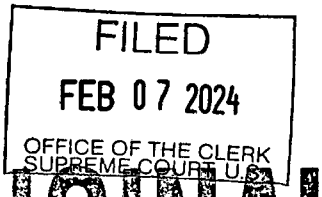
23-7721

No.

IN THE SUPREME COURT OF THE UNITED STATES



DARREN M. REESE,

Petitioner,

vs.

JAY FORSHEY, Warden, Noble Correctional Institution,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Darren Reese, *pro se*
Counsel of Record for Darren Reese
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

Warden, Noble Correctional Institution
Mary Anne Reese, LEAD ATTORNEY
Attorney General of Ohio, Cincinnati, Ohio
Counsel of Record for Jay Forshey, Warden,
Noble Correctional Institution
Carew Tower
441 Vine St., Ste. 1600
Cincinnati, Ohio 45202-2906

PETITION FOR CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Is the Rule of Lenity a Constitutional Due Process guarantee that must be employed when a State Court construes ambiguous statutory language?

2. Is it repugnant to the Constitutions, laws, and/or Treaties of the United States, and a violation of Due Process, for a State Court of Last Resort violate and/or ignore its own laws and/or rules in order to reach a ruling that increases the level of offenses and/or penalties and/or relieves the State of its burden of proof regarding enhanced offenses and penalties?

LIST OF PARTIES IN COURT BELOW

The caption set out above contains the names of all the parties.

LIST OF CASES DIRECTLY RELATED TO THIS CASE

1. United States Court of Appeals for the Sixth Circuit
2. No. 23-3494
3. *Reese v. Forshey*, 2023 U.S. App. LEXIS 31765 (6th Cir. November 30, 2023)
4. November 30, 2023

1. United States District Court for the Southern District of Ohio, Eastern Division
2. Case No. 2:20-cv-4124
3. *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 81529 (S.D. Ohio May 9, 2023)
4. May 9, 2023

1. United States District Court for the Southern District of Ohio, Eastern Division
2. Case No. 2:20-cv-4124
3. *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 48221 (S.D. Ohio March 21, 2023)
4. March 21, 2023

1. United States District Court for the Southern District of Ohio, Eastern Division
2. Case No. 2:20-cv-4124
3. *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 24483 (S.D. Ohio February 13, 2023)
4. February 13, 2023

1. United States District Court for the Southern District of Ohio, Eastern Division
2. Case No. 2:20-cv-4124
3. *Reese v. Forshey*, 2022 U.S. Dist. LEXIS 9145 (S.D. Ohio January 18, 2022)
4. January 18, 2022

1. United States District Court for the Southern District of Ohio, Eastern Division
2. Case No. 2:20-cv-4124
3. *Reese v. Warden*, 2021 U.S. Dist. LEXIS 125934 (S.D. Ohio July 7, 2021)
4. July 7, 2021

1. Supreme Court of Ohio
2. 2019-1514
3. *State v. Reese*, 2020 Ohio LEXIS 69 (Ohio January 21, 2020)
4. January 21, 2020

1. Supreme Court of Ohio
2. 2019-1211
3. State v. Reese, 2019 Ohio LEXIS 2234 (Ohio October 29, 2019)
4. October 29, 2019

1. Court of Appeals of Ohio, Fifth Appellate District, Muskingum County
2. Case No. CT2019-0033
3. *State v. Reese*, 2019-Ohio-3453 (Ohio Ct. App., Muskingum County August 26, 2019)
4. August 26, 2019

1. Supreme Court of Ohio
2. 2016-0656
3. *State v. Reese*, 150 Ohio St. 3d 565 (Ohio May 16, 2017)
4. May 16, 2017

1. Supreme Court of Ohio
2. 2016-0656
3. *State v. Reese*, 150 Ohio St. 3d 564 (Ohio December 30, 2016)
4. December 30, 2016

1. Supreme Court of Ohio
2. 2016-0656
3. *State v. Reese*, 2016 Ohio LEXIS 1705 (Ohio June 29, 2016)
4. June 29, 2016

1. Court of Appeals of Ohio, Fifth Appellate District, Muskingum County
2. Case No. CT2015-0046
3. *State v. Reese*, 2016-Ohio-1591 (Ohio Ct. App., Muskingum County April 15, 2016)
4. April 15, 2016

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2. Case No. CR2015-0186
3. September 24, 2015

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C. Opinion of the Ohio Supreme Court, December 30, 2016, reversing Judgment of the Court of Appeals and remanding to the Trial Court

D. Opinion of the Ohio Supreme Court, May 16, 2017, granting Motion for Reconsideration and affirming Court of Appeals' Judgment

E. Judgment of Muskingum County, Ohio denying Appellant's Motion to Correct Void Judgment

F. Opinion of Court of Appeals of Ohio, Fifth Appellate District, Muskingum County, August 26, 2019, affirming conviction

G. Opinion of the Court of Appeals of Ohio, Fifth Appellate District, Muskingum County, denying Application for Reopening

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L. Opinion and Order of United States Court of Appeals for the Sixth Circuit, November 30, 2023, denying Application for Certificate of Appealability

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CITATIONS OF OPINIONS AND ORDERS IN CASE

The original conviction of Petitioner in the Muskingum County, Ohio Court of Common Pleas was not reported, but is set forth at Appendix A.

The original conviction of Petitioner was appealed to the Court of Appeals of Ohio, Fifth Appellate District, Muskingum County, which affirmed the conviction in an Opinion at *State v. Reese*, 2016-Ohio-1591 (Ohio Ct. App., Muskingum County April 15, 2016) and also set forth at Appendix B.

The Ohio Supreme Court reversed the Judgement of the Court of Appeals and remanded to the Trial Court in an Opinion at State v. Reese, 150 Ohio St. 3d 564 (Ohio December 30, 2016) and also set forth at Appendix C.

The Ohio Supreme Court granted a Motion for Reconsideration by the State of Ohio and affirmed the Court of Appeals' Judgment in an opinion at State v. Reese, 150 Ohio St. 3d 565 (Ohio May 16, 2017) and also set forth at Appendix D.

The Common Pleas Court of Muskingum County, Ohio denied as moot Appellant's Motion to Correct Void Judgment in an unreported decision set forth at Appendix E.

The Court of Appeals of Ohio, Fifth Appellate District, Muskingum County affirmed the conviction in an Opinion at *State v. Reese*, 2019-Ohio-3453 (Ohio Ct. App., Muskingum County August 26, 2019) and also set forth at Appendix F.

The Court of Appeals of Ohio, Fifth Appellate District, Muskingum County denied Petitioner's Application for Reopening in an unreported Opinion set forth at Appendix G.

The Ohio Supreme Court declined to accept the case for review in an Opinion at *State v. Reese*, 2019 Ohio LEXIS 2234 (Ohio October 29, 2019) and again at *State v. Reese*, 2020 Ohio LEXIS 69 (Ohio January 21, 2020) set forth at Appendix H.

The Magistrate of the United States District Court for the Southern District of Ohio, Eastern Division entered four Reports and Recommendations, reported at *Reese v. Warden*, 2021 U.S. Dist. LEXIS 125934 (S.D. Ohio July 7, 2021); *Reese v. Forshey*, 2022 U.S. Dist. LEXIS 9145 (S.D. Ohio January 18, 2022) set forth at Appendix I; *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 24483 (S.D. Ohio

February 13, 2023); and *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 48221 (S.D. Ohio March 21, 2023) set forth at Appendix J.

The United States District Court for the Southern District of Ohio, Eastern Division adopted the Magistrate's Reports and Recommendations, overruled Petitioner's Objection, denied the Writ of Habeas Corpus, and denied the Certificate of Appealability in an Opinion at *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 81529 (S.D. Ohio May 9, 2023)and also set forth at Appendix K.

The opinion of the United States District Court of Appeals below declined to issue a Certificate of Appealability in an Opinion reported at *Reese v. Forshey*, 2023 U.S. App. LEXIS 31765 (6th Cir. November 30, 2023) and also set forth at Appendix L.

JURISDICTIONAL STATEMENT

The United States Supreme Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254, which states:

Cases in the courts of appeals may be reviewed by the Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 30, 2023. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, United States Constitution, provides:

> **Sec. 1. [Citizens of the United States.]** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The statuts under which Petitioner was prosecuted were R.C. 2925.03(A)(1), R.C. 2925.01(A), and R.C. 2925.11(A), which, at the time, provided:
Sec. 2925.03. (A) No person shall knowingly do any of the following:
(1) Sell or offer to sell a controlled substance or a controlled substance analog

Sec. 2925.01.
As used in this chapter: **(A)** "Administer," "controlled substance," "controlled substance analog," "dispense," "distribute," "hypodermic," "manufacturer," "official written order," "person," "pharmacist," "pharmacy," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meanings as in section 3719.01 of the Revised Code.

Sec. 2925.11. (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

3. The statute under which Petitioner sought post-conviction relief was 28 USCS § 2254:

State custody; remedies in Federal courts

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State; or either there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant.

An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that either the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigence or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the

State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Except as provided in section 408 of the Controlled Substance Acts 21 USCS § 848, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 28 USCS § 2254.

Statement of the Case

I. Course of Proceedings:

Petitioner was indicted on four counts of trafficking in drugs, one count of illegal manufacture of drugs, and one count of possession of drugs. In the initial indictment, Counts 1, 2, 3, 5, and 6 (i.e., the four counts of trafficking and the one count of possession) were first-degree felonies, and Count 4 (illegal manufacture) was a second-degree felony. Counts 3 and 4 included major drug offender specifications.

On August 17, 2015, in *State of Ohio v. Darren Reese*, Muskingum County Ohio Court of Common Pleas, Case No. CR2015-0186, Petitioner entered a no contest plea, reducing Count 2 to a third-degree felony and Count 5 to a second-degree felony.

On September 24, 2015, the Trial Court sentenced Petitioner to five years for Count One, 24 months for Count Two, 11 years for Count Three, eight years for Count Four, eight years for Count Five, and five years for Count Six, with the sentences for Count One and Six served concurrently and the sentences for Counts Two, Four, and Five served concurrently (App. A).

The judgment and sentence were affirmed by Ohio's Fifth District Court of Appeals, *State v. Reese*, 2016-Ohio-1591 (April 15, 2016) ("*Reese I*") (App. B).

Petitioner appealed that decision to the Supreme Court of Ohio, who accepted jurisdiction, staying proceedings pending its decision in *State v. Gonzales*, 150 Ohio St.3d 261, 2016-Ohio-8319, 81 N.E.3d 405 (Ohio 2016) ("*Gonzales I*"). See *State v. Reese*, 146 Ohio St.3d 1427, 2016-Ohio-4606, 52 N.E.3d 1203 (Ohio 2016).

The Ohio Supreme Court reversed *Gonzales* I; reversed the Fifth District's decision in *Reese I,* and remanded Petitioner's case to the Trial Court for resentencing. See *State v. Reese*, 150 Ohio St.3d 564, 2016-Ohio-8471, 84 N.E.3d 1002 (Ohio 2016) (App. C).

Upon State requested reconsideration, the Ohio Supreme Court overruled its previous decision in *Gonzales I.* See *State v. Gonzales*, 150 Ohio St. 3d 276, (March 6, 2017) ("*Gonzales II*"). The Ohio Supreme Court then overruled its previous reversal in Petitioner's case, reinstating the Court of Appeals' decision in *Reese I*, thereby affirming Petitioner's original sentence based on the new holding of *Gonzales II. State v. Reese*, 150 Ohio St. 3d 565 (2017) (App. D).

On November 27, 2018, Petitioner filed a Motion to Correct Void Judgment with the Trial Court. The Trial Court denied Petitioner's Motion (App. E), and the Fifth District Court of Appeals affirmed. See *State v. Reese*, 2019-Ohio-3453 (August 26, 2019) (App. F).

Petitioner filed an Application for Reopening with the Fifth District Court of Appeals, who denied the Application (App. G); the Ohio Supreme Court did not accept jurisdiction over the appeal therefrom. *State v. Reese*, 157 Ohio St.3d 1538 (2020) (App. H)

On August 12, 2020, Petitioner filed a Petition for Writ of Habeas Corpus. After one Report and Recommendation, as well as three Supplemental Reports and Recommendations by the Magistrate, on May 9, 2023, the District Court adopted the final Magistrate's Supplemental Report and Recommendation and denied Petitioner's Petition and Petitioner's Request for a Certificate of Appealability. *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 81529 (S.D. Ohio May 9, 2023) (App. K). See also *Reese v. Warden*, 2021 U.S. Dist. LEXIS 125934 (S.D. Ohio July 7, 2021); *Reese v. Forshey*, 2022 U.S. Dist. LEXIS 9145 (S.D. Ohio January 18, 2022) (App. I); *Reese v. Forshey*, 2023 U.S. Dist. LEXIS 24483 (S.D. Ohio February 13, 2023); *Reese v. Forshey*, 2023 U.S. Dist. LEXIS

On June 7, 2023, Petitioner filed an appeal and a Motion for a Certificate of Appealability in the United States Court of Appeals for the Sixth Circuit. On November 30, 2023, the Court of Appeals

denied the Certificate of Appealability and, as a result, denied the appeal and motion as moot. *Reese v. Forshey*, 2023 U.S. App. LEXIS 31765 (6th Cir. November 30, 2023) (App. K).

On February 1, 2024, Petitioner filed the instant Petition (mailbox rule) to this Court for a Writ of Certiorari, which was returned to him with instructions to correct and refile within 60 days.

II. Relevant Facts Concerning The Underlying Conviction For Major Drug Offender Specifications

The Zanesville-Muskingum County Ohio Drug Task Force conducted a series of controlled drug buys of cocaine with Petitioner in April and May of 2015, and executed a search warrant on June 1, 2015. The first transaction was for 51.4 grams of cocaine, the second for 27.4 grams, the third for 104.97 grams after drying and 149.65 before drying, and the final for 14.62 grams after drying and 26.69 before drying. The search warrant yielded 83.13 grams of cocaine.

Petitioner was charged with four counts of trafficking in drugs, one count of illegal manufacture of drugs, and one count of possession of drugs. He filed a motion to conduct a purity analysis of the cocaine, which the State opposed.

On June 3, 2015, the Muskingum County Grand Jury indicted Petitioner on five counts of Trafficking in Drugs (Cocaine) in violation of Ohio Revised Code § 2925.03(A)(1)(Counts 1, 2 , 3, and 5), with Count 3 carrying a Major Drug Offender specification; one count of Illegal Manufacture of Drugs, with a major drug offender specification (Cocaine), in violation of Ohio Revised Code § 2925.04(A) (Count 4); and one count of Possession of Drugs (Cocaine) in violation of Ohio Revised Code § 2925.11(A) (Count 6). On page 5, the indictment stated that Counts 1, 2, 3, 5 and 6 were all first-degree felonies, and Count 4 was a second-degree felony. (Indictment, State Court Record ECF No. 18, Exhibit 1).

On August 17, 2015, Petitioner entered a no-contest plea to all counts with Count Two amended to a third-degree felony and Count Five to a second-degree felony. As part of the plea, he stipulated to the lab test results, which did not specify the purity of the cocaine. The Court accepted the plea, found Petitioner guilty, and imposed an aggregate sentence of 16 years.

Petitioner appealed to the Fifth District Court of Appeals of Ohio raising only one assignment of error: "The Trial Court improperly convicted and sentenced Petitioner based on the total weight of the narcotics rather than the weight of the pure amount of cocaine." (Appellant's Brief, State Court Record ECF No. 18, Exhibit 13, PageID 398). The Fifth District affirmed. *State v. Reese*, 2016-Ohio-1591 (Ohio App. 5th Dist. Apr. 15, 2016).

Petitioner appealed to the Supreme Court of Ohio, raising the following proposition of law: "The state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), must prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture." (Memorandum in Support of Jurisdiction, State Court Record, ECF No.18, Ex.17, PageID 418). Noting this proposition of law had already been briefed and argued in the then-pending Ohio Supreme Court case of *State v. Gonzales*, No.2015-0384, Petitioner asked the Ohio Supreme Court to accept jurisdiction ,withhold judgment pending the *Gonzales* decision. Id. at Ex. 18.

The Ohio Supreme Court decided *Gonzales* on December 23, 2016, holding the "offense level for possession of cocaine was determined only by weight of actual cocaine, not by total weight of cocaine plus any filler." *State v. Gonzales*, 150 Ohio St. 3d 261, 2016- Ohio 8319, 81 N.E.3d 405 (2016) (*Gonzales I*); based thereon, the Ohio Supreme Court reversed Petitioner's conviction and remanded the case to the Trial Court. *State v. Reese*, 150 Ohio St. 3d 564, 2016- Ohio 8471, 84 N.E.3d 1002 (2016).

Thereafter the Ohio Supreme Court granted the State's motion for reconsideration in *Gonzales* and held an entire compound, mixture, preparation, or substance was to be considered in determining an appropriate penalty. *State v. Gonzales*, 150 Ohio St. 3d 276, 2017- Ohio 777, 81 N.E.3d 419 (2017) (*Gonzales II*); based thereon, the Ohio Supreme Court reconsidered Petitioner's case and reinstated the Court of Appeals decisions. *State v. Reese*, 150 Ohio St. 3d 565 (2017).

On November 30, 2018, Petitioner filed a Motion to Correct Void Judgment claiming:

> 1. [Petitioner]'s sentence for trafficking in drugs & possession of drugs are void, because the State failed to properly aggravate [sic] them from fifth degree felonies.
>
> 2. Because Count 3 (trafficking in drugs) and Count 4 (illegal manufacturing of the same drugs) are allied offenses of similar import, the failure to merge at the sentencing hearing

renders convictions void ab initio, under R.C. § 2941.25 and the Double Jeopardy Clause of the 5th U.S.C.A.

(State Court Record, ECF No. 18, Ex. 24). The Trial Court denied the Motion both on the merits and because Petitioner had not included these claims on direct appeal. *Id.* at Ex. 28. The Court of appeals affirmed the *res judicata* holding of the Trial Court. *State v. Reese*, 2019-Ohio-3453 (2019), and the Ohio Supreme Court declined jurisdiction at 157 Ohio St. 3d 1538 (2019).

On June 12, 2019, Petitioner applied to reopen his appeal under Ohio App. R. 26(B). (State Court Record, ECF No. 18, Exhibit 41). The Fifth District denied the Application as untimely and the Supreme Court of Ohio declined to exercise appellate jurisdiction. *Id.* at Exs. 42 and 46.

On August 20, 2020, Petitioner filed his Habeas Petition in the United States District Court for the Southern District of Ohio, Eastern Division, raising the following grounds for relief:

Ground One: The appellate court used non-federal grounds to deny review of his federal claims.

Factual Support: This issue was brought up in my memorandum in support of jurisdiction in O. S. Ct. No. 2019-1211, via the explanation presented. I met the 90-day barometer, but to evade federal review, the appellate court expanded the terms of the rule. Any other Petitioner who has demonstrated cause for filing outside the 90-day limit has received review of the merits of application.

Ground Two: Received ineffective assistance of appellate counsel.

Factual Support: Appellate counsel failed to raise "dead-bang" winning arguments.

Ground Three: Convictions and sentences for drug offenses are void based upon being greater than that found by grand jury.

Factual Support: Because the Trial Court had no authority to correct a defective indictment, and the State could not constructively amend such on no contest pleas, any conviction and sentence in excess of that found by the grand jury is void ab initio. I attacked the convictions and sentences at issue, as void and voidable.

Ground Four: Sentences for allied offenses of similar import constitute double-jeopardy.

Factual Support: The issue of similar import for illegal manufacturing of drugs and trafficking in the same drugs was well settled by the very appellate court I presented grievance. Therefore, the doctrine of stare decisis employed to render a failure to correct plain error of constitutional magnitude. This violated the Double Jeopardy Clause and Ohio's codification of such in O.R.C. 2941.25. This voided the sentences pursuant to constitutional and statutory grounds.

> Notwithstanding the fact that Ohio law provides the State with a corrective measure, the Supreme Court demands an absolute sweep. Based upon opportunity to correct, passing invokes federal jurisdiction.
>
> This matter invoked this Court's duty to protect and maintain the supremacy of the Constitution, *Ward v. Bd. of Comm'rs of Love City* (1920), 253 U.S. 17, 23, and warrants a conditional writ to correct federal violations.

(ECF No. 1, Petition, at PageID 2-4).

EXISTENCE OF JURISDICTION BELOW

The United States Supreme Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254, as a review of a Federal Court of Appeals decision that originated in the Federal District Court, Southern District of Ohio, as a Petition by a State prisoner under 28 U.S.C. § 2254; The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 30, 2023;

III. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE COURT OR REGARDING AN ISSUE NOT DIRECTLY DECIDED BY THE COURT.

The questions in this case are straightforward: (1) Is the Rule of Lenity a Constitutionally required imperative? and 2. May a State Court of Last Resort disregard its own Rules of Procedure and/or the laws of its State in order to reach a decision?; and (2) Is it repugnant to the Constitutions, laws, and/or Treaties of the United States, and a violation of Due Process, for a State Court of Last Resort violate and/or ignore its own laws and/or rules in order to reach a ruling that increases the level of offenses and/or penalties and/or relieves the State of its burden of proof regarding enhanced offenses and penalties?

The Courts below each asserted that the Rule of Lenity is not a Constitutional tenet and, therefore, may not be used as an argument to overcome any untimely argument and, thus, renders the question of if the Ohio Supreme Court's decision affirming the Ohio Appellate Court's decision on reconsideration was incorrect moot. The District Court did note, however, the Rule of Lenity has never explicitly been called a Constitutional requirement, but has also not explicitly been determined not to be. Therefore, these questions are unanswered by this Court.

Petitioner respectfully urges all aspects of the Lower Courts' decisions are erroneous and at variance with this Court's decisions as explained in the argument below

ARGUMENT FOR ALLOWANCE OF WRIT

IV. FIRST QUESTION PRESENTED FOR REVIEW

Is the Rule of Lenity a Constitutional Due Process guarantee that must be employed when a State Court construes ambiguous statutory language?

IV.A.1. Introduction

The Rule of Lenity is based on the Fifth and Fourteenth Amendments' concerns guarantying due process – specifically, the right to fair notice. U.S. Const. amend. V & XIV, § 1.

Pursuant to the Rule of Lenity, judges should strictly interpret penal statutes. Penal statutes impose a fine or imprisonment to punish citizens. The U.S. Constitution (and all state constitutions) requires notice before the Government can deprive a person of a protected interest involving life, liberty, or property. U.S. Const. amend. V & XIV, § 1.

Those accused of crimes should be able to know what the law is. If a statute does not clearly and unambiguously target specific conduct, an individual should not be penalized Thus, the Rule of Lenity furthers the U.S. Constitution's promise people should have fair warning of crimes before they are penalized. "[I]ndividuals should not languish in prison unless the legislature has clearly articulated precisely what conduct constitutes a crime." *United States v. Gonzalez*, 407 F.3d 118, 125 (2d Cir. 2005).

If judges included activity not explicitly covered in the statutory language, they would be expanding the act's reach. *United States v. Bass*, 404 U.S. 336 (1971) ("[L]egislatures and not courts should define criminal activity.").

This Court explained, "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also … keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 2025, 170 L. Ed. 2d.

Thus, the Rule of Lenity furthers separation of powers by respecting the constitutional power distribution. Should a defendant prevail if ambiguity appears on the face of a statute (after examining

just the text), or should all sources of meaning be explored first? Should the Canon be a trump card or a rule of last resort? Some judges apply the Canon whenever the text is ambiguous, without examining other sources of meaning. This is the approach former Justice Scalia took; the Rule of Lenity was his first choice for resolving ambiguity. See, e.g., *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993) (Scalia, J., dissenting). But other justices of this noble Court have cautioned, "[T]his Court has never held that the Rule of Lenity automatically permits a defendant to win." *Muscarello v. United States*, 524 U.S. 125, 139, 118 S. Ct. 1911, 1919, 141 L. Ed. 2d. 111, 122 (1998).

Instead, the Court's current approach is to apply Lenity only when the other sources have failed to resolve the ambiguity. *Shular v. United States*, __ U.S. __, 140 S. Ct. 779

The Canon "applies only if, after seizing everything from which aid can be derived, ... we can make no more than a guess as to what Congress intended." *United States v. Wells*, 519 U.S. 482, 499, 117 S. Ct. 921, 931–932, 137 L. Ed. 2d 107, 122 (1997) (internal citations omitted); Gonzalez, 407 F.3d (The Canon "is not a catch-all maxim that resolves all disputes in the defendant's favor – sort of juristical 'tie goes to the runner.'").

Which approach is correct is unclear. If, as this Court has said, Lenity is premised on the idea "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed," then Lenity should come earlier in the analysis, as Justice Scalia preferred. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.,* 515 U.S. 687, 704, 115 S. Ct. 2407, 2416, 132 L. Ed. 2d 597, 615 n.18 (1995). See also *Cf. State v. Courchesne*, 816 A.2d 562, 618 n.24 (Conn. 2003) ("I would leave for another day the question of whether, because of the constitutional underpinnings embodied in its fair warning rationale, Lenity should be employed immediately upon determining that the text of a criminal statute is ambiguous, or whether it should, along with other substantive presumptions, be employed only as a last resort after all of the relevant tools of construction have been employed.").

Courts have veered toward a Literalist focus on the dictionary meaning of terms, but have failed to overrule older conventions of interpretation, leaving an excess of techniques to support ad hoc departures from literal readings in uncomfortable cases. See, e.g., *United States v. X-Citement Video,*

Inc., 513 U.S. 64, 68-69 (1994) (rejecting the "most natural grammatical reading" of the statute); *Bifulco v. United States*, 447 U.S. 381 (1980) (interpreting statutory reference to "imprisonment" to include the possibility of parole based on an analysis of the statute's policy and legislative history); see generally *Nicholas S. Zeppos*, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 Tex. L. Rev. 1073, 1120 (1992) (describing the Supreme Court's current approach as "eclectic"). See also, e.g., *Smith*, 508 U.S. 223, 228-29 (1993) (relying on dictionary definition of "use" to hold a ban on use of a firearm in the context of a narcotics trafficking offense covered uses of the firearm other than as a weapon); Chapman v. United States, 500 U.S. 453, 461-62 (1991) (citing dictionary definition of "mixture" to interpret sentencing guideline based on the weight of a "mixture" containing the drug LSD to include the weight of the blotter paper on which LSD doses are congealed);

This is where the Rule of Lenity proves useful. The Common Law Doctrine, also known as "Strict Construction," directs courts to construe statutory ambiguities in favor of criminal defendants. See *Bass*, 404 U.S. 336, 347 (1971).

On the normative level, the problem with Lenity is its classic rationales – Notice and Legislative Supremacy – have proven inadequate. The Notice Theory presents Lenity as an assurance no criminal defendants will be caught off guard by broader statutory interpretations than they could reasonably anticipate. See id. at 348 (identifying one of the policies underlying the Rule of Lenity as the principle "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed" (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.))).

The Legislative Supremacy Theory, meanwhile, presents Lenity as a guarantee courts will go no further than the Legislature. See Bass, 404 U.S. at 348 (indicating a second policy reason for Lenity is "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity").

Prosecutors may convict a BB shooter of "armed violence," though, again, the phrase probably connoted something more sinister in the mind of the electorate. See People v. Davis, 766 N.E.2d 641, 643 (Ill. 2002) (again, citing the Rule of Lenity to reject this theory).

The Rule of Lenity serves an interest in disclosure. It compels Legislatures to detail the breadth of prohibitions in advance of their enforcement and it compels Prosecutors to charge crimes with enough specificity to indicate to voters – and juries – what conduct has been treated as criminal. Without the Rule, politicians might prefer to choose broad language obscuring the extent to which criminal laws encompass unremarkable conduct. A Prosecutor who wishes to send a drunken bicyclist to jail would surely prefer to list the conviction as a penalty for "driving while intoxicated" rather than "bicycling while drunk." The Rule of Lenity blocks these outcomes by compelling lawmakers and enforcers to indicate explicitly what they are doing.

The problem is the function of the Rule of Lenity relative to other interpretive conventions has never been entirely clear. Despite its simple formula – resolve ambiguities in the defendant's favor – Lenity is a complex and slippery doctrine. To resolve doubts, courts must first determine what doubts there are. See Kahan, supra, at 384-85.

Lenity could compel courts to adopt the narrowest plausible interpretation of any criminal statute. Under this approach, courts would first establish a set of plausible readings based on all accepted interpretive techniques and then deploy Lenity to select the narrowest reading in the set. The focus of interpretation in criminal cases would shift away from the selection of the best reading and towards a more flexible threshold determination of textual plausibility or reasonableness. Although support for this interpretive method is scant in the case law, it is both the most faithful rendering of Strict Construction's command to construe statutes narrowly and the best means of ensuring the accountability effects.

Evolution of the Rule: Early Origins

Justice Marshall's project was to craft a methodology of interpretation based on the bonds of the common law. Id. Lenity made its entry in a case interpreting Congress's very first criminal statute, the Crimes Act of 1790. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820).

The defendant in Wiltberger had committed manslaughter on a river in China. Id. at 76. Though the statute in question applied only to manslaughter "on the high seas," it defined other crimes to apply more broadly. Murder, piracy, and mutiny, for instance, were banned "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State." Id. at 78 n.(a) (quoting The Act of

April 30, 1790 8). The Government pointed to these broader provisions as a basis for applying the statute to manslaughter on rivers as well as seas. Id. at 77-85. Marshall agreed the "differences with respect to place" made little sense. Id. at 105. "We can conceive no reason," he wrote, "why other crimes, which are not comprehended in this act, should not be punished." Id. Yet, he declined to accept the Government's reading. "The Rule that penal laws are to be construed strictly," he noted, "is perhaps not much less old than construction itself." Id. at 95. Absent clear congressional direction, "this Court cannot enlarge the statute." Id. at 105.

Kelly asserted the Supreme Court's power to give meaning to undefined statutory terms – even to the extent of selecting a definition other than the narrowest option. See id. Had Wiltberger and other early Opinions been more emphatic about the imperative of selecting a narrow reading, even when the text permits other possibilities, it might have been more difficult for Lenity's function to erode. As it happened, in the years since McBoyle courts have increasingly emphasized the definitional powers established by Kelly rather than the requirements of Lenity outlined in Wiltberger. See Kahan, supra.

Modern Federal Practice

Today, Lenity has very little practical effect in decisions interpreting criminal statutes in either State or Federal courts. Justice Thurgood Marshall wrote for this venerable Court in Moskal, "We have always reserved Lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to "the language and structure, legislative history, and motivating policies' of the statute." Moskal, 498 U.S. (quoting Bifulco, 447 U.S. 381, 387 (1980)).

It seems doubtful Chief Justice John Marshall would have accepted this view of Lenity's place. Considering he, himself, admitted it was "extremely improbable" Congress intended the interpretation he chose in Wiltberger, it is impossible to conclude Justice Marshall would have ruled as he did had he considered the statute's legislative history and "motivating policies" before Lenity. Moskal, 498 U.S. at 108 (quoting Bifulco, 447 U.S. at 387).

As Justice Scalia noted in dissent, "the adverb preceding the word 'made' naturally refers to the manner of making, rather than to the nature of the product made. An inexpensively made painting is not the same as an inexpensive painting." Id. at 119. The majority, however, allowed a combination of

textual analysis and "legislative purpose" to block this narrow view, leaving no conflict for the Rule of Lenity to resolve. Id. at 114. Similarly, in Smith , the Court rejected the narrow, intuitive interpretation of a ban on "use" of a firearm "during and in relation to ... [a] drug trafficking crime" as a ban on using the firearm "as a weapon." See Smith, 508 U.S. at 242-43 (Scalia, J., dissenting). See also 18 U.S.C. 924(c)(1)(A) (2000). It held instead the statute could cover the use of a gun as consideration in a narcotics transaction. Smith, 508 U.S. at 237.

As if to underscore the Court's departure from a real commitment to Lenity, Justice Scalia dissented repeatedly from decisions endorsing the Moskal formulation of the Rule. See Smith, 508 U.S. at 241 (Scalia, J., dissenting, joined by Stevens & Souter, JJ.); United States v. R.L.C., 503 U.S. 291, 307 (1992) (Scalia, J., concurring, joined by Kennedy & Thomas, JJ.); Moskal, 498 U.S. 103, 119 (1990) (Scalia, J., dissenting, joined by O'Connor & Kennedy, JJ.).

Justice Scalia's personal confidence in Strict Construction is open to question, since he himself endorsed broad readings in several debatable cases. At the least, however, Justice Scalia's Opinions highlight this honorable Court's willingness to reject plausible narrow readings of statutes based on considerations other than Lenity. Though this revered Court continues to refer to Lenity as one justification among others when it endorses a narrow reading, past Justices have appeared unwilling to rely on the Rule in cases where they favored a broad interpretation. See, e.g., Kozminski, 487 U.S.; Bifulco, 447 U.S. 381, 387 (1980); Bass, 404 U.S. 336, 347 (1971).

The effect of the new approach to Lenity has been even more dramatic in lower Federal courts than in this respected Court. Expansive interpretations have given several key statutes striking breadth. The mail fraud statute, may now permit prosecutions based on little more than a breach of fiduciary duty. This theory has resulted from a Literalist approach to the statute's broad language banning all "schemes to defraud of money, property, or the intangible right to honest services." 18 U.S.C. 1341, 1346 (2000).

While it might be argued such theories follow unambiguously from the statutes' texts, these interpretations hardly implement an intuitive understanding of "fraud" and "extortion." It seems unlikely courts would have extended these statutes to such minor malfeasances had they maintained a strong commitment to Lenity.

The Rule of Lenity today appears to be not so much a "rule" as an argument of convenience in Federal courts. The Rule is used to buttress results obtained on other grounds, not to compel decisions on the merits. See Jeffries, supra, at 198-99 ("Today, strict construction survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation.").

The dominant approach to interpretation of criminal statutes is instead a variety of hyper-Literalism: "use" means whatever the dictionary says it means; "conviction" means any conviction, however doubtful; and "fear" means almost any form of commercial anxiety. A minority, led by Justice Scalia, has decried the methodology of such broad readings as dangerous and unprincipled, but their campaign has had little impact so far on the trend of the decisions. Smith, 508 U.S. 223, 225 (1993); Moskal, 498 U.S. 103, 105-06 (1990); Lewis v. United States, 445 U.S. 55, 67 (1980).

State cases display more or less the same pattern as their Federal counterparts: The Rule of Lenity is frequently cited, but rarely taken seriously. Though nearly every State in the Union has endorsed the Rule of Lenity in some form, rigorous applications of Lenity are extremely rare, and even those rare instances do not appear to reflect a serious commitment to the Rule.

Five States direct statutes are to be construed in light of specified "general purposes" of the criminal code, which do not include Strict Construction, though, in three States, "fair warning" is listed as an objective. N.J. Stat. Ann. 2C:1-2(a)(4); 18 Pa. Cons. Stat. Ann. 104(4); Wash. Rev. Code Ann. 9A.04.020(1)(c). See also Colo. Rev. Stat. 18-1-102; 720 Ill. Comp. Stat. Ann. 5/1-2; N.J. Stat. Ann. 2C:1-2(a); 18 Pa. Cons. Stat. Ann. 105; Wash. Rev. Code Ann. 9A.04.020(2). The codes of the remaining fifteen jurisdictions, including the District of Columbia, include no rule of construction relevant to Lenity. The Federal code also includes no provision directing strict or liberal construction, though Congress has considered adding such a provision several times. See generally Kahan, supra, at 382-83.

Curiously, the liberal construction statutes do not appear to have been a significant motivation for Lenity's deterioration in State court practice. While a few State Courts of Last Resort have accepted the legislative abrogation of Lenity, most have ignored the statutory directives, or at least limited their impact. Courts in many States evidently resolved from very early on to ignore the statutory guidelines.

Livingston Hall reported, in 1935, "Legislative attempts to abrogate or modify the old rule [of Strict Construction] have met with surprisingly little favor with text writers and courts." Hall, supra, at 754.

Just a year before, however, in an Opinion by one of the justices who joined the Legg decision, the Court noted, "we must include in our analysis the Rule of statutory construction which requires that criminal statutes be strictly construed in favor of the defendant." State v. Alford, 970 S.W.2d 944, 947 (Tenn. 1998) (Birch, J.). Whatever the impact of statutory guidelines, a flexible version of Lenity is the dominant approach in nearly every State. Several State High Courts have expressly adopted the Moskal formulation of the Rule. See, e.g., State v. King, 735 A.2d 267, 294 n.47 (Conn. 1999); State v. Ogden, 880 P.2d 845, 853

And it rejected a colorable argument for Lenity in at least one more recent case. See Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001) (rejecting the lower court's interpretation and holding the statutory term "sexual contact" includes any "physical touching of a person's sexual body parts" as opposed to "crimes of sexual battery that require the union of the sexual organ of one person with the oral, anal, or vaginal opening of another").

Recent cases from Ohio show a similar pattern particularly pertinent to the instant case. In State v. Hurd, the Ohio Supreme Court followed the Rule of Lenity and exonerated the defendant, despite describing the lack of an applicable offense for his false representations in a securities registration as "Kafkaesque." 734 N.E.2d 365 (Ohio 2000) at 367.

On the other hand, the same court has said "the canon in favor of Strict Construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose." State v. Sway, 472 N.E.2d 1065, 1068 (Ohio 1984).

Ohio by no means accepts every plausible argument for Lenity. See, e.g., State v. Snowder, 720 N.W.2d 909, 910-11 (Ohio 1999) (rejecting defendant's argument residence in a "community-based correctional facility" did not constitute "detention" within the meaning of a criminal escape statute).

Some of these same courts, however, have rejected respectable Lenity arguments in other cases, and none has clearly indicated Lenity ranks higher than other interpretive resources such as legislative history and policy. See, e.g., State v. Downey, 770 N.E.2d 794 (Ind. 2002) (declining to extend a line of

cases holding the more lenient of possible sentences between a general habitual offender statute and a specific provision should apply based on the Rule of Lenity); State v. Everett, 816 So. 2d 1272 (La. 2002) (rejecting Lenity argument accepted by a concurring Opinion)

On the Federal level, however, some judges on State Courts of Last Resort have protested against the modern trend, arguing for stiffer applications of Lenity. See, e.g., State v. Boleyn, 547 N.W.2d 202, 206 (Iowa 1996) (Snell, J., dissenting); Harris v. State, 728 A.2d 180, 195 (Md. 1999) (Bell, C.J., dissenting); People v. Mitchell, 575 N.W.2d 283, 287 (Mich. 1998) (Kelly, J., dissenting).

Justice Sanders of Washington's Supreme Court was particularly vociferous, citing Lenity in four dissents between 2000 and 2002. See State v. Coria, 48 P.3d 980, 990-91 (Wash. 2002) (Sanders, J., dissenting); State v. Elledge, 26 P.3d 271, 286 (Wash. 2001) (Sanders, J., dissenting); State v. Ahluwalia, 22 P.3d 1254, 1263-64 n.3 (Wash. 2001) (Chambers, J., dissenting, joined by Alexander & Sanders, JJ.); State v. Berry, 5 P.3d 658, 667 (Wash. 2000) (Sanders, J., dissenting).

Yet even Sanders has indicated Lenity comes after legislative history, and other dissents, like the majorities, appear to grab for Lenity as a matter of ad hoc justification, rather than real commitment to principle. See, e.g., Harris, 728 A.2d at 191 (Bell, C.J., dissenting) (noting the provision at issue is "at best ambiguous"); Mitchell, 575 N.W.2d at 287 (Kelly, J., dissenting) (noting "any lingering uncertainty or ambiguity should be resolved in favor of Lenity"). See also Berry, 5 P.3d at 667 (Sanders, J., dissenting) ("When the plain language of a penal statute does not direct a result one way or the other, and we are unable to adduce legislative history to the contrary, the Rule of Lenity requires we construe the act in [the defendant's] favor.").

Formulation of a Constitutionally Required Rule of Lenity

The key question in applying Lenity, therefore, is what rank the Rule holds relative to other interpretive conventions. If multiple interpretive resources – say, plain text and legislative history – were given equal rank to each other and to Lenity, then the Rule of Lenity would have significant implications. In such case, if the text supported a broad view and the legislative history a narrower one, Lenity would compel adoption of the latter. On the other hand, if other conventions came before Lenity, they would often resolve ambiguities before Lenity took effect. As Dan Kahan explains:

> The "meaning" of a statute is a function not just of the signification of words to English-speaking people generally but of the interpretive conventions shared by members of the legal culture in particular. Statutory language is "ambiguous" when these conventions conflict or point in different directions. Ambiguity is either avoided or resolved by giving certain of these conventions priority over others.
> Kahan, *supra*, at 384-85 (citations omitted).

Consequently, "if lenity invariably comes in "last,' it should essentially come in never." Id. at 386. Competing views of the statute will disappear, reconciled by other conventions, before the Rule even comes into operation.

Unfortunately, courts have rarely been explicit about Lenity's place in the interpretive hierarchy. As Justice Scalia – himself a proponent of Lenity – once complained while a judge on the D.C. Circuit, the Rule often seems to provide "little more than atmospherics, since it leaves open the crucial question – almost invariably present – of how much ambiguousness constitutes an ambiguity." *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.).

IV.A.2. Formulation as Relates Directly to the Instant Case

Petitioner's case contrasts sharply with other recent state decisions in which Lenity was supplied as a mechanism for resolving ambiguity. E.g., *Day v. State*, 57 N.E.3d 809, 813 (Ind. 2016).

And in declining to apply the Rule, the Ohio Supreme Court missed an opportunity to reject Lenity's traditional notice justification and consequently its chance to normatively justify the rule on another ground – namely, on the basis of mercy, a historically important, yet currently underappreciated, theory – and ensure its robust application in future cases.

As applied to this case, the usual justification for the Rule of Lenity falters. The most commonly recited reason for the Rule of Lenity is "to promote fair notice." *Kozminski*, 487 U.S.

But fair notice, which the federal courts focused on during Petitioner's Lenity arguments, seems incompatible with the interpretation of Ohio's cocaine possession statute Lenity would urge. A defendant almost certainly does not know the purity of any cocaine in his possession. The purity of cocaine can vary widely, with substantial disparities evident in the average purities across geographic regions and fiscal quarters. See, e.g., DRUG ENF'T AGENCY, NATIONAL FORENSIC LABORATORY INFORMATION SYSTEM: YEAR 2001 ANNUAL REPORT 16 fig.4.6 (2001); *Kozminski*, 487 U.S..

at 16; ARTHUR FRIES ET AL., INST. FOR DEF. ANALYSES, THE PRICE AND PURITY OF ILLICIT DRUGS: 1981-2007, at 9 (2008).

Even sophisticated cocaine traffickers lack the ability to test the purity of cocaine. Ohio authorities, at the time of the instant case, lacked the necessary resources to determine cocaine concentration. As far as Petitioner can find, the State still lacks these resources. Jona Ison,Court's Cocaine Ruling Impacts Indictments, CHILLICOTHE GAZETTE (Jan. 7, 2017, 3:36 PM).

Thus, the pure-weight standard is an unknowable rule incompatible with providing fair notice to defendants. This case corroborates what a chorus of scholars has already theorized: the notice justification is lacking to sustain the Rule of Lenity. See, e.g., Kahan, *supra*, at 345, 348.

As framed by Professor Claudia Card, mercy involves the mitigation of "punishment to insure that the legally permissible punishment does not exceed the amount of suffering the wrongdoer deserves." See Claudia Card, On Mercy, 81 PHIL. REV. 182, 184 (1972); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 191 (1989).

This definition of mercy contrasts with definitions postulated by others that mercy is the compassionate "mitigation of a punishment that would otherwise be deserved as retribution." Jean Hampton, The Retributive Idea, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 158 (1988) (emphasis omitted).

Mercy, then, requires consideration of personal deserts. Card, *supra*, at 193.

Although the letter of the law would require the even application of punishment to every criminally negligent driver who critically injures a pedestrian, mercy would argue against further penalizing a driver who kills her husband. See id. at 201. The driver would have "already served part of what we consider a morally just punishment." Alwynne Smart, Mercy, 43 PHILOSOPHY 345, 348 (1968).

Mercy thus does not violate "the basic rule of justice" that like cases be treated alike. Card, *supra*, at 183-84. Mercy must "rest upon some good reason – some morally relevant feature." Jeffrie Murphy, Mercy and Legal Justice, in FORGIVENESS AND MERCY, *supra*, at 162, 181.

Mercy has especial force in criminal trials in which there is no moral distinction between the conduct prohibited under the harsher reading of an ambiguous statutory provision and the conduct prohibited under the more lenient reading. In these cases, a defendant's personal deserts would call for the lesser sentence; imposition of the harsher sentence instead would reveal "a gap between moral justice and legal justice" otherwise remedied by mercy. Smart, *supra*, at 348; see also Card, *supra*, at 201.

For instance, in the instant case, it is not clear there is a relevant moral difference between carrying 100 grams of 20% pure cocaine and carrying 20 grams of 100% pure cocaine, yet under Ohio's interpretation, the former would be penalized much more harshly. "To base punishment on the weight of the [filler] makes about as much sense as basing punishment on the weight of the defendant." *United States v. Marshall*, 908 F.2d 1312, 1333 (7th Cir. 1990) (en banc) (Posner, J., dissenting) (referring to LSD blotter paper).

The total weight says nothing about the personal deserts of the defendant. In this case, then, a mercy-based Rule of Lenity would actualize substantive justice, enabling courts to "[t]reat like cases alike" and "treat different cases differently." H.L.A. HART, THE CONCEPT OF LAW 159 (3d ed. 2012).

It is important to note Card's conception of mercy is already a feature of the American justice system. This Court has stated, at minimum, "[n]othing in any of [the Court's] cases suggests the decision to afford an individual defendant mercy violates the Constitution"; rather, mercy could be exercised at any of various stages in the criminal justice system, by a variety of actors. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.).

Prominently, the executive pardon power already rests largely on a theory of mercy. See 4 WILLIAM BLACKSTONE, COMMENTARIES *396-97; Linda Ross Meyer, The Merciful State, in FORGIVENESS, MERCY, AND CLEMENCY 64, 67 (Austin Sarat & Nasser Hussain eds., 2007).

Judges – with a full view of the facts of the case and a keen sense for when "legal rules . . . have lagged behind our sense of justice" – may be the best situated of those actors to determine a defendant's deserts and apply the principle of mercy. Meyer, *supra*, at 67.

And judicial mercy in fact comports with the original understanding of the basis for the Rule of Lenity. Early English commentators explicitly labeled the rule as an exercise of mercy. See, e.g., 5 EDWARD CHRISTIAN, NOTES TO BLACKSTONE'S COMMENTARIES 16 (Boston, Thomas & Andrews 1801).

Modern commentators have noted the same. E.g., Phillip M. Spector, The Sentencing Rule of Lenity, 33 U. TOL. L. REV. 511, 514-21 (2002) (describing the English Rule of Lenity as "[i]nstitutional [m]ercy," id. at 514).

Fair notice and other justifications were invented at least after the creation of the U.S. Constitution. See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 296-97 (2012).

Admittedly, grounding the Rule of Lenity in mercy is susceptible to the objection mercy would enable excessive judicial discretion and encourage courts to pass judgment on morally irrelevant criteria, with potentially disastrous consequences for disfavored groups. See Martha C. Nussbaum, Equity and Mercy, 22 PHIL. & PUB. AFF. 83, 114 (1993).

This risk may be heightened by the fact the Rule of Lenity is typically applied by appellate courts, composed of judges who are often not "drawn directly from, or politically accountable to, disadvantaged communities." Carol S. Steiker, Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration, in THE BOUNDARIES OF THE CRIMINAL LAW 27, 54 (R.A. Duff et al. eds., 2010).

To some extent, this concern may be alleviated by the fact mercy would be constrained by its limited application to criminal cases in which the relevant penal statute is ambiguous. And while a successful mercy-based lenity is of course contingent on a nonpathological judicial system and on judges not in thrall to prejudicial passions, it is not clear the American judiciary is irredeemably pathological. Cf. Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1359-60, 1363-64 (2006).

Indeed, the judicial branch is typically considered the most protective of disfavored groups. See Andrea Specht, Comment, The Government We Deserve? Direct Democracy, Outraged Majorities, and the Decline of Judicial Independence, 4 U. SAINT THOMAS L.J. 132, 142 (2006).

Moreover, as Professor Carol Steiker has argued, even given the risk mercy would preferentially advantage "members of powerful groups," any alternative may be intolerable: untempered by judicial discretion, legislative overpenalization – which a mercy-based rule of lenity could combat – has already had "especially devastating effects on minority groups." Steiker, *supra*, at 56.

The present limitations on judicial discretion may be significantly worse than any increase in sentencing leeway. See Carol Steiker, The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System, in THE POLITICAL HEART OF CRIMINAL PROCEDURE 212, 217 (Michael Klarman et al. eds., 2012).

The instant case provides a useful prism for analyzing the Rule of Lenity. The poor fit between the usual reason for Lenity and the facts of this case may explain why the Court declined to engage with the Rule of Lenity, despite the clear opportunity. Mercy can provide a satisfying normative theory of Lenity in a case like this, where there is no strong moral distinction between the conduct penalized under the statutory interpretation urged by the State and the reading urged by Petitioner. Mercy-based Lenity not only may grant greater intellectual clarity to this case, but also may restore some potency to the Rule of Lenity – granting a sword to defendants and courts to cut down overly punitive prosecutions – by shoring up its shaky foundations. See Zachary Price, The Rule of Lenity as a Rule of Structure, 72 FORDHAM L. REV. 885, 902 (2004) at 886 (suggesting the Rule of Lenity may be moribund due to insufficiently strong intellectual underpinnings).

IV.A.3. Federal Formulation/Reasoning

What is required to give the Rule a definite function is some theory of ambiguity – of the sorts of interpretive conflicts falling within Lenity's ambit. A view recently gaining favor in both State and Federal courts ranks Lenity dead last in the interpretive hierarchy. "The Rule comes into operation at the end of the process of construing what [the Legislature] has expressed," compelling the selection of one interpretation over another only if "seizing everything from which aid can be derived" has failed to yield a single best reading. *Bass*, 404 U.S. 336, 347 (1971) (internal quotations and brackets omitted) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)). See also *Callanan*, 364 U.S. 587, 596 (1961).

On this view, judges are free to indulge a broad reading based on legislative history or policy even though the text could mean something narrower. See, e.g., *Smith*, 508 U.S. 223, 229-37 (1993) (rejecting the suggestion a sentencing enhancement for "use" of a firearm in a narcotics transaction referred only to "use as a weapon").

Or they may take a literal view of a statute's broad language, though common sense or legislative policy might suggest a narrow reading. See, e.g., *Chapman*, 500 U.S. 453, 459-63 (1991) (interpreting the weight of a "mixture or substance" containing the drug LSD to include the weight of blotter paper on which the drug was placed).

Lenity comes into play only in the unlikely event other conventions yield an interpretive "tie." Kahan, *supra*, at 386.

Relatively recent decisions by this august Court have endorsed this first approach to Lenity. See *Moskal*, 498 U.S. 103, 108 (1990); *Bifulco*, 447 U.S. 381, 387 (1980).

Neither State nor Federal Courts today seem to prefer narrow readings automatically; instead, they tend to interpret criminal laws much as they would civil statutes. Accordingly, Lenity tends to appear in Opinions only as a supplemental rationale when narrow readings are chosen for other reasons, not as the exclusive or even dominant basis for a decision.

Justice Scalia sketched a theory of Lenity in a series of dissents. On this view, Lenity operates to cut off broad readings based on policy, legislative history, or other extra-textual sources whenever the text standing alone supports a narrower view. In other words, this theory ranks Lenity second to the plain text in the interpretive hierarchy: judges first identify the text's plain meaning, resolving any ambiguities without reference to Lenity; next, they deploy Lenity to resolve any ambiguity between this first reading and any broader view supported by non-textual interpretive theories. As Justice Scalia put it, "if the Rule of Lenity means anything, it means that the Court ought not ... use an ill-defined general purpose to override an unquestionably clear term of art... [nor] give the words a meaning that even one unfamiliar with the term of art would not imagine." *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting).

When a statute refers, for example, to the "use" of a firearm in a narcotics transaction, the court must follow the commonsense meaning of the statutory phrase (use as a weapon), even if Congress's

apparent policy ("drugs and guns are a dangerous combination") could support an interpretation encompassing less obvious meanings (e.g., use as consideration for drugs). *Smith*, 508 U.S. 223, 240 (1993); *Id.* at 242-43 (Scalia, J., dissenting).

Likewise, when a statute refers to "falsely made" titles, it must cover only forgeries, even if Congress's purpose ("attacking a category of fraud") could justify interpreting it to reach titles based on false information as well. *Moskal*, 498 U.S. at 111; *Id.* at 119-20 (Scalia, J., dissenting).

In each case, it is the plain text controlling; Lenity blocks broader readings.

Justice Scalia's rendition of Lenity is peculiar because it summons Lenity's symmetric doctrine (always favor the narrower reading) in support of an asymmetric preference for text-oriented interpretations(first look to the text, then apply Lenity to bar other readings).It's clear Justice Scalia's main commitment was to Textualism rather than Lenity. When the text indicates broad liability, he joined the majority in spurning Lenity. See, e.g., *Deal v. United States*, 508 U.S. 129, 131 (1993) (majority opinion by Scalia, J.) (rejecting appeals to the Rule of Lenity and holding the statutory phrase "second or subsequent conviction" applies when the two convictions are simultaneous); *Chapman*, 500 U.S. 453, 455 (1991) (Rehnquist, C.J., joined by White, Blackmun, O'Connor, Scalia, Kennedy, & Souter, JJ.)(interpreting sentencing provision to count blotter paper as a"mixture"containing the drug LSD).

Moreover, in academic writing, he labeled Strict Construction a "canard" and quipped, "I should think that the effort, with respect to any statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Scalia, Assorted Canards, *supra*, at 581-82 (emphasis omitted). One might therefore conclude Scalia's appeals to Lenity are merely rhetorical. Like the *Moskal* majority, he cites Lenity when it favors his side; otherwise, he ignores it.

Justice Scalia's Lenity dissents, however, hinted at a more fundamental connection with Textualism. His claim was not simply Lenity is one argument in his favor, but rather Lenity means legislative history and policy should not cloud the plain text. *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting).

Justice Scalia's textual methodology entails a bias toward narrow readings – with the consequence Lenity often supports the same result as his brand of Textualism. One commentator has

canvassed Justice Scalia's statutory decisions, both criminal and civil, and concluded the dominant characteristic of his interpretive jurisprudence was a preference for narrow readings over broad ones. Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol'y 401, 477 (1994) at 404.

As is evident from his dissent in *Smith*, Textualism for Justice Scalia meant something different from the dictionary-oriented Literalism often practiced by his colleagues. Justice Scalia did not simply focus on the literal definition of terms in the statute; rather, he sought to identify the text's "plain meaning" – the commonsense interpretation first springing into an ordinary reader's mind. This difference in approach is evident time and again in this esteemed Court's statutory cases. Whereas his colleagues often defended broad readings by citing the dictionary definitions of the statute's terms, Justice Scalia typically identified the meaning of a statutory phrase by comparing it to everyday expressions using similar terms. Compare *Smith*, 508 U.S. 223, 228-29 (1993) (citing the dictionary definition of "use"), with *Id.* at 242-43 (Scalia, J., dissenting) (deducing the meaning of "use" from examples of common usage and criticizing the majority for failing "to grasp the distinction between how a word can be used and how it ordinarily is used"), and *Moskal*, 498 U.S. at 108-09 (concluding the phrase "falsely made" is "broad enough" to encompass forged instruments), with *Id.* at 119-20 (Scalia, J., dissenting) (again offering sample everyday phrases as evidence of the term's ordinary meaning and accusing the majority of endorsing an "extra-ordinary" interpretation); see also *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406 (1999) (unanimous opinion by Scalia, J.) (rejecting a "linguistically possible" interpretation because it was not the "more natural meaning" as evidenced by comparison to sample phrases from everyday speech).

Whether or not this search for commonsense meaning is a coherent project (some scholars have questioned it), it is clear accepting a "plain" reading will ordinarily mean rejecting the more attenuated implications of a text. See, e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 416-17 (1989) ("The central problem [with Textualism] is that the meaning of words ... rest on both culture and context.Statutory terms are not self-defining, and words have no meaning before.

Though explicit authority for this third approach to Lenity is scant in the case law, some support may be drawn from Justice Holmes's classic Opinion in *McBoyle*. The case presented the question whether a defendant, who had transported a stolen airplane, could be convicted under a statute regulating theft of "motor vehicles." *Id.* at 25-26. The statute defined "motor vehicle" as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." *Id.* at 26 (quoting Act of Oct. 29, 1919, ch. 89, 41 Stat. 324). Though he admitted "etymologically" the definition could encompass "a conveyance working on land, water, or air," Justice Holmes ruled for the Court the statute could not support a conviction for transporting a stolen aircraft. *Id.* at 26.

Justice Holmes's rationale appears to be a version of the Textualist approach to Lenity. Much as Justice Scalia focused on the "plain meaning" of statutes, Justice Holmes asked what the statute would mean to the "common mind" and concluded the words would evoke "only the picture of vehicles moving on land." *Id.* at 27. He then cut off broader interpretations looking beyond the text, noting, "the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the Legislature had thought of it, very likely broader words would have been used." *Id.* Despite the parallels to Justice Scalia's technique, however, Justice Holmes's result seems the most convincing under this version of Lenity. As it stands, Justice Holmes's assertions about the plain meaning of the language are a judicial fiat – a contestable assertion by one reader about what other readers would conclude. Without a built-in bias for the narrower reading, one might just as easily conclude the phrase "any self-propelled vehicle" includes airplanes and boats (otherwise, why not say, "any self-propelled landcraft"?). Noted earlier, Justice Scalia's tendency to select narrow interpretations suggests his interpretive approach in fact included such a bias for narrow readings. The bias, however, is not explicit. See Karkkainen, *supra*, at 404 (noting Justice Scalia's ostensible aim was "plain meaning" interpretation though the practical thrust of his Opinions may have been to advance Strict Construction). When the focus is on the text – even if it is the "plain meaning" of the text – the way will remain open for judges to conclude the statute's meaning is somewhat broader than the narrowest defensible interpretation of its terms. Again, Justice Scalia's willingness to accept broad liability rules in cases

where the textual argument favors the broader view appears to confirm this implication of his Textualist methodology. Similarly, Lenity could permit consideration of Congress's policy purposes, which again could support a broad reading: Airplanes, like automobiles, may be readily moved over State lines, so Federal criminal penalties seem equally appropriate. See Kahan, *supra*, at 401 (stating the "purpose of the Act was to reinforce State theft statutes, which were (and remain) difficult to enforce against crimes that span multiple jurisdictions"). It is at least plausible, however, the statute covers only land vehicles; Lenity may therefore block all broader readings – even if they, too, are plausible.

A New Hampshire case, *State v. Richard*, further illustrates the differences between these three varieties of Lenity. 786 A.2d 876 (N.H. 2001) at 878. The defendant in *Richard* was accused of repeated sexual assault of two young boys. Rather than charge him on the basis of discrete offenses or a single pattern of misconduct with respect to each boy, the State constructed an indictment including ten pattern counts, one for each "discrete type of sexual assault" the defendant committed more than once on each boy. *Id.* Thus, for instance, two pattern counts related to his performance of fellatio on them, two more to their fellatio on him, and yet a third for acts of mutual fellatio. See *id.* The statute defined a "pattern" as "committing more than one act under [the sexual assault provisions] upon the same victim over a period of 2 months or more and within a period of 5 years." N.H. Rev. Stat. Ann. 632-A:1 (Supp. 2000), quoted in *Richard*, 786 A.2d at 879.

The defendant argued this language was meant only "to proscribe as a single pattern crime any and all variants of sexual assault ... committed against a single victim during a common time frame, regardless of the number or nature of the underlying acts." *Richard*, 786 A.2d at 879.

Dividing a single sequence of sexual crimes into multiple pattern counts, he claimed, would subject him to "multiple punishments for the same offense" in violation of the Double Jeopardy Clause. *Id.* at 879.

Though the Court mentioned Lenity, it gave it no force, deeming the statute unambiguous based on considerations of policy. *Id.* at 879. The defendant's reading, it explained, could lead to the "absurd" result only a single pattern conviction would be possible "when a victim is unable to recall discrete assaults due, in part, to their frequency, while defendants whose victims have discrete recall would

remain accountable for multiple convictions under the single-act sexual assault provisions." *Id.* Textualism, the second method, might favor the defendant instead, but its implications are debatable. One might argue, as the defendant did, it is most natural to read "pattern" to refer to the entire pattern and "committing more than one act" to mean committing all the acts, yet it also seems possible to read the plain language – "committing more than one act" – to define any distinct subset of sexual wrongs occurring over a two-month period as a "pattern." *Id.* Even if it has negative policy implications or is not the most intuitive, the defendant's reading is at least plausible. Lenity could therefore compel the court to adopt it, leaving it to the Legislature to correct any resulting "absurdities".

It may not be surprising the Court chose to throw the book at a defendant accused of crimes as appalling as those alleged in *Richard.* Lenity, however, is appropriate, even with respect to such heinous crimes.

IV.A4. Summation of Argument:

The abandonment of the Rule of Lenity is a mistake. Though the Notice Theory is flawed and legislative supremacy inadequate, a more robust theory of the political processes of criminal law – of the structural relationships between the Governmental branches and the role of statutory construction in regulating them – provide ample justification for the Rule.

For Lenity to serve its purpose of enhancing criminal law's democratic responsiveness, the Rule must be given more teeth than the *Moskal* formulation. The *Moskal* formula strips the Rule of Lenity of independent significance, leaving judges free to select any reading they prefer on the merits based on ""the language and structure, legislative history, and motivating policies' of the statute." *Moskal*, 498 U.S. 103, 108 (1990) (quoting *Bifulco*, 447 U.S. 381, 387 (1980)).

Given Legislatures' evident preference for severity rather than Lenity, serious consideration of legislative history and policy is likely to push courts toward broader interpretations. The apparent tendency of courts applying *Moskal* to construe statutes against defendants may confirm this intuition. See, e.g., *Smith*, 508 U.S.; *King*, 735 A.2d; *Ogden*, 880 P.2d. But see *R.L.C.*, 503 U.S. at 305-06 (plurality Opinion) (applying *Moskal* but construing the statute in the defendant's favor).

What is needed, therefore, is not an equal opportunity for defense and prosecution to appeal to legislative policy, but rather a generic judicial policy of favoring defendants' views a "tenderness of the law for the rights of individuals," as Chief Justice Marshall put it. *Wiltberger, 18 U.S.*

Like Canons of constitutional avoidance, Lenity would permit courts to scold Legislators for proscribing unobjectionable conduct while preserving their power to maintain such policies if they wished to reinstate them.

Still, the use of Lenity to support departures from the text is probably not a realistic possibility, given the disregard of legislative preferences that it would entail. See *Bilionis*, *supra*, at 1271 (identifying failure to account for the "countermajoritarian difficulties attending judicial review under the capacious concept of due process" as a principle defect of proposals for substantive limits on criminal law).

The substitution of judicial norms for legislative preferences, always dubious in a democratic polity, is especially problematic in the area of criminal law, where the opprobrium of the community affords the moral justification for punishment. Implementing due process review through reversible interpretive holdings based on Lenity might make the practice more palatable, yet the acceptability of the Rule of Lenity would likely suffer if it were unmoored from principles of interpretation and set adrift on the doubtful waters of substantive due process.

A more realistic option is after establishing a set of plausible readings based on accepted interpretive techniques, courts could deploy Lenity to select the narrowest one. The effect of this approach would be to replace the Government's advantages under *Moskal* with a bias in the defendant's favor. The defense could argue, for example, the Legislature's purpose was narrower than the text implies, but the Government could not extend the text on such a basis. Accordingly, Legislators could not expect conduct to be criminalized unless it were defined in crystal-clear terms; Prosecutors could then bring charges only on the basis of narrowly drawn prohibitions. The benefits of Legislative and Executive accountability might then be realized. The real effect is probably the opposite.

Interpretive questions arise in a wide variety of contexts. Lenity enhances democratic accountability. In many disputes over grammatical ambiguity, there may be no better justification for Lenity than the need to impose discipline on the drafting process – and in many cases the concrete

remedy of releasing a guilty defendant may seem mismatched with the abstract goal of improving the drafting quality of statutes in the long run. Likewise, in cases of double jeopardy or heinous wrongdoing, Lenity may serve only to hold the Legislature to the scheme of penalties it appeared to choose in advance. This concern relates importantly to the democratic legitimacy of criminal law, but the need for accountability may not be as imperative as when, say, proxy offenses or open-ended statutes threaten to permit unaccountable prosecutions of innocent defendants.

It bears emphasis the only version of Lenity that would work serious changes in criminal justice is the one mandating selection of the narrowest plausible reading established by reference to a variety of interpretive techniques. An orientation toward the plain text may be more disciplined than the current *ad hoc* approach, but it will not guarantee a narrow reading when statutes include broad language, as in the open-ended "common law" provisions; when a literal reading of the text could support expansive liability; or when a sweeping catchall phrase follows a definitional list. In such disputes, a more aggressive preference for Lenity must be deployed to cut off the expansive possibilities of the text.

The overbreadth of American criminal law is one of its most widely recognized problems. A toughened Rule of Lenity would be one of the problem's most congenial solutions. Whereas the substantive due process review of crimes raises the specter of counter-majoritarian judicial activism, the Rule of Lenity would be understood as a device for strengthening criminal law's responsiveness to democratic preferences. To be sure, limiting constructions may thwart legislative preferences in particular cases in the short run. Yet, correcting objectionable judicial rulings does not appear to involve much effort or distraction on the part of Legislatures and, in the long run, the elaboration of a more detailed criminal code could enhance the accountability of both Legislators and Prosecutors. Legislatures would need to disclose the precise nature of the conduct they intended to criminalize and Prosecutors' charging decisions could be reviewed more easily based on the specific crime definitions Lenity would stimulate.

Such rules set the parameters of inter-branch relations, effectuating background expectations about Governmental structure and determining how much power Legislatures may delegate. By requiring specificity in criminal statutes, the Rule of Lenity enhances the accountability of both

lawmaking and enforcement in criminal law, where the value of majoritarian moral legitimacy is paramount.

Statutory construction, as many commentators have observed, is plagued by inconsistent standards and *ad hoc* resolutions. Imposing a uniform, clearly-articulated Rule of Lenity, and identifying it as a Constitutionally guaranteed Rule under the Fifth and Fourteenth Amendments, would go a long way towards regularizing statutory construction. This, after all, was Chief Justice Marshall's goal when he introduced the Rule of Lenity into American jurisprudence nearly 200 years ago. See *Wiltberger, 18 U.S.*

Courts should therefore be required to embrace and strengthen the Strict Construction of criminal statutes. To do so, this Supreme Court must recognize the Rule as an enforceable guarantee contained within the Fifth and Fourteenth Amendments' guarantees of due process.

IV.B. SECOND QUESTION PRESENTED FOR REVIEW

> Is it repugnant to the Constitutions, laws, and/or Treaties of the United States, and a violation of Due Process, for a State Court of Last Resort violate and/or ignore its own laws and/or rules in order to reach a ruling that increases the level of offenses and/or penalties and/or relieves the State of its burden of proof regarding enhanced offenses and penalties?

IV.B.1. Introduction

For purposes of argument and germaneness, Petitioner will focus on the Ohio Supreme Court's actions in *State v. Gonzales*, as that case was the basis for overturning, and then, on reconsideration, affirming Petitioner's sentence. 150 Ohio St. 3d 276 (Ohio March 6, 2017)

In *State v. Gonzales*, the Supreme Court of Ohio failed to apply Lenity in a criminal case, despite the fact it is codified in the State of Ohio. 2017-Ohio-777, 2017 WL 938679 (Ohio Mar. 6, 2017). See also OHIO REV. CODE ANN. § 2901.04(A).

IV.b.2. Gonzales I

In the summer of 2012, Rafael Gonzales telephoned Saul Ramirez, angling for cocaine. *State v. Gonzales*, 2015-Ohio-461, 2015 WL 502263, P 2 (Ohio Ct. App. 2015).

Gonzales and Ramirez met, and Ramirez allowed Gonzales to try a small sample of his cocaine. See *id.* Satisfied with the quality, Gonzales asked to purchase a larger quantity. See *id.* But Ramirez was, in fact (and unbeknownst to Gonzales), a police informant. Merit Brief of Amicus Curiae, Office of the Ohio Public Defender, in Support of Rafael Gonzales at 1-2, *State v. Gonzales*, 2017-Ohio-777 (Nos. 2015-0384, 2015-0385), 2015 WL 8959387.

Ramirez offered Gonzales two bricks of imitation cocaine, with a small bag containing real cocaine weighing 139 grams hidden inside one. *Gonzales*, 2015-Ohio-461, 2015 WL 502263, P 3.

Gonzales paid $58,000 in cash in exchange for the two bricks. *Id.* Ohio authorities apprehended and arrested Gonzales soon afterward. *Id.* P 4. Gonzales was indicted for cocaine possession. *Id.* P 5. At trial, the jury determined Gonzales was guilty and further found he possessed at least 100 grams of cocaine at the time of arrest, qualifying him as a "major drug offender" and mandating an enhanced sentence of eleven years' imprisonment. *Id.* P 7; see also OHIO REV. CODE ANN. §§ 2925.11(C)(4)(f), 2929.14(A)(1) (LexisNexis 2014).

If not for the finding the amount of cocaine was at least 100 grams, Gonzales would likely have been sentenced to a prison term between three and eleven years. See id. §§ 2925.11(C)(4)(e), 2929.14(A)(1).

Gonzales appealed, arguing the Trial Court improperly increased his sentence based on the total weight of cocaine including fillers. See Appellee Rafael Gonzales' Merit Brief at 5-6, *State v. Gonzales*, 2017-Ohio-777 (Nos. 2015-0384, 2015-0385), 2015 WL 8959386.

Powder cocaine is invariably adulterated with filler materials, which decrease purity; common fillers include baking soda and baby laxatives. Ohio dep't of mental health & addiction servs., surveillance of drug abuse trends in the state of Ohio, January-June 2015, at 88 (2015).

The Ohio Sixth District Court of Appeals agreed with Gonzales, reasoning "the plain language of [the cocaine possession statute] support[ed] appellant's argument." *Gonzales*, 2015-Ohio-461, 2015 WL 502263, P 41; see also *id.* P 57.

The statutory definition of cocaine, unlike those of other controlled substances, did not include the term "mixture". Compare OHIO REV. CODE ANN. § 2925.01(X) (defining cocaine for purposes of

drug crimes), and id. § 3719.41 sched. II(A)(4) (listing coca leaves and cocaine), with id. § 3719.41 sched. I(C)(19) (listing marijuana).

Instead, cocaine was defined strictly as "a salt, compound, derivative, or preparation of coca leaves." Id. § 2925.01(X)(2). This meant the State could establish the level of Gonzales's offense only if he carried over 100 grams of chemically pure cocaine. See *Gonzales*, 2015-Ohio-461, 2015 WL 502263, P 47.

Recognizing an appellate split, the Supreme Court of Ohio accepted an appeal by the State and affirmed. See *State v. Smith*, 2011-Ohio-2568, 2011 WL 2112609 (Ohio Ct. App. 2011); *State v. Gonzales* (*Gonzales I*), 2016-Ohio-8319, 2016 WL 7449218, PP 1, 7 (Ohio Dec. 23, 2016) (plurality Opinion), vacated and superseded on reh'g, 2017-Ohio-777, 2017 WL 938679 (Ohio Mar. 6, 2017).

Writing for a three justice plurality, Justice Lanzinger first recited the Rule of Lenity, but then proceeded to find the statutory language unambiguous: the term "cocaine" did not include cocaine mixtures and referred solely to pure cocaine. *Gonzales I*, 2016-Ohio-8319, 2016 WL 7449218, P 10; *Id.* P 15-17.

The plurality thus rejected the dissent's argument the statutory term "compound" included mixtures and viewed the term "compound" as referring only to "[t]he chemical makeup." *Id.* P 18-19; cf. THE MERRIAM-WEBSTER DICTIONARY 148 (new ed. 2016) (defining "compound" as "a distinct substance formed by the union of two or more chemical elements").

Justice Kennedy concurred in the judgment. She considered the term "of cocaine" ambiguous, but agreed the statute should be read such that the major drug offender classification required possession of at least 100 grams of pure cocaine. *Id.* PP 24, 29 (Kennedy, J., concurring in judgment only). Ambiguity allowed Justice Kennedy to consider legislative history in order to assign meaning consonant with the legislative intent. *Id.* PP 25-26 (citing OHIO REV. CODE ANN. § 1.49 (LexisNexis 2015) (allowing courts to make certain considerations to determine legislative intent in construing ambiguous statutes)). And echoing the plurality, she reasoned the legislative intent militated toward the statutory interpretation reducing sentences overall. See *id.* PP 32-35.

Three justices disagreed. In dissent, Chief Justice O'Connor accused the plurality of "introduc[ing] a purity or weight requirement for cocaine possession [ ] not found in the language of the statute or supported by the reality of how cocaine is produced, distributed, or consumed." *Gonzales I*, 2016-Ohio-8319, 2016 WL 7449218, P 37 (O'Connor, C.J., dissenting).

The statutory definition of cocaine included any "compound" made from cocaine, and, under both the ordinary understanding and the dictionary definition, the word "compound" would encompass mixtures of cocaine and fillers. See *id.* P 42. The statute, then, was unambiguous and did not include a pure-weight standard. See *id.* P 46-47.

IV.b.3. Gonzales II

The Ohio General Assembly acted immediately *after* the decision, with the lower chamber voting unanimously to amend the statute and establish a total-weight standard for cocaine possession. Jim Provance, Ohio Clears Wording of Cocaine Sentencing, THE BLADE (Jan. 16, 2017, www.toledoblade.com/State/2017/02/16/Ohio-clears-wording-of-cocaine-sentencing.html.

The State simultaneously filed a motion for reconsideration, arguing the Court misunderstood and misapplied the Rule of Lenity. Appellant State of Ohio's Sup.Ct.Prac.R. 18.02 Motion for Reconsideration at 2-4, *State v. Gonzales*, 2017-Ohio-777 (Nos. 2015-0384, 2015-0385).

A newly formulated Ohio Supreme Court, consisting of two new justices voted 4-3 to reconsider the case. *State v. Gonzales* (*Gonzales II*), 2017-Ohio-777, 2017 WL 938679, P 22 (Fischer, J., concurring in part and dissenting in part).

Authoring a new majority Opinion – and preempting the legislative effort to supersede *Gonzales I* by statute – Chief Justice O'Connor vacated the prior decision and reversed the intermediate court judgment. *Gonzales II*, 2017-Ohio-777, 2017 WL 938679, P 3 (majority Opinion).

Chief Justice O'Connor adopted, in substantial part, her own reasoning in *Gonzales I*. By its plain meaning, the word "compound" included fillers. *Id.* PP 10-13. Any contrary conclusion would "insert the words 'actual' or 'pure'" into the statute. *Id.* P 13.

Justices DeWine and Fischer – who both joined the Ohio Supreme Court after *Gonzales I* was decided – wrote brief separate Opinions but agreed with the majority on the merits of the case. See Randy

Ludlow, Paul E. Pfeifer: Retiring Ohio Supreme Court Justice Has Left Mark, Columbus Dispatch (DEC. 26, 2016, 10:21 AM), www.dispatch.com/content/stories/local/2016/12/26/paul-e-pfeifer-retiring-justice-has-left-mark.html

Justice DeWine replaced Justice Pfeifer. Id. Justice Fischer replaced Justice Lanzinger. Jim Provance, Lanzinger Gets Set for Retirement from Ohio's Top Court, THE BLADE (Dec. 27, 2016, 11:44 AM), http://www.toledoblade.com/Courts/2016/12/27/Judith-Ann-Lanzinger-gets-set-for-retirement-from-Ohio-s-top-court.html; see *Gonzales II*, 2017-Ohio-777, 2017 WL 938679, P 20 (DeWine, J., concurring); *id.* PP 22-24 (Fischer, J., concurring in part and dissenting in part).

Justice DeWine emphasized his belief reconsideration was proper because *Gonzales I* was "fundamentally flawed." *Id.* P 20 (DeWine, J., concurring). Justice Fischer, on the other hand, voiced his discomfort with reconsideration but nevertheless argued it was his "duty to participate" after the court granted the State's motion for reconsideration. *Id.* P 27 (Fischer, J., concurring in part and dissenting in part); see also *id.* PP 22, 25-26.

IV.B.3.a Disregard for Court Rules of Practice and Precedent

Justice Kennedy dissented. The majority, she suggested, was underhandedly overruling court precedent and slyly subverting core constitutional values. See *id.* PP 33, 38 (Kennedy, J., dissenting).

Reconsideration should be limited to cases suffering from "obvious error." *Id.* P 35

The Court's Rules of Practice provide that "[a] motion for reconsideration shall not constitute a reargument of the case." Ohio S. Ct. Prac. R 18.02(B).

Traditionally, the Court has used its reconsideration authority to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1996).

"We will not, however, grant reconsideration when a movant seeks merely to reargue the case at hand." *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9; Ohio S. Ct. Prac. R 18.02(B) ("A motion for reconsideration shall not constitute a reargument of the case").

The State's arguments presented nothing new and pointed to obvious error(s), merely seeking another bite at the apple. The precedent established in *Gonzales I* should not have been overturned without a thorough analysis under the tripartite test of *Westfield Ins. Co. v. Galatis*, in a new case. 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

Yet the newly-formulated Court willfully accepted the State's fictive "assert[ions] that the court misapplied the rule of lenity," despite the "stark[] absen[ce]" in *Gonzales I* of any consideration of lenity. *Gonzales II.*; see also *id.* PP 36, 38. Reiterating her concurrence in *Gonzales I*, Justice Kennedy stressed the cocaine possession statute was ambiguous. See *id.* PP 44-46. Ambiguity necessitated the use of legislative history for interpretation, and the legislative history clearly supported a pure-weight standard. *Id.* PP 58-64.

Reconsideration of the case was improper, to begin with. The Ohio Supreme Court clearly disregarded its own rules in order to kowtow to political pressure exerted by Governor's DeWine's legislative majority upon a Court on which the Governor's son had been recently empaneled. Each of the Opinions in *Gonzales I* were fully and carefully considered by the Court. The only thing changing between *Gonzales I* and *Gonzales II* was the makeup of the Court. Not to say a later makeup of a court cannot reconsider a case or decision previously decided by a different iteration of the same court. This revered Court did so, to much dialogue across the nation, in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 213 L. Ed. 2d 545, 2022 U.S. LEXIS 3057, 29 Fla. L. Weekly Fed. S 486, 2022 WL 2276808 (U.S. June 24, 2022).

Dobbs, however, was a decision made almost fifty (50) years after the case it overturned, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, 1973 U.S. (U.S. January 22, 1973).

Dobbs was a decision that took almost five (5) *decades* of practice and understanding to reach. Conversely, *Gonzales I* was overturned in less than three (3) *months*.

In *Gonzales II*, the State's Motion for Reconsideration was simply a clear attempt to win the case based on the change in the makeup of the Court, not based on the case's merits. The lead Opinion in *Gonzales I* applied the unambiguous language of the statute. *Gonzales I* at ¶ 17, 20, 22.

The new majority in *Gonzales II* issued a decision allowing reconsideration not based on any argument not expressly addressed in the dissent in *Gonzales I*. There was nothing new to be reconsidered. The only thing new was the make-up of the Court, which was not sufficient grounds for granting reconsideration. Doing so was a flagrant departure from the Court's own Rules of Practice.

Kennedy, J., dissenting stated "the state repeats the argument that it asserted in its motion for reconsideration in State v. Gonzales, 150 Ohio St. 3d 276, 2017-Ohio-777, 81 N.E.3d 419 ("Gonzales II"), that is, that this court in State v. Gonzales, 150 Ohio St. 3d 261, 2016-Ohio-8319, 81 N.E.3d 405 ("Gonzales I"), used a "canon of strict construction to infer legislative intent" in its interpretation of R.C. 2925.03 and 2925.11. However, this argument fails. Because the court in Gonzales I did not hold that R.C. 2925.11 was ambiguous, it did not examine the legislative intent and it did not construe R.C. 2925.11 strictly against the state: "The state fails to point to any ambiguity in the statute. Without that, we must simply apply the statute as it is written, without delving into legislative intent." (Emphasis added.) Id. at ¶ 17. *State v. Reese,* 150 Ohio St.3d 565, 2017-Ohio-2789, 84 N.E.3d 1002

IV.B.3.b. Lenity, as Codified in Ohio, Required Ruling in Petitioner's Favor

State Courts are, of course, separate from Federal Courts, and should retain their autonomy. But, given the Due Process rights enumerated in the U.S. Constitution override any State Constitution, let alone any State Court decision, they must be held accountable when they flout the rules and policies they, themselves, institute. This is where this Court must make a strong statement by declaring such actions by any State Court, of Last Resort or otherwise, are unconstitutional and that those who suffer as a result of bad or corrupt decisions of State Courts can turn to the Federal Courts to right the wrong.

Gonzales I articulated the correct path for the General Assembly if, in fact, the plain language of the statute did not adequately reflect the intent of the current General Assembly. *Gonzales I* at ¶ 22 (lead opinion) and ¶ 35 (Kennedy, J., concurring in judgment only) (if the General Assembly intended to include a mixture of cocaine and fillers for the weight threshold in the penalties for possession of cocaine, it can change the statute). And the legislature did just that. Our nation, let alone the State of Ohio, was built on the core tenant legislative bodies have the sole authority to legislate, not courts.

In any event, the State was wrong to assert Lenity would not determine the outcome in the case. The Rule of Lenity required construing the statute to punish only "clearly proscribed" conduct. *Gonzales I*, P 66. The statute had not clearly set out a sentencing enhancement for possession of 100 grams of cocaine "mixture"; lenity thus favored Gonzales. According to settled principles of statutory interpretation, the State had to lose.

Thus, the Court ignored one Ohio law in order to strengthen another. But, it was the legislature's place to do so; . Further, in doing so, the Court specifically mandates the Court can't ignore simply to render a decision in favor of The State of Ohio.

The Court, however, flouted its opportunity to reinvigorate and apply the Rule, and, in turn, ignored a law of the very State they are meant to uphold the law in.

IV.b.4. Conclusion

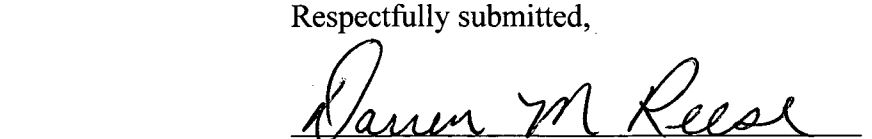
As a result, this venerable Court should rule the Ohio Supreme Court violated Petitioner's Constitutional Rights to Due Process under the Fifth and Fourteenth Amendments by disregarding the State's Constitution and laws, as well as its own Rules of Practice and, as such, its reconsideration in *Gonzales II*, and consequently, *State v. Reese (Reese II)* should be rendered void and the sentence correction mandated in *State v. Reese (Reese I)* should be reinstated.

CONCLUSION

The judgment below is a unique departure from decisions of this Court that is repugnant to the Constitution, laws, and/or Treaties, of the United States. This petition for a writ of certiorari should, therefore, be granted. Any other disposition would be allowing State prosecutors to facilitate fraud and let laws be decided by political election instead of the legislators intent.

Dated:

Respectfully submitted,



Darren M. Reese, #A719-244, *pro se*
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724