

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1359 Offenses Involving Fentanyl or Fentanyl Analogs

**SPONSOR(S):** Criminal Justice Subcommittee, Abbott and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1226

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 3 N, As CS	Padgett	Hall
2) Justice Appropriations Subcommittee	11 Y, 4 N	Smith	Keith
3) Judiciary Committee			

### SUMMARY ANALYSIS

Fentanyl is a synthetic opioid analgesic that is approximately 50 to 100 times more potent than morphine. Recently, law enforcement agencies have reported increased seizures of fentanyl-laced products that are brightly colored and often resemble candy, popularly known as “rainbow fentanyl.” The United States Drug Enforcement Administration (DEA) reports that drug cartels are manufacturing rainbow fentanyl in an effort to target children and young adults. In a three-month period from August 2022 to October 2022, the DEA and its law enforcement partners seized various types of rainbow fentanyl in 26 states.

CS/HB 1359 amends ss. 893.13 and 893.135, F.S. to provide enhanced penalties for selling, possessing with intent to sell, or trafficking in specified types of fentanyl and fentanyl derivatives as follows:

- Amends s. 893.13, F.S., to create a new offense, punishable as a first degree felony and subject to minimum mandatory term of imprisonment for three years, if a person sells, manufactures, or delivers, or possesses with the intent to sell, manufacture, or deliver, specified fentanyl or fentanyl derivatives if the fentanyl or derivative is in a form that resembles, or was mixed, granulated, absorbed, spray-dried, aerosolized, as or onto, coated on in whole or in part, or solubilized with or into, a product, if the product or its packaging further has at least one of the following attributes:
  - A bright color or coloring scheme;
  - Resembles the trade dress of a branded food product, consumer food product, or logo food product;
  - Incorporates an actual or fake registered copyright, service mark, or trademark;
  - Resembles candy, cereal, a gummy, a vitamin, or a chewable product, such as a gum or gelatin-based product; or
  - Contains a cartoon character imprint.
- Amends s. 893.135, F.S., to require a mandatory minimum term of life imprisonment and a \$1,000,000 fine for any person convicted of trafficking in dangerous fentanyl or fentanyl analogues if such fentanyl or fentanyl analog is in a form which has the attributes listed above.

The bill imposes mandatory minimum sentences of imprisonment for selling, possessing with intent to sell, or trafficking specified fentanyl or fentanyl analogs. There may be a positive indeterminate prison bed impact to the Florida Department of Corrections resulting from the increased prison sentences required by the bill.

The bill provides an effective date of October 1, 2023.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Controlled Substances

Chapter 893, F.S., the Florida Comprehensive Drug Abuse Prevention and Control Act, classifies controlled substances<sup>1</sup> into five categories, called schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed therein. The distinguishing factors between the different drug schedules are the “potential for abuse”<sup>2</sup> of the substance and whether there is a currently accepted medical use for the substance.<sup>3</sup>

The controlled substance schedules are as follows:

- Schedule I substances have a high potential for abuse and currently have no accepted medical use in the United States, including substances such as cannabis and heroin.<sup>4</sup>
- Schedule II substances have a high potential for abuse and have a currently accepted but severely restricted medical use in the United States, including substances such as raw opium, fentanyl, and codeine.<sup>5</sup>
- Schedule III substances have a potential for abuse less than the substances contained in Schedules I and II and have a currently accepted medical use in the United States, including substances such as stimulants and anabolic steroids.<sup>6</sup>
- Schedule IV substances have a low potential for abuse relative to substances in Schedule III and have a currently accepted medical use in the United States, including substances such as benzodiazepines and barbiturates.<sup>7</sup>
- Schedule V substances have a low potential for abuse relative to the substances in Schedule IV and have a currently accepted medical use in the United States, including substances such as mixtures that contain small quantities of opiates, narcotics, or stimulants.<sup>8</sup>

##### *Fentanyl*

Fentanyl is a synthetic opioid analgesic that is approximately 50 to 100 times more potent than morphine.<sup>9</sup> When prescribed by a physician, fentanyl is typically used to treat patients with severe pain or to manage pain after surgery and is administered via injection, transdermal patch, or in lozenges.<sup>10</sup> Although prescription fentanyl can be misused, most overdoses and related deaths have been linked to illicitly manufactured fentanyl, including fentanyl analogs.<sup>11</sup>

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<sup>1</sup> “Controlled substance” means any substance named or described in Schedules I-V of s. 893.03, F.S. S. 893.02(4), F.S.

<sup>2</sup> “Potential for abuse” means that a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of its being: 1) used in amounts that create a hazard to the user’s health or safety of the community; 2) diverted from legal channels and distributed through illegal channels; or 3) taken on the user’s own initiative rather than on the basis of professional medical advice. S. 893.035(3)(a), F.S.

<sup>3</sup> See s. 893.03, F.S.

<sup>4</sup> S. 893.03(1), F.S.

<sup>5</sup> S. 893.03(2), F.S.

<sup>6</sup> S. 893.03(3), F.S.

<sup>7</sup> S. 893.03(4), F.S.

<sup>8</sup> S. 893.03(5), F.S.

<sup>9</sup> National Institute on Drug Abuse, *Fentanyl*, <https://www.drugabuse.gov/publications/drugfacts/fentanyl> (last visited Mar. 16, 2023).

<sup>10</sup> *Id.*

<sup>11</sup> Centers for Disease Control and Prevention, *Increases in Fentanyl-Related Overdose Deaths-Florida and Ohio, 2013-2015*, <https://www.cdc.gov/mmwr/volumes/65/wr/mm6533a3.htm> (last visited Mar. 16, 2023).

Recently, law enforcement agencies have reported increased seizures of fentanyl-laced products that are brightly colored and often resemble candy, popularly known as “rainbow fentanyl.”<sup>12</sup> The United States Drug Enforcement Administration (DEA) reports that drug cartels are manufacturing rainbow fentanyl in an effort to target children and young adults.<sup>13</sup> In a three-month period from August 2022 to October 2022, the DEA and its law enforcement partners seized various types of rainbow fentanyl in 26 states.<sup>14</sup>

### *Sale of a Controlled Substance*

Section 893.13(1), F.S., prohibits a person from selling, manufacturing<sup>15</sup>, or delivering,<sup>16</sup> or possessing with the intent to sell, manufacture, or deliver a controlled substance. The penalty for selling a controlled substance varies depending on several factors, including the type and amount of the substance sold, and the location where the sale takes place. Generally, sale of a controlled substance is punishable as either a second degree felony<sup>17</sup> or third degree felony.<sup>18</sup> Under current law, selling, manufacturing, or delivering, or possessing with the intent to sell, manufacture, or deliver, fentanyl, carfentanil, or an analog or mixture of such substances is punishable as a second degree felony.

### *Sale of a Controlled Substance to a Minor*

Section 893.13(4), F.S., prohibits a person 18 years of age or older from:

- Delivering a controlled substance to a person younger than 18 years of age;
- Using or hiring a person younger than 18 years of age as an agent or employee in the sale or delivery of a controlled substance; or
- Using a person younger than 18 years of age to assist in avoiding detection or apprehension for a violation of ch. 893, F.S.

A violation is punishable as either a first, second, or third degree felony depending on the controlled substance that is sold or delivered. Under current law, delivering fentanyl or fentanyl derivatives to a person younger than 18 years of age is punishable as a first degree felony.

### *Drug Trafficking*

Drug trafficking occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into the state, or is in actual or constructive possession of, a specified quantity of a controlled substance.<sup>19</sup> Generally, a drug trafficking offense is punishable as a first degree felony.<sup>20, 21</sup> Section

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<sup>12</sup> United State Drug Enforcement Administration, *DEA Warns of Brightly-Colored Fentanyl Used to Target Young Americans*, <https://www.dea.gov/press-releases/2022/08/30/dea-warns-brightly-colored-fentanyl-used-target-young-americans> (last visited Mar. 16, 2023).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> “Manufacture” means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation, compounding, packaging, or labeling of a controlled substance by:

- A practitioner or pharmacist as an incident to his or her administering or delivering of a controlled substance in the course of his or her professional practice.
- A practitioner, or his or her authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis, and not for sale. S. 893.02(15)(a), F.S.

<sup>16</sup> “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. S. 893.02(6), F.S.

<sup>17</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>18</sup> S. 893.13(1), F.S. A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>19</sup> Florida law criminalizes trafficking in cannabis; cocaine; illegal drugs, which include morphine, opium, hydromorphone, or any salt derivative, isomer, or salt of an isomer thereof, including heroin; hydrocodone, oxycodone; fentanyl; phencyclidine; methaqualone; amphetamine; flunitrazepam; gamma-hydroxybutyric (GHB); gamma-butyrolactone (GBL); 1,4-Butanediol; phenethylamines; lysergic acid diethylamide (LSD); synthetic cannabinoids; and n-benzyl phenethylamines. S. 893.135, F.S.

<sup>20</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>21</sup> Trafficking in certain controlled substances can be a capital offense under specified circumstances. See, e.g., s. 893.135(1)(h)2., F.S. (Any person who knowingly manufactures or brings into this state 400 grams or more of amphetamine . . . who knows that the probable

893.135, F.S., outlines threshold amounts of the applicable controlled substance for each trafficking offense. All drug trafficking offenses are subject to mandatory minimum sentences and heightened fines, which are determined by the threshold amounts. Absent waiver by the prosecutor, a judge may not sentence an offender below the statutory mandatory minimum term of imprisonment; however, a prosecutor may waive such a mandatory minimum sentence.<sup>22</sup>

Under s. 893.135(1)(c)4., F.S., a person commits the offense of trafficking in dangerous fentanyl or fentanyl analogues if he or she knowingly sells, purchases, manufactures, delivers, or brings into this state, or is knowingly in actual or constructive possession of four grams or more of:

- Alfentanil, as described in s. 893.03(2)(b)1., F.S.;
- Carfentanil, as described in s. 893.03(2)(b)6., F.S.;
- Fentanyl, as described in s. 893.03(2)(b)9., F.S.;
- Sufentanil, as described as in s. 893.03(2)(b)30., F.S.;
- A fentanyl derivative, as described in s. 893.03(1)(a)62., F.S.;
- A controlled substance analog of such enumerated substances, as described in s. 893.0356, F.S.; or
- A mixture containing any such enumerated substances.

A violation is punishable as a first degree felony. The following thresholds determine the minimum mandatory sentence and fine for a person convicted of trafficking in dangerous fentanyl or fentanyl analogues.

Fentanyl Threshold	Mandatory Minimum	Fine
≥ 4 g. but < 14 g.	7 yrs.	\$50,000
≥ 14 g. but < 28 g.	20 yrs.	\$100,000
≥ 28 g.	25 yrs.	\$500,000

There are no current enhancements for fentanyl that is in a form or packaged in such a way that appeals to a child or resembles a legitimate product or food.

## Effect of Proposed Changes

### *Sale of a Controlled Substance*

CS/HB 1359 amends s. 893.13, F.S., to create a first degree felony offense if:

- A person sells, manufactures, or delivers, or possesses with the intent to sell, manufacture, or deliver:
  - Alfentanil, as described in s. 893.03(2)(b)1., F.S.;
  - Carfentanil, as described in s. 893.03(2)(b)6., F.S.;
  - Fentanyl, as described in s. 893.03(2)(b)9., F.S.;
  - Sufentanil, as described as in s. 893.03(2)(b)30., F.S.;
  - A fentanyl derivative, as described in s. 893.03(1)(a)62., F.S.;
  - A controlled substance analog of such enumerated substances, as described in s. 893.0356, F.S.; or
  - A mixture containing any such enumerated substances, and
- Such substance or mixture is in a form that resembles, or is mixed, granulated, absorbed, spray-dried, or aerosolized as or onto, coated on, in whole or in part, or solubilized with or into, a product, when such product or its packaging further has at least one of the following attributes:
  - A bright color or coloring scheme;
  - Resembles the trade dress of a branded food product, consumer food product, or logo food product;

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result of such manufacture or importation would be the death of any person commits capital manufacture or importation of amphetamine, a capital felony).

<sup>22</sup> *Madrigal v. State*, 545 So. 2d 392 (Fla. 3d DCA 1989) (prosecutor has right to waive the mandatory minimum sentence requirement absent any rule or statutory authority).

- Incorporates an actual or fake registered copyright, service mark, or trademark;
- Resembles candy, cereal, a gummy, a vitamin, or a chewable product, such as a gum or gelatin-based product; or
- Contains a cartoon character imprint.

Under the bill, a court must sentence a person who violates this section to a mandatory minimum term of imprisonment of three years.

### *Drug Trafficking*

The bill amends s. 893.135, F.S., to require a court to sentence a person who is convicted of trafficking in dangerous fentanyl or fentanyl analogues to a mandatory minimum term of life imprisonment and a \$1,000,000 fine if such fentanyl or fentanyl analog is in a form that resembles, or is mixed, granulated, absorbed, spray-dried, or aerosolized as or onto, coated on, in whole or in part, or solubilized with or into, a product, when such product or its packaging further has at least one of the following attributes:

- A bright color or coloring scheme;
- Resembles the trade dress of a branded food product, consumer food product, or logo food product;
- Incorporates an actual or fake registered copyright, service mark, or trademark;
- Resembles candy, cereal, a gummy, a vitamin, or a chewable product, such as a gum or gelatin-based product; or
- Contains a cartoon character imprint.

The bill provides an effective date of October 1, 2023.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 893.13, F.S., relating to prohibited acts; penalties.

**Section 2:** Amends s. 893.135, F.S., relating to trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engaged in trafficking.

**Section 3:** Provides an effective date of October 1, 2023.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The bill imposes mandatory minimum sentences of imprisonment for selling, possessing with intent to sell, or trafficking specified fentanyl or fentanyl analogs under ss. 893.13 and 893.135, F.S.

There may be a positive indeterminate prison bed impact to the Florida Department of Corrections resulting from enhanced penalties enacted by the bill.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 13, 2023, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Created a first degree felony offense to prohibit a person from selling, manufacturing, delivering, or possessing with the intent to sell, manufacture, or deliver fentanyl or fentanyl derivatives with specified attributes.
- Revised the mandatory sentence that a court must impose if a person sells, manufactures, or delivers, or possesses with the intent to sell, manufacture, or deliver specified fentanyl or fentanyl derivatives from “an additional sentence of five years” to a minimum mandatory term of imprisonment of three years.
- Specified additional fentanyl derivatives which can subject a person to the minimum mandatory term of imprisonment if a person sells, manufactures, or delivers, or possesses with the intent to sell, manufacture, or deliver such substances.
- Revised the attributes a fentanyl or fentanyl derivative must have to subject a person to the minimum mandatory terms of imprisonment under the bill for selling, possessing with the intent to sell, and trafficking in such substances, to improve clarity and remove duplicative provisions.
- Increased the mandatory minimum fine that a court must impose if a person is convicted of trafficking in specified dangerous fentanyl or fentanyl analogues from \$500,000 to \$1,000,000.
- Revised mandatory sentencing requirements related to trafficking in specified dangerous fentanyl or fentanyl analogues to remove duplicative and unnecessary provisions.
- Changed the effective date of the bill from July 1, 2023, to October 1, 2023.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.