Supreme Court of Ohio Clerk of Court - Filed October 02, 2015 - Case No. 2015-0384

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2015-0384; 2015-0385
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Wood County
v.	:	Court of Appeals,
	:	Sixth Appellate District
RAFAEL GONZALES,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. WD-13-086
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO

PAUL A. DOBSON (0064126)
Wood County Prosecutor
GWEN K. HOWE-GEBERS (0041521)
DAVID T. HAROLD* (0072338)
Assistant Prosecutors
**Counsel of Record*
One Courthouse Square, Annex
Bowling Green, Ohio 43402
419-354-9250
419-353-2904 fax
dharold@co.wood.oh.us

Counsel for Appellant
State of Ohio

ANDREW R. MAYLE* (0075622)
**Counsel of Record*
JEREMIAH S. RAY (0074655)
RONALD J. MAYLE (0030820)
Mayle Ray & Mayle LLC
210 South Front Street
Fremont, Ohio 43420
419-334-8377
419-355-9698 fax
amayle@mayleraymayle.com

Counsel for Appellee
Rafael Gonzales

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
HANNAH C. WILSON (0093100)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF AMICUS INTEREST 2

STATEMENT OF CASE AND FACTS 3

A. A jury convicted Gonzales of possession of cocaine, and the trial court sentenced him as a major drug offender under R.C. 2925.11(C)(4)(f) 3

B. The Sixth District upheld Gonzales's conviction but reversed his penalty enhancement because it believed the State was required to prove the weight of the pure cocaine, exclusive of filler materials, in Gonzales's possession. 4

ARGUMENT 5

***Amicus Curiae*'s Proposition of Law:**

In a prosecution under R.C. 2925.11(C)(4), the State is not required to prove that the weight of cocaine, exclusive of filler materials, meets the statutory threshold. The offense levels in R.C. 2925.11(C)(4)(b)-(f) are determined by weighing the total compound, mixture, preparation, or substance containing cocaine. 5

A. Ohio's drug-possession statute imposes penalties based on the quantity of "the drug involved" in the violation, and in cocaine cases the quantity is determined by weighing the entire mixture or substance that contains cocaine. 6

1. The text of R.C. 2925.11(C)(4) provides that "a compound, mixture, preparation, or substance containing cocaine" may be the unit used to measure "the amount of the drug involved." 6

2. Ohio's policy in controlled substance cases is to impose sentences based on weight, not purity. 8

3. The history of Ohio's cocaine laws confirms the State's policy with respect to cocaine. 10

4. Ohio's appellate courts have consistently rejected arguments for purity testing, and this Court's own cases confirm that those decisions are correct. 14

B. The Sixth District's Opinion ignores the history and context of Ohio's cocaine laws. 17

C. Sixth District's decision will have negative practical consequences for Ohio's law enforcement agencies and, by extension, public safety. 19

1. BCI currently performs a qualitative analysis in cocaine cases, which can be completed in roughly one hour. 20

2. Compliance with the Sixth District's decision will require BCI to develop methods for quantitative analysis, a process that will require significant investments of time and money. 21

3. If BCI is required to test the purity of a substance containing cocaine, the processing time for a typical cocaine assignment will jump from one hour to at least two days. 23

4. A purity test requirement will slow the wheels of justice and result in public safety risks. 24

CONCLUSION 25

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Dodd v. Croskey,
143 Ohio St. 3d. 293, 2015-Ohio-2362.....6, 8

Garr v. Warden,
126 Ohio St. 3d 334, 2010-Ohio-2449.....15, 16, 17

In re Bruce S.,
134 Ohio St. 3d 477, 2012-Ohio-5696.....14, 19

State v. Barker,
1992 WL 15159 (2d Dist. 1992).....11

State v. Black,
142 Ohio St. 3d 332, 2015-Ohio-513.....10, 17

State v. Brown,
107 Ohio App. 3d 194 (3d Dist. 1995).....11, 14

State v. Chandler,
109 Ohio St. 3d 223, 2006-Ohio-2285.....12, 15, 16

State v. Chandler,
2004-Ohio-3436 (5th Dist.)..... *passim*

State v. Combs,
1991 WL 214208 (2d Dist. 1991).....11

State v. Fuller,
1997 WL 598404 (1st Dist. 1997).....11, 14

State v. Limoli,
140 Ohio St. 3d 188, 2014-Ohio-3072.....13

State v. Morris,
1995 WL 571998 (8th Dist. 1995).....11, 14

State v. Neal,
1990 WL 88804 (3d Dist. 1990).....11, 14

State v. Remy,
2004-Ohio-3630 (4th Dist.).....12, 14, 19

State v. Roberts,
134 Ohio St. 3d 459, 2012-Ohio-5684.....17

State v. Smith,
2011-Ohio-2568 ..... *passim*

State v. White,
132 Ohio St. 3d 344, 2012-Ohio-2583 8

State v. White,
142 Ohio St. 3d 277, 2015-Ohio-492 18

State v. Wilkerson,
2008-Ohio-4750 (2d Dist.) 11, 12

Statutes, Rules, and Constitutional Provisions

1996 Ohio Laws File 185, R.C. 2925.11(C)(4)(f) (1996) 12

R.C. 1.47(C) 19

R.C. 1.47(D) 1, 19

R.C. 1.49(A) 17

R.C. 1.49(C) 17

R.C. 1.49(E) 17

R.C. 2901.04(A) 8

R.C. 2925.01 ..... 18, 19

R.C. 2925.01(X) 17, 18, 19

R.C. 2925.01(AA) 18

R.C. 2925.01(E) (1993) 11

R.C. 2925.01(E)(1) (1993) 11

R.C. 2925.01(Y) 18

R.C. 2925.01(Z) 18

R.C. 2925.03 16

R.C. 2925.03(A)(4) 10

R.C. 2925.03(C)(4) (1994) 11

R.C. 2925.03(C)(4)(g) 15, 16

R.C. 2925.11 ..... *passim*

R.C. 2925.11(A) 3, 6

R.C. 2925.11(C) 17

R.C. 2925.11(C)(3)-(7) (1996) 12

R.C. 2925.11(C)(4) ..... *passim*

R.C. 2925.11(C)(4)(a) 6, 8

R.C. 2925.11(C)(4)(a)-(f) 5, 6, 19

R.C. 2925.11(C)(4)(b) 8

R.C. 2925.11(C)(4)(b)-(f) ..... *passim*

R.C. 2925.11(C)(4)(b)-(f) (1996) 12

R.C. 2925.11(C)(4)(f) ..... *passim*

R.C. 2925.11(C)(5)(b) 18

R.C. 2925.11(C)(6)(b) 18

R.C. 2929.01 3

R.C. 2929.01(W) 8

R.C. 2941.1410 8

R.C. 3719.41 ..... 18, 19

Other Authorities

2011 Am. Sub. H.B. 86 (129th G.A.) 13

Exec. Office of the President, Office of Nat'l Drug Control Policy, *The Price and Purity of Illicit Drugs: 1981 Through the Second Quarter of 2003* (Nov. 2004) 9, 10

Nat'l Drug Intelligence Ctr., New York Drug Threat Assessment: Cocaine (Nov. 2002) 10

Nat'l Drug Intelligence Ctr., Texas Drug Threat Assessment: Cocaine (Oct. 2003) 10

Nat'l Forensic Science Tech. Ctr., *A Simplified Guide to Forensic Drug Chemistry* 20, 21

Ohio Attorney General Mike DeWine, Bureau of Criminal Investigations, Laboratory Division 2, 20

Ohio Criminal Sentencing Comm'n, *A Plan for Felony Sentencing in Ohio* (July 1, 1993) 12

U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* (2007) 4

INTRODUCTION

Ohio law punishes drug possession based on the amount of the drug involved in a violation. Illegal drugs often vary in purity. For example, powder cocaine, as purchased in the United States, is rarely pure cocaine hydrochloride. It is often cut or diluted with substances such as corn starch, sugar, or even other drugs. For decades, where the State has proved that the substance possessed by the defendant contained cocaine, Ohio courts have imposed penalties based on the substance's aggregate weight without regard to its purity.

Until now. In the decision below, the Sixth District upheld Rafael Gonzales's convictions for purchasing $58,000 of cocaine, but reversed his penalty and remanded his case for re-sentencing as merely a fifth-degree felony. It did so because the State had not proved the weight of the *pure* cocaine in Gonzales's possession. The State had instead, like so many times before, proved the weight of the total substance, and that the substance contained cocaine.

The decision below is divorced from the context and history of Ohio's cocaine sentencing laws. When interpreting a statute, this Court seeks to carry out the intent of the General Assembly. In doing so, the Court often considers the statute's history and presumes that the General Assembly intended a result that is capable of feasible execution. *See* R.C. 1.47(D). The Sixth District's interpretation creates an outcome that is not. The consequences of the decision below are so at odds with the State's capabilities and the General Assembly's broader policy choices that they could not have been intended.

The Attorney General is not aware of any non-federal public crime laboratories in Ohio that are capable of determining the purity of a substance containing cocaine. The Bureau of Criminal Investigations (BCI) does not perform this analysis, and it will be burdensome for it to acquire the equipment and methods to do so. If the Sixth District's opinion becomes the law of Ohio, it will be at least eighteen months before BCI could even issue an accredited report

attesting to the purity of cocaine substances. This delay will torpedo current and future cocaine cases, including an August 2015 statewide operation that seized millions of dollars' worth of controlled substances. It will also be a stick in the spokes of Ohio's efforts to defeat the heroin crisis currently raging across the state.

Therefore, the Court should answer the certified question "no," and should reverse the Sixth District.

STATEMENT OF AMICUS INTEREST

The Attorney General's interest in this case is two-fold.

As Ohio's chief law officer, the Attorney General is concerned with ensuring that Ohio's drug-offense statutes are correctly interpreted and enforced. The decision below makes it nearly impossible, as a practical matter, for a defendant charged with possessing cocaine to be sentenced for anything other than a felony in the fifth degree. These consequences are inconsistent with the General Assembly's policy choices.

The Attorney General also takes interest in this case because the Sixth District's opinion will affect BCI, the State's official crime laboratory. BCI's Laboratory Division—which includes laboratories in London, Richfield, and Bowling Green—assists state, local, and federal law enforcement by processing over 220,000 pieces of evidence a year. *See* Ohio Attorney General Mike DeWine, Bureau of Criminal Investigations, Laboratory Division, *available at* http://tinyurl.com/pjq7n94. In 2014, this included the completion of 20,000 chemistry assignments at BCI's London campus alone—5,000 of which involved cocaine.

The decision below will affect BCI in ways that the Sixth District did not anticipate and that the General Assembly did not intend. BCI, though proficient at identifying cocaine through *qualitative* analysis, currently lacks the methods necessary to perform the *quantitative* analysis required to determine the purity of a substance containing cocaine. Indeed, BCI is not even

accredited to perform this type of work. Becoming an accredited laboratory in this field will require an enormous investment of time and money. Once this capacity is achieved, integrating this analysis into cocaine cases will slow BCI's work in all controlled-substance cases—cocaine and otherwise—at great cost and with little benefit.

STATEMENT OF CASE AND FACTS

A. A jury convicted Gonzales of possession of cocaine, and the trial court sentenced him as a major drug offender under R.C. 2925.11(C)(4)(f).

In July 2012, Gonzales purchased cocaine from a confidential informant for $58,000. *See State v. Gonzales*, 2015-Ohio-461 ¶ 2 (6th Dist.) ("App. Op."). After arranging the purchase in a recorded telephone conversation, Gonzales met the informant at a Wood County Meijer parking lot to inspect the drugs, which were packaged into two, one-kilogram bricks. *Id.* The two met again later the same day, this time at a Super 8 motel along I-280, to complete the transaction. *Id.* ¶ 3. Both kilograms that Gonzales purchased were imitation cocaine, but one brick held a baggie containing 139 grams of a substance that contained genuine cocaine. *Id.* (During controlled purchases, the State uses the least amount of genuine cocaine possible to minimize the risk of losing large quantities of cocaine, should things go awry.) Gonzales took possession of the two bricks and left the hotel. *Id.* He was then arrested, and the drugs were seized. *Id.* ¶ 4.

Gonzales was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(4)(f). *Id.* ¶ 5. The indictment alleged that the amount of cocaine equaled or exceeded 100 grams, and accordingly contained a major-drug-offender specification under R.C. 2929.01. *Id.* At trial, the State submitted evidence that the substance in the baggie (that had been hidden in one of the bricks) contained cocaine. *Id.* ¶ 6. (To be clear, the evidence did *not* concern the imitation cocaine in the two bricks; it related only to the substance in the baggie.) The jury found Gonzales guilty of possession of cocaine, and

specifically found that Gonzales had possessed an amount that equaled or exceeded 100 grams. *Id.* ¶ 7. The trial court sentenced Gonzales to 11 years in prison and imposed a $15,000 fine. *Id.*

B. The Sixth District upheld Gonzales's conviction but reversed his penalty enhancement because it believed the State was required to prove the weight of the pure cocaine, exclusive of filler materials, in Gonzales's possession.

Gonzales appealed his sentence to the Sixth District Court of Appeals, making five assignments of error. *Id.* ¶ 8. The appellate court rejected four of Gonzales's assignments, those relating to: the State's drug identification testimony, *see id.* ¶¶ 9-32, the trial court's jury instructions, *see id.* ¶¶ 33-37, and the State's amendment of its bill of particulars, *see id.* ¶¶ 49-56. The remaining issue was whether "the trial court erred by allowing the jury to consider the entire weight of [the seized cocaine] in determining whether [Gonzales] possessed 100 or more grams of cocaine." *Id.* ¶ 38.

Gonzales argued that the language of R.C. 2925.11(C)(4)(f) required the State to prove the weight of pure cocaine in his possession, and not the aggregate weight of the cocaine *and* the fillers. *Id.* ¶ 40. Cocaine hydrochloride (powder cocaine) is often mixed with substances such as baking soda, sugars, corn starch, or even other drugs to increase its volume. *See* U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 62 (2007), *available at* http://tinyurl.com/ntg8zgx. "These alterations can cause the purity level of powder cocaine to vary considerably." *Id.* Because the State had proved only that the substance in Gonzales's possession *contained* cocaine (as opposed to precisely *how much* of the substance *was* cocaine, and not filler), Gonzales argued that he was ineligible for the enhanced penalties outlined in Subsection (C)(4)(f). App. Op. ¶ 40.

Looking at the statutes defining cocaine and outlining drug possession offenses, the Sixth District agreed. *Id.* ¶¶ 40-48. The court reversed Gonzales's penalty enhancements and remanded the case to the trial court for resentencing. *Id.* ¶ 57. It recognized, however, that its

decision conflicted with the decision of the Second District Court of Appeals in *State v. Smith*, 2011-Ohio-2568. That court had held that "the State was not required to prove that [the defendant] possessed or trafficked pure cocaine equal to or exceeding the statutory amount. Rather, . . . it was enough that the substance . . . tested, as a whole, satisfied the weight requirement." *Smith*, 2011-Ohio-2568 ¶¶ 14-15. The Sixth District *sua sponte* certified a conflict to this Court for resolution. App. Op. ¶ 58.

The State filed a discretionary appeal from the Second District's decision concerning the penalty enhancement, and Gonzales filed a cross-appeal raising three different issues related to his conviction. This Court declined to review Gonzales' cross-appeal, but agreed to hear the State's appeal and also to resolve the following certified question:

> Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture?

See 07/08/2015 Case Announcements, 2015-Ohio-2747, Case No. 2015-0384 (accepting conflict) and Case No. 2015-0385 (granting discretionary review).

ARGUMENT

***Amicus Curiae*'s Proposition of Law:**

> *In a prosecution under R.C. 2925.11(C)(4), the State is not required to prove that the weight of cocaine, exclusive of filler materials, meets the statutory threshold. The offense levels in R.C. 2925.11(C)(4)(b)-(f) are determined by weighing the total compound, mixture, preparation, or substance containing cocaine.*

The answer to the certified question is "no." Ohio's drug laws impose penalties based on the aggregate weight or dosage of the drug involved. The decision below broke with decades of precedent to impose a purity-testing requirement in cocaine cases. The Sixth District's narrow interpretation of Ohio's drug-possession statute ignores context and history, and the consequences further illustrate why it is wrong. For one thing, the State's own crime

laboratory—like apparently all other state laboratories in Ohio—lacks validated methods for performing the purity tests the Sixth District has now required in every cocaine prosecution. This means that, under the Sixth District's view, the State presently lacks the ability to convict a cocaine defendant of anything greater than a fifth-degree felony (the only offense level that requires no proof of weight). Alongside the statutory text and purpose, these consequences indicate that the Sixth District's holding is mistaken.

A. Ohio's drug-possession statute imposes penalties based on the quantity of "the drug involved" in the violation, and in cocaine cases the quantity is determined by weighing the entire mixture or substance that contains cocaine.

Ohio imposes penalties for cocaine offenses based on the weight of the substance containing cocaine, and not its purity. The text, purpose, and history of Ohio's cocaine possession statute support this view, as do nearly thirty years of precedent.

1. The text of R.C. 2925.11(C)(4) provides that "a compound, mixture, preparation, or substance containing cocaine" may be the unit used to measure "the amount of the drug involved."

The Court should begin with the text. "To determine the legislative intent, we look to the language of the statute and the purpose to be accomplished by the statute." *Dodd v. Croskey*, 143 Ohio St. 3d. 293, 2015-Ohio-2362 ¶ 24. It is a violation of Ohio law to knowingly possess a controlled substance. R.C. 2925.11(A). Where "the drug involved . . . is cocaine or a compound, mixture, preparation, or substance containing cocaine," the defendant "is guilty of possession of cocaine." R.C. 2925.11(C)(4). The penalties for possession of cocaine are set forth in R.C. 2925.11(C)(4)(a) through (f). They increase in severity as "the amount of the drug involved" increases. *See* R.C. 2925.11(C)(4)(b)-(f). Without any proof of weight, for example, possession of cocaine is a fifth-degree felony. *See* R.C. 2925.11(C)(4)(a). And, as here,

> *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.

R.C. 2925.11(C)(4)(f) (emphasis added).

The question here is whether "the amount of the drug involved" is measured by weighing the entire substance that was seized, or only the pure cocaine in that substance. The statute specifies that a violation of R.C. 2925.11 constitutes possession of cocaine when "the drug involved" is either (a) "cocaine" as defined in Chapter 2925, or (b) "a compound, mixture, preparation, or substance containing cocaine." R.C. 2925.11(C)(4). Put differently, "the drug involved" can be *either* cocaine *or* a substance that contains cocaine and filler materials.

In R.C. 2925.11(C)(4)(b)-(f), the term "amount" quantifies "the drug involved." Because "the drug involved" can be *either* cocaine *or* a substance containing cocaine, it follows that the amounts listed in Subsections (b) through (f) can be determined by weighing *either* pure cocaine *or* a substance containing cocaine, as the facts of a particular case require. This is true if "the drug involved" is pure powder cocaine, powder cocaine that is cut with other substances, or crack cocaine.

This point is confirmed by examining R.C. 2925.11(C)(4) as a whole. As the Second District recognized in *State v. Smith*, the statute does not distinguish between pure cocaine and diluted cocaine. *See* 2011-Ohio-2568 ¶ 16 (2d Dist.). "Under the statutory scheme, then, possessing or selling 'cocaine' is the same as possessing or selling a substance containing cocaine. There is no meaningful difference between the two." *Id*. A person who happens to buy relatively pure cocaine is no more or less guilty than a person who happens to buy cocaine that has been cut with filler materials.

2. Ohio's policy in controlled substance cases is to impose sentences based on weight, not purity.

Sentencing a cocaine offender based on the weight of the entire substance containing cocaine is consistent with the purpose of Ohio's drug-offense laws. Ohio's drug-offense statutes impose penalties based on the quantity of the drug involved in the violation; sentences increase as the "amount of the drug involved" increases. When interpreting R.C. 2925.11, it is proper for the Court to consider the General Assembly's purpose in crafting Ohio's drug laws. *See Dodd*, 2015-Ohio-2362 ¶ 24. "While [the Court] must be mindful that, although criminal statutes are strictly construed against the state, R.C. 2901.04(A), they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent." *State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583 ¶ 20. The Sixth District's narrow interpretation makes it practically impossible to sentence a defendant guilty of possession of cocaine with anything more than a fifth-degree felony. *See* R.C. 2925.11(C)(4)(a) (without proof of amount, "possession of cocaine is a felony of the fifth degree"). Sentencing an offender like Gonzales to a year in prison for purchasing $58,000 of cocaine is plainly at odds with the statute's purpose.

The decision below ignores the General Assembly's intention to impose greater penalties on defendants who possess larger quantities of drugs. Ohio's drug-possession offenses and penalties are outlined in R.C. 2925.11. The penalties for violating this statute vary based on the type of drug involved, and increase in severity as the quantity of the drug involved increases. *Compare* R.C. 2925.11(C)(4)(b) (fourth-degree felony for possession of five to ten grams of cocaine) *with* R.C. 2925.11(C)(4)(f) (first-degree felony for possession of one hundred or more grams of cocaine). This structure recognizes that drugs in greater quantities will be consumed by larger numbers of users, thus posing a greater threat to Ohio's communities. Ohio's Major Drug Offender Specification similarly reinforces this policy. *See* R.C. 2929.01(W); R.C. 2941.1410

(A person is a major drug offender if he possesses, sells, or offers to sell "any drug, compound, mixture, preparation, or substance that consists of or contains" minimum quantities of certain controlled substances.).

The statutory structure of the drug laws ensures adequate punishment for individuals, such as street or mid-level dealers, who possess cocaine in large (yet perhaps relatively less pure) quantities because they are essential links in the drug-distribution chain. An offender in possession of a large quantity of cocaine is an offender who can sell cocaine to a large number of users. This is true regardless of the purity of the cocaine. A distributor who possesses a warehouse of cocaine that has been diluted to 50 percent purity should not be punished for only half of the marketable substance in his possession.

By contrast, it makes little sense to penalize cocaine offenders based on the purity of the drug involved, particularly where there is no clear intention to do so. For one thing, purity is an odd metric for allotting punishment. Drugs like cocaine "are what economists refer to as 'experience goods'; purchasers often cannot readily assay the quality of the drug until it is consumed, which generally occurs after a price is negotiated and the deal is completed." Exec. Office of the President, Office of Nat'l Drug Control Policy, *The Price and Purity of Illicit Drugs: 1981 Through the Second Quarter of 2003* 4 (Nov. 2004), *available at* http://tinyurl.com/odcrs9x. Quantity, on the other hand, is almost always a known. In light of the purposes of felony sentencing, it is logical to impose a penalty based on what the defendant at least *thought* he possessed or had purchased, even if it later turns out to be less than pure.

Furthermore, drug purity is generally driven by market forces, geographic location, or the honesty of a particular trafficker—factors beyond the control of the average dealer or user. *See id*. at v, 3. "[A]t any given place and time, a wide range of prices and purities can be observed

for a particular drug." *Id.* at v. A purity-based penalty scheme would result in inconsistencies in punishment from year to year as trends change. *See id.* at 8 (discussing long-term purity trends for powder cocaine). Inconsistencies could also occur within a given year, as an offender's good or bad luck would have it. *See* Nat'l Drug Intelligence Ctr., Texas Drug Threat Assessment: Cocaine (Oct. 2003), *available at* http://tinyurl.com/qyyqu4p (noting that "[p]urity levels of powdered cocaine in Texas ranged from 70 to 90 percent in FY2002, while purity levels of crack ranged from 35 to 84 percent"); Nat'l Drug Intelligence Ctr., New York Drug Threat Assessment: Cocaine (Nov. 2002), *available at* http://tinyurl.com/nw5gnmo ("Purity levels for powdered cocaine average 75 percent, ranging from a low of 20 percent in the Buffalo area to a high of 90 percent in New York City."). Measuring the total weight of the drug involved avoids these problems.

3. The history of Ohio's cocaine laws confirms the State's policy with respect to cocaine.

The legislative history is relevant to discerning the General Assembly's intent concerning cocaine penalties. *See State v. Black*, 142 Ohio St. 3d 332, 2015-Ohio-513 ¶ 38. The text of R.C. 2925.11(C)(4) is informed by its history, which largely turns on the General Assembly's policy choices about the treatment of crack cocaine. As the State has argued, the Court should consider three relevant periods: pre-1995, 1995 to 2011, and 2011 to the present. This context shows that the legislature has never intended to penalize cocaine offenders based on the purity of the drug in question.

Before 1995. Prior to 1995, even the Sixth District agrees that the penalties for cocaine offenses were based on the weight of the entire substance containing cocaine. *See* App. Op. ¶ 46. The Revised Code criminalized the possession and sale of controlled substances, and assigned penalties based on the amount of the controlled substance involved. *See, e.g.*, R.C.

2925.03(A)(4), (C)(4) (1994) (making it a crime to "[p]ossess a controlled substance in an amount equal to or exceeding the bulk amount," and specifying that such a violation is a third-degree felony). For many controlled substances, including cocaine, the relevant amounts were set forth in the provisions defining the "bulk amount." *See* R.C. 2925.01(E) (1993). In cocaine cases, the bulk amount was defined as "[a]n amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance that contains any amount of . . . cocaine." R.C. 2925.01(E)(1) (1993).

During this period, Ohio courts did not interpret these statutes to require purity testing. *See, e.g.*, *State v. Fuller*, 1997 WL 598404 (1st Dist. 1997); *State v. Morris*, 1995 WL 571998 (8th Dist. 1995); *State v. Brown*, 107 Ohio App. 3d 194 (3d Dist. 1995); *State v. Barker*, 1992 WL 15159 (2d Dist. 1992); *State v. Combs*, 1991 WL 214208 (2d Dist. 1991); *State v. Neal*, 1990 WL 88804 (3d Dist. 1990). Instead, they held that "the content or purity of cocaine is immaterial so long as there is any amount of cocaine in the compound or substance." *See, e.g.*, *Neal*, 1990 WL 88804 at *2.

1995 to 2011. The General Assembly enacted a new framework for felony sentencing in 1995's landmark S.B. 2. *See generally State v. Wilkerson*, 2008-Ohio-4750 (2d Dist.) (discussing S.B. 2 and the "origin of Ohio's crack/powder disparity"). This bill, along with S.B. 269 in 1996, also changed the Revised Code's treatment of cocaine offenses. These amendments did not signal any intention to shift away from a volume-based penalty scheme and toward a purity-based scheme. Tellingly, courts during this period continued to sentence cocaine offenders based on the aggregate weight of the substance containing cocaine. *See, e.g.*, *Smith*, 2011-Ohio-2568.

S.B. 2's changes included removing reference to cocaine, marijuana, LSD, heroin, and hashish in the definition of "bulk amount." For those drugs, the General Assembly enacted drug-specific penalty schemes. *See* R.C. 2925.11(C)(3)-(7) (1996). The penalties were tied to quantity—that is, "the amount of the drug involved" in each offense—whether described by weight (marijuana, cocaine, heroin, hashish) or dose (LSD). *See id*.

If "the drug involved" was "cocaine or a compound, mixture, preparation, or substance containing cocaine," the offense was possession of cocaine. *See* R.C. 2925.11(C)(4) (1996). Like other controlled substances, the penalties for possession of cocaine were based on "the amount of the drug involved." *See* R.C. 2925.11(C)(4)(b)-(f) (1996). Unlike other drugs, however, the penalties for possession of cocaine *differed* depending on whether the drug involved was powder cocaine or crack cocaine. *See* 1996 Ohio Laws File 185, R.C. 2925.11(C)(4)(f) (1996) ("If the amount of the drug involved exceeds one thousand grams *of cocaine that is not crack cocaine* or exceeds one hundred grams *of crack cocaine*, possession of cocaine is a felony of the first degree." (Emphases added.)). This reflected the General Assembly's then-policy of treating crack cocaine more severely than powder cocaine. *See Wilkerson*, 2008-Ohio-4750 ¶¶ 13, 27; *see also* Ohio Criminal Sentencing Comm'n, *A Plan for Felony Sentencing in Ohio* 40 (July 1, 1993), *available at* http://tinyurl.com/o2mdm2s ("For criminal sentencing purposes, powder cocaine and crack cocaine are different drugs.").

During the period of 1995 to 2011, Ohio courts continued to impose penalties for cocaine offenses based on the weight of the total substance containing cocaine. *See Smith*, 2011-Ohio-2568; *State v. Remy*, 2004-Ohio-3630 (4th Dist.); *cf. State v. Chandler*, 2004-Ohio-3436 (5th Dist.) (citing cases imposing penalties based on aggregate weight with approval), *aff'd* 109 Ohio St. 3d 223 (2006).

2011 to present. With the passage of H.B. 86 in 2011, the General Assembly ended the disparate treatment of crack and powder cocaine. 2011 Am. Sub. H.B. 86 (129th G.A.), preamble, *available at* http://tinyurl.com/ocg3wpy; *see also State v. Limoli*, 140 Ohio St. 3d 188, 2014-Ohio-3072 ¶ 3 (noting that "one of the purposes of H.B. 86 was to 'eliminate the difference in criminal penalties for crack cocaine and powder cocaine'"). The statutory provisions setting forth cocaine penalties were amended to include a single range applicable to cocaine in any form. A typical amendment follows, with deletions shown in strikethrough and additions in bold, shaded text:

> (f) If the amount of the drug involved equals or exceeds one ~~thousand~~ **hundred** grams of cocaine ~~that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine~~, possession of cocaine is a felony of the first degree. [R.C. 2925.11(C)(4)(f) (2011).]

H.B. 86 also excised the definition of crack cocaine from the Revised Code. These changes simply moved from a regime where the "drug involved" was classified as either "crack cocaine" or "not crack cocaine," to one where all cocaine was treated uniformly. These amendments demonstrate the legislature's intent to ensure that each cocaine offense level carried one penalty that applied to specified amounts "of cocaine."

The phrase "of cocaine" in R.C. 2925.11(C)(4)(b)-(f) does not signify a shift to purity-based penalties in cocaine cases. The overall history shows that Ohio's drug laws have been amended on various occasions between 1995 and the present to reflect the General Assembly's policy choices. They indicate the General Assembly's purpose of treating crack cocaine one way, and then another way. But these amendments did *not* alter the manner in which "the amount of the drug involved" is measured. The Attorney General is not aware of anything in the legislative history (in 1995 or 2011) that indicates the General Assembly's intention to depart from the normal approach to drug sentencing in cocaine cases. Given the significance of such a

step, it is reasonable for this Court to conclude that the General Assembly did not intend for an offender's penalty to turn on the purity of the drug involved.

4. Ohio's appellate courts have consistently rejected arguments for purity testing, and this Court's own cases confirm that those decisions are correct.

Ohio's drug trafficking and possession statutes have been in force—albeit in various forms—for over three decades. Apart from the decision below, Gonzales has not cited any Ohio decision interpreting them to require purity testing of cocaine. That is because Ohio's appellate courts have repeatedly held that the penalty in a cocaine trafficking or possession case is based on the total weight of the substance containing cocaine. This consistent (and correct) interpretation has never drawn a rebuke from the General Assembly. This Court presumes that the General Assembly is aware of courts' interpretations of existing statutes when it enacts an amendment. *In re Bruce S.*, 134 Ohio St. 3d 477, 2012-Ohio-5696 ¶ 11. Indeed, the Court will "presume that if the General Assembly disagreed with the rule set forth in [these cases], it would have responded to [them] at some point in the past thirty years." *Id*.

The decisions rejecting purity-testing arguments span several decades and several amendments to Ohio's drug-offense statutes, and consistently apply the General Assembly's policy of imposing penalties based on total weight, not purity. *See Neal*, 1990 WL 88804 at *2 ("[T]he content or purity of cocaine is immaterial so long as there is any amount of cocaine in the compound or substance."); *Morris*, 1995 WL 571998 at *2 ("The state, therefore, is not required to demonstrate the purity of the mixture."); *Brown*, 107 Ohio App. 3d 194, 201-203; *Fuller*, 1997 WL 598404; *Remy*, 2004-Ohio-3630 ¶¶ 48-53 ("[P]ursuant to R.C. 2925.11 . . . the amount of baking soda or other substances mixed with the cocaine is immaterial."); *cf. Chandler*, 2004-Ohio-3436 ¶ 65(citing *Neal* and *Brown* with approval). This is not to mention the scores of cases imposing penalties based on the aggregate weight of the substance containing cocaine.

As recently as 2011, the Second District held that the penalty in a trafficking or possession case is based on the weight of the entire substance containing cocaine. *See Smith*, 2011-Ohio-2568 ¶¶ 12, 15-16. In *Smith*, the defendant had been convicted of trafficking and possessing cocaine. *Id.* ¶ 4. A forensic chemist had tested .01 gram samples of the substances in question; the tests confirmed that each contained cocaine. *Id.* The analyst did not, however, test the substances for purity, and consequently "did not determine what percentage of each sample was cocaine and what percentage was a filler." *Id.* The defendant appealed, arguing "that the State was required to prove what portion of each substance was a drug and to weigh only that portion of the entire substance" when determining his offense level. *Id.* ¶ 7.

The Second District rejected these arguments. It concluded that the amount of "the drug involved"—in that case, "an off-white chunky substance containing cocaine"—is measured by weighing both the cocaine and the substances with which it might have been mixed. *Id.* ¶ 12. The court noted that Ohio's drug offense laws showed no concern with the purity of the cocaine possessed or sold. *Id.* ¶ 16. "Under the statutory scheme, then, possessing or selling 'cocaine' is the same as possessing or selling a substance containing cocaine. There is no meaningful difference between the two." *Id.* Citing the decisions of other Ohio courts, the court concluded that the statute requires the weight of the entire mixture containing cocaine to be considered when determining the penalty for cocaine offenses. *Id.* ¶¶ 12, 14-15.

This Court's cases support the Second District's view in *Smith*. The decisions in *State v. Chandler*, 109 Ohio St. 3d 223, 2006-Ohio-2285, and *Garr v. Warden*, 126 Ohio St. 3d 334, 2010-Ohio-2449, rest on the premise that the State need not prove that the weight of the actual controlled substance satisfies the statutory amounts in the drug-penalty provisions. Both cases dealt with the major-drug-offender penalty that was then authorized by R.C. 2925.03(C)(4)(g).

R.C. 2925.03 is Ohio's drug-trafficking statute, and parallels R.C. 2925.11, Ohio's possession statute. Under then-R.C. 2925.03(C)(4)(g), a defendant guilty of trafficking in cocaine was to be sentenced as a major drug offender "[i]f the amount of the drug involved equals or exceeds one hundred grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine." This tracks the language in the current statute at issue here. *Cf.* R.C. 2925.11(C)(4)(f) ("If the amount of the drug involved equals or exceeds one hundred grams of cocaine, . . . the offender is a major drug offender.").

In *Chandler*, the Court was asked whether a defendant could be sentenced as a major drug offender if the substance in question, though weighing more than 100 grams, did not contain any controlled substance. 2006-Ohio-2285 ¶¶ 1, 3. (The defendants in *Chandler* had offered to sell a substance represented to be crack cocaine, but that was in fact pure baking soda. *Id.* ¶ 3.) The Court interpreted the language in R.C. 2925.03(C)(4)(g) as requiring the State to prove only that the "substance offered for sale . . . contain[s] *some detectable amount* of the relevant controlled substance." *Id.* at syl (emphasis added). The Court reinforced this view in *Garr*, 2010-Ohio-2449, which dealt with cocaine. There, it held that a person may be sentenced as a major drug offender in a "properly proven" offer-to-sell case even if "a substance offered for sale is not recovered or tested in order to ascertain whether it contains a *detectable amount* of a controlled substance." *Id.* ¶¶ 2, 28 (emphasis added).

In both *Chandler* and *Garr*, the Court viewed the weight of the total mixture (as opposed to the weight of the actual controlled substance) to be the relevant unit of measurement. To meet the one hundred-gram threshold, the substance had to contain only "a detectable amount" of controlled substance. A detectable amount is surely less than one hundred grams. Although *Chandler* and *Garr* interpret the former major drug offender penalty of Ohio's trafficking statute,

the statutory language and graduated sentences are the same as those at issue here. These decisions thus reinforce the decisions of various appellate courts that have imposed penalties in cocaine cases based on the aggregate weight of the mixture containing cocaine. If the Sixth District is correct, *Chandler* and *Garr* are both flawed.

B. The Sixth District's Opinion ignores the history and context of Ohio's cocaine laws.

The decision below is at odds with the General Assembly's policy choices in controlled substance cases. "To determine the General Assembly's intent, the court may consider several factors, including the object sought to be obtained, the legislative history, and the consequences of a particular construction." *Black*, 2015-Ohio-513 ¶ 38; R.C. 1.49(A), (C), (E). The appellate court fixed its attention on the phrase "of cocaine" in R.C. 2925.11(C)(4)(f) and the accompanying definition of cocaine in R.C. 2925.01(X) to hold that the State must prove that the weight of pure cocaine meets the statutory threshold. *See* App. Op. ¶ 45 (holding that a defendant may be punished "for only the portion of the disputed substance that is chemically identified as cocaine"). This language ("of cocaine") is a relic of the disparate treatment of crack and powder cocaine between 1995 and 2011; it is not indicative of a legislative purpose to impose penalties in cocaine cases based on purity. To hold otherwise would impose a requirement in cocaine cases that is inexplicably absent from all other controlled substance cases. The Sixth District's reasoning is wrong for the following reasons.

First, the appellate court drew inapt comparisons between cocaine and other drugs described in R.C. 2925.11(C). *See id.* ¶¶ 42-45. It observed that other drug-penalty provisions in R.C. 2925.11, such as those for heroin and marijuana, lack the modifying language in the cocaine-penalty provisions. *See id.* ¶ 42 ("Importantly, the statute does not state 100 or 200 grams *of marihuana*."). This ignores the differential penalties for crack and powder cocaine that existed for over fifteen years in Ohio; heroin and marijuana have no analogous history. *See State*

v. Roberts, 134 Ohio St. 3d 459, 2012-Ohio-5684 ¶¶ 12-20, 26 (considering statute's historical context). In light of this history, the phrase "of cocaine," which remains after the 2011 amendments, is best understood as signaling that the penalties in R.C. 2925.11(C)(4)(b)-(f) apply to both crack and powder cocaine.

In a similar vein, the Sixth District's opinion lacks a true explanation for why the Revised Code would penalize most drugs based on aggregate weight, but not cocaine. (The quantities of certain drugs, like heroin and LSD, are measured by dosage *or* aggregate weight. *See, e.g.*, R.C. 2925.11(C)(5)(b); R.C. 2925.11(C)(6)(b).) To be sure, the court contrasted the definition of cocaine with the definitions of marijuana, LSD, and hashish, and concluded that "the legislature's failure to include . . . language [concerning a mixture] in the definition of cocaine was intentional." App. Op. ¶ 45.

There are two problems with this. As an initial matter, the court looked in part at definitions in the controlled substance schedules in R.C. 3719.41, whereas the proper definitions for LSD, hashish, marijuana, and cocaine in Chapter 2925 are located in R.C. 2925.01. *See* R.C. 2925.01(X), (Y), (Z), (AA) (setting forth definitions "[a]s used in this chapter"). *Compare* R.C. 2925.01(Y) ("'L.S.D.' means lysergic acid diethylamide.") *with* R.C. 3719.41 (Schedule I(C)(18)) (defining LSD as "[a]ny material, compound, mixture, or preparation that contains any quantity of . . . lysergic acid diethylamide"). More importantly, such a presumption should not be employed when it results in the puzzling situation of cocaine being singled out for expensive and cumbersome testing with no apparent purpose or benefit. *See State v. White*, 142 Ohio St. 3d 277, 2015-Ohio-492 ¶ 29 (statutes are interpreted to avoid "unreasonable" "consequences").

Second, the Sixth District's analysis is wrong because it disregards the fact that the statute penalizes possession of cocaine, regardless of how it appears. Although the court is

correct that the definitions in R.C. 2925.01(X) and R.C. 3719.41 describe cocaine in technical terms, without "mixture" language, *see* App. Op. ¶¶ 43-45, those definitions are further modified by R.C. 2925.11(C)(4). That is, R.C. 2925.11(C)(4)(a)-(f) speak not just of cocaine, but of the untold numbers of mixtures and substances that might contain cocaine. This should have informed the Court's analysis.

Finally, the Court improperly departed from the longstanding decisions of other Ohio appellate courts. It rejected several decades of persuasive authority as "inapposite" because those "cases rely upon a prior version of R.C. 2925.01 . . . . [which] was subsequently amended in 1995 and the foregoing provision was removed." App. Op. ¶ 46. But the phrase "of cocaine" has been in the statute since 1995, as has the current definition of cocaine in R.C. 2925.01(X). Cases like *Remy* (2004), *Chandler* (2006), and *Smith* (2011)—all of which either held or implied that the amount of the drug involved includes filler materials—interpreted the post-1995 version of the drug offense statutes. But the General Assembly has never found it necessary to amend Chapter 2925 to reverse these interpretations. This Court will "presume that if the General Assembly disagreed with the rule set forth in [these cases], it would have responded to [them]." *Bruce S.*, 2012-Ohio-5696 ¶ 11. Tellingly, it has not.

C. Sixth District's decision will have negative practical consequences for Ohio's law enforcement agencies and, by extension, public safety.

Apart from the clearly unintended consequences (like reducing Gonzales's penalty to a fifth-degree felony), the Sixth District's ruling will disrupt the work of law-enforcement agencies like BCI. When the General Assembly enacts a statute, "it is presumed that" that body intends a "just and reasonable result" that may be feasibly executed. *See* R.C. 1.47(C)-(D). BCI currently lacks a validated method to quantitate cocaine (i.e., determine its purity) under its accreditation standards. In fact, the Attorney General is not aware of *any* non-federal public laboratory in

Ohio that performs purity tests of cocaine. Although the federal Drug Enforcement Administration (DEA) laboratories do this work, the current wait-time for processing is *eighteen months*. Developing the methods necessary to test cocaine for purity will be no simple matter; it will upend BCI's laboratory processes now and in the future. In the meantime, all pending and new cocaine cases are practically limited to fifth-degree felonies, regardless of the amount of the drugs seized. The mere fact that the State's premiere crime laboratory is not equipped to perform this analysis suggests that the General Assembly never intended to require purity testing in cocaine prosecutions.

1. BCI currently performs a qualitative analysis in cocaine cases, which can be completed in roughly one hour.

BCI is critical to the State's law-enforcement efforts. BCI's Laboratory Division processes 220,000 pieces of evidence each year. *See Laboratory Division*, *available at* http://tinyurl.com/pjq7n94. The Bureau's Chemistry Unit "examines physical evidence to determine the presence or absence of illegal or harmful substances." *Id*. Most of this workload involves drug analysis, and cocaine makes up a significant portion. In 2014, BCI's London laboratory completed 20,000 chemistry assignments, about 5,000 of which involved cocaine. (Only marijuana and heroin have higher numbers, on average.) In the second quarter of 2015, BCI processed 1,106 cocaine cases statewide.

BCI currently performs what is called a qualitative analysis in drug investigations. A qualitative analysis "determines what substances are present and if one or more of those substances is illegal." Nat'l Forensic Science Tech. Ctr., *A Simplified Guide to Forensic Drug Chemistry*, *available at* http://tinyurl.com/pb46vqa. In other words, BCI currently tests substances to determine whether they contain a controlled substance. It does *not* perform a *quantitative* analysis, which determines "the amount, or purity, of the illegal substance." *Id.*

A typical qualitative analysis can be completed in roughly one hour. The forensic analyst retrieves the evidence from a secure locker and weighs it to determine the total weight of the substance. The analyst then pulls a sample and performs a presumptive test. If the presumptive test indicates that cocaine may be present, the analyst will proceed to perform a confirmatory test. The confirmatory test uses an instrumental technique called Gas Chromatography/Mass Spectrometry. *Id.* This process "identif[ies] each component by comparing its chemical signature against reference materials." *Id.* The instrument produces a graph, which the analyst examines to confirm whether the substance has a chemical signature matching that of cocaine. This finding will be recorded in a lab report that, together with the analyst's testimony, can be used by the prosecutor at trial.

2. Compliance with the Sixth District's decision will require BCI to develop methods for quantitative analysis, a process that will require significant investments of time and money.

If the Sixth District's ruling stands, the qualitative analysis described above will no longer work for penalty purposes in a cocaine case. This is because the test does not say anything about *how much* cocaine is in a substance. To determine the precise weight of cocaine, excluding filler agents, the lab will need to perform a *quantitative* analysis. This analysis, which most commonly uses a technique called liquid chromatography, is time-intensive and requires sophisticated instruments. Moreover, it cannot simply be performed by purchasing a new scale and consulting a handbook. BCI (and other state laboratories) will be required to devote significant resources to this process.

Upfront investment. Developing the drug chemistry methods for a quantitative analysis will require an enormous investment. BCI estimates that it will take six to nine months just to acquire the equipment and develop a method for purity testing. It will be at least eighteen

months before BCI can issue an accredited report that determines the purity of a substance or mixture containing cocaine.

The first—and simplest step—will be acquiring necessary equipment. Given government procurement controls, this is never actually simple. BCI will need to purchase sophisticated volumetric glassware, and at least six liquid-chromatography instruments. These are expensive pieces of equipment that are not currently part of BCI's budget. And given their cost, they will need to be purchased through a competitive-bidding process, which will take time.

To accommodate this new equipment, BCI will also have to reconfigure its chemistry laboratories. Where reconfiguration is not possible, BCI will have to purchase and install additional materials, such as laboratory-grade countertops, to house the instrumentation.

BCI will also have to develop an actual method to test cocaine substances for purity, a process that it estimates will take several months. This cannot be done by simply mimicking a method that another laboratory has developed. Because determining the purity of a substance requires a high degree of precision, each laboratory's methods must be tailored to that laboratory's equipment. This process will affect human resources, as scientists currently processing controlled substance cases will be diverted from their normal assignments. Once this process is complete, all of BCI's analysts must be trained in the new method—another expense, and another drain on human resources.

Accreditation. Even after BCI develops its method, it will not be accredited to issue reports concerning the purity of a cocaine substance. BCI's own internal standards make accreditation necessary for it to issue reports of this nature, and no doubt a defendant would be ready with a *Daubert/Valentine* challenge if it were to issue an unaccredited report. BCI is currently accredited by the American Society of Crime Lab Directors Laboratory Accreditation

Board (ASCLAD/LAB). Although BCI is accredited for certain disciplines, its scope of accreditation does not include quantitative analysis. Thus, before BCI can issue an accredited report, it will have to satisfy the accreditation process.

BCI must develop one year's body of work before it can even *apply* for accreditation. Applying outside of its normal cycle will require an extra fee. Once its application is submitted, BCI will then need to pay for the Board's members to visit each of BCI's three laboratories for onsite observation. Assuming no setbacks, it will take approximately eighteen months before BCI could become accredited to issue reports concerning the purity of a substance containing cocaine.

3. If BCI is required to test the purity of a substance containing cocaine, the processing time for a typical cocaine assignment will jump from one hour to at least two days.

BCI's problems will not end once it has developed a method for quantitative analysis and received accreditation. A single purity test will take days, compared to the hour it now takes to perform a simple qualitative analysis for cocaine. In light of the high volume of cocaine cases that BCI sees each year—last year, 5,000 at its London campus alone—this enormous increase in time will affect BCI's work processing all chemistry assignments.

As an initial matter, analysts will have to develop and maintain a range of standards that can be used to support quantitative analyses of cocaine substances. Reference standards are necessary to validate the analytical measurement method used in a quantitative analysis. They provide analysts with a point of reference against which they can compare the results of the tests performed on a cocaine sample. Reference standards used for quantitative analyses have a limited shelf life and must be regularly re-created to ensure the validity of the method. This preparation alone takes several hours.

The process itself—known as liquid chromatography—is expensive and time intensive. It involves combining samples of the seized cocaine mixture with a solvent, and then running the solvent through a column filled with adsorbent material. The liquid-chromatography instrument is able to separate cocaine from other material because different components of the cocaine substance will interact with the column's adsorbent material in different ways. A detector instrument will analyze these interactions and will provide data on the relative quantities of each component. The analyst will repeat this process with several different samples from the seized substance to ensure that an accurate representation of the mixture has been tested.

Going forward, BCI estimates that it will take approximately two days to complete a single cocaine assignment, as opposed to the single hour it now takes to confirm the presence of cocaine. When multiplied across the thousands of cocaine cases BCI tackles each year, the disruption will be staggering.

4. A purity test requirement will slow the wheels of justice and result in public safety risks.

While BCI undertakes the expensive and laborious development of a method for testing the purity of cocaine, the normal flow of controlled-substance cases will continue. The diversion of resources to cocaine testing will create a bottleneck in all controlled substance cases. This is not simply an inconvenience for BCI or a strain on its budget (although it is both of those things). The consumption of limited State resources on a test that produces no benefit will have real consequences outside of the laboratory.

In the short term, new and currently pending cocaine cases will be limited to sentencing as felonies in the fifth degree, given the State's practical inability to prove the weight of pure cocaine and the DEA laboratories' eighteen-month processing time. Serious offenders could escape just and adequate punishment, to the detriment of Ohio communities.

In the long term, the resources consumed by the purity testing of cocaine will cause other drug investigations and prosecutions to slow down. These investigations have life-or-death consequences. Drug cases often turn on identifying users and encouraging them to divulge the identities of their dealers, who in turn can lead law enforcement to traffickers and large quantities of drugs. If law-enforcement officials cannot get laboratory reports in a timely fashion, it becomes more difficult to pursue the low-level cases that eventually remove drugs from circulation. In the meantime, violent crimes and overdose deaths that could have been prevented are sure to occur. This is particularly true now, as the State battles a heroin epidemic that shows no signs of abating. These public-safety consequences are another way in which the Sixth District's decision imposes enormous costs with no apparent social benefit.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
HANNAH C. WILSON (0093100)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of *Amicus* Curiae Ohio Attorney General Michael DeWine in Support of Appellant State of Ohio was served via ordinary mail this 2nd day of October, 2015 upon the following counsel:

Paul A. Dobson
Wood County Prosecutor
Gwen K. Howe-Gebers
David T. Harold
Assistant Prosecutors
One Courthouse Square, Annex
Bowling Green, Ohio 43402

Counsel for Appellant
State of Ohio

Andrew R. Mayle
Jeremiah S. Ray
Ronald J. Mayle
Mayle Ray & Mayle LLC
210 South Front Street
Fremont, Ohio 43420

Counsel for Appellee
Rafael Gonzales

/s Eric E. Murphy
Eric E. Murphy
State Solicitor