
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 947 **Hearing Date:** July 14, 2015
Author: Chávez
Version: February 26, 2015
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Controlled Substances: Firearms*

HISTORY

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

Prior Legislation: AB 117 (Committee on Budget) - Ch. 39, Stats. of 2011
AB 109 (Committee on Budget) - Ch. 15, Stats. of 2011

Support: Peace Officers Research Association of California

Opposition: None known

Assembly Floor Vote: 78 - 0

PURPOSE

The purpose of this bill is to: 1) provide that a person who is convicted of being armed with a firearm while in possession of a specified controlled substance is punishable pursuant to Section 1170, subdivision (h), for a felony jail term of 16 months, two years or three years, unless he or she is disqualified from a jail term by a serious felony conviction or sex offender registration status; and 2) provide that a person who is subject to an enhancement of three, four or five years for being personally armed with a firearm in the commission of a specified drug commerce offenses shall serve the entire sentence in prison.

Existing law:

Specifies that every person who unlawfully possesses any amount of a substance containing cocaine base, cocaine, heroin, methamphetamine, crystal or liquid phencyclidine (PCP), or who possesses plant material containing PCP, or a hand-rolled cigarette treated with PCP while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code § 11370.1, subd. (a).)

Defines "armed with" a firearm as having it available for immediate offensive or defensive use. (Health & Saf. Code, § 11370.1 subd. (a).)

Specifies that any person who is personally armed with a firearm in the commission or attempted commission of a specified controlled substance commerce or manufacturing offense shall be punished by an additional and consecutive term of imprisonment in the county jail for three, four, or five years. (Pen. Code § 12022, subd. (c).)

This bill:

Specifies that any person who commits a felony offense of unlawfully possessing any amount of a substance containing cocaine or another specified drug, a crystalline or liquid substance containing PCP, plant material containing PCP, or a hand-rolled cigarette treated with PCP, while armed with a loaded, operable firearm, is subject to imprisonment pursuant to Penal Code Section 1170, subdivision (h) for two, three, or four years.

Specifies that any person who is personally armed with a firearm in the commission of numerous specified controlled substance commerce or manufacturing offenses, pursuant to Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code is subject to imprisonment in the state prison for three, four, or five years.

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:

The Public Safety Realignment Act of 2011 (AB 109) was chaptered into law to address prison overcrowding, escalating costs and rehabilitation issues caused by incarcerating low-level offenders in state prison. A seemingly unintended consequence of AB 109 is that a person convicted of simple possession of a controlled substance while armed with a loaded firearm is punishable by state imprisonment. However, a person convicted for the far more egregious crimes of selling, and possessing a controlled substance for sale, while armed with a loaded firearm is punishable by time in a local prison.

Although the numbers of both groups appear similar, the inequity caused by sending the less dangerous person to prison is inconsistent with the goals of AB 109. AB 947 would alternate these punishments between being served in county jail and state prison. This bill would make it a felony, punishable by county jail if an individual is found in possession with both a firearm and illegal substances. For those convicted with a firearm in the commission of a specified controlled substance with the intent to sell, the individual would be required to serve his/her time in state prison.

California is one of the nation's leaders in drug defense; this change in punishment is essential to continue the war on drugs and is in conformity with the goals of the Legislature in enacting AB 109.

2. Under Criminal Justice Realignment Persons Convicted of Low-Level Felonies Serve Their Executed Sentences in County Jail, not Prison, with Specified Exceptions

AB 109 - Ch. 15, Stats. 2011 - enacted what is generally referred to as criminal justice realignment. Realignment made a number of felonies punishable by imprisonment in a county

jail, not state prison, unless the defendant is disqualified by a serious felony conviction or sex offender registration status. The felonies punishable by imprisonment in county jail are generally on the lower end of the felony spectrum. Prior to realignment, the only convicted felons in county jails were those who were convicted of a felony, granted probation, but ordered to serve a term in jail as a condition of probation, not as a sentence.

3. Punishment Scheme for Health and Safety Code section 11370.1 and Penal Code section 12022, subdivision (c)

A defendant who convicted of possession of specified controlled substances for personal use while armed with a loaded, operable firearm is punishable by a term in a state prison of two, three, or four years. (Pen. Code § 11370.1.) This penalty was not changed by realignment. Prior to realignment, a person who was personally armed with a firearm in the commission of specified drug commerce offenses was subject to an prison term enhancement of three, four, or five years. (Pen. Code § 12022, subd. (c).) This enhancement became subject to sentencing pursuant Penal Code Section 1170, subdivision (h) through realignment. A defendant convicted of specified drug commerce offenses with an enhancement allegation for being armed with a firearm serves his or her sentence in jail, unless excluded because of serious felony conviction or status as a sex offender registrant.

Current law thus provides that the sentence for the more serious offense of drug commerce while armed will be served in jail and the sentence for the less serious offense of drug possession while armed will be served in jail. This is an anomaly, as felony jail terms under realignment were intended for lower-level felonies. This bill reverses the penalty provisions for these offenses and provides that drug commerce while armed with a firearm is to be served in prison, while drug possession while armed is to be served in jail.

This bill does not directly change where the sentence for a drug commerce crime would be served, unless a firearm enhancement is established. Drug commerce crimes are generally subject to felony jail terms pursuant to Penal Code Section 1170 subdivision (h). This bill would direct a court to impose a state prison *enhancement* when the defendant has been convicted of a drug trafficking offense while personally armed with a firearm. The defendant would thus be convicted of a jail felony crime for which the enhancement is to be served in prison. In such cases, the enhancement provision requiring a prison term controls and the defendant serves the entire sentence in prison, regardless of whether the underlying offense would otherwise be punishable by a felony jail sentence. (*People v. Vega* (2014) 222 Cal. App. 4th 1374, 1387.)

4. Argument in Support

The California District Attorneys Association argues in support

Realignment was intended to address prison overcrowding, escalating costs, and rehabilitation issues caused by incarcerating low-level offenders in the state prison. AB 109 sought to correct these issues by allowing such offenders to serve their prison time in local jail, leaving room in state prison for more serious offenders.

Unfortunately, the drafting of AB (109) created an incongruous result whereby a person convicted of simple possession of a controlled substance while armed with a loaded and operable firearm is punishable by a term in state prison, while a person convicted of the far more egregious crime of selling, and possessing a controlled substance (other than marijuana) for sale, while armed with a loaded and operable firearm is punishable in county jail pursuant to PC 1170(h).

AB 947 would effectively flip the location of where these sentences are served – armed drug dealers and traffickers would be state prison eligible, while those who simply possess controlled substances while armed would serve their sentences locally. We believe that this is consistent with the intent of the Legislature, and the goals of Realignment, that low level offenders serve time locally, and more serious offenders serve time in state prison.

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