IN THE SUPREME COURT OF OHIO

Case Nos. 2015-0384 and 2015-0385

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

APPELLEE RAFAEL GONZALES' MERIT BRIEF

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INTRODUCTION

The prosecutorial briefs insist that the words "of cocaine" in R.C. 2925.11(C)(4)(f) are a "*faux paus*," "holdover," and "relic" resultant from a "scrivener's error."

This impliedly concedes that applying the statute *as written* invariably leads to the result reached by the Sixth District. Otherwise, the prosecutors would attack that court's *application* of the plain text rather than urge that the *text itself* is what is wrong.

Of course, the blithe contention that the text is wrong is not even cognizable here since it flouts the bedrock axiom underpinning the separation-of-powers doctrine: "the General Assembly understands how to draft laws." *Pauley v. Circleville*, 137 Ohio St.3d 212, 2013-Ohio-4541, ¶38. This court therefore applies statutes as written by giving effect to every word—it does not delete words by rendering them meaningless under the guise of interpretation. And since this tribunal doesn't adjudicate the wisdom of statutes or make policy, the prosecutorial arguments are inappropriate: if this state's attorney general or a group of prosecutors feel that applying the text as written will "slow the wheels of justice" or cause "public-safety concerns" then they ought to petition the General Assembly since their preferred relief lies "within the *legislative branch* of the state government." *Miller v. Fairley*, 141 Ohio St. 327, 334 (1943).

And so, while the prosecutorial briefs strike a confident tone, the truth is that their underlying argument defies core legal principles that transcend any particular case.

"The express statutory text is a *faux pas*" said no court—ever.

FACTS

This is a possession—not trafficking—case. Gonzales was *not* sentenced for "purchasing $58,000 of cocaine" as no such offense exists. And contrary to the state's brief at page five and

the attorney general's brief at pages three and four, the verdict form actually states "that the amount *of cocaine* involved at the time of the offense did *equal* or exceed 100 grams."

The record does *not* support this portion of the verdict. Indeed, the attorney general's brief at page four openly admits that "the state proved only that the substance in Gonzales' possession *contained* cocaine" and *not* "precisely *how much* of the substance was cocaine and not filler." This dispositive fact confirms ¶46 of the opinion below: "the record contains no evidence that would allow a factfinder to determine the weight of actual cocaine…"

Yet the state's brief at page six proclaims: "Under the guise of 'statutory construction,' today's Major Drug Offender is now entitled to a fifth-degree felony, even if that person fills a warehouse with his or her drugs." Not so. In truth, the court held that the state *failed to prove* that Gonzales was a "major drug offender."

And this holding did *not* come under the "guise" of statutory construction. Rather, the appeals court found that the operative text is plain and its meaning is obvious. Because of this—*not* because those with a warehouse full of drugs must be set free—the court refrained from interpretation and instead applied the law to the undisputed fact that the state failed to prove that Gonzales possessed one hundred grams of cocaine.[1]

The state portrays the Sixth District's decision as "absurd" even though its own facile argument theorizes that the text is a *faux pas* resultant from a scrivener's error and hence shouldn't be applied at all. From this odd thesis the state just assumes its central theme: that this court must interpret R.C. 2925.11(C)(4)(f) even though it is unambiguous. And under the guise

[1] Further, the state overlooks the attempt statute. If the state had requested an "attempt" instruction in this case then perhaps the jury would've convicted Gonzales for attempt, which would be an F2, *not* an F5. *State v. Taylor*, 113 Ohio St.3d 297, 2007-Ohio-1950. But for some reason—whether out of strategy or blunder—the state never requested such an instruction. Whatever the case, the naked assertion that affirming would require all possession-of-cocaine cases to be prosecuted as fifth-degree felonies is totally false.

of nothing but statutes from *other* states and a statutory scheme *repealed* in this state, the state ultimately invites this court to amend a current statute by judicial fiat. Bluntly, *that* is absurd.

Before going further, Gonzales must clarify three quick points.

First, Gonzales does *not* argue that the state must prove the "purity" of a mixture containing cocaine. Rather, the law plainly requires the state to prove a certain weight "*of cocaine*" exists before the offense level for "possession of cocaine" may be elevated. And if the relevant weight of cocaine exists in a "mixture," it really doesn't matter if the mixture is 10%, 20%, 70% or 99% pure since the offense level is tethered to the weight *of cocaine* within the mixture, not purity *per se*. This is confirmed by the certified question: must the state "prove that *the weight of the cocaine* meets the statutory threshold?"

Second, whether the state chooses at its own crime labs to measure the weight of "cocaine"—the substance defined by R.C. 2925.01(X)—is immaterial. Indisputably, a lab can determine the amount of cocaine within a mixture. This state's brief at page nine confirms this by citing New York and Georgia statutes and the federal sentencing guidelines implicating the purity of mixtures containing cocaine in certain cases. If New York, Georgia and the federal government can determine the purity of a mixture—and hence the amount of cocaine within a mixture—then so can Ohio. Thus, the attorney general's contention that the Sixth District's opinion isn't "*feasible*" is untrue: just because someone hasn't done something doesn't mean that it isn't feasible.

Third, the attorney general's brief at page eighteen objects that "the Sixth District's opinion lacks a true explanation for why the Revised Code would penalize most drugs based on the aggregate weight, but not cocaine." But this is actually unremarkable since "the court has

nothing to do with the wisdom or unwisdom of the provisions of the statute"[2] nor with the "policy of a statute." *State ex. rel. Ohio Congress of Parents and Teachers v. State Bd. of Edn.,* 111 Ohio St.3d 568, 2006-Ohio-5512, ¶20. "That is *the exclusive concern* of the legislative branch of the government." *Id*. Indeed, "the General Assembly is the ultimate arbiter of public policy." *State ex. rel. Plain Dealer Publishing v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, ¶54. "The wisdom and the policy of legislation" is therefore "not subject to review by the court." *South Euclid v. Bilkey*, 126 Ohio St. 505, 507 (1933).

Even so, the attorney general cites a good reason for the legislature's inclusion of the words "of cocaine": lab studies showing that the purity of mixtures containing cocaine vary wildly. Given advances since the Stone Ages of technology—including when the law once upon a time used "bulk amounts" to determine the penalty—the law now requires that before someone is mandatorily imprisoned for eleven years under R.C. 2925.11(C)(4)(f), the state must prove that the person possessed at least one hundred grams "*of <u>cocaine</u>*," as opposed to a bunch of sugar or baking soda mixed with a little "cocaine."

ARGUMENT

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

A: Yes.

The Sixth District's concise rationale below is difficult to improve upon. The court held that, in its plainest terms, R.C. 2925.11(C)(4)(f) requires the state to prove that the amount of drug involved "*equals*"—is literally the same as—at least one hundred grams "of *cocaine*," *i.e*.,

[2] *Miller v. Fairley*, 141 Ohio St. at 334. All italics herein are added by Gonzales unless otherwise noted.

the substance statutorily defined by R.C. 2925.01(X). By definition, "filler material" is *not* "cocaine." Thus, the state must prove that the weight of *the cocaine* meets the statutory threshold, excluding the weight of any filler material within a mixture. Because the appeals court's rationale (plain meaning), result (reversal of weight specification), and remedy (remand for resentencing) are all correct, this court should affirm.

I. The current statutory scheme plainly requires the state to prove the weight "of cocaine" the offender possessed before the offense level for possession of cocaine is enhanced under R.C. 2925.11(C)(4)(b)-(f).

Possessing any controlled substance—cocaine, marihuana, LSD—is illegal under R.C. 2925.11(A). From there, various controlled substances are subject to *different* statutory treatment under the various subsections, divisions, and subdivisions within R.C. 2925.11. And if the substance is "cocaine," then the offense is possession of cocaine. *See* R.C. 2925.11(C) ("…whoever violates division (A) of this section is guilty of possession of cocaine…") Penalties for possession of cocaine are determined under R.C. 2925.11(C)(4)(a)-(f). ("The penalty for the offenses shall be determined as follows***") Possessing *any* amount of cocaine is a fifth-degree felony under R.C. 2925.11(C)(4)(a). The offense level is gradually enhanced by determining the weight in grams "of cocaine" that the offender possessed.

This framework culminates at R.C. 2925.11(C)(4)(f), which provides:

> If the amount of the drug involved *equals* or exceeds *one hundred grams <u>of cocaine</u>*, 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.

Far from "absurd," this statutory scheme is rational—especially since, as the attorney general stipulates—the purity of mixtures containing cocaine varies a lot. Whether one agrees or disagrees with the policy of tethering the penalty to the weight "of cocaine," the operative text *is* plain and its meaning *is* obvious: the more grams "of cocaine" possessed, the higher the offense

level. Because "cocaine" is a term of art defined under R.C. 2925.01(X) and that technical definition does *not* include "filler material" such as sugar or baking soda, the weight in grams of such filler material cannot possibly count toward the weight in grams "of cocaine." In contrast, as the Sixth District explained at ¶¶43-44 below, the definitions of *other* controlled substances cover filler material that may be mixed with the actual controlled substance. For example, under R.C. 2925.01(A)(A), "marihuana" has the same meaning as in R.C. 3719.01. And under R.C. 3719.01(O), "marihuana" means "all parts of a plant of the genus cannabis, whether growing or not; the seeds of a plant of that type; the resin extracted from a part of a plant of that type; *and every* compound, manufacture, salt, derivative, *mixture*, or preparation of a plant of that type or of its seeds or resin." The former definition of "crack cocaine" contained similar verbiage, which proves that the General Assembly knows how to write definitions that would cover "filler material" when it wants. Yet it did not do so here. This further confirms that inclusion of the words "of cocaine" was not a *faux pas* since "cocaine" does not include "filler material." In sum, possessing cocaine mixed with filler material is a felony, but the offense level is enhanced only by the weight "*of cocaine*," which necessarily does *not* include filler by definition.

Therefore, reversing would require this court to either (1) change the definition of "cocaine" to include "filler material" or (2) delete the words "of *cocaine*" by rendering them meaningless. Obviously, no court may legislate from the bench in this manner and therefore this court wisely leaves "it to the General Assembly to rewrite the statute if it deems it necessary." *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶54.

A. The operative statutory text is plain and unambiguous and therefore it must be applied; *not* "interpreted."

"An unambiguous statute is to be applied, *not* interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944), ¶5 of syllabus. This court calls this the "*first* rule" of statutory construction. *Storer*

Communications, 37 Ohio St.3d 193, 194 (1988). Thus, the first question presented by the state's appeal is whether R.C. 2925.11(C)(4)(f) is ambiguous. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶13. If it is ambiguous, this court must then interpret the statute to determine the General Assembly's intent. *Id*. But if it is not ambiguous, then this court must not "interpret" it; it must simply apply it. *Id*.[3] Applying these principles here, the Sixth District accurately held that the statute is "plain" and its meaning "obvious" and therefore rightfully applied it as written.

On appeal, the state does *not* contend that the text is ambiguous: its aim is to *avert* application of the unambiguous text by having this court render the words "of cocaine" a meaningless *faux pas* resultant from a scrivener's error. If this logic were adopted, all penal statutes would instantly be subject to the whims of the judiciary, which is antithetical to (1) the canons of interpretation that the state professes to espouse *and* the ones it fails to mention: (2) the plain-meaning rule and (3) rule of lenity.

B. Applying the statute to the facts supports affirmance.

When the state indicted Gonzales for possession of cocaine under R.C. 2925.11(A) and sought an enhancement under R.C. 2925.11(C)(4)(f), it undertook the burden of proving that:

- Gonzales possessed "cocaine," and
- That the amount of the drug involved at least "*equals*" one hundred grams "of *cocaine*."

The Sixth District held that the state only proved the *first* part, which is why it vacated the *second* part of the verdict regarding weight. The court is correct. As mentioned, unlike some other controlled substances, "cocaine" by definition does *not* include "filler material." Thus, the weight in grams of "filler material" cannot possibly count toward the state's burden to prove that

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

the defendant possessed at least one hundred grams "of cocaine." And since the state failed to offer any trial evidence proving the weight of cocaine, the remedy of vacating the specification portion and remanding the case for re-sentencing is proper. This result hardly requires that today's major-drug offender is "entitled" to a fifth-degree felony even if they have a "warehouse full of drugs." Such hyperbole is of little assistance in this case, where it is conceded that a lab *can* determine the weight of cocaine within a mixture.[4]

In spite of that, the state is adamant that the words "of cocaine" are a "relic," "faux pas," or "holdover" and therefore meaningless. According to the state, it may fulfill its burden under R.C. 2925.11(C)(4)(f) and imprison a person for a mandatory eleven-year term *without any proof* of how many grams of cocaine the defendant possessed. This argument is untenable since proving how much cocaine the defendant possessed is *precisely* what the statute requires. That is, possession of cocaine is a felony of the <u>first</u> degree *if <u>and</u> only if* the amount of the drug involved "*equals* or exceeds one hundred grams ***of <u>cocaine</u>***." *See* R.C. 2925.11(C)(4)(f). Where the state proves only that the defendant possessed cocaine—but not *how much*—then the offense is still "possession of cocaine" but the offense is a felony of the <u>fifth</u> degree. *See* R.C. 2925.11(C)(4)(a).

[4] Notably, the state and attorney general cite *State v. Brown*, 107 Ohio App.3d 194 (3d Dist. 1995). In *Brown*—which is *twenty* years old—the expert chemist actually determined the amount "of cocaine" within an overall mixture. *Id*. at 204, ("Furthermore, the chemist testified that Exhibit 17(A) was 'nearly pure crack cocaine' and weighed 18.1 grams. He further testified that Exhibit 16 contained "[l]ess than a tenth of a gram" of cocaine and weighed 15.8 grams. According to his testimony, the remaining substance was procaine, which is "an additive to expand the quantity of a substance" but not a controlled substance.")

C. It doesn't matter if the word "amount" modifies the phrase "the drug involved" because the whole statute requires the state to prove that the amount of the drug involved at least "*equals*" one hundred grams "*of cocaine*."

The attorney general's brief at page seven says that the word "amount" *quantifies* "the drug involved." The more accurate statement is that "amount" *modifies* the phrase "the drug involved." But so what? The statute must be read as a whole. *In re Application of Ohio Power Co.*, 140 Ohio St. 3d 509, 2014-Ohio-4271, ¶26 (rejecting argument that "focuse[d] solely on" one phrase while ignoring the phrase "in context"); *cf. Cedar Fair, L.P. v. Falfas*, 140 Ohio St. 3d 447, 2014-Ohio-3943, ¶ 16 (rejecting argument that "relie[d] on reading the quoted words in isolation") (contract interpretation). Here, the remainder of R.C. 2925.11(C)(4)(f) goes on to unambiguously require the state to prove that the amount of the drug involved at least "*equals*" one hundred grams "of *cocaine*."

"Equals" means "is the same as."

Thus, the state must prove that the amount of the drug involved is the same as at least one hundred grams "of *cocaine*." This necessarily means that the state must prove that the defendant possessed at least one hundred grams of "cocaine" as defined by R.C. 2925.01(X) since anything less than one hundred grams "of cocaine" is *not* "equal" to it.

D. The rationale of the appellant in *State v. Smith* was different than the rationale Gonzales advanced below. Further, the underlying cases cited in ¶12 of *Smith* are all inapposite.

Notably, the state in its briefing at the trial court and appeals court levels never once cited the supposed "conflict" case, *State v. Smith*, 2nd Dist. No. 2010–CA–36, 2011 WL 2112609, 2011-Ohio- 2568. And that's because the argument raised in *Smith* is not the same argument that Gonzales raised below. In *Smith*, the defendant claimed "the State was required to determine what part of the substance he sold was cocaine and what part was food." *Id*., ¶11. That's not the

issue. Rather, it's that the weight of any filler, including food, cannot possibly count toward the weight "of cocaine" since the definition of "cocaine" under R.C. 2925.01(X)—which the appellant inexplicably never raised in *Smith*—does not cover any sort of filler material. And so even if "the drug involved" includes filler such as sugar or baking (which may otherwise be considered "food" according to the defendant in *Smith*) the Sixth District's analysis here remains correct since R.C. 2925.11(C)(4)(f) always requires that the amount of the drug involved at least *equal* one hundred grams "of *cocaine*."

"Cocaine" does not include sugar or baking soda by definition. So, the point is not whether baking soda is "food" or whether "the drug involved" includes baking soda. It's that baking soda doesn't become "cocaine" by being mixed with it. Indeed, the term "mixture" *presupposes* that "filler material" and "cocaine" are not the same. In sum, the appellant in *Smith* raised the wrong argument and thus failed to raise the definition of "cocaine" under R.C. 2925.01(X) or invoke the key phrase "*equals* or exceeds one hundred grams *of cocaine*." Finally, the *Smith* court relied upon the same sort of irrelevant cases that the Sixth District properly distinguished at ¶46 below.

Smith at ¶12 cites *State v. Moore*—a "crack cocaine" case[5]—and *State v. Baliey*, an Oxcycodone case.[6] But in *Moore*, "crack cocaine" included the entire mixture by definition: under *former* R.C. 2925.01(G)(G) "crack cocaine" meant "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." No such definition applies here. Thus, the former legislative disparity between

[5] 2nd Dist. No. 21863, 2007 WL 1721074, 2007-Ohio-2961.

[6] 2nd Dist. No. 21123, 2005 WL 3446276, 2005 -Ohio- 6669.

"cocaine" and "crack cocaine" supports Gonzales because it shows that the General Assembly knows how to write definitions. Because the definition of "crack cocaine" expressly *included* a "mixture . . . that . . . contains *any* amount of cocaine," the weight of the entire mixture would naturally count toward the enhancement. But here, the General Assembly also knew what it was doing when it: (a) defined "cocaine" in R.C. 2925.01(X) in a technical manner that necessarily does *not* include an entire mixture containing any amount of cocaine and then (b) required in R.C. 2925.11(C)(4)(f) that the amount of the drug involve at least equal one hundred grams "of cocaine." This court *must* presume that the General Assembly included the words "of cocaine" advisedly. *Vance v. St. Vincent Hospital*, 64 Ohio St.2d 36, 39 (1980) ("The General Assembly must be assumed or presumed to have used the words of a statute advisedly.")

In *Bailey*, the enhancer for possession of Oxcycodone was determined by the statutory "bulk amount," which is itself defined to include the weight of an entire mixture containing any Oxcycodone. *Bailey*, 2005-Ohio-6669, ¶1 ("The bulk amount of a controlled substance is an amount equal to or exceeding twenty (20) grams or five (5) times the maximum daily dose in the usual dose manual of a compound, mixture, preparation, or substance that is or contains any amount of a Schedule II opiate or opiate derivative.") As shown by the decision below, the statutory scheme in place for "cocaine" is totally different: "bulk amounts" for cocaine have been repealed and the definition of "cocaine" doesn't include filler. Thus, the rationales of the other cases cited at ¶12 of *Smith* lack persuasiveness here. *State v. Combs* (decided under now repealed "*bulk amount*" method); *State v. Fuller,* ("The quantity of the entire mixture, rather than the quantity of pure cocaine within the mixture, is used to determine *bulk amount*.")

E. The attorney general's "decades of persuasive authority" argument is illogical since cases such as *State v. Neal* have effectively been overruled by intervening legislative enactment.

The attorney general's brief at page nineteen offers that "legislative inaction" ever since the release of *State v. Neal*[7] and other decisions signals legislative agreement with those decisions. Frankly, this makes no sense. *First*, the opinion below at ¶46 explains that *Neal* and the cases cited in ¶12 of *Smith* discussed above are rooted upon a *prior* statutory scheme that has since been repealed and replaced:

> ***[T]he 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. *** 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. *** Consequently, we conclude that the cases cited by the state are inapposite.

Second, the attorney general twice quotes *In re Bruce S* but both times uses a parenthetical that changes the quote. The attorney general then cites a thread of appellate cases—largely depending upon *State v. Neal*—and quotes *In re Bruce S*, stating that this court must "presume that if the General Assembly disagreed with the rule set forth in [these cases], it would have responded to [them]." But here is what *In re Bruce S* actually says: "we presume that if the General Assembly disagreed with the rule set forth in *Cox,* it would have responded to it…" 2012-Ohio-5696, ¶11. Notably, *Cox* is a Supreme Court of Ohio case. Thus, *In re Bruce S* applies only when *a court of last resort* reviewed a statute. Then, subsequent legislative inaction signals agreement with *this court's* decisions. Because this court has not addressed the current

[7] *State v. Neal*, 3d Dist. Hancock No. 5–89–6, 1990 WL 88804 (June 29, 1990).

version of R.C. 2925.11(C)(4)(f), the attorney general's logic is lacking. *Cf*., *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, supra, 2005-Ohio-3807, ¶45.

1. The rationale of *State v. Neal* actually supports Gonzales.

At the time of *Neal*, the penalty for possession of cocaine was determined by the "bulk amount," which included the weight of a mixture containing *any* amount of cocaine.[8] *See* former R.C. 2925.01(E)(1), (defining "bulk amount" as, "An amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance *which is, or which contains any amount of *** cocaine ****.") The term "bulk amount" no longer applies to determining the penalty for possession of cocaine and the words "*any* amount of cocaine" no longer appear R.C. 2925.11(C)(4)(b)-(f). Thus, proof that the offender possessed "any amount of cocaine" is *necessary* to sustain a conviction under R.C. 2925.11(C)(4)(f) *but not sufficient* because the statute now requires proof of possession of at least one hundred grams "of cocaine."

In truth, the rationale stated at page two of *Neal* supports affirmance:

> *It cannot be gainsaid that the definition of a crime is within the sound discretion of the General Assembly and not for the courts. Thus the legislature, in its infinite wisdom, has determined what is a controlled substance and what is the bulk amount of a controlled substance*. Thus, under the statute, the bulk amount may be either ten grams of a compound, mixture, preparation, or substance containing any amount of cocaine or may be twenty-five unit doses of a compound, mixture, preparation, or substance containing any amount of cocaine.

Just as in the 1980s and 1990s the legislature could "in its infinite wisdom" tether the penalty for possession of cocaine to a "bulk amount," (*Neal*), the legislature enjoys the power to tether the penalty to the weight in grams "of cocaine" (*Gonzales*).

[8] The BCI witness who testified in *Neal*, Larry Rentz, was precluded from testifying in this case.

2. If the legislature intended for the weight "of filler material" to elevate the offense level for possession "of cocaine," then it would not have been difficult to find language to express the purpose.

The state argues that the "spirit" of the law is to permit the weight of filler material to enhance the offense level for possession "of cocaine." Even if that were true—which it is not—it is *not* what the legislature enacted. "The question is *not* what the General Assembly intended to enact but the meaning of that which it did enact." *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St. 3d 596, 2014-Ohio-2440, ¶38. Thus, the "spirit" is best left in the spiritual realm. *Board of Elec. for Franklin Cty. v. State ex. rel. Schneider*, 128 Ohio St. 273, 283 (1934), ("Unless such spirit is clearly manifest, it had best be left in the spiritual world.")

In the real world, the prosecutorial briefs show that the purity of a substance containing cocaine can be determined. Thus, the amount of cocaine in a substance can also be determined.

The Ohio legislature would've also known this when it enacted R.C. 2925.11(C)(4)(b)-(f) and provided potentially severe penalties tied to the amount "of cocaine" possessed. If the legislature intended to permit the weight in grams of filler material to count toward elevating the offense level for possession of cocaine, then "it would not have been difficult to find language which would express that purpose." *Lake Shore Elec. R. Co. v. Public Utils. Comm'n*, 115 Ohio St. 311, 319 (1926).[9] It in fact does so for other controlled substances, such as marihuana.

Enforcing the statutory text as written vindicates the separation of powers. "[A] fundamental principle of the constitutional separation of powers among the three branches of

[9] *See e.g., Chapman v. United States*, 500 U.S. 453 (1991), (discussing federal LSD statute, plainly indicating that the entire weight of a mixture containing LSD could be used for sentencing purposes). Further, federal law forbids the possession of "500 grams or more *of a mixture or substance containing a detectable amount of…cocaine*." 21 U.S.C. §841(b)(1)(B)(ii)(I).

government is that the legislative branch of government is 'the ultimate arbiter of public policy.'" *Kaminski v. Metal & Wire Prods. Co.,* 125 Ohio St.3d 250, 2010-Ohio-1027, ¶59. "In fulfilling that role, the legislature is entrusted with *the power to continually refine Ohio's laws* to meet the needs of our citizens." *Id.* "[I]it is *not* the role of the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly." *Id*. at ¶61. Affirming does not stop the legislature from further refining the statute if it deems fit. In fact, this court just made this identical point at ¶38 of *Ohio Neighborhood Fin., Inc. v. Scott*:

> If the General Assembly intended to preclude payday-style lending of any type except according to the requirements of the STLA, our determination that the legislation enacted in 2008 did not accomplish that intent will permit the General Assembly to make necessary amendments to accomplish that goal now. But *the position that amici in support of appellee urge upon this court is fraught with legislative policy decisions, and to adopt that position would exceed the bounds of this court's authority*.

F. The state's rationale leads to mathematical and other absurdities.

By definition, "cocaine" does *not* include so-called "filler materials" such as sugar or baking soda. Unlike some other controlled substances, cocaine is not defined to include a mixture or substance containing cocaine: it is defined as cocaine itself, nothing more or less.

But the state's argument requires that one gram "of cocaine" mixed with ninety-nine grams "of sugar" *equals* one hundred grams "of cocaine." This necessarily requires that one gram "of cocaine" *equals* one gram "of sugar." This requires finding that sugar <u>is</u> cocaine.

But sugar is not cocaine. *See* R.C. 2925.01(X).

Thus, the state's argument not only defies the plain text, it frustrates basic grammar, arithmetic, and common sense. Here is Gonzales' argument: (1 gram of cocaine) + (99 grams of sugar) ≠ 100 grams of cocaine. And here is the state's: (1 gram of cocaine) + (99 grams of sugar)

= 100 grams of cocaine. Because one gram of cocaine plus ninety nine grams of sugar does *not* equal—is *not* the same as—one hundred grams "of cocaine," the state's argument is invalid.

Consider other examples. One defendant possesses 99.99 grams of "cocaine" mixed with absolutely nothing. The other defendant possesses a detectable trace of cocaine mixed with 100 grams of baking soda. Under the state's rationale, the offender possessing a miniscule amount of cocaine is a "major drug offender"—not because of the grams "of cocaine" possessed but because of the grams "of baking soda"—and yet the offender possessing 99.99 grams of actual cocaine is not. Under another example, two people each possess one gram of cocaine mixed with nothing. But the second person mixes his one gram of cocaine with 99 grams of baking soda. According to the state, the second person now possesses one hundred grams "of cocaine" or 100x more cocaine than the first person. This requires that baking soda becomes "cocaine" by being mixed with it, which is absurd. In reality, the second person possesses a *mixture* that contains *some* cocaine, and *some* backing soda. But the entire weight of a mixture containing some unknown grams of cocaine is irrelevant under R.C. 2925.11(C)(4)(b)-(f) since under that statute only the weight in grams "of cocaine" enhances the offense level. The attorney general complains that this is not true of other substances. But so what? This is the legislature's *exclusive* prerogative and hence is beyond judicial review, just as is the fact that possession of marihuana is a minor misdemeanor and possession of cocaine is a felony.

Next, the first paragraph of the attorney general's brief states that cocaine is sometimes mixed with other drugs. Consider then an offender mixing 50 grams of cocaine with 50 grams of another controlled substance. Simultaneously possessing different controlled substances can constitute multiple offenses under R.C. 2925.11. *State v. Delfino*, 22 Ohio St.3d 270 (1986), syllabus. But under the state's theory, the offender would possess 100 grams of *each* controlled

substance. That is, the other controlled substance would become cocaine and the cocaine would simultaneously become the other substance and the person would possess 100 grams of *each* substance, which is impossible.

In reply to these examples the state might argue that since offense-level enhancements for possession of cocaine are determined differently under R.C. 2925.11(C)(4)(f) than as determined under other provisions of R.C. 2925.11 for other controlled substances, therefore R.C. 2925.11(C)(4)(f) must be resultant from a scrivener's error. For example, the attorney general's brief at page seventeen asserts that words analogous to "of cocaine" are "inexplicably absent" from *other* provisions within R.C. 2925.11. But treating *different* substances *differently* is "a policy decision that comes within the purview of the General Assembly, not the courts." *Pauley v. Circleville*, 2013-Ohio-4541, ¶38. And therefore the attorney general's assertion rests upon the false premise that the General Assembly must treat every controlled substance the same. The legislature is free to include the words "of cocaine" even if, for example, the marihuana enhancer statute does not state "of marihuana." Despite this, the state invokes a litany of rules of interpretation in a glum effort to have this court declare the words "of cocaine" meaningless.

G. If the rules of interpretation apply, they uniformly undermine the state's entire argument.

The insistence that the words "of cocaine" are a relic or *faux pas* contradicts the "basic presumption in statutory construction that…when language is inserted in a statute it is inserted to accomplish some definite purpose." *State ex. rel. Cleveland Elec. Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959). "It is the duty of this court to give effect to the words used in a statute, not to delete words…" *State v. Jordan*, 89 Ohio St.3d 488, 492, 2000-Ohio-225. "The presumption *always* is, that every word in a statute is designed to have *some* effect, and hence the rule that, 'in putting a construction upon any statute, every part shall

be regarded, and it shall be so expounded, if practicable, as to give some effect to *every part of it.*'" *Ford Motor Co. v. Ohio Bureau of Emp. Srvs.*, 59 Ohio St.3d 188, 571 N.E.2d 727 (1991), (emphasis in original), quoting *Turley v. Turley*, 11 Ohio St. 173, 179 (1860). *See*, R.C. 1.47(B) ("it is presumed that * * * [t]he entire statute is intended to be effective * * *.") "It is impermissible to make an interpretation contrary to the plain and express words of the statute, *the meaning of which the General Assembly must be credited with understanding*." *State v. Altick*, 82 Ohio App.3d 240, 611 N.E.2d 863 (1992), citing *In re Hinton's Estate*, 64 Ohio St. 485, 60 N.E. 621 (1901). "Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it *did* enact." *Storer Communications*, supra, 37 Ohio St.3d at 194. "That body should be held to mean what it has plainly expressed, and hence no room is left for construction." *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraph two of syllabus.[10]

The state's argument breaks all of these precepts.

H. Even if the operative text is somehow ambiguous, the rule of lenity requires this court to strictly construe it against the state and in favor of Mr. Gonzales and therefore this court should still affirm.

If this court deems the statutes ambiguous, then the rule of lenity applies. *State v. Stevens*, 139 Ohio St.3d 247, 11 N.E.3d 252, 2014-Ohio-1932, ¶12 (explaining rule of lenity and applying it in favor of the defendant). "The 'rule of lenity' applies in criminal cases and is codified in R.C. 2901.04(A), which provides that sections of the Revised Code that define penalties '*shall* be

[10] *See also*, *Carr v. U.S.*, 560 U.S. 438, 458 (2010), quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–254 (1992), ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.")

strictly construed against the state, and liberally construed in favor of the accused.'" *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶37. The rule of lenity requires that this court must not "interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous." *Id*. at ¶38. The touchstone of the rule is "statutory ambiguity." *Id*. The state fails to mentions the rule of lenity despite instructing this court to "interpret" R.C. 2925.11(C)(4)(f).

This silence is best explained by the fact that applying the rule of lenity here would further confirm what the plain-meaning rule already requires: that the state must prove that the amount of the drug involved "*equals*" at least "one hundred grams *of cocaine*." Despite this, the government is resolute that it can imprison Mr. Gonzales for a mandatory eleven-year term *without any proof* that he possessed at least one hundred grams of cocaine.

The state is completely wrong—the answer to the certified question is "yes."

II. The state's verbose and cumbersome "proposition of law" should be rejected since the answer to the certified question—"yes"—moots the jurisdictional appeal.

The state and all of its supporting *amici* enjoy wide prosecutorial discretion in issuing indictments. And if an indictment presents the need to conduct certain testing to prove all the essential elements—and if the prosecution feels that a particular defendant deserves a severe or mandatory term of imprisonment—then do the testing. Nothing requires that locking up a person in prison for eleven years must be easy for the state. And no one denies that society may mandatorily incarcerate for years those who commit serious crimes. But is it too much to ask the state to prove the charge first? Chemical testing is even done in routine OVI cases yet the state did not offer *any* expert scientific testimony—qualitative *or* quantitative—in this case.

Finally, while the prosecutorial briefs repeatedly mention "drug dealers" or "trafficking," the possession and trafficking statutes have different elements and serve different purpose. The state did not charge Gonzales under the *trafficking* statute. This omission should not lure this court into rewriting the plain language of the *possession* statute.

Rather than imperiling basic legal principles under an untenable "*faux pas*" analysis, this court should affirm the separation of powers embedded in this state's constitution by affirming the Sixth District's plain-meaning analysis, which invariably leads to the holding at ¶47 below:

> 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.

III. CONCLUSION

This court should:

- Answer the certified question "yes" and therefore reject the state's sole proposition in its jurisdictional appeal;
- Hold that to prove an offense-level enhancement under R.C. 2925.11(C)(b)-(f), the state must prove the weight "of cocaine" and therefore the weight of "filler material" within a mixture does *not* count toward the weight "of cocaine" since by statutory definition "cocaine" does not include "filler material"; and
- Affirm the Sixth District's rationale (plain meaning) and remedy (remand for resentencing).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015 a true and accurate copy of the foregoing was sent via e-mail to the following:

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