
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 1182 **Hearing Date:** March 29, 2016
Author: Galgiani
Version: February 18, 2016
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Controlled Substances*

HISTORY

Source: Author

Prior Legislation: SB 333 (Galgiani) – Vetoed, 2015

Support: Los Angeles Deputy Sheriffs Association; California College and University Police Chiefs Association; California Correctional Supervisors Association; California Narcotic Officers Association; California Police Chiefs Association; Los Angeles County Professional Peace Officer Association; Crime Victims United of California; Los Angeles Police Protective League; Riverside Sheriffs Association; California District Attorneys Association; Peace Officers Research Association of California; California State Sheriffs' Association; Fraternal Order of Police; Association of Orange County Deputy Sheriffs; Long Beach Police Officers Association; California Statewide Law Enforcement Association; Sacramento County Deputy Sheriffs' Association;

Opposition: California Attorneys for Criminal Justice; Legal Services for Prisoners with Children

PURPOSE

The purpose of this bill is to provide that possession of gamma hydroxybutyric acid (GHB), flunitrazepam (Rohypnol), or ketamine with the intent to commit a sex crime, as defined, is a felony, punishable pursuant to Penal Code Section 1170 (h) for sixteen months, two years or three years.

Existing law provides that the possession of specified controlled substances including ketamine, flunitrazepam, and GHB, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, is a misdemeanor punishable by up to one year in a county jail, except for a person who has one or more prior convictions for a specified violent felony or has been convicted of a prior offense requiring the person to register as a sex offender, then the penalty shall be a felony. (Health & Saf. Code, §§ 11350, subd. (a) and 11377, subd. (a).)

Existing law classifies controlled substances in five schedules according to their danger and potential for abuse. Schedule I controlled substances have the greatest restrictions and penalties, including prohibiting the prescribing of a Schedule I controlled substance. (Health & Saf. Code, §§ 11054 to 11058.)

Existing law states, except as provided, that every person who possesses for sale or purchases for purposes of sale any of the specified controlled substances, including cocaine and heroin, shall be punished by imprisonment in a county jail for two, three, or four years. (Health & Saf. Code, § 11351.)

Existing law provides that every person that transports, imports into the state, sells, furnishes, administers, or gives away, or offers to transport, import into the state, sell, furnish, or give away, or attempts to import into this state or transport cocaine, cocaine base, or heroin, or other specified controlled substances listed in the controlled substance schedule, without a written prescription from a licensed physician, dentist, podiatrist, or veterinarian shall be punished by imprisonment for three, four, or five years. (Health & Saf. Code, § 11352, subd. (a).)

Existing law states that the possession for sale of methamphetamine, and other specified controlled substances is punishable by imprisonment in a county jail for 16 months, two or three years. (Health & Saf. Code, § 11378.)

Existing law provides that every person that transports, imports into the state, sells, furnishes, administers, or gives away, or offers to transport, import into the state, sell, furnish, or give away, or attempts to import into this state or transport methamphetamine, or other specified controlled substances listed in the controlled substance schedule, without a written prescription from a licensed physician, dentist, podiatrist, or veterinarian shall be punished by imprisonment for two, three, or four years. (Health & Saf. Code, § 11379, subd. (a).)

Existing law states that every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating agent, with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony punishable by imprisonment in the state prison for 16 months, or two or three years. (Pen. Code, § 222.)

Existing law states that rape is an act of sexual intercourse accomplished where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused. (Pen. Code, §§ 261, subd. (a)(3); 262, subd. (a)(2).)

Existing law specifies felony penalties for any person who commits an act of sodomy, oral copulation or sexual penetration where the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused. (Pen. Code, §§ 286, subd. (i); 288a, subd. (i); 289, subd. (e).)

This bill provides that a person who possesses gamma hydroxybutyric acid (GHB), ketamine or flunitrazepam, also known by the trade name Rohypnol, with the intent to commit sexual assault, as defined, is guilty of a felony, punishable by imprisonment pursuant to Penal Code Section 1170 (h) for sixteen months, two years or three years.

This bill defines "sexual assault" for the purposes of this bill to include, but not be limited to, violations of specified provisions related to sexual assault committed against a victim who is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance.

This bill states the finding of the Legislature that in order to deter the possession of ketamine, GHB, and Rohypnol by sexual predators and to take steps to prevent the use of these drugs to incapacitate victims for purposes of sexual exploitation, it is necessary and appropriate that an individual who possesses one of these substances for predatory purposes be subject to felony penalties.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several 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 December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 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).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 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 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:

In November 2014, California voters approved Proposition 47 which reclassified many crimes from felonies to misdemeanors. One of these reclassifications involved the possession of the drugs Rohypnol, GHB and ketamine—commonly known as “date rape” drugs. Prior to Proposition 47, possession of a date rape drug was punishable as a “wobbler” in which the prosecutor or judge can determine whether a felony or misdemeanor is appropriate based on the facts of the case. Prop. 47 removed the ability to charge an individual with a felony for possession.

A fundamental difference exists between the possession of recreational drugs meant to be consumed by that individual and the possession of ‘date rape’ drugs when intended to be used on another individual. These drugs will render a sexual assault victim completely incapacitated. They also result in a victim having little to no memory of the assault which took place. This allows a rapist to escape prosecution because a victim can’t remember the details of the crime when questioned in court. Concerns have been expressed in the law enforcement community that the new law relating to the possession of date rape drugs can potentially weaken sexual assault statutes and harm public safety.

Senate Bill 1182 would give prosecutors the ability to bring felony charges against individuals caught in possession of date rape drugs with the intent to commit a sexual assault. Given the difficult nature of prosecuting sexual assault crimes, the Legislature should embrace this opportunity to provide serious consequences for criminals looking to use date rape drugs to facilitate a heinous crime.

2. Difference Between Attempted Sexual Assault and Possession of a Drug with Intent to Commit a Sex Crime

Governor Brown vetoed the identical predecessor to this bill - SB 333 (Galgiani) - in 2015. In relevant part, the Governor’s veto message on this and numerous other bills stated:

Each of these bills creates a new crime - usually by finding a novel way to characterize and criminalize conduct that is already proscribed. This multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit.

Members may wish to consider whether possession of a drug with intent to commit a sex crime is equivalent to attempt to commit a sex crime, which already is a crime. In many cases, the proof of an attempted sex crime would overlap with proof of possession of a drug with intent to commit a sex crime. An attempt to commit a crime has the following two elements: The defendant intended to commit a crime and he or she took a direct, yet ultimately ineffectual, step towards commission of the crime. An attempted crime would have been completed except for some circumstance or occurrence that interrupted or prevented the defendant's commission of the offense. Preparation to commit a crime is not a direct step towards commission of a crime that establishes an attempt. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; CALCRIM 406.) Possession of a drug with the intent to commit a sex crime would appear to constitute preparation, not an attempt, under current law.

With the crime defined by this bill - possession of a specified drug with the intent to commit a sex crime - the prosecution would not need to prove that the defendant went beyond preparation and took a direct step toward commission of the crime. The prosecutor would simply need to prove possession, including exercising dominion and control of a drug that is not held on the defendant's person, with the intent to commit a sex offense. Proof of intent would typically involve the defendant's admission of such intent or prior convictions and arrests for similar conduct.

In most cases, there are limits on the use of prior convictions as proof of a current crime. Specifically, a defendant's prior convictions or bad acts cannot be used to establish his or her *propensity* to commit the charged offense. (Evid. Code § 1101, subd. (a).) Propensity evidence is essentially improper character evidence. Jurors who are informed that a defendant has been previously convicted of a crime – especially the same crime for which the defendant is being tried – are highly likely to convict the defendant because of his or her propensity to commit the charged offense, not the evidence in the current case. *People v. Thompson* (1980) 27 Cal.3d 303, 317-318.) Evidence of prior convictions and other bad acts are, however, admissible to prove knowledge intent, motive, common plan or identity. (Evid. Code § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th at 380, 393-406.)

As to sex crime prosecutions, “all that changed ...with the advent of [Evidence Code] section 1108.” (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.) Evidence Code Section 1108, subdivision (a) provides: “In a criminal action in which the defendant is accused of a sexual offense, *evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.*” Section 352 authorizes a trial judge to bar use of evidence that is more prejudicial than probative. Evidence is more prejudicial than probative if the unfairness of the evidence outweighs its tendency to prove an issue in the case.

Jurors find prior convictions or arrests for a similar offense to the one charged to be *very* powerful evidence. The fact that jurors will likely rely on a prior conviction in weighing a defendant's guilt than the evidence about the current offense is precisely why prior conviction evidence is generally inadmissible. (*People v. Thompson, supra*, 27 Cal.3d 303, 317-318.)

3. Plea Bargain Issues – Obtaining a Plea to Possession of a Drug with Intent to Commit a Sex Crime in Cases where Conviction at Trial of a Violent Sex Crime is Uncertain

The crime defined by this bill could be the basis for a plea bargain in cases where the prosecutor and the defendant are each not confident of prevailing in the trial of a sex crime such as rape or forced oral copulation. If there are proof problems with a more serious sex offense – for example, the witness cannot remember important things about the incident or she is extremely reluctant to testify - the prosecutor could still obtain a felony conviction for sex crime through a plea, rather than the defendant going free or being convicted of an offense that doesn't reflect his criminal sexual intent. A defendant could be motivated to plead guilty in order to avoid a long sentence if he were convicted of the more serious offense. Because the consequences for something going wrong are so severe - a long prison term for the defendant and the possibility that a predator walks free for the prosecution - each side tends to be acutely aware of the weaknesses in his or her case.

Defendants with prior sex offenses are excluded from misdemeanor possession of drugs charges under Proposition 47. However, a simple possession conviction would not reflect that the defendant's crime was sexually motivated or that he has a history of sex crimes. The crime defined by this bill would clearly reflect the defendant's criminal sexual intent.

4. Use of Ketamine, Flunitrazepam or GHB for Prescription Medications, Self-Medication and Intoxication

Ketamine is an anesthetic-dissociative drug. It appears to be the drug of choice in pediatric surgery and pediatric emergency pain management, as it blocks the sensation of pain without full unconsciousness and depressed respiration.¹² Ketamine is very widely used in African and other countries with low per-capita income levels, as it is effective, cheap and safe. Greater restrictions of ketamine manufacturing and distribution have caused great alarm in Africa among physicians and public health experts.³

Ketamine has recently been used as an “off label” drug for the treatment of depressions. Patients report that they lose their depressive symptoms quickly and the effect lasts for months.⁴ Clinical trials have been conducted or are underway for use of ketamine as a formally recognized depression treatment. The results of the trials have been remarkably positive.⁵⁶

Ketamine is used for intoxication or mind-altering experiences. Users seek the dissociative experience that would be considered an unwanted or problematic side effect in medical use. Users lose awareness of their surroundings and report vivid hallucinations. Some people found them profound and enjoyable,⁷ others found the experience disturbing.

¹ <http://www.ncbi.nlm.nih.gov/pubmed/18645539>

² <http://emupdates.com/wp-content/uploads/2011/01/ACEP-Ketamine-Guideline-2011.pdf>

³ <http://www.theguardian.com/world/2015/feb/27/raver-drug-ketamine-control-plan-at-un-condemned-as-potential-disaster>

⁴ http://www.nytimes.com/2014/12/10/business/special-k-a-hallucinogen-raises-hopes-and-concerns-as-a-treatment-for-depression.html?_r=0

⁵ <http://www.nimh.nih.gov/about/director/2014/ketamine.shtml>

⁶ <http://www.nimh.nih.gov/labs-at-nimh/join-a-study/trials/adult-studies/rapid-antidepressant-effects-of-ketamine.shtml>

⁷ <https://www.erowid.org/experiences/exp.php?ID=38360>

GHB is prescribed to narcoleptics to allow them to sleep deeply at night. It is often used as a so-called “club drug.”⁸ It has been described as being similar to alcohol intoxication, but with more euphoric effects, without a hangover the next day. However, users’ experiences are quite variable.⁹ GHB is dangerous when mixed with alcohol, as both are central nervous system depressants.

Flunitrazepam is a benzodiazepine, the class of sedative-hypnotic drugs that include Xanax, Valium, and many others. It was developed in 1965. It has been described as 10 times more potent than Valium, but is typically prescribed in doses that are 1/10th of that of a common Valium dose. It is not available legally in the United States, but it is available around the world. It has been the most widely prescribed drug of its class in Europe.¹⁰ It has been successfully used to treat alcoholics suffering from delirium tremens during withdrawal. Flunitrazepam is very widely used by heroin addicts to boost the effects of the drug without risking overdose and to ease withdrawal.¹¹¹² A University of Illinois study on the extent of drug facilitated sexual assault noted use of the drug by opiate addicts and cocaine users, including rape victims themselves. (Negruz, et al., Estimate of the Incidence of Drug-Facilitated Sexual Assault in the U.S, Univ. of Illinois, Chicago (Nov. 2005).)

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⁸ ‘The silent ‘G’’ Contemporary Drug Problems, 2012

⁹ https://www.erowid.org/experiences/subs/exp_GHB.shtml#General

¹⁰ <http://www.cesar.umd.edu/cesar/drugs/rohypnol.asp>

¹¹ <http://www.ncbi.nlm.nih.gov/pubmed/8102333>

¹² <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3454351/>