

February 1, 2019

House Committee on Judiciary

Testimony Notes on  
H.103 (2019) Drug Possession  
Vermonters for Criminal Justice Reform  
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In general, we strongly support H.103 because it helps de-felonize possession of drugs and reduce prison sentences for drug possession. Underlying the proposed changes, there seems to be a policy decision that we should not encumber someone with a felony for drug possession but the penalty for selling drugs should be a felony conviction.

I have come to believe that we would be better off de-criminalizing all drug possession and that penalties for drug selling should be much, much lower (generally less than 2 years of incarceration). Our drug laws come with a high price tag and have made no impact on the universal availability of drugs, even inside maximum-security prisons. We will lose very little by moderating these harsh and ineffective laws. By limiting the multi-generational harm these laws inflict on families, and by shifting resources toward prevention and treatment, we have much to gain.

A policy framework under which possession = misdemeanor and selling = felony would itself constitute significant progress. But within that framework I would ask: Should we continue to take the extraordinary step of using government power to take away an individual citizen's right to be free, and forcibly imprison them without actual proof beyond a reasonable doubt that they actually sold drugs?

In general, we expect that to be convicted of a crime, the state must present proof of guilt beyond a reasonable doubt. But that's not how it is with drug crimes. Our laws often use mere possession of certain drug amounts as proof that you are deserving of the punishment for actually selling the drug. And it's worse than that. On top of convicting and punishing for drug selling based on mere possession, our laws don't even require that prosecutors prove the amount of the drug actually possessed. Instead, we allow them to weigh the whole drug mixture and punish for

rapidly increasing decades based on the weight of mostly inert materials that contain an unknown amount of the actual drug (with heroin, they don't even actually remove the drug from the packaging but instead get the weight by multiplying the weight of an average bag in Vermont by the number of bags). This is a lot of estimating when the appropriate standard is proof beyond a reasonable doubt and penalties jump by decades based on weight categories.

Interestingly, this state of affairs was recognized as unfair and untenable under the marijuana provisions, which don't allow marijuana-infused products to be weighed in total, but instead require that "only the portion of a marijuana-infused product that is attributable to marijuana shall count toward the possession limits of this section." I ask myself why this issue was recognized in the context of marijuana but not in the context of heroin where the potential harm from miscalculation is so much greater, and I can only conclude that the answer relates to the relative stigma attached to marijuana consumers and people with opioid use disorder.

Another example: Merely transporting heroin into Vermont with the intent to "sell or dispense" triggers an extra 10 years of potential incarceration, even with zero evidence of an actual drug sale (or even an actual intent to sell, since the intent could have been merely to share the heroin with a friend or partner!). I suspect this provision reflects an inaccurate belief that crossing a state border is indicative of high-level drug selling, but many Vermont heroin users cross Vermont borders in acquiring heroin for personal use. I am concerned that this provision also reflects a problematic fear of outsiders, especially black men from urban areas. In any case, we should stop and think about the fact that by opting to retain this provision we would be saying that it is okay to incarcerate a human being for a decade with no proof that they actually sold or even intended to sell a drug.

How did we get here? We got here because as a society we successfully demonized people who use drugs and sell drugs to the point that many reasonable policy makers and members of the public now have trouble recognizing that convicting someone who possesses drugs for selling drugs, and incarcerating them for years, without actually proving that they sold drugs is inconsistent with our values. We should not ignore the racism that is often part of this process of marginalization and demonization. Here in Vermont, there are often strong racial overtones to discussions about "out of state drug dealers."

Should “intent to sell” be a crime? I don’t think so. If the intent is to punish people for selling drugs, then we should require prosecutors to prove that they actually sold drugs. I don’t think we should allow our legal system to take shortcuts by simply proving possession, intent or crossing of state lines. None of these actually proves that a person actually sold drugs. And we should not punish people as if they actually sold drugs, unless we actually prove they sold drugs – no matter how mad we are at them, how afraid we are of them or how much trouble we have recognizing their full citizenship and humanity.

Use of an intent to sell standard is a step in the right direction, but I would urge us to go much further. I would urge the standard to be proof of actual drug selling, but at a minimum we should require proof of attempted drug selling. Compare standards: Possession vs. intent to sell vs. intent plus preparation to sell vs. intent plus an overt act (attempted selling) vs. an actual sale.

We are currently subjecting defendants to potential penalties that rival the penalties for the worst violent crimes for what is often actually just simple drug possession, when you get right down to it.

This bill would still permit a very long prison sentence of 5 years merely for intending to sell, even if you never took any action to actually sell anything. I have intended to lose 10 pounds for years, but I haven’t actually done it! Intentions are meager things. They are often unrealistic and they are often never actually realized. It should take more than possession + intent to trigger a felony punishable by up to 5 years in prison.

**Proposed changes to the bill as introduced for the committee to consider:**

- Limit drug possession punishments to 1 year in all cases.
- Require actual proof of selling to impose a felony. If proof of intent to sell is used as the standard instead of proof of sale, reduce penalties to punish appropriately for intent only, and not for selling (18 months or less).
- Require accurate weighing of drug amounts.
- Match potential sentences under statute to the actual sentences imposed by judges to avoid inappropriate coercion of defendants to plead guilty in exchange for a plea deal.

- Match drug amounts under the statute to actual personal use/low level selling amounts vs. high-level trafficking/king pin amounts to avoid treating individuals who are possessing for personal use or selling at a low level as if they are drug traffickers or drug king pins.
- Include a provision recognizing the unique benefits of non-prescribed buprenorphine by protecting people from criminal prosecution for possession of buprenorphine without a prescription. Non-prescribed buprenorphine is commonly purchased in the illicit drug market by people with opioid use disorder who are attempting to avoid using heroin/fentanyl and are trying to limit overdose risk, a choice we should support. Use of non-prescribed buprenorphine is a common pathway to drug treatment and recovery, and we should facilitate transitions from non-prescribed buprenorphine to low barrier prescribed buprenorphine.
- Eliminate the extra 10-year penalty for crossing state lines while transporting heroin into Vermont (it is racist and xenophobic and unfairly traps the many Vermonters who live near borders). In the alternative, reduce the penalty for transporting across state lines to 1 year or less.
- Eliminate punishment for delivery. People who sell drugs charge money. Delivery is a problematic construct because it either permits punishment for drug selling without proof of economic activity, or it improperly targets low level drug users who share drugs with a partner or a friend and punishes them as if they are engaged in drug selling for economic gain.
- Eliminate drug trafficking as a separate crime under Vermont law and rely on prosecution for drug selling. In the alternative, redefine drug trafficking under Vermont law to match the common understanding of the term trafficking: selling drugs in large quantities as a high-level participant in a large multi-state and multi-national criminal organization associated with significant acts of violence.

Currently, drug trafficking under state law simply means possessing drugs in even moderately large quantities with the intent to “sell or dispense.” The potential penalty of 30 years in prison is wildly excessive for anyone but perhaps a top leader in a large multi-state and multi-national criminal organization associated with significant violence who actually sold very large quantities of drugs as evidenced by proof beyond a reasonable doubt.

Currently, the 30-year penalty also applies to a homeless, opioid-dependent 18 year old with major mental health issues who possessed 3.5 grams of a mix containing an unknown

amount of heroin, which he intended to share with his partner because he does not want her to have direct contact with the risks of the illicit drug market. This is true even though the 3.5 grams of heroin would only last the pair a couple of days. This is true even though he never actually shared the drugs with anyone or sold the drugs to anyone.

The Illinois Good Samaritan law provides immunity for possession of “small amounts” of drugs of any kind, which they define as 3 grams or less of heroin or cocaine. And LEAD, the Law Enforcement Assisted Diversion Program in Seattle, uses a threshold possession amount of 3 grams or less of any substance to determine eligibility for diversion. Yet under Vermont’s current trafficking law, a person who did not actually intend to sell drugs is subject to a sentence of 30 years simply for possessing (with the intent to share with a friend or partner) just .5 grams more of heroin than would be eligible for diversion by law enforcement in Seattle or immunity in Illinois. The potential penalty jumps to 40 years in Vermont if the unfortunate citizen happened to cross the state border on the way home from buying the heroin.

Treatment referral data collected from Vermonters who use heroin showed that the average bags used per day was 15, the median bags used per day was 10, the range used per day was 1 – 150. Many said they use 30 – 70 bags per day. With about 45 bags per gram, 3.5 grams is 159 bags. This is about a 3-day supply for someone who uses 50 bags per day, or less than a 2-day supply for a couple who uses 50 bags per day each.

I asked several people with lived experience about amounts they had possessed for personal use, and what amount would indicate to them that someone was selling.

Person 1 said someone might commonly have 100-200 bags in possession for personal use and felt that over 1,000 bags would indicate a seller to him.

Person 2 had bought up to 280 bags at a time for personal use and felt over 500 bags would indicate a seller to him.

Person 3 said he had sometimes bought 1,000 to 2,000 bags at a time for personal use and felt that over 2,000 bags would indicate a seller to him (he also said several friends had done the same and had not been willing to sell any to him indicating it was for personal use).

Person 4 said that she had often had 100 bags at a time for personal use but would have had more if she could have gotten the money together because she did not want to have to look for

drugs every day and was afraid of running out and being in withdrawal. She did not have a strong sense of what amount would indicate a person who is selling.

All four indicated that this issue is complicated because there is a lot of variation among users. They said that someone possessing 1 bag might be looking to sell it while someone possessing 2,000 bags might refuse to sell any. One said that he thought police should not look at amounts but at whether selling is actually happening.

That is exactly what Portugal does. Portugal decriminalized drug use including opioid use, but not drug sales. They base their threshold on the amount an average user is likely to use in a 10-day period. It is legal to possess up to this amount. Amounts in excess of this threshold are considered indicative of selling and triggers a police investigation into whether selling was actually taking place.

When we talk about people who sell drugs, it's easy to make laws directed at the media image of a "pusher," "dealer" and "trafficker" who may be violent and involved in gun trafficking and sex trafficking. It's appealing to want to lock those people up without having to actually prove that they are selling drugs, guns or humans. But those same laws commonly ensnare people struggling with substance use disorders who sell in small amounts within a circle of acquaintances and are completely non-violent. These are people who may have an intent to sell, but this often looks more like collecting from friends who have pooled resources to buy drugs at a cheaper price by having one person or a couple make a trip to the city. They don't have scales, ledgers or stacks of cash. But they often do have a friend with pending charges that is willing to provide evidence of intent to sell in exchange for a lighter sentence. Our criminal definitions, standards of proof and penalties in our drug crimes should reflect the same respect for the rule of law and our civil rights as for other crimes. The "anything goes" excesses of the war on drugs have warped our approach to charging and proving drug selling and should be remedied.

Unnecessary incarceration is expensive --up to \$200 per day and often over \$70,000 per person, per year in Vermont. This is triple our annual per pupil spending on education! Incarceration has many life-long consequences for individuals, children and families and should only be used when absolutely necessary.