Supreme Court of Ohio Clerk of Court - Filed December 14, 2015 - Case No. 2015-0384

In the
Supreme Court of Ohio

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

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

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INTRODUCTION

The General Assembly does not "hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). To affirm the Sixth District, however, this Court must find that the General Assembly did just that. In particular, the Court must accept that roughly twenty years ago, the General Assembly hid a new cocaine-sentencing rule in a mere two words: "of cocaine." Courts, prosecutors, and defense lawyers are just now catching up.

Of course, that implausible scenario is not required by the text of Ohio's cocaine-possession statute. Contrary to what defendant Rafael Gonzales says at page 1 of his brief, the Attorney General has never made the concession "that applying the statute *as written* invariably leads to" affirming the Sixth District. Rather, reading a statute as a whole supports the conclusion that sentences in cocaine cases are based on the aggregate weight of the mixture or substance that contains cocaine. This conclusion is supported by the General Assembly's purpose in imposing penalties in controlled substance cases, the history of cocaine laws in Ohio, and precedent.

Gonzales focuses on two words in R.C. 2925.11(C)(4)(f)—"of cocaine"—to argue that penalties in cocaine cases are imposed based on the weight of pure cocaine, and not the weight of the mixture that contains cocaine. *See* Appellee Rafael Gonzales' Merit Br. at 4-9. He claims that his is the only true "application" of the text, *see id*. at 6-7, but his view of the statute is an "interpretation" like any other. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 53 (2012) ("'[I]f you seem to meet an utterance which doesn't have to be interpreted, that is because you have interpreted it already.'"). His brief ignores the statute's context and history, and offers no explanation for the General Assembly's purpose in imposing a purity-testing requirement in cocaine cases. Attempting to establish a post hoc purpose, his *amicus* (the Office of the Ohio Public Defender) tries to tie the outcome in this case

to the 2011 passage of H.B. 86, which eliminated the disparity in treatment of crack and powder cocaine under Ohio law. *See* Merit Br. of *Amicus Curiae*, Office of the Ohio Public Defender, in Supp. of Rafael Gonzales ("OPD Br.") at 15-36. This argument, which Gonzales does not make, is implausible.

It is important to clarify when the statutory text at issue here went into effect. Although Gonzales is vague about precisely when the General Assembly's purported change in policy occurred, his *amicus* asserts that it came in 2011 with H.B. 86. *See* OPD Br. at 1. But that ignores an important fact: the two key words in this appeal ("of cocaine") have been on the books *since the mid-nineties*. *See* 1996 Ohio Laws File 185, R.C. 2925.11(C)(4)(f) ("If the amount of the drug involved exceeds one thousand grams of cocaine that is not crack cocaine . . . , possession of cocaine is a felony of the first degree."). So has the current definition of "cocaine" on which Gonzales relies. *See* R.C. 2925.01(X) (1996). If the Court accepts that the General Assembly intended to or did in fact move to a purity-testing regime in cocaine cases, the relevant statutory change took place in 1995 and 1996 with the passage of S.B. 2 and S.B. 269, not in 2011 with H.B. 86. Under Gonzales' view, that would mean that defendants in powder cocaine cases have been wrongly sentenced since the nineties. The Court need not accept either scenario because the statute, when read as a whole, has always required proof of aggregate weight of the substance that contains cocaine. *See* R.C. 2925.11(C)(4).

Make no mistake: despite Gonzales' protests that this is *just* a ($58,000) possession case, *see* Gonzales Br. at 20, the Court's rule will apply with equal force to Ohio's cocaine trafficking statute, the penalty provisions of which are essentially identical. *Cf.* R.C. 2925.03(C)(4)(g) ("If the amount of the drug involved equals or exceeds one hundred grams of cocaine . . . trafficking in cocaine is a felony of the first degree."). The Court should consider the statute's text and

history in light of the General Assembly's broader purposes in controlled substances cases and reverse the Sixth District.

ARGUMENT

A. In cocaine-possession cases, the penalties are determined by weighing the entire mixture or substance that contains cocaine.

The Attorney General's opening brief established that the text of Ohio's cocaine-possession statute requires the State to prove the weight of an entire substance or mixture that contains cocaine. *See* Br. of *Amicus Curiae* Ohio Att'y General Michael DeWine in Supp. of Appellant State of Ohio ("Att'y Gen. Br.") at 6-7. This is supported by the legislative purpose in controlled substance cases, history, and precedent. *See id*. at 8-17. Along with the text, these are important considerations that inform this Court's "paramount concern," which "is to ascertain and give effect to the intention of the General Assembly." *Dodd v. Croskey*, 143 Ohio St. 3d 293, 2015-Ohio-2362 ¶ 24; *see also* R.C. 1.49; *State v. Black*, 142 Ohio St. 3d 332, 2015-Ohio-513 ¶ 38 (considering "the object sought to be obtained, the legislative history, and the consequences of a particular construction"). Yet Gonzales asks the Court to ignore them all, and instead declare a *nunc pro tunc* sea-change in cocaine sentencing that has somehow escaped Ohio courts (and most defense attorneys) for twenty years. It should decline this invitation.

1. Gonzales narrowly interprets R.C. 2925.11(C)(4)(f) without consideration of the statute as a whole.

As established in the Attorney General's opening brief, the penalties for possession of cocaine are determined by weighing "the amount" of "the drug involved"; in cocaine cases, "the drug involved" may be either (a) "cocaine" or (b) "a compound, mixture, preparation, or substance containing cocaine." *See* Att'y Gen. Br. at 6-7 (discussing R.C. 2925.11(C)(4)). Thus, the penalty thresholds in R.C. 2925.11(C)(4)(b)-(f) are determined by weighing "the drug involved"—whether it is a mixture or a pure substance. Although Gonzales admits that the

"statute must be read as a whole," *see* Appellee Rafael Gonzales' Merit Br. ("Gonzales Br.") at 9, his interpretation would elevate two words ("of cocaine") over all others. *See id*. at 5-6, 9. The Court should reject his interpretation for the following reasons.

First, the Court must read the penalty provisions in the context of the whole possession statute. *See Risner v. Dep't of Natural Res., Div. of Wildlife*, -- Ohio St. 3d --, 2015-Ohio-3731 ¶ 12 (noting that "'a court cannot pick out one sentence and disassociate it from [the statute's] context'"). "The plain meaning that" this Court should "seek to discern is the plain meaning of the whole statute, not of isolated sentences." *Beecham v. United States*, 511 U.S. 368, 372 (1994). The Court is not required to add to or delete from R.C. 2925.11(C)(4)(f) to reverse the decision below, as Gonzales wrongly claims. Gonzales Br. at 6. The interpretation advocated by the Attorney General considers the statute as a whole and gives context to the cocaine penalty provisions.

The Court does not need to add text to the cocaine-possession provisions in order to find that its penalties are based on the weight of the total mixture, and not just the cocaine molecules. R.C. 2925.11(C)(4) informs the penalty subsections by providing that "the drug involved" may be either (a) "cocaine" *or* (b) "a compound, mixture, preparation, or substance containing cocaine." Considering the penalty provisions in R.C. 2925.11(C)(4)(b)-(f) in light of (C)(4)'s dichotomy, the amount of "the drug involved" is the amount of either pure cocaine or a mixture. Thus, the Court need not add language to find that the weight of the total mixture suffices.

Indeed, it is Gonzales who is in effect asking the Court to add language to the statute. Gonzales argues that, to satisfy R.C. 2925.11(C)(4)(f), the amount of the drug involved must be "the same as" 100 grams of cocaine. *See* Gonzales Br. at 9. But this is grammatically clumsy in circumstances in which "the drug involved" is a mixture, as subsection (C)(4) contemplates.

Gonzales is really asking the Court to read the statute to say "if the amount *of cocaine in* the drug involved equals or exceeds 100 grams of cocaine." Without saying so, Gonzales' interpretation adds that extra phrase to the statute.

The Court is also not required to delete language (the words "of cocaine") from the statute to reverse the Sixth District. As already explained, subsection (C)(4)'s treatment of "the drug involved" as being either a mixture or a pure substance informs the language in R.C. 2925.11(C)(4)(f). Moreover, just as the provision should be read in light of its surrounding text, it should also be read to account for its history. *See Black*, 2015-Ohio-513 ¶ 38. Ohio's cocaine statutes have, uniquely among controlled substances, been the subject of amendment due to the differential penalties for crack and powder cocaine that existed between 1995 and 2011. *See* Att'y Gen. Br. at 17-18. For most of that time, penalties in cocaine cases were imposed based on the weight "*of cocaine* that is not crack cocaine" or the weight "*of crack cocaine*." *See* 1996 Ohio Laws File 185, R.C. 2925.11(C)(4)(f) (emphasis added). In 2011, H.B. 86 eliminated that differential treatment, excising mention of "crack cocaine" from the Revised Code. *See* 2011 Ohio Laws File 29. The phrase "of cocaine," which remains even after the 2011 amendments, can be read as signaling that the penalties in R.C. 2925.11(C)(4)(b)-(f) apply to both crack and powder cocaine.

Second, other controlled-substance definitions that include mixture language are irrelevant because the "mixture" language in subsection (C)(4) informs R.C. 2925.11(C)(4)(f). Gonzales cites the definition of marijuana, R.C. 2925.01(AA), and the former definition of crack cocaine, R.C. 2925.01(GG) (2010), to suggest that "the General Assembly knows how to write definitions that would cover 'filler material' when it wants." *See* Gonzales Br. at 6; *see also id*. at 11, 14. That may be true with respect to definitions, but the General Assembly knows how to

cover "filler material" in actual penalty statutes, too. That is what it did here when it stated that "the drug involved" may be "cocaine or a compound, mixture, preparation, or substance containing cocaine." *See* R.C. 2925.11(C)(4); *see also State v. Smith*, 2011-Ohio-2568 (2d Dist.) ("Under the statutory scheme, then, possessing or selling 'cocaine' is the same as possession or selling a substance containing cocaine. There is no meaningful difference between the two.").

2. Gonzales cannot explain the purpose of requiring purity-testing in cocaine cases.

As with almost all other controlled substances, Ohio's policy in cocaine cases is to impose sentences based on the weight of the entire substance containing cocaine, not its purity. *See* Att'y Gen. Br. at 8-10; *cf. State v. Chandler*, 109 Ohio St. 3d 223, 2006-Ohio-2285. Gonzales offers no real purpose for the unique treatment of cocaine offenses that his textual interpretation creates, brushing off concerns about the General Assembly's intent with a shrug. *See* Gonzales Br. at 16 ("But so what?"). Giving effect to the General Assembly's intent is this Court's "paramount concern" when it interprets statutes, and the "purpose to be accomplished" is a key consideration. *See Dodd*, 2015-Ohio-2362 ¶ 24. These counterarguments cannot overcome the General Assembly's purpose of imposing penalties in controlled substance cases based on total weight.

First, reversal does not require this Court to legislate from the bench. Gonzales argues that it is not this Court's role to pass judgment on the General Assembly's policy choices. *See* Gonzales Br. at 3-4, 14-15. Few would disagree with him. But declaring a policy wise or foolish is not the same thing as determining whether the General Assembly intended "[t]he consequences of a particular construction." *See* R.C. 1.49. The consequences of the Sixth District's construction—a defendant who possessed what he believed to be $58,000 of cocaine convicted of a felony in the fifth degree, all state crime laboratories unequipped to process

routine cocaine cases—could not have been intended. Contrary to Gonzales' claims, *affirming* the Sixth District would create a new rule for cocaine sentencing.

Second, the purpose behind sentencing in almost all controlled substance cases—imposing penalties based on aggregate weight, not purity—supports reversal. *See* Att'y Gen. Br. at 8-10. Gonzales argues that variances in the purity of drugs support his position, but that would simply create inconsistencies in sentencing based on a particular defendant's good or bad luck, as opposed to what the defendant thought he possessed. *See id*. at 9-10. Gonzales also posits as "absurd" a scenario in which mixing a single gram of cocaine with 99 grams of baking soda makes a defendant eligible to be a major drug offender. *See* Gonzales Br. at 16. But that is what some unscrupulous drug dealers *do* to make one gram of cocaine 99 times more valuable. And there is no dispute that this "absurd" result would be the result in many other controlled substances cases. *Cf. Chandler*, 2006-Ohio-2285 ("A substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g).").

Third, Gonzales cannot rebut the fact that the consequences of the Sixth District's decision will have little benefit at enormous cost. The immediate effect is to require the State to outsource its drug analysis work in order to convict cocaine defendants of anything above a fifth-degree felony. Recognizing this, Gonzales suggests that the State could have charged him under Ohio's attempt statute, R.C. 2923.02, to convict him of a felony in the second degree. *See* Gonzales Br. at 2, n.1. Regardless of whether such a charge could have been successful under the Sixth District's analysis, it defies reason to say that the General Assembly would have intended *attempted* possession of cocaine to carry a stronger penalty than *actual* possession of cocaine.

3. Gonzales misconstrues the Attorney General's argument about precedent by ignoring nearly all cases decided after 1995, including this Court's *Chandler* and *Garr* opinions.

The Attorney General's opening brief showed that Ohio's appellate courts have consistently rejected attempts to impose a purity-testing requirement in cocaine cases, and that this Court's own decisions support that view. *See* Att'y Gen. Br. at 14-17, 19. Importantly, Ohio courts *continued* to do this even after the 1995 enactment of the modern possession statute, with no rebuke from the General Assembly. Gonzales misconstrues the Attorney General's argument by claiming that it relies solely on decisions, like *State v. Neal*, 1990 WL 88804 (3d Dist. 1990), that were decided before the 1995 enactment of S.B. 2. *See* Gonzales Br. at 11-12. He tellingly ignores the significance of the post-1995 decisions cited by the Attorney General, *see* Att'y Gen. Br. at 14-17, and is silent about this Court's analogous *Chandler* and *Garr* opinions. His attempts to circumvent this argument fail.

As an initial matter, this Court can and should attach significance to the General Assembly's legislative inaction in light of *post-1995* Ohio appellate decisions rejecting purity requirements in cocaine cases. This Court has "observed that 'the General Assembly has shown no hesitation in acting promptly when it disagrees with appellate rulings involving statutory construction and interpretation.'" *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St. 3d 357, 2013-Ohio-989 ¶ 19 (quoting *In re Bruce S.*, 134 Ohio St. 3d 477, 2012-Ohio-5696 ¶ 11). It is appropriate to presume that the General Assembly was aware of the way in which Ohio courts were interpreting the cocaine-possession statute, and to draw inferences from its legislative inaction.

Gonzales quibbles with the Attorney General's citation of *In re Bruce S.* because that case discussed the General Assembly's silence in the face of one of this Court's own opinions. *See* Gonzales Br. at 12. He contends that the presumption of legislative awareness applies only

when a court of last resort interprets a statute. *See id*. at 12-13 (citing *State ex rel. Plain Dealer Publ'g Co. v. Cleveland*, 106 Ohio St. 3d 70, 2005-Ohio-3807). Perhaps this principle applies with special force with respect to this Court's own decisions, but this Court has not always limited it in that way. It has also stated generally that "[i]t is presumed that the General Assembly is fully aware of *any prior judicial interpretation* of an existing statute when enacting an amendment." *See Clark v. Scarpelli*, 91 Ohio St. 3d 271, 278 (2001) (emphasis added).

Indeed, this Court recently considered decisions from "appellate districts around the state" to construe a statute in accord with those decisions. *See Riffle*, 2013-Ohio-989 ¶¶ 18-20. In rejecting an opposing interpretation, it noted that "the General Assembly [had] amended [one of the statutes in question] on multiple occasions" yet had "not attempted to abrogate these appellate court holdings" construing the statute. *Id*. ¶ 20; *cf. Gordon v. Ill. Army Nat'l Guard*, 215 F.3d 1329 (Table), 2000 WL 286091, at *4 (March 9, 2000 7th Cir.) (noting that Congress "enacts legislation with knowledge of the law" and is "well aware of the various circuit courts' approach" to existing statutes).

Based on the foregoing, the Court should presume that the General Assembly was aware that for the last twenty years, cocaine defendants in Ohio have been sentenced based on the total weight of the cocaine mixture or substance. Up until now, Ohio courts consistently imposed sentences in cocaine cases based on the weight of the total substance containing cocaine. *See* Att'y Gen. Br. at 11-12, 14-15. Gonzales and his *amicus* do not dispute this. The Attorney General readily admits that the pre-1995 decisions, such as *Neal*, are based on a prior statute (albeit one implementing a similar policy). *See id*. at 11 (discussing decisions issued before S.B. 2). The point is that even *after* the 1995/1996 amendments, courts *continued* to interpret Ohio's cocaine statutes as requiring only proof of aggregate weight. Regardless of what Gonzales

thinks of their reasoning, intermediate appellate courts refused to find a purity-testing requirement in R.C. 2925.11 in 2004 and 2011. *See State v. Remy*, 2004-Ohio-3630 (4th Dist.); *State v. Smith*, 2011-Ohio-2568 (2d Dist.). Those decisions bookend this Court's analogous opinions in *Chandler* and *Garr v. Warden*, 126 Ohio St. 3d 334, 2010-Ohio-2449, in which the Court spoke of a comparable provision as requiring proof of "some detectable amount" of the controlled substance in question. *See Chandler*, 2006-Ohio-2285 at syl. (crack cocaine); *Garr*, 2010-Ohio-2449 ¶¶ 2, 28 (cocaine). Despite what would, in Gonzales' view, amount to an across-the-board misreading of a felony-sentencing statute, the General Assembly did not step in to correct these interpretations.

This is not for a lack of attention to the possession statute. Between 2004 and the present, the General Assembly amended R.C. 2925.11 six times. *See* 2012 Ohio Laws File 189 (G.A. 129th); 2011 Ohio Laws File 43 (G.A. 129th); 2011 Ohio Laws File 29 (G.A. 129th); 2008 Ohio Laws File 128 (G.A. 127th); 2006 Ohio Laws File 74 (G.A. 126th). Although some were minor amendments, the most significant (H.B. 86 in 2011), was signed by the Governor one month after *Smith* was decided (and seven years after *Remy*). And yet none of these amendments corrected the *Smith* and *Remy* courts' reading of R.C. 2925.11. Gonzales' attempt to wiggle out from under this presumption thus falls flat.

4. The rule of lenity does not require the Court to adopt Gonzales' textual interpretation.

The Court should apply the basic tools of statutory interpretation before employing the rule of lenity. "While [the Court] must be mindful that, although criminal statutes are strictly construed against the state, R.C. 2901.04(A), they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent." *State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583 ¶ 20. The rule of lenity "comes into operation at the end of the process of

construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan v. United States*, 364 U.S. 587, 596 (1961); *see also State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478 ¶ 40 (citing *Callanan*). Reading the text in the context of the possession statute, the history of cocaine offenses in Ohio, and precedent, this Court can conclude that R.C. 2925.11(C)(4)(f) does not impose a purity-testing requirement without reaching for the rule of lenity.

Gonzales argues that "if the operative text is somehow ambiguous," the Court must automatically adopt his interpretation. *See* Gonzales Br. at 18. He relies in part on this Court's fractured opinion in *State v. Stevens*, 139 Ohio St. 3d 247, 2014-Ohio-1932 (plurality op.). *See* Gonzales Br. at 18. But only three justices in *Stevens* held that the rule of lenity required reversal in favor of the defendant. *See Stevens*, 2014-Ohio-1932 ¶¶ 12-13 (plurality op.) (finding statute's text ambiguous and employing rule of lenity to rule in favor of defendant). The remainder were either silent on the rule of lenity, *see id*. ¶ 19 (French, J., concurring in judgment) ("I concur with the decision to reverse the court of appeals' judgment, but not because I find the definition . . . ambiguous."), or voiced vigorous dissents, *see id*. ¶¶ 39-44 (Kennedy and O'Donnell, JJ., concurring in part and dissenting in part) (finding statute unambiguous, but stating that "[e]ven if ambiguity could be divined" in the statute, "we should not necessarily default to the interpretation proposed by the defendants"); *id*. ¶¶ 62, 66-67 (O'Connor, C.J., dissenting) (stating that "[t]he lead opinion's analysis corrupts the court's teachings on the rule of lenity"). Because *Stevens* is "a plurality opinion which failed to receive the requisite support of four justices of this [C]ourt," its application of the rule of lenity should not "constitute controlling law." *See Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 633 (1994).

B. The arguments about the General Assembly's purpose advanced by Gonzales' *amicus* are not plausible or persuasive.

Gonzales' *amicus* tries to fill in the "purpose" void by arguing that the purity requirement is part-and-parcel of the 2011 changes ushered in by H.B. 86. *See* Merit Br. of *Amicus Curiae*, Ohio Public Defender, in Supp. of Rafael Gonzales ("OPD Br.") at 15-36. The Public Defender argues at pages 15-25 of its brief that the changes enacted in H.B. 86 demonstrate that the legislature intended for cocaine penalties to be based on the amount of pure cocaine. It also argues that imposing penalties based on the weight of pure cocaine is consistent with the General Assembly's purpose of eliminating the difference in criminal penalties for crack and powder cocaine. *See id*. at 25-36. Both arguments are wrong on the common question of the timeline, and uniquely wrong on their own merits.

First, tying the result in the decision below to the General Assembly's purposes in passing H.B. 86 does not make sense given the timeline of amendments to Ohio's cocaine statutes. The definition of "cocaine" in R.C. 2925.01(X) and the phrase "of cocaine" in R.C. 2925.11(C)(4)(f) were part of the 1995/1996 amendments to the controlled substance statutes. *See* Att'y Gen. Br. at 19; *supra* at 2. H.B. 86 preserved those elements, and its other changes did not alter their meaning. If the Court accepts the *amicus*'s interpretation of those terms now, it must accept that these terms were (or should have been) interpreted in the same manner starting in 1995 or 1996, at least with respect to non-crack cocaine cases. (The Attorney General agrees that "cocaine" in this context was and is considered a mixture containing cocaine, but for the different reasons already explained. *See* Att'y Gen. Br. at 6-7; *supra* at 3-6.) The Public Defender's attempt to avoid these facts does not hold up.

The Public Defender asserts that although "[t]he statutory definition of cocaine under R.C. 2925.01 has remained constant," *see* OPD Br. at 16, "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)," *see id*. at 19. Rather, for reasons related to "the science" or purported redundancy, "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.'" *See id.*

This argument is difficult to follow, but is incorrect in any event. The Public Defender appears to argue that prior to H.B. 86, the word "cocaine" in R.C. 2925.11(C)(4)(f) could not have referred to anything other than a mixture *because* it was modified by the phrase "that is not crack cocaine," with crack cocaine being defined, in part, as a mixture. In other words, it would like the statute to be read in context *then*, but not *now*.

Examining the phrase "of cocaine that is not crack cocaine" using the Revised Code's unchanged definition of "cocaine" and its former definition of "crack cocaine" does not require this result. Stepping into the Public Defender's paradigm, that phrase could be read as "[a] cocaine salt . . . or the base form of cocaine," *see* R.C. 2925.01(X), that is not "a . . . substance that is . . . analytically identified as the base form of cocaine," *see* R.C. 2925.01(GG) (2010). Stated differently, the phrase simply says that these penalties apply to cocaine salts, but not cocaine in base form. Gonzales admits that cocaine in base form is chemically different than cocaine in salt form. *See* OPD Br. at 18. It is not clear how that is redundant or inconsistent with "the science."

Second, even if the purported change occurred in 2011, the Public Defender cannot show that it has anything to do with H.B. 86's purpose of reducing the penalties for certain non-violent offenses. *See* OPD Br. at 22-25. The Public Defender claims that H.B. 86's amendments to R.C. 2925.11(C)(4)(a)-(f) "significantly lowered the amount 'of cocaine' necessary to trigger an elevation in sentence," and that the only way this is consistent with the purpose of reducing

sentences is if the amounts considered are pure cocaine, and not cocaine mixtures. *See* OPD Br. at 24. This theory rests on an unsound premise and thus fails.

The Public Defender's claim that the amendments to R.C. 2925.11(C)(4)(a)-(f) lowered threshold amounts for cocaine penalties across the board is not correct. *See* OPD Br. at 24. "The act eliminate[d] the penalty distinctions provided in the offenses involving the two forms of cocaine, and provide[d] a penalty for the offenses involving any type of cocaine that *generally ha*[*d*] *a severity that* [*was*] *between the two* [*then*-]*current penalties*." *See* Ohio Legislative Serv. Comm'n, Final Analysis: Am. Sub. H.B. 86 at 65 (emphasis added). Specifically, the new, unified penalty thresholds on the lower end were more closely tailored to the former penalty thresholds for non-crack cocaine, whereas the new, unified penalty thresholds on the higher end were more closely tailored to the former penalty thresholds for crack cocaine. *See id.* at 65-66. In some cases, H.B. 86 *reduced* the potential penalties for crack cocaine, while actually *increasing* them for powder cocaine. *See, e.g.*, Am. Sub. H.B. 86, R.C. 2925.11(C)(4)(c) (lowering threshold quantity as compared to former powder-cocaine trigger but increasing the threshold quantity as compared to the former crack-cocaine trigger). For the major drug offender provision, the threshold for crack cocaine actually remained unchanged. *See id.*, R.C. 2925.11(C)(4)(f).

Furthermore, although H.B. 86 did enact other measures to reduce sentences for non-violent offenders, those changes were not necessarily through amendments to the threshold quantities. *See, e.g.*, *id.*, R.C. 2929.13(B) (outlining conditions for community control sanctions for certain non-violent felony offenses).

It is thus is inaccurate to say that H.B. 86 imposed across-the-board leniency for cocaine penalties, and too simplistic to say that the *only* purpose of H.B. 86 was to reduce prison

sentences. Rather, the amendments to the cocaine-possession penalties eliminated the differential treatment that penalized crack cocaine more harshly than powder cocaine, and created a uniform set of penalty thresholds that navigated between the two prior schemes. As a result, the Public Defender's claim that purity testing is required to give effect to the General Assembly's changes is incorrect.

Third, the Public Defender's claim that the General Assembly intended to impose a purity requirement to eliminate racial disparities in drug sentencing is unsupported by facts or argument. *See* OPD Br. at 25-36. Its brief spends ten pages discussing the 100-to-1 crack-to-powder ratio for threshold cocaine quantities that existed under federal law until the Fair Sentencing Act of 2010 reduced that ratio to 18-to-1. *See id*. It cites federal studies showing that African Americans are disproportionately convicted of federal crack cocaine offenses, and were thus disproportionately affected by harsh crack cocaine penalties. *See id*. at 33-35.

It is not clear what this has to do with purity testing in cocaine cases. Unlike the federal government, Ohio no longer distinguishes between crack and powder cocaine. *See, e.g.*, R.C. 2925.11(C)(4)(f). A defendant with a 100-gram substance containing powder cocaine triggers the same offense level as a defendant with a 100-gram substance containing the base form of cocaine. *Id*. Presumably, the Public Defender is suggesting that crack cocaine is often less pure than powder cocaine. *See* OPD Br. at 25 (stating that "some legislatures—like Ohio's—also set out harsher penalties for highly impure cocaine"). But this goes more or less unspoken, unsupported by any facts or relevant argument in its brief. Regardless of what the *amicus* would like this case to be about, it is not about the former disparity that existed between powder and crack cocaine.

C. The Public Defender's assertions about the process for quantitating cocaine are irrelevant and, in many instances, unfounded.

The Attorney General's opening brief established that imposing a purity-testing requirement in cocaine cases would impose a significant burden on the Bureau of Criminal Investigations (BCI). *See* Att'y Gen. Br. at 19-25. A brief submitted by *amici* the Ohio Prosecuting Attorney's Association and the Cuyahoga County Prosecutor's Office established that this new regime "would affect every local government crime lab in the State of Ohio." *See* Br. of *Amicus Curiae* Ohio Prosecuting Attorney's Ass'n and Cuyahoga Cnty. Prosecutor's Office in Supp. of Appellant State of Ohio at 3. In response, Gonzales' *amicus* lobs several accusations at the Attorney General for "misrepresent[ing] the process by which the purity of cocaine may be determined." *See* OPD Br. at 7; *id*. at 7-15. The Attorney General firmly denies that. Ultimately, these sideshow arguments do nothing to undermine the original point: the fact that the State's premiere crime laboratory is not equipped or prepared to perform this burdensome analysis suggests that the General Assembly never intended to require purity testing in cocaine prosecutions. *See* Att'y Gen. Br. at 20.

First, whatever method is adopted to calculate the purity of cocaine will be more complex and time-consuming than the current procedures used to identify the presence of cocaine. The Public Defender fixates on other methods of quantitative analysis, *see* OPD Br. at 7-10; those methods are viable options, but they cannot be adopted or completed with the snap of a finger. Gonzales' *amicus* wrongly claims that the Attorney General's opening brief misrepresented the process required because it discussed what the Public Defender concedes is a recommended method to quantify cocaine. *See* OPD Br. at 8; *see also* United Nations Office on Drugs and Crime, Recommended Methods for the Identification and Analysis of Cocaine in Seized Materials at 33 (March 2012), https://goo.gl/nk1QBB ("In addition to [gas

chromatography], [high performance liquid chromatography] is another major separation technique commonly used in forensic drug analysis.”). In no way did the opening brief suggest that liquid chromatography was the only way forward; it simply walked through the steps of one method that BCI has been forced to consider to educate the Court about ramifications of the Sixth District’s holding.

Second, the Public Defender—an agency that is not responsible for running chemistry laboratories—makes unsupported assertions about how long it “should” take to process a cocaine assignment using qualitative and quantitative analyses. BCI estimated a two-day turnaround time based on what it knows about its laboratory space, human resources, current workload, likely instrument availability, and the general requirements of quantitation. This estimate contemplates the preparation of samples and materials, instrument time, evaluation of data, and calculations.

Third, it is not realistic to expect the State to outsource to private or federal laboratories every cocaine assignment that requires quantitative testing (i.e., cocaine assignments where the substance recovered weighs 5 grams or more). The Public Defender implies that the Attorney General’s brief withheld information about other laboratories’ ability to perform purity testing of cocaine. *See* OPD Br. at 11-15. But the opening brief stated in plain terms that “[a]lthough the federal Drug Enforcement Administration (DEA) laboratories do this work, the current wait-time for processing is *eighteen months*.” Att’y Gen. Br. at 20; *see also id*. at 24. Unloading the State’s cocaine caseload on an outside laboratory while the State develops a quantitative method will not solve all the problems created by the decision below.

For one thing, simply because BCI sometimes contracts with outside parties does not make it possible to shift its entire caseload of cocaine cases with more than 5 grams of substance

onto private laboratories. The Public Defender argues that, because BCI contracted four years ago with private laboratories for DNA testing, that it should be able to do the same here. *See* OPD Br. at 11-13. In assistance, the Public Defender identifies all of two laboratories (one in Pennsylvania, one in Indiana) that theoretically could work with BCI. *See id*. at 13. Although it is possible for BCI or the other public crime laboratories to work with private companies to complete assignments, it is unrealistic to assume that this could be done for every cocaine case containing 5 grams or more. To put things in perspective, in 2010 and 2011, BCI outsourced an average of 179 Y-STR DNA assignments a year. Between September 2011 and September 2015, BCI processed a total of 2179 cocaine cases where the seized substance weighed five grams or more—roughly 540 cases a year. This figure does not include the cocaine cases processed by local or regional crime laboratories. To the extent that these assignments were processed by out-of-state laboratories, that could require bringing out-of-state analysts to Ohio to testify at trial. It would simply not be practicable to shift all of these assignments to an outside entity; to the extent that some but not all were outsourced, it would be a waste of resources.

The same logic applies to the DEA. The DEA does partner with state laboratories in certain cases; the Attorney General noted this possibility at pages 20 and 24 of its opening brief. Often this is through a state-federal task force, or through the federal government's joint involvement in a particular investigation. For example, the *Sanchez* case that the Public Defender discusses at pages 14 to 15 of its brief was the result of a joint investigation. The DEA will also assist with certain state assignments upon request. It would be an abuse of this courtesy to ask the DEA to dedicate its scarce resources to process all of Ohio's cocaine assignments that contain more than five grams of substance. Furthermore, it would be unrealistic. BCI understands that, as of last summer, the DEA's processing time for an outside quantitative

analysis of cocaine was eighteen months. Given a defendant's Sixth Amendment right to a speedy trial, this wait makes complete reliance on the DEA an unreasonable option.

CONCLUSION

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

Respectfully submitted,

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