

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 231 Exposures of First Responders to Fentanyl and Fentanyl Analogs

**SPONSOR(S):** Criminal Justice Subcommittee, Baker

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

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		Saag	Keith
3) Judiciary Committee			

### SUMMARY ANALYSIS

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

With the increase in the illicit use of fentanyl, first responders such as law enforcement officers are increasingly coming into contact with fentanyl that is seized while making arrests and traffic stops. In recent years, there have been several reports of law enforcement officers suffering medical complications such as lightheadedness, heart palpitations, and nausea after being exposed to fentanyl. In some instances, the symptoms were severe enough to cause other officers on the scene to respond by administering an opioid antagonist, such as Narcan. Toxicologists and medical doctors, however, caution that fentanyl, although highly toxic, is relatively difficult to transmit through skin contact without a transdermal patch and likely would not remain airborne in sufficient quantities to cause a medical issue if inhaled.

CS/HB 231 creates s. 893.132, F.S., to provide a criminal penalty, punishable as a first degree felony, if a person 18 years or older who is unlawfully in possession of dangerous fentanyl or fentanyl analogues exposes a first responder, including a law enforcement officer, correctional officer, correctional probation officer, firefighter, emergency medical technician, or paramedic, to such fentanyl or fentanyl analogues and an overdose or serious bodily injury to the first responder results. Under the bill, "expose or exposure" means to cause any of the following, including, but not limited to, ingestion, inhalation, needlestick injury, or absorption through skin or mucous membranes. The bill defines "overdose or serious bodily injury" as drug toxicity or a physical condition that creates a substantial risk of death or substantial loss or impairment of the function of any bodily member or organ.

The bill provides an affirmative defense from prosecution if the first responder acted so far outside of the scope of ordinary care generally exercised by a member of his or her profession that he or she caused or substantially contributed to the exposure.

The bill may have an indeterminate positive jail and prison bed impact by creating a new first degree felony offense for exposing a first responder to dangerous fentanyl or fentanyl analogs and thereby causing them to overdose or suffer bodily harm, which may result in increased admissions or longer sentences to such facilities.

The bill provides an effective date of October 1, 2024.

# 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> Fentanyl and fentanyl-related substances are classified as Schedule II controlled substances.<sup>12</sup>

As the illicit use of fentanyl increases, first responders such as law enforcement officers are increasingly coming into contact with fentanyl that is seized while making arrests and traffic stops.<sup>13</sup> In

<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, *What is Fentanyl?*, <https://nida.nih.gov/publications/drugfacts/fentanyl> (last visited Jan. 16, 2024).

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

<sup>11</sup> Centers for Disease Control and Prevention, *Fentanyl*, <https://www.cdc.gov/opioids/basics/fentanyl.html> (last visited Jan. 16, 2024).

<sup>12</sup> S. 893.03(2)(b)1., 6., 9., 29., 30., and 32., F.S.

<sup>13</sup> FOX 10, *Florida Officer Accidentally Overdoses on Fentanyl, Body Cam Video Released*, <https://www.fox10tv.com/2022/12/16/florida-officer-accidentally-overdoses-fentanyl-body-cam-video-released/> (last visited Jan. 16, 2024). First Coast News, *Flagler Sheriff’s Deputy Exposed to Fentanyl During Traffic Stop*,

recent years, there have been several reports of law enforcement officers suffering medical complications such as lightheadedness, heart palpitations, and nausea after being exposed to fentanyl.<sup>14</sup> In some instances, the symptoms were severe enough to cause other officers on the scene to respond by administering an opioid antagonist, such as Narcan.<sup>15</sup> However, these incidents have been disputed by toxicologists and medical doctors who claim that fentanyl is relatively difficult to transmit through skin contact without a transdermal patch and would likely not remain airborne in sufficient quantities to cause a medical issue if inhaled.<sup>16</sup>

### **Unlawful Possession of Fentanyl**

The penalty for unlawfully possessing a controlled substance depends on several factors, including the type and amount of the controlled substance possessed and whether a person possessed such substance with the intent to sell or deliver the substance to another person. Generally, the unlawful possession of less than four grams of fentanyl<sup>17</sup> is a third degree felony.<sup>18</sup> If a person unlawfully possesses less than four grams of fentanyl with the intent to sell, manufacture, or deliver such fentanyl, a person commits a second degree felony.<sup>19</sup> If a person unlawfully possesses fentanyl, alfentanil, carfentanil, sufentanil, or other fentanyl derivatives or analogs and the weight is four grams or more, a person commits the offense of trafficking in dangerous fentanyl or fentanyl analogues, which is punishable as a first degree felony.<sup>20</sup>

### **Unlawful Distribution of Fentanyl Resulting in Overdose or Serious Bodily Injury**

In 2023, the Legislature enacted s. 893.131, F.S., which prohibits a person 18 years of age or older from distributing<sup>21</sup> heroin, alfentanil, carfentanil, fentanyl, sufentanil, fentanyl derivatives, or an analog or mixture containing such substances, when such substances cause or are a substantial factor<sup>22</sup> in causing an overdose or serious bodily injury<sup>23</sup> to the user. A person commits a violation regardless of whether the distribution is made directly or indirectly through another person to the person who overdosed or suffered serious bodily injury. A violation is punishable as a second degree felony. A second or subsequent conviction is punishable as a first degree felony.

### **Injury to First Responders from Fentanyl Exposure**

Under current law, s. 893.13(10), F.S., provides that if a person violates *any* provision of ch. 893, F.S.,<sup>24</sup> and the violation results in a serious injury to a state or local law enforcement officer as defined

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<https://www.firstcoastnews.com/article/news/local/flagler-county-sheriff-deputy-exposed-to-fentanyl/77-791dd3b7-0f1a-4bbb-bc82-8bcfcb5c4231> (last visited Jan. 16, 2024).

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

<sup>15</sup> *Id.*

<sup>16</sup> NPR, *Are Cops Really Being Poisoned by Fentanyl Exposure?*, <https://www.npr.org/2023/05/16/1175726650/fentanyl-police-overdose-misinformation> (last visited Jan. 16, 2024).

<sup>17</sup> The same penalties apply if a person unlawfully possesses a fentanyl derivative, controlled substance analog, or a mixture containing a fentanyl derivative or analog.

<sup>18</sup> S. 893.13(6)(a), F.S. A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

<sup>19</sup> S. 893.13(1)(a)1., F.S. A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

<sup>20</sup> S. 893.135(1)(c)4.b., F.S. A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084, F.S. A person convicted of trafficking in dangerous fentanyl and fentanyl analogues is subject to specified mandatory minimum sentences and fines that vary depending on the amount of fentanyl possessed.

<sup>21</sup> “Distribute” means to deliver, other than by administering or dispensing, a controlled substance, and includes the direct or indirect delivery of a controlled substance to a user. S. 893.131(1)(a), F.S.

<sup>22</sup> “Substantial factor” means that the use of a substance or mixture alone is sufficient to cause an overdose or serious bodily injury, regardless of whether any other substance or mixture used is also sufficient to cause an overdose or serious bodily injury. S. 893.131(1)(e), F.S.

<sup>23</sup> “Overdose or serious bodily injury” means drug toxicity or a physical condition that creates a substantial risk of death or substantial loss or impairment of the function of any bodily member or organ. S. 893.131(1)(d), F.S.

<sup>24</sup> Generally, a violation of ch. 893, F.S., is an offense related to the unlawful sale, manufacture, delivery, or possession of a controlled substance.

in s. 943.10, F.S.,<sup>25</sup> a firefighter as defined in s. 633.102, F.S.,<sup>26</sup> an emergency medical technician as defined in s. 401.23, F.S.,<sup>27</sup> a paramedic as defined in s. 401.23, F.S.,<sup>28</sup> an employee of a public utility or an electric utility as defined in s. 366.02, F.S., an animal control officer as defined in s. 828.27, F.S., a volunteer firefighter engaged by state or local government, a law enforcement officer employed by the Federal Government, or any other local, state, or Federal Government employee who is injured during the course and scope of his or her employment, the person commits a third degree felony. If the injury sustained results in death or great bodily harm, the person commits a second degree felony.<sup>29</sup>

### Offense Severity Ranking Chart

Felony offenses subject to the Criminal Punishment Code (CPC) are listed in a single offense severity ranking chart (OSRC), which uses 10 offense levels to rank felonies from least severe (Level 1) to most severe (Level 10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute. A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense. The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.<sup>30</sup> If an offense is unranked, the CPC specifies a default level on the OSRC depending on the felony degree of the offense.<sup>31</sup>

### **Effect of Proposed Changes**

CS/HB 231 creates s. 893.132, F.S., to provide a criminal penalty, punishable as a first degree felony, if a person 18 years or older who is unlawfully in possession of dangerous fentanyl or fentanyl analogues exposes a first responder to such fentanyl or fentanyl analogues and an overdose or serious bodily injury to the first responder results. The bill does not rank the offense on the OSRC. As such, the first degree felony defaults to a Level 7 offense on the OSRC.

The bill provides an affirmative defense from prosecution if the first responder acted so far outside of the scope of ordinary care generally exercised by a member of his or her profession that he or she caused or substantially contributed to the exposure.

The bill defines the following terms:

- "Dangerous fentanyl or fentanyl analogues" means any controlled substance described in s. 893.135(1)(c)4.a.(I)-(VII), F.S., which includes:
  - 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.;

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<sup>25</sup> "Law enforcement officer" means any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. The term includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency. The term also includes a special officer employed by a Class I, Class II, or Class III railroad pursuant to s. 354.01, F.S. S. 943.10(1), F.S.

<sup>26</sup> "Firefighter" means an individual who holds a current and valid Firefighter Certificate of Compliance or Special Certificate of Compliance issued by the division under s. 633.408, F.S. S. 633.102(9), F.S.

<sup>27</sup> "Emergency medical technician" means a person who is certified by the department to perform basic life support pursuant to this part. S. 401.23(12), F.S.

<sup>28</sup> "Paramedic" means a person who is certified by the department to perform basic and advanced life support pursuant to this part. S. 401.23(18), F.S.

<sup>29</sup> *Id.*

<sup>30</sup> S. 921.0022, F.S.

<sup>31</sup> S. 921.0023, 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.
- "Expose or exposure" means to cause any of the following, including, but not limited to, ingestion, inhalation, needlestick injury, or absorption through skin or mucous membranes.
- "First responder" means a law enforcement officer as defined in s. 943.10(1), F.S., a correctional officer as defined in s. 943.10(2), F.S.,<sup>32</sup> a correctional probation officer as defined in s. 943.10(3), F.S.,<sup>33</sup> a firefighter as defined in s. 633.102, F.S., an emergency medical technician as defined in s. 401.23, F.S., or a paramedic as defined in s. 401.203, F.S., who is acting in his or her official capacity.
- "Overdose or serious bodily injury" means drug toxicity or a physical condition that creates a substantial risk of death or substantial loss or impairment of the function of any bodily member or organ.

The bill provides an effective date of October 1, 2024.

**B. SECTION DIRECTORY:**

**Section 1:** Creates s. 893.132, F.S., relating to dangerous fentanyl exposure of first responder resulting in overdose or serious bodily injury.

**Section 2:** Provides an effective date of October 1, 2024.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

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

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

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

None.

**D. FISCAL COMMENTS:**

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<sup>32</sup> "Correctional officer" means any person who is appointed or employed full time by the state or any political subdivision thereof, or by any private entity which has contracted with the state or county, and whose primary responsibility is the supervision, protection, care, custody, and control, or investigation, of inmates within a correctional institution; however, the term "correctional officer" does not include any secretarial, clerical, or professionally trained personnel. S. 943.10(2), F.S.

<sup>33</sup> "Correctional probation officer" means a person who is employed full time by the state whose primary responsibility is the supervised custody, surveillance, and control of assigned inmates, probationers, parolees, or community controllees within institutions of the Department of Corrections or within the community. The term includes supervisory personnel whose duties include, in whole or in part, the supervision, training, and guidance of correctional probation officers, but excludes management and administrative personnel above, but not including, the probation and parole regional administrator level. S. 943.10(3), F.S.

The bill may have an indeterminate positive jail and prison bed impact by creating a new first degree felony offense, for exposing a first responder to dangerous fentanyl or fentanyl analogs and thereby causing them to overdose or suffer bodily harm, which may result in increased admissions or longer sentences to such facilities. To the extent that some offenders may be sentenced differently as a result of the new offense, the impact is indeterminate.

### **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 January 10, 2024, the Criminal Justice Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it:

- Included correctional officers and correctional probation officers in the definition of “first responder.”
- Defined the term “overdose or serious bodily injury.”
- Corrected a statutory cross-reference to the list of dangerous fentanyl and fentanyl analogs.
- Required a person to be 18 years of age or older for the criminal penalty in the bill to apply.
- Deleted a provision that created a second degree felony offense for exposing a first responder to fentanyl where such exposure results in serious injury.
- Deleted mandatory minimum sentencing requirements.
- Included an affirmative defense that can be raised by the defendant if the first responder caused or substantially contributed to his or her exposure to fentanyl.

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