



# THE BUCKEYE INSTITUTE

## **Interested Party Testimony on Senate Bill 3 Before the Ohio Senate Judiciary Committee**

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Chair Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Committee, thank you for the opportunity to testify today regarding Senate Bill 3 and drug sentencing reform.

My name is Daniel J. Dew, and I am a legal fellow at **The Buckeye Institute**'s Legal Center, an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.

Thank you for taking up this critical issue and for pursuing smart criminal justice policy that looks to balance the competing but interconnected concerns of due process, individual freedom, and society's inherent need for vigorous criminal law enforcement.

I would like to discuss several key issues today: reclassification; thresholds and mandatory sentences; retroactivity; drug-free school zones; and probable cause.

### **Reclassification**

Senate Bill 3 is consistent with Ohio's recent reform initiatives that have helped our prisons remain available for more dangerous criminals rather than overwhelmed by low-level, non-violent drug possessors. As of January 2018, only 2,688 of almost 50,000 prison beds in Ohio were taken by those whose most serious crime is drug possession. During the Issue 1 campaign, judges and prosecutors observed that because of House Bill 86, T-CAP, drug courts, and other sensible reforms, Ohio's criminal justice system already treats low-level drug possession like a misdemeanor. And that's a good thing.

In **testimony** on last session's Senate Bill 66, the Ohio Prosecuting Attorneys Association said, "If the legislature wishes to treat these offenders as misdemeanants it ought to label the crimes as misdemeanors." And that is exactly what Senate Bill 3 would do. By reclassifying low-level drug possession as a misdemeanor, Ohio would join a growing list of nearly twenty states—as diverse as California and South Carolina—that already treat low-level drug possession as a misdemeanor.

Some worry that reclassifying low-level possession will increase crime rates in our communities. Thus far, those fears appear overblown. Oklahoma, **for example**, reclassified low-level possession and property crimes as misdemeanors in 2017 and has not seen any increase in overall crime rates. California reclassified low-level possession in 2014 and researchers at the University of California Irvine **subsequently found** little empirical evidence to support critics' fears that California's reclassification was responsible for an uptick in the state's crime rate. And a **2018 Pew Charitable Trusts study** found no correlation between prison sentences and drug use, overdose deaths, or drug arrests. The data simply does not support the claim that states must threaten prison time or a felony conviction in order to maintain public safety and encourage individuals to address their drug addiction.

Moreover, even if Ohio reclassifies low-level drug crimes to misdemeanors, drug courts would still have the tools they need to impose effective accountability. A misdemeanor retains the stick of incarceration that some judges claim is necessary to encourage treatment, but without the permanent impact of a felony conviction that can hurt housing, education, and employment prospects for years.

## Thresholds and Mandatory Sentences

Senate Bill 3 proposes new weight thresholds for drug offenses. The proposed thresholds are based on the **Criminal Justice Recodification Committee's** field-expert recommendation. Researchers at Case Western Reserve University in Cleveland advised the Committee after interviewing hundreds of people convicted of drug crimes to help determine whether—based on the amount of illicit drugs in the convict's possession—an individual was more likely to be using, selling to support an addiction, or preying on those suffering from drug addiction. One of the witnesses at the last hearing, shared that most possessors she knew dealt to support their drug addiction. The current law, however, fails to make that nuanced distinction and ties judges' hands with mandatory prison sentences that often prevent them from reaching just results for some individuals. The **Ohio Judicial Conference has stated**, “[i]f judges are to fulfill their constitutional duty to secure just results for the people of Ohio, judges need the flexibility to fashion appropriate sentences given the particular facts and circumstances of individual crimes.” The revised thresholds under Senate Bill 3 would enhance judicial flexibility and subject fewer people to mandatory prison sentences.

Harsh, mandatory minimum prison sentences do not increase public safety or decrease the supply of illicit drugs in the community. A **study** of how such sentences affected the availability of crack cocaine, for example, found “no overall drop [in drug availability] since the mandatory minimums were implemented.” Additionally, there is scant evidence that mandatory minimum sentences hit the criminal leaders and organizers most responsible for trafficking in our communities. **In 1992**, “[o]nly 5% of the offenders convicted under the [federal] mandatory minimum statutes . . . were organizers or leaders of an extensive drug operation. Over 85% did not manage or supervise trafficking activity.” By 2016, after various changes to thresholds triggering federal mandatory minimums, a mere **11.7 percent** of offenders sentenced to federal mandatory terms played a leadership role in a criminal organization. That means that the overwhelming majority of those affected by mandatory prison terms are low-level offenders who are easily replaced in drug rings and other criminal gangs and syndicates.

Unfortunately, drug-related mandatory minimum sentences too often just affect those suffering from addiction. And when those who are preying on our communities come before the court, we should trust that our prosecutors will prosecute them to the fullest and our judges will impose appropriate sentences.

## Retroactivity

Senate Bill 3 does not currently contain a retroactivity provision, but one has been informally discussed. Ohio could make its criminal justice and sentencing reforms retroactive, following the federal model adopted in last year's bipartisan **First Step Act**. Unfortunately, the plea bargain system complicates any effort to make reforms automatically retroactive. In Ohio, approximately 97 percent of criminal cases are resolved through plea bargains, which means that many people who were likely guilty of drug trafficking pleaded down to drug possession. The First Step Act accounts for this reality by allowing people to petition the court for retroactivity. Judges then have discretion to grant or deny the request according to the circumstances of each case.

Ohio would not be the only state to pursue such a course. Last November, **Florida passed a constitutional amendment** that allows criminal justice reforms to be retroactive. And Oklahoma's

governor just **signed a bill** making reclassification of drug possession crimes retroactive. When the bill takes effect, Oklahoma expects to release between 500 and 800 people from prison, and up to 60,000 people will be eligible to have prior offenses reclassified.

### **Drug-Free School Zones**

Senate Bill 3 retains Ohio's so-called drug-free school zone laws that enhance penalties for drug trafficking on school property or within one thousand feet of school property. Ohio law makes such trafficking a strict liability offense, that is, a person is guilty "regardless of whether the offender knows the offense is being committed..." in the prohibited area.

Such a policy can disproportionately affect urban areas—where there are more schools per square mile—without really reducing trafficking to minors. Although drug pushers who target children should be punished more harshly, a **review of drug-free school zone convictions** in two Massachusetts cities that included 80 percent of all trafficking cases found that only one of the 450 drug-free school zone convictions included dealing drugs to a minor. By changing the drug-free school zone enhancement from a strict liability offense to a specific intent offense, Ohio could protect its children without unduly punishing the unwary.

### **Trace Amounts and Probable Cause**

Senate Bill 3 would decriminalize miniscule or trace amounts of illegal drugs. Some have argued that decriminalizing trace amounts may inadvertently prevent the use of drug-sniffing dogs. Drug-sniffing dogs alert to trace amounts of narcotics the same way they alert officers to large quantities. The dog—and thus law enforcement officers—do not immediately know whether the dog has detected a large or trace amount of an illegal substance. Thus, the argument goes, the dog could alert officers to something—the trace amount—that is not in fact illegal, which would then negate any probable cause for conducting a search and seizure. Probable cause is the legal standard that allows law enforcement to conduct a search based upon "a belief reasonably arising out of circumstances known to the seizing officer..." Because the drug-sniffing dog does not distinguish between trace and large amounts of illicit narcotics, officers could *reasonably* believe that any alert given by the dog indicates the presence of an illegal quantity of drugs. In cases in which only trace amounts are found, drug charges presumably would not be brought—but those cases should not be the tail that wags the dog.

### **Conclusion**

Ohio stands among the nation's leaders in looking for commonsense policies that will keep our neighborhoods safe while ensuring that non-violent offenders do not overrun our prisons or our courts. Your willingness to address the important but nettlesome issues of sentencing and criminal justice reform has not gone unnoticed. The Buckeye Institute applauds your efforts and stands ready to help at your request.

I am happy to answer any questions that you may have at this time.

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