
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 305 **Hearing Date:** April 14, 2015
Author: Bates
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Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Sentence Enhancements: Concentrated Cannabis*

HISTORY

Source: San Diego County District Attorney; California District Attorneys Association

Prior Legislation: AB 3392 (Weggeland) Ch. 871, Stats. of 1996

Support: California Narcotics Officers Association; California State Sheriffs' Association; County of San Diego

Opposition: American Civil Liberties Union; California Chapter of the National Organization for the Reform of Marijuana Laws; Drug Policy Alliance; Legal Services for Prisoners with Children

PURPOSE

The purpose of this bill is to include manufacturing "concentrated cannabis" in an existing sentence enhancement under which a person convicted of manufacturing methamphetamine by chemical extraction or synthesis, or possession of precursor chemicals with the intent to make PCP, is subject to a sentence enhancement of two years if a child under 16 resides in the place of manufacturing and five years if a child suffers great bodily injury.

Existing law defines marijuana as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds of that plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin." (Health and Saf. Code § 11018.)

Existing law defines "concentrated cannabis" as "the separated resin, whether crude or purified, obtained from marijuana." (Health and Saf. Code § 11006.5.)

Existing law provides that possession of not more than 28.5 grams of marijuana is an infraction, punishable by a fine of up to \$100. Possession of more than 28.5 grams of marijuana is a misdemeanor, punishable by a jail term of up to six months, a fine of up to \$500, or both. (Health and Saf. Code § 11357, subds (a)-(b).)

Existing law provides that where a crime is punishable pursuant to Penal Code Section 1170, subdivision (h), the defendant shall serve the applicable felony sentence in the county jail, unless the defendant has been previously convicted of a serious felony or must register as a sex offender. (Pen. Code §§ 290, 1170, subd. (h), 1192.7, subd. (c).)¹

Existing law provides that cultivation or processing of marijuana is a felony, punishable pursuant to Penal Section 1170, subdivision (h), by a sentence of 16 months, two years or three years and a fine of up to \$10,000. (Health and Saf. Code § 11358.)

Existing law provides that possession of marijuana for sale or transfer of any kind is a felony, punishable pursuant to Penal Code Section 1170, subdivision (h), for a term of 16 months, two years or three years and a fine of up to \$10,000. (Health and Saf. Code § 11359.)

Existing law provides that sale or transfer of marijuana is a felony, punishable pursuant to Penal Code Section 1170, subdivision (h), for a term of two, three or four years and a fine of up to \$10,000. (Health and Saf. Code § 11360.)

Existing law provides that possession of concentrated cannabis is a misdemeanor, punishable by a county jail term of up to one year and a fine of up to \$500, except that if the defendant has been convicted of a serious felony or is required to register as a sex offender, the offense is a felony, punishable by a sentence of 16 months, two years or three years, pursuant to Penal Code Section 1170, subd. (h). (Health and Saf. Code § 11357, subd. (a).)

Existing law provides that a person who, by chemical extraction or synthesis, manufactures, compounds, converts, produces, derives, processes, or prepares *any* controlled substance, shall be punished by imprisonment pursuant to Penal Code Section 1170, subdivision (h) for three, five, or seven years and a fine of up to \$50,000. (Health and Saf. Code § 11379.6.)

Existing law provides that where a defendant possesses specified combinations of chemicals, or specified chemical variants of such chemicals, with the intent to manufacture PCP is guilty of a felony, punishable pursuant to Section 1170, subdivision (h) by a term of two, four or six years and a fine of up to \$10,000. (Health and Saf. Code § 11383.)

Existing law provides that where a defendant is convicted of manufacturing methamphetamine by chemical extraction or synthesis, or convicted of possession of precursor chemicals with the intent to make PCP, and a child under the age of 16 resides in the structure where the manufacturing took place, the defendant shall receive an enhancement of two years. If a child under the age of 16 suffers great bodily injury, the enhancement is five years. These two enhancements must be served in prison, as well as the underlying conviction for manufacturing, per se. (Health and Saf. Code § 11379.7; *People v. Vega* (2014) 222 Cal.App.4th 1374.)

Existing law defines great bodily injury as a “significant or substantial physical injury.” Great bodily injury can include abrasions, bruises and lacerations, as well as more serious injuries. (*People v. Salas* (1978) 77 Cal.App.3d 600, 605-607; *People v. Washington* 210 1042, 1047-1048.)

¹ Section 1170 (h) states that a defendant convicted of a violent felony (Pen. Code §667.5, subd. (c)) must serve his or her execute felony sentence in prison. However, as all violent felonies are serious felonies, a reference to serious felonies includes violent felonies.

This bill provides that a defendant who is convicted of manufacturing concentrated cannabis shall be subject to an enhancement of two years if a child under the age of 16 resides in the place of manufacturing and an enhancement of five years if a child under the age of 16 suffers great bodily injury. The enhancement term and the underlying conviction shall be served in prison.

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 February of this year 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:

There have been a total of 55 butane hash oil labs with children residing or present in the structure through December 2014. Since January 2015 there have been 7 more instances to total 62 to date. In 2012 there were only 4 labs found, so the need to update statute is needed now more than ever. As of August of 2014, 6 children had been reported injured and 1 child dead, but clearly many more have gone unreported and these labs endanger those in nearby residences.

As of February of 2014, the Los Angeles Times reported that a Los Angeles County Deputy District Attorney has prosecuted 26 people since 2013 under a law that penalized PCP and meth manufacturing, but not concentrated cannabis. Clearly the problem of children exposed to these fires or explosions is on the rise.

Existing law does not go far enough to protect children when dealing with concentrated cannabis. Meth and PCP manufacturing in any structure where children under the age of 16 are present can already add 2 or 5 years to one's felony sentence, if caught. Unfortunately manufacturing concentrated cannabis is left out of this code section; therefore, district attorneys do not have the full panoply of tools to protect vulnerable children living in these homes.

2. Background on Concentrated Cannabis, Including Hashish, Butane Honey Oil and Related Substances

The most common and widely known form of concentrated cannabis is hashish, or hash. There are references to hashish use in the Middle East at least as early as the 10th Century.²³ Hashish has traditionally been made by hand, with simple screens, presses and cloth bags – commonly, marijuana is essentially pounded into a resinous powder that is heated or pressed to form a block or sticky paste.⁴

Hash oil is generally made by using a solvent to strip the essential oils from marijuana plant matter. The resulting material is often described as “honey oil” or “wax,” reflecting the appearance of the product. A relatively new and popular form of concentrated cannabis is “butane honey oil” or “BHO.” BHO is commonly made by packing marijuana in a steel or glass tube, introducing or injecting butane in one end of the tube and straining the liquid material that emerges from the other end of the tube. The liquid may be heated – in warm water – to purge the butane. The resulting product is a resin or oil. Butane is volatile and highly flammable. Using too much heat or exposing the butane to a spark can cause an explosion, especially inside a structure, as evaporated butane gas can fill a room. Extracting BHO outside allows the butane

² <http://druglibrary.org/schaffer/hemp/history/first12000/2.htm>

³ <http://www.narconon.org/drug-information/hashish-history.html>

⁴ <http://nimbinwave.com/facts/afghanistan-hashish>

vapors to dissipate into the air. Other solvents – including alcohol – can be used to produce hash oil.

In Colorado, hash oil is legal, but production is highly regulated. The Los Angeles Times reported on February 5, 2014:

Safer forms of production exist where it is sanctioned and regulated under state law. In Colorado's highly controlled market, state officials this month set forth rules requiring hash oil producers to follow the same procedures that manufacturers use to extract oils from plants to make canola oil, fragrances, food additives, pharmaceuticals and shampoo.

Butane extraction must be done in a closed loop system so that no vapor escapes, in rooms with powerful ventilation systems. And the facilities must comply with health and safety codes and be inspected by a certified industrial hygienist or professional engineer.

Hash oil contains a very high concentration of the active chemicals in marijuana, most notably THC, which is understood to produce the high experienced by the user. However, numerous other chemicals are found in marijuana, hashish and hash oil. The most widely known of these is CBD. CBD antagonizes (cancels) the effect of THC. The National Cancer Institute in the National Institutes of Health has noted that “[t]he use of Cannabis for medicinal purposes dates back at least 3,000 years.” CBD and THC have been identified as having numerous medical benefits, including relief from nausea, pain and inflammation, reducing seizures and shrinking and inhibiting the growth of tumors.”⁵

3. Broad Scope of This Bill

As noted above, concentrated cannabis has been used for centuries. Recently, however, using solvents to strip the oils from whole plant material have become increasingly popular. The most common solvent used in the process is butane, although isopropyl, ethyl alcohol and carbon dioxide can also be used. Butane is especially volatile and flammable. When butane evaporates during the process, concentrations of the odorless gas can fill a room, similar to how natural gas from a leaky gas line or valve can fill a house. Any spark or flame, even static electricity, can cause the gas to explode.

There are methods to produce hash oil without solvents. One method growing in popularity involves soaking marijuana in very cold water as it is filtered. Another method uses olive oil.⁶ It can be argued that these methods do not use chemical processes, and thus would not be covered by the bill. As there are few reported cases interpreting what constitutes chemical processing of concentrated cannabis, a definitive conclusion cannot be stated.

In discussions with committee staff, the sponsor agreed that the bill should be limited to cases in which defendants used volatile solvent extraction to manufacture concentrated cannabis.

⁵ <http://www.cancer.gov/cancertopics/pdq/cam/cannabis/patient/page2>

⁶ <http://www.medicaljane.com/2014/02/20/european-study-what-is-the-best-cannabis-oil-extraction-method/>

Members may wish to consider whether the enhancement the bill proposes should be limited to such circumstances.

IF THE BILL IS APPROVED BY THE COMMITTEE, SHOULD IT SPECIFY THAT THE ENHANCEMENT APPLIES TO THE USE OF A VOLATILE SOLVENT TO MANUFACTURE CONCENTRATED CANNABIS?

4. Appellate Decisions Have Found That the Enhancement for Endangering or Injuring a Child in the Manufacturing of Methamphetamine or PCP, and the Underlying Conviction for Manufacturing Itself, must be Served in Prison

The statute imposing a two-year enhancement for methamphetamine manufacturing that causes great bodily injury to a child and the five-year enhancement for manufacturing the drug in a structure where a child resides – Health and Safety Code Section 11379.7 - provides that the enhancement terms must be served in prison. The court in *People v. Vega, supra*, 222 Cal.App. 4th 1374, held that where a defendant is convicted of manufacturing methamphetamine and is subject to either enhancement the entire sentence must be served in prison. The enhancements essentially pull the sentence for the underlying crime of manufacturing, which would otherwise be served in jail pursuant to Penal Code Section 1170, subdivision (h), into prison as well.

The court essentially took the following steps in its analysis:

- Penal Code Section 18 provides: “ Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.”
- The sentence for a subdivision (h) crime is to be served in jail, except where the defendant has a prior serious felony conviction or is required to register as a sex offender. Paragraph (3) of subdivision (h) provides that those defendants must serve their sentences in prison.
- Health and Safety Code Section 11379.7 provides that an enhancement for manufacturing methamphetamine or PCP in a place where a child resides, or where a child is injured, shall be served in prison. This is an additional exception to the general rule in Penal Code Section 1170 (h) that the sentence for the crime of manufacturing, per se, is to be served in county jail. That is, a defendant who is convicted of manufacturing methamphetamine or PCP shall serve his or her sentence in county jail, unless he or she has a disqualifying prior conviction or an enhancement requiring a prison term applies.

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.⁷

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.⁸

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.”⁹

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.

⁷ 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>.)

⁸ *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.)

⁹ *Id.* at 132-133.

WOULD A SENTENCE ENHANCEMENT DISCOURAGE PERSONS FROM MANUFACTURING CONCENTRATED CANNABIS?

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.¹⁰

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 officer] pointed out, were easy to prosecute to conviction. But . . . the drug market continued to thrive at the intersection”

Despite the risks of drug dealing and the low average profits, many young disadvantaged people with little social capital and limited life chances choose

¹⁰ *Id.* at 155-156 (emphasis added).

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.¹¹

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 --

¹¹ *Id.* at 146 (citations omitted).