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**Representative Bob Cupp**

**4th House District**

**Representative John M. Rogers**

**60th House District**

**SPONSOR TESTIMONY – HB 4**

Good afternoon Chair Bacon, Vice Chair Dolan, Ranking Member Thomas, and members of the committee.

Representative Rogers and I appreciate the opportunity to offer sponsor testimony today in support of HB 4.

HB 4 will restore the statutory penalties for possession of cocaine that were undone by the Ohio Supreme Court’s recent decision in *State v. Gonzales*, Slip Opinion 2016-Ohio-8319, and trafficking in cocaine in *State v. Sanchez*, Slip Opinion 2016-Ohio-8470.

Under Ohio’s statutory drug penalty framework, penalties increase with the increase in the quantity of the drug involved in the violation. For cocaine, Ohio Revised Code section 2925.11(C)(4) prescribes five steps or tiers of felony penalties with the increasing amount – measured in weight -- of cocaine involved.

Prior to HB 86, enacted in 2011, the statute provided higher penalties for **crack** cocaine than for **powder** cocaine. The higher penalties for crack were created at a time when crack usage was at epidemic proportions -- then perceived to be nearly on the scale of the heroin addiction problem today.

During the sentencing reform changes in HB 86, the penalty distinction between powder cocaine and crack cocaine for the crimes of possession of the drug and trafficking of the drug was eliminated. In doing so, the relevant wording of the statute was changed from “grams of cocaine that is not crack cocaine” to “grams ***of cocaine,***” and the penalties were revised. Those two remaining words, “of cocaine,” are at issue here.

On December 23, 2016, the Ohio Supreme Court decided the case of *State v. Gonzales.* A divided Court held that the definition of “cocaine” in the penalty section of the possession statute, RC 2925.11 (C)(4)(b) through (f), as now drafted, requires the prosecutor to prove the quantity of **pure** cocaine rather than the long-standing precedent of proving the quantity of any **mixture or compound containing cocaine**. The court’s opinion specifically noted that the statutory modification in H.B. 86 left in the statute the words “of cocaine,” the effect of which was to modify the offense by the use of the drug’s name. The court observed that the similar marihuana and heroin statutes lacked the modifier.[[1]](#footnote-1) Consequently, the court concluded that the General Assembly intended the increased penalty tiers to apply only to the weight of the pure cocaine, excluding the weight of any material – or filler -- the pure cocaine was mixed with.

The **trafficking** in cocaine penalty section suffers from the same wording defect.

Ohio law has never previously been interpreted to require the disaggregation of a cocaine from any filler present in a mixture in order to meet the quantity requirement for the various penalty tiers. The BCI laboratories are not currently accredited to perform this quantitative analysis for use as evidence in court proceedings. Because of this, cocaine possession and trafficking regardless of quantity will, as a practical matter, only be prosecuted as a fifth degree felony, the lowest penalty under statute, if the law is not amended.[[2]](#footnote-2) Under this situation, many if not most offenders will be subject only to a community control sanction if they have not previously been convicted of a felony offense. Courts only have the discretion to impose a prison sentence for these 5th degree felonies in limited situations, usually when violence was involved in the offense.[[3]](#footnote-3)

As the law now stands, drug dealers and traffickers are incentivized to possess and traffic in larger quantities of cocaine because the penalty would be of no greater consequence if the dealers and traffickers are apprehended with large quantities rather than smaller quantities. This is an incentive that must not be left in place.

HB4 will repair this gap in Ohio’s cocaine penalties by deleting the unintentional surplus statutory text (i.e. the words “of cocaine”) in both the possession and trafficking sections. The penalty tiers will then once again clearly apply to “cocaine or a compound, mixture, preparation or substance containing cocaine” of the weight specified. Every day we delay in repairing the statute, the lowest penalty will continue to apply for cocaine possession and trafficking. Therefore, the bill includes an emergency clause to make it effective on the day it is signed by the Governor. It also includes language to clarify that it was never the intent of the legislature to require a determination of the purity of the cocaine contained in a mixture.

While working to amend the statutory language at issue in the Ohio Supreme Court’s decision, we noticed similar language in the Financing Drug Trafficking and Major Drug Offender sections of the Ohio Revised Code. We also noticed similar wording with regard to LSD and hashish. After speaking with the Attorney General’s Office and BCI, we determined that this other language should also be clarified to avoid legal challenge. An amendment to H.B. 4 has been prepared to encompass all of these issues, and the amendment has the support of the Ohio Prosecuting Attorneys Association and (hopefully the Attorney General’s office). We hope that you will consider this amendment.

H.B. 4 passed the House unanimously with an emergency clause, and we hope the committee and the Senate will also take quick action to repair the cocaine penalty framework in the criminal code through H.B.4.

Thank you for your time and consideration. We welcome any questions the committee might have.

1. Slip. Op. at 7-8. [↑](#footnote-ref-1)
2. O.R.C. 2925.11(C)(4) [↑](#footnote-ref-2)
3. O.R.C. 2929.13(B) [↑](#footnote-ref-3)