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IN THE SUPREME COURT OF OHIO
2013 TERM

STATE OF OHIO, : Case No. **2013-0403**
 :
 Plaintiff-Appellant, : On Appeal from the
 : Franklin County
 vs. : Court of Appeals,
 : Tenth Appellate District
 AMBER M. LIMOLI, :
 :
 Defendant-Appellee. : Court of Appeals
 : Case No. 11AP-924

MERIT BRIEF OF DEFENDANT-APPELLEE

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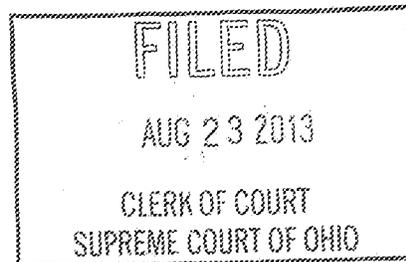


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STATEMENT OF THE FACTS

As a salvo in the never-ending "War on Drugs," Congress promulgated a schedule of enhanced penalties for federal offenses involving crack cocaine with the passage of the Anti-Drug Abuse Act of 1986. The penalty structure treated one gram of crack cocaine as being the equivalent of one hundred grams of powder cocaine (the "100:1 ratio"). According to an historical analysis prepared by the United States Sentencing Commission, Congress "bypassed much of its usual deliberative process" in passing this legislation due to the perception of a national sense of urgency surrounding crack cocaine use. U.S. Sentencing Commission, 2002 Special Report to Congress, Cocaine and Federal Sentencing Policy, Chapter 2, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/ch1.pdf (accessed Aug. 16, 2013), at 5.

Chapter 2925 of the Ohio Revised Code defines "cocaine" expansively to encompass all forms of the drug, including salts of cocaine (cocaine hydrochloride, or powder cocaine) and cocaine base (crack cocaine). R.C. 2925.01(X). Prior to 1996, the trafficking and possession statutes utilized a unitary penalty schedule which treated all forms of cocaine the same. The penalty subsections of those statutes labeled all cocaine offenses, regardless of precise form of cocaine, as "trafficking in cocaine" and "possession of cocaine," respectively.

In 1996, the General Assembly enacted its own set of enhanced penalties for offenses involving crack cocaine. However, in passing Am. Sub. S.B. 269, the legislature did not amend the definition of "cocaine." Instead, it carved out a sub-definition for "crack cocaine." S.B. 269 also retained the same nomenclature for cocaine-related offenses. That is, the amended statutes

continued to employ the labels, “trafficking in cocaine” and “possession of cocaine,” to describe all offenses involving cocaine in whatever form, including crack cocaine.

Over the years, the 100:1 ratio had been criticized as a poorly thought out, knee-jerk reaction by the legislators to “do something” about the crack cocaine epidemic. The enhanced penalties for crack cocaine offenses drew withering criticism due to their disproportionate effect in the sentencing of African-American and other minority offenders. The United States Supreme Court even commented that this sentencing policy “fostered disrespect for and lack of confidence in the criminal justice system because of a widely held perception that it promote[d] unwarranted disparity based on race.” *Kimbrough v. United States*, 552 U.S. 85, 98, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007)(internal citation and quotation marks omitted).

The pressure on Congress to correct this injustice came to a head at the end of the last decade. In 2010, the United States Congress responded to pressure from the Administration, the United States Sentencing Commission, and the public by passing the Fair Sentencing Act of 2010 (“FSA”). Although Congress was unwilling to eliminate the penalty disparity entirely, it did reduce the penalties for crack cocaine by changing the powder-to-crack ratio from 100: 1 to a more reasonable 18: 1.

The new federal legislation fell short in one significant respect: it failed to address the question of whether pre-FSA crack offenders still awaiting sentencing would receive the benefit of the penalty reductions. This glaring omission generated a plethora of wasteful and unnecessary litigation in the federal district and circuit courts.

Ultimately, in *Dorsey v. United States*, 567 U.S. ____ ,132 S.Ct. 2321, 2326, 183 L.Ed.2d 250 (2012), the United States Supreme Court resolved the question of “whether the Act's more lenient

penalty provisions apply to offenders who committed a crack cocaine crime before August 3, 2010 [the effective date of the FSA], but were not sentenced until after August 3.” A majority of the Justices answered this question in the affirmative.

Meanwhile, the General Assembly addressed the crack cocaine/powder cocaine disparity problem at the state level when it passed comprehensive reform of Ohio’s sentencing laws in 2011. The legislature explicitly stated in the preamble to Amended Substitute House Bill 86 (“H.B. 86”) that the purpose of the amendments to the trafficking and possession statutes was “to eliminate the difference in criminal *penalties* for crack cocaine and powder cocaine[.]” (emphasis supplied).

The Legislative Service Commission analysis of the Act explained that the H.B. 86 changes restored the unitary penalty structure for cocaine offenses as it existed prior to 1996, albeit with some modifications to the actual penalties:

Formerly, two distinct sets of *penalties* were provided for those offenses – one set applied to cocaine that was crack cocaine, and the other applied to cocaine that was not crack cocaine. * * * The act eliminates the *penalty* distinctions provided in the offenses involving the two forms of cocaine, and provides a *penalty* for the offenses involving any type of cocaine that generally has a severity that is between the two current *penalties*.

(Emphasis supplied). Legislative Service Commission, Final Analysis, Am. Sub. H.B. 86, 129th General Assembly, Accessible at <http://www.lsc.state.oh.us/analyses129/11-hb86-129.pdf>. (accessed Aug. 13, 2013), at pp. 65-66 (“LSC Analysis”).

The General Assembly wisely chose not to leave judges, prosecutors, defendants, and their attorneys guessing as to the applicability of the new penalties to pre-H.B. 86 crack offenders still awaiting sentencing. Section 3 of that Act expressly directs that “[t]he amendments to sections *** 2925.03 [the trafficking statute], * * * [and] 2925.11 [the possession statute] 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.” (Emphasis supplied).

For the most part, the General Assembly succeeded in its effort to eliminate needless litigation over the retroactivity issue. In the two years since H.B. 86 went into effect, the question has arisen in only three appellate districts, the First, the Second, and the Tenth. The county prosecutors for Montgomery County and Hamilton County have conceded the applicability of the reduced penalties to crack offenders still awaiting sentencing. *State v. Gatewood*, 2d Dist. No. 2012-CA-12, 2012-Ohio-4181, ¶12; *State v. Solomon*, 1st Dist. No. C-120044, 2012-Ohio-5755, ¶13¹. The First and Second District panels accepted the prosecutors’ concessions. The lone holdout is the Franklin County Prosecutor.

The record in this appeal discloses that in July 2010, Columbus police officers stopped and searched Defendant-Appellee Amber Limoli (“Limoli”). They found approximately nine grams of crack cocaine hidden in her bra. (Tr. 187). The prosecutor’s office waited until November 2010 to indict her. The heading of the indictment described the offense as “possession of cocaine.” After the trial court denied her motion to suppress the evidence, Limoli pled no contest to the charge.

Limoli’s sentencing hearing took place in October 2011 (after H.B. 86 went into effect). Defense counsel argued that H.B. 86 eliminated the requirement of mandatory imprisonment for his client’s offense and that “this Court is free to place Ms. Limoli under community control, and I would submit that is the appropriate sanction in this case.” (Tr. 163). The assistant prosecutor

¹The Hamilton County Prosecutor took the position that “R.C. 1.58(B) only applies to give Solomon the benefit of a reduced penalty, not a reduced level of the offense.” *Id.* at ¶28.

acknowledged “maybe the [mandatory] time element has gone away,” but insisted Limoli should go to prison. (Tr. 161). The trial judge sentenced Limoli to a one-year mandatory prison term under the pre-H.B. 86 statute, and stated “you both can have a shot at me [on appeal] if you think this is appropriate.” He agreed to stay the sentence pending appeal. (Tr. 166).

The prosecutor in Limoli’s appeal argued that H.B. 86 “eliminated an offense, i.e. crack-cocaine possession, and instead substituted another offense for it, i.e., possession of cocaine.” Therefore, he asserted, Limoli is not entitled to the benefit of the reduced penalty schedule. The Tenth District was not persuaded and ruled in favor of Limoli on this issue. This Court accepted jurisdiction over the county prosecutor’s appeal from the Tenth District’s ruling.

ARGUMENT

APPELLEE'S COUNTER-PROPOSITION OF LAW:

THE REDUCED PENALTIES UNDER 2011 AM. SUB. H.B. 86 APPLY TO AN OFFENDER WHO COMMITTED AN OFFENSE INVOLVING CRACK COCAINE PRIOR TO SEPTEMBER 30, 2011, BUT IS SENTENCED THEREAFTER.

The 129th General Assembly's purpose in passing H.B. 86 was "to reduce the amount of public funds used to operate state prisons, to reduce the number of offenders in prison for violation of low to moderate level offenses, [and] to increase the availability of community control sanctions[.]" Ohio Judicial Conference, July 20, 2011 Enactment News, <http://www.ohiojudges.org/Document.ashx?DocGuid=eaec81d9-ab76-4c0a-b007-290a02308ad> (accessed Aug. 16, 2013).

Section 3 of the Act directs courts and prosecutors to give offenders still awaiting sentencing the benefit of the penalty reductions. Despite this clear expression of legislative intent in Section 3, the Franklin County Prosecutor has filed an appeal in this Court to deprive Limoli, one of the "low to moderate level" offenders targeted by H.B. 86, of the benefits of its reduced penalties.

As explained below, legislative intent controls the question of whether an offender who committed her crime before the passage of new sentencing legislation is entitled to the benefit of any favorable change in the penalty. The court of appeals carefully analyzed the transitional language of H.B. 86 and concluded the reduced penalty structure for crack cocaine offenses applies to Limoli's case. *Limoli*, 2012-Ohio-4502, ¶¶61-62.

The county prosecutor's legal challenge seeks a result that runs contrary to the will of the legislature. Limoli submits that the prosecutor lacks the authority to mount this challenge

independently of the Attorney General. The Revised Code requires the Attorney General's participation to ensure that the prosecutor's position is truly representative of the State's position, especially in light of strong indications that the General Assembly intended a different implementation of H.B. 86 than the one he is advocating in this appeal. She further submits that the prosecutor's challenge rests on flawed legal reasoning and fails on the merits.

I. SECTION 3 OF H.B. 86 EVINCES A CLEAR INTENT ON THE PART OF THE GENERAL ASSEMBLY TO APPLY THE REDUCED PENALTIES FOR CRACK COCAINE OFFENSES TO PRE-H.B. 86 OFFENDERS STILL AWAITING SENTENCING.

In *Dorsey v. United States*, the United States Supreme Court emphasized that legislative intent plays the predominant role in determining whether an offender is entitled to the benefits of a penalty reduction under intervening legislation. The majority opinion began its analysis by noting that "courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, [must] assure themselves that ordinary interpretive considerations point clearly in that direction." *Id.* 132 S.Ct. at 2332. It identified, as one important "interpretive consideration," the fact that applying the prior law's mandatory sentencing provisions to the post-FSA sentencing of pre-FSA crack offenders "would create disparities of the kind that Congress enacted the * * * [FSA] to prevent." *Id.* at 2333. The Court ultimately concluded that "Congress intended the [FSA]'s new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders. That is the Act's 'plain import' or 'fair implication.'" *Id.* at 2335.

This Court, too, has acknowledged that legislative intent controls the question of the applicability of new sentencing legislation to offenders who committed their crimes prior to its enactment. *State v. Rush*, 83 Ohio St.3d 53, 57, 1998-Ohio-423, 697 N.E.2d 634, 637 ("It is the General Assembly, of course, that possesses authority to determine the effective dates of

enactments passed pursuant to its legislative powers.”) It has emphasized the judicial system’s obligation to honor any express statement of the legislature’s intent on this subject. *Id.*

The Supreme Court in *Dorsey* did not have the benefit of an express statement of Congress’s intent regarding the retroactive application of the FSA. In contrast, the transitional language found in Section 3 of H.B. 86 supplies Ohio courts with clear direction that the General Assembly intended offenders such as Limoli should receive the benefits of its reduced penalties for offenses involving crack cocaine:

The amendments to sections 2925.01 . . . and 2925.11 of the Revised Code, . . . that are made in this act apply to a person who commits an offense involving marihuana, cocaine, or hashish 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.

The provisions of sections 2925.01 . . . and 2925.11 of the Revised Code, . . . , in existence prior to the effective date of this act shall apply to a person upon whom a court imposed sentence prior to the effective date of this act for an offense involving marihuana, cocaine, or hashish. The amendments to sections 2925.01 . . . and 2925.11 of the Revised Code, . . . that are made in this act do not apply to a person upon whom a court imposed sentence prior to the effective date of this act for an offense involving marihuana, cocaine, or hashish.

A plain reading of the two paragraphs of Section 3 indicates the legislature’s desire to draw a distinction between pre-H.B. 86 offenders awaiting sentencing and offenders whose sentences had already become final. Yet, the prosecutor insists that “[i]f the General Assembly truly wished to mandate application of the amendments to pre-amendment conduct, it would have specifically said so, rather than requiring courts to engage in an analysis under R.C. 1.58(B).” (Appellant’s Brief, at 14).

The Franklin County Prosecutor took a different stance when he represented the State as the appellee in *Rush*. When the General Assembly passed the Ohio Felony Sentencing Act in 1996,

it added language that pre-S.B. 2 offenders should be sentenced under the law in existence at the time of their crimes “notwithstanding division (B) of section 1.58 of the Revised Code.” The defendants in that appeal argued that the “notwithstanding” language was in illegal attempt by the legislature to “circumvent” R.C. 1.58(B).

The Franklin County Prosecutor disagreed with this contention, and this Court sided with him, stating “[t]he phrase ‘notwithstanding division (B) of section 1.58 of the Revised Code’ communicates the General Assembly's proactive purpose by arresting R.C. 1.58(B)’s operation in this instance. The language defines the time, as chosen by the General Assembly, at which the new provisions of S.B. 2 are to be applied and prior to which they are of no effect.” *Rush*, 83 Ohio St.3d at 58, 697 N.E.2d at 639.

Similarly, Section 3 of H.B. 86 communicates the General Assembly’s proactive purpose to afford the benefits of the reduced penalties under R.C. 1.58(B) to pre-H.B. 86 offenders who had not yet been sentenced (and to deny the same reductions to those offenders whose sentences had become final before its enactment). The prosecutor proposes that Section 3 should be regarded merely as a helpful reminder to the courts that R.C. 1.58(B) might be applicable. (Appellant’s Brief, at 14).

However, his proposal runs afoul of the principle that legislation “must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶26.

House Bill 86 lowered the penalties for offenses involving crack cocaine below a certain weight threshold. It left the penalties for powder cocaine the same or increased them. Thus, the language in Section 3 would be rendered “superfluous,” “meaningless,” or “inoperative” unless construed as an express statement of legislative intent to give pre-H.B. 86 offenders still awaiting sentencing the benefits of the penalty reductions for crack cocaine. Pursuant to *Rush*, this policy statement should be respected and enforced.

II. THE FRANKLIN COUNTY PROSECUTOR’S LEGAL CHALLENGE TO SECTION 3 EXCEEDS HIS AUTHORITY UNDER R.C. 309.08 AND RESTS ON A MISUNDERSTANDING OF THE PENALTY CHANGES ENACTED BY H.B. 86.

Revised Code 1.58(B) directs that “[i]f the penalty, * * * or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, * * * or punishment, if not already imposed, shall be imposed according to the statute as amended.” The court of appeals carefully reviewed the amendments to R.C. 2925.11, defining the offense of possession of controlled substances, and concluded that Limoli was eligible for sentencing under H.B. 86's reduced penalty structure:

The text of H.B. 86 is significant for purposes of this appeal in two ways. First, the text illustrates that, both before and after the enactment of H.B. 86, R.C. 2925.11(C)(4) provided that a person who violated R.C. 2925.11(A) by possessing cocaine (without distinguishing between the powdered or solid form of cocaine) was “guilty of possession of cocaine.” Second, all of the relevant H.B. 86 amendments to R.C. 2925.11 follow the phrase in R.C. 2925.11(C)(4) providing that “[t]he penalty for the offense shall be determined as follows: * * *.” Construed together, these two phrases require the conclusion that H.B. 86 did not change the elements of the criminal offense of possession of cocaine but only changed the penalty for that offense.

Accordingly, we reject the state's assertion that H.B. 86 eliminated the offense of “possession of crack cocaine” and created a new offense of “possession of either powdered or crack cocaine.” Both before and after enactment of the bill, the offense created by R.C. 2925.11(C)(4) was “possession of cocaine.” By the express language of the bill, H.B. 86 accomplished only a change in the penalty for

that offense. Accordingly, R.C. 1.58(B) applies, and the trial court was required to impose the penalty for that offense “according to the statute as amended” by H.B. 86.

State v. Limoli, 10th Dist. No. 11AP-924, 2012-Ohio-4502, ¶¶61-62.

The Franklin County Prosecutor disagrees with the court of appeals’ ruling. He insists Limoli’s right to the benefits of H.B. 86’s reduced penalties is foreclosed by this Court’s decision in *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, 797 N.E.2d 977, wherein the syllabus states that “R.C. 1.58(B) does not apply to give a criminal defendant the benefit of a reduced sentence if, by applying it, the court alters the nature of the offense *including* specifications to which the defendant pled guilty or of which he was found guilty.” (Emphasis supplied).

Limoli did not plead to any specifications. Yet, the prosecutor insists that H.B. 86 “altered” the nature of the offense. In a nutshell, the prosecutor argues that crack cocaine and powder cocaine are different substances, rather than different forms of the same substance. He contends that under the pre-H.B. 86 possession statute, there existed two cocaine-related offenses, “possession of cocaine” and “possession of crack cocaine.” He further contends that H.B. 86 merged the two offenses and created a new offense called “possession of cocaine,” which would include crack cocaine. Therefore, says the prosecutor, Limoli is not entitled to the benefit of a penalty reduction. His position is untenable and should be rejected for the following reasons.

A. The Prosecuting Attorney Lacks the Authority to Independently Pursue a Position in This Court That Conflicts with the Intent of the General Assembly in Enacting H.B. 86.

The county prosecutor’s attempt to reconcile his position with the legislature’s intent is lukewarm at best. His brief devotes a mere two paragraphs to this subject. (Appellant’s Brief, at 14-15). Instead, the main thrust of his legal challenge resembles the one pursued by the

defendants in *Rush*, i.e. the General Assembly lacked the authority to do what it intended to do, or went about it incorrectly. The Revised Code precludes him from independently pursuing this position in this Court for the entire State of Ohio.

Typically, the attorney general is the official designated by the legislature to control the direction of litigation on behalf of the state in the supreme court. *State v. Market*, 158 Ind. App. 192, 202, 302 N.E.2d 528, 533 (1973). In *Market*, the Indiana appellate court conducted a comprehensive survey of supreme court rulings from other states regarding the authority of a local prosecutor to represent the state's interests in its highest court and concluded that:

[N]ot a single State permits the county Prosecuting Attorney to take an appeal from the trial court in a criminal case to the State Supreme Court on his own initiative. Either the Attorney General alone is authorized to prosecute such appeals, or the Prosecuting Attorneys with the consent of, *and in conjunction with*, the Attorney General have the right to appeal criminal cases from the county [appellate] Court.

Id. (emphasis supplied).

In Ohio, the General Assembly has designated the Attorney General as the State's chief law officer. R.C. 109.02 directs him to "appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." While R.C. 2953.14 permits either the Attorney General or a county prosecutor to "institute" an appeal to this Court from the judgment of a court of appeals in a criminal case, a county prosecutor lacks authority to prosecute the appeal on the merits except "in conjunction with the Attorney General." R.C. 309.08(A).

A statutory restriction on the ability of a local prosecutor to bind the state in supreme court litigation reflects the legislature's belief that the involvement of the attorney general is necessary to insure the sovereign's legal representative speaks with one voice on matters of state-wide

concern. *Ex parte Taylor*, 36 S.W.3d 883, 887 (Tex.Crim.App. 2001). The Texas Court of Criminal Appeals (Texas' highest court with appellate jurisdiction in criminal matters) in *Taylor* rejected a district attorney's contention that he should be permitted to pursue an appeal independently of the state prosecuting attorney (the Texas equivalent of the Ohio Attorney General in criminal matters):

The State of Texas has only one, indivisible interest in a criminal prosecution: to see that justice is done. Different lawyers doubtless have different views of how the law should be shaped to achieve that goal, but that does not give them different interests. *The state prosecuting attorney has a statewide view that a local prosecutor may not have, and this doubtless explains the legislature's choice to give the state prosecuting attorney the primary authority in this court and an authority to intervene in the courts of appeals.*

Id. (emphasis supplied).

The General Assembly's intent to apply the reduced crack cocaine penalties to pre-H.B. 86 offenders awaiting sentencing is evident from the legislation and its history. The county prosecutors for Montgomery and Hamilton counties have conceded this point. *Gatewood, Solomon*. The Franklin County Prosecutor insists on staking out a contrary position.

Revised Code 309.08(A) permits him to press his particular view in the common pleas court of his home county and the court of appeals of his appellate district. *Cf. State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, 978 N.E.2d 135, ¶30 (a prosecutor's authority to bind the State of Ohio to a plea agreement is limited solely to crimes committed in his own county). The protocol is different in this Court. The same statute precludes him from advocating his position in this Court on behalf of the State of Ohio except in conjunction with the Attorney General. Because that statutory requirement has not been met in this case, the Court should reject the prosecutor's argument on procedural grounds.

B. The Prosecutor’s Position Rests on the Erroneous Assumption That the Pre-H.B. 86 Possession Statute Treated Cocaine and Crack Cocaine as Different Controlled Substances.

The prosecutor’s contention that H.B. 86 created an entirely new offense called “possession of cocaine” rests on the assumption that the pre-amendment statutes treated cocaine and crack cocaine as different controlled substances. This assumption is incorrect for the following reasons.

1. Prior Opinions of This Court Have Recognized That the Pre-H.B. 86 Trafficking Statute Defined a Singular Offense Covering All Cocaine-Related Substances, Including Crack Cocaine. By Implication, the Same Analysis Applies to the Pre-H.B. 86 Possession Statute.

Two opinions of this Court undermine the prosecutor’s contention that H.B. 86 altered the “nature” of the offense of “possession of cocaine.” In *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, ¶8, the Court explained that Division (A) of R.C. 2925.03 defines the offense of trafficking in a controlled substance and that “[t]he *penalty provisions* are found in R.C. 2925.03(C)(1) through (7) [2][.]” (Emphasis supplied). The Court said that “[b]y the terms of the penalty statute for cocaine, R.C. 2925.03(C)(4), the substance involved in the violation is to be cocaine or, at the very least, ‘a compound, mixture, preparation, or substance containing cocaine.’” *Id.* at ¶18.

State v. Jackson, 134 Ohio St.3d 184, 2012-Ohio-5561, 980 N.E.2d 1032, ¶11 reaffirmed *Chandler’s* interpretation of the trafficking statute. The Court stated that Division (C) “set[s] forth the degree of the offense and the penalty, depending on which subsection of (C) the drug involved falls under: (C)(1) Schedule I or II drugs, (2) Schedule III, IV, or V drugs, (3) marihuana, (4) *cocaine*, (5) L.S.D., (6) heroin, and (7) hashish.” (Emphasis supplied)

“Cocaine” is defined by statute to include every possible form of cocaine, including crack cocaine. R.C. 2925.01(X). Under the rule in *Jackson* (and *Chandler*), the pre-H.B. 86 possession statute defined a unitary offense for all cocaine-related substances, including crack cocaine. If this Court believed the General Assembly had intended to create a separate offense known as “possession of crack cocaine,” it would have identified such an offense in the recital of offenses found in Paragraph 11 of the *Jackson* opinion .

2. The Science of Cocaine Does not Support the Prosecutor’s Position.

The prosecutor’s position relies on flawed science. In *Kimbrough*, the Supreme Court took judicial notice that “[c]rack and powder cocaine are two forms of the same drug.” 552 U.S. at 94, 128 S.Ct. at 566. Citing the 1995 special report of the United States Sentencing Commission to Congress, Justice Ginsberg’s opinion points out that the “active ingredient in powder and crack cocaine is the same” and “[t]he two forms of the drug also have the same physiological and psychotropic effects.” *Id.*

Appellate opinions issued after *Kimbrough* have recognized this distinction. *United States v. Johnson*, No. 12-3811, ___ F.3d ___ (6th Cir. Aug. 20, 2013) (“Powder cocaine and cocaine base are two different forms of the same drug, but have been subject to different penalties for the same drug quantity”); *State v. Marshall*, 4th Dist. No. 09CA13, 2010-Ohio-1958, ¶152 (“Cocaine base is another form of cocaine.”)

3. The Plain Language of the Pre- and Post-H.B. 86 Statutes Treat Powder Cocaine and Crack Cocaine as Two Forms of the Same Substance.

Even if there is leeway in the scientific literature for informed minds to disagree on this point, the General Assembly was free to decide for itself whether crack cocaine should be treated

as a form of cocaine, rather than a completely different substance. The Legislative Service Commission Analysis of H.B. 86 states unequivocally that the lawmakers chose the first option:

Under the general penalty structure provided in preexisting law for the state's drug trafficking offenses and drug possession offenses, the penalties vary, depending upon the type and amount of the drug involved, and the circumstances of the offense. Under preexisting law, *unchanged by the act*, if the drug involved is cocaine, the offenses are "trafficking in cocaine" and "possession of cocaine." Formerly, two distinct sets of penalties were provided for those offenses – one set applied to cocaine that was crack cocaine, and the other applied to cocaine that was not crack cocaine.

LSC Analysis, at 65 (emphasis supplied).

The county prosecutor places far too much reliance on *State v. Banks*, 182 Ohio App.3d 276, 2009-Ohio-1892, 912 N.E.2d 633, to justify a contrary conclusion. He argues that "[i]f the proof of 'crack cocaine, as opposed to cocaine' did not make a difference as to the nature of the offense, then *Banks* should not have been acquitted by the Tenth District." (Appellant's Brief, at 16).

The Fifth District court of appeals in *State v. White*, 5th Dist. No. 07CA000014, 2008-Ohio-2828, was presented with the same issue and reached the opposite result. The indictment in that case charged the defendant with trafficking in "crack cocaine." The laboratory report produced at trial identified the drug in question only as "cocaine." In rejecting the defendant's contention that he was entitled to an acquittal, the Fifth District explained:

We conclude that trafficking in cocaine includes trafficking in crack cocaine because R.C. 2925.03(C)(4) states that trafficking in cocaine includes trafficking in cocaine and trafficking in a compound, mixture, preparation or substance containing cocaine. R.C. 2925.01 (GG) defines 'crack cocaine' as 'a compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine or that is in a form that resembles rocks or pebbles generally intended for individual use.' Therefore, trafficking in cocaine includes trafficking in crack cocaine.

Id. at ¶24.

In *Marshall*, the Fourth District addressed the converse of the scenario in *White* (and *Banks*). The indictment charged the defendant with possessing “cocaine” and trafficking in “cocaine.” The forensic chemist identified the substances underlying both counts as “crack cocaine.” On appeal, Marshall argued his indictment was defective and his convictions should be vacated “because the drug at issue is actually crack cocaine, not cocaine.” *Id.* 2010-Ohio-1958, at ¶130.

In rejecting his argument, the hearing panel construed the pre-H.B. 86 statutes in a manner similar to *White*:

Both R.C. 2925.03(C)(4)(e) and R.C. 2925.11(C)(4)(d) apply “if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine[.]” . . . [A]s used in these sections, we do not believe the term “cocaine that is not crack cocaine” serves to exclude any form of cocaine as defined by R.C. 2925.01 (X). Instead, *we believe this language merely distinguishes between the available punishments.* Such a distinction is necessary because, essentially, cocaine and crack cocaine “are different forms of the same base substance.”

Id. at ¶153 (emphasis supplied, internal citations omitted).

White and *Marshall* are consistent with this Court’s rulings in *Chandler* and *Jackson*. *Banks* is not. The two other appellate decisions cited by the prosecutor, *State v. Yslas*, 173 Ohio App.3d 396, 2007-Ohio-5646, 878 N.E.2d 712 (2nd Dist.) and *State v. Crisp*, 3^d Dist. No. 1-05-45, 2006-Ohio-2509, were decided before the U.S. Supreme Court decision in *Kimbrough* and this Court’s decision in *Jackson*. To the extent those rulings assumed the General Assembly considered cocaine and crack cocaine to be different controlled substances, they lack any precedential value for this appeal.

The prosecutor's premise - that powder cocaine and crack cocaine are different substances - is further undermined by language in the pre-H.B. 86 definition that treated powder cocaine the same as crack cocaine for penalty purposes if it was "in a form that resembles rocks or pebbles generally intended for individual use." *State v. Wilson*, 156 Ohio App.3d 1, 2004-Ohio-144, 804 N.E.2d 61 (8th Dist.), ¶126. In *Wilson*, the court of appeals held that "[t]he state, therefore, does not have to prove that the cocaine found in the sample is in the base form, only that the substance contains cocaine and in a form that looks like 'individual use' rocks or pebbles." *Id.*

In sum, the Tenth District correctly concluded that "both before and after the enactment of H.B. 86, R.C. 2925.11(C)(4) provided that a person who violated R.C. 2925.11(A) by possessing cocaine (without distinguishing between the powdered or solid form of cocaine) was 'guilty of possession of cocaine.'" *Limoli*, 2012-Ohio-4502, at ¶61. It therefore properly rejected "the state's assertion that H.B. 86 eliminated the offense of 'possession of crack cocaine' and created a new offense of 'possession of either powdered or crack cocaine.'" *Id.* ¶62. Because the amendments only affected the penalty for Limoli's offense, she is entitled to the benefit of the reduction in the event her conviction remains in place following the proceedings on remand.

CONCLUSION

Limoli asks this Court to enforce the transitional language in Section 3 as intended by the General Assembly and affirm the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Defendant-Appellee Amber M. Limoli was served upon Ron O'Brien, Prosecuting Attorney, Franklin County, Ohio, and Steven L. Taylor, Assistant Prosecuting Attorney, Attorneys for Plaintiff-Appellant State of Ohio, by hand-delivery this 23rd day of August, 2013.

A handwritten signature in cursive script, reading "Dennis C. Belli". The signature is written in black ink and is positioned above a horizontal line.

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