

TESTIMONY OF MEAGAN SWAY, ESQ.

LD 1675 — Ought to Pass

An Act To Amend Certain Provisions of Maine's Drug Laws

JOINT STANDING COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

May 14, 2021

Senator Deschambault, Representative Warren and distinguished members of the Joint Standing Committee on Criminal Justice and Public Safety, greetings. My name is Meagan Sway, and I am policy director of the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. We urge you to support LD 1675.

The ACLU has opposed drug prohibition and supported efforts to end the War on Drugs. We have done so for two key reasons: first, criminalizing drug use violates the principle that the criminal law may not be used to protect individuals from the consequences of their own autonomous choices or impose on people a majoritarian conception of morality and responsibility; and second because enforcement of drug laws has led the government to commit a wide range of civil liberties violations. LD 1675 touches on both of these concerns.

This legislation addresses two overreaches in our current drug laws. The first is that in an effort to go after drug traffickers, lawmakers changed our drug laws so that trafficking of heroin or fentanyl are treated differently than every other kind of scheduled drug, and differently than most other crimes. As a general rule, the government must prove every element of a crime in order to get a conviction, including that an unlawful act occurred and that the defendant intended to do that act. When it comes to a person who possesses 2 grams of a mixture that contains *any* amount of heroin or fentanyl, though, the government does not need to prove that the person had any intent at all to sell those drugs. Just possessing that small quantity of drugs—less than the weight of a penny—is enough for the government to obtain a felony drug trafficking conviction, which carries a sentence of up to 10 years for the first offense, and up to 30 years for subsequent convictions. The legislature, in an effort to go after drug traffickers, has given the government a

shortcut in taking away people’s liberties. This unfairly weights criminal cases in favor of the government and violates basic tenets of due process of law.

These due process violations are not merely academic. They have created real harm in our state. While the total drug arrests in our state rose only slightly between 2008 and 2018, Class A drug arrests rose by 157 percent and Class B drug arrests rose by 13 percent during that time.¹ Drug arrests of women increased 25 percent between 2008 and 2018, with Class A drug arrests more than tripling during that time.² Of the new admissions to Maine’s women’s prison last year, 58 percent were for drug crimes.³ The racial disparities are stark: Black people make up about 1.6 percent of Maine’s population, but are 21 percent of the Class A drug arrests and 15 percent of the Class B drug arrests.⁴ The shortcuts given to the government have not kept our community members safer: deaths from drug overdoses are higher than they have ever been, killing 11 people a week. Fentanyl laces an increasing amount of street drugs, not just opioids, so that many people who buy drugs are carrying around mixtures that contain fentanyl without even realizing it. And, because many people who have serious substance use disorder use significantly more than 2 grams of drugs in a day, this means that an increasing number of people are subject to our drug trafficking laws simply for having in their possession drugs to try to keep sickness at bay.

The second change that this bill makes is to fix the crack cocaine/powder cocaine disparity in Maine’s laws. These disparities come from a misguided time in our country’s drug policy. In an effort to punish people out of using drugs, Congress moved in 1984 to create mandatory minimum sentences primarily aimed at drug and violent crimes. The most infamous mandatory minimum sentences created were for cocaine, where the crack cocaine/powder cocaine disparity first appeared in law—the same penalty applied to 5 grams of crack was applied to 500 grams of powder cocaine. Maine’s crack cocaine/powder cocaine disparities are

¹ Ben Shelor, Jessica Gonzales-Bricker & Carl Reynolds, Justice Reinvestment in maine Second Presentation to the Maine Commission to Improve the Sentencing, Supervision, Incarceration and Management of Prisoners, Nov. 12, 2019, (“CSG Report”) available at <https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Maine-second-presentation1.pdf>.

² *Id.*

³ MDOC Adult Data Report Year End 2020, available at <https://www.maine.gov/corrections/sites/maine.gov.corrections/files/inline-files/2020%20Year%20End%20Adult%20Data%20Report.pdf>.

⁴ CSG Report.

very low in comparison, applying a 1:3.5 disparity instead. But they are a vestige of bad science, when lawmakers thought crack was much more dangerous than powder cocaine, and bad policy, when lawmakers thought they could punish people out of using drugs. We know better now. There is nearly no chemical difference between the two substances, and their potency is the same. But, because crack is cheaper than powder, the disparity has the effect of treating wealthier people more leniently than people without as much money. This enforces a two-tiered system of justice, where people with money get better treatment than people without.

As policymakers, you all have made great strides to ensure the law treats people who use drugs with compassion and empathy. LD 1675 provides one more way of doing this: by ensuring that the government must have evidence of drug trafficking, rather than evidence of just drug possession, in order to get a conviction on this very serious charge. We ask you to pass this legislation.