

ASSEMBLY BILL

No. 828

Introduced by Assembly Member Holden

February 21, 2013

An act to amend Sections 11370.6 and 11379.6 of the Health and Safety Code, and to amend Section 1170 of the Penal Code, relating to controlled substances.

LEGISLATIVE COUNSEL'S DIGEST

AB 828, as introduced, Holden. Controlled substances:

(1) Existing law prohibits every person from possessing any moneys or negotiable instruments in excess of \$100,000 which have been obtained as the result of the unlawful sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture any specified controlled substance, with knowledge that the moneys or negotiable instruments have been so obtained, and prohibits any person from possessing any moneys or negotiable instruments in excess of \$100,000 which are intended by that person for the unlawful purchase of any specified controlled substance, and from committing an act in substantial furtherance of the unlawful purchase. Existing law requires that a person who violates one of those provisions be punished by imprisonment in a county jail for a term not to exceed one year, or by imprisonment in a county jail for 2, 3, or 4 years.

This bill would require that a person who violates one of those provisions be punished by imprisonment in the state prison, rather than a county jail, for the specified term.

(2) Existing law, except as specified, prohibits every person from manufacturing, compounding, converting, producing, deriving, processing, or preparing, either directly or indirectly by chemical

extraction or independently by means of chemical synthesis, any specified controlled substance, and requires that the person be punished by imprisonment in a county jail for 3, 5, or 7 years and by a fine not exceeding \$50,000. Existing law also, except as specified, prohibits every person from offering to perform an act which is punishable under the preceding provision, and requires that the person be punished by imprisonment in a county jail for 3, 4, or 5 years.

This bill would require that a person who violates either of those provisions be punished by imprisonment in the state prison, rather than a county jail, for the specified term.

(3) Under existing law, where the defendant has a prior or current felony conviction for a specified serious felony or a prior or current conviction for a specified violent felony, or has a prior felony conviction in another jurisdiction for an offense that has all the elements of a specified serious felony or a specified violent felony, that defendant is required to register as a sex offender, as specified. Existing law requires that where the defendant is convicted of a crime and as part of the sentence a specified enhancement is imposed, an executed sentence for a specified felony shall be served in state prison.

This bill would specify which sentence enhancements would require the executed sentence for specified felonies be served in state prison.

Vote: majority. Appropriation: no. Fiscal committee: yes.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11370.6 of the Health and Safety Code
 2 is amended to read:
 3 11370.6. (a) Every person who possesses any moneys or
 4 negotiable instruments in excess of one hundred thousand dollars
 5 (\$100,000) which have been obtained as the result of the unlawful
 6 sale, possession for sale, transportation, manufacture, offer for
 7 sale, or offer to manufacture any controlled substance listed in
 8 Section 11054, 11055, 11056, 11057, or 11058, with knowledge
 9 that the moneys or negotiable instruments have been so obtained,
 10 and any person who possesses any moneys or negotiable
 11 instruments in excess of one hundred thousand dollars (\$100,000)
 12 which are intended by that person for the unlawful purchase of
 13 any controlled substance listed in Section 11054, 11055, 11056,
 14 11057, or 11058 and who commits an act in substantial furtherance

1 of the unlawful purchase, shall be punished by imprisonment in a
2 county jail for a term not to exceed one year, or by imprisonment
3 ~~pursuant to subdivision (h) of Section 1170 of the Penal Code in~~
4 ~~the state prison~~ for two, three, or four years.

5 (b) In consideration of the constitutional right to counsel
6 afforded by the Sixth Amendment to the United States Constitution
7 and Section 15 of Article 1 of the California Constitution, when a
8 case charged under subdivision (a) involves an attorney who
9 accepts a fee for representing a client in a criminal investigation
10 or proceeding, the prosecution shall additionally be required to
11 prove that the moneys or negotiable instruments were accepted by
12 the attorney with the intent to participate in the unlawful conduct
13 described in subdivision (a) or to disguise or aid in disguising the
14 source of the funds or the nature of the criminal activity.

15 (c) In determining the guilt or innocence of a person charged
16 under subdivision (a), the trier of fact may consider the following
17 in addition to any other relevant evidence:

18 (1) The lack of gainful employment by the person charged.

19 (2) The expert opinion of a qualified controlled substances
20 expert as to the source of the assets.

21 (3) The existence of documents or ledgers that indicate sales
22 of controlled substances.

23 SEC. 2. Section 11379.6 of the Health and Safety Code is
24 amended to read:

25 11379.6. (a) Except as otherwise provided by law, every
26 person who manufactures, compounds, converts, produces, derives,
27 processes, or prepares, either directly or indirectly by chemical
28 extraction or independently by means of chemical synthesis, any
29 controlled substance specified in Section 11054, 11055, 11056,
30 11057, or 11058 shall be punished by imprisonment ~~pursuant to~~
31 ~~subdivision (h) of Section 1170 of the Penal Code in the state~~
32 ~~prison~~ for three, five, or seven years and by a fine not exceeding
33 fifty thousand dollars (\$50,000).

34 (b) Except when an enhancement pursuant to Section 11379.7
35 is pled and proved, the fact that a person under 16 years of age
36 resided in a structure in which a violation of this section involving
37 methamphetamine occurred shall be considered a factor in
38 aggravation by the sentencing court.

39 (c) Except as otherwise provided by law, every person who
40 offers to perform an act which is punishable under subdivision (a)

1 shall be punished by imprisonment pursuant to subdivision (h) of
2 Section 1170 of the Penal Code in the state prison for three, four,
3 or five years.

4 (d) All fines collected pursuant to subdivision (a) shall be
5 transferred to the State Treasury for deposit in the Clandestine
6 Drug Lab Clean-up Account, as established by Section 5 of Chapter
7 1295 of the Statutes of 1987. The transmission to the State Treasury
8 shall be carried out in the same manner as fines collected for the
9 state by the county.

10 SEC. 3. Section 1170 of the Penal Code, as amended by Section
11 2 of Chapter 828 of the Statutes of 2012, is amended to read:

12 1170. (a) (1) The Legislature finds and declares that the
13 purpose of imprisonment for crime is punishment. This purpose
14 is best served by terms proportionate to the seriousness of the
15 offense with provision for uniformity in the sentences of offenders
16 committing the same offense under similar circumstances. The
17 Legislature further finds and declares that the elimination of
18 disparity and the provision of uniformity of sentences can best be
19 achieved by determinate sentences fixed by statute in proportion
20 to the seriousness of the offense as determined by the Legislature
21 to be imposed by the court with specified discretion.

22 (2) Notwithstanding paragraph (1), the Legislature further finds
23 and declares that programs should be available for inmates,
24 including, but not limited to, educational programs, that are
25 designed to prepare nonviolent felony offenders for successful
26 reentry into the community. The Legislature encourages the
27 development of policies and programs designed to educate and
28 rehabilitate nonviolent felony offenders. In implementing this
29 section, the Department of Corrections and Rehabilitation is
30 encouraged to give priority enrollment in programs to promote
31 successful return to the community to an inmate with a short
32 remaining term of commitment and a release date that would allow
33 him or her adequate time to complete the program.

34 (3) In any case in which the punishment prescribed by statute
35 for a person convicted of a public offense is a term of imprisonment
36 in the state prison of any specification of three time periods, the
37 court shall sentence the defendant to one of the terms of
38 imprisonment specified unless the convicted person is given any
39 other disposition provided by law, including a fine, jail, probation,
40 or the suspension of imposition or execution of sentence or is

1 sentenced pursuant to subdivision (b) of Section 1168 because he
2 or she had committed his or her crime prior to July 1, 1977. In
3 sentencing the convicted person, the court shall apply the
4 sentencing rules of the Judicial Council. The court, unless it
5 determines that there are circumstances in mitigation of the
6 punishment prescribed, shall also impose any other term that it is
7 required by law to impose as an additional term. Nothing in this
8 article shall affect any provision of law that imposes the death
9 penalty, that authorizes or restricts the granting of probation or
10 suspending the execution or imposition of sentence, or expressly
11 provides for imprisonment in the state prison for life, except as
12 provided in paragraph (2) of subdivision (d). In any case in which
13 the amount of preimprisonment credit under Section 2900.5 or any
14 other provision of law is equal to or exceeds any sentence imposed
15 pursuant to this chapter, the entire sentence shall be deemed to
16 have been served and the defendant shall not be actually delivered
17 to the custody of the secretary. The court shall advise the defendant
18 that he or she shall serve a period of parole and order the defendant
19 to report to the parole office closest to the defendant's last legal
20 residence, unless the in-custody credits equal the total sentence,
21 including both confinement time and the period of parole. The
22 sentence shall be deemed a separate prior prison term under Section
23 667.5, and a copy of the judgment and other necessary
24 documentation shall be forwarded to the secretary.

25 (b) When a judgment of imprisonment is to be imposed and the
26 statute specifies three possible terms, the court shall order
27 imposition of the middle term, unless there are circumstances in
28 aggravation or mitigation of the crime. At least four days prior to
29 the time set for imposition of judgment, either party or the victim,
30 or the family of the victim if the victim is deceased, may submit
31 a statement in aggravation or mitigation to dispute facts in the
32 record or the probation officer's report, or to present additional
33 facts. In determining whether there are circumstances that justify
34 imposition of the upper or lower term, the court may consider the
35 record in the case, the probation officer's report, other reports,
36 including reports received pursuant to Section 1203.03, and
37 statements in aggravation or mitigation submitted by the
38 prosecution, the defendant, or the victim, or the family of the victim
39 if the victim is deceased, and any further evidence introduced at
40 the sentencing hearing. The court shall set forth on the record the

1 facts and reasons for imposing the upper or lower term. The court
2 may not impose an upper term by using the fact of any
3 enhancement upon which sentence is imposed under any provision
4 of law. A term of imprisonment shall not be specified if imposition
5 of sentence is suspended.

6 (c) The court shall state the reasons for its sentence choice on
7 the record at the time of sentencing. The court shall also inform
8 the defendant that as part of the sentence after expiration of the
9 term he or she may be on parole for a period as provided in Section
10 3000.

11 (d) (1) When a defendant subject to this section or subdivision
12 (b) of Section 1168 has been sentenced to be imprisoned in the
13 state prison and has been committed to the custody of the secretary,
14 the court may, within 120 days of the date of commitment on its
15 own motion, or at any time upon the recommendation of the
16 secretary or the Board of Parole Hearings, recall the sentence and
17 commitment previously ordered and resentence the defendant in
18 the same manner as if he or she had not previously been sentenced,
19 provided the new sentence, if any, is no greater than the initial
20 sentence. The court resentencing under this subdivision shall apply
21 the sentencing rules of the Judicial Council so as to eliminate
22 disparity of sentences and to promote uniformity of sentencing.
23 Credit shall be given for time served.

24 (2) (A) (i) When a defendant who was under 18 years of age
25 at the time of the commission of the offense for which the
26 defendant was sentenced to imprisonment for life without the
27 possibility of parole has served at least 15 years of that sentence,
28 the defendant may submit to the sentencing court a petition for
29 recall and resentencing.

30 (ii) Notwithstanding clause (i), this paragraph shall not apply
31 to defendants sentenced to life without parole for an offense where
32 the defendant tortured, as described in Section 206, his or her
33 victim or the victim was a public safety official, including any law
34 enforcement personnel mentioned in Chapter 4.5 (commencing
35 with Section 830) of Title 3, or any firefighter as described in
36 Section 245.1, as well as any other officer in any segment of law
37 enforcement who is employed by the federal government, the state,
38 or any of its political subdivisions.

39 (B) The defendant shall file the original petition with the
40 sentencing court. A copy of the petition shall be served on the

1 agency that prosecuted the case. The petition shall include the
2 defendant's statement that he or she was under 18 years of age at
3 the time of the crime and was sentenced to life in prison without
4 the possibility of parole, the defendant's statement describing his
5 or her remorse and work towards rehabilitation, and the defendant's
6 statement that one of the following is true:

7 (i) The defendant was convicted pursuant to felony murder or
8 aiding and abetting murder provisions of law.

9 (ii) The defendant does not have juvenile felony adjudications
10 for assault or other felony crimes with a significant potential for
11 personal harm to victims prior to the offense for which the sentence
12 is being considered for recall.

13 (iii) The defendant committed the offense with at least one adult
14 codefendant.

15 (iv) The defendant has performed acts that tend to indicate
16 rehabilitation or the potential for rehabilitation, including, but not
17 limited to, availing himself or herself of rehabilitative, educational,
18 or vocational programs, if those programs have been available at
19 his or her classification level and facility, using self-study for
20 self-improvement, or showing evidence of remorse.

21 (C) If any of the information required in subparagraph (B) is
22 missing from the petition, or if proof of service on the prosecuting
23 agency is not provided, the court shall return the petition to the
24 defendant and advise the defendant that the matter cannot be
25 considered without the missing information.

26 (D) A reply to the petition, if any, shall be filed with the court
27 within 60 days of the date on which the prosecuting agency was
28 served with the petition, unless a continuance is granted for good
29 cause.

30 (E) If the court finds by a preponderance of the evidence that
31 the statements in the petition are true, the court shall hold a hearing
32 to consider whether to recall the sentence and commitment
33 previously ordered and to resentence the defendant in the same
34 manner as if the defendant had not previously been sentenced,
35 provided that the new sentence, if any, is not greater than the initial
36 sentence. Victims, or victim family members if the victim is
37 deceased, shall retain the rights to participate in the hearing.

38 (F) The factors that the court may consider when determining
39 whether to recall and resentence include, but are not limited to,
40 the following:

- 1 (i) The defendant was convicted pursuant to felony murder or
2 aiding and abetting murder provisions of law.
- 3 (ii) The defendant does not have juvenile felony adjudications
4 for assault or other felony crimes with a significant potential for
5 personal harm to victims prior to the offense for which the sentence
6 is being considered for recall.
- 7 (iii) The defendant committed the offense with at least one adult
8 codefendant.
- 9 (iv) Prior to the offense for which the sentence is being
10 considered for recall, the defendant had insufficient adult support
11 or supervision and had suffered from psychological or physical
12 trauma, or significant stress.
- 13 (v) The defendant suffers from cognitive limitations due to
14 mental illness, developmental disabilities, or other factors that did
15 not constitute a defense, but influenced the defendant's
16 involvement in the offense.
- 17 (vi) The defendant has performed acts that tend to indicate
18 rehabilitation or the potential for rehabilitation, including, but not
19 limited to, availing himself or herself of rehabilitative, educational,
20 or vocational programs, if those programs have been available at
21 his or her classification level and facility, using self-study for
22 self-improvement, or showing evidence of remorse.
- 23 (vii) The defendant has maintained family ties or connections
24 with others through letter writing, calls, or visits, or has eliminated
25 contact with individuals outside of prison who are currently
26 involved with crime.
- 27 (viii) The defendant has had no disciplinary actions for violent
28 activities in the last five years in which the defendant was
29 determined to be the aggressor.
- 30 (G) The court shall have the discretion to recall the sentence
31 and commitment previously ordered and to resentence the
32 defendant in the same manner as if the defendant had not
33 previously been sentenced, provided that the new sentence, if any,
34 is not greater than the initial sentence. The discretion of the court
35 shall be exercised in consideration of the criteria in subparagraph
36 (B). Victims, or victim family members if the victim is deceased,
37 shall be notified of the resentencing hearing and shall retain their
38 rights to participate in the hearing.
- 39 (H) If the sentence is not recalled, the defendant may submit
40 another petition for recall and resentencing to the sentencing court

1 when the defendant has been committed to the custody of the
2 department for at least 20 years. If recall and resentencing is not
3 granted under that petition, the defendant may file another petition
4 after having served 24 years. The final petition may be submitted,
5 and the response to that petition shall be determined, during the
6 25th year of the defendant's sentence.

7 (I) In addition to the criteria in subparagraph (F), the court may
8 consider any other criteria that the court deems relevant to its
9 decision, so long as the court identifies them on the record,
10 provides a statement of reasons for adopting them, and states why
11 the defendant does or does not satisfy the criteria.

12 (J) This subdivision shall have retroactive application.

13 (e) (1) Notwithstanding any other law and consistent with
14 paragraph (1) of subdivision (a), if the secretary or the Board of
15 Parole Hearings or both determine that a prisoner satisfies the
16 criteria set forth in paragraph (2), the secretary or the board may
17 recommend to the court that the prisoner's sentence be recalled.

18 (2) The court shall have the discretion to resentence or recall if
19 the court finds that the facts described in subparagraphs (A) and
20 (B) or subparagraphs (B) and (C) exist:

21 (A) The prisoner is terminally ill with an incurable condition
22 caused by an illness or disease that would produce death within
23 six months, as determined by a physician employed by the
24 department.

25 (B) The conditions under which the prisoner would be released
26 or receive treatment do not pose a threat to public safety.

27 (C) The prisoner is permanently medically incapacitated with
28 a medical condition that renders him or her permanently unable
29 to perform activities of basic daily living, and results in the prisoner
30 requiring 24-hour total care, including, but not limited to, coma,
31 persistent vegetative state, brain death, ventilator-dependency, loss
32 of control of muscular or neurological function, and that
33 incapacitation did not exist at the time of the original sentencing.

34 The Board of Parole Hearings shall make findings pursuant to
35 this subdivision before making a recommendation for resentence
36 or recall to the court. This subdivision does not apply to a prisoner
37 sentenced to death or a term of life without the possibility of parole.

38 (3) Within 10 days of receipt of a positive recommendation by
39 the secretary or the board, the court shall hold a hearing to consider
40 whether the prisoner's sentence should be recalled.

1 (4) Any physician employed by the department who determines
2 that a prisoner has six months or less to live shall notify the chief
3 medical officer of the prognosis. If the chief medical officer
4 concurs with the prognosis, he or she shall notify the warden.
5 Within 48 hours of receiving notification, the warden or the
6 warden's representative shall notify the prisoner of the recall and
7 resentencing procedures, and shall arrange for the prisoner to
8 designate a family member or other outside agent to be notified
9 as to the prisoner's medical condition and prognosis, and as to the
10 recall and resentencing procedures. If the inmate is deemed
11 mentally unfit, the warden or the warden's representative shall
12 contact the inmate's emergency contact and provide the information
13 described in paragraph (2).

14 (5) The warden or the warden's representative shall provide the
15 prisoner and his or her family member, agent, or emergency
16 contact, as described in paragraph (4), updated information
17 throughout the recall and resentencing process with regard to the
18 prisoner's medical condition and the status of the prisoner's recall
19 and resentencing proceedings.

20 (6) Notwithstanding any other provisions of this section, the
21 prisoner or his or her family member or designee may
22 independently request consideration for recall and resentencing
23 by contacting the chief medical officer at the prison or the
24 secretary. Upon receipt of the request, the chief medical officer
25 and the warden or the warden's representative shall follow the
26 procedures described in paragraph (4). If the secretary determines
27 that the prisoner satisfies the criteria set forth in paragraph (2), the
28 secretary or board may recommend to the court that the prisoner's
29 sentence be recalled. The secretary shall submit a recommendation
30 for release within 30 days in the case of inmates sentenced to
31 determinate terms and, in the case of inmates sentenced to
32 indeterminate terms, the secretary shall make a recommendation
33 to the Board of Parole Hearings with respect to the inmates who
34 have applied under this section. The board shall consider this
35 information and make an independent judgment pursuant to
36 paragraph (2) and make findings related thereto before rejecting
37 the request or making a recommendation to the court. This action
38 shall be taken at the next lawfully noticed board meeting.

39 (7) Any recommendation for recall submitted to the court by
40 the secretary or the Board of Parole Hearings shall include one or

1 more medical evaluations, a postrelease plan, and findings pursuant
2 to paragraph (2).

3 (8) If possible, the matter shall be heard before the same judge
4 of the court who sentenced the prisoner.

5 (9) If the court grants the recall and resentencing application,
6 the prisoner shall be released by the department within 48 hours
7 of receipt of the court's order, unless a longer time period is agreed
8 to by the inmate. At the time of release, the warden or the warden's
9 representative shall ensure that the prisoner has each of the
10 following in his or her possession: a discharge medical summary,
11 full medical records, state identification, parole medications, and
12 all property belonging to the prisoner. After discharge, any
13 additional records shall be sent to the prisoner's forwarding
14 address.

15 (10) The secretary shall issue a directive to medical and
16 correctional staff employed by the department that details the
17 guidelines and procedures for initiating a recall and resentencing
18 procedure. The directive shall clearly state that any prisoner who
19 is given a prognosis of six months or less to live is eligible for
20 recall and resentencing consideration, and that recall and
21 resentencing procedures shall be initiated upon that prognosis.

22 (f) Notwithstanding any other provision of this section, for
23 purposes of paragraph (3) of subdivision (h), any allegation that
24 a defendant is eligible for state prison due to a prior or current
25 conviction, sentence enhancement, or because he or she is required
26 to register as a sex offender shall not be subject to dismissal
27 pursuant to Section 1385.

28 (g) A sentence to state prison for a determinate term for which
29 only one term is specified, is a sentence to state prison under this
30 section.

31 (h) (1) Except as provided in paragraph (3), a felony punishable
32 pursuant to this subdivision where the term is not specified in the
33 underlying offense shall be punishable by a term of imprisonment
34 in a county jail for 16 months, or two or three years.

35 (2) Except as provided in paragraph (3), a felony punishable
36 pursuant to this subdivision shall be punishable by imprisonment
37 in a county jail for the term described in the underlying offense.

38 (3) Notwithstanding paragraphs (1) and (2), where the defendant
39 (A) has a prior or current felony conviction for a serious felony
40 described in subdivision (c) of Section 1192.7 or a prior or current

1 conviction for a violent felony described in subdivision (c) of
2 Section 667.5, (B) has a prior felony conviction in another
3 jurisdiction for an offense that has all the elements of a serious
4 felony described in subdivision (c) of Section 1192.7 or a violent
5 felony described in subdivision (c) of Section 667.5, (C) is required
6 to register as a sex offender pursuant to Chapter 5.5 (commencing
7 with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime
8 and as part of the sentence an enhancement pursuant to *Sections*
9 *11370.2, 11370.4, 11379.7, or 11379.8 of the Health and Safety*
10 *Code, or Section 186.11 or subdivision (c) of Section 12022* is
11 imposed, an executed sentence for a felony punishable pursuant
12 to this subdivision shall be served in state prison.

13 (4) Nothing in this subdivision shall be construed to prevent
14 other dispositions authorized by law, including pretrial diversion,
15 deferred entry of judgment, or an order granting probation pursuant
16 to Section 1203.1.

17 (5) The court, when imposing a sentence pursuant to paragraph
18 (1) or (2) of this subdivision, may commit the defendant to county
19 jail as follows:

20 (A) For a full term in custody as determined in accordance with
21 the applicable sentencing law.

22 (B) (i) For a term as determined in accordance with the
23 applicable sentencing law, but suspend execution of a concluding
24 portion of the term selected in the court's discretion, during which
25 time the defendant shall be supervised by the county probation
26 officer in accordance with the terms, conditions, and procedures
27 generally applicable to persons placed on probation, for the
28 remaining unserved portion of the sentence imposed by the court.
29 The period of supervision shall be mandatory, and may not be
30 earlier terminated except by court order. Any proceeding to revoke
31 or modify mandatory supervision under this subparagraph shall
32 be conducted pursuant to either subdivisions (a) and (b) of Section
33 1203.2 or Section 1203.3. During the period when the defendant
34 is under such supervision, unless in actual custody related to the
35 sentence imposed by the court, the defendant shall be entitled to
36 only actual time credit against the term of imprisonment imposed
37 by the court. Any time period which is suspended because a person
38 has absconded shall not be credited toward the period of
39 supervision.

1 (ii) The portion of a defendant's sentenced term during which
2 time he or she is supervised by the county probation officer
3 pursuant to this subparagraph shall be known as mandatory
4 supervision.

5 (6) The sentencing changes made by the act that added this
6 subdivision shall be applied prospectively to any person sentenced
7 on or after October 1, 2011.

8 (i) This section shall become operative on January 1, 2014.

O