
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 44 **Hearing Date:** April 25, 2023
Author: Umberg
Version: April 13, 2023
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances*

HISTORY

Source: San Diego Mayor Todd Gloria

Prior Legislation: SB 1350 (Melendez), failed passage in Senate Public Safety 2022
SB 350 (Melendez), failed passage in Senate Public Safety 2021
AB 2173 (Parra), Ch. 502, Stats. 2004

Support: 911 Ambulance Provider's Alliance; Arcadia Police Officers' Association; Association of Orange County Deputy Sheriffs; Big City Mayors; Burbank Police Officers' Association; California Association of Highway Patrolmen; California Catholic Conference; California Coalition of School Safety Professionals; California Contract Cities Association; California District Attorneys Association; California Narcotic Officers Association; California Police Chiefs Association; City and County of San Francisco; City of Beverly Hills; City of Downey; City of Fountain Valley; City of Irvine; City of Laguna Niguel; City of Newport Beach; City of Orange; City of San Diego; City of Santa Ana; City of Seal Beach; City of Tustin; City of Villa Park; City of West Hollywood; City of Yorba Linda Councilwoman Beth Haney; City of Yucaipa; Claremont Police Officers Association; Consumer Attorneys of California; Corona Police Officers Association; County of Orange; Culver City Police Officers' Association; Daniel Calazans Foundation; Deputy Sheriffs' Association of Monterey County; Drug Awareness Foundation; Drug Induced Homicide; DUID Victim Voices; Families Against Fentanyl; FentanylSolution.org; Fullerton Police Officers' Association; Govern for California; High Truths on Drugs and Addiction; Inland Empire Coalition of Mayors; International Union of Operating Engineers, Cal-Nevada Conference; Kings County Sheriff's Office; League of California Cities; Long Beach City Prosecutor Doug P. Haubert; Los Angeles County Sheriff's Department; Los Angeles Police Protective League; Los Angeles School Police Officers Association; Murrieta Police Officers' Association; Newport Beach Police Association; Orange County District Attorney; Orange County Sheriff's Department; Palos Verdes Police Officers Association; Peace Officers Research Association of California; Placer County Deputy Sheriffs' Association; Pomona Police Officers' Association; Project Eli; Riverside County District Attorney; Riverside County Sheriff's Office; Riverside County Supervisor Karen Spiegel; Riverside Police Officers Association; Riverside Sheriffs' Association; Sacramento County Sheriff's Office; San Bernardino County District Attorney's Office; San Diego County District Attorney's Office; San Diego County Sheriff's

Department; San Francisco District Attorney's Office; Santa Ana Police Officers Association; Smart Approaches to Marijuana; Stanislaus County Opioid Safety Coalition; Upland Police Officers Association; UPS; Ventura County District Attorney's Office; Victims of Illicit Drugs; We Save Lives; several individuals

Opposition: ACLU California Action; California Public Defenders Association; Care First California; Community Legal Services in East Palo Alto; Drug Policy Alliance; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Initiate Justice; Initiate Justice Action; La Defensa; Law Enforcement Action Partnership; Legal Services for Prisoners With Children; National Harm Reduction Coalition; Rubicon Programs; San Francisco Public Defender; San Francisco Rising; Sister Warriors Freedom Coalition; Transitions Clinic Network; Treatment on Demand Coalition; W. Haywood Burns Institute

PURPOSE

The purpose of this bill is to require a court to provide a written advisory to a person convicted of specified drug offenses notifying the person of the danger of selling or administering illicit drugs and counterfeit pills and of the potential future criminal liability if another person dies as a result of that person's actions.

Existing law makes it unlawful for a person to possess for sale or purchase for purpose of sale cocaine, cocaine base, heroin and specified opiates and opioid derivatives. (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 cocaine, cocaine base, heroin and specified opiates and opioid derivatives. (Health & Saf. Code, § 11352.)

Existing law makes it unlawful for a person to manufacture, compound, convert, produce, derive, process, or prepare, either directly or indirectly by chemical extraction or by means of chemical synthesis any controlled substance, including opiates, opium derivatives, hallucinogenic substances, cocaine, and cocaine base, among others. (Health & Saf. Code, § 11379.6.)

Existing law defines manslaughter as the unlawful killing of a human being without malice, and provides that there are three kinds: voluntary—upon a sudden quarrel or heat of passion; involuntary—in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; and vehicular. (Pen. Code, § 192.)

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187.)

Existing law provides that malice may be express or implied. Provides that malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen. Code, § 188, subd. (a).)

Existing law provides that if it is shown that the killing resulted from an intentional act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. (Pen. Code, § 188, subd. (b).)

This bill requires the court to advise a person who is convicted of, or who pleads guilty or no contest to, a violation of Section 11351, 11352 for transporting, importing, selling, or administering a controlled substance, offering to transport, import, sell, or administer a controlled substance, or attempting to transport, import, sell, or administer a controlled substance, or 11379.6, where the substance contained fentanyl or a fentanyl analog, of the following:

“You are hereby advised that all illicit drugs and counterfeit pills are dangerous to human life and become even deadlier when they are, sometimes unknowingly, mixed with substances such as fentanyl and analogs of fentanyl. People can and have died from these substances, even in very small doses. It is extremely dangerous and deadly to human life to sell or administer drugs, in any form, when not lawfully authorized to do so. If you do so in the future and a person dies as a result of that action, and you knew or should have known that the substance you provided contained fentanyl or a fentanyl analog, you may be charged with homicide, up to and including the crime of murder, within the meaning of Section 187 of the Penal Code. In addition, this conviction will be considered by a judge or jury as to whether you knew or should have known that the substance you provided to the decedent contained fentanyl.”

This bill requires the court to additionally read the above advisory statement in a case in which the person exchanged a controlled substance containing fentanyl or its analogs for anything else of value except when the controlled substance containing fentanyl or its analogs is exchanged for a controlled substance or alcohol.

This bill requires the advisory statement to be included in a plea form, if used, or the fact that the advisory was given to be specified on the record.

This bill requires the fact that the advisory was given to be recorded in the abstract of the conviction.

This bill prohibits the advisement from being used as evidence in the prosecution of a minor in juvenile court.

COMMENTS

1. Need For This Bill

According to the author:

As the former Deputy Director of the White House Office of National Drug Control Policy, Chair of the Senate Judiciary Committee, a former U.S. Attorney, and a career prosecutor, I have dedicated my life to the equal pursuit of justice for all. In that vein, I am certain there is no justice in allowing willful negligence by drug dealers or a lack of action on the part of the Legislature to result in murder and a continually escalating death toll caused by fentanyl poisonings. In fact, there is an obligation by the Legislature to ensure public safety equitably across California. There is an unequal application of justice too, in cases where a drug dealer can be prosecuted in one county, but not in another when drug sales and people regularly cross jurisdictions.

Taken as a piece of numerous reforms to battle this crisis, SB 44 will implement a tempered approach to fentanyl poisonings that first warns and then punishes drug dealers who traffic in fentanyl in a manner that results in death. By using education and a measured approach that abides the will of California's voters, we will be able to hold people accountable when they knowingly and willfully cause the death of others.

2. Advisory Statement in This Bill Mirrors Existing Language In DUI Context

This bill would require the court to advise a person who is convicted of, or who pleads guilty or no contest to, a violation of possession for sale, transporting, importing, selling, administering, or manufacturing specified controlled substances of the following:

“You are hereby advised that all illicit drugs and counterfeit pills are dangerous to human life and become even deadlier when they are, sometimes unknowingly, mixed with substances such as fentanyl and analogs of fentanyl. People can and have died from these substances, even in very small doses. It is extremely dangerous and deadly to human life to sell or administer drugs, in any form, when not lawfully authorized to do so. If you do so in the future and a person dies as a result of that action, and you knew or should have known that the substance you provided contained fentanyl or a fentanyl analog, you may be charged with homicide, up to and including the crime of murder, within the meaning of Section 187 of the Penal Code. In addition, this conviction will be considered by a judge or jury as to whether you knew or should have known that the substance you provided to the decedent contained fentanyl.”

The language in this bill is modeled after the language codified by AB 2173 (Parra), Chapter 502, Statutes 2004, which requires the court to provide a person convicted of a reckless driving offense or DUI with an advisory statement. The advisory in Vehicle Code section 23593 reads:

“You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.”

3. Use of Advisement to Establish Implied Malice in a Subsequent Prosecution

The author intends for the advisory required in this bill to help establish implied malice in a subsequent second-degree murder prosecution in which a person convicted of the drug offenses specified in this bill engages in future drug-related criminal conduct that results in the death of another person. As stated above, the advisory in this bill is modeled after the DUI advisory codified in the Vehicle Code. With respect to deaths resulting from DUIs, the California Supreme Court held in *People v. Watson* (1981), 30 Cal.3d 290, 298, in affirming a second-degree murder conviction, that “when the conduct in question can be characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied.” The stated intent of AB 2173 (Parra), Chapter 502, Statutes 2004, was to help prosecutors prove implied malice in second-degree murder cases arising out of DUI cases resulting in death by “making it clear that those individuals were aware of the danger they posed to others by drinking and driving as a result of the statement required by this bill which they

signed after the original DUI conviction.” (Assem. Com. on Pub. Safety, Analysis of Assem. Bill 2173 (2003-2004 Reg. Sess.) as introduced February 18, 2004, p. 4.)

As is the case with a DUI in which an intoxicated driver kills another person, a person engaged in drug-related criminal conduct (e.g., selling a controlled substance) that results in the death of another person may be charged under current law with second-degree murder or manslaughter. In response to an increase in fentanyl-related deaths in recent years, district attorneys across the state have charged individuals who sold, supplied, or otherwise engaged in unlawful conduct involving fentanyl that led to someone’s death with murder. (See Alyssa Flores, *Suspected Drug Dealer Charged with Murder After Fentanyl-Related Death* (Oct. 18, 2022) available at <<http://abc30.com/fentanyl-deaths-drug-dealers-arrested-murder-charges-filed-suspect/12343224/>>; Karen Wynter and Vivian Chow, *Fighting Fentanyl in California: Prosecuting Murder* (Nov. 16, 2022) available at <<https://ktla.com/news/local-news/fighting-fentanyl-in-california-prosecuting-murder/>>; Melanie Wingo, *20-Year-Old Facing Murder, Felony Drug Charges After Roseville 15-Year-Old’s Fentanyl Poisoning* (Aug. 13, 2022) available at <<https://www.kcra.com/article/nathaniel-cabacungan-murder-drug-charges-roseville-fentanyl-poisoning/40886646#>>; Josh Campbell, *A California Teenager Has Been Charged with Murder in 12-Year-Old’s Drug Overdose Death* (Jan. 26, 2022) available at <<https://www.cnn.com/2022/01/26/us-california-teenager-murder-charge-overdose/index.html>>.)

Murder is defined as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187.) First-degree murder is a murder committed by specified lethal means, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate various specified felonies, or that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death. (Pen. Code, § 189, subd. (a).) All other murder is murder of the second degree. (Pen. Code, § 189, subd. (b).) Malice may be express or implied. (Pen. Code, § 188, subd. (a).) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (*Id.*) If it is shown that the killing resulted from an intentional act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. (Pen. Code, § 188, subd. (b).) As stated above, the advisory in this bill is intended to help establish implied malice in a second-degree murder prosecution.

The advisory in this bill notifies a person convicted of specified drug offenses whose future drug-related conduct results in the death of another person that the person “may be charged with homicide, up to and including the crime of murder, within the meaning of Section 187 of the Penal Code.” Presumably, homicide that is not murder, as defined, refers to manslaughter. Manslaughter is defined as the unlawful killing of a human being without malice. (Pen. Code, § 192.) There are three kinds of manslaughter: voluntary—upon a sudden quarrel or heat of passion; involuntary—in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; and vehicular. (*Id.*)

It is unclear to what extent prosecutors have been successful in establishing implied malice and in securing second-degree murder convictions in DUI cases resulting in death as a result of the passage of AB 2173 or what the effect of this bill may be with respect to drug-related deaths.

4. Argument in Support

According to the California District Attorneys Association:

In California, Driving Under the Influence (DUI) offenders are read an advisory in court to inform them that repeated offenses resulting in death can be charged as manslaughter or murder. SB 44 is modeled off of this example, and would establish a statewide Fentanyl Admonishment to be issued to fentanyl dealers and traffickers whose actions result in the death of another individual or individuals.

Prosecuting overdose-related homicides has always been very difficult in California. To start, societal attitudes have historically tended to cast illicit drug users as primarily responsible – if not exclusively so – for their own demise. Such prejudgments have naturally benefitted criminal offenders dealing in the illicit manufacture and distribution of dangerous drugs like fentanyl. Attitudes are changing, however, and the Legislature should act to encourage this. The illicit manufacture and distribution of fentanyl implicates much more than mere negligence. By requiring those who are successfully prosecuted for the felony manufacture or distribution of fentanyl to explicitly be confronted in a court of law with the fact that fentanyl is dangerous to human life, prosecutors will stand in a better position to later prosecute such offenders for second degree murder should they choose to continue to engage in such a dangerous and destructive endeavor.

CDA is proud to support SB 44 ... in an effort to provide justice to thousands of California families and deter those who deal deadly drugs from continuing to do so. We know this law will add an important tool for counties and agencies grappling with our opioid epidemic.

5. Argument in Opposition

The California Public Defenders Association writes:

SB 44 would require presenting a written advisory to persons convicted of possession for sale categories of controlled offenses that contained fentanyl that: (1) administration or distribution of controlled substances is dangerous, and (2) that one can be charged for homicide if death results from such activities.

The advisory would be used as a predicate to establish the mental state of malice, required for a murder charge, when the person involved in the drug transaction had no intention of ever killing or injuring the person who knowingly obtained the controlled substance.

CPDA sympathizes with and understands the unintended consequences and impact that the use of unregulated illegal drugs can have on the lives of users, as so many of our clients have had problems with drugs. However, SB 44 by creating another basis for a murder charge is an attempt to resurrect the failed public policy of the past and return to mass incarceration as a solution for societal problems. California recently moved away from imposing draconian punishments on those who never intended to kill another human being by their actions and

moved toward a more humane society where we do not punish those who are not personally responsible for killing another human being in the same fashion as those who do intend to kill by enacting SB 1437 (2018).

From our experience as public defenders we know that many of those who engage in the illegal drug trade are often low-level users of drugs themselves. To punish them for the unintended consequences of engaging in illegal narcotic sales and for outcomes that they never intended is contrary to sound public policy and humane treatment in our criminal justice system.

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