



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Support of SB3 Drug Sentencing Law Reform Sponsor Senators Eklund and O'Brien

Chairman Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee. My name is Tim Young. I am the State Public Defender. Thank you for the opportunity to testify as a proponent of SB3 on behalf of the Office of the Ohio Public Defender.

Ohioans are imprisoned for drug offenses more than any other offense.¹ According to recent data from the Ohio Department of Rehabilitation and Corrections, roughly 2600 individuals are in prison for drug possession.² That is enough people to fill approximately two prisons. Of those individuals, 1600 are incarcerated for low-level drug possession – amounts that are for personal use only. Unequivocally, the war on drugs is a failure. Opioids, meth, and cocaine continue to ravage Ohio. It is clear that Ohio will not incarcerate its way out of this crisis. We need a new approach, and SB3 is that approach.

Ohio should make low-level drug possession a misdemeanor offense. Imprisoning addicts has done nothing to combat Ohio's drug crisis. Addiction is an illness, and Ohioans with addiction issues are suffering and need treatment. Incarceration is more expensive and, more importantly, less effective than treatment.³ Treatment reduces the demand for drugs, incarceration does not. It is also important for recovery that individuals suffering from addiction stay in their communities with the positive influences in their life that make them want to get clean and stay clean.⁴ Addiction experts have repeatedly found that treatment is the most effective when individuals can maintain their pro-social support systems, meaning individuals

are able to keep their jobs, housing, and maintain personal family relationships. Imprisoning these individuals for a felony offense destroys their pro-social support systems by removing them from the community, the support of family, and makes it more likely they will relapse upon release. Further, incarcerating people who suffer from addiction makes Ohio more dangerous. The data shows that when these individuals are released from prison without a support system they are more likely to commit a violent offense and/or overdose. Ohio should stop wasting resources and make low-level possession offenses misdemeanors. Making possession a misdemeanor will facilitate those who struggle with addiction getting treatment in their own communities.

Some may have concerns about what will happen if Ohio passes SB3. These fears are not based in fact and are not supported by the data and research. To address those fears and assist the legislature, we want to provide you with data and research – not anecdotes. Perhaps the most prolific misconception is that making possession a felony deters use. This is unequivocally false. The threat of prison does not reduce the demand for drugs. The research is conclusive that drug use is not deterred by harsher penalties.⁵ It has also been said that reclassifying drug possession to a misdemeanor will cause Ohioans to perceive drug use as not dangerous. Domestic violence, assault, and OVI are misdemeanors yet Ohioans do not perceive the offenses as safe or acceptable. Reducing low-level possession to misdemeanors will not encourage dangerous behavior. In fact, when Portugal decriminalized drugs, not reduced the penalty – but completely decriminalized drugs, Portugal’s overdose rate dropped to one-tenth of its previous rate.⁶ They saw a huge reduction in dangerous behavior.

It has been suggested that West Virginia has the highest rate of overdoses because possession is a misdemeanor in that state. It is important to note that 19 states have classified



possession as a misdemeanor (all 19 include first-time possession, some states include additional instances of possession).⁷ Five states have made all possession offenses a misdemeanor.⁸ If making drug crimes misdemeanors increases overdoses, then all 19 of those states should have the highest overdose rates. However, Ohio, where possession is still a felony, has the second highest rate of overdose.⁹ This argument that misdemeanor classification increases overdose rates is without factual support and lacks any merit.

It is worth repeating that 19 other states have made possession a misdemeanor. The sky has not fallen in any of those states. They have not become lawless wastelands that opponents of SB3 fear Ohio will become. The nation is moving in this direction because the research and data are clear and conclusive. Some present are probably thinking, “Wait. I heard things in California have deteriorated since they passed Proposition 47 that reclassified drug possession to a misdemeanor.” I would like to address those misconceptions as well. First, the Public Policy Institute of California (PPIC) in their June 2018 report stated, “[w]e find **no evidence** that violent crime increased as a result of Proposition 47. While California saw an uptick in the violent crime rate from 2014 to 2016, this trend appears to have preceded the reform and is due in large part to unrelated changes in crime reporting after 2014.”¹⁰ [Emphasis added.]

Some opponents to SB3, again fearful of changed outcomes, have asserted that reclassifying possession to a misdemeanor in California caused an increase in auto thefts and larceny. This claim is not accurate. First, researchers found that the increase in the rate of auto thefts resulted from California’s reform known as Realignment, which passed in 2011, not Proposition 47.¹¹ Second, it’s important to note that Proposition 47 also reclassified check forgery, receiving stolen property, shoplifting, theft and writing bad checks under \$950 to a



misdemeanor.¹² It stands to reason that any increase in property crime in California is a result of reclassifying property crimes not reclassifying drug possession. A report from PPIC states that, despite this increase, crime rates in California “remain near historic lows.”¹³

Some have claimed that participation in drug courts “dropped significantly” when possession was reclassified in California. This is the mistake of correlation versus causation and also fails to account for increases in drug treatment that is outside of drug court. The facts are that California saw only a 12% reduction in drug court participation.¹⁴ The reduction in participation allowed California to successfully open drug courts to more individuals with previously barred offenses.¹⁵ Importantly, fewer people in drug court does not mean fewer Californians are receiving treatment. In 2016, because of savings from Proposition 47, California transferred \$67 million to community-based treatment programs.¹⁶ To quote former San Diego police chief Bill Lansdowne, “I think it’s working well...Prop. 47 has taken the felony stigma off tens of thousands of people. It allows them to get jobs. It puts heart in the justice system.”¹⁷

Another feared outcome is that the elimination of trace amount prosecution will prohibit officers from conducting searches of vehicles when a narcotics detection dog alerts to the presence of a drug. This claim is contrary to well-established Supreme Court case law. To start with, dog sniffs are not considered searches.¹⁸ If a narcotics detection dog is walked around a car during a traffic stop and alerts, the alert gives law enforcement probable cause to search the entire car.¹⁹ These cases do not turn on whether the dog is trained to alert based on a specific type or amount of drug. Any suggestion that searches pursuant to a dog alert would be hindered by reclassification of current felony charges to misdemeanors is not true. Under



current law, dogs are routinely trained to alert to the smell of marijuana (a minor misdemeanor) and that alert is enough to warrant a legal search of the entire vehicle.

I also want to address the argument that Ohio should decline to reclassify possession because that is not the way we are currently handling possession cases. The way we have always handled drug possession is wildly ineffective. It is time for Ohio embrace substantive reform. Some have argued against reclassifying low-level possession because addiction services are not available through the misdemeanor courts. For no other offense does Ohio classify the crime based on where the services are currently located. The services will follow the crime. Ohio is a great state that is more than capable of embracing reform and aligning our services to meet the needs of Ohioans struggling with addiction. Possession should be a misdemeanor. I am confident in Ohio's ability to provide effective drug court programs in Municipal Courts as they currently do in Common Pleas Courts.

As written, SB3 offers a compromise to keep misdemeanor possession in common pleas court unless there is an established drug court in that jurisdiction. However, some claim that common pleas judges should not hear misdemeanors. Judges hear those offenses now, we just call them felonies instead of misdemeanors. This argument is without factual support. If Ohio does not pass SB3 because reform might be hard, we are doing a disservice to the people of this great state who are looking to this legislature to take significant steps to solve the drug crisis.

If this legislature is truly committed to assisting Ohioans who are suffering the collateral consequences of addiction, SB3 must be retroactive. SB3 must allow individuals to reclassify their fourth-degree and fifth-degree felony possession convictions to misdemeanors. Again, opponents of retroactivity argue that it will be hard to implement. Public policy should be



directed by data and research – is should not be dictated by the level of ease with which a step might be accomplished. There are ways to implement retroactivity that will not overburden the courts. First, the bill should require that the individual seek reclassification. Additionally, the bill can specify that the state does not have the ability to object, as the court is more than capable of determining whether someone was convicted of a low-level possession. Finally, the motion for reclassification should be without cost to the movant. SB3 must include the retroactivity provision if it hopes to reduce the prison population and provide relief to rehabilitated and recovering individuals.

The Office of the Ohio Public Defender encourages you to pass SB3. In terms of criminal justice reform and fighting the opioid epidemic, Ohio is getting left behind, and its citizens are suffering. Addiction is not being treated and families are paying the price. The time has come for this legislature to take a bold step. A step that will save lives and improve the entire state. SB3 is that step. Thank you for the opportunity to testify today. I am happy to answer questions at this time.

¹ Schladen, Marty, *Ohio's Issues 1 Diagnosed A Prison Problem, But Solutions Complicated*, The Columbus Dispatch, December 3, 2018, citing Ohio Department of Rehabilitation and Corrections data

² Ohio Department of Rehabilitation and Corrections FY 2018 Commitment Report

³ *Drug Rehab Instead of Prison Could Save Billions*, Foundations for Recovery Network, <https://www.dualdiagnosis.org/drug-rehabinstead-of-prison-could-save-billions-says-report-2/>; citing Zarkin, G., Cowell, A., Hicks, K., et.al. *Lifetime Benefits and Costs of Diverting Substance-Abusing Offenders from State Prison*, Sage Journals, August 1, 2015; see also *Replacing Prison Terms with Drug Abuse Treatment Could Save Billions in Criminal Cost*, RTI International, Newswise, January 9, 2013

⁴ McVay, Doug, Schiraldi, Vincent, Ziedenberg, *Treatment or Incarceration*, Justice Policy Institute, January 2004; *Drugs and Crime*, National Council on Alcoholism and Drug Dependence, April 29, 2014, <https://www.ncadd.org/about-addiction/addiction-update/alcohol-drugs-andcrime?highlight=WyJkcVncylsmRydWdzJylsmNyaW1lll0=>

⁵ *More Imprisonment Does Not Reduce State Drug Penalties: Data show no relationship between prison terms and drug misuse*, The Pew Charitable Trusts, March 2018, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>; 2014 research by Peter Reuter at the University of Maryland and Harold Pollack at the University of Chicago found that heavy police enforcement and extended prison sentences do not effectively stop the flow of drugs and drug use. Economist at Columbia and the University of Michigan found that the threat of longer prison sentences does not reduce crime. The National Institute of Justice found that “severity of punishment does little to deter crime.”



⁶ AG Conference Speaker: Ohio Should Emulate Portugal's Drug Policy Experimentation, Hannah News Service, January 16, 2018 <http://www.hannah.com/DesktopDefaultPublic.aspx?type=hns&id=20854>

⁷ 50 State Low-Level Drug Possession Review, Ohio Criminal Sentencing Commission, <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/50StateDrugPossessionReview.pdf>
⁸ Id.

⁹ 50 State Low-Level Drug Possession Review, Ohio Criminal Sentencing Commission, <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/50StateDrugPossessionReview.pdf>

¹⁰ Mia Bird, Magnus Lofstrom, Brandon Martin, Steven Raphael, and Viet Nguyen with research support from Justin Goss, *The Impact of Proposition 47 on Crime and Recidivism*, Public Policy Institute of California, https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf at Summary on pg. 3

¹¹ California's Future: Corrections, January 2019 <https://www.ppic.org/wp-content/uploads/californias-future-january-2019.pdf> at pg. 8

¹² Id.

¹³ California's Future: Corrections, January 2019, <https://www.ppic.org/wp-content/uploads/californias-future-corrections-january-2019.pdf> at pg. 2

¹⁴ Repard, Pauline, *Drug court participation drops four years after Proposition 47 reduced many drug crimes to misdemeanors*, The San Diego Union-Tribune, September 15, 2018, <https://www.sandiegouniontribune.com/news/courts/sd-me-prop47-courts-20180614-story.html>

¹⁵ Id.

¹⁶ Mia Bird, Magnus Lofstrom, Brandon Martin, Steven Raphael, and Viet Nguyen with research support from Justin Goss, *The Impact of Proposition 47 on Crime and Recidivism*, Public Policy Institute of California, https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf at pg. 19

¹⁷ Repard, Pauline, *Drug court participation drops four years after Proposition 47 reduced many drug crimes to misdemeanors*, The San Diego Union-Tribune, September 15, 2018, <https://www.sandiegouniontribune.com/news/courts/sd-me-prop47-courts-20180614-story.html>

¹⁸ *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), *State v. Palicki*, 97 Ohio App.3d 175, 180, 646 N.E.2d 494 (6th Dist.1994), *State v. Jones*, 4th Dist. Washington No. 03CA61, 2004-Ohio-7280, ¶ 24.

¹⁹ *State v. Palicki*, *State v. Jarvis*, 6th Dist. Lucas Court of Appeals No. L-99-1184, 2000 Ohio App. LEXIS 1999 (May 12, 2000).

