the issue of whether the jury instructions correctly state the law. *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 82. The Supreme Court of Ohio has characterized appellate review of jury instructions in this situation as presenting "a question of mixed law and fact, where a mixed de novo and abuse-of-discretion standard of review would be appropriate." *Morris* at ¶ 21, citing *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995).

{¶ 21} An issue of fact would involve a determination of issues like whether the facts in a particular case warrant a particular instruction. For example, in *Wolons*, the issue was whether the evidence at trial warranted a jury instruction on intoxication. Applying an abuse of discretion standard, the Supreme Court of Ohio concluded that the trial court did

not act arbitrarily or unconscionably in refusing the instruction, because the facts fell "short of negating a conscious awareness of the circumstances and events that transpired on the night of the stabbing." *Wolons*, 44 Ohio St.3d at 69, 541 N.E.2d 443.

{¶ 22} In contrast, *Kokitka* involved an instruction to the jury to give no weight to expert testimony if the jury found facts that were different from those assumed by the expert. *Kokitka* at 92. The Supreme Court of Ohio concluded that the instruction usurped the jury's role in evaluating the testimony, and the Supreme Court, therefore, gave no deference to the trial court's decision. *Id.*

{¶ 23} In the case before us, the issue is not factual, meaning that the argument is not whether an instruction on "enterprise" was factually warranted under the circumstances of the case. Instead, the issue is whether the instruction that was given correctly states the applicable law. The analysis, therefore, is not based on abuse of discretion, as the State suggests, and *de novo* review, which we used in *Franklin*, is the appropriate method for evaluating the trial court's action.

{¶ 24} As a further matter, we noted in *Franklin* that "[w]e have never specifically rejected the application of federal law, and, in fact, have both impliedly and expressly applied federal law to Ohio RICO cases when deciding questions of sufficiency of the evidence." *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 105. Notwithstanding this court's prior use of federal law to test the sufficiency of the evidence, the critical issue is whether the trial court's instruction following the statutory language was deficient in a way that prejudiced Griffin.

{¶ 25} The State contends that the failure to give the requested instruction did not prejudice Griffin. In this regard, the State argues that the instruction the trial court submitted

to the jury adequately conveyed all the information needed to determine whether Griffin was associated with an enterprise under Ohio law. In its instruction the trial court defined "enterprise" and "pattern of corrupt activity" and instructed the jury that both needed to be proven beyond a reasonable doubt.

{¶ 26} Essentially, the State is asking us to reconsider our decision in *Franklin*. Although this author agrees with the State on this point, we must decline the invitation. The doctrine of *stare decisis* binds this panel of the court to adhere to *Franklin* "in order to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry." (Citation omitted.) *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. ¶ 19, n. 2. Adherence to *stare decisis* will avoid the inconsistent application of federal law in corrupt activity cases within and between some appellate districts which were fully articulated in *Franklin* at ¶ 89-95. This court has held in *Franklin* and other cases (e.g. *State v. Beverly*, 2d Dist. Clark No. 2011-CA-64, 2013-Ohio-1365) that the OJI instruction is not sufficient on this issue, but acknowledged that it is not beyond legitimate debate. Given the conflicting opinions and interpretations in the districts, we urge The Supreme Court of Ohio to examine and clarify the law on what constitutes a proper instruction on the definition of enterprise.

{¶ 27} As a final argument, the State contends that the facts of the case support no other conclusion but that Griffin, Franklin, and others were engaged in a pattern of corrupt activity. This court noted in *Franklin* that "[a]though there is evidence in the record that could support a finding of an enterprise, the jury was not properly instructed on the point." *Id.* at 106. Again, although this author disagrees with the *Franklin* decision on this issue, we again defer to this court's prior decision under the doctrine of *stare decisis*.

{¶ 28} Accordingly, Griffin's First Assignment of Error is sustained. The conviction for Engaging in a Pattern of Corrupt Activity will be reversed, and this cause will be remanded for further proceedings.

III. Was the Evidence Insufficient Regarding Gel Caps?

{¶ 29} Griffin's Second Assignment of Error is as follows:

The Evidence Was Insufficient as a Matter of Law to Establish the Gel Caps were Criminal Tools.

{¶ 30} Under this assignment of error, Griffin contends that the gel caps were part of the heroin that was found, and cannot be considered a separate criminal tool. Alternatively, Griffin contends that his conduct in possessing both the gel caps and the heroin contained in the gel caps were allied offenses of similar import.

{¶ 31} The original indictment, filed on April 10, 2009, charged Griffin with possession of heroin in an amount equaling or exceeding ten grams, but less than fifty grams, in violation of R.C. 2925.11(A). Re-indictment "B" was filed on October 26, 2009, charging Griffin in Count One of possessing capsules with purpose to use them criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Two, with possession of a razor with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Three with possession of a plate with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Four with possession of cell phone(s) with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); in Count Five with possession of plastic baggie(s) with purpose to use it criminally in the commission of a felony in violation of R.C. 2923.24(A); and in Count Six

with having been engaged in a pattern of corrupt activity between the dates of May 13, 2006 through April 2, 2009, with at least one incident of corrupt activity being possession of heroin in amount between 10 and 50 grams on April 1, 2009, in violation of R.C. 2923.32(A)(1).

{¶ 32} After the jury found Griffin guilty on all counts, the trial court sentenced him to five years of imprisonment for possession of heroin in an amount more than 10 grams but less than 50 grams; five years of imprisonment for engaging in a pattern of corrupt activity, and twelve months of imprisonment on each count of possession of criminal tools, all to be served concurrently for a total term of incarceration of five years. The sentence for the capsules, thus, was a twelve-month sentence, to be served concurrently with the other sentences.

{¶ 33} The State argues that Detective House found both heroin and empty gel caps in the white conversion van in which Griffin was seated, and that Griffin was properly charged separately with possession of the gel caps.

{¶ 34} Our prior opinion noted that on April 1, 2009, Griffin was arrested while sitting in the front passenger seat of a grey and white conversion van that was parked in the parking lot of a convenience store. *Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, at ¶ 28-29. The following evidence was recovered from the van: a bag of heroin containing about 27 grams of heroin in a pocket on the back of the seat where Griffin was sitting; and two baggies that were sitting in a cup holder behind the driver's seat. One of the baggies in the cup holder held 27 gel capsules of what appeared to be heroin, and the other contained a four-gram chunk of heroin. *Id.* at ¶ 30. In addition, a large bag of unused gel capsules was lying on the center console immediately to Griffin's left. *Id.*

Finally, other bags containing unused gel capsules and baggies containing what appeared to be heroin residue were found in storage pouches behind Franklin's seat. *Id.* See, also, Trial Transcript, Volume VI, pp.1144-1151. Testimony at trial also indicated that the gel caps are used in the packaging and sale of heroin. *Id.* at p. 1161.

{¶ 35} The State correctly points out that the weight of the heroin found in the chunks of heroin and the gel caps containing heroin, exclusive of the empty gel caps, accounts for the 33.19 grams mentioned in the indictment for possession of heroin. See Trial Transcript, pp. 887-893. As a result, Griffin could be separately charged and convicted for possession of the empty gel caps as well for as the heroin and gel caps that contained heroin. These are not the same offenses.

{¶ 36} R.C. 2941.25(A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court of Ohio stated that "[u]nder R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct." *Id.* at ¶ 47. The court went on to note that:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is

sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

* * *

Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Johnson* at ¶ 48-51.

{¶ 37} R.C. 2923.24(A) provides that "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." In contrast, R.C. 2925.11(A) states that "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

{¶ 38} Under the circumstances of this case, the offenses were not committed with the same conduct. Griffin's position is based on the contention that his conviction for possession of criminal tools was based on the capsules that surrounded the heroin. However, this is incorrect. The conviction was based on the empty gel capsules, which are used in packaging and selling heroin. For reasons that will follow, we conclude that Griffin should have been sentenced for the gel capsules as drug paraphernalia rather than as criminal tools, but Griffin's argument that these items were subsumed within the possession

of the possession of heroin charge is incorrect.

{¶ 39} Griffin's Second Assignment of Error is overruled.

IV. Did the Trial Court Err in Sentencing Griffin for Possession of Criminal Tools?

{¶ 40} Griffin's Third Assignment of Error is as follows:

> The Trial Court Erred in Sentencing Defendant for Possession of Criminal Tools that Were Drug Paraphernalia.

{¶ 41} Griffin contends under this assignment of error that the gel capsules, razor, baggies, and plate are "drug paraphernalia" rather than criminal tools. Accordingly, Griffin maintains that he should have been sentenced under R.C. 2925.14 for a fourth degree misdemeanor, rather than R.C. 2923.24, which elevates the crime to a fifth degree felony if the article is intended for use in the commission of a felony. In support of his argument, Griffin relies on *State v. Susser*, 2d Dist. Montgomery No. 12745, 1992 WL 41834 (March 2, 1992), and *State v. Wagner*, 6th Dist. Sandusky No. S-93-40, 1994 WL 590537 (Oct. 28, 1994), which followed *Susser*.

{¶ 42} R.C. 2925.14 (C)(1) prohibits any person from knowingly using or possessing with purpose to use, drug paraphernalia. Under R.C. 2925.14(A) "drug paraphernalia" is defined as:

> [A]ny equipment, product, or material of any kind that is used by the offender, intended by the offender for use, or designed for use, in propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or

otherwise introducing into the human body, a controlled substance in violation of this chapter.

{¶ 43} R.C. 2925.14(A)(1)-(13) also provides a non-exclusive list of various equipment, products or materials that could be classified as drug paraphernalia. This list includes items like kits for cultivating controlled substances, scales or balances for weighing or measuring controlled substances, testing equipment for identifying the strength of controlled substances, hypodermic syringes, separation gins for removing twigs and seeds from marijuana, and so forth. In addition, the list includes these items:

(9) A blender, bowl, container, spoon, or mixing device for compounding a controlled substance;

(10) A capsule, balloon, envelope, or container for packaging small quantities of a controlled substance; [and]

(11) A container or device for storing or concealing a controlled substance.

{¶ 44} In comparison, R.C. 2923.24(A), which prohibits individuals from possessing or using criminal tools, states that "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 45} R.C. 2925.14 and R.C. 2923.24 have consisted in essentially the same format since they were enacted in 1989 and 1974, respectively. *Susser* involved two appeals to our court that were decided in 1990 and 1992.

{¶ 46} In the first appeal, we noted that the defendant had been convicted of several charges, including possession of cocaine in violation of R.C. 2925.11(A), and possession of criminal tools in violation of R.C. 2923.24. *State v. Susser*, 2d Dist. Montgomery No. CA 11787, 1990 WL 197958, *1 (Dec. 5, 1990), *abrogated in part on other grounds, State v.*

Teamer, 82 Ohio St.3d 490, 696 N.E.2d 1049 (1998) (*Susser I*). During a search of the defendant's house, officers recovered narcotics-type items in the defendant's bedroom, including "a pipe, a vial containing white residue, a brass type funnel, and a brown bottle containing white residue." *Id.* at * 6. In a kitchen drawer, an officer also recovered "a cut drinking straw next to a glass bottle containing a white residue he believed to be cocaine residue. [The officer] explained that cocaine is often ingested by a cut straw. He also recovered an aluminum nail with the same white residue." *Id.*

{¶ 47} We reversed the conviction for drug abuse, concluding that the minute trace amounts of cocaine discovered on the drug paraphernalia could not satisfy the requirement that the defendant had "knowingly" possessed the cocaine. *Id.* at *11.[1] However, we affirmed the conviction for possession of criminal tools under R.C. 2923.24. We noted that R.C. 2925.12 could not apply, because it pertained only to hypodermic needles or syringes as the relevant drug instrument included in the statute. *Id.* We also rejected the application of R.C. 2925.14, which covered other implements, because that statute was not enacted until November 2, 1989, which was after the defendant had been charged with possession of criminal tools. *Id.*

{¶ 48} After we reversed and remanded the case, Susser was sentenced to consecutive sentences of 18 months in prison for possession of criminal tools, and one year in prison for violating his probation in a prior case. *State v. Susser*, 2d Dist. Montgomery No. 12745, 1992 WL 41834 (March 2, 1992) (*Susser II*). In *Susser II*, the defendant contended that he should have been sentenced under the lesser penalty for a violation of

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[1]This particular conclusion was later rejected in *Teamer*, 82 Ohio St.3d 490, 491-492, 696 N.E.2d 1049, after another district had certified a conflict with *Susser I*.

R.C. 2925.14, rather than the more severe penalty in R.C. 2923.24. *Id.* at *3. We agreed, concluding that there could be "no doubt that the 'criminal tools' that Susser was found to have possessed were 'drug paraphernalia' as defined in R.C. 2925.14(A)." *Id.* at *3-4. We noted the provision in R.C. 1.51 that:

> "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *Id.* at *4.

{¶ 49} Based on this statute, we concluded that:

> It is clear that "drug paraphernalia" is a subcategory of "criminal tool" and that R.C. 2925.14(C)(1) specially proscribes the possession of drug paraphernalia whereas R.C. 2925.24(A) generally proscribes the possession of any criminal tool. *Id.*

{¶ 50} Because R.C. 2925.14 was in effect when Susser was sentenced in 1991, we held that he was entitled to the benefit of the penalty provisions in R.C. 2925.14. *Id.* Our opinion also cited a decision of the Supreme Court of Ohio – *State v. Volpe*, 38 Ohio St.3d 191, 527 N.E.2d 818 (1988) – as well as *State v. Chandler*, 54 Ohio App.3d 92, 560 N.E.2d 832 (8th Dist.1989).

{¶ 51} In *Volpe*, the defendants were charged with gambling, operating a gambling house, and possession of criminal tools. The criminal tools charge, brought under R.C. 2923.24, was based on two gambling machines that were found at a game room operated

by the defendants. *Volpe* at 191-192. After being convicted of the charges, the defendants appealed, challenging "R.C. 2923.24 on the grounds that in enacting R.C. 2915.02, the General Assembly clearly stated a specific intent to charge with a misdemeanor, not a felony, first-time gambling offenders who engage or use a tool in gambling." *Id.* at 193.

{¶ 52} After examining R.C. 1.51, R.C. 2915.02, and R.C. 2923.24, the Supreme Court of Ohio held that:

> R.C. 2915.02(A)(5) and 2923.24 are irreconcilable. R.C. 2915.02(A)(5), in conjunction with R.C. 2915.02(F), treats possession of a gambling device as a first degree misdemeanor. As such, a person convicted of violating R.C. 2915.02(A)(5) could receive no prison sentence or a prison sentence of up to six months. See R.C. 2929.21. R.C. 2923.24 makes possession of criminal tools, arguably such instruments as gambling devices, a fourth degree felony, carrying a minimum prison sentence of six months and a maximum prison sentence of five years. See R.C. 2929.11. Therefore, since R.C. 2915.02 and 2923.24 provide for different penalties for the same conduct, they cannot be construed to give effect to both. R.C. 2915.02 and 2923.24 were enacted effective January 1, 1974, as part of the modern Ohio Criminal Code. Therefore, under R.C. 1.51, the general law, R.C. 2923.24, does not prevail as being the "later adoption." Further, the fact that the General Assembly enacted R.C. 2915.02(A)(5) to reach possession and control of gambling devices indicates that it did not intend for R.C. 2923.24 to reach possession and control of such devices. (Footnotes omitted.) *Volpe* at 193-194.

{¶ 53} Subsequently, in *Chandler*, the Eighth District Court of Appeals applied the reasoning in *Volpe*, and concluded that "alleged possession of syringes could not be punished as anything other than a misdemeanor under R.C. 2925.12 and could not constitute possession of criminal tools under R.C. 2923.24." *Chandler*, 54 Ohio App.3d at 93-94, 560 N.E.2d 832.

{¶ 54} Our decision in *Susser II* was subsequently followed by the Sixth District Court of Appeals in *Wagner*, 6th Dist. Sandusky No. S-93-40, 1994 WL 590537 (Oct. 28, 1994), at *3. In *Wagner*, the Sixth District Court of Appeals concluded that the defendant could only have been found guilty of violating R.C. 2925.14, not R.C. 2923.24, when the property seized was a tool chest and two freezers in which marijuana had been stored, and scales used to weigh marijuana. *Id. Accord, State v. Kobi*, 122 Ohio App.3d 160, 181-182, 701 N.E.2d 420 (6th Dist.1997) (holding that possession of "(1) a radio frequency interference detector, (2) digital scales, (3) Harley Davidson coffee mug, (4) one clear glass jar and one black and white vase with a lid, and (5) numerous books amounting to instruction manuals on successful drug trafficking" could only be used to convict the defendant of possession of drug paraphernalia under R.C. 2925.14, not possession of criminal tools under R.C. 2923.24).

{¶ 55} As was noted, R.C. 2923.24 was enacted in 1974, and R.C. 2925.14 was enacted later, in 1989. Although R.C. 2925.14 has been amended a number of times, it has remained in essentially the same form since its enactment.

{¶ 56} In a recent decision, we concluded that a jury could properly conclude that a small plastic baggie in which cocaine was found could be a criminal tool. *State v. Moulder*, 2d Dist. Greene No. 08-CA-108, 2009-Ohio-5871, ¶ 8 (affirming convictions for

possession of cocaine and possession of criminal tools, and reversing conviction for tampering with evidence.) The case that we cited for this proposition is *State v. Wilson*, 77 Ohio App.3d 718, 603 N.E.2d 305 (8th Dist.1991). *Id.*

{¶ 57} Subsequently, we relied on *Moulder* to find that a plastic baggie used to transport cocaine is a "criminal tool." *State v. Smith*, 2d Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 22 (finding evidence legally sufficient to sustain conviction for possession of criminal tools).

{¶ 58} In *Wilson*, the defendant was convicted of possessing criminal tools in violation of R.C. 2923.24 and drug abuse in violation of R.C. 2925.11. *Wilson* at 719. The facts in the opinion are sparse, but the criminal tools charge apparently arose from the defendant's possession of plastic baggies. *Id.* at 722. The opinion does not say what types of drugs may have been involved. The defendant argued on appeal that he should have been convicted under R.C. 2925.12, for possession of drug abuse instruments, rather than under R.C. 2923.24, for possession of criminal tools. In responding to this argument, the Eighth District Court of Appeals stated as follows:

> This court finds plastic baggies held by the appellant in the case *sub judice* meet the definition set forth in R.C. 2923.24 for possession of criminal tools. Plastic baggies do not fall within the parameters of R.C. 2925.12 because they are used in the drug industry for containing and packaging the drugs, and not primarily as an aid for administering or ingesting the drugs. *Wilson* at 722.

{¶ 59} The court's comment in *Wilson* was accurate, so far as it went, because R.C. 2925.12 deals solely with hypodermics or syringes used by an offender to unlawfully

administer a dangerous drug other than marijuana. A plastic baggie clearly would not fit within this statute, since it is not a hypodermic or syringe.

{¶ 60} Nonetheless, in *Wilson*, the court failed to consider the appropriate statutory provision, R.C. 2925.14, which does deal with items used to contain and package drugs. If the court had considered that point, it would have gone on to decide, as we did in *Susser II*, whether a defendant is properly charged with having violated R.C. 2925.14 or R.C. 2923.24 when he or she is in possession of items that fall within the meaning of drug paraphernalia in R.C. 2925.14. *Susser II*, 2d Dist. Montgomery No. 12745, 1992 WL 41834, *3-4 (March 2, 1992).

{¶ 61} Accordingly, reliance on *Wilson* would be misplaced. *Susser II* is the appropriate authority on drug paraphernalia in this district. On the other hand, *Susser II* did not consider the effect of the Supreme Court of Ohio's decision in *State v. Chippendale*, 52 Ohio St.3d 118, 556 N.E.2d 1134 (1990). *Chippendale* established a framework for deciding whether R.C. 1.51 applies. According to the Supreme Court of Ohio, a court must first determine if the statutes are "general, special, or local. If the statutes are general and do not involve the same or similar offenses, then R.C. 1.51 is inapplicable." *Id.* at 120.

{¶ 62} In the case before us, R.C. 2923.24 is general, and R.C. 2925.14 is specific, and the statutes involve similar offenses. The analysis, therefore, proceeds to the next step, which *Chippendale* describes as follows: "if one of the statutes is general and one specific and they involve the same or similar offenses, we must then ask whether the offenses constitute allied offenses of similar import." *Id.*

{¶ 63} The subject of how to approach allied offenses has been debated for many years. In *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme

Court of Ohio gave the following explanation of its most recent permutation of the allied offense analysis:

> In determining whether two offenses should be merged, the intent of the General Assembly is controlling. We determine the General Assembly's intent by applying R.C. 2941.25, which expressly instructs courts to consider the offenses at issue in light of the defendant's conduct. We have long held that the statute's purpose is to prevent shotgun convictions, as explained in the statute's Legislative Service Commission comments. *Geiger*, 45 Ohio St.2d at 242, 74 O.O.2d 380, 344 N.E.2d 133. With these considerations in mind, we adopt the following approach to determination of allied offenses.
>
> Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.
>
> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses

correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. *Johnson at* ¶ 46-50.

{¶ 64} In the case before us, it is possible to commit both offenses (possession of criminal tools and possession of drug paraphernalia) with the same conduct. R.C. 2923.24 is a very broad statute, and covers the possession of "any substance, device, instrument, or article, with purpose to use it criminally." R.C. 2925.14 is more specific, but it also covers possession, with intent to use drug paraphernalia. As we pointed out in *Susser II*, this is a "subcategory" of "criminal tool." *Susser II*, 2d Dist. Montgomery No. 12745, 1992 WL 41834, *4 (March 2, 1992). The offenses in this case were also committed by the same conduct, being a single act, and were committed with a single state of mind. All that occurred here, to form the offense, was simple possession of a forbidden object.

{¶ 65} Under *Chippendale*, after the offenses have been determined to be of similar import, they must also not have been crimes committed separately or with a separate animus in order for R.C. 1.51 to apply. *Chippendale*, 52 Ohio St.3d 118, 556 N.E.2d 1134, at 120-121. Again, the razor, gel capsules, plate, and baggies involved only simple

possession of the forbidden items, and there is no indication that a separate animus was involved. Thus, R.C. 1.51 would apply.

{¶ 66} Regarding the application of R.C. 1.51, the Supreme Court of Ohio noted in *Chippendale* that:

> Where it is clear that a general provision of the Criminal Code applies coextensively with a special provision, R.C. 1.51 allows a prosecutor to charge on both. Conversely, where it is clear that a special provision prevails over a general provision or the Criminal Code is silent or ambiguous on the matter, under R.C. 1.51, a prosecutor may charge only on the special provision. The only exception in the statute is where " * * * the general provision is the later provision and the manifest intent is that the general provision prevail." Thus, unless the legislature enacts or amends the general provision later in time and manifests its intent to have the general provision apply coextensively with the special provision, the special provision must be the only provision applied to the defendant. *Chippendale* at 121.

{¶ 67} R.C. 2923.24 was enacted in 1974, and R.C. 2925.14 is the later statute, having been enacted in 1989. R.C. 2923.24 has been amended only once, in 1995, and the amendments do not indicate that the statute is to be applied co-extensively with any other statute. R.C. 2925.14 has been amended a number of times, but has remained in essentially the same form since it was originally enacted. R.C. 2925.14 provides the more specific provision, and resort to that statute must be made in situations involving items that could be classified as drug paraphernalia under R.C. 2925.14. Thus, *Susser II* retains validity, even though it did not use the analysis mandated by *Chippendale*.

{¶ 68} As was noted, R.C. 2925.14(C)(1) prohibits any person from knowingly using or possessing with purpose to use, drug paraphernalia. As pertinent to this case, R.C. 2925.14(A) defines "drug paraphernalia" as "any equipment, product, or material of any kind that is used by the offender, * * * in * * * preparing, * * * packaging, repackaging, storing, containing, [or] concealing, * * * a controlled substance in violation of this chapter." The non-exhaustive list of equipment and products that could be classified as drug paraphernalia includes items like bowls, spoons, and other implements used for compounding controlled substances; items like capsules, balloons, envelopes, or containers for packaging small quantities of a controlled substance; and containers or devices for storing or concealing controlled substances. R.C. 2925.14(A)(9)-(11).

{¶ 69} Under these definitions, the items in question were drug paraphernalia – the razor and plate (which contained drug residue) were used to prepare and cut the drugs, and the gel capsules and baggies were used for packaging and storing the drugs. See Trial Transcript, Volume VI, pp. 1155-1159, and pp. 1160-1161. Accordingly, Griffin should have been sentenced for a violation of R.C. 2925.14(C)(1) rather than for possession of criminal tools.

{¶ 70} Based on the preceding discussion, the Third Assignment of Error is sustained.

V. Were the Cell Phones Drug Paraphernalia?

{¶ 71} Griffin's Fourth Assignment of Error states that:

> The Trial Court Erred in Sentencing Defendant Appellant for Possession of Criminal Tools for Possessing Cellular Telephones.

{¶ 72} Under this assignment of error, Griffin contends that the cell phones found

in the area of the drugs should also be considered drug paraphernalia rather than criminal tools. We disagree. The cell phones do not fit within the definition of "drug paraphernalia" in R.C. 2925.14(A). Although the cell phones were used to facilitate drug sales, they were not used to prepare, conceal, store, or repackage controlled substances, and the connection is too attenuated for the cell phones to be considered drug paraphernalia. Instead, the cell phones fit within R.C. 2923.24(A), as devices or instruments that an individual intends to use criminally.

{¶ 73} Accordingly, the Fourth Assignment of Error is overruled.

VI. Did the Trial Court Err in Overruling the Motion to Suppress?

{¶ 74} Griffin's Fifth Assignment of Error is as follows:

The Trial Court Erred in Overruling Defendant Appellant's Motion to Suppress.

{¶ 75} Under this assignment of error, Griffin contends that the trial court erred in overruling his motion to suppress evidence. According to Griffin, the flight of one individual (Franklin) from the van did not justify the detention and search of the other persons in the vehicle. In response, the State maintains that police officers had reasonable suspicion to stop and make contact with the occupants of the van. In addition, the State argues that a search of the van was justified under the automobile exception to the warrant requirement.

{¶ 76} The standards for reviewing decisions on motions to suppress indicate that the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford*, 93 Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994), citing *State v. Clay*, 34 Ohio St.2d

250, 298 N.E.2d 137 (1972). Accordingly, when an appellate court reviews suppression decisions, "we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id.*

{¶ 77} Griffin filed several motions to suppress evidence. One motion asked the court to suppress evidence obtained from an illegal search and seizure on April 1, 2009. Docket # 14. The other motions involved suppression of statements that Griffin made to police on various occasions and are not being challenged on appeal.

{¶ 78} The trial court held a suppression hearing in June 2009 and received testimony from Dayton Police Detective David House, Dayton Police Sergeant Eric Steckel, and Dayton Police Officer Kevin Phillips.

{¶ 79} Detective House testified that on March 31, 2009, he was working as a narcotics detective and was using a cell phone number that he had gotten from another officer for individuals who were selling heroin in Dayton. After calling the number, House arranged to purchase heroin. Upon arriving at the location where he had been directed, House noticed a grey and white Chevrolet conversion van parked along the curb. The lights on the van were off, and the driver of the van quickly flashed his headlights at House, signaling that the van contained the individuals to whom House had been speaking. House pulled up next to the driver's side, and the driver told him to pull forward and turn around. The van had a temporary tag. As soon as House started to pull off and turn around, the van took off at a high rate of speed.

{¶ 80} House called the cell phone again and was told to go to a McDonald's

restaurant on Free Pike. When House called the number again, the subjects informed House that they had recognized him and actually called him Detective House. House was not able to apprehend the individuals that evening.

{¶ 81} The next day, House spotted a grey and white Chevrolet conversion van that appeared to be the same van. He again tried to obtain the license plate number, but only saw a temporary tag. After the van passed House, it turned into the east end of the parking lot of the AM/PM market on Salem Avenue, and backed into a parking spot. This was a high drug crime area and House had made numerous arrests in the general area for drugs. He had also done buy/bust operations in the parking lot of the market, when individuals would meet at that location to sell drugs.

{¶ 82} House lost sight of the van for a moment and then began to watch it. It appeared that the occupants of the van had gotten out and had gone into the convenience store. House then saw two individuals (later identified as DeShawn Foster and De'Argo Griffin) come out of the market, walk to the back door of the passenger side, and get into the vehicle.

{¶ 83} By this time, House had contacted uniformed officers to ask if they could assist. The uniformed officers arrived in a marked cruiser and turned into the AM/PM parking lot. The lights were not activated and the officers had not made contact with the van. As the cruiser was getting close to the van, the back door on the passenger's side was flung open, and Franklin jumped out of the van. Franklin then fled on foot. At that time, House could see that there were at least two other individuals in the van.

{¶ 84} House and two other officers ran after Franklin. House eventually apprehended Franklin on the street to the south that bordered the parking lot. After placing

Franklin in handcuffs and patting him down, House removed about $3,500 from one of Franklin's pockets.

{¶ 85} Officer Eric Steckel remained at the van and made contact with the occupants. Steckel exited his cruiser and drew his weapon for his safety, because he was not sure what was going on. He was also the only one there, since his partner was involved in a foot chase. Steckel told the two occupants in the van to raise their hands. One occupant (later identified as Griffin) was in the front passenger seat of the van, and the other (later identified as Foster) was seated in the rear bench seat of the van.

{¶ 86} The van door from which Franklin had fled was still open, but Steckel was not able to see into the van through that door. As he walked to the front of the van, he could see inside the van. The van contained two captain seats in the front for the driver and passenger, two more captain seats in the middle, and a third row of seating that had a bench seat.

{¶ 87} Steckel asked Griffin to step from the vehicle because he was by himself and wanted to place Griffin in the rear of his cruiser for his safety. When Griffin exited the van, Steckel could see a plastic bag containing several gelatin caps on the front console between the driver's and passenger's seats. He patted Griffin down and placed him in the rear of the cruiser. Griffin had $264 in his pocket. When Steckel felt the wad of money in Griffin's pocket and saw that Griffin had gelatin caps, he concluded that a drug crime was in progress.

{¶ 88} Steckel then returned to the van and ordered Foster out. As Foster was exiting from the rear of the van, Steckel looked down at the rear pocket of the passenger side seat. He could see in plain view a baggie containing what looked like a chunk of heroin.

{¶ 89} By then, Officer Saunders had returned from the foot chase and helped Steckel pat Foster down for officer safety and weapons. Saunders found $262 in Foster's pant pockets and a cell phone. According to Steckel, the two men were not being placed under arrest at that point. They were being detained for Detective House's investigation.

{¶ 90} After Saunders took control of Foster, Steckel went inside the van where he saw another plastic baggie in the cup holder on the driver's side of the van, behind the driver's seat. Steckel was conducting a search for drugs at that point. When officers find drugs in a vehicle, they are eventually going to tow the vehicle pursuant to Dayton Police policy.

{¶ 91} When House returned to the van, Officer Steckel pointed out several items in the van. Standing at the open passenger side door from which Franklin had jumped, House could see a baggie containing about one ounce of heroin in the pocket behind the front passenger seat, directly in front of where Franklin had been sitting. House stated that he could see the plastic baggie without opening the pocket. The bag was clear and House could see large chunks of a brown substance, which in his experience appeared to be heroin.

{¶ 92} House could also see a baggie in a molded cup holder that contained gel caps of heroin. Gel capsules are the most common packing material that is used for heroin.

{¶ 93} House stated that all three individuals were then placed under arrest. Felony drugs were obviously inside the van, and it was going to be towed due to the arrest. The officers did an inventory search of the van prior to the tow.

{¶ 94} After hearing the evidence, the trial court overruled the motion to suppress evidence. The trial court concluded that all the factors, including the attempted drug

evidence. The trial court concluded that all the factors, including the attempted drug transaction the night before and the similarity of the van, provided suspicion for the stop. The court further held that Officer Steckel was entitled to draw his gun for officer safety, and that when Griffin opened the door to leave the van, the drugs in plain sight on the console permitted the arrest and searches of the defendants. Transcript of Proceedings for May 7, 2009, June 19, 2009, July 9, 2009, and March 2, 2010, p. 125.

{¶ 95} In *State v. Roberts*, 2d Dist. Montgomery No. 23219, 2010-Ohio-300, we noted that:

> The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. *State v. Martin*, Montgomery App. No. 20270, 2004-Ohio-2738, at ¶ 10, citing *Terry, supra*; *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, at ¶ 10. A police officer may lawfully stop a vehicle, motorized or otherwise, if he has a reasonable articulable suspicion that the operator has engaged in criminal activity, including a minor traffic violation. See *State v. Buckner*, Montgomery App. No. 21892, 2007-Ohio-4329, ¶ 8. *Roberts* at ¶ 14.

{¶ 96} "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." (Citation omitted.) *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph one of the syllabus. In the case before

us, the totality of the circumstances indicate that the decision to conduct an investigative stop was proper. We agree with the trial court that Detective House had a reasonable articulable suspicion that criminal activity was afoot when the officers attempted to briefly detain the occupants of the van to investigate. Detective House had been involved in an attempted drug transaction with a very similar van the evening before, and thought the van was the same one. The area was also a high drug crime area, and House had previously made arrests in the parking lot where the van stopped. However, before the officers had a chance to stop and question the occupants of the van, Franklin ran from the van, further heightening the officers' suspicion that criminal activity was involved.

{¶ 97} The police also did not violate Griffin's rights by ordering him out of the van. "[A] police officer may order a motorist to get out of a car, which has been properly stopped for a traffic violation, even without suspicion of criminal activity." *State v. Evans*, 67 Ohio St.3d 405, 407, 618 N.E.2d 162 (1993), citing *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). Although no traffic violation was involved in the case before us, the investigatory stop was lawful, and the officer acted reasonably in ordering Griffin to exit the vehicle. In *Evans*, the Supreme Court of Ohio stressed that:

> [T]he order to step out of the vehicle is not a stop separate and distinct from the original traffic stop. It is so minimal and insignificant an intrusion that the *Mimms* court refused to apply the requirements for an investigatory stop. Unlike an investigatory stop, where the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion," *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906, a *Mimms*

order does not have to be justified by any constitutional quantum of suspicion. *Evans* at 408.

{¶ 98} Officer Steckel was also justified in drawing his weapon. " Use of a firearm during an investigatory stop may be permissible if the force is reasonable." *Columbus v. Dials*, 10th Dist. Franklin No. 04AP-1099, 2005-Ohio- 6305, ¶ 24, citing *Wells v. Akron*, 42 Ohio App.3d 148, 150, 537 N.E.2d 229 (9th Dist.1987), and *State v. Gaston*, 110 Ohio App.3d 835, 842, 675 N.E.2d 526 (11th Dist.1996). "In determining whether the use of force was reasonable, it is necessary for us to consider the totality of the circumstance surrounding the drawing of the weapon." *Id.* "The question is whether, under the circumstances, the officer's use of force was reasonably necessary to ensure his safety and whether the use of force was limited in scope and duration." (Citations omitted.) *State v. Dunson*, 2d Dist. Montgomery No. 20961, 2006-Ohio-775, ¶ 17.

{¶ 99} Officer Steckel briefly drew his weapon for his safety because he was alone at the scene with at least two individuals in a car who were suspected of drug activity. Steckel was also not sure what was going on. Under the circumstances, it was reasonable for Steckel to arm himself briefly while he ascertained who was in the car and also assured himself that the individuals were not armed and a threat to his safety.

{¶ 100} Once Griffin opened the door to the van, Steckel observed evidence of drug activity in plain view. House also saw various drugs and drug-related items in plain view when he returned to the van, by looking through the door that Franklin left open when he fled.

{¶ 101} The plain view doctrine "authorizes the seizure, without the necessity of a search warrant, of an illegal object or contraband that is immediately recognizable as such

when it is in plain view of a law enforcement official." *State v. Moore*, 2d Dist. Montgomery No. 20198, 2004-Ohio-3783, ¶ 17, citing *Coolidge v. New Hampshire,* 403 U.S. 443, 465-466, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and *State v. Davie,* 86 Ohio App.3d 460, 464, 621 N.E.2d 548 (8th Dist. 1993). " 'Under [the plain view] doctrine, an officer may seize an item without a warrant if the initial intrusion leading to the item's discovery was lawful and it was "immediately apparent" that the item was incriminating.' " *Moore* at ¶ 17, quoting *State v. Waddy*, 63 Ohio St.3d 424, 442, 588 N.E.2d 819 (1992).

{¶ 102} Finally, the search of the automobile was justified by the automobile exception to the Fourth Amendment's warrant requirement, which allows police to "conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains contraband, and exigent circumstances necessitate a search or seizure." *State v. Moore*, 2d Dist. Montgomery No. 24934, 2012-Ohio-4315, ¶ 13, citing *State v. Mills*, 62 Ohio St.3d 357, 367, 582 N.E.2d 972 (1992) and *Chambers v. Maroney*, 399 U.S. 42, 48, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). In *Moore*, we noted that:

> A vehicle's mobility is the traditional exigency for this exception to the warrant requirement. *Mills* at 367; *California v. Carney*, 471 U.S. 386, 393, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment * * * permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996). The automobile exception does not have "separate exigency requirement" beyond the vehicle's mobility. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S.Ct. 2013, 144 L.E.2d 442 (1999). Moreover, "[t]he immobilization of the vehicle or low

probability of its being moved or evidence being destroyed does not remove the officers' justification to conduct a search pursuant to the automobile exception." *State v. Russell*, 2d Dist. Montgomery No. 19901, 2004–Ohio–1700, ¶ 34. *Moore* at ¶ 13.

{¶ 103} In light of the preceding discussion, the trial court did not err in overruling Griffin's motion to suppress evidence. The Fifth Assignment of Error is overruled.

VII. Did the Trial Court Err in Instructing on Complicity?

{¶ 104} Griffin's Sixth Assignment of Error is as follows:

The Trial Court Erred in Instructing the Jury on Complicity over Objection Where the Bill of Particulars Identified the Defendant as the Principal Offender.

{¶ 105} Under this assignment of error, Griffin objects to the fact that the trial court gave a complicity instruction when Griffin was led to believe that he was a principal offender in the bill of particulars that the State filed regarding each of Griffin's indictments. Griffin concedes that accomplices are punished the same as principal offenders, but argues that he should have been entitled to rely on the bill of particulars.

{¶ 106} In response to this argument, the State notes, citing Volume VII, pp. 1406-1410 of the Trial Transcript, that the trial court, in fact, identified Griffin as the principal offender when it instructed the jury.

{¶ 107} We have reviewed the citation to the Trial Transcript, and find nothing regarding complicity at the place Griffin cites in his brief (Trial Transcript, Volume VII, p. 1387.) At that point in the jury instructions, and for several pages before and after, the court

was discussing the charges and verdict forms pertaining to Griffin's co-defendant, Anthony Franklin. *Id.* at pp. 1383-1406.

{¶ 108} During the discussion of jury instructions, there were objections to the inclusion of language on aiding and abetting, because both Griffin and Franklin had been charged as principals. Trial Transcript, Volume VII, pp. 1377-1378. The State's response at that point was that the aiding and abetting statute placed the defendants on notice. *Id.* at p. 1377. The trial court noted the objection, and did charge the jury with regard to aiding and abetting in connection with Griffin's alleged offenses. *Id.* at pp. 1414-1418.

{¶ 109} The indictments charge Griffin as a principal offender, and the State's response to Griffin's request for a bill of particulars does not mention aiding and abetting. See Doc. #22 and Doc. #44.

{¶ 110} The Supreme Court of Ohio addressed a similar argument in *State v. Herring,* 94 Ohio St.3d 246, 762 N.E.2d 940 (2002). In *Herring*, the indictment charged the defendant with having been a principal offender in the aggravated murder of the victim, but the trial court instructed the jury that it could convict the defendant of aggravated murder either as the principal offender or as an aider and abettor. After the jury found the defendant guilty as an aider and abettor, the defendant appealed, contending that the instruction violated his Sixth Amendment right " 'to be informed of the nature and cause of the accusation.' " *Id.* at 251. Specifically, the defendant argued that "because the bill of particulars indicated that he was the principal offender on Count One, he lacked notice that the trial court would instruct on accomplice liability as to that count." *Id.*

{¶ 111} The Supreme Court of Ohio rejected the defendant's argument, noting that:

> R.C. 2923.03(F) states: "A charge of complicity may be stated in terms

of this section, or in terms of the principal offense." Thus, a defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is "stated * * * in terms of the principal offense" and does not mention complicity. R.C. 2923.03(F) adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. See *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929, 946, citing *Hill v. Perini* (C.A.6, 1986), 788 F.2d 406, 407–408. *Herring* at 251.

{¶ 112} The Supreme Court of Ohio also found no prejudice to the defendant because the defendant failed to "indicate how he could have defended himself differently, given notice that complicity would also be an issue * * *." *Id.* at 251-252. The same comment applies here, since Griffin has not suggested how he would have defended himself differently if he had known that the jury would be instructed on complicity.

{¶ 113} Based on the preceding discussion, the Sixth Assignment of Error is overruled.

VIII. Conclusion

{¶ 114} Griffin's First and Third Assignments of Error having been sustained, and the Second, Fourth, Fifth and Sixth assignments of error having been overruled, Griffin's conviction for Engaging in a Pattern of Corrupt Activity is Reversed, and the judgment, insofar as it sentences Griffin to 12 months in prison on four of the five counts of Possession of Criminal Tools, is reversed and remanded for further proceedings. In all other respects, the judgment is Affirmed.

FROELICH, J., concurs in judgment only.

HALL, J., concurring:

{¶ 115} De'Argo Griffin is a co-defendant of Anthony Franklin, and they were tried together. This court reversed Franklin's conviction for Engaging in a Pattern of Corrupt Activity, holding that a jury instruction on the term "enterprise," fashioned from federal case law on the subject, should have been given. *State v. Franklin*, 2d Dist. Montgomery Nos. 24011, 24012, 2011-Ohio-6802.

{¶ 116} I too am of the opinion that the jury instruction giving Ohio's statutory definition of "enterprise" was adequate, and I would not have required a jury instruction on the expanded federal definition if I were deciding the case in the first instance. Nevertheless, *State v. Franklin* is part of the jurisprudence of this court. The principle of stare decisis commands that a court should not lightly overrule its precedential authority. Moreover, internal consistency between co-defendants tried together further requires that we adhere to the *Franklin* decision. Accordingly, I concur with the lead opinion.

. . . . . .

Copies mailed to:

Mathias H. Heck
Kirsten A. Brandt
Darrell L. Heckman
Hon. Steven K. Dankof

Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2923. Conspiracy, Attempt, and Complicity; Weapons Control (Refs & Annos)
Corrupt Activity

R.C. § 2923.31

2923.31 Definitions

Effective: June 27, 2012
Currentness

As used in sections 2923.31 to 2923.36 of the Revised Code:

(A) "Beneficial interest" means any of the following:

(1) The interest of a person as a beneficiary under a trust in which the trustee holds title to personal or real property;

(2) The interest of a person as a beneficiary under any other trust arrangement under which any other person holds title to personal or real property for the benefit of such person;

(3) The interest of a person under any other form of express fiduciary arrangement under which any other person holds title to personal or real property for the benefit of such person.

"Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general or limited partnership.

(B) "Costs of investigation and prosecution" and "costs of investigation and litigation" mean all of the costs incurred by the state or a county or municipal corporation under sections 2923.31 to 2923.36 of the Revised Code in the prosecution and investigation of any criminal action or in the litigation and investigation of any civil action, and includes, but is not limited to, the costs of resources and personnel.

(C) "Enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. "Enterprise" includes illicit as well as licit enterprises.

(D) "Innocent person" includes any bona fide purchaser of property that is allegedly involved in a violation of section 2923.32 of the Revised Code, including any person who establishes a valid claim to or interest in the property in accordance with division (E) of section 2981.04 of the Revised Code, and any victim of an alleged violation of that section or of any underlying offense involved in an alleged violation of that section.

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(E) "Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

At least one of the incidents forming the pattern shall occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity.

For the purposes of the criminal penalties that may be imposed pursuant to section 2923.32 of the Revised Code, at least one of the incidents forming the pattern shall constitute a felony under the laws of this state in existence at the time it was committed or, if committed in violation of the laws of the United States or of any other state, shall constitute a felony under the law of the United States or the other state and would be a criminal offense under the law of this state if committed in this state.

(F) "Pecuniary value" means money, a negotiable instrument, a commercial interest, or anything of value, as defined in section 1.03 of the Revised Code, or any other property or service that has a value in excess of one hundred dollars.

(G) "Person" means any person, as defined in section 1.59 of the Revised Code, and any governmental officer, employee, or entity.

(H) "Personal property" means any personal property, any interest in personal property, or any right, including, but not limited to, bank accounts, debts, corporate stocks, patents, or copyrights. Personal property and any beneficial interest in personal property are deemed to be located where the trustee of the property, the personal property, or the instrument evidencing the right is located.

(I) "Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any of the following:

(1) Conduct defined as "racketeering activity" under the "Organized Crime Control Act of 1970," 84 Stat. 941, 18 U.S.C. 1961(1)(B), (1)(C), (1)(D), and (1)(E), as amended;

(2) Conduct constituting any of the following:

(a) A violation of section 1315.55, 1322.02, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2905.01, 2905.02, 2905.11, 2905.22, 2905.32 as specified in division (I)(2)(g) of this section, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.22, 2909.23, 2909.24, 2909.26, 2909.27, 2909.28, 2909.29, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2913.05, 2913.06, 2921.02, 2921.03, 2921.04, 2921.11, 2921.12, 2921.32, 2921.41, 2921.42, 2921.43, 2923.12, or 2923.17; division (F)(1)(a), (b), or (c) of section 1315.53; division (A)(1) or (2) of section 1707.042; division (B), (C)(4), (D), (E), or (F) of section 1707.44; division (A)(1) or (2) of section 2923.20; division (E) or (G) of section 3772.99; division (J)(1) of section 4712.02; section 4719.02, 4719.05, or 4719.06; division (C), (D), or (E) of section 4719.07; section 4719.08; or division (A) of section 4719.09 of the Revised Code.

(b) Any violation of section 3769.11, 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date,

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would have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, or any violation of section 2915.05 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to that date.

(c) Any violation of section 2907.21, 2907.22, 2907.31, 2913.02, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.42, 2913.47, 2913.51, 2915.03, 2925.03, 2925.04, 2925.05, or 2925.37 of the Revised Code, any violation of section 2925.11 of the Revised Code that is a felony of the first, second, third, or fourth degree and that occurs on or after July 1, 1996, any violation of section 2915.02 of the Revised Code that occurred prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would not have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, any violation of section 2915.06 of the Revised Code as it existed prior to July 1, 1996, or any violation of division (B) of section 2915.05 of the Revised Code as it exists on and after July 1, 1996, when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and that is involved in the violation, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation exceeds one thousand dollars, or any combination of violations described in division (I)(2)(c) of this section when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

(d) Any violation of section 5743.112 of the Revised Code when the amount of unpaid tax exceeds one hundred dollars;

(e) Any violation or combination of violations of section 2907.32 of the Revised Code involving any material or performance containing a display of bestiality or of sexual conduct, as defined in section 2907.01 of the Revised Code, that is explicit and depicted with clearly visible penetration of the genitals or clearly visible penetration by the penis of any orifice when the total proceeds of the violation or combination of violations, the payments made in the violation or combination of violations, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation or combination of violations exceeds one thousand dollars;

(f) Any combination of violations described in division (I)(2)(c) of this section and violations of section 2907.32 of the Revised Code involving any material or performance containing a display of bestiality or of sexual conduct, as defined in section 2907.01 of the Revised Code, that is explicit and depicted with clearly visible penetration of the genitals or clearly visible penetration by the penis of any orifice when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

(g) Any violation of section 2905.32 of the Revised Code to the extent the violation is not based solely on the same conduct that constitutes corrupt activity pursuant to division (I)(2)(c) of this section due to the conduct being in violation of section 2907.21 of the Revised Code.

(3) Conduct constituting a violation of any law of any state other than this state that is substantially similar to the conduct described in division (I)(2) of this section, provided the defendant was convicted of the conduct in a criminal proceeding in the other state;

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(4) Animal or ecological terrorism;

(5)(a) Conduct constituting any of the following:

(i) Organized retail theft;

(ii) Conduct that constitutes one or more violations of any law of any state other than this state, that is substantially similar to organized retail theft, and that if committed in this state would be organized retail theft, if the defendant was convicted of or pleaded guilty to the conduct in a criminal proceeding in the other state.

(b) By enacting division (I)(5)(a) of this section, it is the intent of the general assembly to add organized retail theft and the conduct described in division (I)(5)(a)(ii) of this section as conduct constituting corrupt activity. The enactment of division (I)(5)(a) of this section and the addition by division (I)(5)(a) of this section of organized retail theft and the conduct described in division (I)(5)(a)(ii) of this section as conduct constituting corrupt activity does not limit or preclude, and shall not be construed as limiting or precluding, any prosecution for a violation of section 2923.32 of the Revised Code that is based on one or more violations of section 2913.02 or 2913.51 of the Revised Code, one or more similar offenses under the laws of this state or any other state, or any combination of any of those violations or similar offenses, even though the conduct constituting the basis for those violations or offenses could be construed as also constituting organized retail theft or conduct of the type described in division (I)(5)(a)(ii) of this section.

(J) "Real property" means any real property or any interest in real property, including, but not limited to, any lease of, or mortgage upon, real property. Real property and any beneficial interest in it is deemed to be located where the real property is located.

(K) "Trustee" means any of the following:

(1) Any person acting as trustee under a trust in which the trustee holds title to personal or real property;

(2) Any person who holds title to personal or real property for which any other person has a beneficial interest;

(3) Any successor trustee.

"Trustee" does not include an assignee or trustee for an insolvent debtor or an executor, administrator, administrator with the will annexed, testamentary trustee, guardian, or committee, appointed by, under the control of, or accountable to a court.

(L) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted in violation of any federal or state law relating to the business of gambling activity or relating to the business of lending money at an usurious rate unless the creditor proves, by a preponderance of the evidence, that the usurious rate was not intentionally set and that it resulted from a good faith error by the creditor, notwithstanding the maintenance of procedures that were adopted by the creditor to avoid an error of that nature.

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(M) "Animal activity" means any activity that involves the use of animals or animal parts, including, but not limited to, hunting, fishing, trapping, traveling, camping, the production, preparation, or processing of food or food products, clothing or garment manufacturing, medical research, other research, entertainment, recreation, agriculture, biotechnology, or service activity that involves the use of animals or animal parts.

(N) "Animal facility" means a vehicle, building, structure, nature preserve, or other premises in which an animal is lawfully kept, handled, housed, exhibited, bred, or offered for sale, including, but not limited to, a zoo, rodeo, circus, amusement park, hunting preserve, or premises in which a horse or dog event is held.

(O) "Animal or ecological terrorism" means the commission of any felony that involves causing or creating a substantial risk of physical harm to any property of another, the use of a deadly weapon or dangerous ordnance, or purposely, knowingly, or recklessly causing serious physical harm to property and that involves an intent to obstruct, impede, or deter any person from participating in a lawful animal activity, from mining, foresting, harvesting, gathering, or processing natural resources, or from being lawfully present in or on an animal facility or research facility.

(P) "Research facility" means a place, laboratory, institution, medical care facility, government facility, or public or private educational institution in which a scientific test, experiment, or investigation involving the use of animals or other living organisms is lawfully carried out, conducted, or attempted.

(Q) "Organized retail theft" means the theft of retail property with a retail value of one thousand dollars or more from one or more retail establishments with the intent to sell, deliver, or transfer that property to a retail property fence.

(R) "Retail property" means any tangible personal property displayed, held, stored, or offered for sale in or by a retail establishment.

(S) "Retail property fence" means a person who possesses, procures, receives, or conceals retail property that was represented to the person as being stolen or that the person knows or believes to be stolen.

(T) "Retail value" means the full retail value of the retail property. In determining whether the retail value of retail property equals or exceeds one thousand dollars, the value of all retail property stolen from the retail establishment or retail establishments by the same person or persons within any one-hundred-eighty-day period shall be aggregated.

CREDIT(S)

(2012 H 262, eff. 6-27-12; 2012 H 386, eff. 6-11-12; 2011 H 86, eff. 9-30-11; 2010 S 235, eff. 3-24-11; 2008 S 320, eff. 4-7-09; 2006 H 241, eff. 7-1-07; 2005 S 9, eff. 4-14-06; 2002 S 184, eff. 5-15-02; 1998 H 565, eff. 3-30-99; 1996 S 277, eff. 3-31-97; 1996 S 214, § 3, eff. 12-5-96; 1996 S 214, § 1, eff. 12-5-96; 1996 S 269, eff. 7-1-96; 1996 H 333, eff. 9-19-96; 1995 S 2, eff. 7-1-96; 1992 S 323, eff. 4-16-93; 1990 H 347; 1988 H 624, H 708; 1986 S 74; 1985 H 5)

Notes of Decisions (87)

R.C. § 2923.31, OH ST § 2923.31

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Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2923. Conspiracy, Attempt, and Complicity; Weapons Control (Refs & Annos)
Corrupt Activity

R.C. § 2923.32

2923.32 Engaging in a pattern of corrupt activity; fines; penalties; forfeiture; records and reports; third-party claims to property subject to forfeiture

Effective: September 30, 2011
Currentness

(A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

(2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

(3) No person, who knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, shall use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

A purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without intent to assist another to do so is not a violation of this division, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer.

(B)(1) Whoever violates this section is guilty of engaging in a pattern of corrupt activity. Except as otherwise provided in this division, engaging in corrupt activity is a felony of the second degree. Except as otherwise provided in this division, if at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder, if at least one of the incidents was a felony under the law of this state that was committed prior to July 1, 1996, and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if committed on or after July 1, 1996, or if at least one of the incidents of corrupt activity is a felony under the law of the United States or of another state that, if committed in this state on or after July 1, 1996, would constitute a felony of the first, second, or third degree, aggravated murder, or murder under the law of this state, engaging in a pattern of corrupt activity is a felony of the first degree. If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, engaging in a pattern of corrupt activity is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code. Notwithstanding any other provision of law, a person may be convicted of violating the provisions of this section as well as of a conspiracy to violate one or more of those provisions under section 2923.01 of the Revised Code.

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(2) Notwithstanding the financial sanctions authorized by section 2929.18 of the Revised Code, the court may do all of the following with respect to any person who derives pecuniary value or causes property damage, personal injury other than pain and suffering, or other loss through or by the violation of this section:

(a) In lieu of the fine authorized by that section, impose a fine not exceeding the greater of three times the gross value gained or three times the gross loss caused and order the clerk of the court to pay the fine into the state treasury to the credit of the corrupt activity investigation and prosecution fund, which is hereby created;

(b) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay court costs;

(c) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay to the state, municipal, or county law enforcement agencies that handled the investigation and prosecution the costs of investigation and prosecution that are reasonably incurred.

The court shall hold a hearing to determine the amount of fine, court costs, and other costs to be imposed under this division.

(3) In addition to any other penalty or disposition authorized or required by law, the court shall order any person who is convicted of or pleads guilty to a violation of this section or who is adjudicated delinquent by reason of a violation of this section to criminally forfeit to the state under Chapter 2981. of the Revised Code any personal or real property in which the person has an interest and that was used in the course of or intended for use in the course of a violation of this section, or that was derived from or realized through conduct in violation of this section, including any property constituting an interest in, means of control over, or influence over the enterprise involved in the violation and any property constituting proceeds derived from the violation, including all of the following:

(a) Any position, office, appointment, tenure, commission, or employment contract of any kind acquired or maintained by the person in violation of this section, through which the person, in violation of this section, conducted or participated in the conduct of an enterprise, or that afforded the person a source of influence or control over an enterprise that the person exercised in violation of this section;

(b) Any compensation, right, or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in division (B)(3)(a) of this section that accrued to the person in violation of this section during the period of the pattern of corrupt activity;

(c) Any interest in, security of, claim against, or property or contractual right affording the person a source of influence or control over the affairs of an enterprise that the person exercised in violation of this section;

(d) Any amount payable or paid under any contract for goods or services that was awarded or performed in violation of this section.

CREDIT(S)

(2011 H 86, eff. 9-30-11; 2008 H 280, eff. 4-7-09; 2006 H 241, eff. 7-1-07; 2000 S 179, § 3, eff. 1-1-02; 1998 S 164, eff. 1-15-98; 1995 S 2, eff. 7-1-96; 1990 H 266, eff. 9-6-90; 1990 H 215; 1988 H 708; 1986 S 74; 1985 H 5)

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Notes of Decisions (254)

R.C. § 2923.32, OH ST § 2923.32
Current through 2013 File 47 of the 130th GA (2013-2014).

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 96. Racketeer Influenced and Corrupt Organizations (Refs & Annos)

18 U.S.C.A. § 1961

§ 1961. Definitions

Effective: March 7, 2013
Currentness

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons)., [1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States

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Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency

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so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

CREDIT(S)

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941; amended Pub.L. 95-575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677; Pub.L. 98-473, Title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub.L. 98-547, Title II, § 205, Oct. 25, 1984, 98 Stat. 2770; Pub.L. 99-570, Title XIII, § 1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub.L. 99-646, § 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub.L. 100-690, Title VII, §§ 7013, 7020(c), 7032, 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402, 4489; Pub.L. 101-73, Title IX, § 968, Aug. 9, 1989, 103 Stat. 506; Pub.L. 101-647, Title XXXV, § 3560, Nov. 29, 1990, 104 Stat. 4927; Pub.L. 103-322, Title IX, § 90104, Title XVI, § 160001(f), Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1987, 2037, 2150; Pub.L. 103-394, Title III, § 312(b), Oct. 22, 1994, 108 Stat. 4140; Pub.L. 104-132, Title IV, § 433, Apr. 24, 1996, 110 Stat. 1274; Pub.L. 104-153, § 3, July 2, 1996, 110 Stat. 1386; Pub.L. 104-208, Div. C, Title II, § 202, Sept. 30, 1996, 110 Stat. 3009-565; Pub.L. 104-294, Title VI, §§ 601(b)(3), (i)(3), 604(b)(6), Oct. 11, 1996, 110 Stat. 3499, 3501, 3506; Pub.L. 107-56, Title VIII, § 813, Oct. 26, 2001, 115 Stat. 382; Pub.L. 107-273, Div. B, Title IV, § 4005(f)(1), Nov. 2, 2002, 116 Stat. 1813; Pub.L. 108-193, § 5(b), Dec. 19, 2003, 117 Stat. 2879; Pub.L. 108-458, Title VI, § 6802(e), Dec. 17, 2004, 118 Stat. 3767; Pub.L. 109-164, Title I, § 103(c), Jan. 10, 2006, 119 Stat. 3563; Pub.L. 109-177, Title IV, § 403(a), Mar. 9, 2006, 120 Stat. 243; Pub.L. 113-4, Title XII, § 1211(a), Mar. 7, 2013, 127 Stat. 142.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12435

Ex. Ord. No. 12503, July 28, 1983, 48 F.R. 34723, as amended by Ex. Ord. No. 12507, March 22, 1985, 50 F.R. 11835, which related to the establishment, functions, administration and termination of the President's Commission on Organized Crime, was revoked by Ex. Ord. No. 12610, Sept. 30, 1987, 52 F.R. 36901.

Notes of Decisions (1969)

Footnotes

1 So in original.

18 U.S.C.A. § 1961, 18 USCA § 1961

Current through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 96. Racketeer Influenced and Corrupt Organizations (Refs & Annos)

18 U.S.C.A. § 1962

§ 1962. Prohibited activities

Currentness

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

CREDIT(S)

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942; amended Pub.L. 100-690, Title VII, § 7033, Nov. 18, 1988, 102 Stat. 4398.)

Notes of Decisions (1752)

18 U.S.C.A. § 1962, 18 USCA § 1962
Current through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13

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