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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** SB 966                      **Hearing Date:** April 5, 2016  
**Author:** Mitchell  
**Version:** February 8, 2016  
**Urgency:** No                                      **Fiscal:** No  
**Consultant:** JM

**Subject:** *Controlled Substances: Sentence Enhancements: Prior Convictions*

### HISTORY

**Source:** Californians United for a Responsible Budget; Drug Policy Alliance; Ella Baker Center for Human Rights

**Prior Legislation:** AB 2320 (Condit) – Ch. 1398, Stats. of 1985

**Support:** American Civil Liberties Union of California; American Friends Service Committee; Arts for Incarcerated Youth Network; Bay Area Black Worker Center; California Attorneys for Criminal Justice; California Coalition for Women Prisoners; California Partnership; California Public Defenders Association; Californians for Safety and Justice; Center for Health Justice; Center for Living and Learning; Center on Juvenile and Criminal Justice; Centro Legal de la Raza; Communities United for Restorative Youth Justice; Courage Campaign; Critical Resistance Los Angeles; Fathers & Families of San Joaquin; Forward Together; Friends Committee on Legislation; HealthRIGHT360; Healthy Communities Inc.; HIV Education and Prevention Project of Alameda County; Human Rights of the Incarcerated Coalition; Islamic Shura Council of Southern California; Justice Now; Justice Policy Institute; Law Enforcement Against Prohibition; Lawyers' Committee for Civil Rights, S.F.; Legal Services for Prisoners with Children; Los Angeles Community Action Network; Monterey Bay Central Labor Council, AFL-CIO; Mortgage Personnel Services; National Center for Youth Law; A New Way of Life; Oakland Rising; Prison Activist Resource Center; Prison Law Office; Prison Policy Initiative; Project Inform; RYSE; San Diego Organizing Project; Silicon Valley Debug; Transgender, Gender-variant, Intersex Justice Project; W. Haywood Burns Institute; Women's Council of the California Chapter of the National Association of Social Workers; Women's Foundation of California; Young Women's Freedom Center; 2 individuals

**Opposition:** Association for Los Angeles Deputy Sheriffs; Association of Deputy District Attorneys; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Narcotic Officers Association; California District Attorneys Association; California Police Chiefs Association; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs Association; International Faith Based Coalition; California State Sheriffs' Association

## PURPOSE

*The purpose of this bill is to repeal the current enhancement for specified drug commerce crimes under which a defendant receives an additional term of three years for each prior conviction of any one the listed crimes.*

*Existing law* classifies controlled substances in five schedules according to their medical utility and potential for abuse. Schedule I controlled substances are deemed to have no accepted medical uses and cannot be prescribed. Examples of drugs in the California Schedule include the following:

- Cocaine, heroin and marijuana are Schedule I drugs.
- Methamphetamine, oxycodone and codeine are Schedule II drugs.
- Barbiturates (tranquilizers, anabolic steroids and specified narcotic, pain medications are Schedule III drugs.
- Benzodiazepines (Valium) and phentermine (diet drug) are Schedule IV drugs.
- Specified narcotic pain medications with active non-narcotic active ingredients are Schedule V drugs. (Health & Saf. Code §§ 11054-11058.)

*Existing law* provides penalties for possession, possession for purposes of sale, and manufacturing of controlled substances. Sentences for drug offenses are typically subject to Penal Code Section 1170 (h). Convicted defendants serve felony sentences in county jails, unless disqualified by prior serious felony convictions or by being a registered sex offender. (Health & Saf. Code §§ 11350-11401.)

*Existing law* includes a myriad of enhancements for controlled substance crimes. These include enhancements for drug crimes that involve of affect minors, for the weight or volume of the substance and prior drug-crime convictions. (See. Health & Saf. Code §§ 11370.2, 11370.4, 11353.4, 11353.6, subd. (b), and 11379.7.)

*Existing law* provides that where a person is convicted in a current case of one of a list of specified drug commerce crimes, and the person has been previously convicted of any of these crimes, he or she shall receive a sentence enhancement of three years for each prior conviction, to be served in jail unless the defendant is disqualified from a jail term by prior serious felony convictions or sex offender registration, or another statute requires a prison term. (Health & Saf. § 11370.2.) The enhancement covers a conviction for conspiracy to commit any of the listed crimes. The qualifying offenses are as follows. All statutory references in the list are to the Health and Safety Code:

- Possession for sale of cocaine, heroin, specified opiates or other specified drugs - § 11350
- Possession for sale of cocaine base - § 11351.5
- Possession for sale of cocaine, heroin, specified opiates and other specified drugs - § 11351
- Sale, distribution or transportation of cocaine, cocaine base heroin, specified opiates - § 11352
- Possession for sale of methamphetamine or specified other drugs - § 11378
- Sale, distribution or transportation of methamphetamine or specified other drugs - § 11379
- Possession for sale of PCP - § 11378.5

- Sale, distribution or transportation of PCP - § 11379.5
- Manufacturing any controlled substance through chemical extraction or synthesis - § 11379.6
- Manufacturing any controlled substance through chemical extraction or synthesis, with an enhancement based on the weight of the substance containing the drug - § 11379.8
- Using a minor in the commission of specified drug offenses - § 11380
- Possession of precursor chemicals with intent to manufacture PCP - § 11383

*This bill* repeals the three-year sentence enhancement for each of a defendant's prior convictions for one of a list of drug commerce crimes, where the defendant is convicted in the current case of another such crime.

#### 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:

SB 966 - the RISE Act will begin undoing the damage of the failed War on Drugs. Long sentences that were central to the drug war strategy utterly failed to reduce drug availability or the number of people harmed in the illicit drug market. Controlled substances are now cheaper and more widely available than ever before, despite a massive investment of tax revenue and mass incarceration that has devastated low-income communities of color.

The RISE Act will free up taxpayer dollars for investment in community-based treatment programs instead of costly jail expansion. Since 2007, California has spent \$2.2 billion on county jail construction – not including the costs borne by the counties for construction and increased staffing, or the state’s debt service. Sheriffs have argued for expansion by pointing to their growing jail populations, particularly people with long sentences and with mental health and substance use needs. By reducing sentences for people with prior drug convictions, SB 966 will diminish this rationale for jail expansion, allowing state and county funds to be invested in programs and services that truly improve public safety, including community-based mental health and substance use treatment, job programs, and affordable housing.

The RISE Act will reduce racial disparities in the criminal justice system. Enhancements based on prior drug convictions exacerbate racial disparities. Although rates of drug use and selling are comparable across racial lines, people of color are far more likely to be stopped, arrested and incarcerated for drug law violations than are whites. Prosecutors are twice as likely to seek an enhanced sentence for a black defendant as for a white defendant charged with the same offense.

The RISE Act would reduce unjust prosecutorial power. Prosecutors use enhancements as leverage to extract guilty pleas. They have complete discretion as to what charges they bring, including enhancements based on prior drug convictions. Prosecutors can coerce people into pleading guilty by offering to reduce the charges they would face at trial. Human Rights Watch observes that “plea agreements have ... become an offer drug defendants cannot afford to

refuse.”

The RISE Act would enhance community safety. Longer sentences for drug offenses do not reduce recidivism, nor do they deter crime – most people are unaware of penalties or think they will not be caught. Incarceration does not reduce crime by incapacitating people who sell drugs at the street level. Research shows that people selling retail-level drugs are quickly replaced as long as the demand for a drug remains high. Incarceration can reduce public safety by destabilizing families and communities. Released inmates face extreme barriers in finding jobs and housing. Family members of incarcerated people also struggle with overwhelming debt from court costs, visitation and telephone fees, and diminished family revenue.

Sentence enhancements based on prior convictions target the poorest and most marginalized people in our communities — those with substance use and mental health needs, and those who, after prior contact with police or imprisonment, have struggled to integrate into free society.

The RISE Act is urgently needed. Counties around the state are building new jails to imprison more people with long sentences, funneling money away from community-based programs and services. People with drug issues, particularly those in low-income communities of color, are increasingly left with the choice of seeking help in a jail or not seeking help at all.

## 2. History of the Enhancement for Prior Drug Crimes

The enhancement for prior drug crime convictions was enacted through AB 2320 (Condit), Chapter 1398, Statutes of 1985. The bill included un-codified legislative intent “to punish more severely those persons who are in the regular business of trafficking in, or production of, narcotics and those persons who deal in large quantities of narcotics as opposed to individuals who have a less serious, occasional, or relatively minor role in this activity.”

The bill - called “The Dealer Statute” - was sponsored by the Los Angeles District Attorney and also included enhancements based on the weight of the drug involved in specified drug commerce crime. The weight enhancement is found in Health and Safety Code Section 11370.4. The Senate Judiciary Committee analysis of the bill set out the sponsor’s explanation that the bill was modeled on particularly harsh federal drug crime laws. The sponsor argued that the bill was necessary to eliminate an incentive for persons “to traffic [in drugs] in California where sentences are significantly lighter than in federal law.”

The federal laws to which the sponsor referred were those enacted in the expansion of the so-called war against drugs during the Reagan administration. President Reagan announced his initiative<sup>1</sup> in October of 1982, at a time when Columbian cocaine “cartels” were becoming powerful.<sup>2</sup> Nancy Reagan announced her “Just Say No” campaign in July of 1984. These federal laws included reduced judicial discretion, including through mandatory minimum sentences. The current administration has begun to pull back on some of the harshest policies

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<sup>1</sup> <http://www.presidency.ucsb.edu/ws/?pid=43085>

<sup>2</sup> <http://www.npr.org/templates/story/story.php?storyId=9252490>

and Congress has passed some sentence reductions, most notably reducing the disparity between cocaine powder crimes and cocaine base crimes.

### 3. Research on Sentences and Sentences Increases as Deterrents 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.<sup>3</sup>

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.<sup>4</sup>

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.”<sup>5</sup>

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<sup>3</sup> 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>.)

<sup>4</sup> *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](http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf).)

<sup>5</sup> *Id.* at 132-133.

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.*

DO SEVERE SENTENCE ENHANCEMENTS, SUCH THE ENHANCEMENT FOR A PRIOR DRUG CRIMES THAT WOULD BE REPEALED BY THIS BILL, DISCOURAGE PERSONS FROM DRUG COMMERCE RECIDIVISM?

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