IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. **DERRICK MOTT, JR.,** Defendant-Appellant.	Case No.: 2022 - _____ Appellate Case No.: CA-2022-10-067

ON APPEAL FROM THE TWELFTH DISTRICT COURT OF APPEALS
WARREN COUNTY, OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DERRICK MOTT, JR.

DAVID FORNSHELL (00715820)
Warren County Prosecuting Attorney

KIRSTEN BRANDT (0070162)
Assistant Prosecuting Attorney
520 Justice Dr.
Lebanon, OH 45036
(P) 513-695-1325
(F) 513-695-2962
kirsten.brandt@warrencountyprosecutor.com

Counsel for the State of Ohio

JAMES F. MAUS (0098245)
7577 Central Parke Blvd., #113
Mason, Ohio 45050
915-203-6067
attyjamesmaus@aol.com
(*Counsel of Record*)

Counsel for Derrick Mott, Jr.

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EXPLANATION OF WHY THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS OF GREAT GENERAL AND PUBLIC INTEREST

This case presents the novel question of whether or not a compound containing a controlled substance must be proven beyond a reasonable to meet the definition of a "drug" as defined in R.C. 2925.01(C) before a defendant's sentence may be increased from an F4 to a higher level (F1 in this case). This issue raises a substantial constitutional question and is of great general and public interest since many individuals in addition to the Appellant-Defendant are given increased sentences without this element being challenged or proven to a jury, in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *State v. Bowers*, 2020-Ohio-5167, 163 Ohio St. 3d 28, 32, 167 N.E.3d 947, 950, and the 6th Amendment to the United States Constitution.

Because the drug element was never proven, the fact that Derek Mott is innocent of the enhancement is also a substantial Constitutional question and is of great general and public interest.

R.C. 2925.03(A) prohibits trafficking a "controlled substance" and carries a maximum sentence of eighteen months (F4). See R.C. 2925(C)(1)(A). However, Appellant was convicted of F1 felonies with a minimum sentence of eleven years. The General Assembly added different elements of proof in order for a conviction of a felony level higher than F4. In addition to the "controlled substance" element in the trafficking subsection of R.C. 2925.03(A), the higher-level felonies, including the F1, require the government to prove the "drug" involved in the offense was 100 grams or more in weight.

R.C. 2925.03(C)(9). R.C. 2925.01(C)[1] incorporates by reference the definition of a drug contained in R.C.4729.01(E)("'Drug' * * * has the same meaning as in section 4729.01 of the Revised Code.")

R.C. 4729.01(E) provides several definitions of "drug." Specifically, R.C. 4929.01(E)(3) defines a drug as "[a]ny article, other than food, intended to affect the structure or any function of the body of humans or animals." If the government simply had to prove the existence of a controlled substance in any amount and then weigh the compound, the General Assembly would not have included "drug" in the penalty provisions of R.C. 2925.03 and give the "drug" element a legal definition. The General Assembly obviously intended to require additional proof before higher sentences applied.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a trial "by an impartial jury." In conjunction with the Due Process Clause, that right requires a jury to find every element of a crime proven beyond a reasonable doubt. *Alleyne v. United States,* 570 U.S. 99, 103, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Facts which "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict" are elements of a crime that must be found by a jury. *Apprendi v. New Jersey,* 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The same applies to any fact that increases a mandatory minimum sentence. *Alleyne*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

Therefore, in addition to proving a "controlled substance" was trafficked (in any amount large or small), the government must present evidence (through an expert witness) to opine that the compound or substance (controlled substance plus fillers) was

[1] Section 2925.01 is title "Drug Offense Definitions"

"intended to affect the structure or any function of the body of humans or animals." This is a matter of simple statutory construction and the legislature's intent is clear: Additional penalties require additional proof, which the government failed to prove in this case.

This case also presents the novel question of whether or not this Court's opinion in *Ohio v. Pendleton,* 2020-Ohio-6833, 163 Ohio St. 3d 114, requires a trial court to include the fact that its instruction to add the total weight of the entire compound to each controlled substance is a presumption, which may be rebutted and rejected by the jury.

This issue raises a substantial constitutional question and is of great general and public interest because, as this Court stated in *Pendelton,* directing the jury to calculate the drugs in such a manner is a "legal fiction" and, therefore, a "presumption" which a jury must be free to not follow. Failure to give the instruction as a presumption relieves the government of having to prove the weight of drugs, an element necessary for conviction of the penalty enhancements, in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, (2000); *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); the Due Process Clauses of United States and Ohio Constitutions, the Fourteenth Amendment and the 6th Amendment to the United States Constitution. Stated differently, failure to instruct as a presumption denies a defendant the right to contest the government's evidence for establishing the weight of a drug. *Id.*

This case presents the next iteration of the evolution of the rule first announced in *State v. Gonzalez (Gonzalez II)* 2017-Ohio-777, 150 Ohio St.3d 276, 81 N.E.3d 419: whether directing the jury to apply a legal fiction in calculating the weight of drugs (once said drugs are proven to be "drugs") requires the jury to be informed the fictional calculation is a presumption which may be rebutted and disregarded by the jury. This

issue presents substantial constitutional questions and is of great general and public interest.

STATEMENT OF THE CASE AND FACTS

Appellant-Defendant Derek Mott, Jr., was indicted in the following counts to his indictment:

Count I – Trafficking in a Fentanyl-Related Compound [F1], O.R.C. § 2925.03(A)(2), O.R.C. §2925.03(C)(9)(h) with a Major Drug Offender Specification (MDO) – Fentanyl – O.R.C. §2941.1410(B);
Count II – Possession of a Fentanyl-Related Compound [F1], O.R.C. §2925.11(A), 2925.11(C)(11)(g) with an MDO – Fentanyl – O.R.C. §2941.1410(B);
Count III – Trafficking in Heroin [F1], O.R.C. §2925.03(A)(2), 2925.03(C)(6)(g), with an MDO §2941.1410(A;
Count IV – Possession of Heroin [F1], §2925.11(A), §2925.11(C)(6)(f), with an MDO, O.R.C. §2941.1410(A);
Count V – Agg. Trafficking [F2], O.R.C. 2925.03(A)(2), 2925.03(C)(1)(d);
Count VI – Agg. Poss. of Drugs [F2], O.R.C. § 2925.11(A), 2925.11(C)(1)(c);
Count VII – Agg. Poss. of Drugs [F3], O.R.C. 2925.11(A), 2925.11(C)(1)(b); and,
Count VIII – Poss. of cocaine [F5], §2925.11(A), 2925.11(C)(4)(a).

On the evening of January 4, 2022, at approximately 9:30 p.m., a Middletown police officer made a traffic stop on a vehicle resulting in information a local Red Roof Inn, where they stopped an individual and learned he had a needle and powder on his person, which they seized. The powder was never tested.

The suspect advised he obtained the powder from room 211 in the Red Roof Inn, where the officers the Defendant-Appellant. Defendant-Appellant was detained became aware of a parole warrant.

The officers did not find any cash or weapons in the room; there were no prints on the baggies and other items they seized; and no transactions involving Appellant were observed. The powder and needle seized from the unnamed pedestrian were never matched up with the powder from Room 211. The unnamed pedestrian did not name

Appellant-Defendant as the source of his drugs. Detective Hoyle met Officer Singleton at headquarters and conducted a videotaped interview, which the government chose not to play during trial. Based upon the information obtained, the detectives obtained a search warrant. The agents went back to the hotel and searched Room 211.The agents seized several bags containing powder, as well as other items.

Officer Singleton testified at trial Appellant-Defendant "informed me that there was approximately 11 ounces of fentanyl in the room, and 11 grams of crystal methamphetamine and that he was just fronted the drugs."

On September 27, 2022, the trial commenced. During voir dire, the prosecutor discussed calculating drug weight. The trial court then *sua sponte* instructed the jury:

> Regarding the weight of drugs, you do math, so weight is important. If we were able to show, and the Judge instructs you on it, two substances together they'd be -- the Defendant is responsible for the total amount of each of the substances, meaning -- strike that. The total weight applies to both of the substances, would you be able to follow that instruction? Pg 108. See also pg. 116, 118-119.

Staff forensic chemist Todd Yoak testified that he performed chemical tests on the substances seized. After obtaining net weights of each seized bag of material, he used a scalpel to take a "small sample" from each item, performed screening tests and then tested the powder with a gas chromatography (GC) mass spectrometer. Significantly, three of the bags seized contained no detectable amounts of illegal substances.

A sample from one of the bags with a net weight of 277.77 grams tested positive for fentanyl based on upon the GC mass spectrometer. That same sample also contained heroin, and MDMB-en-PINACA. No testimony was given regarding an amount of or concentration of the fentanyl, heroin, or MCMB-en-PINACA. Because there was only one small sample taken from that bag of powder, there was no way to determine whether or not the controlled substances were mixed throughout the 277.77 grams.

Despite the fact there were bags with no detectable controlled substances, Mr. Yoak gave no testimony the amounts detected in the bags with controlled substances were enough to negate a contaminated sample. Most importantly, he did not give an affirmative expert opinion that any of the bags, individually or in total, contained a "drug" or more than 100 hundred grams of a "drug" as defined by R.C. 2925.01(C). Defense counsel asked the following:

Q. And do you conduct any purity testing when you've determined a sample is a controlled substance to determine how pure of a controlled substance it is?
A.No.
Q. Is that required for you to do?
A. No.
Q. Okay. Is there a reason that your laboratory doesn't perform the purity testing?
A. **It's not required by code**. (emphasis added)
Q. So you just kind of skim it off the top? Do you go into the middle of the bulk amount? How do you actually obtain part of the material for testing?
A. I use a scalpel or a spatula to just take a small portion of the powder sample. Sometimes it's from the edge, sometimes it's from the middle.
Q. And you indicated as part of your testimony, there is no investigation into the purity of the material? A. Correct.
Q. Okay. Did you have any indication about in sample 001 and 002 the breakdown as to how much of each different chemical may have been in that sample?
A. Not a percentage. A data provides what's called a relative abundance. So you kind of have an idea of the strength of one drug compared to another. But you can't use that for -- you would need further testing to determine percentage.
Q. So there's -- that further testing was not done?
A. Right. (Id.)

Included in the government's closing argument was the following statement:

Therefore, the law in Ohio tells us that the mixture of the drugs is considered to be each individually, and someone who is in possession of it is responsible for its collective weight. Todd Yoak told you what the weight was, 304.18 grams of fentanyl, heroin, and MDMB-en-PINACA. Therefore, an excess of 100 grams of fentanyl, an excess of 100 grams of heroin, and ten times the bulk amount of MDMB-en-PINACA.

The trial court instructed the jury:

If the substance contains two or more drugs, what you determine is the total weight of the substance is applicable to each of the drugs in the substance individually.

[If] a substance that contains a drug also contains any filler, adulterants, and/or other drug, the weight of the drug is what you determine is the total weight of the entire substance. If the substance contains two or more drugs, what you determine is the weight of the substance is applicable to each of the drugs in the substance individually.

The trial court never instructed the jury regarding the "drug" element or stated the weighing technique was a "presumption." Ohio Revised Code's definition of "drug." The jury returned guilty verdicts on all Counts. Appellant-Defendant was sentenced to 14 to 19.5 years.

The Twelfth District Court of Appeals upholds Mr. Mott's conviction.

The "Drug" Element in R.C. 2925.03(C)(9)(h)

The Court of Appeals affirmed the conviction and sentence, holding "[t]he state presented more than sufficient evidence to support Mott's convictions." *State v. Mott,* 2023-Ohio-2268, ¶ 35. In the process, however, the court of appeals misstated the law regarding the elements of the sentencing enhancements in R.C. 2925.03. The court held "the penalty sections of the drug trafficking and drug possession statutes establish a sentencing scheme where the degree of the offense is determined by the amount of the *controlled substance*." Id., ⁋ 30 (italics added) In the next sentence, however, the court acknowledged the "drug" element without defining it. "Therefore, R.C. 2925.03 and 2925.11 prescribes punishments depending on the type of *'drug'* and the amount of the *'drug'* being possessed or trafficked." *Mott*, 2023-Ohio-2268, ⁋ 30. (italics added)

These statements are inaccurate because, as mentioned previously, the relevant sentencing provisions use and define the term "drug" and exclude the term "controlled substance":

"If the *drug* involved in the violation is a fentanyl-related compound or a compound, mixture, preparation, or substance containing a fentanyl-related compound, * * * "[t]he penalty for the offense shall be determined as follows:"

If the amount of the "*drug* involved equals or exceeds one-thousand-unit doses or equals or exceeds one hundred grams, * * * trafficking in a fentanyl-related compound 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." O.R.C. §2925.03(C)(9)(h) (italics added).

The term "drug" is defined in R.C. 2925.01(C): "'Drug' … has the same meaning as in section 4729.01 of the Revised Code."

On the other hand, a "controlled substance" is defined differently: "'Controlled substance' * * * has the same meanings as in section 3719.01 of the Revised Code."

Although "controlled substance" is an element of the R.C. 2925.03(A) trafficking provision, it is *not* an element of any of the sentencing provisions in R.C. 2925.03, including 2925.03(9)(h). More importantly, it also has a completely different definition than "drug." Therefore, simply because the government provided expert testimony that several of the seized compounds contained a "controlled substance" does not mean it proved any of the compounds were "drugs," as defined in R.C. 2925.01(C). Therefore, there was no evidence to support convictions for any offense higher than in F4.

The Jury Instruction Regarding Weight of Drugs

The 12th District also overruled Appellant-Defendant's challenge to the jury instruction on calculating the weight of the drugs for determining the applicable sentencing range. The court applied the plain error standard because there was no objection at trial.

Appellant-Defendant's argument to the 12th District was that the legal weight of the drugs, as held in *Gonzalez II,* was determined by this Court court in *Pendleton* to be a presumption. "Thus, the statute allows the *presumption* that 100 percent of the

mixture or substance is fentanyl for the purpose of establishing that the fentanyl weighs 100 to 1000 grams." *State v. Pendleton*, 2020-Ohio-6833, ¶ 15.

However, the 12th District's opinion does not refer to or even contain the word "presumption," which is the heart of Appellant-Defendant's argument on this issue. Defendant-Appellant filed a timely motion for reconsideration, raising the sufficiency of evidence ("drug" element) and the jury instruction ("presumption"). The court overruled the motion. The decision did not address or contain the word "presumption" and did not address whether the "drug" element, as defined in R.C. 2925.01(C), was proven by the government with sufficient evidence.

The rulings of the Court of Appeals run afoul of the Sixth Amendment rights of all people charged with serious drug trafficking offenses and contradict the Supreme Court decisions in *Apprendi* and *Alleyne*. Individuals charged with drug crimes should be able to fully contest all of the elements of the offense, including sentencing provisions and the weight of drugs. It violates due process and the Sixth Amendment to convict a defendant based upon an irrebuttable "legal fiction." Mr. Mott respectfully urges this Court to accept the instant appeal to address these substantial constitutional issues of great general and public interest.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

<u>Proposition of Law No. I</u>: In order to secure a conviction of any of the penalty provisions of R.C. 2305.03 (raising the offense level above F4), the government must prove beyond a reasonable doubt that a "drug," as defined in R.C. 2925.01(C) was involved in the offense. Failure to meet that evidentiary burden results in a maximum offense level of F4.

In the drug trafficking statute (R.C. 2925.03), the General Assembly chose to require separate elements of proof for a conviction of a felony level higher than F4. R.C. 2925.03(1)-(2) requires proof beyond a reasonable doubt a defendant knowingly

distributed a "controlled substance." The offense is a felony F4 with a maximum sentence of 18 months.

However, the penalty provisions of R.C. 2925.03 require proof that a "drug" was involved in the offense. "Drug" is defined in the same chapter in R.C. 2925.01(C) as having the "same meaning as in section 4729.01 of the Revised Code." R.C. 2925.01(A) defines a "controlled substance" as having the "same meanings as in section 3719.01 of the Revised Code." The two definitions are not the same, or even similar to each other. Therefore, a laboratory test which proves the presence of a "controlled substance" does not, in and of itself, prove that a "drug" was involved.

This is a matter of basic statutory interpretation. In any case concerning the meaning of a statute, the focus is on the text. "'[O]ur inquiry begins with the statutory text and ends there as well if the text is unambiguous.'" *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 38, *quoting BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004). "Thus, when a statute is unambiguous in its terms, courts must apply it rather than interpret it." *Id.*

The drug definition in R.C.2925.01(C) refers to the definition of a drug in R.C. 4729.01, which gives four distinct definitions, none of them the same as the definition of a "controlled substance."

The definition of controlled substance contained in R.C. 2925.01(A) refers to R.C. 3719.01(C), a completely different statute, which defines a "controlled substance" as "drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V."

In the case at bar, is it beyond dispute the government did not present any testimony, expert or otherwise, that a drug defined by R.C.2925.01(C) was involved in the offense. We know this because during voir dire, the prosecutor incorrectly announced to the venire "[we] don't have to prove anything ***. We don't have to prove *what effect it would have on anybody*, we just have to prove" whether the defendant possessed it. (T.54, September 27, 2022) (emphasis added). That statement references and contradicts the definition of "drug" in R.C. 4729.01(E)(3): "Any article, other than food, *intended to affect the structure or any function of the body of humans* or animals." (emphasis added)

Appellant-Defendant was also convicted of illegally possessing drugs (2925.11(A)) in Counts II, IV, VI, VII, and VIII. R.C. 2925.11(A) also requires the government to prove the substances knowingly possessed were "drugs" as defined in R.C. 2925.01(C).

Chemist Todd Yoak's testimony completely lacked any testimony the seized items were "drugs." He only tested for and testified regarding "controlled substances." During cross-examination, defense counsel broached an issue touching on whether or not the compound could have affected a user (whether it was a "drug" or not), Mr. Yoak refused to answer, saying he does not have to test for that because of some unidentified "code."

These statements by the prosecutor and chemist are critical admissions, proving the government based its prosecution on a false interpretation of the law and infected the trial with it from the beginning. The government failed to prove beyond a reasonable doubt that Appellant-Defendant knowingly possessed, distributed, trafficked, or sold any "drugs."

State v Gonzalez (Gonzalez II), 2017-Ohio-777, 150 Ohio St.3d 276, 81 N.E.3d 419, provides no assistance to the government. To the contrary, the court in *Gonzalez II* stated, "the applicable offense level for cocaine possession under R.C. 2925.11(C)(4) is

determined by the total weight of the *drug involved*, including any fillers that are part of the usable drug. *State v. Gonzales*, 2017-Ohio-777, ¶ 18, 150 Ohio St. 3d 276, 281–82, 81 N.E.3d 419, 424. The court could easily have found that the term "drug" was generic rather than the legally defined term in R.C. 2925.01(C). Instead, the court found the weight of the drug referred to the entire usable drug, not just the exact weight of the controlled substance cocaine in the mixture. The *Gonzalez II* court added, "If a legislative definition is available, we construe the words of the statute accordingly. R.C. 1.42." Id. at ¶ 4.

In *Gonzalez II*, this Court held the entire compound, including any fillers which are part of the "*usable drug,"* are considered for the purpose of determining the appropriate penalty for cocaine possession. *State v. Gonzales*, 2017-Ohio-777, 150 Ohio St. 3d 276, 81 N.E.3d 419.

The significance of the legal issue of whether the statutorily defined term "drug" is an element of the sentencing provisions is revealed in the context of the facts of this case. The evidence proves only that Appellant-Defendant was merely present at the scene when the officers arrived at Room 211 to investigate drug activity. No drugs, weapons, or other incriminating items were seized from Appellant-Defendant. There were fingerprints or DNA linking him to the seized items. He had no cash and did not rent the room, even though a drug transaction had recently occurred.

For these reasons, this case raises substantial constitutional questions and is of great general and public interest.

<u>Proposition of Law No. II</u>: When instructing the jury on determining the weight of drugs for purposes of determining the offense level of conviction pursuant to *Pendleton*, the trial court must inform the jury that application of the total weight of the compound to a controlled substance or all of the

controlled substances in the compound is a presumption which can rebutted and the jury may choose to not apply.

The government built its case around a materially incorrect statement of law regarding Ohio law on proving the weight element of a drug charge. The government, in jury selection, the forensic chemist's testimony, and closing argument, repeatedly informed the jury it must accept the weight of the seized powders and apply that weight to each controlled substance individually. The trial court adopted that incorrect version of Ohio law and included the instruction during the government's voir dire, as well as during the jury charge without informing the jury it was a presumption.

The instruction was misleading because the supreme court, in *Ohio v. Pendleton*, 2020-Ohio-6833, 163 Ohio St. 3d 114, 168 N.E.3d 458 made clear, the "legal fiction" of applying the total weight of the mixture/compound to each drug in the separate counts is a "*presumption,"* which the jury could be rebutted and disregarded. Id., ¶ 9 and 14.

"[A] reviewing court must consider the jury charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.'" *Kokitka v. Ford Motor Co.* (1995), 73 Ohio St.3d 89, 93, 652 N.E.2d 671, *quoting Becker v. Lake Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165. "A presumption exists that a jury has followed the instructions given to it by the trial court." *State v. Nichols*, No. 99AP-1090, 2000 WL 33231611, at *4 (Ohio Ct. App. 2000). Crim.R. 30(A) states on appeal "a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict." *Id*.

Appellant submits the following instruction(s) "probably misled the jury in a matter materially affecting the complaining party's substantial rights" (plain error):

[F]or all additional findings contained in these instructions if a substance that contains a *drug* also contains any filler, adulterants, or another drug, the weight of the drug is what you determine is the total weight of the entire substance. If the substance contains two or more *drugs*, what you determine is the total weight of the substance is applicable to each of the *drugs* in the substance individually. (September 28, 2022, T.p. 45)

As an additional -- as with the additional findings, if a substance that contains a drug also contains any filler, adulterants, and/or other drug, the weight of the drug is what you determine is the total weight of the entire substance. If the substance contains two or more drugs, what you determine is the weight of the substance is applicable to each of the drugs in the substance individually (September 28, 2022, T.p. 49)

This instruction conflicts materially with the Ohio Supreme Court's decision in *Pendleton*, this Court made several observations regarding the "legal fiction" of applying the total weight of the drugs to two or more separate counts involving different substances. "Thus, [2925.03(C)(1)(d)] *allow*s the *presumption* that 100 percent of the mixture or substance is fentanyl for the purpose of establishing that the fentanyl weighs 100 to 1000 grams. *State v. Pendleton*, 2020-Ohio-6833, 163 Ohio St. 3d 114, 119, 168 N.E.3d 458, 463 ¶ 15 (emphasis added).

"Given the foregoing, and pursuant to the logic of *Gonzales II*, each of the applicable drug-trafficking offenses under R.C. 2925.03 allows a fact-finder to consider conduct that *exists*—for example, trafficking in 50 grams of powder containing a detectable amount of heroin—and then make a fictional assumption about that existing conduct to satisfy the weight element of the offense: the full 50 grams is 100 percent heroin. Nothing in R.C. 2925.03 allows a fact-finder to then *create* additional conduct that does not exist in fact: trafficking in a separate, additional 50 grams of powder containing a detectable amount of fentanyl. Nothing in R.C. 2925.03 allows a fact-finder to double the fiction and assume that the full 50 grams is simultaneously 100 percent heroin and 100 percent fentanyl." *State v. Pendleton*, 2020-Ohio-6833, 163 Ohio St. 3d 114, 119, 168 N.E.3d 458, 463.[2]

[2] R.C. 2925.03 does not contain the term "detectable."

A "presumption" is rebuttable.[3] In addition, if the Revised Code "allows" a fact-finder to make a "fictional assumption" about the weight of a "drug," then that same fact-finder is allowed to not make that fictional assumption. This Court chose the word "presumption" with no indication it meant anything other than the legal term used every day by courts at all levels in Ohio (and all other jurisdictions). Like any other presumption, the jury was free to not apply it.

This is especially true in the case of a "legal fiction." The *Pendleton* court observed, "Nothing in R.C. 2925.03 allows a fact-finder to double the fiction and assume that the full 50 grams is simultaneously 100 percent heroin and 100 percent fentanyl." *Pendleton*, 2020-Ohio-6833, ¶ 17. That's why this Court held it to be a presumption. It violates due process and the Sixth Amendment to convict a defendant based upon an irrebuttable "legal fiction," which occurred in this case.

CONCLUSION

This case involves the government's fundamental obligation to prove all of the elements of a felony offense, including sentencing enhancements and the weight of drugs and raises substantial constitutional questions and is of great general and public interest. Mr. Mott, Jr., requests that this Court accept jurisdiction so that the issues raised herein can be fully presented and reviewed on their merits.

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[3] "Such presumption, though, is not conclusive and may be rebutted by proof of facts which tend to show the contrary, or which raise a conflicting presumption. 13 Ohio Jurisprudence 372, Section 18. The presumption is no more than prima facie evidence and may be shown to be ill founded by counterevidence. *Youngs v. Heffner*, 36 Ohio St. 232, 237." *Brunny v. Prudential Ins. Co. of Am.*, 151 Ohio St. 86, 92, 84 N.E.2d 504, 507 (1949)

Respectfully submitted,

/s/ *James F. Maus*

JAMES F. MAUS (0098245)
Counsel for Derrick Mott, Jr.
7577 Central Parke Blvd., #113
Mason, Ohio 45050
Phone: (915) 203-6067
attyjamesmaus@aol.com

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction has been served on Kirsten Brandt, Counsel for Plaintiff-Appellee, Warren County Prosecutor's Office, via e-mail delivery at kirsten.brandt@warrencountyprosecutor.com on October 20, 2023.

/s/ James F. Maus

James F. Maus