
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 1103 **Hearing Date:** April 24, 2018
Author: Bates
Version: April 16, 2018
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled Substances: Fentanyl*

HISTORY

Source: Orange County Sheriff's Department

Prior Legislation: SB 176 (Bates) Failed passage in Senate Public Safety 2017
SB 1323 (Bates) Held in Assembly Appropriations 2016

Support: (support received for prior version of bill) California District Attorneys Association; California Police Chiefs Association; California Public Defenders Association; California State Sheriffs' Association; Orange County Board of Supervisors; Riverside Sheriffs' Association; San Diego County District Attorney's Office; San Diego County Sheriff's Department

Opposition: (opposition received to prior version of bill) ACLU of California; California Public Defenders Association

PURPOSE

The purpose of this bill is permit a court to impose 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.

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).)

Existing law provides the following penalties:

- Possession 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.)

- Possession 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.)
- Transport, import, sale, furnish, 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 based on the weight of the heroin, cocaine, or cocaine base possessed for sale, sold, transported, etc. (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 based on the liquid volume of a substance containing methamphetamine, amphetamine, phencyclidine (PCP) and its analogs possessed for sale, sold, transported, etc. (Health & Saf. Code § 11370.4, subd. (b).)

Existing law provides that the above listed enhancements shall not be imposed unless the allegation that the weight of the substance containing one of the above listed drugs 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 a 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 creates a new enhancement statute that permits a court to impose 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.

COMMENTS

1. Need for This Bill

According to the author:

SB 1103 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.

Fentanyl can serve as a direct substitute for heroin in opioid dependent individuals. However, fentanyl is a very dangerous substitute for heroin because it is much more potent and results in frequent overdoses that can lead to respiratory depression and death. Some analogues 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 are being exposed to. Fentanyl is inexpensive to produce, making it a go-to heroin substitute for the drug cartels who are looking to increase their bottom line. Finally, fentanyl has proven to be a significant threat to law enforcement personnel and first responder as minute amounts—equivalent to a few grains of salt—can be lethal, and visually, can be mistaken for cocaine or white powder heroin....

SB 1103 recognizes that the danger posed by fentanyl is greater than that of other drugs with penalty enhancements based on weight. Fentanyl is not only far stronger than heroin, 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.

Nationwide there has been a significant increase in fentanyl-related overdose fatalities. The Centers for Disease Control and Prevention reported the sharpest increase in drug overdose deaths in 2016 to be among fentanyl and synthetic opioids with over 42,000 overdose deaths. This is an increase five times higher than the deaths in 1999. California had over 4,600 opioid related deaths in 2016. Orange County has seen an increase in Fentanyl related cases. For example, Orange County statistics show an increase in the number of deaths with fentanyl present from 23 in 2010 to 67 in 2017, seeing a 100 percent increase between 2015 and 2017. The purpose of this legislation is to provide California law enforcement with a tool for addressing the illegal sale of fentanyl before the state reaches the high level of overdose fatalities seen on the East Coast.

2. Background on Fentanyl and Its Analogs

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 Apr. 2, 2018].)

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, as well as its analogs, is manufactured in laboratories in China and Mexico, and then shipped to the U.S. or smuggled across the U.S.-Mexico border. It is typically distributed in powder form, but is increasingly available in the form of counterfeit prescription pills. The Drug Enforcement Administration (DEA) reports that the fentanyl coming into the U.S. from Mexico is generally low in purity, while the fentanyl coming into the country directly from China has purity levels as high as 90 percent. (<https://www.dea.gov/docs/DIR-040-17_2017-NDTA.pdf> [as of Apr. 2, 2018].)

Illicitly-produced fentanyl is often mixed with heroin, oftentimes 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 Apr. 15, 2018].) Recent reports by law enforcement agencies and health care providers indicate that fentanyl is appearing in cocaine more frequently than had been seen previously, and it is unclear if this is being done intentionally. (<<https://www.npr.org/sections/health-shots/2018/03/29/597717402/fentanyl-laced-cocaine-becoming-a-deadly-problem-among-drug-users>> [as of Apr. 2, 2018].)

Many cases that are reported as involving fentanyl actually involve one of several fentanyl analogs. Fentanyl analogs are substances that are in the same chemical family as fentanyl and have similar pharmacological effects, but have slight variations in their chemical structure. In 2016, the DEA's Special Testing and Research Laboratory found that fentanyl-related substances and other new opioids accounted for 32 percent of the substances tested. (<https://www.dea.gov/docs/DIR-040-17_2017-NDTA.pdf> [as of Apr. 2, 2018].) Fentanyl analogs are often used by drug traffickers in an attempt to circumvent existing laws regulating controlled substances. In addition, as discussed further below, fentanyl analogs are more challenging to prosecute.

3. DEA Threat Assessment

The DEA publishes an annual illicit drug “threat assessment” which reviews trends and issues concerning major drugs of abuse. The 2017 Threat Assessment of fentanyl concluded:

Fentanyl will continue to pose a grave threat to the United States while the current illicit production continues, and new forms of synthetic substances emerge. Fentanyl has penetrated mainstream illicit drug markets, and its extreme potency level means a small quantity of the drug can cause mass overdose events, relative to other drugs. The illicit fentanyl market will expand in the near term as new fentanyl products reach a wider variety of drug users. Fentanyl-related substances will continue to pose a serious threat; the majority of these varieties have never been studied in humans, and dosing levels are unclear. It is likely that illicit drug

markets will also see the rise, and fall, of new fentanyl-related opioids as traffickers experiment with new compounds to test the markets, and attempt to evade drug scheduling actions. (<https://www.dea.gov/docs/DIR-040-17_2017-NDTA.pdf> [as of Apr. 2, 2018].)

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 analogs rather than solely fentanyl.

5. Many Fentanyl Cases Involve a Fentanyl Analog

As noted above, many cases that are reported as involving fentanyl actually involve one of numerous fentanyl analogs. Fentanyl is a Schedule II drug 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 possess 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 a fentanyl-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 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.

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 analogs, 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 (February 6, 2018); *See* November 2017 DEA press release announcing the intention of the agency to issue the

temporary scheduling order explaining that “[w]ithout the action announced today, prosecutors must overcome cumbersome evidentiary hurdles to secure convictions of these traffickers under the Analogue Act.” (<<https://www.dea.gov/divisions/hq/2017/hq110917.shtml>> [as of Apr. 3, 2018]).)

6. Research on Sentences as a Deterrent to Crime

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.

(National Research Council (2014) *The Growth of Incarceration in the United States: Exploring Causes and Consequences* Committee on Causes and Consequences of High Rates of Incarceration, J. Travis, B. Western, and S. Redburn, Editors. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. <http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf>.)

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.” (National Research Council, *supra*, *The Growth of Incarceration in the United States*, p. 132.)

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.

(*Id.* at 133.) The report concludes: “The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.” (*Id.* at 5.)

7. Amendments

This bill was originally heard at the Committee’s hearing on April 10, 2018. The bill was subsequently amended. The amendments remove fentanyl from the existing weight enhancement

statute and create a new enhancement statute that only pertains to drug commerce crimes involving fentanyl. In addition, the fentanyl enhancement statute this bill proposes to create would be discretionary, unlike the existing weight enhancement statute.

8. Argument in Support

According to the San Diego County District Attorney's Office:

This bill appropriately validates the serious nature of fentanyl by putting it in the same classification as the other drugs like heroin. Fentanyl has progressed as a huge safety risk for the community and has become a major contributor in many overdose deaths in San Diego as well as all over the country.

...This bill would impose that additional term upon, and authorize a fine against, a defendant who violates those laws with respect to a substance containing fentanyl.

SB 1103 recognizes the danger posed by fentanyl is far greater than that of the other drugs with penalty enhancements based on weight. Fentanyl is not only stronger than heroin, but also threatens the lives and safety of first responders and law enforcement.

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. Rather, studies have found that certainty of punishment...has a greater deterrent effect than the severity of the punishment itself. Current law already provides significant penalties for the underlying behavior at issue in this bill.

Rather than acting as a deterrent, the new enhancements will only serve to overcrowd our jails...Unnecessarily crowding our jails and prisons is not fiscally prudent, nor safe for inmates, jail staff, or the public.

Moreover, there is a growing national consensus that the war on drugs, characterized by draconian sentences like the ones at issue in SB 1103, has been a harmful, expensive failure.

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