OHIO HOUSE OF REPRESENTATIVES
CRIMINAL JUSTICE COMMITTEE

HOUSE BILL 141

OPPOSITION TESTIMONY OF BARRY W. WILFORD
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The Ohio Association of Criminal Defense Lawyers is opposed to enactment of House Bill 141 in its current form. Though laudable as a demonstrative effort of the sponsors to mitigate the growing synthetic opiate and heroin crisis in this state and to save lives of those tragically addicted to these drugs, some of its provisions needlessly do harm to the structure of our criminal code, and others reflect poor criminal justice policy choices adopted out of a reckless pursuit to impose penal sanctions as a means of combating an epidemic social crisis.

I. *If you can't say something good about something . . . .*

As many of us learned from our mothers, we should first acknowledge the positive merits of something before turning critical. Therefore, allow me to pause to note and duly credit the sponsors of this bill for resisting the persistent temptation of legislators to fashion another mandatory prison term for violations a new offense. The bill therefore does no violence to the respect traditionally shown for the importance of preserving judicial discretion in sentencing. (However, as argued below, without specifically designating the sentencing as mandatory prison terms, HB 141 sets forth a sentencing scheme that will nevertheless, require judges to sentence the overwhelming number offenders to prison terms, which is exactly the harm which mandatory prison terms usually accomplish.)

II. *"Bastardizing" the offense of Involuntary Manslaughter*.

"*Bastardize*" [verb] 1. Corrupt or debase (a language, art form, etc.), typically by adding new elements.

Oxford English Dictionary

Under current law Involuntary Manslaughter enjoys some symmetrical balance: it is either a classified felony of the first degree or third degree, based upon whether the predicate offense is a felony or a misdemeanor. HB 141 will disrupt that elegant balance by making one form of Involuntary Manslaughter an unclassified felony (perhaps the only offense both classified and unclassified), carrying a range of prison terms that are drastically removed from the statutory confines of any other statutory offense in the criminal code: a range of definite

prison terms between 1-20 years, imposing a maximum term *more* than twice the maximum prison term for any other form of Involuntary Manslaughter, although the minimum term can be as much as three times *less* than the most serious form of Involuntary Manslaughter under current law. Logically, it must be asked, *how can it be both more and less serious ? Why is that* ?

This vast range of penal sanctions invites system abuse, and amounts to a wholesale abdication by the General Assembly in setting forth a rational structure of criminal culpability and related penal sanctions. Those charged with offenses that carry such a vast and unstructured degree of possible sentencing invites prosecutorial abuse, because those charged with such offenses, whether guilty or not, will quite forseeably face overwhelming coercion into surrendering the right to trial simply to minimize the possible risk of an unknown prison term if convicted after trial. Such a vast range of penal sanctions is an undesirable powerful incentive for defendants to alternatively seek "sentence bargaining" to resolve charges under this new offense, in a prosecution which of course will involve as well other felony offenses (*e.g.*, Aggravated Trafficking in Drugs and Trafficking in Drugs).

This proposed new form of Involuntary Manslaughter differs fundamentally in other obvious ways from all other forms of the offense under current law:

(1) the range of prison terms exceed the earliest release opportunities (*i.e.*, 15 years) for offenders convicted of a purposeful Murder (R.C. 2929.02). Does it make sense to punish an unintentional killing more than offenses committed with specific purpose to kill?

(2) although the hallmark of Involuntary Manslaughter under current law involves an unintended death that results from knowingly or recklessly committing an underlying offense, under HB 141, the offense can be committed without any criminal intent whatsoever, it being designated a "strict liability offense." (Line 35-37).

(3) the new offense can be committed without being the "proximate cause of death" of the victim, so long as it "contribute to the death" (Line 29-30) in some undefined way, shape or form "as a result" of the underlying drug offense. Since the offense is already designated a strict liability offense which can be committed

without any mental culpability, does it make sense to also remove requirement of any evidence of direct causation in causing death.

(4) an elaborate structured (*i.e.*, "micro-managed") sentencing scheme under HB 141 which requires a prison term wherever three or more aggravating factors are findings by the sentencing court, where the list of aggravating factors are so overlapping and redundant that three or more factors will be present in almost every prosecution:

For example, the first aggravating factor is:

> "(1) The offender was previously convicted of or pleaded guilty to aggravate trafficking in drugs or trafficking in drugs in violation of section2925.03 of the Revised Code *or was engaged as a normal practice in any of the acts that could constitute that violation.*

Observation: this factor reads: "drug dealer." And it removes the legal obligation of the prosecutor under current Ohio law to prove someone's guilt in favor of being able to show that the offender's engaged in drug dealing "as a normal practice." It is also submitted that "normal practice" is a fuzzy and hazy legal standard which has no equivalent application in the Ohio Criminal Code.

The second aggravating factor:

> "(2) The offender sold, distributed, dispensed, or administered or caused to sold, dispensed, administered a mixture of various controlled substances or controlled substance analogs to the victim."

Observation: this factor includes "drug dealer," which is duplicative of the first aggravating factor. Beyond that flaw, and in defiance of all logic, it includes in its definition a person who "administered" the drug(s). Yet, one of the mitigating factors under this bill [R.C. 2903.04(E)(4)(c)(1)], which allows for community control as a sentencing option for the court is "the offender was a co-user of the controlled substance with the victim." So, where it is a co-drug user who "administers" the drug to the victim, a very common situation in retail drug distribution, this factor under the statutory scheme of HB 141 is both a mitigating *and* aggravating factor. This constitutes a new and novel legal ground.

The fifth aggravating factor is:

> (5) "The offender was part of a criminal enterprise involving controlled substances or controlled substance analogs."

Observation: this factor reads: "drug dealer." Drug dealing is a quintessential example of a criminal enterprise. This factor is completely duplicative of the aggravating factors set forth in the first and second of the list of aggravating factors.

Not only are the aggravating factors duplicative and overlapping of each other as argued above; they also are also duplicative and overlapping of the basic elements of the offense itself set forth in R.C. 2903.04(C), which reads:

> "No person shall cause or contribute to the death of another or the unlawful termination of another's pregnancy *as a result of the offender's sale, distribution, dispensation, or administration of any controlled substance or controlled substance analog in violation of any provision of Chapter 2925 of the Revised Code*."

Observation: Read: "drug dealer."

III. *A more rational approach*:

Since the obvious focus of the objective of this legislation is the offenders who are involved in distributing the synthetic opiates and heroin, legislators should address it through the offense of Aggravated Trafficking in Drugs (R.C. 2925.02). It is suggested that a new Specification be drafted under Chapter 2941 which includes new additional penal sanctions for offenders whose offense results in the death of the victim.

Under such approach, it is submitted the Specification should maintain the "proximate cause of death" standard under current law. The proponent testimony is underwhelming that convictions are difficult under this standard because (it is rationalized) some jurors believe the victim's conduct is the proximate cause of death. We should not lower the burden of proof just because the evidentiary requirements of conviction are burdensome. Lowering the burden of proof here

will just make it easier for proponents to argue it should be lowered in other contexts, an undesirable slippery slope that is contrary to our basic tenets.

The penalty for a finding of guilt of the Specification should invoke an additional "springboard" range of prison terms that the sentencing court can impose in additional to the prison term based upon the conviction for the predicate Aggravated Trafficking offense. This sentencing scheme has been previously employed by the General Assembly in the sentencing of Repeat Violent Offenders (R.C. 2929.14(B)(2)(b)). Since there is no legal requirement that a prison term imposed for a Specification under either Chapter 2929 or 2941 must be a mandatory prison term, the prison term imposed for this Specification should be a non-mandatory term, and thus consistent with the tradition of judicial discretion in sentencing of felony offenders.

IV. *Conclusion*:

The experience of other states and the consensus of many experts concur that criminalization will not provide the needed cure for Ohio's pending social crisis. Our own past experience in Ohio teaches that increased penal sanctions will not result in reducing drug usage (or deaths resulting therefrom), where the demand for drugs is strong and the supply of drugs is resilient.

Measures like HB141 which attempt to approach the social crisis through criminalization should adopt an approach that seeks to do no more harm than necessary to the criminal code out of misguided zeal to use criminal laws to address the situation. HB 141 fails in this regard, and should be scrapped for a more rational approach as presented above.