



2021 South Dakota Legislature

Senate Bill 189

Introduced by: **Senator Rohl**

1 **An Act to revise and establish certain provisions related to drug crimes and**
 2 **enforcement and create a penalty therefor.**

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 **Section 1.** That § 22-42-1 be AMENDED.

5 **22-42-1. Definitions.**

6 Terms used in this chapter mean:

- 7 (1) "Controlled drug or substance," a drug or substance, or an immediate precursor of
 8 a drug or substance, listed in Schedules I through IV. The term includes an altered
 9 state of a drug or substance listed in Schedules I through IV absorbed into the
 10 human body;
- 11 (2) "Counterfeit substance," a controlled drug or substance which, or the container of
 12 labeling of which, without authorization, bears the trade-mark, trade name, or other
 13 identifying mark, imprint, number, or device, or any likeness thereof, of a
 14 manufacturer, distributor, or dispenser other than the person or persons who
 15 manufactured, distributed, or dispensed such substance and which thereby falsely
 16 purports or is represented to be the product of, or to have been distributed by, such
 17 other manufacturer, distributor, or dispenser;
- 18 (3) "Deliver" or "delivery," the actual or constructive transfer of a controlled drug,
 19 substance, or marijuana whether or not there exists an agency relationship;
- 20 (4) "Dispense," to deliver a controlled drug or substance to the ultimate user or human
 21 research subject by or pursuant to the lawful order of a practitioner, including the
 22 prescribing, administering, packaging, labeling, or compounding necessary to
 23 prepare the substance for such delivery, and a dispenser is one who dispenses;
- 24 (5) "Distribute," to deliver a controlled drug, substance, or marijuana. Distribution
 25 means the delivery of a controlled drug, substance, or marijuana;

- 1 (6) "Manufacture," the production, preparation, propagation, compounding, or
2 processing of a controlled drug or substance, either directly or indirectly by
3 extraction from substances of natural origin, or independently by means of chemical
4 synthesis or by a combination of extraction and chemical synthesis. A manufacturer
5 includes any person who packages, repackages, or labels any container of any
6 controlled drug or substance, except practitioners who dispense or compound
7 prescription orders for delivery to the ultimate user;
- 8 (7) "Marijuana," all parts of any plant of the genus cannabis, whether growing or not,
9 in its natural and unaltered state, except for drying or curing and crushing or
10 crumbling. The term includes an altered state of marijuana absorbed into the human
11 body. The term does not include fiber produced from the mature stalks of such
12 plant, or oil or cake made from the seeds of such plant. The term does not include
13 the plant Cannabis sativa L. and any part of that plant, including the seeds thereof
14 and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of
15 isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration
16 of not more than three-tenths of one percent on a dry weight basis;
- 17 (8) "Marijuana concentrate," the resin extracted from any part of a marijuana plant and
18 every compound, manufacture, salt, derivative, mixture, or preparation from such
19 resin;
- 20 (9) "Practitioner," a doctor of medicine, osteopathy, podiatry, dentistry, optometry, or
21 veterinary medicine licensed to practice his profession, or pharmacists licensed to
22 practice their profession; physician's assistants certified to practice their profession;
23 government employees acting within the scope of their employment; and persons
24 permitted by certificates issued by the Department of Health to distribute, dispense,
25 conduct research with respect to, or administer a substance controlled by chapter
26 34-20B;
- 27 ~~(9)~~(10) "Precursor" or "immediate precursor," a substance which the Department of
28 Health has found to be and by rule designates as being a principal compound
29 commonly used or produced primarily for use, and which is an immediate chemical
30 intermediary used or likely to be used, in the manufacture of a controlled drug or
31 substance, the control of which is necessary to prevent, curtail, or limit such
32 manufacture;
- 33 ~~(10)~~(11) "Schedule I," "Schedule II," "Schedule III," and "Schedule IV," those
34 schedules of drugs, substances, and immediate precursors listed in chapter 34-20B;

1 ~~(11)~~(12) "Ultimate user," a person who lawfully possesses a controlled drug or
2 substance for that person's own use or for the use of a member of that person's
3 household or for administration to an animal owned by that person or by a member
4 of that person's household.

5 **Section 2.** That § 22-42-2 be AMENDED.

6 **22-42-2. Unauthorized manufacture, distribution, counterfeiting or**
7 **possession of Schedule I or II substances as felony--Mandatory sentences.**

8 Except as authorized by this chapter or chapter 34-20B, no person may
9 manufacture, distribute, or dispense a substance listed in Schedules I or II; possess with
10 intent to manufacture, distribute, or dispense a substance listed in Schedules I or II;
11 create or distribute a counterfeit substance listed in Schedules I or II; or possess with
12 intent to distribute a counterfeit substance listed in Schedules I or II. A violation of this
13 section is a Class 4 felony. However, a violation of this section is a Class 3 felony if the
14 person is in possession of three or more of the following:

- 15 (1) Three hundred dollars or more in cash;
16 (2) A firearm or other weapon pursuant to §§ 22-14-6, 22-14-15, 22-14-15.1, 22-14-
17 15.3, and subdivision 22-1-2(8);
18 (3) Bulk materials used for the packaging of controlled substances;
19 (4) Materials used to manufacture a controlled substance including recipes, precursor
20 chemicals, laboratory equipment, lighting, ventilating or power generating
21 equipment; or
22 (5) Drug transaction records or customer lists.

23 The distribution of a substance listed in Schedules I or II to a minor is a Class 2 felony.
24 A first conviction under this section shall be punished by a mandatory sentence in the
25 state penitentiary of at least one year, which sentence may not be suspended. Probation,
26 suspended imposition of sentence, or suspended execution of sentence may not form the
27 basis for reducing the mandatory time of incarceration required by this section. A second
28 or subsequent conviction under this section shall be punished by a mandatory sentence in
29 the state penitentiary of at least ten years, which sentence may not be suspended.
30 Probation, suspended imposition of sentence, or suspended execution of sentence may
31 not form the basis for reducing the mandatory time of incarceration required by this
32 section. However, a first conviction for distribution to a minor under this section shall be
33 punished by a mandatory sentence in the state penitentiary of at least five years, which
34 sentence may not be suspended. Probation, suspended imposition of sentence, or

1 suspended execution of sentence may not form the basis for reducing the mandatory time
2 of incarceration required by this section. A second or subsequent conviction for distribution
3 to a minor under this section shall be punished by a mandatory sentence in the state
4 penitentiary of at least fifteen years, which sentence may not be suspended. Probation,
5 suspended imposition of sentence, or suspended execution of sentence, may not form the
6 basis for reducing the mandatory time of incarceration required by this section.

7 Any person who, for consideration, intentionally distributes any controlled substance
8 or counterfeit substance in violation of this section and another person dies as a direct
9 result of using that substance, the sentence for the principal felony shall be enhanced by
10 increasing the class of the principal felony two levels. The enhancement may not exceed
11 the sentence for a Class C felony.

12 A civil penalty may be imposed, in addition to any criminal penalty, upon a conviction
13 of a violation of this section not to exceed ten thousand dollars. A conviction for the
14 purposes of the mandatory sentence provisions of this chapter is the acceptance by a
15 court of any plea, other than not guilty, including nolo contendere, or a finding of guilt by
16 a jury or court.

17 A charge for unauthorized manufacture, distribution, or possession with intent to
18 manufacture or distribute marijuana concentrate shall be charged under § 22-42-7.5 or
19 22-42-7.6.

20 **Section 3.** That § 22-42-5 be AMENDED.

21 **22-42-5. Unauthorized possession of controlled drug or substance as felony.**

22 No person may knowingly possess a controlled drug or substance unless the
23 substance was obtained directly or pursuant to a valid prescription or order from a
24 practitioner, while acting in the course of the practitioner's professional practice or except
25 as otherwise authorized by chapter 34-20B. A charge for unauthorized possession of
26 controlled substance when absorbed into the human body as set forth in subdivision 22-
27 42-1(1) shall only be charged under the provisions of § 22-42-5.1. A violation of this
28 section for a substance in Schedules I or II is a Class 5 felony. A violation of this section
29 for a substance in Schedule III and IV is a Class 6 felony. A charge for unauthorized
30 possession of marijuana concentrate shall be charged under § 22-42-7.4.

31 **Section 4.** That § 22-42-5.1 be AMENDED.

1 **22-42-5.1. Unauthorized ingestion of controlled drug or substance as felony.**

2 No person may knowingly ingest a controlled drug or substance or have a controlled
3 drug or substance in an altered state in the body unless the substance was obtained
4 directly or pursuant to a valid prescription or order from a practitioner, while acting in the
5 course of the practitioner's professional practice or except as otherwise authorized by
6 chapter 34-20B. A violation of this section for a substance in Schedules I or II is a Class
7 5 felony. A violation of this section for a substance in Schedules III or IV is a Class 6
8 felony. This section does not apply to ingesting marijuana concentrate or having marijuana
9 concentrate in an altered state in the body.

10 **Section 5.** That § 22-42-6 be AMENDED.

11 **22-42-6. Possession of certain amounts of marijuana prohibited--Degrees**
12 **according to amount.**

13 ~~No person may knowingly possess marijuana. It is a Class 1~~ Class 2 misdemeanor
14 ~~to possess two ounces of marijuana or less more than one ounce but less than eight~~
15 ~~ounces of marijuana. It is a Class 6 felony~~ Class 1 misdemeanor ~~to possess more than two~~
16 ~~ounces of marijuana but less than one half pound~~ eight to sixteen ounces of marijuana.
17 It is a ~~Class 5~~ Class 6 felony to possess ~~one half pound but less than one pound~~ more
18 than sixteen ounces of marijuana. ~~It is a Class 4 felony to possess one to ten pounds of~~
19 ~~marijuana. It is a Class 3 felony to possess more than ten pounds of marijuana. A civil~~
20 ~~penalty may be imposed, in addition to any criminal penalty, upon a conviction of a~~
21 ~~violation of this section not to exceed ten thousand dollars. This section does not apply to~~
22 any person licensed or registered with the state to undertake an activity involving the
23 possession of marijuana who acts in compliance with the authorizing law. This section
24 does not apply to any person possessing marijuana complying with the provisions of
25 chapter 34-20G.

26 **Section 6.** That § 22-42-7 be AMENDED.

27 **22-42-7. Distribution or possession with intent to distribute specified**
28 **amounts of marijuana--Degrees according to amount.**

29 ~~The distribution, or possession with intent to distribute, of less than one half ounce~~
30 ~~of marijuana without consideration is a Class 1 misdemeanor; otherwise, the distribution,~~
31 ~~or possession with intent to distribute, of one ounce or less of marijuana is a Class 6 felony~~
32 more than one ounce but less than two ounces of marijuana is a Class 2 misdemeanor.
33 ~~The distribution, or possession with intent to distribute, of more than one ounce but less~~

1 ~~than one half pound of marijuana is a Class 5 felony.~~ two ounces but less than sixteen
2 ounces of marijuana is a Class 1 misdemeanor. The distribution, or possession with intent
3 to distribute, ~~of one half pound but less than one pound of marijuana is a Class 4 felony~~
4 sixteen ounces but less than five pounds of marijuana is a Class 6 felony. The distribution,
5 or possession with intent to distribute, ~~of one pound or more of marijuana is a Class 3~~
6 felony. The distribution, or possession with intent to distribute, ~~of less than one half ounce~~
7 of marijuana to a minor without consideration is a Class 6 felony; otherwise, the
8 distribution, or possession with intent to distribute, of one ounce or less of marijuana to a
9 minor is a Class 5 felony. The distribution, or possession with intent to distribute, ~~of more~~
10 than one ounce but less than one half pound of marijuana to a minor is a Class 4 felony.
11 ~~The distribution, or possession with intent to distribute, of one half pound but less than~~
12 ~~one pound of marijuana to a minor is a Class 3 felony.~~ The distribution, or possession with
13 intent to distribute, ~~of one pound or more of marijuana to a minor is a Class 2 felony.~~ A
14 first conviction of a felony under this section shall be punished by a mandatory sentence
15 in the state penitentiary or county jail of at least thirty days, which sentence may not be
16 suspended. A second or subsequent conviction of a felony under this section shall be
17 punished by a mandatory sentence of at least one year. Conviction of a Class 1
18 misdemeanor under this section shall be punished by a mandatory sentence in county jail
19 of not less than fifteen days, which sentence may not be suspended. A civil penalty, not
20 to exceed ten thousand dollars, may be imposed, in addition to any criminal penalty, upon
21 a conviction of a felony violation of this section five pounds but less than ten pounds of
22 marijuana is a Class 4 felony. The distribution, or possession with intent to distribute, ten
23 to fifty pounds of marijuana is a Class 3 felony. The distribution, or possession with intent
24 to distribute, more than fifty pounds of marijuana is a Class 2 felony. This section does
25 not apply to any person licensed or registered with the state to undertake an activity
26 involving the distribution, or possession with intent to distribute, marijuana who acts in
27 compliance with the authorizing law. This section does not apply to any person
28 distributing, or possessing with the intent to distribute, marijuana complying with the
29 provisions of chapter 34-20G.

30 **Section 7.** That a NEW SECTION be added:

31 **22-42-7.1. Open and public use of marijuana or marijuana concentrate--Civil**
32 **penalty.**

33 No person may openly consume or display one ounce or less of marijuana or eight
34 grams or less of marijuana concentrate in a public place other than an area licensed for

1 such activity under the laws of this state. The court may impose a civil penalty for a
2 violation of this section not to exceed one hundred dollars. Any civil penalty collected
3 pursuant to this section shall be deposited into the state general fund.

4 **Section 8.** That a NEW SECTION be added:

5 **22-42-7.2. Distribution or possession with intent to distribute marijuana to**
6 **a minor--Degrees according to amount.**

7 It is a Class 6 felony to distribute to a minor, or possess with the intent to distribute
8 to a minor, less than one ounce of marijuana. It is a Class 3 felony to distribute to a minor,
9 or possess with the intent to distribute to a minor, one ounce but less than eight ounces
10 of marijuana. It is a Class 2 felony to distribute to a minor, or possess with the intent to
11 distribute to a minor, eight ounces to two pounds of marijuana. It is a Class 1 felony to
12 distribute to a minor, or possess with the intent to distribute to a minor, more than two
13 pounds of marijuana. This section does not apply if the distribution, or possession with
14 intent to distribute, to a minor complies with the provisions of chapter 34-20G.

15 **Section 9.** That a NEW SECTION be added:

16 **22-42-7.3. Possession of certain number of marijuana plants prohibited--**
17 **Degrees according to number.**

18 It is a Class 6 felony to possess four to twelve marijuana plants. It is a Class 4
19 felony to possess more than twelve marijuana plants. This section does not apply to any
20 person licensed or registered with the state to possess marijuana plants who acts in
21 compliance with the authorizing law. This section does not apply to any person possessing
22 marijuana plants complying with the provisions of chapter 34-20G.

23 **Section 10.** That a NEW SECTION be added:

24 **22-42-7.4. Possession of certain amounts of marijuana concentrate**
25 **prohibited--Degrees according to amount.**

26 It is a Class 1 misdemeanor to possess more than eight grams but less than two
27 ounces of marijuana concentrate. It is a Class 6 felony to possess two to five ounces of
28 marijuana concentrate. It is a Class 4 felony to possess more than five ounces of marijuana
29 concentrate. This section does not apply to any person licensed or registered with the
30 state to undertake an activity involving the possession of marijuana concentrate who acts

1 in compliance with the authorizing law. This section does not apply to any person
2 possessing marijuana concentrate complying with the provisions of chapter 34-20G.

3 **Section 11.** That a NEW SECTION be added:

4 **22-42-7.5. Manufacture, distribution, or possession with intent to distribute**
5 **certain amounts of marijuana concentrate--Degrees according to amount.**

6 It is a Class 1 misdemeanor to manufacture, distribute, or possess with the intent
7 to distribute, more than eight grams but less than sixteen grams of marijuana concentrate.
8 It is a Class 6 felony to manufacture, distribute, or possess with the intent to distribute,
9 sixteen grams but less than five ounces of marijuana concentrate. It is a Class 4 felony to
10 manufacture, distribute, or possess with intent to distribute, five ounces but less than five
11 pounds of marijuana concentrate. It is a Class 3 felony to manufacture, distribute, or
12 possess with intent to distribute, five to twenty-five pounds of marijuana concentrate. It
13 is a Class 2 felony to manufacture, distribute, or possess with intent to distribute, more
14 than twenty-five pounds of marijuana concentrate. This section does not apply to any
15 person licensed or registered with the state to undertake an activity involving the
16 manufacture, distribution, or possession with intent to distribute, marijuana concentrate
17 who acts in compliance with the authorizing law. This section does not apply to any person
18 manufacturing, distributing, or possessing with the intent to distribute, marijuana
19 concentrate complying with the provisions of chapter 34-20G.

20 **Section 12.** That a NEW SECTION be added:

21 **22-42-7.6. Distribution or possession with intent to distribute marijuana**
22 **concentrate to a minor--Degrees according to amount.**

23 It is a Class 6 felony to distribute to a minor, or possess with the intent to distribute
24 to a minor, one gram or less of marijuana concentrate. It is a Class 4 felony to distribute
25 to a minor, or possess with the intent to distribute to a minor, more than one gram but
26 less than one ounce of marijuana concentrate. It is a Class 2 felony to distribute to a
27 minor, or possess with the intent to distribute to a minor, one ounce to one pound of
28 marijuana concentrate. It is a Class 1 felony to distribute to a minor, or possess with the
29 intent to distribute to a minor, more than one pound of marijuana concentrate. This section
30 does not apply if the distribution, or possession with intent to distribute, to a minor
31 complies with the provisions of chapter 34-20G.

32 **Section 13.** That § 22-42-10 be AMENDED.

1 **22-42-10. Keeping place for use or sale of controlled substances as felony.**

2 Any person who keeps or maintains a place which is resorted to by persons using
3 controlled drugs and substances for the purpose of using such substances when such use
4 is in violation of this chapter, or which is used for the keeping or selling of such substances
5 in violation of this chapter, is guilty of a Class 5 felony.

6 **Section 14.** That § 22-42-15 be AMENDED.

7 **22-42-15. Ingesting substance, except alcoholic beverages, marijuana, or**
8 **any substance derived from marijuana, for the purpose of becoming intoxicated**
9 **as misdemeanor--Venue for violation.**

10 Any person who intentionally ingests, inhales, or otherwise takes into the body any
11 substance, except alcoholic beverages as defined in § 35-1-1, marijuana or any substance
12 derived from marijuana for purposes of becoming intoxicated, unless such substance is
13 prescribed by a practitioner of the medical arts lawfully practicing within the scope of the
14 practitioner's practice, is guilty of a Class 1 misdemeanor. The venue for a violation of this
15 section exists in either the jurisdiction in which the substance was ingested, inhaled, or
16 otherwise taken into the body or the jurisdiction in which the substance was detected in
17 the body of the accused.

18 **Section 15.** That § 22-42-19 be AMENDED.

19 **22-42-19. Drug free zones created--Violation as felony--Sentence--Defense.**

20 Any person who commits a violation of § 22-42-2, 22-42-3, ~~or 22-42-4~~, 22-42-
21 7.2, 22-42-7.3, 22-42-7.6 or a felony violation of § 22-42-7 or 22-42-7.5, if such activity
22 has taken place:

- 23 (1) In, on, or within one thousand feet of real property comprising a public or private
24 elementary or secondary school or a playground; or
25 (2) In, on, or within five hundred feet of real property comprising a public or private
26 youth center, public swimming pool, or video arcade facility; is guilty of a Class 4
27 felony. The sentence imposed for a conviction under this section carries a minimum
28 sentence of imprisonment in the state penitentiary of five years. Any sentence
29 imposed under this section shall be consecutive to any other sentence imposed for
30 the principal felony. The court may not place on probation, suspend the execution
31 of the sentence, or suspend the imposition of the sentence of any person convicted
32 of a violation of this section. However, the sentencing court may impose a sentence
33 other than that specified in this section if the court finds that mitigating

1 circumstances exist which require a departure from the mandatory sentence
2 provided for in this section. The court's finding of mitigating circumstances allowed
3 by this section and the factual basis relied upon by the court shall be in writing.

4 It is not a defense to the provisions of this section that the defendant did not know
5 the distance involved. It is not a defense to the provisions of this section that school was
6 not in session.

7 **Section 16.** That a NEW SECTION be added:

8 **32-23-7.1. Presumption arising from chemical analysis of bodily fluids--**
9 **Delta-9 tetrahydrocannabinol.**

10 In any criminal prosecution for a violation of § 32-23-1 relating to driving a vehicle
11 while under the influence of marijuana, a violation of § 22-16-41, or a violation of § 22-
12 18-36, the amount of delta-9 tetrahydrocannabinol in the defendant's blood at the time
13 of the alleged offense as shown by chemical analysis of the defendant's blood gives rise
14 to the following presumptions:

15 (1) If there was at that time less than 15 nanograms of delta-9 tetrahydrocannabinol
16 per milliliter in whole blood, it is presumed that the defendant was not under the
17 influence of delta-9-tetrahydrocannabinol; or

18 (2) If there was at that time 15 nanograms or more of delta-9 tetrahydrocannabinol
19 per milliliter in whole blood, such fact does not give rise to any presumption that
20 the defendant was or was not under the influence of delta-9 tetrahydrocannabinol,
21 but such fact may be considered with other competent evidence in determining the
22 guilt or innocence of the defendant.

23 **Section 17.** That § 32-23-8 be AMENDED.

24 **32-23-8. Other evidence on being under the influence of alcoholic beverage.**

25 The provisions of ~~§-§§~~ 32-23-7 and 32-23-7.1 may not be construed as limiting
26 the introduction of any other competent evidence bearing upon the question whether or
27 not the defendant was under the influence of an alcoholic beverage or delta-9
28 tetrahydrocannabinol.

29 **Section 18.** That a NEW SECTION be added:

1 **32-33-14.2. Saliva tests at temporary roadblocks prohibited under certain**
2 **circumstances.**

3 No law enforcement officer may request that a person occupying a motor vehicle
4 stopped at the temporary roadblock submit to a test designed to detect the presence of
5 drugs in the person's saliva unless specific and articulable facts taken together with
6 rational inferences from those facts reasonably warrant the request.