

IN THE SUPREME COURT OF OHIO

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

**MERIT BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER,
IN SUPPORT OF RAFAEL GONZALES**

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INTRODUCTION

The Sixth District Court of Appeals applied appropriate canons of statutory construction to determine that R.C. 2925.11(C)(4) requires that the State provide proof of the amount of “actual cocaine” contained in the substance in order to meet the statutory threshold necessary for a penalty enhancement. The statutory language in R.C. 2925.11(C)(4) went into effect on September 30, 2011 as a result of the passage of House Bill 86 (“HB 86”). The changes made to R.C. 2925.11(C)(4) and related provisions by HB 86 were made by the General Assembly in order to accomplish its stated goal: to **eliminate** the difference in criminal penalties for crack cocaine and powder cocaine. The Sixth District’s decision, in correctly applying appropriate canons of statutory construction, is also consistent with the General Assembly’s stated purpose.

The Sixth District properly evaluated the plain language of the statute and gave effect to the intent of the General Assembly when it held that R.C. 2925.11(C)(4) requires that the State provide proof of the “actual cocaine” contained in the substance in order to meet the statutory threshold necessary for a penalty enhancement. Additionally, the Sixth District properly dismissed prior decisions of appellate courts which interpreted statutory language that was no longer in effect after the passage of HB 86. Consequently, this Court should affirm the decision below. The decision in *State v. Smith*, 2d Dist. Greene No. 2010-CA-36, 2011-Ohio-2568 was prior to the effective date of the new HB 86 provisions and is not relevant to this Court’s inquiry.

STATEMENT OF THE CASE AND FACTS

In this case, Rafael Gonzales was found guilty by a jury of possession of cocaine with a major-drug-trafficker specification. *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461. This matter involved Mr. Gonzales’ purchase of cocaine from a confidential informant, Saul Ramirez. *Id.* at ¶ 2. Mr. Ramirez was a confidential informant for the Drug

Enforcement Agency (“DEA”). Trial Transcript, Day 2 (“Tr. D2”), p. 80. Mr. Ramirez recorded a conversation between himself and Mr. Gonzales, in which Mr. Gonzales agreed to meet with Ramirez in order to purchase cocaine. *Gonzales* at ¶ 2. During the initial, face-to-face meeting, Mr. Gonzales inspected the cocaine. *Id.* Mr. Ramirez testified, over defense objections, that the transaction involved one kilogram of cocaine. Trial Transcript, Day 1 (“Tr. D1”), p. 156-7. Mr. Ramirez went on to say that he told Mr. Gonzales that the cocaine was 90% pure. *Id.* at 146. However, Mr. Ramirez later admitted that the cocaine may have been mixed with other materials, and he had no idea of the purity of the cocaine. *Id.* at 176. Mr. Ramirez and Mr. Gonzales finally negotiated a price and scheduled a time to meet to complete the transaction. *Gonzales* at ¶ 2. This cocaine was State’s Exhibit 16. Tr. D1, p. 146, 176.

Later that afternoon, Mr. Gonzales met Mr. Ramirez at a Super 8 motel in Wood County. *Gonzales* at ¶ 2. Initially, Mr. Gonzales was upset that Mr. Ramirez would not produce the cocaine until Mr. Gonzales presented the money. *Id.* at ¶ 3. Mr. Gonzales eventually displayed \$58,000 in cash, and an undercover officer entered the room with two kilograms of cocaine. *Id.* The first kilogram of cocaine—State’s Exhibits 3—was imitation¹ cocaine created to look like real cocaine. *Id.* Placed inside State’s Exhibit 3, for purposes of the exchange with Mr. Gonzales, was State’s Exhibit 13—a bag of genuine cocaine, weighing 139 grams. *Id.* The second kilogram—State’s Exhibit 4—was also manufactured—or imitation—cocaine. *Id.* A tracking device was planted inside State’s Exhibit 4. *Id.*

After the money was counted, [Mr. Gonzales] took possession of the two kilograms of cocaine and departed.

[Mr. Gonzales] was subsequently arrested, after which the drugs were seized by the arresting officers and tested by the Ohio Bureau of Criminal Investigation (BCI). The BCI test confirmed that the substance contained inside exhibit No. 13 was indeed cocaine.

¹ Tr. D2, p. 14.

However, the BCI analyst that performed the test was unavailable to testify at trial. Consequently, the test results were not admitted at trial. Nonetheless, the state retested the substance on November 1, 2013, four days prior to trial. The results of the test were provided to [Mr. Gonzales]. However, because appellant was given the test results only a short time prior to trial, the trial court excluded the second BCI report and both test results out of concern that their use at trial would violate Crim.R. 16(K).

Id. at ¶ 3-4.

On August 1, 2012, Mr. Gonzales was indicted for one count of possession of cocaine, in violation of R.C. 2925.11(A) and (C)(4)(f). The indictment also included a major-drug-offender specification pursuant to R.C. 2929.01, and was based on the allegation that the amount of cocaine equaled or exceeded 100 grams. *Id.* at ¶ 5. The case proceeded to trial on November 5, 2013. *Id.* at ¶ 6. During the trial, the State was not permitted to utilize the BCI test results to identify the seized substances as cocaine. *Id.* However, several witnesses, including Mr. Ramirez, were permitted to testify that the substance was cocaine. *Id.* In addition, BCI Agent Mark Apple told jurors that he knew the weight of the cocaine from a lab report. Tr. D2, p. 67. “At the conclusion of the evidence, the jury found [Mr. Gonzales] guilty of possession of cocaine. Additionally, the jury found that [Mr. Gonzales] possessed an amount of cocaine that equaled or exceeded 100 grams.” *Gonzales* at ¶ 7.

In his appeal to the Sixth District Court of Appeals, Mr. Gonzales argued that the trial court erred when it permitted the jury to consider the entire weight of State’s Exhibit 13 in determining whether he possessed 100 or more grams of cocaine. The Sixth District agreed and found that Mr. Gonzales’ penalty enhancement under R.C. 2925.11(C)(4)(f) should be vacated:

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 marihuana, 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 marihuana. 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.

Having found that the relevant inquiry in determining the level of the offense under R.C. 2925.11(C)(4)(a) through (f) centers on a determination of the amount of actual “cocaine” contained in the mixture, we now turn to the definition of “cocaine” in R.C. 2925.01(X) and 3719.41. Notably, the definition of cocaine differs from that of many other drugs. Most drugs are defined broadly such that a mixture containing the particular drug falls within the definition. For example, “marihuana” is defined as “Any material, compound, mixture, or preparation that contains any quantity of [marihuana].” R.C. 3719.41 (Schedule I(C)(19)). Likewise, R.C. 3719.41 defines lysergic acid diethylamide (LSD) as “Any material, compound, mixture, or preparation that contains any quantity of [LSD].” R.C. 3719.41 (Schedule I(C)(18)). Similarly, the definition of hashish includes “Any material, compound, mixture, or preparation that contains any quantity of [hashish].” R.C. 3719.41 (Schedule I(C)(32)).

Unlike the broad definitions used for marihuana, LSD, and hashish, cocaine is defined under R.C. 3719.41 (Schedule II(A)(4)) as

Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine, their salts, isomers, and derivatives, and salts of those isomers and derivatives), and any salt, compound, derivative, or preparation thereof that is chemically equivalent to or identical with any of these substances * * *.

Cocaine is similarly defined in R.C. 2925.01(X). In both statutes, “cocaine” does not include the entire “mixture” as is the case with marihuana, LSD, and hashish. We must presume that the legislature’s failure to include such language in the definition of cocaine was intentional. *See State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 9, *quoting Columbus-Suburban Coach Lines, Inc. v. Public Utilities Com.*, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969) (“[I]t is the duty of this court to

give effect to the words used, not to delete words used or to insert words not used.’”). Consequently, we conclude that a defendant may be held liable for cocaine offenses under R.C. 2925.11 for only that portion of the disputed substance that is chemically identified as cocaine.

Here, the state offered no evidence as to the purity of the cocaine. While there was testimony concerning the weight of exhibit No. 13, the record contains no evidence that would allow a factfinder to determine the weight of actual cocaine contained therein. Nevertheless the state cites several Ohio cases that stand for the proposition that the purity of cocaine is immaterial, and that the entire mixture may be weighed for purposes of the penalty enhancement. *State v. Brown*, 107 Ohio App.3d 194, 668 N.E.2d 514 (3d Dist.1995); *State v. Neal*, 3d Dist. Hancock No. 5-89-6, 1990 Ohio App. LEXIS 2937, 1990 WL 88804 (June 29, 1990); *State v. Fuller*, 1st Dist. Hamilton No. C-960753, 1997 Ohio App. LEXIS 4398, 1997 WL 598404 (Sept. 26, 1997); *State v. Remy*, 4th Dist. Ross No. 03CA2731, 2004-Ohio-3630; *State v. Chandler*, 157 Ohio App.3d 672, 2004-Ohio-3436, 813 N.E.2d 65 (5th Dist.); *State v. Morris*, 8th Dist. Cuyahoga No. 67401, 1995 Ohio App. LEXIS 4289, 1995 WL 571998 (Sept. 28, 1995); *State v. Brooks*, 8th Dist. Cuyahoga No. 50384, 1986 Ohio App. LEXIS 5735, 1986 WL 2677 (Feb. 27, 1986). Notably, the above cases rely upon a prior version of R.C. 2925.01 that defined the bulk amount of a controlled substance as “[a]n amount equal to or exceeding ten grams * * * of a compound, mixture, preparation, or substance that is or contains any amount of * * * cocaine.” R.C. 2925.01 was subsequently amended in 1995 and the foregoing provision was removed. See Am.S.B. No. 2, 1995 Ohio Laws File 50. Consequently, we conclude that the cases cited by the state are inapposite.

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. *Contra State v. Smith*, 2d Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 14-15 (“[T]he State was not required to prove that Smith possessed or trafficked pure cocaine equal to or exceeding the statutory amount. Rather, as we have explained, it was enough that the substance * * *, as a whole, satisfied the weight requirement.”). Because the state failed to introduce evidence as to the purity or weight of the cocaine in this case, we find that appellant's penalty enhancement under R.C. 2925.11(C)(4)(f) must be reversed and vacated.

Id. at ¶ 42-4.

**STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants, coordinate criminal defense efforts throughout Ohio, promote the proper administration of criminal justice, ensure equal treatment under the law, and protect the individual rights guaranteed by the state and federal constitutions. Accordingly, the OPD has an interest in ensuring the individual rights guaranteed by the Ohio Constitution.

ARGUMENT

CERTIFIED CONFLICT: Must the state, in prosecuting cocaine offenses involved in 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?

STATE’S PROPOSITION OF LAW:

In a prosecution under R.C. 2925.11(A) and (C)(4), the prosecution does not need to prove that the drug involved was pure cocaine; instead, the prosecution need only prove that the drug involved was “cocaine or a compound, mixture, preparation, or substance containing cocaine.” The offense level, furthermore, is determined by the total weight of the drug involved (the compound, mixture, preparation, or substance containing cocaine), not just the weight of actual cocaine therein.

**AMICUS CURIAE OHIO ATTORNEY GENERAL’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 the 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.

There has long been a dispute over the inequity in punishments between crack cocaine and powder cocaine. This dispute and the resulting push to remove disparate and unjust sentencing differences has resulted in change—not just in Ohio, but in other states as well as on the federal level. In Ohio, HB 86 made a number of changes to portions of the revised code

pertaining to sentencing. Prior to addressing the reasons for the passage of HB 86, it is important to first look at the scientific standards at issue, and the fact that the Amicus Brief submitted by the Ohio Attorney General misrepresented the process by which the purity of cocaine may be determined.

A. The Sixth District’s decision is in line with scientific standards.

In 1997, the U.S. Drug Enforcement Administration (DEA) and the Office of National Drug Control Policy (ONDCP) co-sponsored the formation of the Technical Working Group for the Analysis of Seized Drugs (TWGDRUG), now known as the Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG).² Currently, SWGDRUG is comprised of a core committee of more than 20 forensic scientists from around the world. The mission of SWGDRUG is to recommend minimum standards for the forensic examination of seized drugs and to seek their international acceptance.³

In the amicus brief of the Ohio Attorney General, it is noted that the Bureau of Criminal Investigations (“BCI”) only performs qualitative analysis of controlled substances. Qualitative testing simply demonstrates the presence of a controlled substance—in the instant case, cocaine. Michael D. Cole, *The Analysis of Controlled Substances*, Chapter 6, Cocaine: 6.3 Qualitative Identification of Cocaine, p. 100 (John Wiley & Sons, Ltd. 2003). SWGDRUG provides the standards for reporting qualitative results. SWGDRUG provides the following example as to how to report the results of a qualitative analysis of cocaine:

Contains cocaine (salt form not determined)⁴

² <http://www.swgdrug.org/history.htm> (accessed Nov. 21. 2015).

³ *Id.*

⁴ <http://www.swgdrug.org/Documents/SWGDRUG%20Recommendations%20Version%207-0.pdf> IVC.5.2.1 Qualitative Results, p. 54(accessed Nov. 21, 2015).

BCI's confirmatory testing for the presence of cocaine is done through a Gas Chromatography/Mass Spectrometry.⁵ Amicus Brief Ohio Attorney General, p. 21. Included in BCI's qualitative testing, is a measurement of the total weight of the substance. *Id.* However, this is not a quantification of the cocaine. Michael D. Cole, *The Analysis of Controlled Substances*, Chapter 6, Cocaine: 6.4 Quantification of Cocaine, p. 107 (John Wiley & Sons, Ltd. 2003).

SWGDRUG provides an example of the reporting of quantitative results for cocaine:

Cocaine was identified in the Item 1 powder at a purity of $65 \pm 9\%$ (99.7% confidence interval). The item 1 powder weighed 800 ± 4 mg (99.7% confidence interval).

Amici Ohio Attorney General states, without citation, that liquid chromatography is the most commonly used technique. Amicus Brief Ohio Attorney General, p. 21. However, just like qualitative analysis, there is more than one method to measure the cocaine in a substance. In fact, gas chromatography (GC-FID or GC-MS)⁶ is the preferred method to quantify cocaine in street samples. Michael D. Cole, *The Analysis of Controlled Substances*, Chapter 6, Cocaine: 6.4 Quantification of Cocaine, p. 100 (John Wiley & Sons, Ltd. 2003). SWGDRUG sets forth over 8 different methods by which gas chromatography can be used to quantify the amount of cocaine in the sample. In addition, SWGDRUG notes that liquid chromatography and capillary eletrophoresis methods can also be used to quantify the amount of cocaine in a sample.

BCI would have to set out its own, new protocols if it began quantitative testing.

However, it is not without precedent for a state lab to do this. Below are the protocols from the

⁵ Per SGWDRUG's monograph of cocaine, Gas Chromatography is one way of testing for the presence of cocaine. Liquid chromatography can also be used. <http://www.swgdrug.org/Monographs/COCAINE.pdf> (accessed Nov. 21, 2015).

⁶ Gas Chromatography-Flame Ionization Detector or Gas Chromatography-Mass Spectrometry.

Massachusetts State Police Forensic Services Group for using Gas Chromatography-Mass Spectrometry to determine the amount of cocaine in a sample:

10.3 Gas Chromatography/Mass Spectrometry

10.3.1 Accurately weigh two to four milligrams of homogenized sample into a culture tube and record the weight.

10.3.2 Accurately dispense five milliliters of methanol and mix.

10.3.3 Accurately dispense 50 μ l of the internal standard Promazine solution (approximately 8.7 mg/ml) to sample solution and mix.

10.3.4 Transfer sample solution to autosampler vial and cap.

10.3.5 Initiate the autosampler sequence running a solvent blank before the solvent control sample and a solvent blank between each sample and reference standard.

10.3.6 When case samples are entered, the ratio of the volume of methanol in milliliters to the milligrams of sample used may be entered as the multiplier in the sequence table with the appropriate method to generate a quantitative result of the cocaine

10.3.7 Three concentrations of an accurately prepared cocaine reference standard are run on the day of use. The concentrations are 0.10 mg/ml, 0.25 mg/ml and 0.50 mg/ml. These standards will also include the internal standard Promazine in the same quantity as the case sample.

10.3.8 The Cocaine Reference standards must be run within a 24 hour period of the sample on the same instrument and under the same parameters.

10.3.9 Chromatography must demonstrate Gaussian peaks with integration of the target peak and the internal standard.

10.3.10 Compare ion spectra and retention time of the target peak and the internal standard of the sample with the target peak and the internal standard of the reference standard.

10.3.11 The integrated retention time of the target peak and the internal standard of sample must be within + 0.100 minutes of the target peak and the internal standard of the reference standard, and the mass spectrum of the target peak of the sample must show

conformance with the target peak of the reference standard in order to render identification.

10.3.12 A spectral search of the target peak of the sample and the target peak of the reference standard, using a commercially available library, i.e. SWGDRUG, must reveal greater than 70% match for either sample or reference standard.

10.3.13 A quantitative result for cocaine may be found using a Three Point Calibration table.

10.3.14 The data from these three cocaine standards are used to create a calibration table. This may be done by a programmed method on the instrument. The calibration table is to be updated and recalibrated after the running of the three cocaine standards. A method is to be saved with the day's calibration table.

10.3.15 If a different amount of solvent or powder is used, this information is to be documented in the case record.

10.3.16 Additional substances identified as Class D controlled substances or higher will be reported as such.

10.3.17 Additional substances identified as Class E Controlled substances or non-controlled Substances may be reported out as "also detected."

Massachusetts State Police Forensic Services Group, *Protocol for the Analysis of Suspected Cocaine Samples*, Version 6.0, Issued by Acting Director, Issue Date, April 22, 2013, pp. 12-14.

The above protocols contemplate the completion of testing within a day. This is consistent with Amici Ohio Attorney General's statement that gas chromatography for the presence of cocaine currently takes BCI one hour to complete. Amicus Brief Ohio Attorney General, p. 21.

Amici Ohio Attorney General does not discuss GS-MS and GS-FID⁷ and only discusses the quantitative assessment tool of liquid chromatography. First, Amici Ohio Attorney General complains that preparation of reference standard for this test takes several hours. Amicus Brief

⁷ A full discussion of GS-FID is in the following article: Pinero, E. and Casale, J. (Drug Enforcement Administration), Quantitation of Cocaine by Gas Chromatography-Flame Ionization Detection Utilizing Isopropylcocaine as a Structurally Related Internal Standard, *Microgram Journal*, Vol. 4, Numbers 1-4 (Jan.-Dec. 2006).

Ohio Attorney General, p. 23. Preparation of a reference sample should not take hours. This claim is specious at best. Second, Amici Ohio Attorney General bemoans the limited shelf life of reference samples. However, the length of this shelf-life is not mentioned by Amici Ohio Attorney General. The shelf-life of such reference samples is measured in months—not days.⁸ Third, the State fails to detail what portions of the process of liquid chromatography would necessitate the 2 days it estimated needed to complete this type of testing. It is unclear if the State is arguing this is some function of the testing itself, or the function of performing testing in a state laboratory where processes are often broken down and divided amongst analysts. Without any sort of description, it is difficult to respond to the State's claims.

The Sixth District's decision encourages a scientific process to determine the actual amount of cocaine, which makes the system just and fair. And that is certainly consistent with the intent of the General Assembly.

1. Smoke and mirrors: Complaints regarding accreditation and time for testing are irrelevant and misleading.

While the State is correct that BCI would have to become accredited to perform quantitative analysis, this would certainly not bar prosecutions for cocaine-related drug prosecutions. First, this Court is not deciding what type of testing is necessary to secure an indictment. Certainly, the type of testing which BCI performs is sufficient to initiate a complaint or indictment. This Court is addressing what evidence or test is necessary to secure a conviction for a specific quantity of cocaine in a substance.

Second, and more importantly, this would not be the first instance in which BCI did not have adequate technology to carry out testing necessary for prosecution. For example, a type of

⁸ See generally, Austin Police Department, Forensic Chemistry Section, Technical Manual, p. 59, (Jan. 21, 2014), (shelf-life for GS-FID reference standard is 3 months), available: http://www.austintexas.gov/sites/default/files/files/Police/DC_Technical_Manual_010114_2_.pdf (accessed Nov. 24, 2015).

DNA testing known as Y-STR came into use in 2002. John M. Butler, *Fundamentals of Forensic DNA Typing*, pp. 32-35. BCI did not become validated on Y-STR and accredited to perform Y-STR testing until 2011. However, this did not limit BCI from seeking a contract with other labs with the technology to perform Y-STR testing until such time as BCI could become validated and accredited to do so. As early as 2004, BCI contracted with private laboratories, such as LabCorp to perform Y-STR DNA testing for purposes of prosecution. See Appellant's Merit Brief, pp. 5, 24-26, *State v. McCarley*, 9th Dist. Summit No. CA-22562, August 30, 2005; *State v. Griffin*, 5th Dist. Stark No. 2006CA00175, 2007-Ohio-4431; *State v. Jenkins*, 11th Dist. Trumbull No. 2006-T-0058, 2007-Ohio-4227. BCI contracted with private labs as late as early 2011 to perform Y-STR DNA testing. See, Merit Brief of Appellant, pp. 32-37, *State v. Thomas*, Ohio Supreme Court Case No. 2012-2026.⁹

Despite the fact that BCI did not perform Y-STR in these cases and multiple others, BCI or prosecutors' offices sought the appropriate testing from a certified laboratory in order to properly prosecute a case. Even in some cases, where the DNA test results were not the centerpiece of the State's evidence, BCI still contracted with outside laboratories in order to perform the testing necessary for prosecution. BCI now performs Y-STR DNA testing for the State. In fact, based on a requirement set forth by the FBI, BCI has recently become certified on a new STR DNA test known as Globalfiler. Given BCI's recent ability to fulfill FBI requirements and the State's expenditures to ensure prosecution and conviction, it is disingenuous to complain about the hurdles of accreditation in order to comply with a law which requires that individuals serve prison time for the actual amount of cocaine sold or possessed, rather than also serving time for portions of the substance which are not illegal.

⁹ BCI also contracted with LabCorp in the Thomas case. Throughout this time period, the forensic DNA testing facility of LabCorp was located in North Carolina.

Third, the State complains that there are no “non-federal public crime laboratories in Ohio that are capable of determining the purity of a substance containing cocaine.” Amici Ohio Attorney General, p. 1. Based on the careful wording of the Attorney General regarding what labs cannot perform quantitative testing, it would be reasonable to infer that there are both federal and private labs in Ohio which perform such testing. In addition, a number of private labs outside of Ohio perform purity testing. Two such examples are NMS Labs (located in Pennsylvania)¹⁰ and AIT Laboratories (located in Indianapolis, Indiana).¹¹ As discussed in the section below, the DEA’s lab has provided purity testing for the State of Ohio in at least one other case. In fact, the DEA’s North Central Lab in Chicago has provided drug testing in a number of Ohio prosecutions. *State v. Fabian*, 11th Dist. Trumbull No. 2001-T-0080, 2002-Ohio-3152; *State v. Smith*, 7th Dist. Jefferson No. 05 JE 1, 2006-Ohio-4684; *State v. Hudson*, 8th Dist. Cuyahoga No. 79010, 2002-Ohio-1408.

Finally, failing to conduct an analysis of other components of a substance containing cocaine allows the State to forgo the opportunity to pursue major distributors of controlled substances.¹² This is because different methods of gas chromatography can be used to develop an “impurity profile” of a cocaine sample.¹³ See Michael D. Cole, *The Analysis of Controlled Substances*, Chapter 6, Cocaine: 6.5 Comparison of Cocaine Samples, p. 109-110 (John Wiley & Sons, Ltd. 2003).

¹⁰ <http://www.nmslabs.com/services-forensic-Drug-ID> (accessed Nov. 21, 2015). It should be noted that the availability of purity testing was confirmed with a representative of NMS Labs.

¹¹ <https://www.aitlabs.com/forensic-designer-drug-testing/> (accessed Nov. 21, 2015). It should be noted that the availability of purity testing was confirmed with a representative of AIT Laboratories.

¹² <http://msutoday.msu.edu/news/2014/new-cocaine-tracking-system-could-lead-to-better-drug-enforcement/> (accessed Nov. 23, 2015).

¹³ Methods for Impurity Profiling of Heroin and Cocaine, https://www.unodc.org/pdf/publications/report_st-nar-35.pdf (accessed Nov. 21, 2015).

2. The State has utilized purity testing in the prosecution of another defendant charged as a result of DEA informant, Saul Ramirez.

Saul Ramirez has been utilized in a number of cases involving both federal and state law enforcement. Mr. Ramirez first appeared as a confidential informant for Wood County around 2007. *State v. Solis*, 6th Dist. Wood No. WD-08-042, 2009-Ohio-6683, ¶ 17. But Mr. Ramirez's name first appeared in Ohio caselaw in 2001. *State v. Ramirez*, 6th Dist. Wood No. WD-00-050, WD-00-062, 2001 Ohio App. LEXIS 3252 (July 20, 2001). However, in 2001, his name was solely involved in the arrangement of a shipment of marijuana from Texas, where he lived, to Ohio, through a DEA informant. *Id.* A warrant issued for his arrest. But he was not picked up until 2007. In *Solis*, Mr. Ramirez, as a confidential informant, arranged for the transport of almost 20,000 grams of marijuana to Ohio from Texas for sale. *Solis* at ¶ 17-22. Mr. Ramirez acted as a confidential informant in at least two other cases in Wood County. *State v. Rodriguez*, 6th Dist. Wood No. WD-08-013, 2009-Ohio-4280; *State v. Rodriguez*, 6th Dist. Wood No. WD-08-011, 2009-Ohio-4059. The above cases involved BCI special agents as well as local law enforcement. *Id.* Although these are Ohio cases, Mr. Ramirez became a DEA informant in 2007.

In another Ohio case, which is still pending before the Sixth District Court of Appeals, Mr. Ramirez testified as a confidential informant for the DEA. In that case, the DEA arranged for their confidential informant, Mr. Ramirez, to buy drugs from Roberto Sanchez as part of two controlled drug transactions. *State v. Roberto Sanchez*, Sandusky C.P. Case No. 12-CR-829, T.pp. 159 (*State v. Sanchez*, 6th Dist. No. S-14-030).

The first transaction occurred on July 1, 2008. Sanchez Transcript ("Tr."), p. 164-176. Mr. Ramirez purchased cocaine in two forms from Mr. Sanchez at the same time: crack and powder. *Id.* at 178-179. Detective Mark Apple testified at trial that the purchased drugs were

analyzed at a laboratory in Chicago, Illinois. *Id.* at 181.¹⁴ According to the lab analysis, the crack form of the cocaine’s gross weight was 34.1 grams, and was 42-percent actual cocaine. *Id.* at 182. Therefore, Mr. Ramirez purchased 14.3 grams of actual cocaine in the crack form. *Id.* at 182. The powder form of cocaine’s gross weight was 4.3 grams and was 78.3-percent actual cocaine. *Id.* at 184. As a result, Mr. Ramirez purchased 3.3 grams of actual cocaine in the powder form. *Id.* at 184.

The second transaction between Mr. Ramirez and Mr. Sanchez occurred on August 14, 2008. *Id.* at 191-196. Mr. Ramirez purchased cocaine in one form from Mr. Sanchez: crack. *Id.* at 192. Detective Apple testified that the purchased drugs were analyzed at North Central Laboratory in Chicago, Illinois. *Id.* at 199. According to the lab’s analysis, the net weight was 6.8 grams. *Id.* at 199. Detective Apple did not testify about the purity.

The purchased drugs were immediately sent to the DEA’s North Central Laboratory. Although the indictment was not issued until July 18, 2012, this was due to the State’s needing to delay the disclosure of the confidential informant and not the drug test. In other words, the State was able to secure the appropriate testing, as well as a conviction, with testing through a DEA laboratory.

B. The legislature intended for the punishments set forth under R.C. 2925.11(C)(4) to pertain to amounts of “actual cocaine.”

To further demonstrate why the Sixth District’s application of the principles of statutory interpretation produced the correct result, it is important to understand the chemistry and the

¹⁴ This is a DEA lab, which is certified by American Society of Crime Lab Directors/Laboratory Accreditation Board (“ASCLD/LAB”) for quantitative drug analysis, which includes both weight and purity testing. <http://www.asclld-lab.org/cert/ALI-008-T.pdf> (accessed Nov. 21, 2015); <http://www.swgdrug.org/Documents/SWGDRUG%20Recommendations%20Version%207-0.pdf> (accessed Nov. 21, 2015).

history of how the term cocaine has been defined. After this is understood, a review of all the changes to the statutory language further supports the Sixth District's decision.

- 1. Under the Sixth District's decision, the definition of cocaine comports with the science and shows the legislature corrected previously tortured statutory language.**

The statutory definition of cocaine under R.C. 2925.01 has remained constant, even following the passage of HB 86:

“Cocaine” means any of the following:

(1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;

(2) 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;

(3) 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.

Compare R.C. 2925.01(X) (2010) (Exhibit C to Appendix) *with* R.C. 2925.01(X) (2015) (Exhibit D to Appendix). However, HB 86 removed the following definition from R.C. 2925.01:

“Crack cocaine” means a compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine or that is in a form that resembles rocks or pebbles generally intended for individual use.

Compare R.C. 2925.01(GG) (2010) (Exhibit C to Appendix) *with* R.C. 2925.01(GG) (2015) (Exhibit D to Appendix).

Prior to reviewing and ascribing meaning to the change in the statutory provisions of R.C. 2929.11(C)(4)(a)-(f), it is important to understand the chemistry of cocaine in order to

understand the meaning of the terms used in the statute and to give full effect to the terms of the statute:¹⁵

As a matter of chemistry, cocaine is an alkaloid with the molecular formula $C_{17}H_{21}NO_4$. Webster's Third New *International Dictionary* 434 (2002). An alkaloid is a base—that is, a compound capable of reacting with an acid to form a salt. [fn1] *Id.*, at 54, 180; see also Brief for Individual Physicians and Scientists as *Amici Curiae* 2-3 (herein-after Physicians Brief). Cocaine is derived from the coca plant native to South America. The leaves of the coca plant can be processed with water, kerosene, sodium carbonate, and sulphuric acid to produce a paste-like substance. R. Weiss, S. Mirin, & R. Bartel, *Cocaine* 10 (2d ed. 1994). When dried, the resulting “coca paste” can be vaporized (through the application of heat) and inhaled, i.e., “smoked.” See United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 11-12 (1995) (hereinafter Commission Report). Coca paste contains $C_{17}H_{21}NO_4$ --that is, cocaine in its base form.

FOOTNOTES

[fn1] There are more detailed theories of how acids and bases interact. For our purposes, it is sufficient to note the fundamental proposition that a base and an acid can combine to form a salt, and all three are different types of compounds. See generally Brief for Individual Physicians and Scientists as *Amici Curiae* 8; *A Dictionary of Chemistry* 6-7, 62-63, 496 (J. Dainith ed., 5th ed. 2004).

Dissolving coca paste in water and hydrochloric acid produces (after several intermediate steps) cocaine hydrochloride, which is a salt with the molecular formula $C_{17}H_{22}NO_4+Cl^-$. *Id.*, at 12; Physicians Brief 3. Cocaine hydrochloride, therefore, is not a base. It generally comes in powder form, which we will refer to as “powder cocaine.” It is usually insufflated (breathed in through the nose), though it can also be ingested or diluted in water and injected. Because cocaine hydrochloride vaporizes at a much higher temperature than chemically basic cocaine (at which point the cocaine molecule tends to decompose), it is generally not smoked. See Commission Report 11, n. 15, 12-13.

¹⁵ While the U.S. Supreme Court analyzed the terms in 21 U.S.C. §§ 841(b)(1)(A) and (B), this statutory language is almost identical to that in R.C. 2925.01(G). In addition, the legislature has no effect on the underlying science.

Cocaine hydrochloride can be converted into cocaine in its base form by combining powder cocaine with water and a base, like sodium bicarbonate (also known as baking soda). *Id.*, at 14. The chemical reaction changes the cocaine hydrochloride molecule into a chemically basic cocaine molecule, Physicians Brief 4, and the resulting solid substance can be cooled and broken into small pieces and then smoked, Commission Report 14. This substance is commonly known as “crack” or “crack cocaine.” [fn2] Alternatively, powder cocaine can be dissolved in water and ammonia (also a base); with the addition of ether, a solid substance--known as “freebase”--separates from the solution, and can be smoked. *Id.*, at 13. ***As with crack cocaine, freebase contains cocaine in its chemically basic form. Ibid.***

FOOTNOTES

[fn2] Though the terms “crack” and “crack cocaine” are interchangeable, in this opinion we adopt DePierre’s practice and generally employ the latter.

Chemically, therefore, there is ***no difference between the cocaine in coca paste, crack cocaine, and freebase—all are cocaine in its base form. On the other hand, cocaine in its base form and in its salt form*** (i.e., cocaine hydrochloride) ***are chemically different***, though they have the same active ingredient and produce the same physiological and psychotropic effects. See *id.*, at 14-22. The key difference between them is the method by which they generally enter the body; smoking cocaine in its base form--whether as coca paste, freebase, or crack cocaine--allows the body to absorb the active ingredient quickly, thereby producing a shorter, more intense high than obtained from insufflating cocaine hydrochloride. *Ibid.*; see generally *Kimbrough v. United States*, 552 U.S. 85, 94, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007).

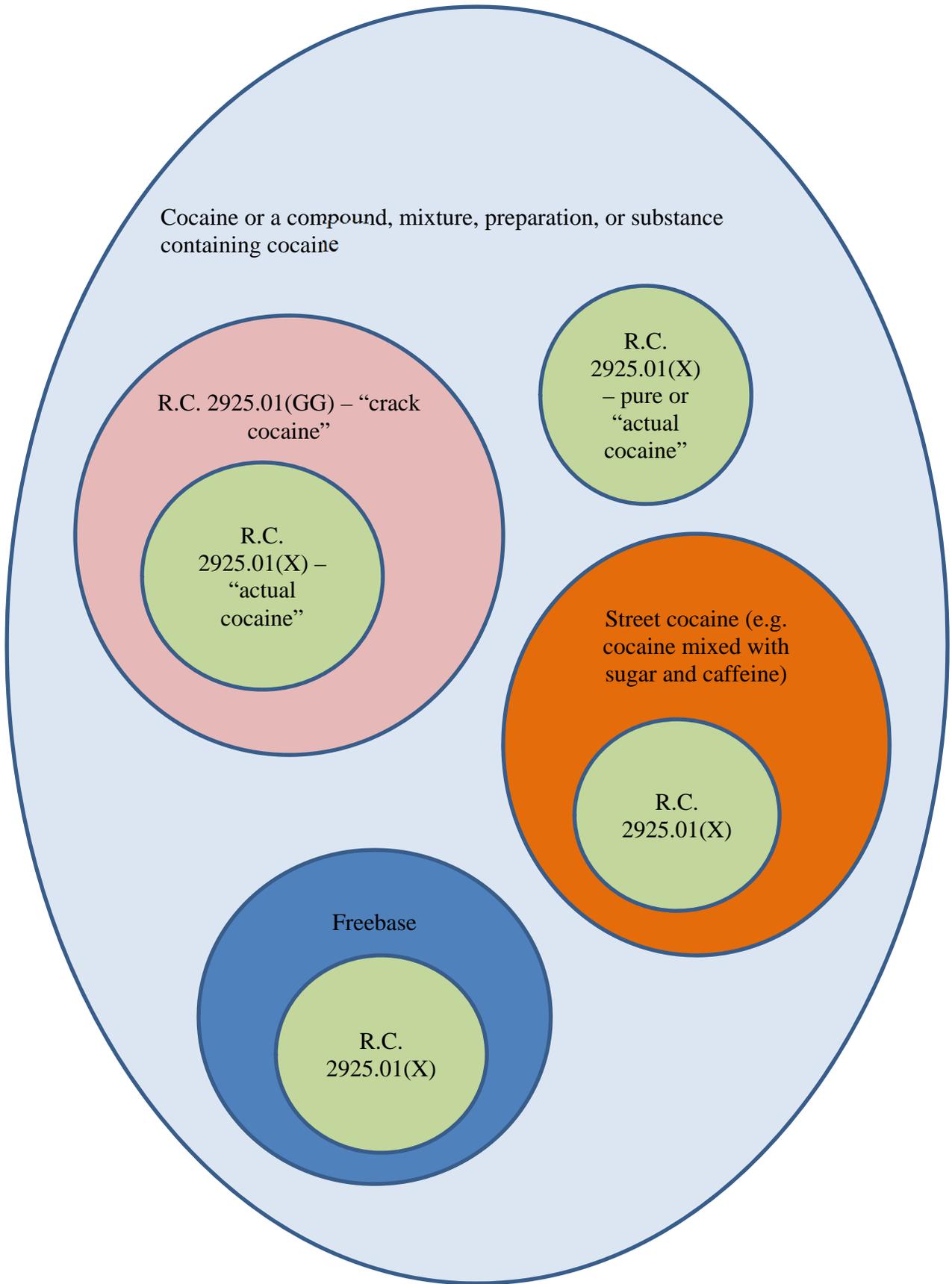
(Emphasis added.) *DePierre v. United States*, 564 U.S. ___, 131 S.Ct. 2225, 2228, 180 L.Ed.2d 114 (2011).

As a matter of chemistry, it would make sense that the legislature would remove the definition of “crack cocaine,” as it is redundant. And, the legislature has already defined cocaine, in its various chemical make-ups. “Crack cocaine” is simply one of many mixtures that contains cocaine. Other mixtures containing cocaine are frequently created because cocaine is often diluted with fillers like sugar and creatine, which are disguised by adding caffeine,

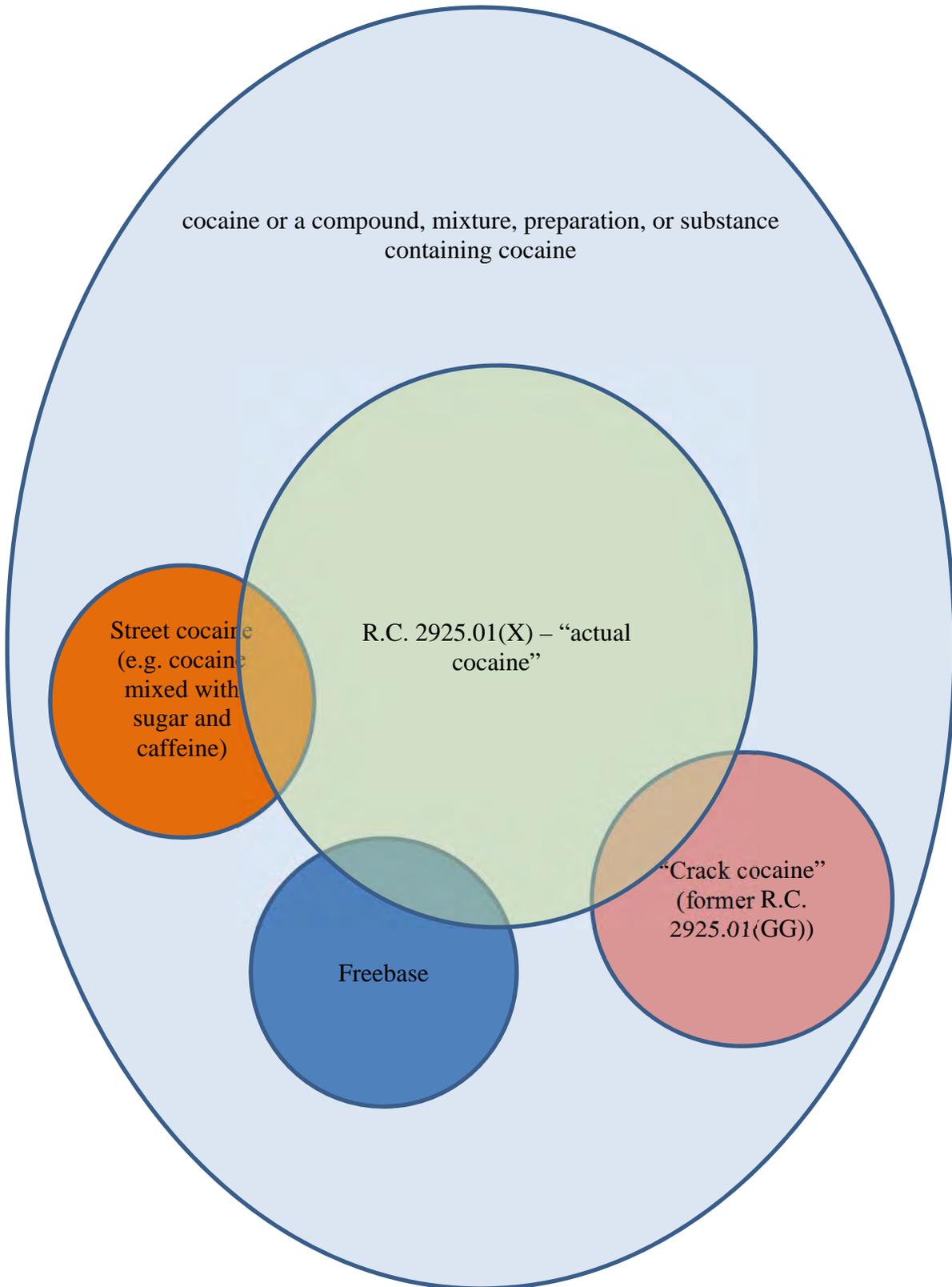
lidocaine, or benzocaine to mimic the stimulating and local anesthetic properties of cocaine.¹⁶ It is the controlled substance, regardless of what it is mixed with, that the legislature now defines; it is also the cocaine itself that the legislature intended to punish with the changes made by HB 86.

In addition, prior to the passage of HB 86, the definition of the term cocaine in the phrase “of cocaine” was not the definition set out in R.C. 2925.01(X). That is because the legislature’s use of the phrase “of cocaine that is not crack cocaine” could not be read to be consistent with the science if the definition of cocaine in R.C. 2925.01(X) was utilized. In order to read a section like R.C. 2925.11(C)(4)(f) consistent with the science, prior to the passage of HB 86, the term cocaine in the phrase “of cocaine” had to be defined as “cocaine or a compound, mixture, preparation, or substance containing cocaine.” This is illustrated in the diagram below:

¹⁶ See <http://www.economist.com/node/21560270> (accessed Nov. 24, 2015).



However, after the passage of HB 86, term cocaine in the phrase “of cocaine” can be defined as the legislature set forth in R.C. 2925.01(X) and remain consistent with the science:



In addition, this legislative change to give force and effect to the statutory definition of “cocaine” and produce a clearer reading of the statute which is consistent with the science, is also consistent with the intent to eliminate disparities in sentencing for crack and powder cocaine. As setting the definition of the term cocaine in the phrase “of cocaine” as that contained in R.C. 2925.01(X) would ensure that individuals were punished equally for the same amount of the drug.

2. The overall changes made by HB 86 to R.C. 2925.01, 2925.11, and 2925.03 demonstrate that the legislature intended for punishment to be based on the amount of “actual cocaine.”

Before addressing the specific changes in statutory language, it is important to note both the specific purpose for the changes, along with the overriding purpose of HB 86 itself. The specific purpose of the changes was “to **eliminate** the difference in criminal penalties for crack cocaine and powder cocaine.” (Emphasis added).¹⁷ More broadly, many of the other changes in HB 86 looked to reduce the number of individuals serving prison time for non-violent offenses.¹⁸

Keeping both the broad and the specific intent of the legislature in mind, the following outlines the changes that HB 86 made to R.C. 2925.11(C)(4):¹⁹

¹⁷ http://archives.legislature.state.oh.us/BillText129/129_HB_86_EN_N.html (accessed Nov. 20, 2015).

¹⁸ Some examples of those changes are: “to increase from \$500 to \$1,000 the threshold amount for determining increased penalties for theft-related offenses and for certain elements of ‘vandalism’ and ‘engaging in a pattern of corrupt activity’; to increase by 50% the other threshold amounts for determining increased penalties for those offenses; *** to provide that if ‘nonsupport of dependents’ is based on an abandonment of or failure to support a child or a person to whom a court order requires support and is a felony the sentencing court generally must first consider placing the offender on one or more community control sanctions; *** to generally require offenders convicted of or pleading guilty to a felony of the fourth or fifth degree that is not a specified offense to serve community control sanctions when the conviction or plea did not occur in specified circumstances.”

http://archives.legislature.state.oh.us/BillText129/129_HB_86_EN_N.html (accessed Nov. 23, 2015).

¹⁹ The language stricken by HB 86 is denoted with a ~~strike through~~ and the language added by HB 86 is denoted with a double-underline.

If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ~~twenty five~~ ten grams of cocaine ~~that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine~~, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds ~~twenty five~~ ten grams but is less than ~~one hundred~~ twenty grams of cocaine ~~that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine~~, possession of cocaine is a felony of the third degree, ~~and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.~~ and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If possession of cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds ~~one hundred~~ twenty grams but is less than ~~five hundred~~ twenty-seven grams of cocaine ~~that is not crack cocaine or equals or exceeds ten grams but is less than twenty five grams of crack cocaine~~, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds ~~five hundred~~ twenty-seven grams but is less than ~~one thousand~~ hundred grams of cocaine ~~that is not crack cocaine or equals or exceeds twenty five grams but is less than one hundred grams of~~

~~crack cocaine~~, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(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, 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 ~~and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.~~

Compare R.C. 2925.11(C)(4)(a), (b), (f) (2010) (Exhibit A in Appendix) *with* R.C.

2925.11(C)(4)(a), (b), (f) (2015) (Exhibit B in Appendix).

The two primary things that HB 86 changed in the statutory language of R.C. 2925.11(C)(4)(a)-(f) is that: (1) it removed the separate sentencing scheme for “crack cocaine,” and (2) it significantly lowered the amount “of cocaine” necessary to trigger an elevation in sentence. Notably, HB 86 did not strike the “of cocaine” modifier for the weight.

In a bill designed to reduce prison sentences for non-violent offenders, the lowering of the amount “of cocaine” to trigger an elevation in the potential prison sentence is inconsistent with such an intention. However, if the term cocaine in the phrase “of cocaine” is defined by R.C. 2925.01(X) rather than as “cocaine or a compound, mixture, preparation, or substance containing cocaine,” the reduction makes perfect sense. Cocaine’s prior, broad definition, as it encompassed cocaine with a number of other substances, should require a large amount to trigger elevated sentencing. However, if the statute is read to require punishment for only the amount of actual cocaine, the amount required to trigger elevated sentencing should be smaller.

Based on the science, there is no need to create a separate sentencing scheme for “crack cocaine” because the solid substance which is “crack cocaine” contains cocaine. When legislatures set out separate penalties for “crack cocaine,” they were targeting this particular form

of the drug containing cocaine—more specifically, they were targeting users and sellers of this form of the drug containing cocaine and singling them out for harsher sentences. In order to do so, some legislatures—like Ohio’s—also set out harsher penalties for highly impure cocaine. In other words, under pre-HB 86 statutory language, an individual could get more time than someone who sold more cocaine. For example, if Person A sold 300 grams of a mixture containing cocaine but that mixture only contained 90 grams of “actual cocaine,” under the pre-HB 86 statute, he or she would be guilty of a second-degree felony. In contrast, if Person B sold 300 grams of a mixture containing cocaine but that mixture contained close to 250 grams of actual cocaine, under the pre-HB 86 statute, he or she would also be guilty of a second-degree felony.

House Bill 86 eliminated the targeting of “crack cocaine,” which also eliminated the discordant results described above. Targeting “crack cocaine,” in particular, singled out African-Americans for harsher sentences. As described below, the history of such targeting is without basis and has results in unwarranted treatment and sentencing in the criminal justice system—which HB 86 has sought to eliminate.

C. Requiring the same punishment for the same amount of cocaine eliminates unjustified inequities and racial disparities in drug sentencing.

The Ohio General Assembly stated multiple purposes for the passage of HB 86. For the amendments at issue herein, the purpose was “to **eliminate** the difference in criminal penalties for crack cocaine and powder cocaine.” (Emphasis added).²⁰ As discussed above, the Ohio General Assembly elected to accomplish this goal by basing punishment on the amount of actual cocaine for all crimes involving cocaine. This eliminates inequity—not just in cases involving

²⁰ http://archives.legislature.state.oh.us/BillText129/129_HB_86_EN_N.html (accessed Nov. 20, 2015).

crack cocaine but in all cases wherein cocaine is a part of the substance that is the basis for the charge.

1. History of the disparities in crack cocaine and powder cocaine sentencing.

Differences in the penalties for crack cocaine and powder cocaine began prior to 1995, the time period in which the Ohio Attorney General began looking at the statutory provisions under R.C. 2925.11(C)(4). As noted by the Sixth District Court of Appeals, prior to 1995, the statutory language stated what the State is asking this Court to do now—impose punishment based on the total amount of compound recovered regardless of the amount of cocaine contained in it. The legislature did not re-adopt this language in HB 86, as this language would not achieve the stated objective of eliminating the difference in criminal penalties for crack cocaine and powder cocaine.

The Supreme Court of the United States described the initiation of legislation which treated the same drug in two different and disparate ways as follows:

In 1986, increasing public concern over the dangers associated with illicit drugs--and the new phenomenon of crack cocaine in particular--prompted Congress to revise the penalties for criminal offenses involving cocaine-related substances. See 552 U.S., at 95-96, 128 S. Ct. 558, 169 L. Ed. 2d 481. At the time, federal law generally tied the penalties for drug offenses to both the type of drug and the quantity involved, with no provision for mandatory minimum sentences. See, e.g., § 841(b)(1) (1982 ed., Supp. III). After holding several hearings specifically addressing the emergence of crack cocaine, Congress enacted the Anti-Drug Abuse Act of 1986 (ADAA), 100 Stat. 3207, which provided mandatory minimum sentences for controlled-substance offenses involving specific quantities of drugs.

DePierre v. United States, 564 U.S. ___, 131 S.Ct. 2225, 2228, 180 L.Ed.2d 114 (2011).

Specifically, the Anti-Drug Abuse Act of 1986:

***provided a mandatory 10-year sentence for certain drug offenses involving 5 kilograms or more of “a mixture or substance

containing a detectable amount of ” various cocaine-related elements, including coca leaves, cocaine, and cocaine salts; it also called for the same sentence for offenses involving only 50 grams or more of “a mixture or substance . . . which contains cocaine base.” ADAA, § 1002, 100 Stat. 3207-2 (amending §§ 841(b)(1)(A)(ii)-(iii)) (emphasis added). The ADAA also stipulated a mandatory 5-year sentence for offenses involving 500 grams of a mixture or substance containing coca leaves, cocaine, and cocaine salts, or 5 grams of a mixture or substance containing “cocaine base.” *Id.*, at 3207-3 (amending §§ 841(b)(1)(B)(ii)-(iii)).

Id. These provisions established a “100-to-1 ratio for the threshold quantities of cocaine-related substances that triggered the statute’s mandatory minimum penalties. That is, 5 grams or more of ‘a mixture or substance . . . which contains cocaine base’ was penalized as severely as 100 times that amount of the other cocaine-related elements enumerated in the statute.” *Id.*

In 2010, the quantity ratio in 21 U.S.C. § 841(b)(1) was reduced to roughly 18-to-1. *See* Fair Sentencing Act of 2010 (“FSA”), § 2, 124 Stat. 2372 (changing the quantity in 21 U.S.C. § 841(b)(1)(A)(iii) from 50 to 280 grams and in subparagraph (B)(iii) from 5 to 28 grams). In 2011, the Sentencing Commission amended the Sentencing Guidelines consistent with the FSA and then voted to apply the new guidelines retroactively to individuals sentenced before the FSA was enacted.²¹

The original version of United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (Nov. 2010) (USSG) did not define “cocaine base” as used in that provision.

[B]ut in 1993 the Commission issued an amendment to explain that “ ‘[c]ocaine base,’ for the purposes of this guideline, means ‘crack,’ ” that is, “the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.” USSG App. C, Amdt. 487 (effective Nov. 1, 1993); see also USSG § 2D1.1(c), n. (D). The Commission noted that “forms of cocaine base other than crack (e.g., coca paste . . .) will be treated as cocaine.” USSG App. C, Amdt. 487.5

²¹ Congress gave the Commission authority to make its amendments retroactive in 28 U.S.C. § 994(u).

The Guidelines' Drug Quantity Table only lists "cocaine" and "cocaine base" among its enumerated controlled substances, but the application notes make clear that the term "cocaine" includes "ecgonine and coca leaves," as well as "salts, isomers, and salts of isomers" of cocaine. § 2D1.1(c), and comment., n. 5.

DePierre v. United States, 131 S.Ct. at 2228, fn. 5.

The United States Sentencing Commission ("USSC"), in a report to Congress on the Fair Sentencing Act ("FSA"), laid out the history of federal cocaine sentencing policy, including its proposed 1995 amendment which recommended a 1-to-1 ratio for crack and powder cocaine.²²

²² United States Sentencing Commission, *Report to Congress: Impact of the Fair Sentencing Act of 2010*, August 2015, pp. 4-5, available at: http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf#page=8 (accessed Nov. 21, 2015).

Historical Background

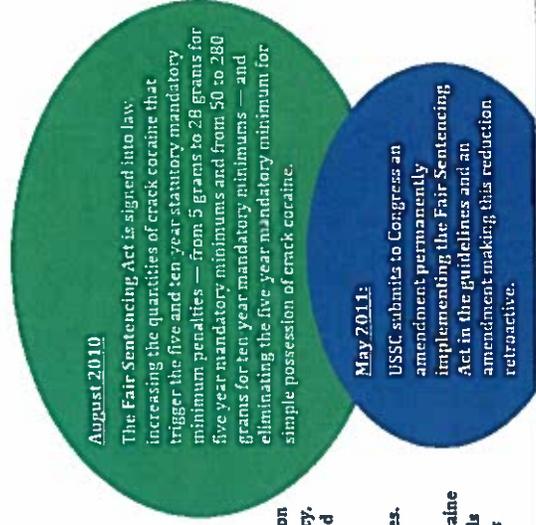
Federal Cocaine Sentencing Policy 1985 through 2000



- United States Sentencing Commission
- United States Congress
- United States Department of Justice
- Supreme Court of the United States

Historical Background

Federal Cocaine Sentencing Policy 2000 through 2015



May 2002:
USSC issues its third report on federal cocaine sentencing policy. The USSC unanimously concludes that current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress, recommends a drug quantity ratio of not more than 20-to-1 and again strongly urges Congress to repeal the mandatory minimum penalty for simple possession of crack cocaine.

May 2007:
USSC issues its fourth report on federal cocaine sentencing policy, maintaining its consistently held position that the 100-to-1 drug quantity ratio significantly undermines Congress' objectives. USSC submits to Congress an amendment reducing crack cocaine guideline penalties by two levels and an amendment making this reduction retroactive.

2000 2005 2010 2015

January 2005:
United States v. Booker makes the guidelines advisory.

September 2003:
Attorney General John Ashcroft directs that federal prosecutors "must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case ... The most serious offense or offenses are those that generate the most substantial sentences under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence."

May 2010:
Direction from Attorney General Eric Holder shifts the focus of charging decisions to emphasize federal prosecutors' individualized assessment of each case.

December 2007:
Kimbrough v. United States holds that a sentencing judge may consider the disparity between the guidelines' treatment of crack and powder cocaine when determining a sentencing range.

January 2009:
Spears v. United States holds that a district court has authority to substitute a crack/powder cocaine ratio different than 100-to-1 to avoid sentencing disparity under *Kimrough*.

July 2011:
Holder states that "the law requires the application of the [FSA's] new mandatory minimum sentencing provisions to all sentences that occur on or after Aug. 3, 2010, regardless of when the offense took place."

Following the Sentencing Commission’s February 1995 report and May 1995 proposed amendments, the House Subcommittee on Crime and the Senate Committee on the Judiciary held separate hearings to gather additional input on the 100:1 ratio and the proposed equalization. *See Cocaine and Federal Sentencing Policy: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 104th Cong. (1995)* (hereinafter “1995 House Hearing”); U.S. Sentencing Commission and Cocaine Sentencing Policy: Hearing Before the Sen. Comm. on the Judiciary, 104th Cong. (1995) (hereinafter “1995 Senate Hearing”). Throughout those hearings, witnesses repeatedly highlighted the disproportionate impact of the 100:1 ratio on African Americans, and repeatedly underscored the lack of justification for the ratio. In fact, of the 16 witnesses who testified at the hearings, all but one urged Congress to eliminate the 100:1 ratio. Despite the overwhelming evidence before it, Congress rejected the Sentencing Commission’s proposed equalization, thereby reaffirming the 100:1 ratio. *See Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334.*

The USSC continually reported that the harms associated with crack cocaine did not justify its substantially harsher treatment compared to powder cocaine (USSC, 1995; 1997; 2002).²³ Any increased addictiveness of crack cocaine is due to its method of use (smoking), rather than to any pharmacological difference between the various forms of cocaine. Powder cocaine that is smoked is equally as addictive as crack cocaine, and powder cocaine that is

²³ United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, (February 1995), available: <http://www.ussc.gov/news/congressional-testimony-and-reports/drug-topics/special-report-congress-cocaine-and-federal-sentencing-policy-february-1995> (accessed Nov. 21, 2015); United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, (April 1997), available: http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf (accessed Nov. 21, 2015); United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, (May 2002), available: <http://www.ussc.gov/news/congressional-testimony-and-reports/drug-topics/report-congress-cocaine-and-federal-sentencing-policy> (accessed Nov. 21, 2015).

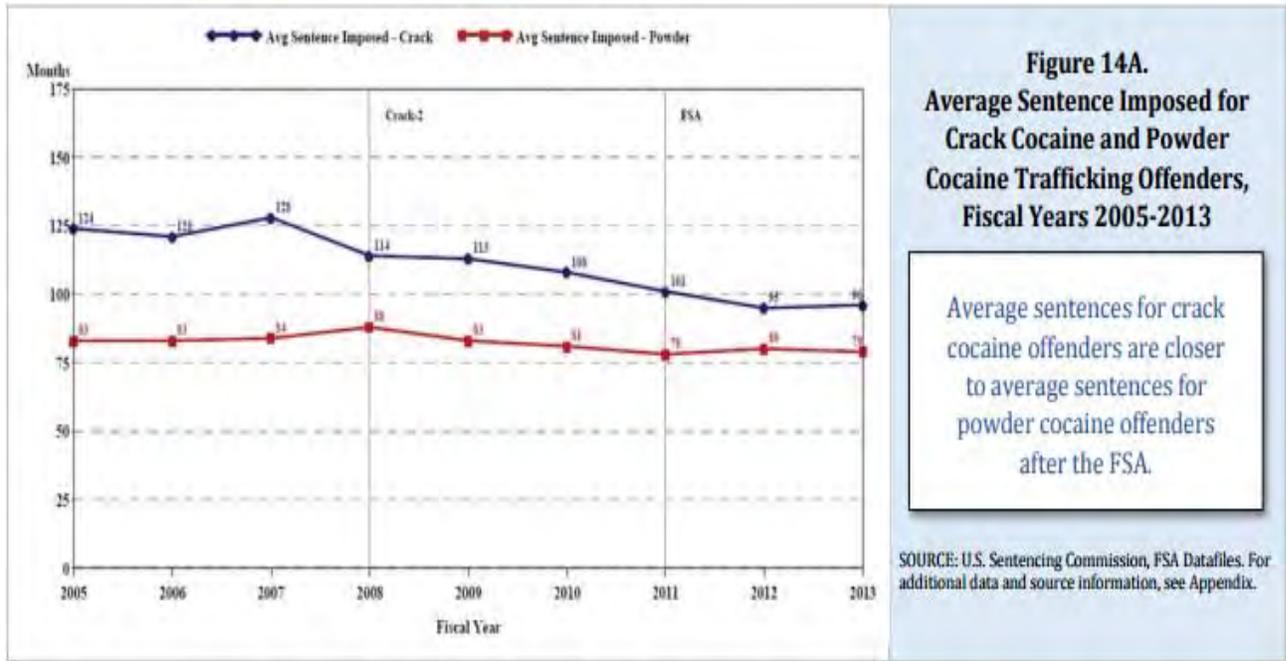
injected is more harmful and more addictive than crack cocaine, although cocaine injection is relatively rare. *Id.* Recent research has demonstrated that some of the worst harms thought to be associated with crack cocaine use, such as disabilities associated with pre-natal cocaine exposure, are not as severe as initially feared, and not any more serious than exposure from powder cocaine.²⁴

Powder cocaine is easily converted into crack cocaine through a simple process involving baking soda and a kitchen stove. Conversion usually is done at the lowest levels of the drug distribution system. Large percentages of the persons subject to five- and ten-year penalties under the current rules do not fit the category of serious or high-level traffickers that Congress described when initially establishing the five- and ten-year penalty levels. Most crack cocaine offenders receiving sentences greater than five years are low-level street dealers. For no other drug are such harsh penalties imposed on such low-level offenders. High penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers (USSC, 1997). For these and other reasons, the Commission has repeatedly recommended that the quantity thresholds for crack cocaine be revised upward. In 2001 (USSC, 2001) the Commission recommended that the crack cocaine threshold be raised to at least 25 grams from 5 grams, replacing the current 100 to-1 ratio with a 20-to-1 ratio.²⁵

²⁴ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Chapter Four: Racial, Ethnic, and Gender Disparities In Federal Sentencing Today (Nov. 2004), available: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap4.pdf> (accessed Nov. 22, 2015); *See also*, <https://www.aclu.org/cracks-system-twenty-years-unjust-federal-crack-cocaine-law?redirect=criminal-law-reform/cracks-system-twenty-years-unjust-federal-crack-cocaine-law> (accessed Nov. 22, 2015).

²⁵ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Chapter Four: Racial, Ethnic, and Gender Disparities In Federal Sentencing Today (Nov. 2004), available: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap4.pdf> (accessed Nov. 22, 2015).

The 2015 USSC report noted that, following the passage of the Fair Sentencing Act, had moved the average sentence for crack cocaine closer to that of powder cocaine.²⁶



While the FSA was a step toward increased fairness, the 18-to-1 ratio continues to perpetuate the outdated and discredited assumptions about crack cocaine that gave rise to the unwarranted 100-to-1 disparity in the first place.

2. Punishing for the actual amount of cocaine eliminates racial disparities in crack and powder cocaine sentencing.

The 100-to-1 ratio resulted in vast unwarranted racial disparities in the average length of sentences for comparable offenses because the majority of people arrested for crack offenses are not Caucasian.

Analyzing post-Guidelines data from 1989 and 1990, the Department of Justice concluded that 82 percent of all defendants convicted of federal crack cocaine offenses were

²⁶ United States Sentencing Commission, *Report to Congress: Impact of the Fair Sentencing Act of 2010*, August 2015, pp. 23, available at: http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf#page=8 (accessed Nov. 21, 2015).

African American. Douglas C. McDonald and Kenneth E. Carlson, Bureau of Justice Statistics, Dep't of Justice, *Sentencing in the Federal Courts: Does Race Matter?*, 90-93 (Dec. 1993) (hereinafter "Sentencing in Federal Courts"). The National Association of Criminal Defense Attorneys ("NACDL") notes in an amicus brief, filed in *Davis v. United States Sentencing Commission*, U.S. Court of Appeals for the DC Circuit, Case no. 14-5109, --- F.Supp.2d ----, 2014 WL 1400725, D.D.C., April 11, 2014 (NO. CV 11-1433 (JEB)), (12/18/14), that:

During the early-to-mid 1990s, the percentage of federal crack cocaine convictions involving African Americans steadily rose. E.g., 1995 Senate Hearing at 38, 42 (statement of Wayne A. Budd, Commissioner, U.S. Sentencing Commission) (stating that over 90 percent of federal crack cocaine convicts in 1994 were African American); 1995 House Hearing at 76 (statement of Lyle Strom, U.S. District Judge, District of Nebraska) (discussing a study conducted by the District of Nebraska finding that 90 percent of federal crack cocaine - 11 - prosecutions from 1990 through part of 1993 involved African Americans); *id.* at 123, 130-31 (statement of William B. Moffitt, Treasurer, NACDL) (showing that African Americans comprised approximately 90 percent of all federal crack cocaine convicts for each year from 1992 to 1995, and identifying at least one study showing that the percentage exceeded 92 percent in 1992); *Cocaine & Fed. Sent'g Pol'y* at 152 (concluding that in 1993, 88.3 percent of convicted crack cocaine offenders were African American). By 1995, more than 90 percent of federal defendants convicted of crack cocaine offenses were African American. 1995 House Hearing at 130 (statement of William B. Moffitt, Treasurer, NACDL). In contrast, the percentage of white defendants convicted of crack cocaine offenses markedly decreased over the same time period. At least one study showed that in 1988 and 1989, whites comprised more than 20 percent of federally convicted crack cocaine defendants. *Id.* at 132 (statement of William B. Moffitt, Treasurer, NACDL). Thereafter, that percentage dropped precipitously, plummeting to 3 or 4 percent between 1992 and 1994. 1995 Senate Hearing at 42 (statement of Wayne A. Budd, Commissioner, U.S. Sentencing Commission); 1995 House Hearing at 130-31 (statement of William B. Moffitt, Treasurer, NACDL); *id.* at 163 (statement of Nkechi Taifa, Legislative Counsel, ACLU).

According to a 1991 survey by the Department of Health and Human Services, 62 percent of all crack users were white, and only 25 percent were African American. See Nat'l Inst. on Drug Abuse, *National Household Survey on Drug Abuse: Population Estimates* 1991, 37-39 (1991). The Sentencing Commission likewise reported that a majority of crack cocaine users were white. Cocaine & Fed. Sent'g Pol'y at 34 (indicating that 52 percent of crack cocaine users were white and 38 percent were African American). Furthermore, in 1995, African Americans comprised only 15 percent of the population. See 1995 House Hearing at 7 (statement of Rep. Charles B. Rangel). Yet, African Americans represented more than 90 percent of all convicted federal crack cocaine offenders, whereas whites comprised barely more than 3 percent.

By 1990, *** prison sentences for African Americans were over 40 percent longer. Sent'g in Fed. Courts at 93; *accord* 1995 House Hearing at 83-85 (statement of Douglas C. McDonald, Senior Scientist and Manager, ABT Associates Inc.); Cocaine & Fed. Sent'g Pol'y at 153-54. The disproportionate impact of the 100:1 ratio accounted for 60 percent of this sentencing disparity, and for “nearly all of the black/white difference in sentences for cocaine trafficking” Sent'g in Fed. Courts at 94; *accord* 1995 House Hearing at 85 (statement of Douglas C. McDonald, Senior Scientist and Manager, - 15 - ABT Associates Inc.); Cocaine & Fed. Sent'g Pol'y at 153-54. Perhaps most strikingly, a Department of Justice study concluded that equalizing the powder-to-crack ratio would not only eliminate the difference in prison lengths for African Americans and whites, but would slightly reverse it. Sent'g in Fed. Courts at 2; *accord* Cocaine & Fed. Sent'g Pol'y at 153-54.²⁷

In 2002, 81 percent of the offenders sentenced for trafficking the crack form of cocaine were African-American.²⁸ The average length of imprisonment for crack cocaine was 119 months, 136 compared to 78 months for the powder form of the drug. Average sentences for crack cocaine were 25 months longer than for methamphetamine and 81 months longer than for heroin.²⁹ By 2004, under the 100-to-1 disparity, African Americans served virtually as much

²⁷ <http://www.nacdl.org/Advocacy.aspx?id=31323> (Accessed Nov. 22, 2015).

²⁸ USSC, Sourcebook (2002), at Tbl. 34.

²⁹ *Id.* at Fig. J..

time in prison for a nonviolent drug offense (58.7 months) as Caucasians did for a violent offense (61.7 months).³⁰ In 2010, 85 percent of the 30,000 people sentenced for crack cocaine offenses under the 100-to-1 regime were African-American.³¹ The State's interpretation of R.C. 2925.11(C)(4) would result in the sentencing disparities and the resulting disparate impact.

CONCLUSION

The Sixth District Court of Appeals properly applied R.C. 2925.11 to require that the State must prove the amount of cocaine contained in a substance consistent with the legislature's stated goal of eliminating sentencing disparities between crack and powder cocaine. Consequently, this Court should affirm the decision below and extend the Sixth District's well-reasoned analysis to this Court's jurisprudence.

Respectfully submitted,

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³⁰ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 112 (Table 7.16) (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf> (accessed Nov. 21, 2015).

³¹ See U.S. Sentencing Comm'n, Office of Research & Data, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 If the Amendment Were Applied Retroactively*, May 20, 2011, at 19, available at http://www.ussc.gov/sites/default/files/pdf/research/retroactivity-analyses/fair-sentencing-act/20110128_Crack_Retroactivity_Analysis.pdf; R.D. Hartley and J.M. Miller, *Crack-ing the Media Myth: Reconsidering Sentencing Severity for Cocaine Offenders by Drug Type*, 35 CRIMINAL JUSTICE REVIEW 67 (2010).

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CERTIFICATE OF SERVICE

A copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public**

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IN THE SUPREME COURT OF OHIO

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

**APPENDIX TO MERIT BRIEF OF AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER,
IN SUPPORT OF RAFAEL GONZALES**

26 of 116 DOCUMENTS

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*** ARCHIVE DATA ***

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2925. DRUG OFFENSES
DRUG ABUSE

ORC Ann. 2925.11 (2010)

§ 2925.11. Possession of drugs

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," *52 Stat. 1040 (1938)*, *21 U.S.C.A. § 301*, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

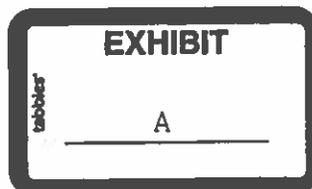
(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.



(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs 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 and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code*.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), or (f) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty-five grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand 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, 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 and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code*.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. 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 and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code*.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If 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, possession of heroin is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin 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 and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code*.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and *sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code* and in addition to any other sanction that is imposed for the offense under this section, *sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code*, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) (a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of *section 2929.18 of the Revised Code* unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of *section 3719.21 of the Revised Code*, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of *section 2929.18 of the Revised Code* in accordance with and subject to the requirements of division (F) of *section 2925.03 of the Revised Code*. The agency that receives the fine shall use the fine as specified in division (F) of *section 2925.03 of the Revised Code*.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with *section 2925.38 of the Revised Code*.

(F) It is an affirmative defense, as provided in *section 2901.05 of the Revised Code*, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with *section 2901.05 of the Revised Code*, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of *section 2925.03 of the Revised Code* applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

HISTORY:

138 v S 184, § 5 (Eff 6-20-84); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v H 298 (Eff 7-26-91); 145 v H 377 (Eff 9-30-93); 145 v H 391 (Eff 7-21-94); 146 v H 249 (Eff 7-17-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 2 (Eff 6-20-97); 147 v S 66 (Eff 7-22-98); 148 v S 107 (Eff 3-23-2000); 148 v H 241. Eff

5-17-2000; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 151 v S 154, § 1, eff. 5-17-06; 152 v H 195, § 1, eff. 9-30-08.

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*** Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 24 (HB 238).***

Title 29: Crimes -- Procedure
 Chapter 2925: Drug Offenses
 Drug Abuse

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ORC Ann. 2925.11 (2015)

§ 2925.11 Possession of drugs.

(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," *52 Stat. 1040 (1938)*, *21 U.S.C.A. 301*, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

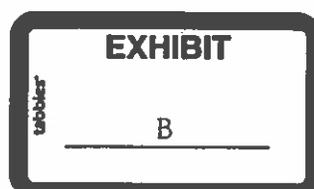
(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marijuana, cocaine, L.S.D., heroin, hashish, and controlled substance analogs, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.



(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs 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.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), or (g) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams but is less than forty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years.

(g) If the amount of the drug involved equals or exceeds forty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine, possession of cocaine is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine, possession of cocaine is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If possession of cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds twenty grams but is less than twenty-seven grams of cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) 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.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. 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.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If 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, possession of heroin is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin 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.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), (f), or (g) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams but is less than two thousand grams of hashish in a solid form or equals or exceeds two hundred grams but is less than four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years.

(g) If the amount of the drug involved equals or exceeds two thousand grams of hashish in a solid form or equals or exceeds four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(8) If the drug involved is a controlled substance analog or compound, mixture, preparation, or substance that contains a controlled substance analog, whoever violates division (A) of this section is guilty of possession of a controlled substance analog. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(8)(b), (c), (d), (e), or (f) of this section, possession of a controlled substance analog is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams, possession of a controlled substance analog is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty grams but is less than thirty grams, possession of a controlled substance analog is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds thirty grams but is less than forty grams, possession of a controlled substance analog is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds forty grams but is less than fifty grams, possession of a controlled substance analog is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds fifty grams, possession of a controlled substance analog 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.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and *sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code* and in addition to any other sanction that is imposed for the offense under this section, *sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code*, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) (a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of *section 2929.18 of the Revised Code* unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of *section 3719.21 of the Revised Code*, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of *section 2929.18 of the Revised Code* in accordance with and subject to the requirements of division (F) of *section 2925.03 of the Revised Code*. The agency that receives the fine shall use the fine as specified in division (F) of *section 2925.03 of the Revised Code*.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with *section 2925.38 of the Revised Code*.

(F) It is an affirmative defense, as provided in *section 2901.05 of the Revised Code*, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with *section 2901.05 of the Revised Code*, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of *section 2925.03 of the Revised Code* applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

(H) It is an affirmative defense to a charge of possession of a controlled substance analog under division (C)(8) of this section that the person charged with violating that offense obtained, possessed, or used an item described in division (HH)(2)(a), (b), or (c) of *section 3719.01 of the Revised Code*.

HISTORY: HISTORY:

138 v S 184, § 5 (Eff 6-20-84); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v H 298 (Eff 7-26-91); 145 v H 377 (Eff 9-30-93); 145 v H 391 (Eff 7-21-94); 146 v H 249 (Eff 7-17-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 2 (Eff 6-20-97); 147 v S 66 (Eff 7-22-98); 148 v S 107 (Eff 3-23-2000); 148 v H 241. Eff 5-17-2000; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 151 v S 154, § 1, eff. 5-17-06; 152 v H 195, § 1, eff. 9-30-08; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2011 HB 64, § 1, eff. Oct. 17, 2011; 2012 HB 334, § 1, eff. Dec. 20, 2012.

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*** ARCHIVE DATA ***

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
 FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2925. DRUG OFFENSES

ORC Ann. 2925.01 (2010)

§ 2925.01. Definitions

As used in this chapter:

(A) "Administer," "controlled substance," "dispense," "distribute," "hypodermic," "manufacturer," "official written order," "person," "pharmacist," "pharmacy," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meanings as in *section 3719.01 of the Revised Code*.

(B) "Drug dependent person" and "drug of abuse" have the same meanings as in *section 3719.011 [3719.01.1] of the Revised Code*.

(C) "Drug," "dangerous drug," "licensed health professional authorized to prescribe drugs," and "prescription" have the same meanings as in *section 4729.01 of the Revised Code*.

(D) "Bulk amount" of a controlled substance means any of the following:

(1) For any compound, mixture, preparation, or substance included in schedule I, schedule II, or schedule III, with the exception of marihuana, cocaine, L. S. D., heroin, and hashish and except as provided in division (D) (2) or (5) of this section, whichever of the following is applicable:

(a) An amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance that is or contains any amount of a schedule I opiate or opium derivative;

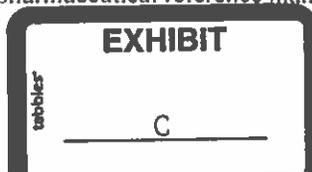
(b) An amount equal to or exceeding ten grams of a compound, mixture, preparation, or substance that is or contains any amount of raw or gum opium;

(c) An amount equal to or exceeding thirty grams or ten unit doses of a compound, mixture, preparation, or substance that is or contains any amount of a schedule I hallucinogen other than tetrahydrocannabinol or lysergic acid amide, or a schedule I stimulant or depressant;

(d) An amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II opiate or opium derivative;

(e) An amount equal to or exceeding five grams or ten unit doses of a compound, mixture, preparation, or substance that is or contains any amount of phencyclidine;

(f) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or



substance that is or contains any amount of a schedule II stimulant that is in a final dosage form manufactured by a person authorized by the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and the federal drug abuse control laws, as defined in *section 3719.01 of the Revised Code*, that is or contains any amount of a schedule II depressant substance or a schedule II hallucinogenic substance;

(g) An amount equal to or exceeding three grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II stimulant, or any of its salts or isomers, that is not in a final dosage form manufactured by a person authorized by the Federal Food, Drug, and Cosmetic Act and the federal drug abuse control laws.

(2) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III or IV substance other than an anabolic steroid or a schedule III opiate or opium derivative;

(3) An amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III opiate or opium derivative;

(4) An amount equal to or exceeding two hundred fifty milliliters or two hundred fifty grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule V substance;

(5) An amount equal to or exceeding two hundred solid dosage units, sixteen grams, or sixteen milliliters of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III anabolic steroid.

(E) "Unit dose" means an amount or unit of a compound, mixture, or preparation containing a controlled substance that is separately identifiable and in a form that indicates that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual.

(F) "Cultivate" includes planting, watering, fertilizing, or tilling.

(G) "Drug abuse offense" means any of the following:

(1) A violation of division (A) of section 2913.02 that constitutes theft of drugs, or a violation of *section 2925.02, 2925.03, 2925.04, 2925.041, 2925.05, 2925.06, 2925.11, 2925.12, 2925.13, 2925.22, 2925.23, 2925.24, 2925.31, 2925.32, 2925.36, or 2925.37 of the Revised Code*;

(2) A violation of an existing or former law of this or any other state or of the United States that is substantially equivalent to any section listed in division (G) (1) of this section;

(3) An offense under an existing or former law of this or any other state, or of the United States, of which planting, cultivating, harvesting, processing, making, manufacturing, producing, shipping, transporting, delivering, acquiring, possessing, storing, distributing, dispensing, selling, inducing another to use, administering to another, using, or otherwise dealing with a controlled substance is an element;

(4) A conspiracy to commit, attempt to commit, or complicity in committing or attempting to commit any offense under division (G) (1), (2), or (3) of this section.

(H) "Felony drug abuse offense" means any drug abuse offense that would constitute a felony under the laws of this state, any other state, or the United States.

(I) "Harmful intoxicant" does not include beer or intoxicating liquor but means any of the following:

(1) Any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefaction, paralysis, unconsciousness, asphyxiation, or other harmful physiological effects, and includes, but is not limited to, any of the following:

(a) Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, or other preparation containing a volatile organic solvent;

(b) Any aerosol propellant;

(c) Any fluorocarbon refrigerant;

(d) Any anesthetic gas.

(2) Gamma Butyrolactone;

(3) 1,4 Butanediol.

(J) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

(K) "Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

(L) "Sample drug" means a drug or pharmaceutical preparation that would be hazardous to health or safety if used without the supervision of a licensed health professional authorized to prescribe drugs, or a drug of abuse, and that, at one time, had been placed in a container plainly marked as a sample by a manufacturer.

(M) "Standard pharmaceutical reference manual" means the current edition, with cumulative changes if any, of any of the following reference works:

(1) "The National Formulary";

(2) "The United States Pharmacopeia," prepared by authority of the United States Pharmacopeial Convention, Inc.;

(3) Other standard references that are approved by the state board of pharmacy.

(N) "Juvenile" means a person under eighteen years of age.

(O) "Counterfeit controlled substance" means any of the following:

(1) Any drug that bears, or whose container or label bears, a trademark, trade name, or other identifying mark used without authorization of the owner of rights to that trademark, trade name, or identifying mark;

(2) Any unmarked or unlabeled substance that is represented to be a controlled substance manufactured, processed, packed, or distributed by a person other than the person that manufactured, processed, packed, or distributed it;

(3) Any substance that is represented to be a controlled substance but is not a controlled substance or is a different controlled substance;

(4) Any substance other than a controlled substance that a reasonable person would believe to be a controlled substance because of its similarity in shape, size, and color, or its markings, labeling, packaging, distribution, or the price for which it is sold or offered for sale.

(P) An offense is "committed in the vicinity of a school" if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises.

(Q) "School" means any school operated by a board of education, any community school established under Chapter 3314. of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum standards under *section 3301.07 of the Revised Code*, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted at the time a criminal offense is committed.

(R) "School premises" means either of the following:

(1) The parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed;

(2) Any other parcel of real property that is owned or leased by a board of education of a school, the governing authority of a community school established under Chapter 3314. of the Revised Code. or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under *section 3301.07 of the Revised Code* and on which some of the instruction, extracurricular activities, or training of the school is conducted,

whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the parcel of real property at the time a criminal offense is committed.

(S) "School building" means any building in which any of the instruction, extracurricular activities, or training provided by a school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted in the school building at the time a criminal offense is committed.

(T) "Disciplinary counsel" means the disciplinary counsel appointed by the board of commissioners on grievances and discipline of the supreme court under the Rules for the Government of the Bar of Ohio.

(U) "Certified grievance committee" means a duly constituted and organized committee of the Ohio state bar association or of one or more local bar associations of the state of Ohio that complies with the criteria set forth in Rule V, section 6 of the Rules for the Government of the Bar of Ohio.

(V) "Professional license" means any license, permit, certificate, registration, qualification, admission, temporary license, temporary permit, temporary certificate, or temporary registration that is described in divisions (W)(1) to (36) of this section and that qualifies a person as a professionally licensed person.

(W) "Professionally licensed person" means any of the following:

(1) A person who has obtained a license as a manufacturer of controlled substances or a wholesaler of controlled substances under Chapter 3719. of the Revised Code;

(2) A person who has received a certificate or temporary certificate as a certified public accountant or who has registered as a public accountant under Chapter 4701. of the Revised Code and who holds an Ohio permit issued under that chapter;

(3) A person who holds a certificate of qualification to practice architecture issued or renewed and registered under Chapter 4703. of the Revised Code;

(4) A person who is registered as a landscape architect under Chapter 4703. of the Revised Code or who holds a permit as a landscape architect issued under that chapter;

(5) A person licensed under Chapter 4707. of the Revised Code;

(6) A person who has been issued a certificate of registration as a registered barber under Chapter 4709. of the Revised Code;

(7) A person licensed and regulated to engage in the business of a debt pooling company by a legislative authority, under authority of Chapter 4710. of the Revised Code;

(8) A person who has been issued a cosmetologist's license, manicurist's license, esthetician's license, managing cosmetologist's license, managing manicurist's license, managing esthetician's license, cosmetology instructor's license, manicurist instructor's license, esthetician instructor's license, or tanning facility permit under Chapter 4713. of the Revised Code;

(9) A person who has been issued a license to practice dentistry, a general anesthesia permit, a conscious intravenous sedation permit, a limited resident's license, a limited teaching license, a dental hygienist's license, or a dental hygienist's teacher's certificate under Chapter 4715. of the Revised Code;

(10) A person who has been issued an embalmer's license, a funeral director's license, a funeral home license, or a crematory license, or who has been registered for an embalmer's or funeral director's apprenticeship under Chapter 4717. of the Revised Code;

(11) A person who has been licensed as a registered nurse or practical nurse, or who has been issued a certificate for the practice of nurse-midwifery under Chapter 4723. of the Revised Code;

(12) A person who has been licensed to practice optometry or to engage in optical dispensing under Chapter 4725. of the Revised Code;

(13) A person licensed to act as a pawnbroker under Chapter 4727. of the Revised Code;

(14) A person licensed to act as a precious metals dealer under Chapter 4728. of the Revised Code;

(15) A person licensed as a pharmacist, a pharmacy intern, a wholesale distributor of dangerous drugs, or a terminal distributor of dangerous drugs under Chapter 4729. of the Revised Code;

(16) A person who is authorized to practice as a physician assistant under Chapter 4730. of the Revised Code;

(17) A person who has been issued a certificate to practice medicine and surgery, osteopathic medicine and surgery, a limited branch of medicine, or podiatry under Chapter 4731. of the Revised Code;

(18) A person licensed as a psychologist or school psychologist under Chapter 4732. of the Revised Code;

(19) A person registered to practice the profession of engineering or surveying under Chapter 4733. of the Revised Code;

(20) A person who has been issued a license to practice chiropractic under Chapter 4734. of the Revised Code;

(21) A person licensed to act as a real estate broker or real estate salesperson under Chapter 4735. of the Revised Code;

(22) A person registered as a registered sanitarian under Chapter 4736. of the Revised Code;

(23) A person licensed to operate or maintain a junkyard under Chapter 4737. of the Revised Code;

(24) A person who has been issued a motor vehicle salvage dealer's license under Chapter 4738. of the Revised Code;

(25) A person who has been licensed to act as a steam engineer under Chapter 4739. of the Revised Code;

(26) A person who has been issued a license or temporary permit to practice veterinary medicine or any of its branches, or who is registered as a graduate animal technician under Chapter 4741. of the Revised Code;

(27) A person who has been issued a hearing aid dealer's or fitter's license or trainee permit under Chapter 4747. of the Revised Code;

(28) A person who has been issued a class A, class B, or class C license or who has been registered as an investigator or security guard employee under Chapter 4749. of the Revised Code;

(29) A person licensed and registered to practice as a nursing home administrator under Chapter 4751. of the Revised Code;

(30) A person licensed to practice as a speech-language pathologist or audiologist under Chapter 4753. of the Revised Code;

(31) A person issued a license as an occupational therapist or physical therapist under Chapter 4755. of the Revised Code;

(32) A person who is licensed as a professional clinical counselor or professional counselor, licensed as a social worker or independent social worker, or registered as a social work assistant under Chapter 4757. of the Revised Code;

(33) A person issued a license to practice dietetics under Chapter 4759. of the Revised Code;

(34) A person who has been issued a license or limited permit to practice respiratory therapy under Chapter 4761. of the Revised Code;

(35) A person who has been issued a real estate appraiser certificate under Chapter 4763. of the Revised Code;

(36) A person who has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.

(X) "Cocaine" means any of the following:

(1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;

(2) 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;

(3) 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.

(Y) "L.S.D." means lysergic acid diethylamide.

(Z) "Hashish" means the resin or a preparation of the resin contained in marihuana, whether in solid form or in a liquid concentrate, liquid extract, or liquid distillate form.

(AA) "Marihuana" has the same meaning as in *section 3719.01 of the Revised Code*, except that it does not include hashish.

(BB) An offense is "committed in the vicinity of a juvenile" if the offender commits the offense within one hundred feet of a juvenile or within the view of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the offender knows the offense is being committed within one hundred feet of or within view of the juvenile, or whether the juvenile actually views the commission of the offense.

(CC) "Presumption for a prison term" or "presumption that a prison term shall be imposed" means a presumption, as described in division (D) of *section 2929.13 of the Revised Code*, that a prison term is a necessary sanction for a felony in order to comply with the purposes and principles of sentencing under *section 2929.11 of the Revised Code*.

(DD) "Major drug offender" has the same meaning as in *section 2929.01 of the Revised Code*.

(EE) "Minor drug possession offense" means either of the following:

(1) A violation of *section 2925.11 of the Revised Code* as it existed prior to July 1, 1996;

(2) A violation of *section 2925.11 of the Revised Code* as it exists on and after July 1, 1996, that is a misdemeanor or a felony of the fifth degree.

(FF) "Mandatory prison term" has the same meaning as in *section 2929.01 of the Revised Code*.

(GG) "Crack cocaine" means a compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine or that is in a form that resembles rocks or pebbles generally intended for individual use.

(HH) "Adulterate" means to cause a drug to be adulterated as described in *section 3715.63 of the Revised Code*.

(II) "Public premises" means any hotel, restaurant, tavern, store, arena, hall, or other place of public accommodation, business, amusement, or resort.

(JJ) "Methamphetamine" means methamphetamine, any salt, isomer, or salt of an isomer of methamphetamine, or any compound, mixture, preparation, or substance containing methamphetamine or any salt, isomer, or salt of an isomer of methamphetamine.

(KK) "Lawful prescription" means a prescription that is issued for a legitimate medical purpose by a licensed health professional authorized to prescribe drugs, that is not altered or forged, and that was not obtained by means of deception or by the commission of any theft offense.

(LL) "Deception" and "theft offense" have the same meanings as in *section 2913.01 of the Revised Code*.

HISTORY:

136 v H 300 (Eff 7-1-76); 136 v S 414 (Eff 9-22-76); 137 v H 565 (Eff 11-1-78); 138 v H 900 (Eff 7-1-80); 138 v S 378 (Eff 3-23-81); 139 v H 535 (Eff 8-20-82); 139 v S 199 (Eff 7-1-83); 141 v H 281 (Eff 7-18-85); 143 v H 215 (Eff 4-11-90); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v H 322 (Eff 3-2-92); 145 v H 156 (Eff 5-19-93); 146 v S 143, § 1 (Eff 3-5-96); 146 v S 2 (Eff 7-1-96); 146 v S 143, § 5 (Eff 7-1-96); 146 v H 125 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 223 (Eff 3-18-97); 147 v S 66 (Eff 7-22-98); 147 v S 117 (Eff 8-5-98); 147 v H 606 (Eff 3-9-99); 147 v S 200 (Eff 3-30-99); 148 v H 18 (Eff 10-20-99); 148 v H 202 (Eff 2-9-2000); 149 v H 7 (Eff 8-7-2001); 149 v H 273 (Eff 7-23-2002); 149 v H 415 (4-7-2003); 149 v H 364, § 1, eff. 4-8-2003; 149 v H 364, § 8, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v S 209, § 1, eff. 5-6-05; 151 v S 53, § 1, eff. 5-17-06; 152 v H 195, § 1, eff. 9-30-08.

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*** Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 24 (HB 238).***

Title 29: Crimes -- Procedure
 Chapter 2925: Drug Offenses

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ORC Ann. 2925.01 (2015)

§ 2925.01 Definitions.

As used in this chapter:

(A) "Administer," "controlled substance," "controlled substance analog," "dispense," "distribute," "hypodermic," "manufacturer," "official written order," "person," "pharmacist," "pharmacy," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meanings as in *section 3719.01 of the Revised Code*.

(B) "Drug dependent person" and "drug of abuse" have the same meanings as in *section 3719.011 of the Revised Code*.

(C) "Drug," "dangerous drug," "licensed health professional authorized to prescribe drugs," and "prescription" have the same meanings as in *section 4729.01 of the Revised Code*.

(D) "Bulk amount" of a controlled substance means any of the following:

(1) For any compound, mixture, preparation, or substance included in schedule I, schedule II, or schedule III, with the exception of controlled substance analogs, marihuana, cocaine, L.S.D., heroin, and hashish and except as provided in division (D)(2) or (5) of this section, whichever of the following is applicable:

(a) An amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance that is or contains any amount of a schedule I opiate or opium derivative;

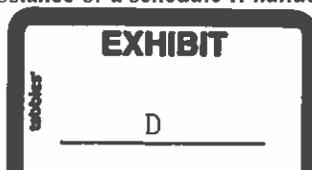
(b) An amount equal to or exceeding ten grams of a compound, mixture, preparation, or substance that is or contains any amount of raw or gum opium;

(c) An amount equal to or exceeding thirty grams or ten unit doses of a compound, mixture, preparation, or substance that is or contains any amount of a schedule I hallucinogen other than tetrahydrocannabinol or lysergic acid amide, or a schedule I stimulant or depressant;

(d) An amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II opiate or opium derivative;

(e) An amount equal to or exceeding five grams or ten unit doses of a compound, mixture, preparation, or substance that is or contains any amount of phencyclidine;

(f) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II stimulant that is in a final dosage form manufactured by a person authorized by the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and the federal drug abuse control laws, as defined in *section 3719.01 of the Revised Code*, that is or contains any amount of a schedule II depressant substance or a schedule II hallucinogenic substance;



(g) An amount equal to or exceeding three grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II stimulant, or any of its salts or isomers, that is not in a final dosage form manufactured by a person authorized by the Federal Food, Drug, and Cosmetic Act and the federal drug abuse control laws.

(2) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III or IV substance other than an anabolic steroid or a schedule III opiate or opium derivative;

(3) An amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III opiate or opium derivative;

(4) An amount equal to or exceeding two hundred fifty milliliters or two hundred fifty grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule V substance;

(5) An amount equal to or exceeding two hundred solid dosage units, sixteen grams, or sixteen milliliters of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III anabolic steroid.

(E) "Unit dose" means an amount or unit of a compound, mixture, or preparation containing a controlled substance that is separately identifiable and in a form that indicates that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual.

(F) "Cultivate" includes planting, watering, fertilizing, or tilling.

(G) "Drug abuse offense" means any of the following:

(1) A violation of division (A) of section 2913.02 that constitutes theft of drugs, or a violation of *section 2925.02, 2925.03, 2925.04, 2925.041, 2925.05, 2925.06, 2925.11, 2925.12, 2925.13, 2925.22, 2925.23, 2925.24, 2925.31, 2925.32, 2925.36, or 2925.37 of the Revised Code*;

(2) A violation of an existing or former law of this or any other state or of the United States that is substantially equivalent to any section listed in division (G)(1) of this section;

(3) An offense under an existing or former law of this or any other state, or of the United States, of which planting, cultivating, harvesting, processing, making, manufacturing, producing, shipping, transporting, delivering, acquiring, possessing, storing, distributing, dispensing, selling, inducing another to use, administering to another, using, or otherwise dealing with a controlled substance is an element;

(4) A conspiracy to commit, attempt to commit, or complicity in committing or attempting to commit any offense under division (G)(1), (2), or (3) of this section.

(H) "Felony drug abuse offense" means any drug abuse offense that would constitute a felony under the laws of this state, any other state, or the United States.

(I) "Harmful intoxicant" does not include beer or intoxicating liquor but means any of the following:

(1) Any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefaction, paralysis, unconsciousness, asphyxiation, or other harmful physiological effects, and includes, but is not limited to, any of the following:

(a) Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, or other preparation containing a volatile organic solvent;

(b) Any aerosol propellant;

(c) Any fluorocarbon refrigerant;

(d) Any anesthetic gas.

(2) Gamma Butyrolactone;

(3) 1,4 Butanediol.

(J) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

(K) "Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

(L) "Sample drug" means a drug or pharmaceutical preparation that would be hazardous to health or safety if used without the supervision of a licensed health professional authorized to prescribe drugs, or a drug of abuse, and that, at one time, had been placed in a container plainly marked as a sample by a manufacturer.

(M) "Standard pharmaceutical reference manual" means the current edition, with cumulative changes if any, of references that are approved by the state board of pharmacy.

(N) "Juvenile" means a person under eighteen years of age.

(O) "Counterfeit controlled substance" means any of the following:

(1) Any drug that bears, or whose container or label bears, a trademark, trade name, or other identifying mark used without authorization of the owner of rights to that trademark, trade name, or identifying mark;

(2) Any unmarked or unlabeled substance that is represented to be a controlled substance manufactured, processed, packed, or distributed by a person other than the person that manufactured, processed, packed, or distributed it;

(3) Any substance that is represented to be a controlled substance but is not a controlled substance or is a different controlled substance;

(4) Any substance other than a controlled substance that a reasonable person would believe to be a controlled substance because of its similarity in shape, size, and color, or its markings, labeling, packaging, distribution, or the price for which it is sold or offered for sale.

(P) An offense is "committed in the vicinity of a school" if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises.

(Q) "School" means any school operated by a board of education, any community school established under Chapter 3314. of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum standards under *section 3301.07 of the Revised Code*, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted at the time a criminal offense is committed.

(R) "School premises" means either of the following:

(1) The parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed;

(2) Any other parcel of real property that is owned or leased by a board of education of a school, the governing authority of a community school established under Chapter 3314. of the Revised Code, or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under *section 3301.07 of the Revised Code* and on which some of the instruction, extracurricular activities, or training of the school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the parcel of real property at the time a criminal offense is committed.

(S) "School building" means any building in which any of the instruction, extracurricular activities, or training provided by a school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted in the school building at the time a criminal offense is committed.

(T) "Disciplinary counsel" means the disciplinary counsel appointed by the board of commissioners on grievances and discipline of the supreme court under the Rules for the Government of the Bar of Ohio.

(U) "Certified grievance committee" means a duly constituted and organized committee of the Ohio state bar association or of one or more local bar associations of the state of Ohio that complies with the criteria set forth in Rule V, section 6 of the Rules for the Government of the Bar of Ohio.

(V) "Professional license" means any license, permit, certificate, registration, qualification, admission, temporary license, temporary permit, temporary certificate, or temporary registration that is described in divisions (W)(1) to (36) of this section and that qualifies a person as a professionally licensed person.

(W) "Professionally licensed person" means any of the following:

(1) A person who has obtained a license as a manufacturer of controlled substances or a wholesaler of controlled substances under Chapter 3719. of the Revised Code;

(2) A person who has received a certificate or temporary certificate as a certified public accountant or who has registered as a public accountant under Chapter 4701. of the Revised Code and who holds an Ohio permit issued under that chapter;

(3) A person who holds a certificate of qualification to practice architecture issued or renewed and registered under Chapter 4703. of the Revised Code;

(4) A person who is registered as a landscape architect under Chapter 4703. of the Revised Code or who holds a permit as a landscape architect issued under that chapter;

(5) A person licensed under Chapter 4707. of the Revised Code;

(6) A person who has been issued a certificate of registration as a registered barber under Chapter 4709. of the Revised Code;

(7) A person licensed and regulated to engage in the business of a debt pooling company by a legislative authority, under authority of Chapter 4710. of the Revised Code;

(8) A person who has been issued a cosmetologist's license, hair designer's license, manicurist's license, esthetician's license, natural hair stylist's license, managing cosmetologist's license, managing hair designer's license, managing manicurist's license, managing esthetician's license, managing natural hair stylist's license, cosmetology instructor's license, hair design instructor's license, manicurist instructor's license, esthetics instructor's license, natural hair style instructor's license, independent contractor's license, or tanning facility permit under Chapter 4713. of the Revised Code;

(9) A person who has been issued a license to practice dentistry, a general anesthesia permit, a conscious intravenous sedation permit, a limited resident's license, a limited teaching license, a dental hygienist's license, or a dental hygienist's teacher's certificate under Chapter 4715. of the Revised Code;

(10) A person who has been issued an embalmer's license, a funeral director's license, a funeral home license, or a crematory license, or who has been registered for an embalmer's or funeral director's apprenticeship under Chapter 4717. of the Revised Code;

(11) A person who has been licensed as a registered nurse or practical nurse, or who has been issued a certificate for the practice of nurse-midwifery under Chapter 4723. of the Revised Code;

(12) A person who has been licensed to practice optometry or to engage in optical dispensing under Chapter 4725. of the Revised Code;

(13) A person licensed to act as a pawnbroker under Chapter 4727. of the Revised Code;

(14) A person licensed to act as a precious metals dealer under Chapter 4728. of the Revised Code;

(15) A person licensed as a pharmacist, a pharmacy intern, a wholesale distributor of dangerous drugs, or a terminal distributor of dangerous drugs under Chapter 4729. of the Revised Code;

(16) A person who is authorized to practice as a physician assistant under Chapter 4730. of the Revised Code;

(17) A person who has been issued a certificate to practice medicine and surgery, osteopathic medicine and surgery, a limited branch of medicine, or podiatry under Chapter 4731. of the Revised Code;

(18) A person licensed as a psychologist or school psychologist under Chapter 4732. of the Revised Code;

(19) A person registered to practice the profession of engineering or surveying under Chapter 4733. of the Revised Code;

(20) A person who has been issued a license to practice chiropractic under Chapter 4734. of the Revised Code;

(21) A person licensed to act as a real estate broker or real estate salesperson under Chapter 4735. of the Revised Code;

(22) A person registered as a registered sanitarian under Chapter 4736. of the Revised Code;

(23) A person licensed to operate or maintain a junkyard under Chapter 4737. of the Revised Code;

(24) A person who has been issued a motor vehicle salvage dealer's license under Chapter 4738. of the Revised Code;

(25) A person who has been licensed to act as a steam engineer under Chapter 4739. of the Revised Code;

(26) A person who has been issued a license or temporary permit to practice veterinary medicine or any of its branches, or who is registered as a graduate animal technician under Chapter 4741. of the Revised Code;

(27) A person who has been issued a hearing aid dealer's or fitter's license or trainee permit under Chapter 4747. of the Revised Code;

(28) A person who has been issued a class A, class B, or class C license or who has been registered as an investigator or security guard employee under Chapter 4749. of the Revised Code;

(29) A person licensed and registered to practice as a nursing home administrator under Chapter 4751. of the Revised Code;

(30) A person licensed to practice as a speech-language pathologist or audiologist under Chapter 4753. of the Revised Code;

(31) A person issued a license as an occupational therapist or physical therapist under Chapter 4755. of the Revised Code;

(32) A person who is licensed as a licensed professional clinical counselor, licensed professional counselor, social worker, independent social worker, independent marriage and family therapist, or marriage and family therapist, or registered as a social work assistant under Chapter 4757. of the Revised Code;

(33) A person issued a license to practice dietetics under Chapter 4759. of the Revised Code;

(34) A person who has been issued a license or limited permit to practice respiratory therapy under Chapter 4761. of the Revised Code;

(35) A person who has been issued a real estate appraiser certificate under Chapter 4763. of the Revised Code;

(36) A person who has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.

(X) "Cocaine" means any of the following:

(1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;

(2) 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;

(3) 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.

(Y) "L.S.D." means lysergic acid diethylamide.

(Z) "Hashish" means the resin or a preparation of the resin contained in marihuana, whether in solid form or in a liquid concentrate, liquid extract, or liquid distillate form.

(AA) "Marihuana" has the same meaning as in *section 3719.01 of the Revised Code*, except that it does not include hashish.

(BB) An offense is "committed in the vicinity of a juvenile" if the offender commits the offense within one hundred feet of a juvenile or within the view of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the offender knows the offense is being committed within one hundred feet of or within view of the juvenile, or whether the juvenile actually views the commission of the offense.

(CC) "Presumption for a prison term" or "presumption that a prison term shall be imposed" means a presumption, as described in division (D) of *section 2929.13 of the Revised Code*, that a prison term is a necessary sanction for a felony in order to comply with the purposes and principles of sentencing under *section 2929.11 of the Revised Code*.

(DD) "Major drug offender" has the same meaning as in *section 2929.01 of the Revised Code*.

(EE) "Minor drug possession offense" means either of the following:

(1) A violation of *section 2925.11 of the Revised Code* as it existed prior to July 1, 1996;

(2) A violation of *section 2925.11 of the Revised Code* as it exists on and after July 1, 1996, that is a misdemeanor or a felony of the fifth degree.

(FF) "Mandatory prison term" has the same meaning as in *section 2929.01 of the Revised Code*.

(GG) "Adulterate" means to cause a drug to be adulterated as described in *section 3715.63 of the Revised Code*.

(HH) "Public premises" means any hotel, restaurant, tavern, store, arena, hall, or other place of public accommodation, business, amusement, or resort.

(II) "Methamphetamine" means methamphetamine, any salt, isomer, or salt of an isomer of methamphetamine, or any compound, mixture, preparation, or substance containing methamphetamine or any salt, isomer, or salt of an isomer of methamphetamine.

(JJ) "Lawful prescription" means a prescription that is issued for a legitimate medical purpose by a licensed health professional authorized to prescribe drugs, that is not altered or forged, and that was not obtained by means of deception or by the commission of any theft offense.

(KK) "Deception" and "theft offense" have the same meanings as in *section 2913.01 of the Revised Code*.

HISTORY: HISTORY:

136 v H 300 (Eff 7-1-76); 136 v S 414 (Eff 9-22-76); 137 v H 565 (Eff 11-1-78); 138 v H 900 (Eff 7-1-80); 138 v S 378 (Eff 3-23-81); 139 v H 535 (Eff 8-20-82); 139 v S 199 (Eff 7-1-83); 141 v H 281 (Eff 7-18-85); 143 v H 215 (Eff 4-11-90); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v H 322 (Eff 3-2-92); 145 v H 156 (Eff 5-19-93); 146 v S 143, § 1 (Eff 3-5-96); 146 v S 2 (Eff 7-1-96); 146 v S 143, § 5 (Eff 7-1-96); 146 v H 125 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 223 (Eff 3-18-97); 147 v S 66 (Eff 7-22-98); 147 v S 117 (Eff 8-5-98); 147 v H 606 (Eff 3-9-99); 147 v S 200 (Eff 3-30-99); 148 v H 18 (Eff 10-20-99); 148 v H 202 (Eff 2-9-2000); 149 v H 7 (Eff 8-7-2001); 149 v H 273 (Eff 7-23-2002); 149 v H 415 (4-7-2003); 149 v H 364, § 1, eff. 4-8-2003; 149 v H 364, § 8, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v S 209, § 1, eff. 5-6-05; 151 v S 53, § 1, eff. 5-17-06; 152 v H 195, § 1, eff. 9-30-08; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 334, § 1, eff. Dec. 20, 2012; 2014 HB 232, § 1, eff. July 10, 2014.