
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 701 **Hearing Date:** June 27, 2023
Author: Villapudua
Version: June 20, 2023
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances: fentanyl*

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 1955 (Nguyen), failed in Assembly Public Safety Committee 2022
SB 1060 (Bates), failed in Senate Public Safety Committee 2022
SB 75 (Bates), failed in Senate Public Safety Committee 2021
SB 161 (Bates), failed in Senate Public Safety Committee 2019
SB 1103 (Bates), failed in Senate Public Safety Committee 2018
SB 176 (Bates), failed in Senate Public Safety Committee 2017
SB 1323 (Bates), held in Assembly Appropriations Committee 2016

Support: California Association of Highway Patrolmen; California Contract Cities Association; California State Sheriffs' Association; City of Bakersfield; City of Norwalk; County of Orange; Crime Victims United of California; Peace Officers Research Association of California; Ventura County District Attorney's Office

Opposition: ACLU California Action; California Public Defenders Association; Drug Policy Alliance; Ella Baker Center for Human Rights; Friends Committee on Legislation of California

Assembly Floor Vote: 72 - 0

PURPOSE

This purpose of this bill is to impose an additional term of 3 to 25 years upon a person who is convicted of specified drug offenses with respect to a substance containing fentanyl, if the substance exceeds a specified weight.

Existing law establishes the California Uniform Controlled Substances Act which regulates controlled substances. (Health & Saf. Code, § 11000 et seq.)

Existing law classifies controlled substances into five schedules according to their danger and potential for abuse. (Health & Saf. Code, §§ 11054-11058.)

Existing law classifies fentanyl as a Schedule II controlled substance. (Health & Saf. Code, § 11055, subd.(c)(8).)

Existing law provides the following penalties:

- Possessing for sale or purchasing for purposes of sale of heroin, cocaine, and specified opiates, including fentanyl – 1170(h) felony term of 2, 3, or 4 years (Health & Saf. Code, § 11351.)
- Possessing for sale or purchasing for purposes of sale of cocaine base – 1170(h) felony term of 2, 3, or 4 years (Health & Saf. Code, § 11351.5.)
- Transporting, importing, selling, furnishing, administering, giving away, etc. of heroin, cocaine, and specified opiates, including fentanyl – 1170(h) felony term of 3, 4, or 5 years (Health & Saf. Code, § 11352.)
 - If transporting between noncontiguous counties – 1170(h) felony term of 3, 6, or 9 years (*Id.*)

Existing law provides the following enhancements for a conviction of possession for sale or purchasing for the purpose of sale of heroin, cocaine, or cocaine base, or transporting, importing, selling, furnishing, administering, or giving away heroin, cocaine, or cocaine base, or conspiracy to commit any of those offenses, based on the weight of the substance containing heroin, cocaine, or cocaine base:

- 1 kilogram- 3 years
 - 4 kilograms - 5 years
 - 10 kilograms - 10 years
 - 20 kilograms - 15 years
 - 40 kilograms - 20 years
 - 80 kilograms - 25 years
- (Health & Saf. Code, § 11370.4, subd. (a).)

Existing law prohibits the above listed enhancements from being imposed unless the allegation that the weight of the substance containing fentanyl or its analogs exceeds the amount provided above and is charged in the accusatory pleading and admitted or found to be true by the trier of fact. (Health & Saf. Code, § 11370.4, subd. (c).)

Existing law provides that the court may strike the additional punishment for the enhancement if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment. (Health & Saf. Code, § 11370.4, subd. (e).)

Existing law provides that in addition to the term of imprisonment provided by law for persons convicted of violating specified drug trafficking crimes, the trial court may impose a fine not exceeding \$20,000 for each offense. (Health & Saf. Code, § 11372, subd. (a).)

Existing law provides that a person receiving an additional prison term for trafficking more than a kilogram of a substance containing heroin, cocaine base, or cocaine may, in addition, be fined by an amount not exceeding \$1,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (b).)

Existing law provides that a person receiving an additional prison term for trafficking more than four kilograms of a substance containing heroin, cocaine base, or cocaine may, in addition, be fined by an amount not to exceed \$4,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (c).)

Existing law provides that a person receiving an additional prison term for trafficking more than four kilograms of a substance containing heroin, cocaine base, or cocaine may, in addition, be fined by an amount not to exceed \$8,000,000 for each offense. (Health & Saf. Code, § 11372, subd. (d).)

This bill adds fentanyl to the list of substances for which the above listed weight enhancements can be imposed.

This bill makes other technical and conforming changes.

COMMENTS

1. Need For This Bill

According to the author:

The use of illicitly produced fentanyl has exploded in the past 7 years, resulting in massive amounts of the dangerous narcotic being dealt on the streets and has led to significant numbers of hospital admissions, overdoses, and tragic deaths. Because the drug up until that point was not in significant black-market circulation, it was not mentioned by name in this State's weight enhancement, Health and Safety Code section 11370.4. This has resulted in the unconscionable problem of fentanyl not appearing to be eligible for enhanced sentencing when trafficked in large-scale amounts, unlike its more 'traditional' cousin, heroin.

With illicit fentanyl costing the user up to \$20.00 per pill, and chronic users potentially using multiple pills per day to avoid difficult withdrawal symptoms, fentanyl is a valuable commodity on the streets. A kilogram of fentanyl *powder* would provide enough fentanyl to manufacture approximately one million *pills* containing fentanyl, which would provide approximately 4 to 10 million dosages to users. A kilogram of *pills* containing fentanyl would equal approximately 9,080 pills, which would provide approximately 36,000 to 92,000 usages, as many fentanyl pill users crush and smoke the pills or take only a portion of a pill for one dosage, saving the rest for a later dosage. Therefore, possession of kilogram-or-greater amounts of this powerful drug demonstrates large-scale trafficking or possession with intent to sell, rather than 'small-time' or 'low-level' drug-dealing, occasional furnishing, or possession for personal use. Possession of these types of significant amounts of this dangerous drug becomes even more profitable when such possession is not punishable to the same extent as is possession of the same exorbitant amount of heroin, its opiate cousin. Treating fentanyl possession in amounts exceeding a kilogram differently from the possession of the same amounts of heroin does not serve public safety, nor does it make logical sense.

2. Background

Fentanyl and Fentanyl-Related Substances

Fentanyl was synthesized in 1959 and has been used medically since the 1960s. The Centers for Disease Control and Prevention (CDC) website 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 footnotes omitted.) (<<http://emergency.cdc.gov/han/han00384.asp>> [as of Mar. 21, 2023].)

Legitimate fentanyl, also known as pharmaceutical fentanyl, is prescribed by a physician in a variety of forms, including lozenges, nasal sprays, and transdermal patches. While some pharmaceutical fentanyl is diverted, this is typically done on a small scale and often for personal use. Illicitly-produced fentanyl is primarily manufactured in laboratories in China and Mexico, and then shipped to the U.S. or smuggled across the U.S.-Mexico border. It is distributed in the form of powder or as counterfeit prescription pills.

Illicitly-produced fentanyl is frequently mixed with heroin, often without the knowledge of the purchaser. The Drug Enforcement Administration (DEA) reports that it is increasingly common for fentanyl to be mixed with adulterants and diluents and sold as heroin, although no heroin is present in the product. (*Id.*; see also Nick Miroff, *Mexican Traffickers Making New York a Hub for Lucrative –and– Deadly Fentanyl* (Nov. 13, 2017) available at <https://www.washingtonpost.com/world/national-security/at-the-new-york-division-of-fentanyl-inc-a-banner-year/2017/11/13/c3cce108-be83-11e7-af84-d3e2ee4b2af1_story.html?noredirect=on&utm_term=.8fd868ed8b2b> [as of Mar. 21, 2023].) Reports by law enforcement agencies and health care providers indicate that fentanyl is appearing in cocaine more frequently than had previously been seen. (Martha Bebinger, *Fentanyl-Laced Cocaine Becoming a Deadly Problem Among Drug Users* (Mar. 29, 2018) available at <<https://www.npr.org/sections/health-shots/2018/03/29/597717402/fentanyl-laced-cocaine-becoming-a-deadly-problem-among-drug-users>>; Joseph Frankel, *The Hard-To-Trace Ingredient Behind Skyrocketing Cocaine Deaths* (May 2, 2018) available at <<https://www.theatlantic.com/health/archive/2018/05/americas-opioid-crisis-is-now-a-fentanyl-crisis/559445/>>; Julia Lurie, *America’s Fentanyl Problem is Reaching a Whole New Group of Users* (Apr. 23, 2018) available at <<https://www.motherjones.com/politics/2018/04/americas-fentanyl-problem-is-reaching-a-whole-new-group-of-users/>> [as of Mar. 21, 2023].) In addition to those individuals who have unknowingly ingested fentanyl while consuming another controlled substance, some individuals are intentionally seeking out fentanyl. (Christine Vestal, *Some Drug Users in Western U.S. Seek Out Deadly Fentanyl. Here’s Why* (Jan. 7, 2019) available at <<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/01/07/some-drug-users-in-western-us-seek-out-deadly-fentanyl->

heres-why> [as of Mar. 21, 2023].) A recent analysis by the DEA’s Special Testing and Research Laboratory’s Fentanyl Signature Profiling Program conducted on wholesale seizures—defined generally as seizures greater than one kilogram—indicated that “heroin is rarely mixed with fentanyl at the wholesale level...[which] points to the likelihood that U.S.-based drug trafficking organizations and dealers are responsible for mixing fentanyl with heroin at the regional and local levels for retail consumption...allow[ing] dealers to maximize profitability by extending heroin supplies.” (<https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf> [as of Mar. 21, 2023].)

Many cases that are reported as involving fentanyl actually involve one of several fentanyl-related substances. Fentanyl-related substances are in the same chemical family as fentanyl and have similar pharmacological effects, but have slight variations in their chemical structure. Fentanyl-related substances are often used by drug traffickers in an attempt to circumvent existing laws regulating controlled substances. In addition, as discussed further below, fentanyl-related substances are more challenging to prosecute.

3. Fentanyl in California

The number of deaths involving fentanyl in California has increased dramatically in recent years. Between 2012 and 2018, fentanyl overdose deaths increased by more than 800%—from 82 to 786. (California Department of Public Health (CDPH), Overdose Prevention Initiative <<https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/SACB/Pages/PrescriptionDrugOverdoseProgram.aspx?msclkid=99f1af92b9e411ec97e3e1fe58cde884>> [as of Jun. 19, 2023].) In 2021, there were 5,961 deaths related to fentanyl overdoses. (CDPH, California Overdose Surveillance Dashboard <<https://skylab.cdph.ca.gov/ODdash/?tab=Home>> [as of Jun. 19, 2023]).

4. Existing Weight Enhancement Covers Many Fentanyl Commerce Crimes

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 one its analogs with heroin, because it is much more potent than heroin and relatively easy and cheap to manufacture. Fentanyl is also increasingly being mixed with cocaine. A defendant convicted of a drug offense involving a mixture of heroin and fentanyl or cocaine 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 or where fentanyl was mixed with one or more substances that are not covered under existing law. However, as noted below, prosecutors will likely still need to use the analog statute as many cases involve fentanyl-related substances rather than solely fentanyl.

5. Many Fentanyl Cases Involve a Fentanyl-Related Substance

As noted above, many cases that are reported as involving fentanyl actually involve one of numerous fentanyl-related substances. Fentanyl is a Schedule II controlled substance in California. As reflected in federal law, but not specifically stated in California law, Schedule I controlled substances are deemed to have no medical utility and possess a high potential for abuse. Schedule II controlled substances have legitimate medical uses, but also a high potential for abuse. When a defendant’s crime involves a fentanyl-related drug that is not listed in the

controlled substance schedules, the prosecutor must prove that the drug is an analog of fentanyl. The analog statute applies to Schedule I and Schedule II controlled substances. (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 or a synthetic cannabinoid compound defined in Section 11357.5.
- 2) A substance that 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 or a synthetic cannabinoid compound defined in Section 11357.5.

6. Federal Efforts to Address Fentanyl-Related Crimes

Drug offenses involving fentanyl may also be prosecuted by federal prosecutors as violations of the federal Controlled Substances Act. In response to the challenges federal prosecutors faced when prosecuting crimes involving fentanyl-related substances, the DEA issued a temporary scheduling order in February 2018 to schedule fentanyl-related substances that are not currently listed in any schedule of the federal Controlled Substances Act and their isomers, esters, ethers, salts and salts of isomers, esters, and ethers in Schedule I. (83 Fed. Reg. 5188 (Feb. 6, 2018).) The temporary scheduling order has been extended several times and is currently set to expire on December 31, 2024. (Congressional Research Service, *The Controlled Substances Act (CSA): A Legal Overview for the 118th Congress* (Jan. 19, 2023) p. 26 available at <<https://sgp.fas.org/crs/misc/R45948.pdf>>.) In 2019, the DOJ and DEA urged Congress to statutorily and permanently schedule the class of fentanyl-related substances. The Biden Administration is supportive of this call to action. (<https://www.dea.gov/sites/default/files/2019-06/DOJ%20DEA%20Fentanyl%20Expiration%20of%20Temp%20Order_SJC_4June19_final.pdf>; <<https://www.judiciary.senate.gov/imo/media/doc/Liskamm-McDermott%20Testimony.pdf>>; <<https://www.whitehouse.gov/ondcp/briefing-room/2021/09/02/biden-harris-administration-provides-recommendations-to-congress-on-reducing-illicit-fentanyl-related-substances/>>.)

In order to stop the flow of fentanyl into the U.S. via packages, former President Trump signed the Synthetics Trafficking and Overdose Prevention (STOP) Act of 2018 which requires the U.S. Postal Service to provide advanced electronic data on packages in order to assist law enforcement in identifying and seizing illicit substances sent through the mail.

7. International Efforts to Address the Fentanyl Crisis

Although fentanyl and many fentanyl-related substances are internationally controlled, several unregulated fentanyl analogues have entered the illicit opioid market in recent years. In 2017, U.N. member states agreed to place two common chemicals used to produce fentanyl under international control. (Congressional Research Service, *China Primer: Illicit Fentanyl and*

China's Role (Dec. 8, 2022) available at <<https://sgp.fas.org/crs/row/IF10890.pdf>>.) As of December 2022, the U.N. had scheduled fentanyl and more than 30 fentanyl-related substances. (*Id.*) China scheduled fentanyl-related substances as a class in May 2019, but remains a major source country for precursor chemicals. (*Id.*)

8. Argument in Support

The California District Attorneys Association, the bill's sponsor, writes:

... [C]urrent law does not adequately address the ever-increasing threat posed by cartels and organized crime. Currently, possession of large-scale amounts from over a kilo to over 80 kilos of cocaine, crack, and heroin are eligible for enhancement punishments under the law, but fentanyl, which is 50 times stronger than heroin, is not explicitly eligible for that increased punishment. AB 701 would resolve this inconsistency.

Importantly, AB 701 does not target "low-level" dealers or users. A kilo of fentanyl pills is enough for between 36,000 to 92,000 dosages personal-use dosages, and a kilo of fentanyl powder would be enough to manufacture approximately one million pills. AB 701 is precision-targeted to high-level dealers, not mere users, low-level street dealers, or people who occasionally share the drug with others.

By enumerating fentanyl as one of the select controlled substances for which possession of excessive amounts is treated more seriously, AB 701 addresses this outdated oversight and protects California's public in a tangible way while providing the courts with clarity on the issue.

9. Argument in Opposition

According to the California Public Defenders Association:

AB 701 relies on outdated War on Drugs mentality and would end up creating more harm than it would prevent. Relying on ever increasing penalties for drug offenses has been extensively researched, and we can therefore make some educated predictions about the outcome of bills like AB 701: it would not reduce the distribution of fentanyl nor would it prevent overdoses; it would reduce neither the supply of drugs or the demand for them; and worse, it could actually discourage effective methods of dealing with the opioid crisis. One study found that states that increase their incarceration rates do not experience a decrease in drug use. When a drug seller is incarcerated, the supply of drugs is not reduced nor is the drug market impacted. Because the drug market is driven by demand rather than supply, research indicates that an incarcerated seller will simply be replaced by another individual to fill the market demand.

Many of the people who will be incarcerated by this bill will be addicts themselves. A Bureau of Justice report found that 70% of people incarcerated for drug trafficking in state prisons used drugs prior to the offense. These individuals often distribute drugs, not for profit, but as a way to support their own substance

use disorder. Often, these “traffickers” are not high-level members of any organized drug distribution scheme, but are rather furnishing narcotics to friends and family members.

The imposition of harsh penalties for distribution could undermine California’s Good Samaritan law, which encourages people to contact emergency services in case of an overdose. The threat of police involvement and harsh prison sentences may make an individual hesitant to call emergency services or run from the scene rather than help the victim.

The primary risk of overdose for fentanyl results from its unknowing ingestion. The process of adding fentanyl to heroin is usually done early in the production process. According to the Drug Enforcement Administration, fentanyl is generally added to heroin before it enters the U.S. Therefore, low level sellers may not know they are distributing fentanyl. This bill would not reduce the inclusion of fentanyl in the drug supply, as it takes place high in the distribution chain.

The War on Drugs has had a devastating impact on communities across California. The unintended consequences of using jails and prisons to deal with a public health issue will take decades to unravel. Rather than diminishing the harms of drug misuse, criminalizing people who sell and use drugs amplifies the risk of fatal overdoses and diseases, increases stigma and marginalization, and drives people away from needed treatment, health, and harm reduction services.

Moreover, California voters have signaled, again and again, their preference for using a health approach to drug offenses, and their desire to unwind the failed War on Drugs. Reversing course and increasing criminal penalties not only flies in the face of multiple statewide elections, but it is also simply bad policy. Societal harms associated with drugs are not alleviated by ever longer prison sentences. Rather, these increased penalties impose their own harm, devastating vulnerable communities, particularly communities.

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