



March 22, 2019

ENGROSSED SENATE BILL No. 28

DIGEST OF SB 28 (Updated March 20, 2019 12:05 pm - DI 133)

Citations Affected: IC 35-48.

Synopsis: Crimes involving synthetic drugs. Specifies that an "enhancing circumstance", for purposes of criminal law, includes a prior conviction for dealing or manufacturing a substance represented to be a controlled substance. Makes certain offenses involving synthetic drugs an enhancing circumstance. Removes certain misdemeanor prosecutions concerning synthetic drugs and synthetic lookalike drugs from eligibility for conditional discharge. Makes the penalty for dealing or manufacturing a substance represented to be a controlled substance a felony of the same level as dealing or manufacturing the controlled substance that the substance is imitating.

Effective: July 1, 2019.

**Bohacek, Koch, Young M,
Randolph Lonnie M, Merritt**

(HOUSE SPONSORS — NEGELE, PRESSEL)

January 3, 2019, read first time and referred to Committee on Corrections and Criminal Law.

January 10, 2019, amended, reported favorably — Do Pass.

January 14, 2019, read second time, ordered engrossed. Engrossed.

January 15, 2019, read third time, passed. Yeas 50, nays 0.

HOUSE ACTION

February 26, 2019, read first time and referred to Committee on Courts and Criminal Code.

March 21, 2019, reported — Do Pass.

ES 28—LS 6047/DI 123



March 22, 2019

First Regular Session of the 121st General Assembly (2019)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2018 Regular and Special Session of the General Assembly.

ENGROSSED SENATE BILL No. 28

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 35-48-1-16.5, AS AMENDED BY P.L.168-2014,
2 SECTION 90, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2019]: Sec. 16.5. "Enhancing circumstance" means one (1) or
4 more of the following:
5 (1) The person has a prior conviction, in any jurisdiction, for
6 dealing in a controlled substance (**or a substance represented to
7 be a controlled substance under IC 35-48-4-4.5 through
8 IC 35-48-4-4.6**), that is not marijuana, hashish, hash oil, **or** salvia
9 divinorum, ~~or a synthetic drug~~; including an attempt or conspiracy
10 to commit the offense.
11 (2) The person committed the offense while in possession of a
12 firearm.
13 (3) The person committed the offense:
14 (A) on a school bus; or
15 (B) in, on, or within five hundred (500) feet of:
16 (i) school property while a person under eighteen (18) years
17 of age was reasonably expected to be present; or

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- 1 (ii) a public park while a person under eighteen (18) years
 2 of age was reasonably expected to be present.
- 3 (4) The person delivered or financed the delivery of the drug to a
 4 person under eighteen (18) years of age at least three (3) years
 5 junior to the person.
- 6 (5) The person manufactured or financed the manufacture of the
 7 drug.
- 8 (6) The person committed the offense in the physical presence of
 9 a child less than eighteen (18) years of age, knowing that the child
 10 was present and might be able to see or hear the offense.
- 11 SECTION 2. IC 35-48-4-4.5, AS AMENDED BY P.L.158-2013,
 12 SECTION 628, IS AMENDED TO READ AS FOLLOWS
 13 [EFFECTIVE JULY 1, 2019]: Sec. 4.5. (a) A person who knowingly or
 14 intentionally delivers or finances the delivery of any substance, other
 15 than a controlled substance or a drug for which a prescription is
 16 required under federal or state law, that:
- 17 (1) is expressly or impliedly represented to be a controlled
 18 substance;
- 19 (2) is distributed under circumstances that would lead a
 20 reasonable person to believe that the substance is a controlled
 21 substance; or
- 22 (3) by overall dosage unit appearance, including shape, color,
 23 size, markings, or lack of markings, taste, consistency, or any
 24 other identifying physical characteristic of the substance, would
 25 lead a reasonable person to believe the substance is a controlled
 26 substance;
- 27 commits dealing in a substance represented to be a controlled
 28 substance, a Level 6 felony, **except as provided in subsection (c).**
- 29 (b) In determining whether representations have been made, subject
 30 to subsection (a)(1), or whether circumstances of distribution exist,
 31 subject to subsection (a)(2), the trier of fact may consider, in addition
 32 to other relevant factors, the following:
- 33 (1) Statements made by the owner or other person in control of
 34 the substance, concerning the substance's nature, use, or effect.
- 35 (2) Statements made by any person, to the buyer or recipient of
 36 the substance, that the substance may be resold for profit.
- 37 (3) Whether the substance is packaged in a manner uniquely used
 38 for the illegal distribution of controlled substances.
- 39 (4) Whether:
- 40 (A) the distribution included an exchange of, or demand for,
 41 money or other property as consideration; and
- 42 (B) the amount of the consideration was substantially greater



1 than the reasonable retail market value of the substance.

2 **(c) If, in addition to the elements described in subsection (a), the**
 3 **state proves beyond a reasonable doubt:**

4 **(1) that the defendant:**

5 **(A) expressly or impliedly represented the substance to be**
 6 **a specific controlled substance; or**

7 **(B) knew or reasonably should have known that a**
 8 **reasonable person would believe that the substance is a**
 9 **specific controlled substance;**

10 **(2) the amount of the substance; and**

11 **(3) if applicable, the presence of an enhancing circumstance;**
 12 **the offense is a felony of the same level as the penalty for delivering**
 13 **or financing the delivery of the same amount of the specific**
 14 **controlled substance that the substance is imitating, including any**
 15 **sentencing enhancement that would apply due to the presence of an**
 16 **enhancing circumstance.**

17 SECTION 3. IC 35-48-4-4.6, AS AMENDED BY P.L.44-2016,
 18 SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 19 JULY 1, 2019]: Sec. 4.6. (a) A person who knowingly or intentionally:

20 (1) manufactures;

21 (2) finances the manufacture of;

22 (3) advertises;

23 (4) distributes; or

24 (5) possesses with intent to manufacture, finance the manufacture
 25 of, advertise, or distribute;

26 a substance described in section 4.5 of this chapter commits a Level 5
 27 felony, **except as provided in subsection (e).**

28 (b) A person may be convicted of an offense under subsection (a)(5)
 29 only if:

30 (1) there is evidence in addition to the weight of the substance
 31 that the person intended to manufacture, finance the manufacture
 32 of, advertise, or distribute the substance; or

33 (2) the amount of the substance involved is at least twenty-eight
 34 (28) grams.

35 (c) A person who knowingly or intentionally possesses a substance
 36 described in section 4.5 of this chapter commits a Class C
 37 misdemeanor. However, the offense is a Class A misdemeanor if the
 38 person has a previous conviction under this section.

39 (d) In any prosecution brought under this section it is not a defense
 40 that the person believed the substance actually was a controlled
 41 substance.

42 **(e) If, in addition to the elements described in subsection (a), the**



1 state proves beyond a reasonable doubt:

2 (1) that the defendant:

3 (A) expressly or impliedly represented the substance to be
4 a specific controlled substance; or

5 (B) knew or reasonably should have known that a
6 reasonable person would believe that the substance is a
7 specific controlled substance;

8 (2) the amount of the substance; and

9 (3) if applicable, the presence of an enhancing circumstance;
10 the offense is a felony of the same level as the penalty for
11 manufacturing, financing the manufacture of, advertising,
12 distributing, or possessing with intent to manufacture, finance the
13 manufacture of, advertise, or distribute the same amount of the
14 specific controlled substance that the substance is imitating,
15 including any sentencing enhancement that would apply due to the
16 presence of an enhancing circumstance.

17 (e) (f) This section does not apply to the following:

18 (1) The manufacture, financing the manufacture of, processing,
19 packaging, distribution, or sale of noncontrolled substances to
20 licensed medical practitioners for use as placebos in professional
21 practice or research.

22 (2) Persons acting in the course and legitimate scope of their
23 employment as law enforcement officers.

24 (3) The retention of production samples of noncontrolled
25 substances produced before September 1, 1986, where such
26 samples are required by federal law.

27 SECTION 4. IC 35-48-4-12, AS AMENDED BY P.L.168-2014,
28 SECTION 104, IS AMENDED TO READ AS FOLLOWS
29 [EFFECTIVE JULY 1, 2019]: Sec. 12. If a person who has no prior
30 conviction of an offense under this article or under a law of another
31 jurisdiction relating to controlled substances pleads guilty to possession
32 of marijuana, hashish, ~~or salvia or a synthetic drug or a synthetic drug~~
33 ~~lookalike substance~~ as a misdemeanor, the court, without entering a
34 judgment of conviction and with the consent of the person, may defer
35 further proceedings and place the person in the custody of the court
36 under conditions determined by the court. Upon violation of a
37 condition of the custody, the court may enter a judgment of conviction.
38 However, if the person fulfills the conditions of the custody, the court
39 shall dismiss the charges against the person. There may be only one (1)
40 dismissal under this section with respect to a person.



COMMITTEE REPORT

Madam President: The Senate Committee on Corrections and Criminal Law, to which was referred Senate Bill No. 28, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, line 6, after "substance" insert "**(or a substance represented to be a controlled substance under IC 35-48-4-4.5 through IC 35-48-4-4.6)**".

Page 2, between lines 8 and 9, begin a new paragraph and insert:

"SECTION 2. IC 35-48-4-4.5, AS AMENDED BY P.L.158-2013, SECTION 628, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2019]: Sec. 4.5. (a) A person who knowingly or intentionally delivers or finances the delivery of any substance, other than a controlled substance or a drug for which a prescription is required under federal or state law, that:

- (1) is expressly or impliedly represented to be a controlled substance;
- (2) is distributed under circumstances that would lead a reasonable person to believe that the substance is a controlled substance; or
- (3) by overall dosage unit appearance, including shape, color, size, markings, or lack of markings, taste, consistency, or any other identifying physical characteristic of the substance, would lead a reasonable person to believe the substance is a controlled substance;

commits dealing in a substance represented to be a controlled substance, a Level 6 felony, **except as provided in subsection (c)**.

(b) In determining whether representations have been made, subject to subsection (a)(1), or whether circumstances of distribution exist, subject to subsection (a)(2), the trier of fact may consider, in addition to other relevant factors, the following:

- (1) Statements made by the owner or other person in control of the substance, concerning the substance's nature, use, or effect.
- (2) Statements made by any person, to the buyer or recipient of the substance, that the substance may be resold for profit.
- (3) Whether the substance is packaged in a manner uniquely used for the illegal distribution of controlled substances.
- (4) Whether:
 - (A) the distribution included an exchange of, or demand for, money or other property as consideration; and



(B) the amount of the consideration was substantially greater than the reasonable retail market value of the substance.

(c) If, in addition to the elements described in subsection (a), the state proves beyond a reasonable doubt:

(1) that the defendant:

(A) expressly or impliedly represented the substance to be a specific controlled substance; or

(B) knew or reasonably should have known that a reasonable person would believe that the substance is a specific controlled substance;

(2) the amount of the substance; and

(3) if applicable, the presence of an enhancing circumstance; the offense is a felony of the same level as the penalty for delivering or financing the delivery of the same amount of the specific controlled substance that the substance is imitating, including any sentencing enhancement that would apply due to the presence of an enhancing circumstance.

SECTION 3. IC 35-48-4-4.6, AS AMENDED BY P.L.44-2016, SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2019]: Sec. 4.6. (a) A person who knowingly or intentionally:

(1) manufactures;

(2) finances the manufacture of;

(3) advertises;

(4) distributes; or

(5) possesses with intent to manufacture, finance the manufacture of, advertise, or distribute;

a substance described in section 4.5 of this chapter commits a Level 5 felony, **except as provided in subsection (e).**

(b) A person may be convicted of an offense under subsection (a)(5) only if:

(1) there is evidence in addition to the weight of the substance that the person intended to manufacture, finance the manufacture of, advertise, or distribute the substance; or

(2) the amount of the substance involved is at least twenty-eight (28) grams.

(c) A person who knowingly or intentionally possesses a substance described in section 4.5 of this chapter commits a Class C misdemeanor. However, the offense is a Class A misdemeanor if the person has a previous conviction under this section.

(d) In any prosecution brought under this section it is not a defense that the person believed the substance actually was a controlled substance.



(e) If, in addition to the elements described in subsection (a), the state proves beyond a reasonable doubt:

(1) that the defendant:

(A) expressly or impliedly represented the substance to be a specific controlled substance; or

(B) knew or reasonably should have known that a reasonable person would believe that the substance is a specific controlled substance;

(2) the amount of the substance; and

(3) if applicable, the presence of an enhancing circumstance; the offense is a felony of the same level as the penalty for manufacturing, financing the manufacture of, advertising, distributing, or possessing with intent to manufacture, finance the manufacture of, advertise, or distribute the same amount of the specific controlled substance that the substance is imitating, including any sentencing enhancement that would apply due to the presence of an enhancing circumstance.

(e) (f) This section does not apply to the following:

(1) The manufacture, financing the manufacture of, processing, packaging, distribution, or sale of noncontrolled substances to licensed medical practitioners for use as placebos in professional practice or research.

(2) Persons acting in the course and legitimate scope of their employment as law enforcement officers.

(3) The retention of production samples of noncontrolled substances produced before September 1, 1986, where such samples are required by federal law."

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to SB 28 as introduced.)

YOUNG M, Chairperson

Committee Vote: Yeas 9, Nays 0.



COMMITTEE REPORT

Mr. Speaker: Your Committee on Courts and Criminal Code, to which was referred Senate Bill 28, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

(Reference is to SB 28 as printed January 11, 2019.)

MCNAMARA

Committee Vote: Yeas 10, Nays 2

