SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No: SB 1323 **Hearing Date:** April 5, 2016
Author: Bates
Version: February 19, 2016
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: ***Controlled Substances: Fentanyl***

HISTORY

Source: Orange County Sheriff's Department

Prior Legislation: None

Support: California Police Chiefs Association; California State Sheriffs' Association; Crime Victims United of California; Orange County Board of Supervisor, Third District; Orange County District Attorney; San Bernardino County Sheriff-Coroner; San Diego County Sheriff's Department

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; California Public Defenders Association; Legal Services for Prisoners with Children

PURPOSE

The purpose of this bill is to include the synthetic opioid fentanyl in an enhancement statute under which a defendant convicted of any of a list of specified drug commerce crimes involving heroin, cocaine or cocaine base receives an addition prison term of from three years to 25 years based on the weight of the substance containing the drug involved in the case.

Existing law provides the following penalties for commerce in cocaine, cocaine base, heroin and specified opiates – including fentanyl. The section references are to the Health and Safety Code. Sale includes any transfer or distribution:

- § 11351 possession for sale – felony 1170 (h) term of 2, 3 or 4 years
- § 11351.5 possession of cocaine base for sale - felony 1170 (h) term 2, 3,or 4 years
- § 11352 sale – 3, 6 or 9 years

Existing law provides the following enhancements based on the weight of the heroin, opiate or cocaine possessed for sale or sold. (Health and Saf. Code §§ 11370.4, subd. (a).)

1 kilogram	3 years
4 kilograms	5 years
10 kilograms	10 years
20 kilograms	15 years

40 kilograms	20 years
80 kilograms	25 years

This bill adds fentanyl to the list of drugs that include heroin, cocaine or cocaine base for purposes of an enhancement for drug commerce based on the weight of the substance involved in the case that contained one of the listed drugs.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and

- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> SB 1323 would add fentanyl to a category of dangerous drugs, such as heroin, that are subject to penalty enhancements based on the weight an individual has in his possession for sale or distribution. Fentanyl is a synthetic opioid. In its pharmaceutical form, fentanyl is used to treat people with severe chronic pain when other pain medicines no longer work and as an anesthetic in surgery. When abused, both pharmaceutical and clandestine fentanyl affect the brain and nervous system by producing a euphoric high 80 to 100 times stronger than morphine and 40 times stronger than heroin. Overdosing on fentanyl causes blood pressure to plummet, diminishes breathing and induces deep sleep coma, which can lead to death. Between 2013 and 2014, California was one of 25 states affected by fentanyl overdose incidents and deaths. Fentanyl produced clandestinely has no legal medical use and can be smoked, snorted, ingested or injected.
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> Fentanyl can be substituted for heroin in opioid dependent individuals. However, fentanyl is a very dangerous because it is much more potent and results in frequent overdoses that can lead to respiratory depression and death. Some analogs are even more potent. Particularly troubling is the fact that users are often unaware that they are using fentanyl and, therefore, ignorant to the severe risks they face. Fentanyl is inexpensive to produce, making it a go-to heroin substitute for the drug cartels. Finally, fentanyl has proven to be a significant threat to law enforcement personnel and first responders as minute amounts – equivalent to a few grains of salt—can be lethal, and visually, can be mistaken for cocaine or white powder heroin.
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> Nationwide there has been a significant increase in fentanyl-related overdose fatalities. In Ohio there were 514 fentanyl-related fatal overdoses in 2014 compared to 92 in 2013. Maryland also saw a sharp increase with 185 fentanyl-related fatal overdoses in 2014 compared to 58 in 2013. Florida had 397 fatal overdoses attributable to fentanyl in 2014, up from 185 in 2013. While most increases in fentanyl overdose fatalities have been in eastern states, law enforcement officials in California fear that the trend is coming to California. Orange County has seen an increase in Fentanyl related cases. For example, Orange County Crime Lab statistics show a 100 percent increase between 2014 (10 cases) and October 2015 (20 cases) in driving under the drug's influence cases. There has also been an increase in those found in possession of the drug.
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> SB 1323 amends Section 11370.4 of the Health and Safety Code to include fentanyl with heroin and cocaine in the category of drugs that are subject to enhancements by weight. By doing so, this bill targets those distributing, trafficking, and selling mass quantities of Fentanyl. SB 1323 recognizes that the

> danger posed by fentanyl use is greater than that of other opioids, but also threatens the lives and safety of those who do not even use it. This bill would therefore take the commonsense step of adding the same enhancements for fentanyl, thereby protecting unknowing users, first responders, and children.

2. Fentanyl and Fentanyl Analogs History and Background

Fentanyl was synthesized in the 1960s and has been used medically since 1968. The Centers for Disease Control and Prevention (CDC) website[1] provides this description of fentanyl:

> Fentanyl, a synthetic and short-acting opioid analgesic, is 50-100 times more potent than morphine and approved for managing acute or chronic pain associated with advanced cancer. …[M]ost cases of fentanyl-related morbidity and mortality have been linked to illicitly manufactured fentanyl and fentanyl analogs, collectively referred to as non-pharmaceutical fentanyl (NPF). NPF is sold via illicit drug markets for its heroin-like effect and often mixed with heroin and/or cocaine as a combination product—with or without the user's knowledge—to increase its euphoric effects. While NPF-related overdoses can be reversed with naloxone, a higher dose or multiple number of doses per overdose event may be required …due to the high potency of NPF. (Internal quotation marks and footnotes omitted.)

Mixing fentanyl or a fentanyl analog with heroin is not a consistent phenomenon and may change over time and from place to place. A 2015 study[2] by researchers at the Centers for Disease Control and Prevention investigated acetyl fentanyl overdose deaths in Rhode Island over one year's time - March 2012 through May 2013, and separately analyzed data from March through May of 2013. 64% of the decedents in the full year data had consumed only acetyl fentanyl, not a mixture of that drug and heroin, although numerous persons had used a mixture of the two drugs. In the14 acetyl fentanyl overdoses from March through May of 2013, the drug was not likely mixed with heroin.

3. DEA Analysis of Current Fentanyl Trends

The Drug Enforcement Administration (DEA) publishes an annual illicit drug "threat assessment." The assessment reviews trends and issues concerning major drugs of abuse.

The 2105 [3]Threat Assessment stated as to fentanyl:

> Fentanyl will remain a threat while the current clandestine production continues; however, *it is unlikely to assume a significant portion of the opioid market. Fentanyl's short-lasting high, coupled with its high mortality rate, renders it unappealing to many opioid users who prefer the longer-lasting high that heroin offers and who wish to avoid the increased danger from fentanyl*. Fentanyl will continue to remain available in limited quantities; however, it will most commonly be consumed unknowingly, mixed with heroin or other drugs. Fentanyl will remain a significant threat to law enforcement personnel and first responders

[1] http://emergency.cdc.gov/han/han00384.asp
[2] http://link.springer.com/article/10.1007%2Fs13181-015-0477-9
[3] http://www.dea.gov/docs/2015%20NDTA%20Report.pdf – p. 43

> as minute amounts… can be lethal, and visually, can be mistaken for cocaine or white powder heroin. (Italics added.)

The DEA has reported[4] to the United States Senate that most illicit fentanyl is produced in Mexico "with its analogs and precursors obtained from distributors in China. Fentanyl is smuggled across the [Southwest U.S. border] in kilogram quantities…"

4. Many Fentanyl Commerce Crimes are Covered by the Current Drug Weight Enhancements, as Fentanyl is Often Mixed with Heroin, a Drug Included in the Current Enhancement

The existing enhancement based on the weight of the drug involved in specified drug commerce crimes includes any substance containing cocaine, cocaine base or heroin. Illicit drug manufacturers, distributors and sellers often mix fentanyl or an analog with heroin, because it is much more potent than heroin and relatively easy and cheap to manufacture. A defendant convicted of commerce involving a mixture of heroin and fentanyl would be subject to the weight enhancement under current law. This bill would only be necessary where the sole drug manufactured, distributed or sold in the underlying crime was fentanyl. However, as noted in Comment #5, prosecutors will likely still need to use the analog statute to implement this bill, as most cases will involve fentanyl analogs, not fentanyl per se.

5. Most Fentanyl Cases Involve a Fentanyl Analog, typically Acetyl Fentanyl

As noted above, most cases that are reported as involving fentanyl actually involve one of numerous fentanyl analogs or derivatives. Fentanyl and alfafentanyl are Schedule II drugs in California. As reflected in federal law, but not specifically stated in California law, Schedule I drugs are deemed to have no medical utility and a high potential for abuse. Schedule II drugs have legitimate medical uses, but also a high potential for abuse. Where a defendant's crime involved acetyl fentanyl or another related drug that is not listed in the controlled substance schedules, it appears the prosecutor must prove that the drug is an analog of fentanyl. The analog statute applies to Schedule I and Schedule II drugs. (Health & Saf. Code §§ 11054 and 11055.)

Health and Safety Code Section 11401 defines an analog as follows:

> (1) A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance classified in Section 11054 or 11055.
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> (2) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance classified in Section 11054 or 11055.

6. Fentanyl Analogs have a Wide Range of Potency and Dangers

Pharmaceutical fentanyl is much more potent than morphine or heroin. However, the analgesic, euphoric and overdose properties of pharmaceutical fentanyl are relatively certain and well

[4] http://www.dea.gov/pr/speeches-testimony/2015t/111715t.pdf

known, or can be determined. However, each batch of non-pharmaceutical fentanyl can have very different chemical composition and effects. Acetyl fentanyl is actually less potent than pharmaceutical fentanyl, but that is not true for all fentanyl analogs. There is no consistent ratio of analgesic (pain control), euphoric and overdose properties among fentanyl analogs. That is, the overdose potential of a drug does not necessarily rise or fall with the euphoric and analgesic properties among the analogs. The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) has written that other analogs have been estimated as being thousands of times more potent than morphine. The EMCDDA[5]cautioned: "It is difficult to be certain that this increased analgesic potency means that the euphoric effects are similarly increased, and more importantly, whether the overdose potential of these analogues is also increased by the same margin."

A person who has become accustomed to an analog with comparatively low overdose potential who thereafter uses a drug with a high potential for overdose, is at especially great risk for overdose. For example, the fentanyl analog 3-methylfentanyl, known by the street name of China White, caused many overdose deaths in California in 1978. So-called *China White is several hundred times more potent than morphine*. Acetyl fentanyl is *four to five times more potent than heroin*, but substantially less potent than pharmaceutical fentanyl.

7. Research on Sentences as a Deterrent to Crime

Criminal justice experts and commentators have noted that, with regard to sentencing, "a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits.

> Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits.[6]

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

> A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses. A related literature focuses

[5] http://www.emcdda.europa.eu/publications/drug-profiles/fentanyl

[6] Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* (November 2010), The Sentencing Project (http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.)

> specifically on enforcement of drug laws and the relationship between those criminal sanctions and the outcomes of drug use and drug prices.[7]

In regard to deterrence, the authors note that in "the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy. . . .

> Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not."[8]

Members may wish to discuss whether the "rationalistic view" of crime described above likely would apply to persons who manufacture concentrated cannabis – that is, whether the sentencing enhancements proposed by this bill would be known by these offenders and, if so, whether the additional time would discourage commission of the crime.

WOULD SEVERE SENTENCE ENHANCEMENTS DISCOURAGE PERSONS FROM ENGAGING IN FENTANYL COMMERCE AND IMPROVE PUBLIC SAFETY?

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have "large crime prevention benefits," but that incremental, lengthy prison sentences are ineffective for crime deterrence:

> Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. *Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.*
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> Evidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates. *Nevertheless, the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their*

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[7] *The Growth of Incarceration in the United States* (2014), Jeremy Travis, Bruce Western and Steve Redburn, Editors, Committee on Causes and Consequences of High Rates of Incarceration, The National Research Council, p. 131 (citations omitted) (http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf,)

[8] *Id.* at 132-133.

> *prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders.* For these reasons, statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime.[9]

With regard to the drug trade, the authors state:

> For several categories of offenders, an incapacitation strategy of crime prevention can misfire *because most or all of those sent to prison are rapidly replaced in the criminal networks in which they participate. Street-level drug trafficking is the paradigm case*. Drug dealing is part of a complex illegal market with low barriers to entry. Net earnings are low, and probabilities of eventual arrest and imprisonment are high . . . Drug policy research has nonetheless shown consistently that arrested dealers are quickly replaced by new recruits . . . . At the corner of Ninth and Concordia in Milwaukee in the mid-1990s, for example, 94 drug arrests were made within a 3-month period. "These arrests, [the police officer] pointed out, were easy to prosecute to conviction. But . . . the drug market continued to thrive at the intersection" . . . .
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> Despite the risks of drug dealing and the low average profits, many young disadvantaged people with little social capital and limited life chances … sell drugs on street corners because it appears to present opportunities not otherwise available. However, [they] … overestimate the benefits of that activity and underestimate the risks. This perception is compounded by peer influences, social pressures, and deviant role models provided by successful dealers who live affluent lives and… avoid arrest. Similar analyses apply to members of deviant youth groups and gangs: as members … are arrested and removed from circulation, others take their place. Arrests and imprisonments of easily replaceable offenders create illicit "opportunities" for others.[10]

Members may wish to discuss whether the enhancement proposed by this bill would provide any appreciable crime deterrent benefits, and whether greater incapacitation for these offenders could generate the "misfire" consequence described above.

WOULD THE ADDED COSTS OF INCARCERATION FROM EXPANDING THIS SENTENCING ENHANCEMENT BE OUTWEIGHED BY ITS PUBLIC SAFETY BENEFIT, EITHER THROUGH INCAPACITATION OR DETERRENCE?

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[9] *Id.* at 155-156 (emphasis added).

[10] *Id.*, at 146 (citations omitted).