

Senate Bill 3 – Sub Bill summary – AS AMENDED 12/17/2019

Prepared by the Ohio Judicial Conference

Updated January 7, 2020

The Substitute Bill was accepted March 6, 2019, and per the sponsors, is intended to distinguish those who are more culpable, that is traffickers and dealers, from those considered less culpable (addicts and those in possession for personal use). **On June 27, 2019, the Senate Judiciary Committee accepted a series of amendments. The bill was again amended on December 11 and December 17, 2019. Those changes are noted in this document and identified by amendment number.**

The bill seeks to accomplish this by recategorizing drug offenses into four types:

- Aggravated trafficking (F1, F2)
- Major trafficking (F1, F2, F3)
- Trafficking (F3, F4, F5)
- Possession (unclassified misdemeanor for all listed below EXCEPT fentanyl-related compound and sexual-assault enabling substances, which are F4 or F5)
  - **AMDT 1473:** ATTEMPT to commit an unclassified misdemeanor drug possession offense is an M1, but the offender is still eligible for all of the practices and procedures established in the bill for unclassified misdemeanor offenses (i.e., holding charge in abeyance while completing treatment)

Aggravated trafficking and major trafficking are established through a sale or intent to sell, OR presumptively based on the amount of drug in question (no need to prove a sale or intent to sell) Trafficking and possession deal with the same amounts, but trafficking specifically requires a sale or intent to sell.

	Aggravated trafficking <sup>1</sup>	Major Trafficking <sup>1</sup>	Trafficking <sup>2</sup>	Possession <sup>3</sup>
Sched. I or II substance not listed below	≥ 50 times bulk amt	≥ bulk amt but < 5 times bulk amt	≥ .025 g but < bulk amt	≥ .025 g but < bulk amt
Sched. III, IV, or IV	NA	≥ 5 times bulk amt	≥ .025 g but < 5 times bulk amt	≥ .025 g but < 5 times bulk amt
Cocaine	≥ 50 g	≥ 10 g but < 50 g	≥ .025 g but < 10 g	≥ .025 g but < 10 g
L.S.D.	≥ 500 unit doses or 50 g	≥ 50 u/d or 5 g but < 500 u/d or 50 g	≥ ¼ u/d or .025 g but < 50 u/d or 5 g	≥ ¼ u/d or .025 g but < 50 u/d or 5 g
Heroin	≥ 300 u/d or 30 g	≥ 50 u/d or 5 g but < 300 u/d or 30 g	≥ ¼ u/d or .025 g but < 50 u/d or 5 g	≥ ¼ u/d or .025 g but < 50 u/d or 5 g
Fentanyl-related compound	≥100 u/d or 10 g	≥ 50 u/d or 5 g but < 100 u/d or 10 g	≥ ¼ u/d or .025 g but < 50 u/d or 5g	< 50 u/d or 5 g
Marijuana (not hashish)	≥ 40,000 g	≥ 1,000 g but < 40,000 g	≥ .025 g but < 1,000 g	≥ .025 g but < 1,000 g
Hashish	≥ 2,000 g	≥50 g but < 2,000 g	≥.025 g but < 50 g	≥.025 g but < 50 g
Controlled substance analog	≥ 30 g	≥ 20 g but < 30 g	≥ .025 g but < 20 g	≥ .025 g but < 20 g
Sexual assault-enabling substance <sup>4</sup>	*used to establish offense level and sanction but not offense itself	*used to establish offense level and sanction but not offense itself	*used to establish offense level and sanction but not offense itself	Sched. I or II: < bulk amt Sched. III-V: < 5 times bulk amt

***The bill originally decriminalized the possession of trace amounts of a substance (anything less than .025 g). AMDT 236x1: Adds the new offense of “possession of a controlled substance trace amount,” which is an amount less than the smallest amount to establish simple possession above. If the controlled substance is marijuana or hashish, the offense is a minor misdemeanor. For all other controlled substances, it is an unclassified misdemeanor. An arrest or conviction does not constitute a criminal record.***

<sup>1</sup> No person shall knowingly obtain, possess, sell, or offer to sell, or prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute, a controlled substance in the listed amounts; Sec. 2925.03, starting at line 662 and Sec. 2925.031, starting at line 1984

<sup>2</sup> No person shall knowingly sell or offer to sell, or obtain or possess with purpose to distribute or sell, or prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance in the listed amounts; Sec. 2925.032, starting at line 2227

<sup>3</sup> No person shall knowingly obtain, possess or use a controlled substance in the listed amounts; Sec. 2925.11, starting at line 2632

<sup>4</sup> **AMDT 0283:** expands the definition of “sexual assault-enabling drug to include any controlled substance that is used to facilitate to commission of a sexual assault. **AMDT 1475** clarifies that this includes a drug that the person might possess legally, but uses to facilitate an assault.

The level of felony and corresponding sanction depends upon the amount of drug in question. For example, the breakdown for aggravated trafficking in cocaine<sup>5</sup>, the offense is either a F1 or F2 as follows:

- If  $\geq 50$  g but  $< 100$  g  $\rightarrow$  F2 with mandatory F2 prison term
- If  $\geq 100$  g but  $< 250$  g  $\rightarrow$  F1 with mandatory F1 prison term
- If  $\geq 150$  g  $\rightarrow$  F1, major drug offender, mandatory prison term of 10 or 11 years

**Most possession offenses are now unclassified misdemeanors<sup>6</sup>**, with a presumption of treatment over jailing, unless in committing the offense the offender made threats of violence, in which case the presumption does not apply and the maximum possible sanctions are:

- Jail term of not more than 364 days
- Fine of not more than \$1,000
- Not more than six months in CBCF

**Possession of marijuana is treated differently than possession of other controlled substances.**

Possession of less than 200g is a minor misdemeanor, and can elevate up to either an M4 or M1 for higher amounts. Arrest or conviction of a minor misdemeanor possession charge “does not constitute a criminal record” and need not be reported by the person in response to any inquiries about the person’s criminal record, including for purposes of employment or licensing.

Judges may hold charges for first-time offenders (*AMDT 0234x1 provides that a prior marijuana or hashish possession, regardless of when occurred, does NOT preclude participation*) in abeyance if the offender agrees to seek, comply with, and complete treatment, and waives his/her right to a speedy trial. The offender is not required to enter a guilty plea in order for the court to hold the prosecution in abeyance. Upon successful completion of treatment, judge shall dismiss the charges. If offender fails at treatment, judge may continue the person on the same program with the same or new/additional terms, order the person to a different treatment program, or continue with the prosecution that was held in abeyance.

The unclassified misdemeanor possession offenses can elevate to felonies under some circumstances:

- The offender has two possession offenses in the previous three years (elevates to F5)
- The controlled substance is a sexual-assault-enabling drug (elevates to M1, F5, or F4 depending on amount/schedule of drug and prior offenses)

**SPEEDY TRIAL, WEAPONS DISABILITY, STATUTE OF LIMITATIONS, FORFEITURE**

A series of amendments (**AM 1477, AM 1478, 1500**) provide that the unclassified misdemeanor possession offenses carry the same speedy trial, weapons disability, forfeiture, and statute of limitation requirements as if the offenses were felonies.

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<sup>5</sup> Complete breakdown of all felony levels and sanctions have been omitted from this summary. See bill text for full breakdown

<sup>6</sup> Note that possession of fentanyl-related-compounds or sexual-assault-enabling substances remain felonies, as under current law

### JURISDICTION OVER DRUG OFFENSES

As introduced, the bill states that municipal courts (Sec. 1901.20, at line 71) operating a drug court “shall hear all charges of any reclassified drug possession offense.” A parallel section exists for county courts (Sec. 1907.02, at line 124). If a municipal court or county court does not operate a drug court, the court of common pleas in that jurisdiction will hear the charges.

However, the bill goes on to define “reclassified misdemeanor drug possession offense” as one committed before the effective date of the bill, when it was a felony, and heard after the effective date of the bill, when it is a misdemeanor. This seems to apply only to a small interval of time, and may not be the intent of the legislation. (See Sec. 1901.20, starting at line 80).

**AMDT 0567-2:** The amendment removes the above stricken language and instead grants concurrent jurisdiction to municipal/county courts and common pleas courts to hear any charge of a reclassified misdemeanor drug possession offense. The “appropriate prosecuting authorities” shall determine whether to prosecute the case in the municipal/county court or the common pleas court. If the court that is decided upon operates a specialized docket, then the court shall determine whether the case shall be prosecuted in the specialized docket.

**AMDT 1474:** Repeals Amendment 0567-2 (described above), which had been adopted in June. In its place, Amendment 1474 provides that the unclassified misdemeanor charges are to originate in the municipal/county court but, upon motion by the prosecution, defense, or the court *sua sponte*, the case may be transferred to the common pleas court. Intent is to give local authorities the discretion, based on local resources, to determine which court would be most appropriate.

### PROBATE CIVIL COMMITMENT

**The bill changes the current involuntary civil commitment process for substance use disorder in a few ways.** First, it waives the filing fee in Sec. 5119.93. Second, the petition for commitment must be accompanied by either a security deposit covering half the costs (as is current law) or documentation establishing that insurance will cover half the cost, or evidence to the satisfaction of the court that the petitioner will be able to cover some of the estimated cost of treatment\*). Lastly, the bill requires, as a criterion for being civilly committed under Chapter 5119, evidence of having overdosed and being revived at least three one or more\* times, having overdosed in a vehicle, or having overdosed in the presence of a minor.

\*Added with **AMDT 0233x1**

**AMDT 0233x1 also does the following:** If following civil commitment hearing, the court orders treatment and finds by clear and convincing evidence that the person presents an imminent danger or threat to self or others as a result of the drug or alcohol abuse, the court may order a 72-hour (max) hospitalization in addition to the treatment ordered.

### COMMUNITY CONTROL SANCTIONS REVOCATIONS & “TECHNICAL VIOLATIONS”

**The 90- and 180-day caps to technical violation probation revocations are still in the law.** The bill narrows use of the caps only to technical violations (not “a violation of law committed while under community control”). The bill includes a definition of “technical violation”: a new criminal offense,

either felony or misdemeanor, is NOT considered "technical violation." This exclusion does not apply to minor misdemeanors, which are changed elsewhere in the bill (e.g. minor misdemeanor marijuana possession charge currently involves less than 100 grams, the bill makes 200 grams a minor misdemeanor). (Sec. 2929.15, starting at line 5369)

**AMDT 0232:** *The amendment clarifies that the 90- and 180-day terms are new days. It also includes in the description of what is not a technical violation: an articulated refusal to participate, or a ~~repeated~~ **demonstrated**<sup>7</sup> refusal to participate, in the community control sanction or any of its conditions, which demonstrates to the court that the offender has abandoned the objects of the sanction or condition.*

#### RECORD SEALING

**Reclassified misdemeanor drug possession offenses are eligible to be sealed.** (Sec. 2953.31, starting at line 5520) The same definition is used above, in JURISDICTION OVER DRUG OFFENSES. A person can petition to have such an offense sealed "at any time after successful completion" of a treatment program or an intervention plan. (Sec. 2953.32.32, starting at line 5615) Any felony that is reclassified into a misdemeanor is to be considered having always been a misdemeanor (starting at line 5658).

#### AFFIRMATIVE DEFENSES AND "DOES NOT APPLY" LANGUAGE

**AMDT 0284** provides that, for trafficking and possession offenses, current exemptions ("does not apply" language) to the offense (that is, manufacturers, pharmacists, etc.) are treated as affirmative defenses to the offense.

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<sup>7</sup> As amended in **AMDT 1479**