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Criminal Justice

Sentencing reform through a stronger SB 3

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Introduction

Ohio spends more than \$1.8 billion a year to keep nearly 50,000 people in prison. We lock up a larger share of our neighbors than all but 13 other states and only two states have a higher share of people on probation.¹ Many people in our corrections system struggle with substance-use disorder and, sometimes drug possession is their only crime. Yet we have the nation's second-highest overdose rate and 5,111 Ohioans died of drug overdoses in 2017.² Focusing on punishment rather than treatment spends too much of our budget on a system that incarcerates too many Ohioans, leaves prisons overcrowded and unsafe for inmates and guards, and damages communities across the state.

Senate Bill 3, under consideration in the Ohio Senate, seeks to provide addiction treatment instead of incarceration to Ohioans charged with possession of certain drugs. As introduced, SB 3 would reclassify some low-level drug offenses from felonies to misdemeanors. This is an important reform for Ohio.

This analysis finds that, as introduced, SB 3 would provide treatment for some Ohioans who would otherwise face time in prison. Exceptions in the bill, however, would exclude many Ohioans who could benefit.

Because of these exceptions, SB 3 would continue to allow incarceration for:

- Possession of small amounts of drugs that include fentanyl;³
- Possession of five substances that can be used to incapacitate a victim before a sexual assault;⁴
- Low-level drug possession for those found to possess drugs two or more times in the three previous years;
- A second conviction for possession of marijuana;
- Cases that include a threat of violence.

SB 3 would continue to give local courts wide discretion on sentencing, allowing judges to still send people to prison in many cases. This goes against national research that suggests that meaningful sentencing reform must include more direct policy guidance and rules for local courts.⁵ Without that, experts warn that legislation will still keep the prison population high, will not bring down costs related to over-incarceration, and will do too little to reduce addiction and help communities.

Removing these exceptions would allow treatment for more Ohioans, an approach that is more effective than locking people up,⁶ and will do more to heal our communities.

¹ See state-level data from the Sentencing Project at <https://bit.ly/2Gnt3ss>.

² See state-level data from the Centers for Disease Control and Prevention at <https://bit.ly/2aowvy2C>.

³ Senate Bill 1, signed into law by Gov. John Kasich in 2018, sets penalties for possession of fentanyl or fentanyl-laced drugs. This will likely send more Ohioans to prison for drug possession, and result in longer sentences for many, even as SB 3, in its current form, seeks to reduce sentencing for low-level drug possession. This is particularly relevant because many drug dealers seek to boost profits by mixing fentanyl, which is cheaper and more potent, into other drugs. See for example: National Institute on Drug Abuse: <https://bit.ly/2UC9n9f>.

⁴ Although SB 3 lists five drugs as “sexual assault-enabling drugs” and these get media attention, alcohol is the most common substance associated with sexual assault. See: Anderson, L.J., Flynn, A., and Pilgrim J.L. “A global epidemiological perspective on the toxicology of drug-facilitated sexual assault: A systematic review,” *Journal of Forensic and Legal Medicine*, 2017 <https://bit.ly/2GC8qdy>. Also see LeBeau, M., et al., Recommendations for Toxicological Investigations of Drug Facilitated Sexual Assaults,” *Journal of Forensic Sciences*, 1999, which notes that “of the 22 substances used in drug-facilitated rapes, alcohol is the most common,” referenced from <https://sapac.umich.edu/article/196>. “Corrupting another with drugs” and “Attempted corrupting another with drugs” are currently felonies and will remain felonies in Ohio.

⁵ See “Reclassified: State Drug Law Reforms to Reduce Felony Convictions and Increase Second Chances,” by the Urban Institute, October 2018 at urban.org/research/publication/reclassified.

⁶ See: “Is providing drug abuse treatment to offenders worth the financial investment?” from “Principles of Drug Abuse Treatment for Criminal Justice Populations - A Research-Based Guide,” the National Institute on Drug Abuse at <https://bit.ly/2lpMqEM>.

Another bill moving through the Ohio Senate, SB 55, would increase penalties for drug trafficking near addiction-service providers, putting it at cross-purposes with SB 3's stated goal of redirecting those with addiction from prison to treatment. While the bill's intent to target drug dealers preying on people attempting to overcome drug addiction may seem sensible, the reality of people's lives may be less clear-cut, as drug users often sell drugs themselves, and those recovering from addiction often still use illegal drugs. Further, using proximity presents a bias against people in urban communities, which are built more densely. In a city or inner-ring suburb, a person is more likely to be near a treatment center without knowing it.

Strengthening SB 3

More broadly, the proposed legislation does not address Ohio's punitive approach to drug use. This is at the root of the huge increase in our prison population, which has more than tripled since 1980. Because it does not focus on reducing our state's prison population, SB 3 would redirect less public money to treatment, prisons are likely to remain overcrowded and unsafe, and Ohio communities will likely continue to feel the devastating impact of over-incarceration.

In a February letter to Senate leadership, Policy Matters Ohio outlined the key principles for meaningful reform, which we refer to as the "Five Rs."⁷ In addition to the first R, reclassifying low-level drug possession for as many Ohioans as possible, these principles recommend that Ohio:

- **Retroactively apply** reclassification to include communities over-targeted by past drug prosecution. This would allow Ohioans previously incarcerated for possession to be resentenced or released to community programs. It would also benefit people with low-level felony convictions who did not serve prison sentences but continue to be held back by their records, especially those facing barriers to work from one of Ohio's more than 500 drug-related collateral sanctions. For people who have already completed sentences, retroactivity would provide opportunities to change past possession felonies to misdemeanors. This would address racial disparities in the system, because past drug wars disproportionately targeted African Americans.⁸
- **Reform the probation-to-prison pipeline** for Ohioans who violate probation in ways that are not crimes. This could divert nearly a quarter of those who enter our state's prison system each year. Incarcerating people for minor probation violations does not improve public safety but significantly contributes to prison overcrowding. SB 3 includes alternatives to incarceration for technical probation violations, but still allows incarceration; it also gives wide discretion to local courts, which can often result in more incarceration.
- **Reduce sentences** for offenders who participate in education, behavioral and treatment programming while in prison. This would allow Ohioans to earn the opportunity to leave prison sooner and better prepared to become productive members of their communities. SB 3 contains no provisions for earned-time credit.
- **Reemploy Ohioans** by modifying or eliminating statutes and administrative rules that erect major hurdles to job attainment for Ohioans who have served their time. When people with records are blocked from jobs, they struggle to support themselves, leaving them more vulnerable to recidivism. Provisions in SB 3 do allow sealing of

⁷ See "Policy Matters recommends principles for criminal justice reform" at <https://bit.ly/2UOiPqa>.

⁸ As an example of an approach to retroactive application that has been accepted nationally, the First Step Act, signed into law by President Donald Trump in December 2018, will apply the Fair Sentencing Act to 3,000 people who were convicted of crack offenses before the law went into effect. See <https://bit.ly/2XjhXfl>.

records for low-level drug offenses newly reclassified from felony to misdemeanor, both in the future and retroactively. By reclassifying 5th-degree felony drug-possession charges as misdemeanors, SB 3 would lift nearly 300 collateral sanctions from affected Ohioans.⁹

SB 3 makes some progress on technical violations of probation and record sealing, but for the most part the bill stops short of the principles outlined here. Most importantly, it contains too many exceptions to reclassification and does not reclassify low-level drug offenses retroactively, and therefore does not provide new opportunities for currently and previously incarcerated Ohioans who would benefit from reclassification.

Retroactivity would change the sentences of those currently incarcerated for low-level drug offenses, potentially allowing earlier release, and would open new job prospects for low-level drug users with past criminal convictions. If SB 3 fails to apply reclassification retroactively, Ohioans facing collateral sanctions will be treated differently because their convictions came under stricter law. Finally, the criminal justice system has disproportionately targeted drug use by people of color; retroactivity would be a step toward fairness.¹⁰

SB 3's projected impact

The sponsors of SB 3 have said their goal is not to reduce prison population, but to provide treatment rather than incarceration. This is an important goal, but it is not the only reform needed. It is hard to estimate how many Ohioans SB 3 would benefit in its current form. Exceptions in the bill make it hard to find data to predict sentencing. Sentencing enhancements and mandatory minimums either in SB 3 as introduced or in other proposals would increase sentencing and incarceration, working against potential progress from this bill.

In 2018, Policy Matters analyzed a proposed constitutional amendment to reduce incarceration in Ohio and free up funds for addiction treatment. Our analysis suggested that reclassifying low-level drug offenses from felonies to misdemeanors could reduce Ohio's prison population by 2,688.¹¹ Exceptions in SB 3 mean it will help fewer Ohioans, particularly given that many drug dealers are seeking to increase profits by mixing fentanyl, which is cheaper and more potent, into other street drugs.¹² This means drug users may unknowingly possess fentanyl, under the assumption that they have purchased a different drug.

For our 2018 report, Policy Matters calculated Ohio prison system costs of \$59.95 per inmate per day or \$21,882 per year. This consists mainly of staff costs and does not include fixed costs such as facilities; it represents savings that would be realized as the prison population is reduced significantly, but assumes no facility closure given that the state's prisons are filled beyond capacity.

We estimate that more fundamental reform would reduce prison population by more than 2,600 for reclassification, by more than 4,000 for probation reform, by more than 3,600 by enabling early release, for a total of more than 10,000 inmates. The savings from all of these elements would total more than \$225 million. In contrast, SB 3 as introduced might save some

⁹ See "Breaking Barriers: Issue 1 would put Ohioans back to work" at <https://bit.ly/2Sw5jb6>.

¹⁰ The Urban Institute's Reclassified report notes that despite using illegal drugs at similar rates to white people, black people are arrested for drug offenses three to four times more often, leading to significant racial disparities. The report also notes that in 2010, 25 percent of black people had a current or prior felony conviction (compared with just 6 percent of the rest of the population). See "Reclassified: State Drug Law Reforms to Reduce Felony Convictions in Increase Second Chances," by the Urban Institute, October 2018 at <https://urban.is/2DiYjEX>.

¹¹ See Policy Matters report "Issue 1: Reducing incarceration, improving communities," at <https://bit.ly/2VPYRNL>.

¹² See for example National Institute on Drug Abuse: www.drugabuse.gov/publications/drugfacts/fentanyl/.



\$33 million. We could not replicate this estimate, but bill sponsors provided that number to a Columbus Dispatch reporter. The table below shows potential savings for the relevant principles outlined by Policy Matters (the Five Rs).

Table 1				
Projected impact of sentencing reform				
	Senate Bill 3 as introduced		Policy Matters proposal	
Ohioans diverted from prison by reclassifying low-level drug offenses	1,500*	\$32.8 million	2,688**	\$58.8 million
Probationers avoiding reincarceration for technical violations	0	-	4,019	\$87.9 million
Currently incarcerated adults enabled to earn early release.	0	-	3,628	\$79.4 million
Projected incarceration reduction and savings to prison system	1,500	\$32.8 million	10,335	\$226.1 million

Source: *A 3/6/19 Columbus Dispatch article cited an estimate that 1,500- 2,000 people could be diverted from prison because of SB 3; in an April 1 email, the author said his source had been the bill's sponsors. See article at <https://bit.ly/2KQ84UK>. A legislative aide to SB 3 sponsor Sen. John Eklund said the office was not able to provide an estimate (phone conversation, 4/16/19) Sen. Eklund said publicly that the goal is to help Ohioans who need addiction treatment, not to reduce prison population. (Panel discussion, City Club of Cleveland, 4/12/19)

**Retroactive application would likely increase this number, but it is unclear how many would petition to have their sentences reclassified, therefore retroactivity is not factored into this projection.

Drug courts

In some Ohio counties, people can be sent to drug court as a way to get them into treatment instead of prison. These courts have been found to reduce recidivism and reduce costs when well executed.¹³ Drug courts will remain an option under SB 3.

Drug courts are, however, insufficient as a way of increasing treatment or reducing incarceration for a variety of reasons. Participants, for example, can receive treatment only if they are arrested and they sometimes still face collateral consequences from those arrests, like barriers to housing and jobs.¹⁴ In its current form, SB 3 does not specifically include reclassification for Ohioans who accept treatment in lieu of conviction, leaving them subject to collateral sanctions that those with convictions newly classified as misdemeanors would not face. If left unaddressed, this will mean that Ohioans could be penalized for accepting treatment. Furthermore, these courts are not widely available. In Ohio, where 5,111 people died of drug overdoses in 2017, at least 30 counties do not have drug courts, and the courts that do exist are available to only a small number of participants – nowhere near the number who need treatment instead of incarceration. The counties offering the most opportunities serve far fewer than 200 participants a year.¹⁵

Finally, studies find enormous racial disparities in who is sent to drug courts.¹⁶ The Cleveland Plain Dealer examined hundreds of low-level drug prosecutions and found that 72 percent of white defendants were given an option of drug court, compared to just 53 percent of black

¹³ See “Ohio Drug Court Evaluation” at publicsafety.ohio.gov/links/ocjs_OhioDrugCourtEvaluation.pdf.

¹⁴ See “Do Drug Courts Work? Findings from Drug Court Research,” by the National Institute of Justice, modified May 1, 2018, and retrieved April 10, 2019 at nij.gov/topics/courts/drug-courts/pages/work.aspx.

¹⁵ See Ohio Department of Administrative Services interactive map at <https://bit.ly/2B6ZYIL>.

¹⁶ See “Drug Courts in the Americas” by the Social Science Research Council, October 2018, at ssrc.org/publications/view/drug-courts-in-the-americas/. Also “Understanding and Responding to Racial Differences in Drug Court Outcomes,” by Dannerback, A., Harris G., Sundet P., and Lloyd K., the Journal of Ethnicity in Substance Abuse, Vol. 5(2) 2006, haworthpress.com/web/JESA.

defendants. Black defendants were 66 percent more likely to be saddled with a felony.¹⁷ They were 72 percent more likely to be rejected from the Early Intervention Program that is one of two main pathways into drug court.¹⁸ Nevertheless, SB 3 would allow these local courts to continue working with Ohioans charged with low-level drug offenses.

Broader reform allows greater impact

A March 2019 report found that previous sentencing reform in Ohio may have helped slow growth in prison population but has not substantially reduced it. The disappointing results stem at least in part from the broad discretion given to local courts to interpret and implement new laws, according to the report, which also cited the need for stronger limits on incarceration for technical violations of probation.¹⁹

Unfortunately, SB 3 as written gives wide discretion to local courts in two key areas: sentencing for low-level drug possession and incarceration for technical probation violations.

An October 2018 Urban Institute study shows that drug-law reforms in five states have reduced prison populations and yielded significant savings.²⁰ While these changes vary from state to state, the reforms in these five states share three important policy details:

- Drug possession is a misdemeanor (up to at least the third conviction);
- Those convicted of possession are ineligible to serve time in prison (up to at least the third conviction);
- Weight limits for amounts of drugs are not specified, and possession is a misdemeanor for virtually all controlled substances.

The broad nature of the reforms in these five states, designed to reach as many low-level drug offenders as possible, has led to significant reductions in prison population, provided more opportunities for treatment, and reduced the harm to communities from incarceration.

California's Proposition 47, for example, approved by voters in 2014, reclassified drug possession from a felony to a misdemeanor for any quantity of any drug and prohibits prison sentences for all convictions except for individuals with certain criminal histories. According to the Urban Institute report, the new law reduced the prison population by 15,000 and saved state and local governments \$350 million.²¹

Oklahoma implemented a similar reclassification after voters approved State Question 780 in 2016. State experts estimated that since sentencing reforms took effect in July 2017, felony filings fell nearly 29 percent and Oklahoma's crime rate dropped slightly.²² A similarly broad new law in Utah resulted in a drop of 74 percent in new court commitments to prison for drug possession in fiscal year 2017, compared to fiscal year 2014, before the law was passed. The Utah reform also narrowed the reach of drug-free zones from 1,000 feet to 100 feet and created earned-time credits for participation in risk-reduction programming.²³

The exceptions written into Ohio's SB 3 make it much narrower than the laws in the states studied by the Urban Institute; as a result, the bill would reach fewer Ohioans who would

¹⁷ "If you're arrested for drugs, you're more likely to get a second chance if you're white," by Plain Dealer staff, updated Feb 2016 at <https://bit.ly/2XFcQ9j>.

¹⁸ "If you're arrested for drugs, you're more likely to get a second chance if you're white," by Plain Dealer staff, updated Feb 2016 at <https://bit.ly/2XFcQ9j>.

¹⁹ See "Building on Ohio's sentencing changes to keep prison populations in check" by the Alliance for Safety and Justice, Americans for Prosperity - Ohio, and the Buckeye Institute, at <https://bit.ly/2FIJkcx>.

²⁰ See "Reclassified: State Drug Law Reforms to Reduce Felony Convictions in Increase Second Chances," by the Urban Institute, October 2018. urban.org/research/publication/reclassified.

²¹ Ibid.

²² See "Oklahoma shows Issue 1's promise," published by Policy Matters Ohio in October 2018 at <https://bit.ly/2Q2DBB6>.

²³ See "Reclassified: State Drug Law Reforms to Reduce Felony Convictions in Increase Second Chances," by the Urban Institute, October 2018. urban.org/research/publication/reclassified, which describes Utah's sentencing reform legislation.

benefit from being sent to treatment instead of prison and would do little to decrease our state's prison population. Because SB 3 does not include retroactive reclassification, the proposed law would also do less to reduce the impact of past incarceration on Ohio's communities, particularly communities of color, who have borne the brunt of previous iterations of the drug war.

Research suggests there is no causal relationship between higher rates of incarceration and lower crime rates. A 2015 study examined incarceration and crime over a five-year period and found that 30 states reduced both rates at the same time.²⁴ This makes clear that locking people up for drug possession, rather than substantially expanding treatment, does not lead to greater public safety.

Conclusion

Ohio spends more than \$1.8 billion a year to keep nearly 50,000 people in prison. We lock up a larger share of our neighbors than all but 13 other states and only two states have a higher share of people on probation. Many Ohioans in our state's corrections system are drug users who have committed no other crime. Yet Ohio has the nation's second highest drug overdose death rate.

SB 3 takes on an important challenge – that too many Ohioans who struggle with addiction are sent to prison instead of treatment when they are found to possess small quantities of drugs. The sponsors should be applauded for taking this on.

Our review finds that the reforms in SB 3 would not reach many Ohioans who could benefit from addiction treatment and would not have a significant impact on Ohio's prison population.

We therefore recommend a broader approach that eliminates some of the exceptions in SB 3 and incorporates key initiatives. In addition to reclassifying low-level drug possession for as many Ohioans as possible, we recommend that lawmakers:

- Retroactively apply reclassification;
- Reform the probation-to-prison pipeline;
- Reduce sentences for those who earn it; and,
- Reemploy formerly incarcerated Ohioans who encounter barriers to job attainment.

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²⁴ "Imprisonment and Crime Rates Fell in 30 States Over 5 Years," Pew Charitable Trusts, 2015, at <https://bit.ly/2XdORxw>.