
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 333 **Hearing Date:** April 28, 2015
Author: Galgiani
Version: April 20, 2015
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Controlled Substances*

HISTORY

Source: California District Attorneys Association

Prior Legislation: None

Support: Association for Los Angeles Deputy Sheriffs; California College and University Police Chiefs Association; California Correctional Supervisors Organization; California Narcotic Officers Association; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs Association; Crime Victims United of California; San Bernardino County Sheriff; California Insurance Commissioner Dave Jones

Opposition: Ella Baker Center for Human Rights; 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 by a prison term of 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 in state prison for 16 months, or two 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 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:

In November 2014, Proposition 47 was approved by voters to reclassify many crimes that were previously eligible to be charged as either as a felony, or a misdemeanor, as solely misdemeanors, unless the defendant had a prior sex crime or specified violent felony conviction. This included reducing the penalties for the illegal possession of the drugs Rohypnol and GHB —commonly known as 'date rape' drugs. The law enforcement community and sexual assault survivor advocate organizations have expressed concern over this change and how it could potentially weaken current sexual assault laws.

Originally, Senate Bill 333 would have restored wobbler status for the simple possession of these drugs. However, after working with concerned parties I have amended the bill to create a new felony crime of possession with the intent to commit sexual assault for the commonly known date rape drugs of Rohypnol, GHB and ketamine. This will allow prosecutors to bring felony charges against a perpetrator who has been found in possession of these drugs and has taken steps to use them to facilitate a sexual assault.

Given the difficult nature of prosecuting sexual assault crimes, California should embrace this opportunity to provide serious consequences for criminals looking to use date rape drugs to facilitate a heinous crime. Senate Bill 333 recognizes that date rape drugs can be used as a tool for sexual predators and if they are used for this purpose, there must be a instrument available for prosecutors to charge them accordingly.

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

An attempt is the intent to commit a crime and an affirmative, yet unsuccessful, step towards committing the crime. For the crime to be an attempt, the intended crime would have been committed had some circumstance not intervened. “Mere preparation” towards commission of a crime is not an affirmative step. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; CALCRIM 406.)

The crime defined in this bill – possession of a specified drug with intent to commit a sexual assault - would allow conviction of defendants who did not go beyond preparation. For example, the defendant told his companions at a bar that he wanted to drug a woman and have sex with her. He talks to the woman for a while and then puts a drug in her drink. Her friends intervene when the defendant tries to get the now extremely intoxicated woman to leave the bar with him. This could be described as preparation to commit a sex crime, not a direct step towards commission of the crime, and thus not an attempt. This conduct would constitute guilt of possession of a drug with intent to commit a sex crime.

3. Difference between Conviction of Possession with Intent to Commit a Sex Crime and Prosecution of a Person Excluded from a Misdemeanor Prosecution under Proposition 47

Defendants with prior sex offenses are excluded from the misdemeanor drug possession provisions in Proposition 47. However, if an excluded defendant's possession of a drug had a sexual motivation or connection, a simple possession conviction would not reflect that. Even if the prior was a sex offense, there would be nothing about the *current* conviction indicating a sexual motivation or connection.

In contrast, in a prosecution for possession with intent to commit a sex crime under this bill, the defendant's prior convictions and misconduct could be used as evidence of his intent in the current case. There are limits on the use of prior convictions as proof of a current crime, but prior convictions are admissible to show a defendant's intent, motive or knowledge. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393–394; CALCRIM 375.) Nevertheless, jurors find prior convictions for a similar offense to the one charged to be very powerful evidence. Evidence of prior convictions is restricted because the evidence is so convincing. The main restriction is that the jury can't simply find that the prior conviction itself establishes guilt in the current offense. However, as many defendants find – as a practical matter, consideration of a prior conviction or prior bad conduct as proof of intent very often leads to a conviction in the current case.

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/health/trials/depression.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 is 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, to ease withdrawal.¹¹¹² Studies of drug facilitated sexual assault found examples of women who likely used the drug in connection with opiate addiction or cocaine use. The University of Illinois study described in Comment # 7 noted this use of the drug.

5. Proposition 47

On November 4, 2014, California voters approved Proposition 47 - the Safe Neighborhoods and Schools Act - which reduced penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes. Proposition 47 also allows inmates serving sentences for crimes affected by the reduced penalties to apply to be resentenced. According to the California Secretary of State's web site, 59.6 percent of voters approved Proposition 47. (See <<http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf>> [as of Mar. 14, 2015].) The purpose of the measure was "to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), Text of Proposed Laws, p. 70.) One of the ways the measure created savings was by requiring misdemeanor penalties instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession for personal use, unless the defendant has prior convictions for specified violent crimes. (Ibid.)

Four months into its implementation, Proposition 47 has resulted in fewer inmates in state prisons and county jails. According to the Legislative Analysts' Office (LAO), "As of January 28, 2015, the inmate population in the state's prisons was about 113,500, or 3,600 inmates below the February 2015 cap, and slightly below the final February 2016 cap. The expected impact of Proposition 47 on the prison population will make it easier for the state to remain below the population cap." (LAO, The 2015-16 Budget: Implementation of Proposition 47 (Feb. 2015), p. 10.) The LAO report also found that Proposition 47 will likely reduce the costs of criminal justice for counties, by freeing up jail beds and reducing the time probation departments need to follow prisoners after they are released. (*Id.*, at p. 17.)

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/>

6. California Constitutional Limitations on Amending a Voter Initiative

Because Proposition 47 was a voter initiative, the Legislature may not amend the initiative without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) Courts have a duty to jealously guard the people's initiative power and, hence, to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process is not improperly annulled by a legislative body. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.) Yet, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have recognized that the Legislature is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a "related but distinct area" or a matter that an initiative measure "does not specifically authorize or prohibit." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025-1026.)

Proposition 47 states: "This act shall be broadly construed to accomplish its purposes. The provisions of this measure may be amended by a two thirds vote of the members of each house of the Legislature and signed by the Governor so long as the amendments are consistent with and further the intent of this act. The Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), Text of Proposed Laws, p. 74.)

This bill in its original form would have amended Proposition 47's provisions that require misdemeanor penalties for the crime of drug possession for personal use, by allowing felony penalties for the drugs covered by this bill. As amended, this bill does not affect Proposition 47 because this bill no longer deals with simple possession of drug use. Similar to the statutes that require specific intent to sell controlled substances which remain felonies, this bill will require specific intent to commit sexual assault in order to charge a defendant with a felony. Because the bill as amended does not affect Proposition 47, this bill will no longer have to go before the voters.

7. Drug-Facilitated Sexual Assault Statistics

The limited studies on this issue have found that although a person may be surreptitiously drugged with Rohypnol, GHB, or ketamine in order to incapacitate that person, it is much more common for a person to consume these drugs voluntarily for its intoxicating effects.

One study, funded by the National Institute of Justice, examined the prevalence, nature, and reporting of various types of sexual assault experienced by college students. (Krebs, et al., The Campus Sexual Assault Study, National Institute of Justice (Oct. 2007).) The researchers worked with two large, public universities to collect data from over 6,800 undergraduate students (5,466 women and 1,375 men). The data indicated that 7.8% of women were sexually assaulted when they were incapacitated after voluntarily consuming drugs and/or alcohol and 0.6% were sexually assaulted when they were incapacitated after having been given a drug without their knowledge. (*Id.*, at p. iv; see also § 6-1.) The study found that the majority of the sexual assault victims that were incapacitated reported having consumed alcohol (89%) or being intoxicated prior to being assaulted (82%). (*Id.*, § 5.1.3.)

Another study conducted by the University of Illinois at Chicago, funded by the U.S. Department of Justice, worked with four clinics (Texas, California, Minnesota, and Washington State) to study the prevalence of drugs in sexual assault cases received by these clinics. (Negruz, et al., Estimate of the Incidence of Drug-Facilitated Sexual Assault in the U.S, Univ. of Illinois, Chicago (Nov. 2005).) The study used self-reporting surveys as well as toxicological analyses of the subjects. The drugs inquired about in the self-reporting survey included marijuana, cocaine, and amphetamines. These three drugs were chosen because they are not normally given surreptitiously. (*Id.*, at pp. 7-8.) The toxicological analyses tested for those three drugs, as well as other drugs that are often considered "date rape drugs" which include Rohypnol, GHB, ketamine, clonazepam and scopolamine. (*Id.*, at p. 112.) Testing positive for one of these drugs could be due to several different reasons: valid prescription use by the subject, recreational drug use by the subject, surreptitious drug administration by a potential assailant, or, in the case of GHB, endogenous levels because GHB exists naturally in the human body. (*Id.* at pp. 112-113.)

Among the 144 participants, 61.8% tested positive for one of the drugs being analyzed in the study. (Negruz, Estimate of the Incidence of Drug-Facilitated Sexual Assault in the U.S, *supra*, at p. 2.) The drugs separated out as "date rape" drugs were found in seven subjects (4.86%), of which three had a prescription. No one admitted to having a prescription for GHB, or using it recreationally, and GHB was only found in levels considered to be endogenous – produced by the body naturally. (*Id.*, at p. 113.) However, the study does note that GHB has a short detection time of 10-12 hours and because only four subjects reported to the clinic within 12 hours, if any of the subjects had been given GHB, the levels would have been undetectable. (*Id.*, at p. 121.) Ketamine and scopolamine were not reported to by any of the subjects in the surveys, and were not found. Flunitrazepam (Rohypnol) was not admitted to by anyone, but was found in four subjects. (*Id.*, at p. 113.) However, when tested a second time a week later, some of these subjects tested positive for flunitrazepam, indicating that the subjects were self-medicating or using the drug recreationally, but did not report that in the survey. (*Id.*, at pp. 89, 189.) The study concluded that most of the subjects testing positive for these drugs had taken them by their own accord and not received them surreptitiously. (*Id.*, at p. 189.)

The study also evaluated whether participants truthfully reported their drug use. The number of subjects who admitted to taking drugs voluntarily was 40%, as compared to the 61.8% of subjects who tested positive for one of the analyzed drugs. (Negruz, Estimate of the Incidence of Drug-Facilitated Sexual Assault in the U.S, *supra*, at p. 190.) Researchers hypothesized that the subjects' under-reporting of their drug usage may be attributed to the fact that the drugs being analyzed are illegal and a person may face prosecution for its use, or that the subjects may have felt that their recreational use of illegal drugs could negatively affect the course of a sexual assault prosecution. (*Id.*, at pp. 16, 190.)

While drug-facilitated sexual assault is a serious problem, these studies confirm that it occurs most often after an individual's own recreational use of drugs, rather than surreptitious drugging by another person. Drugs such as Rohypnol, ketamine and GHB may be used to facilitate sexual assault of an incapacitated person, but these are not the only drugs that can be used, nor are they the most commonly used. The substance that is most commonly found in sexual assault victims is alcohol. (Krebs, The Campus Sexual Assault Study, *supra* at p. 89; also see Grimes, Alcohol is by far the most dangerous "date rape drug" (Sept. 22, 2014) The Guardian, <<http://www.theguardian.com/science/blog/2014/sep/22/alcohol-date-rape-drug-facilitated-sexual-assault-dfsa>> [as of Mar. 19, 2015].)

This bill targets persons who possess these drugs for predatory purposes, rather than those who merely possess these drugs for personal use. This will ensure that victims of these crimes who may have consumed these drugs voluntarily prior to being assaulted will not have to fear prosecution of a felony when deciding whether to report the incident.

8. Proposition 36 of 2000 – the Substance Abuse and Crime Prevention Act (SACPA)

Proposition 36 of 2000 - the Substance Abuse and Crime Prevention Act (SACPA) - requires that drug possessors be offered treatment without jail. Opponents of SACPA argued that defendants who possessed “date rape” drugs would escape punishment and scrutiny. That is, these defendants would have no problem completing drug treatment, since they did not take the drugs themselves. They would never have a positive drug test and they would show no outward signs of being sex offenders. They would have their records cleared – including the arrest – and be free to commit sex crimes without any scrutiny. This problem simply did not happen. It appears that there have been no reports of sexual predators escaping detection and punishment under SACPA in the 15 years since its passage.

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