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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Bill No:** SB 226                      **Hearing Date:** April 25, 2023  
**Author:** Alvarado-Gil  
**Version:** March 8, 2023  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** SJ

**Subject:** *Controlled substances: armed possession: fentanyl*

## HISTORY

**Source:** California District Attorneys Association

**Prior Legislation:** SB 1070 (Melendez), not heard in Senate Public Safety in 2022

**Support:** Arcadia Police Officers' Association; Burbank Police Officers' Association; California Association of Highway Patrolmen; California Coalition of School Safety Professionals; California State Sheriffs' Association; Claremont Police Officers Association; Corona Police Officers Association; Culver City Police Officers' Association; Deputy Sheriffs' Association of Monterey County; Fullerton Police Officers' Association; Los Angeles School Police Officers Association; Murrieta Police Officers' Association; Newport Beach Police Association; Palos Verdes Police Officers Association; Peace Officers Research Association of California; Placer County Deputy Sheriffs' Association; Pomona Police Officers' Association; Riverside Police Officers Association; Riverside Sheriffs' Association; San Bernardino County; San Diegans Against Crime; San Diego Deputy District Attorneys Association; San Joaquin County District Attorney's Office; Santa Ana Police Officers Association; Take a Stand Stanislaus; Upland Police Officers Association

**Opposition:** 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 list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony.***

*Existing law* makes it unlawful to possess several specified controlled substances, including heroin, cocaine base, cocaine, hydrocodone, and fentanyl. Provides that the punishment is imprisonment in the county jail for not more than one year unless the person has one or more prior convictions for a serious or violent felony, as specified. (Health & Saf. Code, § 11350, subd. (a).)

*Existing law* makes it unlawful for a person to possess for sale or purchase for purpose of sale several specified controlled substances, including heroin, cocaine, opium, and fentanyl. Provides

that the punishment is imprisonment in the county jail for two, three, or four years. (Health & Saf. Code, § 11351.)

*Existing law* makes it unlawful for a person to transport, import, sell, furnish, administer, or give away, or offer or attempt to transport, import, sell, furnish, administer, or give away several specified controlled substances, including cocaine, cocaine base, heroin, and fentanyl. Provides that the punishment is imprisonment in the county jail for three, four, or five years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11352.)

*Existing law* makes it unlawful to possess several specified controlled substances, including methamphetamine, amphetamine, phencyclidine (PCP), and gamma hydroxybutyric acid (GHB). Provides that the punishment is imprisonment in the county jail for not more than one year unless the person has one or more prior convictions for a serious or violent felony, as specified. (Health & Saf. Code, § 11377, subd. (a).)

*Existing law* makes it unlawful to possess for sale several specified controlled substances, including methamphetamine, amphetamine, PCP, and GHB. Provides that the punishment is imprisonment in the county jail for 16 months, two years, or three years. (Health & Saf. Code, § 11378.)

*Existing law* makes it unlawful for a person to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport specified controlled substances, including methamphetamine, amphetamine, PCP, and GHB. Provides that the punishment is imprisonment in the county jail for two, three, or four years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11379.)

*Existing law* provides, notwithstanding any other provision of law, that every person who unlawfully possesses any amount of a substance containing cocaine base, cocaine, heroin, or methamphetamine, a crystalline substance containing PCP, a liquid substance containing PCP, plant material containing PCP, or a hand-rolled cigarette treated with PCP while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code, § 11370.1, subd. (a).)

*Existing law* defines “armed with” to mean having available for immediate offensive or defensive use. (Health & Saf. Code, § 11370.1, subd. (a).)

*Existing law* provides that any person who is convicted of the above offense is ineligible for diversion or deferred entry of judgment, as described. (Health & Saf. Code, § 11370.1, subd. (b).)

*Existing law* regulates firearms, the possession of firearms, and the carrying of firearms. (Pen. Code §§ 23500 et seq.)

*This bill* adds “a substance containing fentanyl” to the statute that makes it a felony to possess one of several controlled substances while armed with a loaded, operable firearm.

*This bill* specifies that it is not applicable to any person lawfully possessing fentanyl, including with a valid prescription.

## COMMENTS

### 1. Need for This Bill

According to the author:

Current law allows for the felony prosecution of a person who possesses a substance containing cocaine, methamphetamine, or phencyclidine (PCP), or heroin while being armed with a loaded, operable firearm. Unlike many drug and/or gun offenses, this offense is punishable in the state prison for two, three, or four years.

A grave threat to public health and safety exists today in the form of the drug fentanyl, which is causing numerous overdose deaths in California and nationwide. Fentanyl is not listed by name as being among the controlled substances eligible for prosecution under existing law – even though it is up to 50 times stronger than heroin, which is on the list.

Californians have seen an increased supply of fentanyl in recent years, causing significant risk to first responders as well as to those who ultimately succumb to fatal overdoses and anyone coming into contact with the illicit drug. It is as dangerous as, or more dangerous than, the drugs listed by name in existing law.

### 2. Background

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. 13, 2023].)

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.

Illicitly-produced fentanyl is frequently mixed with heroin, often without the knowledge of the purchaser. The Drug Enforcement Administration (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](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. 14, 2023].) Reports by law enforcement agencies and health care providers 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 Apr. 14, 2023].) In addition to those individuals who have unknowingly ingested fentanyl while consuming another controlled substance, some individuals are intentionally seeking out fentanyl. (<<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/01/07/some-drug-users-in-western-us-look-out-for-deadly-fentanyl-heres-why>> [as of Apr. 14, 2023].) 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](https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf)> [as of Apr. 14, 2023].)

### 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. (<[https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment\\_WEB.pdf](https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf)> at pp. 17-18.)

#### **4. Effect of This Bill**

Current law provides that possession of any amount of a substance containing cocaine base, cocaine, heroin, methamphetamine, or PCP while armed with a loaded, operable firearm is a felony punishable by imprisonment in the state prison for two, three, or four years. (Health & Saf. Code, § 11370.1, subd. (a).) Notably, existing law does not require that the firearm be unlawfully possessed or that the person otherwise be engaged in unlawful activity related to the firearm. In other words, a person in lawful possession of a loaded, operable firearm who is also in possession of one of the specified controlled substances can be charged with a felony.

This bill adds “a substance containing fentanyl” to the list of controlled substances in this statute but specifies that it does not include fentanyl that is lawfully possessed by the person, including with a valid prescription. As noted above, fentanyl is often mixed with controlled substances that are already included in Health and Safety Code section 11370.1 such as cocaine and heroin. The explicit inclusion of fentanyl would only be necessary in cases in which the substance did not also contain one of the controlled substances included under existing law.

#### **5. Argument in Support**

According to the California District Attorneys Association, the bill’s sponsor:

While fentanyl has occasionally been sold on the streets since the 1970s, the use of this illicit substance has exploded since 2016, resulting in untold numbers of deaths and contributing to the opioid crisis, which has increased homelessness, destroyed families, and wrecked the futures of many of our young people. Because the drug is so highly addictive, a user might need multiple pills per day to avoid becoming “dope sick,” which is to say, to avoid experiencing the excruciating symptoms of withdrawal.

As a valuable commodity on the streets fetching up to \$20 per pill, a possessor of fentanyl who also carries a loaded, operable firearm to protect their “stash” presents a significant public safety threat. Gun violence is a large concern in this state generally, but coupling the opioid epidemic with firearms presents a powder keg of risk.

SB 226 remedies the inconsistency in treatment between heroin, which is already explicitly listed in HS 11370.1 as a drug for which simultaneous firearm possession is outlawed, and fentanyl, which is up to 50 times stronger than heroin and yet is not explicitly mentioned in that statute. SB 226 thereby protects California’s public in a tangible way, while providing the courts with clarity on this important issue.

## 6. Argument in Opposition

The California Public Defenders Association writes:

... SB 226 relies on [the] 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 226: it would not reduce the distribution of fentanyl, nor would it prevent overdoses; it would neither reduce the supply of drugs or the demand for them; and worse, it could actually discourage effective methods of dealing with the opioid crisis. ...

Importantly, the code section that SB 226 seeks to broaden does not require that a firearm be used in any way. Mere presence of the firearm is enough for a conviction, even if the firearm is legally owned and properly and safely stored.

...

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. ...

...

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. ...

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