SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No: SB 212 **Hearing Date:** March 24, 2015
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 Narcotic Officers Association; California State Sheriffs' Association; Chief Probation Officers of California; Los Angeles Police Protective League; Riverside Sheriffs' Association

Opposition: 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 that any person convicted of unlawfully manufacturing, or possessing specified precursors 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.

In1992, 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

[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 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. 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.

Penalties Under Current Law

After the court in *Garcia* struck the school proximity enhancements, Garcia and his codefendants still faced long felony jail terms. 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 would likely been sentenced to 22 years, 8 months in jail? The other defendants would have been sentenced to 21 years in jail.

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. Committee members may wish to determine if the bill should be tailored to apply to manufacturing of methamphetamine or other drugs that create a risk of injury or illness to children at a nearby school.

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

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[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.

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. Nevertheless, methamphetamine manufacturing enhancements would appear to apply to one-pot or shake and bake incidents.

SHOULD THE BILL BE LIMITED TO MANUFACTURING OF METHAMPHETAMINE?

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 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.

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