
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 176 **Hearing Date:** March 21, 2017
Author: Bates
Version: January 24, 2017
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled Substances: Fentanyl and Carfentanil*

HISTORY

Source: Orange County Sheriff's Department

Prior Legislation: SB 1323 (Bates) – Died in Assembly Appropriations Committee

Support: Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California District Attorneys Association; California Narcotic Officers Association; California State Sheriffs' Association; Crime Victims United of California; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Orange County Board of Supervisors; Riverside Sheriffs' Association

Opposition: American Civil Liberties Union; Drug Policy Alliance

PURPOSE

The purpose of this bill is to add an enhancement of three to 25 years for the possession of fentanyl and carfentanil for sale. This bill also classifies carfentanil as a Schedule II controlled substance.

Existing law provides that specified opiates, including fentanyl, are Schedule II controlled substances. (Health and Safety Code § 11055, subd. (c).)

This bill would add carfentanil to the list of Schedule II controlled substances.

Existing law provides the following penalties for commerce in cocaine, cocaine base, heroin and specified opiates and opioid derivatives – including fentanyl. Sale includes any transfer or distribution and carries the following penalties:

- Possession for sale – Felony 1170 (h) term of 2, 3 or 4 years (Health and Safety Code § 11351)
- Possession of cocaine base for sale – Felony 1170 (h) term 2, 3, or 4 years (Health and Safety Code § 11351.5)
- Sale – Felony 1170 (h) term 3, 4, or 5 years (Health and Safety Code § 11352)

- If transporting within the state between noncontiguous counties – Felony 1170 (h) term 3, 6 or 9 years (Health and Safety Code § 11352)

Existing law provides the following enhancements based on the weight of the heroin, opiate or cocaine possessed for sale or sold. (Health and Safety 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

This bill adds fentanyl and carfentanil to the list of drugs that include heroin, cocaine or cocaine base for purposes of an enhancement for drug commerce based on the weight of the substance involved in the case that contained one of the listed drugs.

COMMENTS

1. Need for This Bill

According to the author:

SB 176 would add fentanyl and carfentanil to a category of dangerous drugs, such as heroin, that are subject to penalty enhancements based on the weight an individual has in his or her 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, fentanyl affects the brain and nervous system by producing a euphoric high 50 times stronger than heroin and 100 times stronger than morphine. Overdosing on fentanyl causes blood pressure to plummet, diminished breathing and induces deep sleep coma, often leading to death. Fentanyl produced clandestinely has no legal medical use and can be smoked, snorted, ingested or injected.

Carfentanil is a synthetic opioid most commonly used to immobilize large animals such as elephants. According to the U.S. Drug Enforcement Agency, carfentanil is the most potent commercial opioid in the world. It is 100 times more potent than fentanyl and 5,000 times more potent than heroin. Carfentanil is not approved for human consumption.

Both fentanyl and carfentanil can be substituted for heroin in opioid-dependent individuals. However, both drugs are very dangerous substitutes for heroin as they are significantly more potent and result in frequent overdoses that can lead to respiratory depression and death. Users are often unaware that they are using either of the drugs and are, therefore, ignorant to the severe risks they are being exposed to. Fentanyl and carfentanil are incredibly inexpensive to produce, making them a go-to heroin substitute or diluent for drug cartels. Finally, both fentanyl and carfentanil present a significant threat to law enforcement personnel

and first responders as minute amounts—equivalent to a few grains of salt—can be lethal, and visually, can be mistaken for cocaine or white powder heroin.

There has been a significant increase in fentanyl-related overdose fatalities nationwide in recent years. In Maryland, there have been an estimated 1,468 fentanyl-related deaths between January and September 2016 alone, more than the total number of deaths in 2015. Dramatic increases in fentanyl-related deaths have also occurred in California. According to a review by the Orange County Crime Lab, there was a 90% increase in deaths involving fentanyl and fentanyl analogs between 2015 and 2016. In Sacramento, there were recently 50 overdose cases and 14 deaths in a one-week span.

Similarly, carfentanil-related deaths have risen exponentially. Over 400 carfentanil-related deaths have been recorded across just eight states between July and November 2016. Due to increased fentanyl activity in California spurred by the proliferation of fentanyl in other areas of the country, the Orange County Sheriff's Department predicts that carfentanil will follow the same pattern in California.

SB 176 amends Section 11370.4 of the Health and Safety Code to include fentanyl and carfentanil along with heroin and cocaine in the category of drugs that are subject to enhancements by weight. By doing so, this bill targets those distributing, trafficking, and selling mass quantities of fentanyl and carfentanil. SB 176 recognizes that the dangers posed by fentanyl and carfentanil use are greater than that of other opioids, and also threaten the lives and safety of those who do not even use it. This bill provides a crucial step toward preventing synthetic opioids from causing even more fatalities in our state.

2. History and Background of Fentanyl and Carfentanil

Fentanyl was synthesized in the 1960s and has been used medically since 1968. The Centers for Disease Control and Prevention (CDC) website¹ 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.)

A 2016 DEA report on heroin use and trafficking² indicates that drug traffickers are increasingly using fentanyl in counterfeit prescription pills to exploit high consumer demand for prescription

¹ <http://emergency.cdc.gov/han/han00384.asp>

² https://www.dea.gov/divisions/hq/2016/hq062716_attach.pdf – p. 6

medications. Although opioid painkillers are the most commonly counterfeited medications, traffickers are counterfeiting other drugs, including benzodiazepines.

There are numerous fentanyl analogs. Both fentanyl and its analogs are often mixed with heroin, sometimes unbeknownst to the user. One of fentanyl's analogs, carfentanil, has begun to appear more frequently in the past year. Carfentanil was synthesized in 1974 and is a general anesthetic agent for large animals. It is 100 times more potent than fentanyl and is a Schedule II controlled substance under the federal Controlled Substances Act of 1970. A public warning issued in 2016 by the DEA³ about the health and safety risks of carfentanil stated that the drug is not approved for human consumption and the lethal dose range in humans is unknown. The National Institute of Drug Abuse posted a warning⁴ about the drug in 2016 following a surge of overdoses in Ohio. The DEA has since reported that the drug has been found in several other states, including Florida, Georgia, Rhode Island, Indiana, Pennsylvania, Kentucky, West Virginia, New Jersey and Illinois.⁵

3. Many Fentanyl and Carfentanil 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 an analog—including carfentanil—with heroin, because it is much more potent than heroin and relatively cheap to manufacture.⁶ A defendant convicted of commerce involving a mixture of heroin and fentanyl or heroin and carfentanil would be subject to the weight enhancement under current law.

4. Most Fentanyl Cases Involve a Fentanyl Analog, typically Acetyl Fentanyl

Most cases that are reported as involving fentanyl actually involve one of several fentanyl analogs or derivatives. Fentanyl and alfentanil are Schedule II drugs 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 a high potential for abuse. Schedule II drugs have legitimate medical uses, but also a high potential for abuse and physical or psychological dependence. Where a defendant's crime involved acetyl fentanyl or another 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 & Safety 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.
- (2) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that

³ <https://www.dea.gov/divisions/hq/2016/hq092216.shtml>

⁴ <https://www.drugabuse.gov/drugs-abuse/emerging-trends-alerts>

⁵ <http://www.npr.org/2017/03/11/519649096/can-china-ban-on-deadly-opioid-save-lives-in-the-u-s>

⁶ <https://www.justice.gov/usao-sdca/pr/hundreds-counterfeit-oxycodone-tablets-seized-port-entry-contained-ultra-deadly>

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.

By adding carfentanil, a fentanyl analog, to the list of Schedule II drugs, prosecutors will not need to use the analog statute to prosecute crimes related to carfentanil.

5. Research on the Scheduling of Controlled Substances

The Uniform Controlled Substances Act sets forth the state's five schedules of controlled substances.⁷ Each schedule is composed of groups of narcotics and their derivatives. Substances can be added to or removed from the schedules, as well as moved from one schedule to another. Researchers have explored issues related to the scheduling of controlled substances at the federal level.⁸ For example, one implication of the scheduling of a substance is the imposition of penalties for conduct where none previously existed. Similarly, "up-scheduling" a substance may increase the penalties associated with conduct related to that substance while "down-scheduling" a substance may decrease penalties. Another consideration when expanding the list of substances included in the controlled substance schedules is the effect the addition will have on the size of jail and prison populations.

Researchers have also addressed concerns regarding the difficulty of prosecuting cases involving controlled substance analogs.⁹ Substances can be manipulated such that they are not chemically similar to a controlled substance while still producing effects that are pharmacologically similar to a controlled substance. These manipulations make it difficult for prosecutors to successfully prosecute cases under analog statutes. In that respect, scheduling an analog substance such as carfentanil could allow more efficient prosecutions of that substance.¹⁰ Alternatively, many have observed that "the chemical structure of substances can be continuously manipulated, thus constantly creating new analogue substances that are not scheduled."¹¹

6. Research on Sentences as a Deterrent to Crime

Criminal justice experts and commentators have noted that, with regard to sentencing, "a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits. Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits."¹²

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:

⁷ Uniform Controlled Substances Act, Health and Safety Code §§ 11054 to 11058

⁸ CRS Rep No. R42066, p. 16 (<https://fas.org/sgp/crs/misc/R42066.pdf>)

⁹ *Id.* at 18.

¹⁰ *Id.*

¹¹ *Id.* at 18-19.

¹² Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* (November 2010), The Sentencing Project (<http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.)

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. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses. A related literature focuses specifically on enforcement of drug laws and the relationship between those criminal sanctions and the outcomes of drug use and drug prices.¹³

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. . . .

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.”¹⁴

Members may wish to discuss whether the “rationalistic view” of crime described above likely would apply to large-scale fentanyl and carfentanil sellers – that is, whether the sentencing enhancements proposed by this bill would be known to these offenders and, if so, whether the additional time would discourage commission of the crime.

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have “large crime prevention benefits,” but that incremental, lengthy prison sentences are ineffective for crime deterrence:

Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. *Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small*

¹³ *The Growth of Incarceration in the United States* (2014), Jeremy Travis, Bruce Western and Steve Redburn, Editors, Committee on Causes and Consequences of High Rates of Incarceration, The National Research Council, p. 131 (citations omitted) (http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.)

¹⁴ *Id.* at 132-133.

prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.

Evidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates. *Nevertheless, the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders.* For these reasons, statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime.¹⁵

With regard to the drug trade, the authors state:

For several categories of offenders, an incapacitation strategy of crime prevention can misfire *because most or all of those sent to prison are rapidly replaced in the criminal networks in which they participate. Street-level drug trafficking is the paradigm case.* Drug dealing is part of a complex illegal market with low barriers to entry. Net earnings are low, and probabilities of eventual arrest and imprisonment are high . . . Drug policy research has nonetheless shown consistently that arrested dealers are quickly replaced by new recruits At the corner of Ninth and Concordia in Milwaukee in the mid-1990s, for example, 94 drug arrests were made within a 3-month period. “These arrests, [the police officer] pointed out, were easy to prosecute to conviction. But . . . the drug market continued to thrive at the intersection”

Despite the risks of drug dealing and the low average profits, many young disadvantaged people with little social capital and limited life chances . . . sell drugs on street corners because it appears to present opportunities not otherwise available. However, [they] . . . overestimate the benefits of that activity and underestimate the risks. This perception is compounded by peer influences, social pressures, and deviant role models provided by successful dealers who live affluent lives and . . . avoid arrest. Similar analyses apply to members of deviant youth groups and gangs: as members . . . are arrested and removed from circulation, others take their place. Arrests and imprisonments of easily replaceable offenders create illicit “opportunities” for others.¹⁶

Members may wish to discuss whether the enhancement proposed by this bill would provide any appreciable crime deterrent benefits, and whether greater incapacitation for these offenders could generate the “misfire” consequence described above.

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¹⁵ *Id.* at 155-156 (emphasis added).

¹⁶ *Id.* at 146 (citations omitted).