

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1359 Offenses Involving Fentanyl or Fentanyl Analogs
SPONSOR(S): Judiciary Committee and Criminal Justice Subcommittee, Abbott and others
TIED BILLS: IDEN./SIM. **BILLS:** CS/CS/CS/SB 1226

FINAL HOUSE FLOOR ACTION: 115 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 1359 passed the House on April 26, 2023, and subsequently passed the Senate on May 1, 2023.

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.

The bill amends ss. 893.13 and 893.135, F.S., to provide enhanced penalties for offenses related to fentanyl or 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 of 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 is 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:
 - 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 not less than 25 years and not exceeding life imprisonment and a \$1 million fine if a person 18 years of age or older is convicted of trafficking in dangerous fentanyl or fentanyl analogues by knowingly selling or delivering to a minor at least four grams of fentanyl or a fentanyl analog if such substance or a mixture containing such a substance has any of the attributes listed above.

The Criminal Justice Impact Conference met on March 27, 2023 and determined a similar version of the bill would have a positive indeterminate impact on prison beds.

The bill was approved by the Governor on May 1, 2023, ch. 2023-26, L.O.F., and will become effective on October 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Controlled Substances

Chapter 893, F.S., the Florida Comprehensive Drug Abuse Prevention and Control Act, classifies controlled substances¹ 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”² of the substance and whether there is a currently accepted medical use for the substance.³

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.⁴
- 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.⁵
- 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.⁶
- 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.⁷
- 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.⁸

Fentanyl

Fentanyl is a synthetic opioid analgesic that is approximately 50 to 100 times more potent than morphine.⁹ 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.¹⁰ Although prescription fentanyl can be misused, most overdoses and related deaths have been linked to illicitly manufactured fentanyl, including fentanyl analogs.¹¹

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

² “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.

³ See s. 893.03, F.S.

⁴ S. 893.03(1), F.S.

⁵ S. 893.03(2), F.S.

⁶ S. 893.03(3), F.S.

⁷ S. 893.03(4), F.S.

⁸ S. 893.03(5), F.S.

⁹ National Institute on Drug Abuse, *Fentanyl*, <https://www.drugabuse.gov/publications/drugfacts/fentanyl> (last visited Apr. 19, 2023).

¹⁰ *Id.*

¹¹ 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 Apr. 19, 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.”¹² The United States Drug Enforcement Administration (DEA) reports that drug cartels are manufacturing rainbow fentanyl in an effort to target children and young adults.¹³ 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.¹⁴

Sale of a Controlled Substance

Section 893.13(1), F.S., prohibits a person from selling, manufacturing¹⁵, or delivering,¹⁶ 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 felony¹⁷ or third degree felony.¹⁸ 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

¹² 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 Apr. 19, 2023).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ “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.

¹⁶ “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.

¹⁷ 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.

¹⁸ 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.

substance.¹⁹ Generally, a drug trafficking offense is punishable as a first degree felony.^{20, 21} Section 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.²²

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 the Bill

Sale of a Controlled Substance

The bill 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.;

¹⁹ 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.

²⁰ 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.

²¹ 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 result of such manufacture or importation would be the death of any person commits capital manufacture or importation of amphetamine, a capital felony).

²² *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).

- 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:
 - 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.

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 18 years of age or older who is convicted of trafficking in dangerous fentanyl or fentanyl analogues by knowingly selling or delivering to a minor at least four grams of fentanyl or a fentanyl analog to a mandatory minimum term of not less than 25 years and a not exceeding life imprisonment and a \$1 million 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:

- 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 effective date of this bill is October 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference met on March 27, 2023 and determined a similar version of the bill would have a positive indeterminate impact on prison beds.

Per the Department of Corrections, there were 766 new commitments to prison for the sale, manufacture, or delivery of a controlled substance in FY 18-19, 443 new commitments in FY 19-20, 426 new commitments in FY 20-21, and 520 new commitments in FY 21- 22, however, the share of that total related to fentanyl offenses is unknown. For fentanyl trafficking violations, there were 19 new commitments to prison in FY 18-19, 35 new commitments in FY 19-20, 63 new commitments in FY 20-21, and 169 new commitments in FY 21-22, however, the number of commitments for fentanyl trafficking violations that involve the sale or delivery of fentanyl to a minor is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.