

IN THE SUPREME COURT OF OHIO

Case No. 2015-0385

State of Ohio,)	
)	
)	On appeal from the Sixth District
Appellant/Cross-appellee)	Court of Appeals Case No. WD-13-086
)	
)	
v.)	
)	
Rafael Gonzales,)	
)	
)	
Appellee/Cross-appellant.)	

**RAFAEL GONZALES' COMBINED JURISDICTIONAL MEMORANDUM IN RESPONSE TO THE
STATE'S MEMORANDUM AND IN SUPPORT OF HIS CROSS-APPEAL**

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Constitutional provisions:

Fifth Amendment, United States Constitution.í í í í í í í í ..í í í í í í í í í í í 23

Ohio Constitution Article I, Section 10í í í í í í í í í í í í í í í .í í í í í í 9, 23

GONZALES' RESPONSE TO THE STATE'S MEMORANDUM

I. The state's grievance concerning R.C. 2925.11(C)(4)(f) is within the purview of the General Assembly, not the courts. Thus, this court should decline jurisdiction of the state's appeal.

The state's proposition of law regarding its proposed "interpretation" of R.C. 2925.11(C)(4)(f) has more words than the statute itself, which provides:

If the amount of the drug involved equals or exceeds one hundred grams **of cocaine**, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

This meaning of this statute is plain: only the weight "of cocaine" and nothing else matters.¹ This is a policy decision that comes within the purview of the General Assembly, not the courts.² "Cocaine" is defined by R.C. 2925.01(X). Logically, the weight of something that is not "cocaine" under that definition does not count toward the weight "of cocaine." Thus, the state's argument that the weight of materials that are *not* cocaine counts toward the weight "of cocaine" under R.C. 2925.11(C)(4)(f) contradicts the plain meaning of the text, which needs no interpretation.³

Even so, the state insists that inclusion of the phrase "of cocaine" is a *faux pas* that this court should remedy. *See* State's Br. p.11, ("the drafters made a *faux pas* "). This offends

¹ As the Sixth District stated at ¶42 below, the meaning of the statute is "obvious."

² *Pauley v. Circleville*, 137 Ohio St.3d 212, 2013-Ohio-4541, ¶38

³ *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, ¶12 ("When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply rules of statutory interpretation.")

basic jurisprudence.⁴ And it cannot account for the fact that the General Assembly understands how to draft laws.⁵ But even if inclusion of the words “of cocaine” were a *faux pas*, the state’s remedy lies in the legislative branch, not here. It is the duty of this court to give effect to the words used in a statute, not to delete words.⁶ This court leaves it to the General Assembly to rewrite the statute if it deems it necessary.⁷

II. The Sixth District’s reading of R.C. 2925.11(C)(4)(f) is correct.

A. It’s the state’s argument that leads to absurdities.

The state argues that the Sixth District’s opinion leads to absurd results. But if the state were correct, a defendant who possesses a speck of cocaine mixed with one hundred grams of baking soda is punished more harshly than a defendant that possesses 99.9 grams of cocaine mixed with nothing. This odd result proves the point: including the phrase “of cocaine” in (C)(4)(f) ensures that only those offenders who possess at least one hundred grams of cocaine—the substance defined by R.C. 2925.01(X)—are subject to the mandatory, maximum penalty.

B. The first sentence of the state’s proposition is irrelevant.

Gonzales never argued and the Sixth District never held that the state must prove the defendant possessed “pure cocaine” or that a person who possesses a mixture or substance containing cocaine cannot be prosecuted under R.C. 2925.11(A) or (C)(4). Under the opinion

⁴ *State ex. rel. Cleveland Elec. Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959). (“It is a basic presumption in statutory construction that the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.”)

⁵ *Pauley*, supra, ¶38.

⁶ *State v. Jordan*, 89 Ohio St.3d 488, 492, 2000-Ohio-225.

⁷ *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶54.

below, “purity” remains immaterial— what matters is the weight of cocaine.” Here is the court’s holding in ¶47 with the emphasis in original:

In light of the foregoing, we hold that the state, in prosecuting cocaine offenses under R.C. 2925.11(C)(4)(a) through (f), must prove that the weight of the *actual cocaine* possessed by the defendant met the statutory threshold.

One problem with the state’s memorandum is that it conflates the generalized legal issue— that it must prove the weight of cocaine— in every R.C. 2925.11(C)(4)(f) case— with the factual issue of how the state might satisfy that burden given the specific evidence in any one particular case. These issues must remain distinct. In Ohio, non-cocaine materials are not credited as grams of cocaine. Otherwise, R.C. 2925.11(C)(4)(f) would read differently.⁸

C. The weight “of cocaine”—and nothing else—triggers the enhancer.

Inclusion of the words “of cocaine” within R.C. 2925.11(C)(4)(f) ensures that only those offenders who possess at least one hundred grams of cocaine suffer a maximum, mandatory prison sentence. Since the statutory definition of cocaine does *not* include non-cocaine materials (e.g., sugar or baking soda), it is the weight of cocaine— and nothing else— that triggers R.C. 2925.11(C)(4)(f).

D. The state’s other arguments are illogical, inapposite, inaccurate, or self-defeating.

Drug dealer. The state argues on page two of its brief that after the opinion below, “drug dealers” who “deal in crack cocaine” can only be convicted of an F5. That doesn’t follow from the decision below at all. Anyway, this is a possession case— not a trafficking case— which would have different elements, such as the *offer* to sell.

⁸ For example, federal law outlaws the possession of “500 grams or more of a mixture or substance containing a detectable amount of cocaine.” See 21 U.S.C. §841(b)(1)(B)(ii)(I).

Treatment of other controlled substances. The state correctly observes on page eleven of its brief that the legislature treats other controlled substances differently than cocaine. But this point favors Gonzales, not the state. As the Sixth District observed in its opinion below at ¶42:

Here, R.C. 2925.11(C)(4)(f) increases the level of the offense for possession of cocaine when the amount possessed "equals or exceeds one hundred grams of cocaine." (Emphasis added.) The emphasized language clearly modifies the weight in the statute. This becomes even more obvious upon an examination of the manner in which other drugs are treated under R.C. 2925.11. Concerning marijuana, R.C. 2925.11 increases the level of the offense "[i]f the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams." Importantly, the statute does not state 100 or 200 grams of marijuana. Further, heroin offenses are amplified under R.C. 2925.11 "[i]f the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams." Once again, the statute does not indicate one gram of heroin.

This court presumes that the General Assembly has advisedly treated different controlled substances differently.⁹ Yet again, the penalty enhancement for weight under R.C. 2925.11(C)(4)(f) applies to the weight of the actual cocaine present in the mixture, as opposed to the weight of an entire overall mixture that may contain a detectable amount of some cocaine plus other substances.

Older cases. On page twelve of its brief, the state cites several cases that pre-date the current version of the disputed statute. As the Sixth District observed at ¶46 below, "the cases cited by the state are inapposite" by operation of intervening statutory amendment.

Verdict misstatement. In its statement of the case, the state proclaims that "the jury found that the amount of drug involved exceeded 100 grams." Not so. The verdict form states "that the amount of cocaine involved at the time of the offense did equal or exceed 100 grams." While the form is correct, it tracks the statute, the problem is the verdict is supported by

⁹ *Vance v. St. Vincent Hospital* 64 Ohio St.2d 36, 39 (1980).

nothing since the record contains no evidence that would allow a factfinder to determine the weight of actual cocaine.¹⁰

No conflict. The first sentence of the state's jurisdictional memorandum recites that this case involves a certified conflict. Even if true, a potential conflict is immaterial to a *jurisdictional* appeal. And while the Sixth District certified a conflict *sua sponte* it did so without any briefing on point. In fact, the state never even cited *Smith* at any level below. The issue advanced in *State v. Smith* was obtuse whether food was a drug. Here, the argument is that the weight of a non-cocaine substance cannot count toward the weight of cocaine. No conflict exists because the issue presented in *Smith* is different than the issue here.

The state's appeal does not merit this court's time and lacks substantive merit. Gonzales will now address his cross-appeal below.

¹⁰ See ¶46 of the opinion below.

EXPLANATIONS AS TO WHY A SUBSTANTIAL QUESTION IS INVOLVED, WHY THIS CASE IS OF GREAT PUBLIC OR GREAT GENERAL INTEREST, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED IN GONZALES' CROSS-APPEAL

This case presents this court with an opportunity to develop the law in three areas because each of Gonzales's propositions have broad application in trial litigation throughout this state and therefore, by nature, the propositions are matters of public or great general interest. Further, the first proposition involves a substantial constitutional question.

- I. **FIRST PROPOSITION OF LAW:** A defendant's due process, grand-jury presentment, and double-jeopardy rights are violated when a trial court, at the prosecution's invitation, permits the jury to base its verdict on either indicted or unindicted conduct. The remedy is to vacate a resulting conviction and bar a re-trial.
- A. **Gonzales requests this court to (1) instruct that trial courts may not permit the state to amend a bill of particulars to cover un-indicted conduct and (2) establish the remedy where it cannot be known whether the jury's verdict was based upon indicted or unindicted conduct.**

The prosecution effectively tried Gonzales for two offenses in a one-count indictment. Prior to trial, the state provided a bill of particulars claiming that Gonzales possessed cocaine at Latcha Road, the site of a Super 8 Motel. But at the beginning of trial, the trial court properly excluded expert testimony concerning the alleged "cocaine" from Super 8 due to the state's violation of Crim. R. 16(K), which requires advance disclosure of expert reports. And because the grand-jury indicted on the Super 8 incident only, the state had no other expert.

What occurred next raises serious constitutional questions: the state expanded the scope of the case by amending the bill of particulars to include a *different* possession, involving different alleged cocaine, at a different time, at a different location— a Meijer parking lot. Notably, the substances from Meijer never crossed-over into Super 8 and vice versa.

This is problematic because the simultaneous possession of different types of controlled substances can constitute multiple offenses under R.C. 2925.11.¹¹ If the simultaneous possession of different types of controlled substances can constitute multiple offenses, then the non-simultaneous possession of *different* substances definitely does. Gonzales objected because the state's newfound strategy forced him to defend against two potential offenses (Meijer and Super 8) even though the indictment had one count.

Gonzales repeatedly objected and asked for limiting instructions that he wasn't charged with the Meijer incident, or alternatively, dismissal of the indictment. The trial court refused to dismiss and refused to instruct the jury that the Meijer incident was not indicted and admitted Meijer for purposes of direct guilt:

What happened in the Meijer parking lot is admissible, is relevant, for whatever purpose [the prosecutor] wants to use it.

Trial transcript Day 2, p. 80, lines 15-17.

The jury found Gonzales guilty. The problem is it's impossible to know whether the verdict was for possessing alleged cocaine at Meijer, at Super 8, or a combination of the two. Thus, this case offers the opportunity to develop the constitutional law and remedies governing situations where the state's own trial tactics raise substantial doubt about jury unanimity and whether a conviction is based upon unindicted conduct. The permutations are plentiful. For example, six jurors could have believed that Gonzales possessed cocaine at one location but not at the other and vice versa for the other six jurors, bringing to twelve total jurors believing that he possessed cocaine somewhere, but not at the same place and not even the same cocaine.

This implicates a substantial constitutional question of the highest order. And determining the appropriate remedy independently presents a substantial constitutional question

¹¹ *State v. Delfino*, 22 Ohio St.3d 270, 490 N.E.2d 884 (1986), syllabus.

independently meriting this court's consideration. These questions aren't merely theoretical or academic, but arise in criminal trials—typically when something goes awry during the state's case-in-chief, prompting the prosecutor to compensate for what's gone wrong.

B. Upholding the proceedings below would promote prosecutorial gamesmanship in charging decisions, pretrial discovery, and at trial.

For many legitimate reasons, prosecutors often do not indict defendants on every conceivable offense that could be indicted. This is prosecutorial discretion. But the decision below permits this "discretion" to be abused in practice: it incentivizes prosecutors in future cases to deliberately under-indict cases, offer evidence at trial concerning more instances of potential criminal conduct than indicted, and see what happens. If the defendant is acquitted, the state could indict on the "unindicted" charge(s). "This [tactic] suggests that placing a defendant at risk of double jeopardy is acceptable so long as the prosecution wins and is pleased with the verdict and sentence." *Valentine v. Konteh*, (6th Cir. 2005), 395 F.3d 626, 635.

C. This case presents an indirect attack on all defendants' grand-jury presentment, due process, and double-jeopardy rights.

Most federal and state cases addressing double-jeopardy and grand-jury presentment issues concern the indictment itself. For example, cases address whether an indictment provides adequate notice to the defendant or facially charges an offense. Other cases, such as *Valentine v. Konteh*, address whether multi-count "carbon copy" indictment—e.g., an indictment alleging child abuse over an extended period of time involving the same victim—protects against double jeopardy where one count is not significantly delineated from the next.¹² Generally speaking, the

¹² See also, *State v. Nickel*, 6th Dist. No. OT-009-01, 2009-Ohio-5996, ¶¶42-45.

law concerning these scenarios is somewhat developed, yet remains unsettled.¹³ The issue here is different.

The issue here isn't whether an *indictment* is directly invalid, but whether a *verdict* is invalid based upon developments at the trial of an otherwise valid indictment. What's the remedy where a trial court erroneously permits the state to invite jurors to convict based upon *unindicted* conduct? Gonzales preserved this issue repeatedly:

Mr. Mayle: Your Honor, I request a limiting instruction as this is not
Ms. Howe-Gebers: It says Wood County.
Mr. Mayle: No, no. There's a Bill of Particulars that can we approach?

The Court: Request is denied, sit down.¹⁴

The next day, the trial court moved to amend its bill of particulars to include the Meijer incident. Gonzales objected, but was again overruled. He then requested a cautionary instruction that he was not indicted for both incidents. The state opposed and in its ruling, the trial court held that: "What happened in the Meijer parking lot is admissible, is relevant, for whatever purpose Ms. Howe-Gebers wants to use it."¹⁵ Because of the inherent danger of this ruling, Gonzales filed a written motion on November 6, 2013 requesting an "other acts" cautionary instruction or, alternatively, dismissal of the indictment. The trial court denied all of Gonzales's motions.

¹³ Indeed, even in the "carbon copy" or vague-timeframe cases, the law remains muddled. For example, the Sixth Circuit has criticized Ohio's intermediate appellate courts. *See e.g., Valentine v. Konteh*, (6th Cir. 2005), 395 F.3d 626, 638 ("the Ohio Court of Appeals has strayed so far from that path as to warrant habeas relief"). In turn, Ohio's appellate courts have criticized the Sixth Circuit's decision in *Valentine*. *See e.g., State v. Adams*, No. 13 MA 130, ---N.E.3d---, 2014-Ohio-5854, ¶¶35-36 (criticizing and not following *Valentine*).

¹⁴ Trial Transcript Day 1, p. 145, lines 13-22; *See also, Id.*, p. 156, lines 13-19.

¹⁵ Trial transcript Day 2, p. 80, lines 15-17.

D. This court should establish the remedy.

The constitutional violation here is almost inarguable:

Section 10, Article I of the Ohio constitution provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. *** This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury.¹⁶

This court should accept jurisdiction to determine the remedy. Is it to reverse and remand for a new trial with instructions that the Meijer incident is not admissible for substantive guilt? Or is it to reverse, vacate the conviction, and dismiss the indictment with no further retrial of either the Meijer or Super 8 incidents? These are substantial constitutional questions.

II. SECOND PROPOSITION OF LAW: Testimony offered to identify whether a substance is cocaine as defined by R.C. 2925.01(X) is subject to Evid. R. 702 and Crim. R. 16(K).

Because of the recent enactment of Crim. R. 16(K), the rise of counterfeit-controlled substances and controlled-substance analogs, and the increasing number of criminal prosecutions involving potential expert testimony, the line between expert and lay testimony has more implications to criminal trial practice in this state than ever.

Whether testimony is subject to Rule 702, and therefore Crim. R. 16(K), has major trial-practice implications. Thus, it is important to the bench and bar for this court to articulate where (or at least how) that line is drawn. And as recently addressed by the Supreme Court of North Carolina in *North Carolina v. Llamas-Hernandez*,¹⁷ this court should clarify that opinion testimony elicited from specially trained or experienced witnesses including specialized police officers is subject to Evid. R. 702 and therefore, in Ohio, is subject to Crim. R. 16(K).

¹⁶ *State v. Headley*, 6 Ohio St.3d 475 (1983).

¹⁷ 363 N.C. 8, 673 S.E.2d 658 (2009).

Such testimony is not *lay* testimony. This is an issue of public or great general interest because it significantly affects pretrial and trial procedures in criminal cases throughout this state, especially in controlled-substance cases generally and cocaine cases specifically.

Further, if *lay* witnesses are able to identify substances such as cocaine, which has a highly technical definition under R.C. 2925.01(X), then the floodgates are open in this state for *lay* opinion testimony to come in on virtually any subject. Rule 702 would no longer serve any purpose. It's time for this court to firmly establish the line between opinion and expert testimony in these types of criminal cases because where the line is drawn affects almost every case from pretrial preparation through trial.

III. THIRD PROPOSITION OF LAW: Upon a timely request by the defendant, a trial court must instruct the jury on the definition of "cocaine" under R.C. 2925.01(X) in a prosecution under R.C. 2925.11(C)(4).

Gonzales's third proposition affects every single cocaine-possession case, from F5 to major-drug offender, prosecuted in this state. "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."¹⁸ Here, the trial court refused to instruct the jury on the definition of "cocaine" under R.C. 2925.01(X) even though Gonzales was indicted for possession of "cocaine." Because of the number of cocaine prosecutions in this state and the increasing frequency with which criminal statutes incorporate technical or statutory definitions, this court should accept jurisdiction of Gonzales's third proposition of law and hold that if a crime carries an essential element that incorporates a statutory definition, trial courts must instruct on the statutory definition upon a timely request by either party.

¹⁸ *State v. Scott*, 26 Ohio St.3d 92, 101, 26 OBR 79, 87, 497 N.E.2d 55, 63 (1986).

STATEMENT OF THE CASE

This indictment alleges that Mr. Gonzales possessed cocaine with a specification that the weight of the cocaine was at least one hundred grams. Gonzales pleaded not guilty and went to trial. The jury convicted him and the trial court imposed the mandatory eleven year prison term under R.C. 2925.11(C)(4)(f), plus a fine and license suspension. Gonzales timely appealed and asserted five assignments of error. The appeals court reversed the conviction in part by vacating the jury's finding that Gonzales possessed more than one hundred grams of cocaine, finding that the state failed to produce sufficient evidence regarding the weight of cocaine.

After this decision, Gonzales filed a motion with the trial court for resentencing. The trial court never ruled and therefore Gonzales is still imprisoned and thus has served almost three-times the maximum prison time for the conviction remaining under the Sixth District's ruling.

The state appealed and asked for an emergency stay of the Sixth District's ruling in connection with the state's jurisdictional appeal case number. A notice of certified conflict is also pending. Gonzales opposed the state's motion to stay, which has not been determined yet, opposes jurisdiction of the state's appeal, and files this memorandum in support of his cross-appeal.

Before addressing the facts below, the state's jurisdictional memorandum states that it twice provided expert, scientific reports prior to trial. This is false. But even if it were true, the scientific testimony was *excluded*, and therefore, the state's attempt to bootstrap its appeal based upon inadmissible testimony should be rejected. Anyway, the more the state highlights the (excluded) scientific testimony, the more it underscores Gonzales's second proposition of law.

STATEMENT OF THE FACTS

This case involves an alleged “controlled” transaction involving the DEA. Gonzales awaited jury trial from jail for over a year. Throughout that entire period, the state maintained in its bill of particulars that Gonzales was indicted for allegedly possessing more than 100 grams of cocaine at 3491 Latcha Road in Millbury, Ohio,¹⁹ the address of a Super 8 motel. Gonzales prepared his defense accordingly. Before the state began its case in chief, the trial court excluded the testimony of the state’s laboratory scientist, Larry Rentz, because the prosecution violated Crim. R. 16(K) by not disclosing Rentz’s report, analysis, opinions, and qualifications until less than 48 hours before trial.²⁰

Rentz’s anticipated testimony was that state’s Exhibit 13, the substance from Super 8, was submitted to Rentz as an “unknown substance” and through “accepted forensic drug chemistry methods” was “found to contain Cocaine.”²¹ “Cocaine” has a technical, statutory definition that means any of the following:

- A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;
- Coca leaves or a salt, compound, derivative, or preparation of coca leaves, including ecgonine, a salt, isomer, or derivative of ecgonine, or a salt of an isomer or derivative of ecgonine; or
- A salt, compound, derivative, or preparation of a substance identified in division (X)(1) or (2) of this section that is chemically equivalent to or identical with any of those substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves if the extractions do not contain cocaine or ecgonine.

¹⁹ The state’s original bill of particulars was admitted as “Exhibit A” for purposes of the record.

²⁰ Trial transcript, Day 1 pages 120-132.

²¹ Rentz’s lab report is attached to Gonzales’s November 5, 2013 motion in limine and was also admitted for purposes of the record as Exhibit 21.

See R.C. 2925.01(X).

No scientist. Other than Rentz, none of the state's witnesses submitted pretrial expert reports under Crim. R. 16(K) and none are lab technicians or scientists. Thus, the state had a major problem. Without Rentz, it could not prove two disputed issues at trial: (1) did Exhibit 13 actually contain "cocaine," and if so, (2) how much did the actual "cocaine" inside Exhibit 13 weigh?

Innuendo. To remedy its witness deficit, the state tried its case without Rentz through repeated suggestion that Exhibit 13 tested positive for cocaine at a "scientific crime lab." Indeed, the state's new plan was to have the jury somehow "infer" indirectly what was excluded directly:

[T]he jury can infer whatever they want from BCI and the fact that he testified he personally picked it up from BCI, BCI is a laboratory²²

Strategy shift. Additionally, the state sought to expand the scope of its bill of particulars to include any cocaine transaction anywhere in Wood County including an unindicted incident earlier in the day at a Meijer store parking lot in Northwood.²³ The state sought "to include the conduct of the defendant at the Meijers (sic) parking lot located on Curtice Rd., Northwood, Wood County Ohio"²⁴ even though Super 8 and Meijer are not within walking distance²⁵ and the alleged cocaine from Meijer (Exhibit 16) was not the alleged cocaine from Super 8 (Exhibit 13).²⁶

²² Trial transcript, Day 2, p. 83, lines 3-7.

²³ See "Motion to Amend Bill of Particulars," filed November 6, 2013; See also, Trial transcript, Day 1, p. 160.

²⁴ "Motion to Amend Bill of Particulars," filed November 6, 2013.

²⁵ Trial transcript, Day 1, p. 175, lines 4-11.

²⁶ Trial transcript, Day 2, p. 57, lines 10-25; p. 58, lines 18 through p. 59, lines 3.

Gonzales objected to this expansive strategy shift on several grounds, including due process, double jeopardy, and grand-jury presentment. Alternatively, he requested a limiting instruction that Gonzales was *not* charged with the Meijer incident even if it were admissible as other acts evidence under Rule 404(B). The trial court permitted the amendment, refused all limiting instructions, and ruled that the Meijer exchange could be used **for any purpose** that the prosecutor wanted.²⁷ This opened the door for the jury to consider guilt based upon the Meijer exchange alone.

Meijer. During that exchange, Gonzales met with a confidential informant working for the DEA, Saul Ramirez. This meeting took place at Meijer in Northwood.²⁸ Out of the back of Ramirez's trunk, Gonzales allegedly sampled²⁹ Exhibit 16, which the prosecutor had Ramirez identify (over objection) as a kilogram of 1,000 grams of cocaine.³⁰ Gonzales and Ramirez allegedly had a discussion about the purity of Exhibit 16 with appellant stating that it was poor quality and Ramirez insisting that it was approximately 90% pure.³¹ Ramirez testified at trial that cocaine is often mixed with other materials, and that he actually had no idea of the purity of Exhibit 16.³² The danger that a jury may convict on Meijer was obvious. Indeed, at least one

²⁷ Trial transcript, Day 2, p. 80, lines 15-17.

²⁸ Trial transcript, Day 1, p. 186, l. 16.

²⁹ *Id.*, p. 146-147.

³⁰ *Id.*, pages 156-157.

³¹ *Id.*, p. 146, line 24 thru p. 147, line 18.

³² *Id.*, p. 176, line 21 thru p. 177, line 12.

juror asked the judge to inquire of Ramirez, "Was it real cocaine that Mr. Gonzales tasted at Meijer's?"³³

We will never know if that juror voted to convict because the juror believed the testimony about the Meijer's "cocaine" but not the testimony about the Super 8 "cocaine."

Super 8. Eventually, Gonzales and Ramirez drove to Super 8, where undercover agents were waiting nearby. Inside a hotel room, policeman Luis Mungia delivered two fake bricks of cocaine Exhibits 3 and 4 to Gonzales's room.³⁴ BCI agent Mark Denomy testified that he created Exhibits 3 and 4 to appear as real cocaine:

We manufacture like that to resemble real kilos of cocaine, main reason being that things went bad, if we lost drugs, they're actually getting imitation cocaine rather than real cocaine.³⁵

Special Agent Mark Ellinwood assisted in packaging Exhibits 3 and 4.³⁶ Ellinwood fitted Exhibit 4 with a tracking device and placed Exhibit 13—the subject of Rentz's excluded testimony—inside a hollowed out compartment inside Exhibit 3.³⁷ The Exhibits were convincing because undercover officer Mungia himself believed the fake cocaine to be real.³⁸ After

³³ Trial transcript, Day 1, p. 202, lines 1-2.

³⁴ Trial transcript, Day 2, p. 14, lines 1-4.

³⁵ Trial transcript, Day 1, p. 185, lines 19-22.

³⁶ *Id.*, p. 196, lines 6-15. (The transcript at lines 7 and 13 contains typographical errors. Line 7 should read, "Let's start with 31" and line 13 should read "And 4?" Exhibit "14" has nothing to do with this line of questioning and Exhibit "13" was referenced at line 16, showing that reference to the exhibit above at line 7 was a typographical error.)

³⁷ Trial transcript, Day 1, p. 196, lines 24 thru p. 197, l. 15; Day 2, p. 48, lines 18-24; p. 59, lines 13-15.

³⁸ Trial transcript, Day 2, p. 16, lines 20-21. Similarly, on page 33 of the Day 2 testimony of BCI Agent Kip Lewton, he indicated that Exhibits 3, 4, and 16 all *appear* to be kilograms of cocaine.

Mungia's delivery, undercover agents raided the room and arrested Gonzales, leading to the trial below.

I. The trial court permitted so-called "lay" testimony to identify "cocaine."

Over objection, the trial court permitted the state to use trained DEA and BCI agents as supposed lay witnesses to opine as a substitute for Rentz's excluded scientific testimony that Exhibit 13 contained cocaine. Here is an example:

<p>Q: Are you assigned to a certain task force? A: Yes, I work out of the DEA task force. Q: How long have you been so employed as a police officer and how long have you been associated with the DEA task force? A: Been a police officer approximately twenty years. I've been associated with the DEA task force approximately fifteen years. Q: And working as a task force agent what is that you are regularly involved in? A: We're involved in investigating narcotics activity in the area and surveillance, building intelligence against people that are involved in narcotics. Q: <i>And with that involvement in narcotics have you had any specialized training in the identification or investigation of narcotic cases?</i> A: Yes. Mr. Mayle: Objection, he is a 702 witness. It's not appropriate. The Court: Objection's overruled, proceed. *** Q: Show you what I've marked as State's Exhibit 13, and again based upon your training and experience - - Mr. Mayle: Objection, 701 and 702, Your Honor. The Court: Noted and overruled. A: Sure, yeah, that appears to be cocaine to me.</p> <p>Trial transcript, Day 1, pages 183-189.</p>
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And here is an example involving the prosecutor asking "Special Agent" Mark Ellinwood of the Ohio Bureau of Criminal Investigation to identify a key exhibit as cocaine after Ellinwood laid out his employment with BCI for seventeen years, including fifteen years with Toledo DEA and his specialized training as a canine handler for cocaine investigations:

Q: And [exhibit] 13?
Mr. Mayle: **Objection, Your Honor. This is the same objection, 16(K), 701 and 702.**
The Court: Overruled.
Q: And 13?
A: Cocaine.

Trial transcript, Day 1, pages 193-196.

Day one of trial concluded with “Special Agent” Brendan Gillen of the DEA. He was not asked to opine upon the identity of Exhibit 13, but painstakingly listed his employment, training, and education, and experience, again implying that the state’s witnesses are all “experts.”³⁹

Day two brought more police testimony. The state called Luis Mungia, a police officer at Owens Community College, and asked him to identify “cocaine.” Over objection, Mungia was allowed to opine that the disputed substance was in fact cocaine,⁴⁰ even though under cross-examination he effectively conceded that he had no idea what he was talking about:

Q: [W]hen you testified this is cocaine you are just saying that someone else told you, is that correct?
A: Yes.
Q: You have no personal knowledge one way or the other, correct?
A: No, not for those two packages.⁴¹

The state next called BCI Agent Kip Lewton and went over his extensive training, education, and experience in drug-related investigations, which again highlights Gonzales’s argument that in order to positively identify powder cocaine, knowledge *beyond* what is common to laypersons is needed. Any potential contention that the police officers were not used as

³⁹ See Trial transcript, Day 1, pages 204-207.

⁴⁰ See Trial transcript, Day 2, p. 16 lines 6-21.

⁴¹ *Id.*, p. 18, line 21 thru p. 19, line 2.

experts at trial is untenable. Why else elicit so much testimony as to their individual training and experiences? It's equally untenable to suggest that a layperson can identify a substance as "cocaine" under R.C. 2925.01(X).

As mentioned above, the state's own witnesses explained that the DEA typically uses imitation cocaine in controlled transactions. Additionally, Mungia believed Exhibits 3 and 4 to be actual cocaine and Ramirez acknowledged that he could not possibly know the purity of Exhibit 16. This all highlights that identifying a white powdery substance as cocaine—let alone the weight of actual "cocaine" in the mixture—is not discernable absent scientific testing: even the excluded lab report recited that the material was an "unknown substance" prior to testing.

The state's last witness was Special Agent Mark Apple of BCI. Apple sat with the prosecutor throughout the trial and therefore knew that the state's lab report and testing had been excluded.⁴² Yet here is Apple's testimony:

Prosecutor: And it's a known substance, a control substance, that you are providing, is that correct?

Witness: That's correct.

Prosecutor: And in this case it was *known* to be cocaine?

Defense counsel: Objection, Your Honor, 16(K), 701, 702, speculation.

Court: We'll strike that question.

Prosecutor: Where did you obtain item number 13 from?

Witness: From the BCI laboratory in Bowling Green, Ohio.

Prosecutor: Okay, what is the BCI laboratory?

Witness: It's a crime lab that tests multiple different things, DNA, *drugs*.

(Defense Counsel requests side bar.)

Trial transcript, second day, pages 50-51.

The state repeatedly made overtures that the disputed mixture was tested by a lab:

⁴² Trial transcript, Day 1, p. 173, l. 5-13; *See also* Day 2, p. 67, lines 18-19. ("He's been sitting here. He knows the Court's order.")

Prosecutor Ms. Howe-Gebbers: When you indicate the lab in London, Ohio, what did the lab in London, Ohio do?

Witness: Yes, it's a crime lab. It's the main office for the attorney general's office of the State of Ohio's crime lab and they test a multitude of things at that location **including drugs**

Trial transcript, second day, page 63.

One juror asked Apple (over objection) how he knew the weight of Exhibit 13. Apple's response encapsulates the problem:

Answer: *"I know from a lab report that was conducted that it was 128..."*

o Trial transcript, day, page 67.

Defense counsel promptly objected, but the trial court refused to specifically instruct the jury to disregard the response or declare a mistrial. Over objection,⁴³ the trial court admitted Exhibits 13 (Super 8) and 16 (Meijer kilogram) into evidence for any purpose.

II. The court refused to instruct on the statutory definition of "cocaine."

The trial court refused appellant's request to instruct the jury under R.C. 2925.01(X).⁴⁴

III. The trial court permitted the state to enlarge its case.

As mentioned, after the court excluded Rentz, the state sought to expand the scope of this case to include the conduct of the defendant at the Meijers (sic) parking lot located on Curtice

⁴³ Trial transcript, Day 2, p. 72, lines 15-16.; p. 75, lines 17-21.

⁴⁴ See oDefendant's request for jury instruction of definition of cocaine under R.C. 2925.01(X), o filed November 6, 2013; See also, Trial transcript, Day 2, p. 83, lines 16-25 (requesting instruction); p. 96, line 23-24 (denying instruction).

Rd., Northwood, Wood County Ohio.⁴⁵ Gonzales could not have been indicted for both Super 8 and Meijer: this is a single-count indictment and the initial bill of particulars referenced Latcha Road only. Thus, when the Meijer incident was first introduced, defense counsel requested a limiting instruction:

Q: Where you at now when that conversation started?

A: At the Meijer's parking lot.

Q: Okay.

Mr. Mayle: Your Honor, I request a limiting instruction as this is not

Ms. Howe-Gebers: It says Wood County.

Mr. Mayle: No, no. There's a Bill of Particulars that can we approach?

The Court: Request is denied, sit down.⁴⁶

Later, appellant again objected to an enlarged bill of particulars, stating that it changed the nature and identity of the alleged offense and undercut his double-jeopardy and other constitutional rights. He again specifically asked for a cautionary instruction that he was not indicted for possession at Meijer.⁴⁷ The trial court refused this instruction and then ruled:

Court: What happened in the Meijer parking lot is admissible, is relevant, for whatever purpose Ms. Howe-Gebers wants to use it.⁴⁸

Because of the inherent danger of this ruling, Gonzales later moved for an "other acts" limiting instruction or alternatively, a dismissal of the indictment.⁴⁹ The trial court ruled by

⁴⁵ "Motion to Amend Bill of Particulars," filed November 6, 2013.

⁴⁶ Trial Transcript Day 1, p. 145, lines 13-22; *See also, Id.*, p. 156, lines 13-19.

⁴⁷ See Trial transcript Day 1, p. 145, lines 13-22 (request for limiting instruction as to Meijer parking lot); p. 156, lines 9-19 (objection to testimony of Saul Ramirez identifying a "kilo" of cocaine from Meijer parking lot; request for cautionary instruction when objection overruled); p. 160 lines 6 thru p. 161, line 9 (discussion regarding cautionary instruction); Day 2, p. 76 thru 81 (constitutional objections to and discussion of amendment to bill of particulars).

⁴⁸ Trial transcript Day 2, p. 80, lines 15-17.

stating, “Again, that motion is now overruled officially.”⁵⁰ This permitted the jurors to convict for Meijer, Super 8, or any combination or hybrid.

IV. The trial court refused to instruct the jury on weight and let the jury determine whether Gonzales possessed more than 100 grams of cocaine without any evidence as to whether Exhibits 13 or 16 contained at least 100 grams of actual cocaine.

“Cocaine” is commonly mixed with other substances,⁵¹ such as sugar or baking soda, which affects its purity. Thus, even if the state’s so-called “lay” witnesses could identify cocaine, they could not possibly determine the amount “of cocaine” within Exhibits 13 or 16 without sophisticated, scientific testing in a controlled lab environment. Nobody can. And here—apart from Special Agent Apple blurting the excluded lab report—the only testimony as to weight in this case was that (1) Apple supposedly weighed the entire mixture of Exhibit 13, including the bag containing it, and (2) Exhibit 16 supposedly weighed a kilogram. There is no evidence as to the weight of the *actual cocaine* involved.

⁴⁹ See “Defendant’s request for limiting instruction or alternative motion to dismiss for lack of due process,” filed on November 6, 2013.

⁵⁰ Trial transcript, Day 2, p. 81, lines 8-13.

⁵¹ Trial transcript, Day 2, p. 18, lines 7-13; Day 1, p. 176-177; Day 2, p. 32, l. 3-7.

Saul Ramirez conceded that he did not know the purity of Exhibit 16. And even Special Agent Apple finally conceded that he has no personal knowledge as to the overall contents of Exhibit 13 because he was not present when Exhibit 13 was created.⁵²

Accordingly, Gonzales requested the court to instruct that the jury that it cannot convict Gonzales for possessing more than 100 grams *of cocaine* unless the state proved the actual amount of cocaine involved.⁵³ The trial court denied this instruction on the erroneous rationale that the state need not prove that Gonzales possessed more than 100 grams of actual cocaine in order to convict on the enhancer. The trial court ruled that the state only had to prove that *any* amount of cocaine was present inside an overall mixture weighing at least 100 grams in total.⁵⁴ The jury convicted Gonzales of possession more than 100 grams of cocaine the substance defined in R.C. 2925.01(X).

CONCISE ARGUMENT IN SUPPORT OF GONZALES' PROPOSITIONS OF LAW

FIRST PROPOSITION. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury * * *.⁵⁵ This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury.⁵⁶ The federal constitution affords similar guarantees. Similarly, the Ohio and federal grand-jury presentment and due-process clauses

⁵² Trial transcript, Day 2, pages 60-62.

⁵³ Trial transcript, Day 2, p. 84-85; 94-96; Defendant's motion regarding weight of cocaine filed November 6, 2013.

⁵⁴ See Trial transcript, Day 2, p. 96, line 21 thru p. 97, line 20.

⁵⁵ Ohio Const. Art., I, Sec. 10.

⁵⁶ *Harris v. State*, 125 Ohio St. 257, 264, 181 N.E. 104, 106 (1932).

ensure that a defendant is not convicted of un-indicted conduct and is protected against successive prosecutions. The purpose of a bill of particulars and cautionary or limiting instructions is to *avoid* what happened below. A jury cannot be expected to privately wade through whether Gonzales was charged with the Meijer incident or not. We do not know^o and cannot know^o whether Gonzales was convicted for Meijer (Exhibit 16) or Super 8 (Exhibit 13) because the trial court (1) allowed the state to enlarge its bill of particulars to cover both and (2) admitted evidence as to both incidents for any purpose. We do know that both incidents were on the jurors's minds because they asked questions about the Meijer incident, including whether the Meijer cocaine *was real.*

This thwarts Gonzales's double-jeopardy protections under the Fifth Amendment and Ohio Constitution Article I, Section 10 and creates serious due process and grand-jury presentment problems:

[A] defendant must be tried on the same essential facts on which the grand jury found probable cause.

A variance of proof outside the parameters of the time stated in the indictment can constitute a separate offense. Unless a separate or supplemental indictment is obtained for this separate offense, a defendant is deprived of the process due in the guarantees embodied in Section 10, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution that an accused be tried only on evidence upon which a grand jury found probable cause.

State v. Nickel, 6th Dist. No. OT-O9-001, 2009-Ohio-5996, ¶39

The Sixth District's reasoning that Meijer was a *necessary predicate* to the meeting at Super 8 is mistaken. While the meeting at Meijer lead up to the meeting at Super 8, Gonzales allegedly possessed *different* cocaine during each incident and thus each incident is its own potential crime by extension of *Delfino*, *supra*. Thus, the enlarged bill of particulars *did* change

the identity of the crime charged⁵⁷ instead of one possession at issue, it became two. And it's impossible to determine whether the jury convicted for the possession of the "kilogram" at Meijer⁵⁸ which Gonzales actually sampled⁵⁹ or the substance at Super 8, which he did not sample. If anything, the case for conviction at Meijer was stronger than the Super 8 case. This defeats the double-jeopardy protections under the Fifth Amendment and Ohio Constitution Article I, Section 10 and creates serious due process and grand-jury presentment problems ultimately incentives prosecutorial abuses. The remedy is to vacate the conviction and discharge Gonzales, barring any further retrial.

SECOND PROPOSITION. "Lay" testimony is testimony that is used to help the jury understand a lay witness's observations and is based upon common human experience, e.g., "the car was speeding" or "he was slurring his speech and seemed impaired." The state's witnesses were *not* "lay" witnesses⁶⁰ they were used as experts in lay-witness clothing. Indeed, the state qualified its police officers based upon their training and experience.⁵⁷ The court characterized the fact that police officers aren't scientists as an issue of their credibility as to their opinions.⁵⁸ Not so. It is an issue of *admissibility*. Because the officers are not scientists like Rentz⁶¹ and because they never complied with Rule 16(K) and Rule 702⁶² the officers should not have been allowed to opine in this case in Rentz's place.

A. This court should follow *Llamas-Hernandez*, which the Sixth District found to be "analogous to the facts in the case sub judice."

The precise question of whether non-scientific testimony is competent to identify a powdery substance as "cocaine" has not been decided by this court. But the Supreme Court of North Carolina addressed this exact issue recently. And that court held that non-scientific

⁵⁷ Trial transcript, Day 1, p. 132, line 24 thru p. 133, line 7.

⁵⁸ Trial transcript, Day 1, p. 133, l. 1-2.

testimony is not competent to identify whether a white powdery substance is "cocaine" as defined by North Carolina law, which is almost identical to Ohio law. Scientific testing is required. *See North Carolina v. Llamas-Hernandez*, 673 S.E.2d 658 (2009).

Llamas-Hernandez should be followed here. Otherwise, an officer that is not competent to identify "cocaine" in North Carolina would be in Ohio. This makes no sense. At minimum, this court should hold that when witnesses express opinions based upon specialized training or experience and outside the common human experience, those opinions are subject to Evid. R. 702 and Crim. R. 16(K).

B. This court should clarify, limit, or overrule *State v. McKee*, 2001-Ohio-41.

While the Sixth District found *Llamas-Hernandez* analogous, it felt bound by this court's decision in *McKee*. *See* opinion below, ¶21. But *McKee* is easily distinguishable from this case. *McKee* was not a prosecution for direct possession of drugs. Rather, *McKee* involved a charge of corrupting a minor with marijuana after the minor had already ingested the underlying marijuana. Here, nobody ingested the alleged drugs— except for Gonzales **at Meijer**.

Further, the state's case largely rested upon trained officers, rather than the first-hand knowledge of a person who *actually used* the substance at issue, which was the thrust of the *McKee* holding. Next, this court actually determined that the testimony in *McKee* should have been excluded. Finally, the *McKee* court observed that "the identity of a controlled substance is beyond the common experience and knowledge of juries." That's true. And therefore, *McKee* should be clarified or limited to its facts, if not outright reversed on the *Galatis* test in favor a bright-line holding that in cocaine-possession cases, the law requires technical testimony subject to Evid. R. 702 and Crim. R. 16(K), which was adopted after *McKee*.

The remedy under this proposition is to vacate the entire conviction because it was not proven by sufficient, competent evidence.

THIRD PROPOSITION. Whether Gonzales actually possessed the cocaine as defined by R.C. 2925.01(X) is an essential element in every cocaine-possession prosecution arising under R.C. 2925.11(C). An instruction on the technical definition of cocaine was particularly important here since the state offered no scientific testimony. Without an instruction on the definition of cocaine, a jury is missing the definition of an essential element and therefore has no ability to apply the law to the facts of the case, which is the whole purpose of jury instructions. Compounding the problem is that without the *legal definition* of cocaine, the jury has no basis to determine whether the defendant *in fact* possessed cocaine as opposed to some other substance, such as synthetic cocaine or controlled-substance analogue.

Further, the Sixth District's rationale that the definition of cocaine is not relevant to the issue of the amount or weight of cocaine is untenable because the penalty enhancer depends entirely upon the weight of actual cocaine possessed. Without knowing the definition of cocaine, it is impossible for jurors to determine the issue of the amount of cocaine at issue. The remedy under this proposition is to affirm the Sixth District's vacation of the enhancer because it was not proven and to remand the case for a new trial on the basic charge of cocaine possession.

CONCLUSION

This court should decline jurisdiction of the state's jurisdiction appeal (and the certified conflict) and accept jurisdiction of Gonzales's propositions of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2015, a true and accurate copy of the foregoing was sent by Regular U.S. Mail to the following:

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