
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 849 **Hearing Date:** July 14, 2015
Author: Bonilla
Version: May 4, 2015
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Unlawful Cannabinoid Extraction: Explosion*

HISTORY

Source: Los Angeles County District Attorney

Prior Legislation: None directly on point

Support: Association of Deputy District Attorneys; Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Correctional Supervisors Organization; California District Attorneys Association; California Narcotic Officers' Association; California Professional Firefighters; California State Firefighters' Association; California State Lodge, Fraternal Order of Police; California State Sheriffs' Association; Central Coast Forest Association; Long Beach Police Officers' Association; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Riverside Sheriffs Association; Sacramento County Deputy Sheriffs' Association; Santa Ana Police Officers' Association

Opposition: None known

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to provide that a person who causes an explosion in the solvent extraction of cannabinoids is guilty of an alternate felony-misdemeanor or a misdemeanor, as follows: 1) where the explosion causes great bodily injury, the felony sentence is a term of two, four or six years, with a maximum felony or misdemeanor fine of \$10,000; 2) where the explosion causes damage to inhabited property, the felony sentence is a term of two, three or four year, with a maximum felony or misdemeanor fine of \$10,000; 3) where the explosion causes damage to a structure or forest land, the felony sentence is a term of 16 months, two years or three years, with a maximum felony or misdemeanor fine of \$10,000; and 4) where the explosion causes damage to the property of another person, the offense is a misdemeanor, with maximum jail term of six months, a fine of up to \$1,000, or both.

Existing law:

Provides that a person is guilty of unlawfully causing a fire when he or she recklessly sets fire to or causes to be burned any structure, forestland, or property.

- Unlawfully causing a fire that causes great bodily injury is a felony, punishable by imprisonment in the state prison for two, four, or six years, or by imprisonment in the county jail not to exceed one year, or by a fine, or by both imprisonment and a fine.
- Unlawfully causing a fire that causes an inhabited structure or property to burn is a felony, punishable by imprisonment in the state prison for two, three, or four years, or by imprisonment in the county jail not to exceed one year, or by a fine, or by both imprisonment and a fine.
- Unlawfully causing a fire of a structure or forestland is a felony punishable by imprisonment in the state prison for 16 months, 2, or 3 years, or by imprisonment in the county jail not to exceed one year, or by a fine, or by both imprisonment and a fine.
- Unlawfully causing a fire of property is a misdemeanor. (Pen. Code § 452.)

Provides that any person convicted of reckless fire setting shall be punished by a one, two, or three year enhancement for each of the following circumstances found to be true:

- The defendant was previously convicted of felony arson;
- A peace officer, firefighter, or other emergency personnel suffered great bodily injury;
- The defendant proximately caused great bodily injury to more than one victim in a single incident; or,
- The defendants proximately caused multiple structures to burn. (Pen. Code § 452.1.)

States that the following terms have the following meanings:

- *Structure* means any building, or commercial or public tent, bridge, tunnel, or power plant;
- *Forest land* means any brush covered land, cut over land, forest, grasslands, or woods;
- *Property* means real property or personal property, other than a structure or forest land;
- *Inhabited* means being used for dwelling purposes whether occupied or not.
- *Inhabited structure* and *inhabited property* do not include real property on which an inhabited structure or an inhabited property is located;
- *Maliciously* imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law,
- *Recklessly* means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto. (Pen. Code § 450.)

Provides that any person, firm, or corporation who, except as specified, within this state, possesses any destructive device, other than fixed ammunition of a caliber greater than .60 caliber is guilty of a public offense. A person, firm, or corporation convicted of this offense shall

be punished imprisonment in the county jail for a term not to exceed one year, or in the state prison, or by a fine not to exceed \$10,000, or by both. (Pen. Code § 18710.)

States that any person who recklessly or maliciously has in possession any destructive device or any explosive in any of the following places is guilty of a felony punishable by imprisonment in a county jail for two, four, or six years:

- On a public street or highway;
- In or near any theater, hall, school, college, church, hotel, or other public building
- In or near any private habitation
- In, on, or near any aircraft, railway passenger train, car, cable road, cable car, or vessel engaged in carrying passengers for hire; and,
- In, on, or near any other public place ordinarily passed by human beings. (Pen Code § 18715.)

Provides that any person that possesses any substance, material, or combination of substances or materials with the intent any destructive device or any explosive without first obtaining a valid permit that destructive device or explosive, is guilty of a felony punishable by imprisonment in a county jail for two, three, or four years. (Pen Code § 18720.)

States that every person that does any of the following is guilty of a felony punishable by imprisonment in a county jail for two, four, or six years:

- Carries any destructive device or any explosive on any vessel, aircraft, car, or other vehicle that transports passengers for hire;
- While on board any vessel, aircraft, car, or other vehicle that transports passengers for hire places or carries any destructive device or explosive in any hand baggage, roll, or other container; and;
- Places any destructive device or any explosive in any baggage that is alter checked with any common carrier. (Pen Code, § 18720.)

States except as provided, any person, firm or corporation who, within this state, sells, offers for sale, or knowingly transports any destructive device, other than fixed ammunition of a caliber greater than .60 caliber, is guilty of a felony punishable by imprisonment in a county jail for two, three, or four years. (Pen. Code, § 18730.)

Provides that every person that possess, explodes, or ignites, or attempts to possess, explode, or ignite any destructive device or any explosive with the intent to injure, intimidate, or terrify any person, or with intent to wrongfully injure or destroy any property is guilty of a felony punishable by imprisonment in a county jail for three, five, or seven years. (Pen. Code, § 18740.)

Provides that every person that explodes, or ignites, or attempts to explode, or ignite any destructive device or any explosive with the intent to murder is guilty of a felony punishable by imprisonment in the state prison for life with the possibility of parole. (Pen. Code, § 18745.)

This bill

Provides that any person who extracts, or attempts to extract THC or any other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in great bodily injury shall be punished by imprisonment in a county jail for two, four, or six years, or by imprisonment in a county jail for a term not exceeding one year, by a fine not to exceed \$10,000, or both a fine and imprisonment.

Provides that any person who extracts, or attempts to extract THC or any other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to an inhabited structure or inhabited property shall be punished by imprisonment in a county jail for two, three, or four years, or by imprisonment in a county jail for a term not to exceed one year, by a fine not to exceed \$10,000, or by both a fine and imprisonment.

Provides that any person who extracts, or attempts to extract THC or any other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to forest land shall be punished by imprisonment in a county jail for 16 months, two, or three years, be punished by imprisonment in a county jail for a term not to exceed one year, by a fine not to exceed \$10,000, or by both a fine and imprisonment.

Any person who extracts, or attempts to extract THC or other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to property is guilty of a misdemeanor punishable by imprisonment in a county jail for a term not to exceed six months, by a fine not to exceed \$1,000, or by both a fine and imprisonment. For purposes of this paragraph unlawfully causing an explosion that damages property does not include an explosion that damages his or her own personal property unless there is injury to another person or to another person's structure, forest land, or property.

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:

We have seen a worrying increase in the number of honey oil related butane explosions. In my own district, one explosion knocked a neighboring house off its foundation. Unfortunately, currently law does not provide an adequate means of addressing these butane related explosions. If a person manufacturing honey oil using butane causes an explosion, but that same explosion does not cause fire damage to the structure, the only remedy available to law enforcement is to charge vandalism. This is hardly an appropriate charge for such a dangerous act. AB 849 remedies this situation by ensuring that all honey oil related butane explosions can be charged to appropriately reflect their gravity.

2. Sentencing and Conviction Issues: Author’s Amendments

The introduction of this bill was prompted by a rash of explosions caused by the making of hash[ish] oil - an increasingly popular form of concentrated cannabis - through extraction with a solvent. As described below, the solvent most commonly used is butane, thus the name “Butane Honey Oil,” or “BHO.” Explosions occur when the butane that extracts the “oil” from marijuana fails to dissipate, builds up, sinks to the floor in an enclosed space and explodes from any spark. Extracting the oil outside largely eliminates the risk of explosion, as volatile butane quickly evaporates and disperses in the air.

The current version of the bill would require the prosecution to prove that the defendant committed the crime of manufacturing a controlled substance by chemical synthesis or chemical

extraction in every case involving a BHO making explosion that caused serious damage. The penalty for the most serious form of causing an explosion while extracting BHO - an explosion that caused great bodily injury - has a lower penalty than the crime of manufacturing BHO, per se. That would have caused confusion and complex litigation. For example, if the prosecutor charged the defendant only with causing an explosion through making BHO, could the prosecutor ask the judge to sentence the defendant for manufacturing the BHO, as that crime was necessarily proved in proving the crime involving an explosion.

The author will offer amendments in committee to focus the bill on explosions that cause injury to persons and significant damage to residences and structures where people were present during the explosion. The amendments will apply the bill to any recklessly caused explosion. Intentional conduct involving explosive devices that causes or threatens serious harm is subject to prosecution under other provisions of law.

Prosecutors can still bring charges for BHO manufacturing. However, while it is not legal to make BHO, a person with a medical cannabis recommendation may legally possess BHO. Where a person authorized to use medical cannabis recklessly causes an explosion in the making of BHO for his or her own authorized use, prosecutors may choose to prosecute under this bill rather than under the relatively harsh provisions of the controlled substances manufacturing statute.

The amendments also include a reference to the process in existing law of a civil compromise. In a civil compromise, the defendant and the victim can agree that the defendant will fully compensate the victim for his or her losses apart from criminal prosecution. The court has discretion to approve or reject the compromise. Civil compromise is strictly prohibited for a felony or any domestic violence related charges. A compromise in an explosion case could allow the victim to quickly repair his or her property and the defendant could avoid a criminal conviction for reckless conduct.

The following mockup sets out the proposed amendments, which would replace the current language in the bill:

A person who recklessly causes an explosion is guilty of a public offense.

(a) Where the explosion causes great bodily injury to another person, the offense is a felony, punishable pursuant to Section 1170, subdivision (h) for two, four or six years, or a misdemeanor, punishable by imprisonment in a county jail for up to one year.

(b) Where the explosion causes damage in the amount of a least \$20,000 to an inhabited dwelling or an any structure in which a person was present at the time of the offense, the offense is a felony, punishable pursuant to Section 1170, subdivision (h), or a misdemeanor, punishable by imprisonment in a county jail for up to one year.

(c) Where the explosion causes damage in the amount of a least \$2,000 to an inhabited dwelling or any structure in which a person was present at the time of the offense, the offense is a misdemeanor, punishable by imprisonment in a county jail for up to one year

(c) The court may not impose sentence pursuant to subdivision (a) and an enhancement for infliction of great bodily injury if the same injury is an element of the crime and the basis for the enhancement.

(e) For the purposes of this Section, the amount of damages caused by the defendant's conduct is determined by the market cost of repair or replacement in the place where the offense occurred.

(f) For purposes of this Section, inhabited means currently being used for dwelling purposes, whether occupied or not.

(g) A misdemeanor charged under this Section is subject to a civil compromise pursuant to Sections 1377-1379.

(h) Prosecution under this Section does not limit prosecution under any other provision of law.

3. 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.¹² 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.³

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 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.

¹ <http://druglibrary.org/schaffer/hemp/history/first12000/2.htm>

² <http://www.narconon.org/drug-information/hashish-history.html>

³ <http://nimbinwave.com/facts/afghanistan-hashish>

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.”⁴

4. Related Bills

SB 212 (Mendoza) would define two factors in aggravation that apply in cases in which the defendant is charged with manufacturing a controlled substance by chemical synthesis or extraction. Specifically, the court may consider as a factor in aggravation that the defendant manufactured methamphetamine within 200 feet of an occupied residence or any structure in which others were present at the time of the offense. Where the defendant has been convicted of extracting concentrated cannabis through the use of a volatile solvent, the court may consider as a factor in aggravation that the offense occurred within 300 feet of an occupied residence or any structure in which others were present at the time of the offense. SB 212 is on the Third Reading file in the Assembly.

SB 305 (Bates) would have added the manufacturing of concentrated cannabis by chemical synthesis or extraction to enhancements for causing great bodily to a child and for manufacturing the drug in a place where a child under the age of 16 resides. The existing enhancement applies to the manufacturing of methamphetamine or phencyclidine by chemical synthesis or extraction. SB 305 was held in Senate Appropriations.

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⁴ <http://www.cancer.gov/cancertopics/pdq/cam/cannabis/patient/page2>