
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 75 **Hearing Date:** January 11, 2022
Author: Bates
Version: March 3, 2021
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances: fentanyl*

HISTORY

Source: Orange County Sheriff's Department

Prior Legislation: SB 161 (Bates), failed Senate Public Safety Committee 2019
SB 1103 (Bates), failed Senate Public Safety Committee 2018
SB 176 (Bates), failed Senate Public Safety Committee 2017
SB 1323 (Bates), held in Assembly Appropriations Committee 2016

Support: Association of California Cities - Orange County; California Association of Highway Patrolmen; California Narcotic Officers Association; California Peace Officers' Association; California Police Chiefs Association; California State Sheriffs' Association; City of Laguna Niguel; Crime Victims Alliance; Los Angeles County Sheriff's Department; Orange County Board of Supervisors; Orange County District Attorney's Office; Orange County Employees Association; Orange County Sheriff's Department; Peace Officers' Research Association of California; San Bernardino County Sheriff's Department; San Diego County Sheriff's Department; UPS

Opposition: ACLU of California; California Attorneys for Criminal Justice; California Public Defenders Association; Californians United for a Responsible Budget; Drug Policy Alliance; Ella Baker Center for Human Rights; Initiate Justice; Law Enforcement Action Partnership; We the People- San Diego

PURPOSE

The purpose of this bill is to include fentanyl in an enhancement statute under which any person convicted of any of a list of specified drug offenses receives an additional term of three years to 25 years based on the weight of the drug involved in the case.

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 between noncontiguous counties – 1170(h) felony term of 3, 6, or 9 years (*Id.*)

Existing law provides the following enhancements for a conviction of possessing 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. (Health & 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

Existing law provides enhancements for a conviction of possessing for sale, selling, transporting, importing, furnishing, administering, giving away, etc. of methamphetamine, amphetamine, and phencyclidine (PCP) and its analogs, based on the liquid volume of the substance containing methamphetamine, amphetamine, or PCP. (Health & Saf. Code, § 11370.4, subd. (b).)

Existing law prohibits the above listed enhancements from being imposed unless the allegation that the weight of the substance containing one of the above listed substances 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 authorizes the trial court to impose a fine, in addition to a term of imprisonment, for specified drug offenses of between \$20,000 and \$8 million for each offense. (Health & Saf. Code, § 11372, subd. (a)-(d).)

This bill adds fentanyl to the enhancement statute that imposes an additional term of three to 25 years in a case in which a defendant has been convicted of one of several specified drug commerce crimes involving fentanyl, and authorizes the court to impose a fine of between \$20,000 and \$8 million for each fentanyl-related offense.

COMMENTS

1. Need For This Bill

According to the author:

Fentanyl is a synthetic opioid that is 50 to 100 times stronger than morphine. Illicit producers add fentanyl to heroin to increase its potency, or to disguise it as highly potent heroin. Many users believe they are purchasing heroin and do not know they are purchasing fentanyl – which often results in overdose deaths. Fentanyl is a very dangerous substance because it only takes a few milligrams to cause respiratory depression, overdose, and possible death.

The number of annual fentanyl-involved deaths in California has increased significantly in recent years. There were 431 reported deaths in 2017, 786 deaths in 2018, and 1,513 deaths in 2019. In Los Angeles County alone, deaths soared from 117 in 2017 to a projected 783 deaths in 2020.

The OC Sheriff's Department has seen a sharp rise in the seizures of fentanyl over the past five years. The amount of fentanyl seized by the department teams was zero in 2015, increasing each year to a total of 169 pounds in 2019. Two milligrams of fentanyl can be lethal. Therefore, 169 pounds would be enough to create more than 38 million lethal doses – roughly equivalent to California's population.

At the federal level, both the House of Representatives and Senate voted to temporarily place fentanyl on the Schedule I drug list in 2018. This was in response to the rapid evolution of substances related to fentanyl on the illicit drug market. The order was set to expire last year, however, the "Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act," which became law on February 6, 2020 extended the temporary control of fentanyl-related substances until May 6, 2021.

Senate Bill 75 would stem the influx of dangerous new drugs into our communities by adding fentanyl to a category of drugs, such as heroin, that provides additional deterrents based on the weight an individual possesses for sale or distribution. With fentanyl-related tragedies continuing to rise quickly, California must also act quickly to respond. The Legislature must treat fentanyl as the deadly drug that it is.

2. Background on 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 Jan. 5, 2022].)

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. The Drug Enforcement Administration (DEA) reports that the fentanyl coming into the U.S. directly from China has purities commonly testing above 90 percent, while the fentanyl trafficked into the country from Mexico is generally low in purity. (<<https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf>> [as of Jan. 5, 2022].)

Illicitly-produced fentanyl is frequently mixed with heroin, often without the knowledge of the purchaser. The 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 <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 Jan. 5, 2022].) Reports by law enforcement agencies and health care providers in recent years indicate that fentanyl is appearing in cocaine more frequently than had previously been seen. (<<https://www.npr.org/sections/health-shots/2018/03/29/597717402/fentanyl-laced-cocaine-becoming-a-deadly-problem-among-drug-users>>; <<https://www.theatlantic.com/health/archive/2018/05/americas-opioid-crisis-is-now-a-fentanyl-crisis/559445/>>; <<https://www.motherjones.com/politics/2018/04/americas-fentanyl-problem-is-reaching-a-whole-new-group-of-users/>> [as of Jan. 5, 2022].) 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 Jan. 5, 2022].)

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. DEA Threat Assessment

The DEA regularly publishes an illicit drug “threat assessment” which reviews trends and issues concerning major drugs of abuse. The 2020 Threat Assessment of fentanyl concluded:

... The heroin and fentanyl markets, already intertwined, will continue to grow as traffickers mix heroin with fentanyl to stretch heroin supplies and maximize revenues. Fentanyl and other synthetic opioids will likely continue to contribute to high numbers of drug overdose deaths in the United States in the near term, as fentanyl availability either by itself or mixed in with other drugs—particularly heroin—continues to persist. However, overdose deaths involving heroin alone may stabilize or continue to decline in the near term. The low cost, high potency, and ease of acquisition of fentanyl may encourage heroin users to switch to the drug should future heroin supplies be disrupted. As Mexico is the dominant supplier of heroin entering the United States, additional restrictions or limits on travel across the U.S.-Mexico border due to pandemic concerns will likely impact heroin drug trafficking organizations (DTOs), particularly those using couriers or personal vehicles to smuggle heroin into the United States. Another possibility may be a decrease in the price level for heroin as DTOs and street-level dealers maximize associated profit margins by increasingly mixing fentanyl into distributed heroin. DTOs may come to view heroin as simply an adulterant to fentanyl. Mexican transnational criminal organizations will remain the primary source of supply for heroin and fentanyl smuggled into the United States, using precursors primarily sourced from China, and they will continue to use their extensive infrastructure in both Mexico and the United States to supply lucrative U.S. opioid markets. (*Id.*)

4. Many Fentanyl Commerce Crimes are Covered by the Current Drug Weight Enhancements

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. 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 January 28, 2022. (Extending Government Funding and Delivering Emergency Assistance Act, Pub.L. No. 117-43 (Sept. 30, 2021) 135 Stat. 344, 380 <<https://www.govinfo.gov/content/pkg/PLAW-117publ43/pdf/PLAW-117publ43.pdf>>.) In 2019, the DOJ and DEA urged Congress to statutorily and permanently schedule the class of fentanyl-like substances, and 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, 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. In December 2020, the U.S. Postal Service reported two years of significant declines in the number of seizures of suspected fentanyl or other synthetic opioids. (<<https://fas.org/sgp/crs/row/IF10890.pdf>> [as of Jan. 5, 2022].)

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. (*Id.*) In 2018, U.N. member states agreed to place two common chemicals used to produce fentanyl

under international control. (*Id.*) As of December 2020, the U.N. had scheduled fentanyl and 26 fentanyl analogues. (*Id.*) China scheduled fentanyl-like substances as a class in May 2019, but according to the U.S. Customs and Border Patrol, it remains a “major source country” for various controlled substances and drug-related manufacturing equipment, including pill presses. (*Id.*) However, the scheduling action has led to greater cooperation between the U.S. and China on a broader range of cases. (*Id.*; https://www.dea.gov/sites/default/files/2019-06/DOJ%20DEA%20Fentanyl%20Expiration%20of%20Temp%20Order_SJC_4June19_final.pdf [as of Jan. 6, 2020].)

8. Argument in Support

According to the Orange County Board of Supervisors:

A recent study by the Center for Disease Control (CDC) names fentanyl the deadliest drug in America. Reports describe fentanyl being disguised as other synthetic opioids or drugs, then sold on the street to users who are unaware that fentanyl is a key ingredient. Users who unknowingly ingest these substances believing they are taking a less powerful drug are much more susceptible to overdose or even death. Additionally, adults or children, who may be inadvertently exposed to fentanyl by breathing in airborne particles or simply touching it, could suffer an overdose and possibly death. When abused, fentanyl affects the brain and nervous system by producing a euphoric high 50 times stronger than heroin and 100 times stronger than morphine.

SB 75 would create tougher penalties for those distributing the drug, including a longer sentence and additional fines for those who are convicted. State trends show that this deadly drug is on the rise. According to the California Department of Health, statewide fentanyl deaths increased from 104 in 2014 to 1,603 in 2019. Initial data for 2020 shows a total of 1,550 fentanyl deaths in just the first half of the year. In Orange County, over the last four years the Sheriff’s department narcotics teams have seized 388 pounds of fentanyl, which represents 88 million lethal doses.

9. Argument in Opposition

According to the ACLU of California:

Under existing law, a person who possesses fentanyl for sale can be punished by up to four years in jail. (Health and Safety Code §11351.) Likewise, a person can be punished by up to five years in jail for simply offering to give away fentanyl. (Health and Safety Code §11352.) Adding excessive new sentence enhancements for these crimes will not make our communities safer or reduce any of the public health harms associated with substance use disorders.

Sentence enhancements have been studied extensively across the country and have generated no conclusive evidence that they deter or prevent crime. As to the particular type of enhancement at issue in this bill, we need look no further than our own backyard to see that this additional punishment, as applied to other types of drugs, has done nothing to curb the harms of drug use. Despite the enhancements, the number of heroin-related overdose deaths in California

increased by 21.4% between 2016 and 2017. The number of cocaine-related overdose deaths increased by 18.3%.³ Given that existing enhancements have not improved our safety, there is little sense in extending the policy to yet another drug.

Studies have found that certainty of punishment – the fact that someone will be punished for a particular crime – has a greater deterrent effect than the severity of the punishment itself. As described above, current law already provides significant penalties for the underlying behavior at issue in this bill, and further expansion is unnecessary.

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