

IN THE SUPREME COURT OF OHIO

State of Ohio, :  
:   
Appellant, : Case No. 2013-0403  
:   
v. : On Appeal from the Franklin  
: County Court of Appeals,  
Amber Limoli, : Tenth Appellate District, Case Number  
: 11AP-924  
Appellee. :  
:   
:

**Office of the Ohio Public Defender's Brief Amicus Curiae  
In Support of Appellee Amber Limoli**

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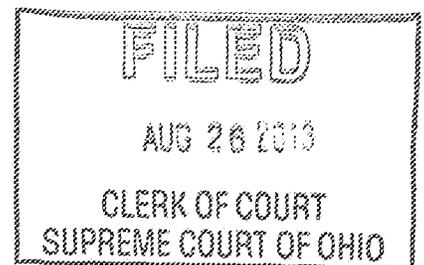


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## **I. Statement of Amicus Curiae's Interests.**

The Office of the Ohio Public Defender, as amicus curiae, files this Brief in support of Appellee Amber Limoli. The Ohio Public Defender is a state agency responsible for providing legal representation and other services to indigent criminal defendants in State court and plays a key role in the promulgation of Ohio statutory and procedural rules. The mission of the Public Defender is to protect the individual rights guaranteed by the State and Federal constitutions through exemplary legal representation in the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. In addition, the Public Defender seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation. As such, the Public Defender can offer this Court the perspective of experienced practitioners who routinely handle significant criminal cases in Ohio's appellate courts. Moreover, the Public Defender has an interest in the interpretation and application of sentencing under R.C. 2925.11(C) and eliminating the disparate sentences that have resulted from the imposition of harsher sentences for crack cocaine violations than for powder cocaine violations.

## II. Analysis.

### Amicus Curiae's Proposition of Law:

**A person sentenced after the effective date of H.B. 86 receives the benefit of the sentencing reductions set forth in R.C. 2925.11.**

Revised Code 2925.11(A) prohibits the use, possession, or acquisition of controlled substances, and R.C. 2925.11(C) sets forth the penalties for the use, possession, or acquisition of cocaine. Before September 2011, the legislature mandated longer sentences for crack cocaine violations, which resulted in a disproportionate number of poor black men being sentenced to longer terms of incarceration. Reginald Fields, *Unequal Crack Cocaine Penalties Cleaned up as Cost Balances Anti-Crime Pressure*, available at [http://www.cleveland.com/open/index.ssf/2011/07/unequal\\_crack\\_cocaine\\_penaltie.html](http://www.cleveland.com/open/index.ssf/2011/07/unequal_crack_cocaine_penaltie.html) (accessed Aug. 23, 2013). To rid Ohio of this disparity, the legislature amended the penalties for cocaine violations, so that powder cocaine and crack cocaine carried similar sentences. *Id.* See Am.Sub.H.B. 86, Gen. Assem. (Ohio 2011) ("H.B. 86"). But it did not change the nature of the offense: possessing crack cocaine in violation of R.C. 2925.11(A) remains a violation of R.C. 2925.11(A) today. Revised Code 1.58(B) mandates that a defendant who has not been sentenced by a statute's effective date shall receive the benefit of any penalty reduction caused by the statutory amendment. Consequently, any person sentenced after September 30, 2011 is entitled to the lesser penalties contained in H.B. 86.

**A. The plain language of R.C. 2925.11 and H.B. 86 establish the legislature's intent to change the penalties for possessing crack cocaine.**

The amendments to R.C. 2925.11(C) were intended to change the penalties for obtaining, possessing, and/or using crack cocaine. In fact, the Preamble to H.B. 86 states that its purpose is "[t]o amend section . . . [R.C.] 2925.11 . . . to eliminate the difference in criminal penalties for crack cocaine and powder cocaine." In addition, the plain language of R.C. 2925.11 evidences that same intent.

When construing a statute, the overriding aim is to give effect to the legislature's intent. The first step in this process is to look at the language in the statute. *In re M.W.*, 133 Ohio St.3d 303, 2012-Ohio-4538, 978 N.E.2d 164, ¶ 17. Courts give words their plain and ordinary meaning and construe them in accordance with traditional rules of grammar and usage. *Id.* If the statute is subject to only one reasonable construction, courts must stop their inquiry and cannot look beyond the words written. *Id.*

For the legislature to achieve its stated purpose of reducing the penalties for possessing crack cocaine, it struck certain language from the penalty provisions of R.C. 2925.11(C):

(C)(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. **The penalty for the offense shall be determined as follows:**

\*\*\*

(b) If the amount of the drug involved equals or exceeds five grams but is less than ~~twenty-five~~ ten grams of cocaine ~~that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine,~~ possession of cocaine is a felony of the fourth degree, and ~~there is a presumption for a prison term for the offense~~ division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds ~~twenty-five~~ ten grams but is less than ~~one hundred~~ twenty grams of cocaine ~~that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine,~~ possession of cocaine is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If possession of cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(Emphasis added.) Am.Sub.H.B. 86. Indeed, R.C. 2925.11(C)(4) declares that it sets forth the penalties for violations of R.C. 2925.11(A). This evidences that the nature of the offense has not changed, but only the penalties for obtaining, possessing, and/or using crack cocaine. Additionally, Section 3 of H.B. makes it clear that the legislature intended for the sentencing amendments to apply to all persons sentenced after H.B. 86's effective date.

Section 3 provides:

The amendments to sections . . . 2925.11 of the Revised Code . . . that are made in this act apply to a person who commits an offense involving . . . cocaine . . . on or after the effective date of this act and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.

Am.Sub.H.B. 86, Section 3.

Revised Code 1.58 states that, “[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.” R.C. 1.58(B). The amended portion of R.C. 2925.11 sets forth the penalties for cocaine violations under R.C. 2925.11(C): “[t]he penalty for the offense shall be determined as follows.” As pronounced in H.B. 86 and R.C. 2925.11, the legislature intended to reduce the penalties for obtaining, possessing, and/or using crack cocaine. The Revised Code specifies that when the penalty for an offense is reduced, the new reduced penalty shall apply to a person who is sentenced after the amendment’s effective date. Thus, the sentencing reductions for crack cocaine apply to all persons sentenced after H.B. 86’s effective date, and this makes sense. Moreover, the rule of lenity requires any ambiguity in those amendments to be resolved in favor of criminal defendants. *State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 38; *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). That rule is codified in R.C. 2901.04(A), and provides that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”

Amber Limoli was awaiting sentencing when H.B. 86’s amendments took effect. Thus, at the time of her sentencing hearing, the reduced penalties in R.C. 2925.11(C) were effective, and the old penalties were no longer operable. In essence, the old

penalties no longer existed, and the trial court could not impose a sentence that was no longer authorized by law. The sentencing reductions in R.C. 2925.11(C) apply to persons, including Ms. Limoli, who are sentenced after H.B. 86's effective date.

**B. It is still illegal to possess crack cocaine, and the elements in R.C. 2925.11 have not changed.**

House Bill 86 did not alter the elements of R.C. 2925.11. Prior to H.B. 86's effective date, R.C. 2925.11(A) prohibited a person from "knowingly obtain[ing], possess[ing], or us[ing] a controlled substance." To prove a violation, the State had to prove three elements: that a person (1) knowingly; (2) obtained, possessed, or used; (2) a controlled substance. The legislature did not alter the elements necessary to establish a violation of R.C. 2925.11(A), and thus, did not alter the nature of the offense. Indeed, just as the statute prohibited a person from possessing crack cocaine on September 29, 2011, it still prohibits a person from possessing crack cocaine today. The State's argument that the nature of the offense has been altered – and not the penalty – lacks merit.

**C. Ohio's public policy favors early implementation of the sentencing reductions.**

The legislature had a sound policy reason for reducing the penalties for crack cocaine violations: to eliminate the disparate sentencing impacts on black men. Reginald Fields, *Unequal Crack Cocaine Penalties Cleaned up as Cost Balances Anti-Crime Pressure*. But the sentencing reductions also alleviate prison overcrowding. See

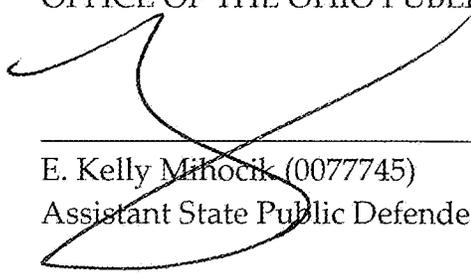
Jefferson, *Ohio's Sentencing Policies Symposium: Article: Sentencing, Drugs, and Prisons: A Lesson from Ohio*, 42 U. Tol.L.Rev. 881 (2011). These public policies are not served by delaying the implementation of the penalty reductions in R.C. 2925.11(C), and there is no justification for delaying the penalty amendments in light of Ohio's public policy.

**III. Conclusion.**

The Office of the Ohio Public Defender as amicus curiae asks that this Court to affirm the Franklin County Court of Appeals' decision and rule that the penalty reductions for using, possessing, or obtaining crack cocaine apply to persons who are sentenced after the effective date of H.B. 86.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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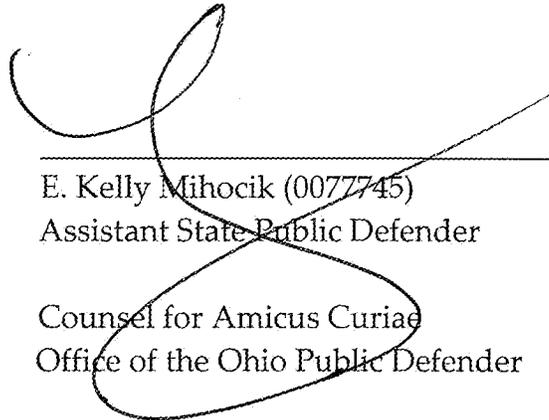
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Certificate of Service

I certify that on this 26th day August 2013, a copy of the foregoing Brief Amicus Curiae was sent by regular U.S. mail, postage-prepaid, to Steven L. Taylor, Chief Counsel, Appellate Division, 373 South High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215, and Dennis Belli, Two Miranova Place, Suite 500, Columbus, Ohio 43215.



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