
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 325 **Hearing Date:** April 18, 2023
Author: Grove
Version: March 15, 2023
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances: fentanyl*

HISTORY

Source: Author

Prior Legislation: AB 1955 (Nguyen), failed in Assembly Public Safety Committee 2022
SB 1060 (Bates), failed in Senate Public Safety Committee 2022
SB 75 (Bates), failed in Senate Public Safety Committee 2021
SB 161 (Bates), failed in Senate Public Safety Committee 2019
SB 1103 (Bates), failed in Senate Public Safety Committee 2018
SB 176 (Bates), failed in Senate Public Safety Committee 2017
SB 1323 (Bates), held in Assembly Appropriations Committee 2016

Support: California District Attorneys Association; City of Fountain Valley; County of Fresno; DUID Victim Voices; FentanylSolution.org; Fresno County District Attorney's Office; Fresno Police Department; High Truths on Drugs and Addiction; Kern County Probation Department; Kern County Prosecutors Association; Kern County Sheriff's Office; Merced County District Attorney's Office; PAIN, Parents & Addicts in Need; Peace Officers Research Association of California; Project Eli; Riverside County Sheriff's Office; Tulare County District Attorney's Office; an individual

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association; Ella Baker Center for Human Rights; San Francisco Public Defender

PURPOSE

The purpose of this bill is to create an enhancement of three to five years when a person is convicted of specified drug-related offenses involving fentanyl or a fentanyl analog, and the drug was designed, shaped, colored, advertised, or packaged in such a way as to resemble food or candy.

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.)
- 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 transporting between noncontiguous counties – 1170(h) felony term of 3, 6, or 9 years (*Id.*)

Existing law provides that a judge or magistrate may, either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. (Pen. Code, § 1385.)

This bill provides that notwithstanding any other law, including Penal Code section 1385, a person who is convicted of possession for sale, purchasing for sale, transporting, importing, selling, furnishing, administering, or giving away, or offering to transport, import, sell, furnish, administer, or give away, or attempting to import or transport, fentanyl or a fentanyl analog that was designed, shaped, colored, advertised, or packaged to resemble food or candy shall receive an additional punishment of three, four, or five years, at the court’s discretion.

This bill defines “food” as any article that is used for food or drink for a person, or for a component of any such article.

This bill defines “candy” as a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces.

This bill includes legislative findings and declarations.

COMMENTS

1. Need For This Bill

According to the author:

Fentanyl is a Schedule II narcotic and according to the United States Sentencing Commission, it is 50 times stronger than heroin and 100 times stronger than morphine. Although originally prescribed by doctors to treat severe pain, fentanyl is often manufactured and distributed through illegal drug markets. Drug cartels and sellers now use fentanyl to increase the potency of heroin and enhance user addiction, often with deadly results.

The California Department of Public Health revealed that in 2021, there were 5,722 fentanyl-related deaths, the second-highest death rate of any state. In 2022,

a report conducted by the Office of Governor Newsom found a 594% increase in fentanyl seized at the border compared to the previous year. The report says, “[t]here was enough of the drug reaching the state in 2022 to kill every man, woman and child in North America—twice.”

Despite the state’s efforts to curb the crisis, a new, colorful version of the drug has entered the market. Recently, brightly colored fentanyl, also known as “rainbow” fentanyl, has been found in many different forms, including pills, powders and candy. With its vibrant colors and candy-like shapes, it has become a new method for dealers to sell this highly addictive and fatal poison to children and young people. In 2021, there were 224 fentanyl-related overdoses among teens from ages 15-19 years old in California.

The fentanyl crisis has gotten out of hand. With the surge of fentanyl overdoses on school campuses, it is important to train teachers and parents on how to use Narcan to save overdosing children, but even better would be preventing the drug from entering schools in the first place. We need to shift our attention, and SB 325 will help us to catch these predators and get them off our streets so they can’t hurt anyone else.

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 Apr. 10, 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.

3. DEA Threat Assessment

The Drug Enforcement Administration 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.)

4. Rainbow Fentanyl

In August of 2022, the DEA issued a warning to the public regarding “an alarming emerging trend of colorful fentanyl” that it believed was “a new method being used by drug cartels to sell highly addictive and potentially deadly fentanyl made to look like candy to children and young people.” (DEA, *DEA Warns of Brightly-Colored Fentanyl Used to Target Young Americans* (Aug. 30, 2022) available at <<https://www.dea.gov/press-releases/2022/08/30/dea-warns-brightly-colored-fentanyl-used-target-young-americans>>.) The warning in this press release was quickly picked up by national and local news media outlets across the country. (See Jacqueline Howard, *What is Rainbow Fentanyl? Colorful Pills Drive New Warnings About Deadliest Drug in the US* (Sept. 25, 2022) available at <<https://www.cnn.com/2022/09/25/health/rainbow-fentanyl-pills-wellness/index.html>>; Carissa Lehmkuhl, ‘*Rainbow Fentanyl*’ Now Found in 21 States, Including Texas (Sept. 29, 2022) available at <<https://www.fox7austin.com/news/rainbow-fentanyl-opioid-drug-states-texas>>; Kate Snow and Safia Samia Ali, *Young People Are Being Targeted With Brightly Colored ‘Rainbow Fentanyl,’ Government Drug Agency Warns* (Sept. 26, 2022) available at <<https://www.nbcnews.com/news/us-news/young-people-are-targeted-brightly-colored-rainbow-fentanyl-government-rcna49503>>.) Although the warning from the DEA did not mention Halloween candy, concerns about brightly colored pills containing fentanyl either inadvertently or intentionally ending up in the nation’s Halloween candy supply went viral. (Jordan Mendoza, *Rainbow Fentanyl Passed Out on Halloween? Why Experts Say That’s ‘Absolutely Ludicrous’* (Oct. 26, 2022) available at <<https://www.usatoday.com/story/news/nation/2022/10/26/rainbow-fentanyl-halloween-candy/10554817002/>>.) Following news reports of this new fentanyl risk, drug policy experts countered that brightly colored pills containing fentanyl were not new, expressed skepticism that drug cartels or street dealers had launched a new effort to target children or young people, and noted that drug traffickers often use specific colors or markings on their products for branding purposes. (*Id.*; Brian Mann, *Is ‘Rainbow Fentanyl’ a Threat to Your Kids This Halloween? Experts Say No* (Oct. 11, 2022) available at

<<https://www.npr.org/2022/10/11/1127168627/is-rainbow-fentanyl-a-threat-to-your-kids-this-halloween-experts-say-no>>.)

5. Effect of This Bill

This bill was introduced to address concerns regarding “rainbow fentanyl.” Under current law, the penalty for possession for sale or purchasing for purposes of sale fentanyl is two, three, or four years in a county jail. (Health & Saf. Code, § 11351.) Existing law provides that the penalty for transporting, importing, selling, furnishing, administering, giving away, or offering to transport, import, sell, furnish, administer, or giving away, or attempting to import or transport, fentanyl is three, four, or five years in a county jail. (Health & Saf. Code, § 11352.) If fentanyl is being transported between noncontiguous counties, the penalty is three, six, or nine years in a county jail. (*Id.*)

This bill creates a new enhancement of three, four, or five years when a person is convicted of possession for sale, purchasing for sale, transporting, importing, selling, furnishing, administering, or giving away, or offering to transport, import, sell, furnish, administer, or give away, or attempting to import or transport, fentanyl or a fentanyl analog that was designed, shaped, colored, advertised, or packaged to resemble food or candy. This enhancement would be in addition to the term a person was sentenced to for the underlying drug offense.

This bill defines “food” as “any article that is used for food or drink for a person, or for a component of any such article” and “candy” as “a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces.”

6. Argument in Support

The Tulare District Attorney’s Office writes:

...This important measure will increase criminal penalties and expand jail time for the possession, sale, or purchase for sale, of “rainbow” fentanyl and the transportation, importation, sale, and trafficking of this lethal drug.

Fentanyl is a Schedule II narcotic and according to the United States Sentencing Commission, it is 50 times stronger than heroin and 100 times stronger than morphine. The California Department of Public Health revealed that in 2021, there were 5,722 fentanyl-related deaths, the second-highest death rate of any state. There were 884 teenage fentanyl overdoses in 2021 and was the cause of 77.14% of drug related deaths among teenagers that year.

Despite the state’s efforts to curb the crisis, a new, colorful version of the drug has entered the market. Recently, brightly colored fentanyl, also known as “rainbow” fentanyl, has been found in many different forms, including pills, powders and candy. With its vibrant colors and candy-like shapes, it has become a new method for dealers to sell this highly addictive and fatal poison to children and young people.

SB 325 includes additional years of punishment for the buying, selling, and transporting of “rainbow” fentanyl. By attaching a longer sentence, offenders will spend more time in prison and less time distributing this lethal poison to children.

7. Argument in Opposition

According to the California Attorneys for Criminal Justice:

This bill creates a new crime: Health and Safety (H&S) Code §11352.3 [] would provide an enhanced punishment (sentence) for the possession for sale and/or sale of fentanyl if the fentanyl was packaged or advertised to look like food or candy, by adding 3, 4, or 5 years to the underlying sentence for a violation of H&S §11351 and §11352.

While ... fentanyl is a dangerous drug that poses a high risk of injury to those who use it, amending the Health & Safety Code to impose harsh punishment enhancements ... is not an appropriate means of dealing with this public health problem. SB 237 could result in an individual who is convicted of transporting for sale one piece of fentanyl that looks like “candy” receiving a prison sentence of 10 years; five years for the underlying H&S 11352 conviction and five more years for the enhancement under H&S 11352.3.

SB 325 represents a regressive move in criminal justice. This bill seeks to take California back to a time where the answer to crime was thought to be longer and longer jail and prison sentences. ... [S]uch an approach did far more damage to our community, and especially to people of color and those who are economically disadvantaged, than it did to protect our community from crime.

SB 325 also seeks to remove the trial court’s discretion under Penal Code §1385 to exercise its discretion regarding sentencing enhancements and dismiss an enhancement if the court feels it is in the interests of justice to do so.

The terms “packaged as or advertised to look like food or candy” are vague and likely to violate a basic rule of criminal law that a statute must be written clearly enough that an average individual would be on notice as to what conduct would violate the law in question.

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