Fiscal Note & Local Impact Statement

127 th General Assembly of Ohio

Ohio Legislative Service Commission
77 South High Street, 9th Floor, Columbus, OH 43215-6136 ✧ Phone: (614) 466-3615
✧ *Internet Web Site:* http://www.lsc.state.oh.us/

BILL: **S.B. 73** DATE: **May 16, 2007**

STATUS: **As Introduced** SPONSOR: **Sen. R. Miller**

LOCAL IMPACT STATEMENT REQUIRED: **Yes**

CONTENTS: **Eliminates penalty distinction between crack and powdered cocaine**

State Fiscal Highlights

STATE FUND	FY 2008	FY 2009	FUTURE YEARS
General Revenue Fund (GRF)			
Revenues	- 0 -	- 0 -	- 0 -
Expenditures	Likely incarceration cost increase, magnitude uncertain	Increase in incarceration costs estimated at up to $25 million or more	Increase in incarceration costs estimated at up to $25 million or more per year

Note: The state fiscal year is July 1 through June 30. For example, FY 2008 is July 1, 2007 – June 30, 2008.

- ***Existing prison-bound offenders.*** An increase in the Department of Rehabilitation and Correction's (DRC) GRF-funded incarceration expenditures estimated at up to $25 million or more is expected to occur in future fiscal years, as more than 900 offenders currently sentenced to prison for powder cocaine possession, trafficking, and preparation serve sentences that, on average, will be almost 13 months longer than they are under existing law.

- ***New prison-bound offenders.*** It is also likely that some number of low-level felony offenders who were formerly sanctioned locally will be committed to prison as a result of the bill's penalty enhancements. The number of what would be new prison-bound offenders is unknown, but, given the high volume of arrests that occur annually involving powder cocaine, this could easily result in an additional increase in DRC's incarceration costs that runs in the millions of dollars annually. Presumably, these offenders would be released from prison at some future date and subject to post-release control supervision by DRC's Adult Parole Authority. The potential costs associated with the supervision of those offenders are uncertain.

- ***Capital improvements.*** At some point, it may be necessary for DRC to construct additional bed space, if sufficient capacity does not exist in their prison system to absorb the larger inmate population that the bill will most certainly create. How and when DRC might undertake the capital improvements necessary to add this space would be extremely speculative at this point in time.

Local Fiscal Highlights

LOCAL GOVERNMENT	FY 2007	FY 2008	FUTURE YEARS
Counties			
Revenues	Potential gain in court costs and fines	Potential gain in court costs and fines	Potential gain in court costs and fines
Expenditures	Factors increasing and decreasing criminal justice system costs, with net effect uncertain, but possibly exceeding minimal cost in some local jurisdictions	Factors increasing and decreasing criminal justice system costs, with net effect uncertain, but possibly exceeding minimal cost in some local jurisdictions	Factors increasing and decreasing criminal justice system costs, with net effect uncertain, but possibly exceeding minimal cost in some local jurisdictions

Note: For most local governments, the fiscal year is the calendar year. The school district fiscal year is July 1 through June 30.

- ***County criminal case processing costs.*** Under the bill, hundreds of powder cocaine offenders arrested annually could be subject to the bill's sentencing enhancements that bump existing felony penalties up one or two degrees. These penalty enhancements and stiffer sentences could make the resolution of many of these powder cocaine cases more problematic, and, as a result, annual county prosecution, indigent defense, and adjudication costs may increase. Legislative Service Commission fiscal staff is unable to precisely estimate the magnitude of this increased annual cost of doing business, but in some jurisdictions the number of affected cases could easily generate additional expenses in excess of minimal. For the purposes of this fiscal analysis, in excess of minimal means an estimated annual cost of more than $5,000 for any affected county criminal justice system.

- ***County sanctioning costs.*** The bill will in all likelihood exert two effects on a county's annual offender sanctioning costs. First, some offenders would be sentenced to longer jail stays (theoretically increasing local sanctioning costs). Second, some offenders, rather than being sentenced to a jail stay, will instead be sentenced to a prison term (theoretically reducing local sanctioning costs). The net fiscal effect of these two factors on annual county offender sanctioning costs is uncertain and is clearly dependent upon the percentage of low-level cocaine powder offenders and local preferences for jail versus prison as the most appropriate form of punishment.

- ***County revenues.*** The bill's felony penalty enhancements create opportunities for counties to collect additional revenue, as a number of powder cocaine offenders could end up paying the higher fine amounts. How much additional fine revenue might be collected annually is very difficult to estimate.

Detailed Fiscal Analysis

Provisions of the bill

The bill essentially eliminates the penalty distinctions that currently exist between the crack and powder varieties of cocaine in favor of the stiffer set of penalties that apply to crack cocaine. As a result, all of the drug offense penalties associated with cocaine that is not specifically crack cocaine are enhanced. The elimination of this distinction occurs in sections of the criminal code dealing with: (1) trafficking in cocaine, (2) aggravated funding of drug trafficking, (3) possession of cocaine, and (4) the definition of "major drug offender."

Trafficking in cocaine

Existing penalties for trafficking in powder cocaine are compared to penalties for trafficking in crack cocaine in Table 1 below, which, for the ease of presentation, excludes penalty enhancements for trafficking near a school or juvenile. Generally, trafficking in the vicinity of a school or juvenile results in a one-step penalty enhancement. Under the bill, an offender who is guilty of trafficking powder cocaine would be subject to the same drug weight thresholds and penalties as if the offender had been trafficking in crack cocaine.

Table 1 – Cocaine Trafficking under Existing Law

Powder Cocaine	Penalty	Sentencing Guidance	Crack Cocaine	Penalty	Sentencing Guidance
5 grams or less	F5	No presumption for or against imprisonment	1 gram or less	F5	No presumption for or against imprisonment
Exceeds 5 grams but less than 10 grams	F4	Presumption in favor of imprisonment	Exceeds 1 gram but less than 5 grams	F4	Presumption in favor of imprisonment
Exceeds 10 grams but less than 100 grams	F3	Mandatory sentence	Exceeds 5 grams but less than 10 grams	F3	Mandatory sentence
Exceeds 100 grams but less than 500 grams	F2	Mandatory sentence	Exceeds 10 grams but less than 25 grams	F2	Mandatory sentence
Exceeds 500 grams but less than 1,000 grams	F1	Mandatory sentence	Exceeds 25 grams but less than 100 grams	F1	Mandatory sentence
Exceeds 1,000 grams	F1	Major Drug Offender – 10 years mandatory plus optional 1-10 years	Exceeds 100 grams	F1	Major Drug Offender – 10 years mandatory plus optional 1-10 years

Under the bill, most offenders guilty of trafficking in powder cocaine would experience penalty enhancements as shown in Table 2 below. This penalty enhancement of one to two degrees generally will occur for what might be termed lower-end trafficking offenders.

Table 2 – Powder Cocaine Trafficking under S.B. 73		
Amount of Powder Cocaine	**Existing Penalty**	**Penalty under S.B. 73**
5 grams or less	F5	F4
Exceeds 5 grams but less than 10 grams	F4	F3
Exceeds 10 grams but less than 100 grams	F3	F2, F1
Exceeds 100 grams but less than 500 grams	F2	F1
Exceeds 500 grams but less than 1,000 grams	F1	F1
Exceeds 1,000 grams	F1	F1

Aggravated funding of drug trafficking

Existing law prohibits a person from providing money or other items of value to another person with the purpose that the recipient of the money or items use them to obtain any controlled substance for the purpose of selling the controlled substance in an amount that equals or exceeds a specified threshold amount for the particular controlled substance involved in the violation. If the drug to be sold or offered for sale is cocaine or a compound, mixture, preparation, or substance containing cocaine, the specified threshold amount that constitutes the element of the offense is an amount that equals or exceeds five grams if the cocaine is not crack cocaine or equals or exceeds one gram if the cocaine is crack cocaine.

The bill abolishes the references to "crack cocaine" and "cocaine that is not crack cocaine" that currently are contained in the element of the offense of "aggravated funding of drug trafficking" that specifies the threshold amount of cocaine that must be involved in the funding conduct in order for the offense to have occurred and establishes one threshold amount for cocaine to be used as the basis for determining whether the offense has occurred. Under the bill, the threshold amount is the same as the threshold amount specified in existing law that applies when the funding conduct involves crack cocaine.

Possession of cocaine

Existing penalties for possession of powder cocaine are compared to penalties for possession of crack cocaine in Table 3 below, which, for the ease of presentation, excludes penalty enhancements for possession near a school or juvenile. Generally, possession of cocaine in the vicinity of a school or juvenile results in a one-step penalty enhancement. Under the bill, an offender who is guilty of possession of powder cocaine would be subject to the same drug weight thresholds and penalties as if the offender possessed crack cocaine.

Table 3 – Cocaine Possession under Existing Law					
Powder Cocaine	**Penalty**	**Sentencing Guidance**	**Crack Cocaine**	**Penalty**	**Sentencing Guidance**
5 grams or less	F5	Presumption against prison	1 gram or less	F5	Presumption against prison
Exceeds 5 grams but less than 25 grams	F4	Presumption in favor of imprisonment	Exceeds 1 gram but less than 5 grams	F4	Presumption in favor of imprisonment
Exceeds 25 grams but less than 100 grams	F3	Mandatory sentence	Exceeds 5 grams but less than 10 grams	F3	Mandatory sentence
Exceeds 100 grams but less than 500 grams	F2	Mandatory sentence	Exceeds 10 grams but less than 25 grams	F2	Mandatory sentence
Exceeds 500 grams but less than 1,000 grams	F1	Mandatory sentence	Exceeds 25 grams but less than 100 grams	F1	Mandatory sentence
Exceeds 1,000 grams	F1	Major Drug Offender – 10 years mandatory plus optional 1-10 years	Exceeds 100 grams	F1	Major Drug Offender – 10 years mandatory plus optional 1-10 years

Under the bill, most offenders guilty of possessing powder cocaine would experience penalty enhancements as shown in Table 4 below. This penalty enhancement of one to two degrees generally will occur for what might be termed lower-end possession offenders.

Table 4 – Powder Cocaine Possession under S.B. 73		
Amount of Powder Cocaine	**Existing Penalty**	**Penalty under S.B. 73**
5 grams or less	F5	F5, F4
Exceeds 5 grams but less than 25 grams	F4	F3, F2
Exceeds 25 grams but less than 100 grams	F3	F1
Exceeds 100 grams but less than 500 grams	F2	F1
Exceeds 500 grams but less than 1,000 grams	F1	F1
Exceeds 1,000 grams	F1	F1

Major drug offenders

Major drug offenders, under existing law, receive a mandatory prison sentence of ten years, plus an optional additional one to ten years. By eliminating the distinction between powder cocaine and crack cocaine present in existing law, the bill specifies that a major drug offender is an offender guilty of the possession, sale, or offer to sell any form of cocaine that totals at least 100 grams. Existing law specifies that a major drug offender offense involves at least 100 grams of crack or 1,000 grams of cocaine. The practical effect of eliminating this distinction would presumably be to increase the number of major drug offenders eligible for extra prison time.

State fiscal effects

The Department of Rehabilitation and Correction (DRC) has conducted research on the bill and reached the following conclusions.

- Most offenders entering prison for a drug crime and especially for a crime involving some form of cocaine have been involved with crack. Less than a fifth of those entering for powder or crack cocaine were involved with powder cocaine – 17.4% of trafficking and 19.9% of possession.
- Powder cocaine offenders would serve longer sentences under the bill. For the average powder cocaine offender, the bill would result in an additional 12.9 months in prison.
- Given the increased length of sentences for powder cocaine offenders, DRC estimates the "stacking effect" would lead to an overall increase of 968 inmates in the prison population. This works out to approximately 1,040.6 additional inmate beds per year.

Using the May 2007 average annual incarceration cost per inmate of $24,470, this represents an approximate increase in GRF-funded incarceration expenditures of $25,463,482 per year. This projected increase in incarceration expenditures will be felt in future fiscal years, as offenders would begin serving their additional prison time at some point in FY 2009 or FY 2010.

In addition to the increased annual incarceration expenditures stemming from increased lengths of stay, the bill will result in a number of powder cocaine offenders being sentenced to a prison system who would otherwise have been subject to local sanctions. The number of what would be new prison-bound offenders is unknown, but, given the high volume of arrests that occur annually involving powder cocaine, this could easily result in an additional increase in DRC's incarceration costs that runs in the millions of dollars annually. Presumably, these offenders would be released from prison at some future date and subject to post-release control supervision by DRC's Adult Parole Authority. The potential costs associated with the supervision of those offenders are uncertain.

Increased lengths of stay and the addition of an unknown, but potentially large, number of additional offenders to the prison system may also have capital ramifications. At some point, it may be necessary for DRC to construct additional bed space, if sufficient capacity does not exist in their prison system to absorb the larger inmate population that the bill will most certainly create.

Local fiscal effects

Possession, trafficking, and the preparation of cocaine for sale are currently felony offenses handled by common pleas courts, and the bill would not change that. What the bill would change, however, is that the stakes for numerous powder cocaine offenders are raised, as felony penalties are enhanced to include the possibility of a prison term, and, for those already prison bound, the reality of sentences will easily double or triple relative to current lengths of stay.

Under the bill, hundreds of powder cocaine offenders arrested annually could be subject to the bill's sentencing enhancements that bump existing felony penalties up one or two degrees. These penalty enhancements and stiffer sentences could make the resolution of many of these powder cocaine cases more problematic, and, as a result, annual county prosecution, indigent defense, and adjudication costs

may increase. Local bargaining practices between prosecutors and defense counsel will most likely be fundamentally altered as prosecutors gain more power with the more severe sentencing outcomes that become possible under the bill. More cases may go to trial, and some cases may go deeper into the trial phase before reaching a conclusion.

Legislative Service Commission fiscal staff is unable to precisely estimate the magnitude of this increased annual cost of doing business. The bill will in all likelihood exert two effects on a county's annual offender sanctioning costs.

First, some number of offenders, most likely low-level cocaine offenders, will still be sentenced to time in a local jail as is the case under current law, but the length of that stay will increase. As a result, annual county offender sanctioning costs will rise.

Second, some number of offenders who are being sentenced to a stay in a local jail under current law will be sentenced to a prison term instead. Under such an outcome, annual county offender sanctioning costs would presumably drop.

The net fiscal effect of these two factors on annual county offender sanctioning costs is uncertain and is clearly dependent upon the percentage of low-level cocaine powder offenders and local preferences for jail versus prison as the most appropriate form of punishment.

The bill's felony penalty enhancements also create opportunities for counties to collect additional revenue, as a number of powder cocaine offenders could end up paying the higher fine amounts. How much additional fine revenue might be collected annually is very difficult to estimate.

LSC fiscal staff: Joseph Rogers, Senior Budget Analyst

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