
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 1060 **Hearing Date:** March 22, 2022
Author: Bates
Version: March 10, 2022
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances: fentanyl and oxycodone*

HISTORY

Source: Riverside County District Attorney's Office
Orange County Sheriff's Department

Prior Legislation: SB 75 (Bates), failed Senate Public Safety Committee 2021
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: California District Attorneys Association; California State Sheriffs' Association;
Peace Officers' Research Association of California

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

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 either fentanyl or oxycodone, 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 classifies oxycodone as a Schedule II controlled substance. (Health & Saf. Code, § 11055, subd.(b)(1)(M).)

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 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. (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 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).)

This bill adds oxycodone 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 oxycodone in which the weight of the substance is between 1-80 kilograms.

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

- Where the substance exceeds 20 grams by weight, the person shall receive an additional term of 3 years.
- Where the substance exceeds 80 grams by weight, the person shall receive an additional term of 5 years.
- Where the substance exceeds 200 grams by weight, the person shall receive an additional term of 10 years.
- Where the substance exceeds 400 grams by weight, the person shall receive an additional term of 15 years.
- Where the substance exceeds 800 grams by weight, the person shall receive an additional term of 20 years.
- Where the substance exceeds 1600 grams by weight, the person shall receive an additional term of 25 years.

This bill prohibits the conspiracy enhancement as it pertains to fentanyl from being imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

This bill adds oxycodone and fentanyl to the provision of law that prohibits the above listed weight enhancements from being imposed unless the allegation that the weight of the substance containing one of the above listed substances exceeds the amount provided above and is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

This bill provides that the court may not impose the additional punishment for the weight enhancements unless it determines that there are circumstances in aggravation supporting the additional punishment and states on the record its reasons for imposing the additional punishment.

COMMENTS

1. Need For This Bill

According to the author:

Fentanyl is officially the deadliest drug in America, according to a recent study by the Center for Disease Control (CDC). Reports describe fentanyl being laced into other synthetic opioids or drugs (such as methamphetamine or cocaine), 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, both adults and children, who are inadvertently exposed to fentanyl by breathing in airborne particles or simply touching it, can suffer an overdose and possibly death.

Fentanyl is an extremely potent manmade opioid that is 50 times stronger than heroin and 100 times more potent than morphine. Often mixed with other illegal drugs such as heroin and methamphetamine, and with fake prescription pills such as oxycodone, fentanyl creates a powerful, lethal combination, taking only two milligrams to be fatal 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 CDC and the California Department of Public Health.

This rise in fentanyl overdose related deaths has disproportionately impacted communities of color. According to 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.

Existing law does not currently include fentanyl or oxycodone as one of the drugs eligible for an additional term based on the weight possessed – even though fentanyl is the most lethal drug on our streets and counterfeit oxycodone pills are often the conduit used by traffickers to deliver fentanyl to unsuspecting users.

SB 1060 amends Section 11370.4 of the Health and Safety Code to close a gap in the law by creating a new set of weight enhancements for fentanyl that are separate from those currently listed for heroin, cocaine, and methamphetamine. These new enhancements would match fentanyl's potency when compared to other drugs. This bill also includes Oxycodone in the category of drugs, like heroin, cocaine, and methamphetamine, which are subject to enhancements by weight.

By doing so, this bill targets those distributing, trafficking, selling larger quantities of fentanyl, while also recognizing the enhanced potency and lethality of fentanyl in comparison to other drugs.

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. 15, 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 Mar. 15, 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 Mar. 15, 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 Mar. 15, 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 Mar. 15, 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.

Oxycodone

Oxycodone is a prescription opioid used to treat moderate to severe pain that is often prescribed following surgery or injury. Oxycodone can be prescribed in a different forms, including as a liquid solution, a concentrated solution, a tablet, a capsule, an extended-release tablet, and an extended-release capsule taken orally. As with other prescription opioids, Oxycodone has a high

potential for abuse. (<<https://www.cdc.gov/opioids/basics/prescribed.html>> [as of Mar. 15, 2022].)

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.* at pp. 17-18.)

With respect to prescription opioids, the 2020 Threat Assessment indicated that although abuse levels and overdose deaths had decreased, their misuse remains a prevalent concern. (*Id.* at p. 37.) In 2018, nearly 15,000 deaths were attributed to prescription opioids, accounting for 32% of all opioid overdose deaths. (*Ibid.*) While prescription opioid deaths decreased from 2017 to 2018, their misuse and diversion has continued to rise over the last two decades. (*Id.* at p. 38.) Notably, hydrocodone and oxycodone products are dispersed at more than twice the rate of any other controlled prescription drug. (*Ibid.*) Although the amount of prescription opioids available on the legal market has declined from its peak in 2011, the amount remains high. (*Id.* at p. 39.) Hydrocodone and oxycodone products made up 78% of all controlled prescription drugs sold to retail level purchasers in 2019. (*Ibid.*) Findings from the 2018 National Survey on Drug Use and Health indicated that prescription drugs were the second most abused substance after cannabis with 9.9 million Americans over the age of 12 reporting misuse of prescription pain medications. (*Id.* at p. 41.) The survey also reported that 51.3% of prescription pain medication users obtained their most recently misused prescription drugs from a friend or relative for free, in exchange for payment, or by theft. (*Id.* at p. 42.)

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 December 31, 2022. (<<https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR2471SA-RCP-117-35.pdf>>; <

room/legislation/2022/03/15/bill-signed-h-r-2471/>.) In 2019, the DOJ and DEA urged Congress to statutorily and permanently schedule the class of fentanyl-like 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, 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 Mar. 15, 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 Mar. 15, 2022].)

8. Argument in Support

The California District Attorneys Association writes:

The opioid crisis in California, much like the entire nation, has claimed many lives, wrecked family units, negatively affected children, and caused additional crimes relating to the need to obtain the narcotic and acts performed as a result of using the narcotic. Those who peddle in these substances are contributing directly to the death of our citizenry and the decay of our society, and when individuals or criminal networks traffic in large amounts of these drugs, such as oxycodone and fentanyl, their sentence should reflect the significant nature of their conduct. This bill especially recognizes that fentanyl in particular is lethal in much smaller doses than many other controlled substances, and the differing weight thresholds for that substance makes good, common sense in that a significantly lower amount of that drug can wreak havoc; thus, having the weight enhancement be triggered by large gram-level amounts will protect the public far more greatly than it would at kilogram-level amounts for that substance.

9. Argument in Opposition

According to the California Public Defenders Association:

SB 1060 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 1060: it would not reduce the distribution of fentanyl or oxycodone, nor would it prevent overdoses; it would reduce neither the supply of drugs or the demand for; and worse, it could actually discourage effective methods of dealing with the opioid crisis. ...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.

...

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. ...Why should California now apply that sort of ineffective and outmoded strategy to yet another controlled substance?

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 of color. For all of these reasons, SB 1060 would take California in the wrong direction.

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