
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: SB 161 **Hearing Date:** January 14, 2020
Author: Bates
Version: January 24, 2019
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled Substances: Fentanyl*

HISTORY

Source: Orange County Sheriff's Department

Prior Legislation: SB 1103 (Bates), Failed Senate Public Safety Committee 2018
SB 176 (Bates), Failed Senate Public Safety Committee 2017
SB 1323 (Bates), Failed Assembly Appropriations Committee 2016

Support: California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; City of Laguna Niguel; City of Mission Viejo; Crime Victims United of California; Riverside Sheriffs' Association; San Diego Board of Supervisors; San Diego County District Attorney

Opposition: ACLU of California; California Attorneys for Criminal Justice; California Public Defenders Association; Drug Policy Alliance; Ella Baker Center for Human Rights

PURPOSE

The purpose of this bill is to add 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, as specified.

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 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, 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....

State trends show fentanyl's proliferation. Even though the number of deaths from opioid overdoses has fallen slightly statewide, deaths related to fentanyl use have increased. According to the California Department of Public Health, 373 people died from fentanyl overdoses in 2017, which is more than the number who died from fentanyl overdoses in 2016, and more than four times the 81 who died from overdosing on the drug in 2013.

Sadly, starting in 2019, we are already seeing deaths caused by fentanyl overdoses across our state....

Existing law imposes an additional term upon a person who is convicted of a violation of, or conspiracy to violate, specified provisions of law with respect to a substance containing heroin or cocaine, if the substance exceeds a specific weight. However, these same enhancements are not in place for fentanyl, which has proven to be the deadliest drug in California.

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. 6, 2020].)

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 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. 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. 6, 2020].)

The DEA also reports that China is the primary source of the fentanyl and fentanyl precursors that are trafficked into the U.S. from Mexico. (*Id.*)

Illicitly-produced fentanyl is often mixed with heroin, sometimes 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. 6, 2020].)

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>>; <<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. 6, 2020].)

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 publishes an annual illicit drug “threat assessment” which reviews trends and issues concerning major drugs of abuse. The 2018 Threat Assessment of fentanyl concluded:

Fentanyl will continue to be a serious threat to the United States while the current illicit production continues and fentanyl availability remains prevalent. Fentanyl’s lethality will continue to pose challenges and risks to law enforcement and first responders as well as contribute to increasing numbers of overdose deaths.

Moreover, new regulations imposed by the United States, China, and Mexico may decrease fentanyl availability and trafficking in the short term but are unlikely to affect long term change, as traffickers will continue to experiment with new FRS [fentanyl-related substances] and adjust supplies accordingly. Drug traffickers will continue to be drawn to fentanyl because of the high profits associated with its distribution. Additionally, the use of both the open and dark web to obscure transactions and to distribute fentanyl directly to both users and independent drug trafficking organizations presents challenges for law enforcement and policy makers working to restrict the flow of fentanyl to the United States.

(<<https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf>> [as of Jan. 6, 2020].)

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 Eliminate Fentanyl

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); *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 Jan. 6, 2020].) The temporary scheduling order is in effect until February 6, 2020. The DOJ and DEA have urged Congress to statutorily and permanently schedule the class of fentanyl-like substances. (<https://www.dea.gov/sites/default/files/2019-06/DOJ%20DEA%20Fentanyl%20Expiration%20of%20Temp%20Order_SJC_4June19_final.pdf> f>; <https://www.judiciary.senate.gov/imo/media/doc/Liskamm-McDermott%20Testimony.pdf>>.)

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. Post Office to provide advanced electronic data on packages in order to assist law enforcement in identifying and seizing illicit substances sent through the mail.

(<https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-initiative-stop-opioid-abuse-reduce-drug-supply-demand-2/> [as of Jan. 6, 2020].)

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 since 2012.

(<https://fas.org/sgp/crs/row/IF10890.pdf> [as of Jan. 6, 2020].) Since 2016, the U.N. has scheduled eight additional fentanyl analogues and two of the most common fentanyl precursor chemicals. (*Id.*) China had previously scheduled several individual fentanyl-related substances, but as of May 1, 2019, China has scheduled fentanyl-like substances as a class. The DOJ believes that this action “will help prevent chemical work-arounds by clandestine synthetic opioid producers in China, and will allow the United States and China to cooperate on a broader range of cases.” (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. 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.)

9. Argument in Support

The Riverside Sheriffs’ Association supports this bill, stating:

SB 161 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.

The bill takes the common sense step of leveling the playing field by ensuring that the extremely dangerous and deadly fentanyl is treated as being at least as harmful as the much “weaker” heroin. The same current enhancements applied to heroin at a minimum should be applicable to fentanyl, thereby protecting unknowing users, first responders, and children.

10. Argument in Opposition

According to the Drug Policy Alliance:

SB 161 would apply the types of penalties applied to possession for sale or sale of a kilo or more of heroin and cocaine to a substance containing any amount of fentanyl. It is obvious to any observer of U.S. drug markets that these penalty enhancements failed to reduce the availability of heroin and cocaine in the U.S. California should not replicate this failed policy.

Californians are increasingly recognizing that a punitive approach to drugs is costly and counterproductive....

SB 161 would neither reduce the distribution of fentanyl nor prevent overdoses. Instead, it could undermine current efforts to address the opioid overdose crisis. Substantial evidence demonstrates that criminal penalties do not have any effect on reducing either the supply of drugs or the demand for them....

When we incarcerate people for distribution of drugs we often inadvertently lock up people impacted by the opioid overdose crisis.... Many individuals who distribute opioids are not high-level traffickers but low-level sellers who are friends or acquaintances of the user. Increased penalties for distribution will most

likely affect low-level sellers, while high-level sellers will likely remain unaffected and continue to drive distribution....

A much more effective approach to reducing overdoses due to fentanyl-laced drugs would be to offer drug checking services and distribute testing strips as the California Department of Public Health is already doing....

Rather than diminishing the harms of drug misuse, criminalizing people who sell and use drugs amplifies the risk of fatal overdoses and diseases, increase stigma and marginalization, and drives people away from needed treatment, health, and harm reduction services.

-- END --