
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 1053 **Hearing Date:** March 22, 2022
Author: Bates
Version: March 14, 2022
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances: enhancements*

HISTORY

Source: Orange County District Attorney's Office
Riverside County District Attorney's Office
San Diego County District Attorney's Office

Prior Legislation: None

Support: California District Attorneys Association; California State Sheriffs' Association;
Peace Officers' Research Association of California; Riverside County Sheriff's
Department

Opposition: California Attorneys for Criminal Justice; California Public Defenders
Association

PURPOSE

The purpose of this bill is to provide that for purposes of the great bodily injury enhancement statute, a person who sells, furnishes, administers, or gives away a controlled substance personally inflicts great bodily injury whenever the person sold, furnished, administered, or given the drugs suffers such injury from using the drugs.

Existing law provides that the punishment for personally inflicting great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony is an additional and consecutive term of imprisonment in the state prison for three years. (Pen. Code, § 12022.7, subd. (a).)

Existing law provides that the punishment for personally inflicting great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature is an additional and consecutive term of imprisonment in the state prison for five years. Defines "paralysis" to mean a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism. (Pen. Code, § 12022.7, subd. (b).)

Existing law provides that the punishment for personally inflicting great bodily injury on a person who is 70 years of age or older, other than an accomplice, in the commission of a felony or attempted felony is an additional and consecutive term of imprisonment in the state prison for five years. (Pen. Code, § 12022.7, subd. (c).)

Existing law provides that the punishment for personally inflicting great bodily injury on a child under the age of five years in the commission of a felony or attempted felony is an additional and consecutive term of imprisonment in the state prison for four, five, or six years. (Pen. Code, § 12022.7, subd. (d).)

Existing law provides that the penalties listed above do not apply if infliction of great bodily injury is an element of the offense. (Pen. Code, § 12022.7, subd. (g).)

Existing law provides that the court impose the additional term of imprisonment under subdivisions (a), (b), (c), or (d), but may not impose more than one of those terms for the same offense. (Pen. Code, § 12022.7, subd. (h).)

Existing law provides the punishment for personally inflicting great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony is an additional and consecutive term of imprisonment in the state prison for three, four, or five years. Provides that “domestic violence” has the meaning provided in subdivision (b) of Section 13700. (Pen. Code, § 12022.7, subd. (e).)

Existing law defines “great bodily injury” to mean a significant or substantial physical injury. (Pen. Code, § 12022.7, subd. (f).)

Existing law provides that these penalties do not apply to murder, manslaughter, arson, or unlawfully causing a fire. Specifies that subdivisions (a) through (d) do not apply if infliction of great bodily injury is an element of the offense. (Pen. Code, § 12022.7, subd. (g).)

This bill provides that for purposes of the great bodily injury enhancement statute, a person who sells, furnishes, administers, or gives away a controlled substance personally inflicts great bodily injury whenever the person sold, furnished, administered, or given the drugs suffers such injury from using the drugs.

COMMENTS

1. Need For This Bill

According to the author:

Fentanyl is an extremely potent manmade opioid. Estimated to be 50 times stronger than heroin and 100 times more potent than morphine, it only takes about two milligrams of fentanyl to be lethal for most people. To place that small amount in perspective, there are approximately 5,000 milligrams in just one teaspoon. Overdosing on fentanyl causes blood pressure to plummet, diminishes breathing and induces deep sleep coma, often leading to death – often without the user even knowing they were ingesting fentanyl.

The statistics are startling. The number of deaths from fentanyl overdoses jumped by more than 2,100% in California in five years. Overdoses of synthetic opioids killed nearly 4,000 residents in the state in 2020, with 3,946 attributed to fentanyl, according to the most recent estimate from the Centers for Disease Control and Prevention (CDC) and the California Department of Public Health.

This rise in fentanyl overdose related deaths has disproportionately impacted communities of color. According to the CDC, drug overdose death rates involving fentanyl for non-Hispanic African Americans had the largest annual percentage increase from 2011 to 2016 at 140.6 percent per year, followed by Hispanic persons at 118.3 percent per year. Fentanyl-involved overdose rates for non-Hispanic White persons increased by 108.8 percent from 2013 to 2016.

Previously in California, if a person sold, furnished, administered or gave away a prohibited narcotic and its use resulted in death or serious injury, the person could be charged with a “great bodily injury” enhancement pursuant to Penal Code sec. 12022.7. This gave the court the option to impose a 3 year enhancement to a sentence, and also classified the offense as serious and violent. However, the California Supreme Court recently ruled in *People v. Ollo* (2021) 11 Cal.5th 682, that in order for the enhancement to apply a person would need to personally administer the narcotic, overruling several District Courts of Appeal that held otherwise. This narrow interpretation would allow most drug dealers to escape punishment when the drugs they sell lead to death or serious injury.

In addition, unlike federal law, California law does not include an enhancement if the sale or furnishing of fentanyl leads to the death or serious injury of a person. 21 US Code 841 increases punishments to a term of imprisonment of not less than 20 years or more than life if death or serious bodily injury results from the use of particular controlled substances. SB 1053 would increase punishments by ten or twenty years if great bodily injury or death resulted from a conviction for a specified controlled substance involving fentanyl when the defendant was previously convicted of specified controlled substance offenses.

2. Great Bodily Injury Enhancement

The great bodily injury enhancement is codified in Penal Code section 12022.7. It provides: “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” (Pen. Code, § 12022.7, subd. (a).) Subdivision (b) of Penal Code section 12022.7 provides that “[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature shall be punished by an additional and consecutive term of imprisonment in the state prison for five years.” Subdivisions (c) through (e) of Penal Code section 12022.7 specify other enhancement terms based on the type of victim (e.g., elderly victim who is 70 years of age or older or child victim under 5 years of age) or the type of offense (i.e., domestic violence). Existing law defines “great bodily injury” to mean “a significant or substantial physical injury.” (Pen. Code, § 12022.7, subd. (f).) Finally, subdivision (g) of Penal Code section 12022.7 provides that the great bodily injury enhancements described do not apply to murder, manslaughter, arson, or the unlawful causing of a fire, and specifies that subdivisions (a) through (d) do not apply if infliction of great bodily injury is an element of the offense.

3. *People v. Olo*

The author has indicated that this bill was introduced in response to *People v. Olo* (2021) 11 Cal. 5th 682. In *Olo*, the Court granted review to determine whether a defendant who furnishes a controlled substance to another person “personally inflicts” great bodily injury whenever the person furnished with the drugs suffers an injury from using the drugs. (*Id.* at p. 685.) The appellant in *Olo* was convicted of furnishing or giving a controlled substance to a minor with a great bodily injury enhancement after his 16-year-old girlfriend died from fentanyl intoxication after ingesting what the appellant and victim believed was cocaine and that was provided by the appellant to the victim. The appellant was sentenced to nine years in prison for furnishing a controlled substance to a minor and an additional three years for the great bodily injury enhancement. At the trial, defense counsel was not permitted to argue that the facts of the case did not support a great bodily injury enhancement due to the victim’s voluntary ingestion of the controlled substance.

In reaching its decision, the Court examined the legislative history of Penal Code section 12022.7, noting that it “counsel[ed] against the broad application of section 12022.7, subdivision (a) to all defendants whose furnishing of drugs results in great bodily injury.” (*Id.* at p. 689.) Specifically, the Court observed that a 1977 amendment to add the term “personally” before the word “inflicts” demonstrated:

[T]he Legislature intended the designation personally to limit the category of persons subject to the enhancement such that an additional penalty for causing great bodily injury is imposed only on those principals who perform the act that directly inflicts the injury. ...[O]ne who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of section 12022.7. ...The 1977 amendment expresses a legislative intent to endorse a restricted definition of the class of individuals subject to the enhanced penalty for the infliction of great bodily injury.

(*Ibid.*) (Internal citations and quotations omitted.)

The Court explained that “[f]urnishing a controlled substance may take many different forms, and not all furnishers fall within the class of individuals who ‘perform that act that directly inflicts the injury.’” (*Ibid.* (citing *People v. Cole*, 31 Cal.3d 568, 571).) The Court then discussed two cases to demonstrate why a fact-specific analysis is consistent with the Legislature’s intent. The defendants in both *People v. Martinez* (2014) 226 Cal.App. 4th 1169 and *People v. Slough* (2017) 11 Cal.App.5th 419 supplied a controlled substance to another person who ultimately overdosed. In *Martinez*, the defendant supplied the victim with methadone and hydrocone pills, knew the drugs were more dangerous when combined with alcohol, and continued to supply the victim with pills while watching her continue to consume alcohol and become intoxicated. (*Ibid.*) In *Slough*, the victim purchased heroin from the defendant and the two parted ways following the transaction. (*Id.* at p. 690.)

In distinguishing these cases, the Court stated:

In *Martinez*, the court reasonably characterized the defendant’s act of personally providing a lethal quantity of drugs to the victim while observing her increasing intoxication as a direct cause of her overdose. In *Slough*, by contrast, the defendant provided drugs but played no role in the victim’s ingestion. The *Slough*

court reasonably concluded that because the defendant neither performed nor participated in the act that directly inflicted the injury, the great bodily injury enhancement could not apply. If the enhancement were to apply to defendants like those in *Slough*, who play no part in the act that directly inflicts the injury, the term personally in the phrase personally inflicts would be read out of section 12022.7. To effectuate the Legislature's intent to impose the enhancement only on those who directly perform the act that causes the physical injury to the victim, we hold that the applicability of section 12022.7, subdivision (a) to cases where a victim suffers great bodily injury from using drugs unlawfully furnished by the defendant depends on the particular circumstances of each case.

(*Ibid.*) (Internal citations and quotations omitted.)

The Court further explained:

In determining whether the personal infliction requirement is satisfied, the key inquiry is whether the furnishing was akin to administering. When a defendant administers the drugs without the victim's consent, the defendant has participated in the injury-causing act and thus may be held liable for personal infliction of the overdose. Where a defendant simply provides drugs to a user who subsequently overdoses, the defendant facilitates but does not personally inflict the overdose. This distinction recognizes the importance of the voluntariness of a victim's ingestion in the determination of whether a defendant personally inflicts great bodily injury in the drug furnishing context. To be eligible for the great bodily injury enhancement, a defendant's participation in the act of ingestion must occur in circumstances in which the victim is not an independent intermediary capable of breaking the personal nexus between the defendant and the overdose injury. Whereas a victim with full capacity who voluntarily chooses to ingest a controlled substance is an independent intermediary, a victim who ingests drugs as a result of coercion or with diminished capacity is not.

(*Id.* at pp. 690-91) (Internal citations and quotations omitted.)

In its analysis, the Court concluded that Penal Code section 12022.7 "requires a fact-specific inquiry that focuses on whether the defendant's actions in furnishing the drugs amounted to personal infliction of injury on the victim." (*Id.* at p. 691.) In holding that the act of furnishing a controlled substance is not by itself sufficient to establish personal infliction of great bodily injury, the Court stated:

In some circumstances, a defendant's act of furnishing drugs and a user's act of ingesting them constitute concurrent direct causes of a subsequent injury. In others, the act of furnishing drugs is merely the proximate cause of injury suffered by the drug user. Distinguishing between such cases and applying section 12022.7 only where the defendant causes injury directly and not through an intermediary require a fact-specific analysis of the circumstances of the furnishing offense, including the role of the defendant and the victim in the events resulting in injury.

(*Id.* at p. 693.) (Internal citations and quotations omitted.)

This bill provides that for purposes of the great bodily injury enhancement statute, a person who sells, furnishes, administers, or gives away a controlled substance personally inflicts great bodily injury whenever the person sold, furnished, administered, or given the drugs suffers such injury from using the drugs.

4. Argument in Support

The San Diego County District Attorney's Office, one of the bill's co-sponsors, writes:

Increasing awareness and education is only part of the approach to responding effectively to the [fentanyl] epidemic. Adequate accountability for those individuals who poison others with fentanyl-laced drugs is also an important component to solving the fentanyl epidemic. California's criminal justice system has a responsibility to respond to the current crisis and address the fentanyl epidemic by clarifying existing sentencing tools that are narrowly targeted to apply to drug dealers who inflict serious bodily injury or death on users of controlled substances. In addition to increasing awareness and education about the dangers of fentanyl, our criminal justice system must recognize there is a distinction between simply committing a controlled substance offense and committing a controlled substance offense that results in great bodily injury to another. The consequences to the offender should reflect that injury to another is more serious than dealing controlled substances.

Senate Bill 1053 would fix a recently-created loophole in the law. Penal Code section 12022.7 has been used to impose a three year enhancement to sentences for selling, furnishing, giving away or administering a controlled substance that resulted in death or serious injury. However, last year, the California Supreme Court in *People v. Ollo* (2021) 11 Cal. 5th 682, ruled that in order to apply the enhancement, the person must personally administer the drug. The *Ollo* case involved a 16 year old girl who died from fentanyl intoxication after using a line of cocaine that contained fentanyl. This ruling overruled several Court of Appeals decisions that held otherwise. The California Supreme Court's recent holding narrowed the application of Penal Code section 12022.7 allowing most drug dealers to escape additional punishment when the drugs they sell cause death or serious injury to another. Senate Bill 1053 would return Penal Code section 12022.7 to the prosecutor's quiver to be used as an option to increase the sentence by three years when drug dealing in death or great bodily injury. Senate Bill 1053 recognizes that injury to human life or death is deserving of additional punishment beyond the mere consequences that flow from the underlying controlled substance violation.

5. Argument in Opposition

According to the California Public Defenders Association:

SB 1053 would provide that "a person who sells, furnishes, administers, or gives away a controlled substance personally inflicts great bodily injury whenever the person sold, furnished, administered, or given the drugs suffers such injury from using the drugs." The individual could be punished by an additional three to six

years in state prison consecutive to any other sentence depending on the age of the injured person.

SB 1053 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 SB 1053: It would not reduce the distribution of fentanyl nor would it prevent overdoses; it would reduce neither the supply of drugs nor 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, neither the supply of drugs is 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. ...

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 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.

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