SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

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Author:	Mendoza		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Controlled Substances: Enhanced Penalties***

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 3451 (O'Connell) – Ch.1248, Stats. 1988
AB 2124 (Umberg) – Ch. 989, Stats. 1992
AB 104 (Quackenbush) – Ch. 551, Stats. 1993

Support: Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Contract Cities Association; California Professional Firefighters; California Narcotic Officers Association; California State Sheriffs' Association; Chief Probation Officers of California; Crime Victims United of California; Los Angeles Police Protective League; Riverside Sheriffs' Association; California Peace Officers Association; Alameda County District Attorney

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; California Public Defenders Association; Drug Policy Alliance

PURPOSE

The purpose of this bill is to extend the enhancement for a drug commerce crime committed on property that is accessible to the public within 1,000 feet of a school to such crimes committed on private property not accessible to the public, and to "preschools," as defined.

Existing law classifies controlled substances in five schedules according to their medical utility and potential for abuse. Schedule I controlled substances are deemed to have no accepted medical uses and cannot be prescribed. Examples of drugs in the California Schedule include the following:

- Cocaine, heroin and marijuana are Schedule I drugs.
- Methamphetamine, oxycodone and codeine are Schedule II drugs.
- Barbiturates (tranquilizers, anabolic steroids and specified narcotic, pain medications are Schedule III drugs.

- Benzodiazepines (Valium) and phentermine (diet drug) are Schedule IV drugs.
- Specified narcotic pain medications with active non-narcotic active ingredients are Schedule V drugs. (Health & Saf. Code §§ 11054-11058.)

Existing law provides penalties for possession, possession for purposes of sale, and manufacturing of controlled substances. (Health & Saf. Code §§ 11350-11401.)

Existing law provides enhancement based on the weight of the heroin, cocaine, possessed for sale, sold or transported. Enhancement ranges from three years for one kilogram to 25 years for 80 kilograms. The increments of the enhancement are three, five, 10, 15, 20, and 25 years. (Health and Saf. Code §§ 11370.4, subd. (a).)

Existing law provides enhancements based on the weight or volume of the methamphetamine or PCP possessed for sale, sold or transported. The enhancements range from three years for one kilogram/30 liters to 15 years for 20 kilograms/400 liters. The increments of the enhancement are three, five, 10, and 20 years. (Health and Saf. Code §§ 11370.4, subd. (b).)

Existing law provides that manufacturing any controlled substance *by chemical extraction or synthesis* is guilty of a felony, punishable pursuant to Penal Code Section 1170, subdivision (h) for a term of three, five or seven years and a fine not to exceed $50,000.

- *The fact that a minor under the age of 16 years resided in a structure in which methamphetamine was manufactured by chemical extraction or synthesis is a factor in aggravation*, indicating that the defendant should be sentenced to the upper term of seven years, unless an enhancement of two or five years is imposed under Section 11397.7 for manufacturing methamphetamine where a minor under the age of 16 resides or the crime caused great bodily injury to such a child.
- The sentence for any person who offers to manufacture a controlled substance by chemical extraction or synthesis is three, four or five years.
- Fines collected under this section are to be transferred to the State Treasurer for deposit in the Drug Lab Clean-up Account. (Health & Saf. Code § 11379.6.)

Existing law provides enhancement based on the weight or volume of methamphetamine or PCP the defendant manufactured by chemical extraction or synthesis: Enhancement ranges from three years for one pound/three gallons to 15 years for 105 gallons/44 pounds. Health & Saf. Code § 11379.8.)

Existing law provides that any person convicted of unlawfully manufacturing, or possessing specified precursor chemicals with the intent to manufacture, methamphetamine or phencyclidine, when the commission or attempted commission of the crime occurs in a structure where any child under 16 years of age is present, shall be punished by an additional 2 years, pursuant to Penal Code Section 1179, subdivision (h). (Health and Saf. Code § 11379.7, subd. (A).)

Existing law includes enhancements for controlled substance crimes that directly involve or affect minors. These include:

- Involving minor in controlled substance crimes concerning a very wide range of drugs, such as opiates, opiate derivatives, specified hallucinogens and depressants, methamphetamine and others – 3, 6 or 9 year enhancement. (Health & Saf. Code § 11353.)

- Involving minor in specified heroin and cocaine crimes on the grounds of a church, synagogue, playground, youth center, child care facility when open for business or when children are using the facility – 1 year enhancement in addition to the 3, 6, 9 year enhancement for using the minor in the commission of the underlying crime. (Health & Saf. Code §§ 11353 and 11353.1.)

- Involving minor in specified heroin and cocaine crimes on the grounds of a school, or within 1000 feet thereof, when open for classes, or when children are using the facility: 2 enhancement in addition to the 3, 6, 9 year term for using the minor in the commission of the crime. An additional enhancement of 1, 2 or 3 years where the defendant is at least four years older than the minor. (Health & Saf. Code §§ 11353 and 11353.1.)

- Involving minor in cocaine base crimes on the grounds of a school, or within 1000 feet thereof, when open for classes, or when children are using the facility, with a prior conviction of that crime – Enhancement of 1, 2 or 3 years. (There are two forms of the enhancement: 1) where the defendant was imprisoned in the prior crime, and 2) where the current crime involved a minor under the age of 14.) (Health & Saf. Code § 11353.4.)

- Selling or providing specified drugs (other than included in other enhancements) to a minor on school ground: Enhancement of 5, 7, or 9 years. (Health & Saf. Code § 11353.5.)

- Manufacturing methamphetamine or PCP in a place where a 16-year-old person resides – Enhancement of 2 years and 5 years where great bodily injury occurs. (Health & Saf. Code § 11379.7.)

- Using minor for drug transactions involving methamphetamine, PCP, LSD on grounds of a church, school, playground et cetera (Health & Saf. Code § 11380.1.) – Enhancement of 1 year (church, playground, et cetera), 2 years (school), 1, 2 or 3 years (minor used was four years younger than the perpetrator).

Existing law provides that where an adult defendant possesses for sale, sells, transports or manufactures cocaine, heroin or methamphetamine within 1,000 feet of a school, he or she shall be punished by an enhancement of 3, 4 or 5 years. (Health & Saf. Code § 11353.6, subd. (b).)

- Where the crime "involves a minor who is at least four years younger" than the adult defendant, the defendant shall be punished by an enhancement of 3, 4 or 5 years, in addition to the enhancement – defined in subdivision (b) of Section 11353.6 - based solely on the proximity to the school. (Health & Saf. Code § 11353.6, subd. (c).)

- Within 1,000 feet of a ….. "school" …means any public area or business establishment where minors are legally permitted to conduct business… within 1,000 feet of any public or private elementary, vocational, junior high or high school.

- Decisional law holds that a public area includes private property that is accessible to the public. (*People v. Jimenez* (1995) 33 Cal.App.4th 54, 58.)

- Decisional law holds that if the charged crime involves a charged or uncharged conspiracy – an agreement to commit a crime and an overt act in furtherance of the conspiracy – and any overt act that is done on property accessible to the public, the enhancement applies. (*People v. Marzet* (1997) 57 Cal.App.4th 329, 332.)

This bill provides that the crimes of possession for sale, transportation and manufacturing of cocaine, heroin or methamphetamine are subject to a sentence enhancement of 3, 4 or 5 years, with an additional 3, 4 or 5 years if the crime involves a minor who is at least four years younger than the defendant, if the crime occurs on private property inaccessible to the public that is within 1,000 feet of a school.

This bill extends the enhancement for committing a drug commerce crime involving cocaine, heroin or methamphetamine within 1,000 feet of a school to such crimes committed near a preschool.

This bill defines a preschool as "a school for children under six years of age."

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In its most recent status report to the court (February 2015), the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> The manufacturing and sale of illicit drugs poses a serious risk to those in areas where these crimes occur, especially children. A child walking home from school can easily come in contact with a drug deal turned violent or a drug dealer selling to children. Additionally, clandestine labs pose a substantial risk of harm to children.
>
> A loophole in the existing law has been exposed by defense attorneys in recent court rulings. Current law adds a sentencing enhancement for drug sale or manufacture within 1,000 feet of school. However, the enhancement cannot be applied if the sale or manufacture occurs on private property, and current law does not clearly protect preschools. SB 212 protects our children by strengthening current law to include illicit drug trafficking of manufacturing on private property and by adding preschools to the definition of schools.

2. History of the "Juvenile Drug Trafficking and Schoolyard Act of 1988"

The Health and Safety Code contains a bewildering array of controlled substance enhancements. A different punishment, or multiple punishments, can be imposed based on relatively small differences between the particular circumstances of many drug crimes.

This bill amends "The Juvenile Drug Trafficking and Schoolyard Act of 1988" - AB 3451 (O'Connell) Ch.1248, Stats. 1988. That legislation defined an enhancement for cocaine commerce crimes committed near schools. The legislation appears to have been part of a series of new laws intended to address concerns about the use of, and commerce in, cocaine, especially crack cocaine.

The Assembly concurrence analysis of the 1988 legislation stated:

> The Senate amendments limit the newly created sentence enhancements in this bill to persons over 18 who are convicted of sale, possession for sale, transportation or manufacture of cocaine or cocaine base upon school grounds, or within 1,000 feet of a school. The 1992 amendments to the law added numerous drug crimes and provided that the enhancement applies where the offense occurred in a public area.

In 1992, AB 2124 (Umberg) added heroin commerce to the enhancement and limited the enhancement to public places. Methamphetamine was added to the enhancement in 1993 by AB 104 (Quackenbush).

The school proximity enhancement statute currently provides that "where the violation takes place upon the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school [while]… the school is open for classes or…programs, or…when minors are using the facility … [the defendant]...shall receive an additional punishment of three, four, or five years at the court's discretion." (Health & Saf. Code § 11353.6, subd. (a).)

Subdivision (g) of Section 11356.6 states: "'Within 1,000 feet of a public or private elementary, vocational, junior high, or high school' means any public area or business establishment where minors are legally permitted to conduct business which is located within 1,000 feet of any public or private elementary, vocational, junior high, or high school."

This bill expands the enhancement to a qualifying crime committed in any "public or private area" within 1,000 feet of a school. The bill also defines a school to include a preschool.

3. Appellate Decisions Concerning the Purpose of the Enhancement

History and Purpose of the Law

The court in *People v. Jimenez* (1995) 34 Cal.App.4th 54, explained the purpose of the school proximity enhancement and interpreted the term "public area." The court noted that the law *initially applied* to *any place* within 1,000 feet of a school. In 1992, the Legislature expanded the enhancement to heroin commerce and tailored the enhancement to any "*public area*," rather than defining the enhancement solely in terms of distance from the school.

The court found that the 1992 amendments "focus[ed] …on preventing the sale of drugs to students on their way to and from school and, equally important, protecting them from exposure to drug dealers and buyers so they will not be influenced to emulate …either." (*Id.*, at p. 59.) The Legislature limited the enhancement to times when a school is open for classes or programs and recognized that drug sales in purely private places inaccessible to minors do not present the harm addressed by the enhancement. The enhancement would apply to any business where minors are allowed to go, such as a convenience store, but not to a bar or an interior room in a private residence. (*Ibid*.)

Broadening the enhancement to include any offense committed within 1,000 feet of a school – regardless of the absence of actual risk to students – may not necessarily reflect the culpability of the defendant. For example, the enhancement would apply a hand-to-hand drug sale inside a private residence within 1,000 feet of a school, but across a walled freeway from the school. The

enhancement would not apply to sales in a restaurant frequented by students less than 1/5 of a mile, or a few city blocks, from a school.

Public Place Includes Private Property Readily Accessible to the Public

The court in *Jimenez* noted that the term "public place," as used in Penal Code Section 647, includes "an area where a member of the public may be lawfully present." (*People v. Jimenez* at p. 60*; quoting People v. White* (1991) 227 Cal.App.3d 886, 891.) These areas include a barber shop, common hallway in an apartment building, front yard of a residence, or an automobile parked on a public street. The court in *Jimenez* specifically found that a public area included a private driveway or other private property "readily accessible to the public." The court noted that limiting the enhancement to public property "would allow a drug dealer who openly sold narcotics within a few feet of a school to avoid the enhancement if he stepped off of the street and onto a private driveway." Such a construction would greatly frustrate the purpose of the statute. (*Jimenez*, at p. 60.)

Other appellate cases have applied the enhancement to crimes where an element of the crime – an essential fact that the prosecution must prove – occurred in a public place. For example, the court in *People v. Marzet* (1997) 57 Cal.App.4th 329 applied the enhancement to a case involving a conspiracy to possess heroin for sale.[1] A conspiracy is an agreement by two or more persons to commit a crime and an overt act in furtherance of the conspiracy. The defendants in *Marzet* possessed the crime inside a private residence and would have sold the heroin inside the residence. However, because some of the overt acts in furtherance of the conspiracy occurred outside the residence - negotiations on a street corner within 1,000 feet of a school - the school proximity enhancement was properly imposed.

4. The Case Addressed by This Bill: *People v. Garcia*

The Ruling affects only the Garcia Case and has no Precedential Value

This bill was introduced to address an *unpublished* opinion of the Sixth District of the Court of Appeal of California in San Jose. The 6th district has jurisdiction over the counties of Santa Clara, San Benito, Santa Cruz, and Monterey. The case at issue is *People v. Garcia*, appellate docket number H040555; Santa Clara County docket number C1241645, filed September 23, 2014. An unpublished case has no precedential value. Prosecutors and superior courts across the state are not bound or limited by the decision and it cannot be cited authority in any other court case. An unpublished opinion is only relevant or citable in other proceedings in that case.

Facts of the Case and the Court's Ruling

In *Garcia*, three defendants were charged with numerous drug crimes, including manufacturing of a methamphetamine, possession for sale of methamphetamine, transportation for sale of methamphetamine, and other relatively minor charges. The drug commerce charges included sentence enhancements that the drugs weighed more than 10 pounds, that a child resided in the place of manufacture and that the crimes occurred within 1,000 feet of a school.

[1] *Marzet* specifically concerned the element of an overt act in a conspiracy. Arguably, the decision would apply to a case where any other element is committed within the school zone. However, committee staff has not found a case addressing that particular issue.

The trial court dismissed the school proximity enhancement because the crimes did not occur in a "public area," as required by the enhancement (Health & Saf. Code § 11353.6, subd. (g)). (*Garcia* Opinion, pp. 8; "Op".)

The Santa Clara County District Attorney relied on the *Marzet* case in arguing that the defendants had engaged in an uncharged conspiracy and the overt acts in furtherance of the conspiracy included transporting chemicals used in manufacturing over the sidewalk and driveway. The court agreed that this argument would have prevailed had the prosecutor proved at the preliminary hearing that such acts occurred while school was in session or open for school-related programs. (Op. pp. 7-8.)

The court ruled that the crime was committed in a "private, enclosed laboratory" that did not meet the statutory definition of a public area. This bill would prevent similar rulings in other cases. It would also extend the school proximity enhancement to preschools.

Available Penalties in the Garcia Case under Current Law

After the court in *Garcia* struck the school proximity enhancements, Garcia and his codefendants still faced long felony jail terms if convicted on all the charges. Specifically, Garcia faced a likely sentence of 16 years, 8 months.[2] The other defendants faced a likely term of 15 years and 8 months. Had the enhancement not been stricken, Garcia could have been sentenced to 22 years, 8 months in jail. The other defendants would have been sentenced to 21 years in jail.

Actual Sentences imposed pursuant to Plea Bargains

The committee obtained the Abstract of Judgment for defendant Garcia and the minute orders or related documents for the plea bargains for all three defendants. Garcia was sentenced to a term of 11 years in jail, pursuant to what appears to be a particularly complicated plea agreement. Garcia received a term of two years for sale of methamphetamine, a one-year-and-eight-month consecutive term for manufacturing and an eight months consecutive term for possession for sale. The 10-year enhancement based on the weight in pounds of the methamphetamine manufactured in the offense was stricken from the sentence. The court did impose an enhancement of five years based on the weight of the methamphetamine that was sold or transported. A consecutive enhancement based on the weight of the methamphetamine possessed for sale was also imposed. Seven years were to be served in jail and four on mandatory supervision. Defendant Francisco Magdaleno pleaded guilty to one charge of sale or transportation of methamphetamine, was granted probation and ordered to serve 180 days as a condition of probation. Defendant Gabriel Magdalenoi pleaded guilty to misdemeanor resisting arrest and was sentenced to serve a term of 364 days in jail.

It is unclear what benefit the prosecutor would have gained had the court not dismissed the school trafficking enhancement. It appears likely that the enhancement would have simply added to the plea bargaining leverage of the prosecutor in Garcia's case. Prosecutors can often choose from an array of enhancements that apply in cases involving drug commerce. The enhancement based on the weight of the methamphetamine involved in manufacturing crime was

[2] The sentencing calculations assume that the defendants would receive the middle term of five years on the manufacturing count and that the possession for sale count was separately punishable. The sentences would be two years higher or lower if the court imposed the higher or lower term respectively. If the possession for sale conviction was not separately punishable, each sentence would be eight months lower.

dismissed as part of the bargain in the Garcia case. The additional enhancement allegation for manufacturing within 1,000 feet of a school would thus not likely have substantially affected the bargain or the resulting sentence.

IN THE CASE THAT PROMPTED INTRODUCTION OF THIS BILL, WOULD THE ENHANCEMENT DISMISSED BY THE COURT HAVE ACTUALLY AFFECTED THE SENTENCE THE DEFENDANTS RECEIVED THROUGH PLEA BARGAINS?

5. Sponsor's Argument Focuses on Manufacturing of a Controlled Substance

The California District Attorneys Association – the sponsor of the bill – emphasizes that "mixing chemicals in clandestine labs is an inherently dangerous activity that creates substantial risk of explosions, fires, chemical burns and toxic fume inhalation…" Such dangers are inherent in the manufacture of methamphetamine, but are not presented by sale or possession for sale of drugs that occur in a private residence.

It appears that the danger from methamphetamine manufacturing largely extends to persons in nearby residences. Arguably, any enhancement or sentencing aggravation for manufacturing should reflect that danger. Manufacturing methamphetamine does not appear to present any special danger to children at a school up to three blocks from the manufacturing site.

In recent years, media and law enforcement reports have noted that a new process for making methamphetamine on a small scale is rapidly growing in popularity. This process is typically called "shake and bake" or "one pot" because the drug is usually made in a 2-liter bottle or a similar closable container and typically produces an amount for personal use. This method requires much less pseudoephedrine than required to make methamphetamine in a full clandestine lab. Although the chemicals in a one-pot process can explode, the method does not present the same degree of danger of explosion as a full lab, and would not produce the large amounts of toxic waste and fumes produced by a large lab.

6. Expanding the Enhancement to Crimes Within 1,000 Feet of a Preschool

Vagueness Concerns

This bill defines a "preschool" as "a school for children under six years of age." The bill does not further define "school" or describe what a school for children under the age of 3 would teach or provide.

A statute punishing a crime committed near a "school for children under six years of age" arguably may be unconstitutionally vague. A statute is invalid if a person of ordinary intelligence cannot reasonably determine what the statute requires of prohibits. (*Connally v. General Const. Co*. (1926) 269 U.S. 385, 391.) The basic premise of the void-for-vagueness doctrine is that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.)

The term "preschool" can be used to refer to a "state preschool" - a statutorily defined and state-funded program to prepare three and four-year-old children for kindergarten. A state preschool must provide the following: "Developmentally appropriate … educational development, health services, social services, nutritional services, parent education and parent participation, evaluation, and staff development." (Ed. Code § 8235.)

"Preschool" is also a widely-used colloquial term that can include any child care or day care facility for children not yet in kindergarten, including infants. It is not unusual for a child care facility that does not provide specialized education programs to be described by its operators as a school. Under this broader definition, preschools can be located in private homes, government buildings, business, churches and secondary schools or colleges. A defendant may not know that he or she is within 1,000 feet of such an entity.

As included in this bill, does the term "school" mean an entity that provides educational and other services consistent with "state preschool" standards? Does it mean any child care facility described as a school? Does it mean any child care facility? Existing law - Health and Safety Code Section 11353.1 for example - provides enhanced penalties for crimes committed on the grounds of a child care facility. A child care facility is defined as a "facility that provides nonmedical care to children under 18 years of age … essential for sustaining the activities of daily living or for the protection of the individual." No similar specificity is included in this bill as to the definition of a preschool. Arguably, a defendant would not know what constitutes a preschool within the meaning of this bill, and the term could be applied differently by prosecutors from county-to-county.

Policy Considerations for Including Preschools in the School Proximity Enhancement

The court decisions interpreting and applying the school proximity enhancement have found that the enhancement was intended to prevent students from being exposed to drug dealers and buyers so that they would not be influenced to emulate either. (*People v. Jimenez, supra,* 33 Cal.4th 54, 59.) The committee may wish to consider whether preschool students would be likely to emulate the conduct of drug sellers and buyers they might pass by when being brought to preschool by their parents. Member also might wish to consider whether preschool students could be injured or harmed by explosions and fumes from a methamphetamine laboratory.

IS THE TERM "PRESCHOOL" UNCONSTITUTIONALLY VAGUE?

DO DRUG COMMERCE CRIMES COMMITTED NEAR PRESCHOOLS CREATE THE RISK OF HARM THAT THE EXISTING SCHOOL PROXIMITY ENHANCEMENT WAS INTENDED TO ADDRESS – PREVENTING STUDENTS FROM BEING INDUCED OR TEMPTED TO EMULATE DRUG BUYERS OR SELLERS?

7. Sentencing Project Study of Drug-Free School Zone Laws

In December of 2013 the Sentencing Project published a study of drug-free school zone laws.[3] The study found the laws problematic for two major reasons:

1. Many drug-free zone laws are too broadly written, often creating long prison terms for crimes that did not endanger children. Such penalties are costly, but provide little or no public safety benefit.

2. Drug-free school zones are clustered in high-density urban areas that are home to minority and economically disadvantaged residents. Residents of these areas convicted of drug

[3] http://www.sentencingproject.org/detail/publication.cfm?publication_id=526

crimes are subject to much harsher penalties than persons convicted of the same crimes in other areas, exacerbating the economic and social barriers attendant to felony convictions.

5. Research on Sentences as a Deterrent to Crime

Criminal justice experts and commentators have noted that, with regard to sentencing, "a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits.

> Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits.[4]

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

> A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses. A related literature focuses specifically on enforcement of drug laws and the relationship between those criminal sanctions and the outcomes of drug use and drug prices.[5]

In regard to deterrence, the authors note that in "the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy. . . .

> Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not."[6]

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[4] Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* (November 2010), The Sentencing Project (http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.)

[5] *The Growth of Incarceration in the United States* (2014), Jeremy Travis, Bruce Western and Steve Redburn, Editors, Committee on Causes and Consequences of High Rates of Incarceration, The National Research Council, p. 131 (citations omitted) (http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf,)

[6] *Id.* at 132-133.

Members may wish to discuss whether the "rationalistic view" of crime described above likely would apply to persons who manufacture concentrated cannabis – that is, whether the sentencing enhancements proposed by this bill would be known by these offenders and, if so, whether the additional time would discourage commission of the crime.

WOULD A SENTENCE ENHANCEMENT DISCOURAGE PERSONS FROM MANUFACTURING METHAMPHETAMINE?

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have "large crime prevention benefits," but that incremental, lengthy prison sentences are ineffective for crime deterrence:

> Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. *Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.*
>
> Evidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates. *Nevertheless, the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders.* For these reasons, statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime.[7]

With regard to the drug trade, the authors state:

> For several categories of offenders, an incapacitation strategy of crime prevention can misfire because most or all of those sent to prison are rapidly replaced in the criminal networks in which they participate. Street-level drug trafficking is the paradigm case. Drug dealing is part of a complex illegal market with low barriers to entry. Net earnings are low, and probabilities of eventual arrest and imprisonment are high . . . Drug policy research has nonetheless shown consistently that arrested dealers are quickly replaced by new recruits . . . . At the corner of Ninth and Concordia in Milwaukee in the mid-1990s, for example, 94 drug arrests were made within a 3-month period. "These arrests, [the police

[7] *Id.* at 155-156 (emphasis added).

> officer] pointed out, were easy to prosecute to conviction. But . . . the drug market continued to thrive at the intersection" . . . .
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> Despite the risks of drug dealing and the low average profits, many young disadvantaged people with little social capital and limited life chances choose to sell drugs on street corners because it appears to present opportunities not otherwise available. However, such people tend to overestimate the benefits of that activity and underestimate the risks . . . . This perception is compounded by peer influences, social pressures, and deviant role models provided by successful dealers who live affluent lives and manage to avoid arrest. Similar analyses apply to many members of deviant youth groups and gangs: as members and even leaders are arrested and removed from circulation, others take their place. Arrests and imprisonments of easily replaceable offenders create illicit "opportunities" for others.[8]

Members may wish to discuss whether the sentence enhancement proposed by this bill would provide any appreciable crime deterrent benefits, and whether greater incapacitation for these offenders could generate the "misfire" consequence described above.

BASED ON THE RESEARCH DESCRIBED ABOVE, WOULD THE SENTENCING ENHANCEMENTS PROPOSED BY THIS BILL IMPROVE PUBLIC SAFETY?

IN A COST-BENEFIT ANALYSIS, WOULD THE ADDED COSTS OF INCARCERATION FROM THE EXPANSION OF THIS SENTENCING ENHANCEMENT BE OUTWEIGHED BY ITS PUBLIC SAFETY BENEFIT, EITHER THROUGH INCAPACITATION OR DETERRENCE?

-- END –

[8] *Id.* at 146 (citations omitted).