

2021 South Dakota Legislature

Senate Bill 189**AMENDMENT 189D FOR THE SENATE JUDICIARY BILL**

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 less than two ounces of marijuana is a Class 2 misdemeanor. The distribution, or
33 possession with intent to distribute, ~~of more than one ounce but less than one half pound~~

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

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

1 **22-42-7.1. Open and public use of marijuana or marijuana concentrate--Civil**
2 **penalty.**

3 No person may openly consume or display one ounce or less of marijuana or eight
4 grams or less of marijuana concentrate in a public place other than an area licensed for
5 such activity under the laws of this state. The court may impose a civil penalty for a
6 violation of this section not to exceed one hundred dollars. Any civil penalty collected
7 pursuant to this section shall be deposited into the state general fund.

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

9 **22-42-7.2. Distribution or possession with intent to distribute marijuana to**
10 **any person under age twenty-one--Degrees according to amount.**

11 It is a Class 6 felony to distribute to any person under the age of twenty-one years,
12 or possess with the intent to distribute to any person under the age of twenty-one years,
13 less than one ounce of marijuana. It is a Class 3 felony to distribute to any person under
14 the age of twenty-one years, or possess with the intent to distribute to any person under
15 the age of twenty-one years, one ounce but less than eight ounces of marijuana. It is a
16 Class 2 felony to distribute to any person under the age of twenty-one years, or possess
17 with the intent to distribute to any person under the age of twenty-one years, eight ounces
18 to two pounds of marijuana. It is a Class 1 felony to distribute to any person under the
19 age twenty-one years, or possess with the intent to distribute to any person under the
20 age of twenty-one years, more than two pounds of marijuana. This section does not apply
21 if the distribution, or possession with intent to distribute, to any person under the age
22 twenty-one years complies with the provisions of chapter 34-20G.

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

24 **22-42-7.3. Possession, attempted possession, and ingestion of marijuana or**
25 **marijuana concentrate by person under twenty-one years prohibited--Violation**
26 **as misdemeanor.**

27 It is a Class 2 misdemeanor for any person under the age of twenty-one years to:
28 (1) Possess or attempt to possess one ounce or less of marijuana; or
29 (2) Ingest marijuana, marijuana concentrate, or any derivative of marijuana for
30 purposes of becoming intoxicated, notwithstanding §§ 22-42-5.1 and 22-42-15.

31 It is a Class 1 misdemeanor for any person under the age of twenty-one years to
32 possess or attempt to possess eight grams or less of marijuana concentrate.

1 This section does not apply to any person under the age of twenty-one years who
2 possesses, attempts to possess, or ingests marijuana, marijuana concentrate, or any
3 derivative of marijuana complying with the provisions of chapter 34-20G.

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

5 **22-42-7.4. Possession of certain amounts of marijuana concentrate**
6 **prohibited--Degrees according to amount.**

7 It is a Class 1 misdemeanor to possess more than eight grams but less than two
8 ounces of marijuana concentrate. It is a Class 6 felony to possess two to five ounces of
9 marijuana concentrate. It is a Class 4 felony to possess more than five ounces of marijuana
10 concentrate. This section does not apply to any person licensed or registered with the
11 state to undertake an activity involving the possession of marijuana concentrate who acts
12 in compliance with the authorizing law. This section does not apply to any person
13 possessing marijuana concentrate complying with the provisions of chapter 34-20G.

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

15 **22-42-7.5. Manufacture, distribution, or possession with intent to distribute**
16 **certain amounts of marijuana concentrate--Degrees according to amount.**

17 It is a Class 1 misdemeanor to manufacture, distribute, or possess with the intent
18 to distribute, less than sixteen grams of marijuana concentrate. It is a Class 6 felony to
19 manufacture, distribute, or possess with the intent to distribute, sixteen grams but less
20 than five ounces of marijuana concentrate. It is a Class 4 felony to manufacture, distribute,
21 or possess with intent to distribute, five ounces but less than five pounds of marijuana
22 concentrate. It is a Class 3 felony to manufacture, distribute, or possess with intent to
23 distribute, five to twenty-five pounds of marijuana concentrate. It is a Class 2 felony to
24 manufacture, distribute, or possess with intent to distribute, more than twenty-five
25 pounds of marijuana concentrate. This section does not apply to any person licensed or
26 registered with the state to undertake an activity involving the manufacture, distribution,
27 or possession with intent to distribute, marijuana concentrate who acts in compliance with
28 the authorizing law. This section does not apply to any person manufacturing, distributing,
29 or possessing with the intent to distribute, marijuana concentrate complying with the
30 provisions of chapter 34-20G or any person manufacturing, distributing, or possessing
31 with the intent to distribute, marijuana concentrate as otherwise permitted by state law.

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

1 **22-42-7.6. Distribution or possession with intent to distribute marijuana**
2 **concentrate to any person under age twenty-one--Degrees according to**
3 **amount.**

4 It is a Class 6 felony to distribute to any person under the age of twenty-one years,
5 or possess with the intent to distribute to any person under the age of twenty-one years,
6 one gram or less of marijuana concentrate. It is a Class 4 felony to distribute to any person
7 under the age of twenty-one years, or possess with the intent to distribute to any person
8 under the age of twenty-one years, more than one gram but less than one ounce of
9 marijuana concentrate. It is a Class 2 felony to distribute to any person under the age of
10 twenty-one years, or possess with the intent to distribute to any person under the age of
11 twenty-one years, one ounce to one pound of marijuana concentrate. It is a Class 1 felony
12 to distribute to any person under the age of twenty-one years, or possess with the intent
13 to distribute to any person under the age of twenty-one years, more than one pound of
14 marijuana concentrate. This section does not apply if the distribution, or possession with
15 intent to distribute, to any person under the age of twenty-one years complies with the
16 provisions of chapter 34-20G.

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

18 **22-42-10. Keeping place for use or sale of controlled substances as felony.**

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

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

24 **22-42-15. Ingesting substance, except alcoholic beverages, marijuana, or**
25 **any substance derived from marijuana, for the purpose of becoming intoxicated**
26 **as misdemeanor--Venue for violation.**

27 Any person who intentionally ingests, inhales, or otherwise takes into the body any
28 substance, except alcoholic beverages as defined in § 35-1-1, marijuana or any substance
29 derived from marijuana for purposes of becoming intoxicated, unless such substance is
30 prescribed by a practitioner of the medical arts lawfully practicing within the scope of the
31 practitioner's practice, is guilty of a Class 1 misdemeanor. The venue for a violation of this
32 section exists in either the jurisdiction in which the substance was ingested, inhaled, or

1 otherwise taken into the body or the jurisdiction in which the substance was detected in
2 the body of the accused.

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

4 **22-42-19. Drug free zones created--Violation as felony--Sentence--Defense.**

5 Any person who commits a violation of § 22-42-2, 22-42-3, ~~or 22-42-4~~, 22-42-
6 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
7 has taken place:

8 (1) In, on, or within one thousand feet of real property comprising a public or private
9 elementary or secondary school or a playground; or

10 (2) In, on, or within five hundred feet of real property comprising a public or private
11 youth center, public swimming pool, or video arcade facility; is guilty of a Class 4
12 felony. The sentence imposed for a conviction under this section carries a minimum
13 sentence of imprisonment in the state penitentiary of five years. Any sentence
14 imposed under this section shall be consecutive to any other sentence imposed for
15 the principal felony. The court may not place on probation, suspend the execution
16 of the sentence, or suspend the imposition of the sentence of any person convicted
17 of a violation of this section. However, the sentencing court may impose a sentence
18 other than that specified in this section if the court finds that mitigating
19 circumstances exist which require a departure from the mandatory sentence
20 provided for in this section. The court's finding of mitigating circumstances allowed
21 by this section and the factual basis relied upon by the court shall be in writing.

22 It is not a defense to the provisions of this section that the defendant did not know
23 the distance involved. It is not a defense to the provisions of this section that school was
24 not in session.