

Joint Hearing of Illinois Senate Criminal Law Committee and Senate Special Committee on Public Safety

Subject Matter On; Violence Reduction & Sentencing Reform in the following areas: 1) removing economic bases for driver's license suspensions; 2) reclassifying misdemeanor offenses to civil offenses; 3) drug penalty reform; and 4) elderly parole.

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Drug Penalty Reform Testimony
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Introduction

Good afternoon, my name is Ben Ruddell. I'm the Director of Criminal Justice Policy at the ACLU of Illinois. Thank you Chairman Sims, Chairman Peters, Chairman Slaughter, and all the members in attendance for the opportunity to testify before you today.

The ACLU opposes the criminal prohibition of drugs, which has failed as a drug control strategy and has inflicted serious harm upon individuals and communities across Illinois. In particular, we can no longer ignore the stark reality that the War on Drugs has deepened racial oppression and inequality. Demand for drugs has existed throughout human history, but prohibition has only pushed the drug economy underground and empowered organized crime, while sacrificing our ability to regulate substances in ways that protect the health and safety of consumers. Illinois needs to shift away from criminalization, and embrace a public health and harm reduction approach to drug use and possession. Our recommendations for reform are as follows:

1. The Illinois General Assembly should pass legislation reforming drug sentences:
 - a. Reduce the sentence classification for all drug possession and distribution crimes by at least one class, as recommended by the bipartisan Commission on Criminal Justice and Sentencing Reform.
 - b. Reclassify simple possession from a felony to a Class A misdemeanor (as 20 other states and the federal government have already done).
 - c. Eliminate mandatory minimums and sentencing enhancements based on prior criminal history for drug offenses.
2. Law enforcement agencies should fully implement pre-arrest ("deflection") of people who need treatment to health services providers in lieu of arrest, and prosecutors should maximize their use of diversion programs that connect people with the care they need while providing an "off ramp" from the criminal legal system.
3. Illinois should strengthen its system for community-based treatment of behavioral health disorders, including wider usage of proven medications like methadone and buprenorphine and the use of wrap-around models that include outreach, case management and treatment.
4. Eliminate the disparities in treatment access that leave Illinois' Black and Brown communities underserved.

5. Embrace life-saving harm reduction strategies, including distribution of naloxone and drug-testing kits, needle exchange, and supervised consumption sites.

The resources currently squandered on drug enforcement, arrests, and incarceration should be reinvested to provide access to community-based treatment for substance use disorders and mental health conditions in every part of the State. At the same time, we must take a decisive step away from sentencing policies adopted during the so-called War on Drugs, and right-size penalties for all drug offenses. Our current drug statutes are overly punitive, place too much power in the hands of prosecutors to overcharge cases and extract pleas, and leave judges with too little flexibility to craft just sentences.

- I. Brief overview of Illinois drug penalties

Under Illinois law, drug offenses mainly break down into four offense types: Possession, Possession with the intent to deliver, Manufacture or delivery, and Trafficking. In addition to the specific type of offense, sentences are based on two variables: the type of drug, and the amount. For every Illinois drug offense, there are statutorily created minimum and maximum sentences. These minimums and maximums escalate when the quantity of a drug exceeds thresholds set by statute. Many drug offenses are non-probationable, meaning the judge does not have the option of sentencing the person to probation, but must sentence them to a mandatory minimum prison term.

Penalties for “possession with intent to deliver” a controlled substance are equivalent to those for manufacturing or selling drugs. These laws against drug selling are so broadly written that it is easy for people caught with drugs for personal use to be charged as sellers. The overlapping nature of these laws means that police and prosecutors decide who is drug user and who is a drug distributor in the eyes of the criminal justice system. They also have the power to determine who the system will treat as a minor player in the drug economy vs. a high-level conspirator.

Illinois law also provides various penalty enhancements that can add years to a person’s sentence based on their past criminal history or other factors. Some of these enhancements can double or even triple the base sentence.

Finally, some higher-level drug offenses are subject to truth in sentencing laws which restrict an incarcerated person’s ability to reduce the length of their stay in prison by following rules and participating in programs.

- II. Harsh drug penalties are both ineffective and harmful.

The premise for enacting harsh, punitive drug laws was that they would reduce the supply of drugs, and in turn, consumption. In reality, the opposite has occurred: Today, after decades of fighting the War on Drugs, we have incarcerated tens of thousands of our fellow Illinoisans and burdened many more with felony records, yet drugs are more readily available than ever.

In 1980, Illinois’ prison population was 11,768. Today it stands at more than 30,000, despite a decades-long decline in the overall crime rate. Data shows that increased drug arrests by the police and the enactment of punitive sentencing policies for drug offenses were major drivers of the spike in incarceration.

While drug use is a reality in all communities, Illinois residents of color are much more likely to be arrested and convicted of a drug offense. In 2018, 60% of those arrested for a drug crime in Illinois were Black. While Black Illinoisans make up 14.5% of the State's population, they make up 54.8% of the prison, and are imprisoned at 8.8 times the rate of whites—one of the worst disparities of any state. When we look specifically at who goes to prison for drug offenses, we see that those disparities are even worse: From 2016 through 2018, 69% of those admitted to IDOC for a controlled substance offense and 59% of those imprisoned for a cannabis offense were Black.

Over the past three decades, at least 1.5 million men and women have been convicted of felonies in Illinois. Even after they have satisfied their sentence, people with felony records face severe stigma as well as a broad range of restrictions on access to employment, housing, education, and other crucial resources, many of which last a lifetime. From 2016-2018 alone, about 20,000 people were convicted of felonies for small-scale drug possession in Illinois, and more than 7,500 of those people went to prison.

The criminal legal system is ill equipped to treat substance use disorder. Even well intentioned staff lack the training, support, and resources to respond to the specific treatment needs of people with substance use disorders. Among people in Illinois jails and prisons, it is estimated that only 17% of those in need of clinical treatment services actually receive those services during their incarceration. While these numbers are abysmal, they are consistent with national averages.

Jails and prisons are not treatment centers. Incarceration ultimately worsens the health of individuals. Incarcerated people who need substance use disorder treatment, including medication, should absolutely receive it—and too often they don't—but no one should ever be incarcerated just for the purpose of getting them into treatment. People with substance use disorders are more vulnerable to the psychological impact of imprisonment, as they are more likely to have traumatic histories. Overdose risk immediately following release is much higher due to reduced physical tolerance to opioids. Even up to a year after release, overdose risk can remain high due to trauma brought on by incarceration, employment and housing pressures, the inability to obtain need-based benefits, and stigma. The likelihood of a person returning from prison and dying from an opioid overdose is significantly higher—74 times higher for heroin and 40 times higher for opioid pills—than for the general population. A substance use disorder diagnosis is also predictive of suicide after release. Risk of suicide among the people returning from prison is 8 to 18 times higher than the non-convicted population.

Incarceration of an individual does not have a singular effect: it places stress on entire families and traumatizes children by taking their fathers and mothers out of the home. Women represent a relatively small but growing percentage of Illinois' incarcerated population. Incarcerated women are more likely to have been convicted of a low-level offense than their male counterparts, and are also more likely than men to have been convicted of drug crimes (30 percent vs. 18 percent). Of the approximately 2,500 women imprisoned in Illinois, about 80% are mothers, and approximately 65 percent of their children are minors. For every mother that is incarcerated, there are about another ten people (children, grandparents, community, etc.) who are directly impacted.

III. Why it makes sense to reduce penalties for people who sell drugs

Casting people who sell drugs as perpetrators and people who use drugs as victims is misguided because these two groups overlap. Many people who are criminalized for drug selling also use drugs. A Bureau of Justice Statistics report found that 70% of people incarcerated for drug trafficking in state prison

reported that they had used drugs in the month prior to their offense. Selling drugs is a way to fund one's own drug use, especially for people without regular employment. Some low-level actors in the supply chain are not even paid in money, but rather in drugs. A 2012 survey found that 43% of people who reported having sold drugs in the past year also reported that they met the criteria for a substance use disorder.

Most people who sell or distribute drugs do not make much money and have little knowledge of the distribution network as a whole--yet these individuals at the bottom of the supply chain are the most vulnerable to arrest. Data suggest that most people in prison for drug selling or distribution are not high-level suppliers and do not have a history of violent conduct. Current modes of drug enforcement also have a highly discriminatory impact on people of color, although studies show that white people are slightly more likely than either Black or Latinx people to report having sold drugs.

IV. The overdose crisis and the role of fentanyl

As you are all aware, Illinois and every other state are currently in the midst of a deadly overdose crisis—a crisis that has significantly worsened during the COVID-19 pandemic. In 2019 Illinois recorded more than 2,000 fatal overdoses, and by the end of 2020 the annual figure number could potentially exceed 3,000 deaths.

The rise in fatal overdoses has been attributed in part to the growing prevalence of fentanyl, a synthetic opioid with 30 to 40 times the potency of heroin, in the supply of heroin and other street drugs. Fentanyl and its analogues are attractive cutting agents, since their increased sedative potency can be perceived as strengthening a batch of heroin. Prohibition creates more incentive for producers and distributors to minimize costs and maximize profits, rather than ensure a safe product. Fentanyl is often imported from clandestine labs located outside the country, and is often added into heroin high up in the supply chain. By the time this supply makes it to the retail level, it may have been cut with even more adulterants, unbeknownst to people who use and sell it.

In response to the increase in overdoses associated with fentanyl, some policymakers have proposed increasing criminal penalties for fentanyl, even as they advocate for a more compassionate, public health-oriented approach to addiction generally. But doubling down on this failed approach would be a terrible mistake, mirroring missteps of the past like 1980's-era laws that treat crack much more harshly than powdered cocaine, or our current draconian methamphetamine laws which were passed during the panic around that drug in the 1990's.

Increasing penalties for fentanyl—or carving fentanyl out of much-needed reforms to drug penalties—creates the risk of compounding the overdose crisis by incentivizing the creation of chemically distinct and even more dangerous substances, and driving people away from health services and into more risky drug consumption activity to avoid detection and prosecution.

V. Our Recommendations for Reform

A. The Illinois General Assembly should pass legislation reforming drug sentences:

1. Reduce the sentence classification for all drug possession and distribution crimes by at least one class, as recommended by the bipartisan Commission on Criminal Justice and Sentencing Reform.

2. Reclassify simple possession from a felony to a Class A misdemeanor (as 20 other states and the federal government have already done).
 3. Eliminate mandatory minimums and sentencing enhancements based on prior criminal history for drug offenses.
- B. Law enforcement agencies should fully implement pre-arrest (“deflection”) of people who need treatment to health services providers in lieu of arrest, and prosecutors should maximize their use of diversion programs that connect people with the care they need while providing an “off ramp” from the criminal legal system.
 - C. Illinois should strengthen its system for community-based treatment of behavioral health disorders, including wider usage of proven medications like methadone and buprenorphine and the use of wrap-around models that include outreach, case management and treatment.
 - D. Eliminate the disparities in treatment access that leave Illinois’ Black and Brown communities underserved.
 - E. Embrace life-saving harm reduction strategies, including distribution of naloxone and drug-testing kits, needle exchange, and supervised consumption sites.

Thank you again for the opportunity to testify today. I’d be happy to answer any questions.