

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 164

INTRODUCER: Senators Polsky and Berman

SUBJECT: Controlled Substance Testing

DATE: March 6, 2023

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Stokes</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	_____	_____	<u>RC</u>	_____

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## I. Summary:

SB 164 amends s. 893.145, F.S., the drug paraphernalia statute, to exclude from the definition of “drug paraphernalia” narcotic drug testing products that are used to determine whether a controlled substance contains fentanyl or a fentanyl analog. If so amended, a person who possesses or uses a fentanyl test strip kit would not be subject to arrest and prosecution for any offense under s. 893.145, F.S.

The Legislature’s Office of Economic and Demographic Research preliminarily estimates that the bill will have a “negative insignificant” prison bed impact (a decrease of 10 or fewer prison beds). See Section V. Fiscal Impact Statement.

The bill takes effect July1, 2023.

## II. Present Situation:

### Scheduling of Fentanyl as a Controlled Substance

State law<sup>1</sup> classifies controlled substances into five categories or classifications, known as schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of substances listed in the schedules. The most important factors in determining which schedule may apply to a substance are the “potential for abuse”<sup>2</sup> of the substance and whether there is a currently accepted medical use for the substance. The controlled substance schedules are described as follows:

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<sup>1</sup> Section 893.03, F.S.

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

- Schedule I substances have a high potential for abuse and no currently accepted medical use in treatment in the United States. Use of these substances under medical supervision does not meet accepted safety standards.<sup>3</sup>
- Schedule II substances have a high potential for abuse and a currently accepted but severely restricted medical use in treatment in the United States. Abuse of these substances may lead to severe psychological or physical dependence.<sup>4</sup>
- Schedule III substances have a potential for abuse less than the Schedule I and Schedule II substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to moderate or low physical dependence or high psychological dependence. Abuse of anabolic steroids may lead to physical damage.<sup>5</sup>
- Schedule IV substances have a low potential for abuse relative to Schedule III substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule III substances.<sup>6</sup>
- Schedule V substances have a low potential for abuse relative to Schedule IV substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule IV substances.<sup>7</sup>

“Fentanyl is a powerful synthetic opioid that is similar to morphine but is 50 to 100 times more potent. It is a prescription drug that is also used and made illegally.”<sup>8</sup> Fentanyl is a Schedule II controlled substance.<sup>9</sup>

“Synthetic opioids, including fentanyl, are now the most common drugs involved in drug overdose deaths in the United States.”<sup>10</sup> According to Florida’s Statewide Drug Policy Advisory Council, the majority of overdose death in Florida in 2021 were related to opioids, and “[t]he most significant increases [in overdose deaths relative to the previous year] were deaths involving fentanyl which increased by 11 percent, and deaths caused by fentanyl increased by 9 percent.”<sup>11</sup>

### **Controlled Substance Analog**

A “controlled substance analog” is as a substance which, due to its chemical structure and potential for abuse, meets the following criteria:

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<sup>3</sup> Section 893.03(1), F.S.

<sup>4</sup> Section 893.03(2), F.S.

<sup>5</sup> Section 893.03(3), F.S.

<sup>6</sup> Section 893.03(4), F.S.

<sup>7</sup> Section 893.03(5), F.S.

<sup>8</sup> National Institute on Drug Abuse, *Fentanyl DrugFacts*, <https://nida.nih.gov/publications/drugfacts/fentanyl> (last visited on Mar. 3, 2023) (internal citations omitted). As a medicine, fentanyl is “typically used to treat patients with severe pain, especially after surgery[,]” and “is also sometimes used to treat patients with chronic pain who are physically tolerant to other opioids.” *Id.*

<sup>9</sup> Section 893.03(2)(b)9., F.S.

<sup>10</sup> National Institute on Drug Abuse, *supra* note 2.

<sup>11</sup> Statewide Drug Policy Advisory Council, *2022 Annual Report* (Dec. 1, 2022), 8, available at [https://www.floridahealth.gov/provider-and-partner-resources/dpac/documents/2022\\_DPAC\\_Annual\\_Report.pdf](https://www.floridahealth.gov/provider-and-partner-resources/dpac/documents/2022_DPAC_Annual_Report.pdf).

- The substance is substantially similar to that of a controlled substance listed in Schedule I or Schedule II; and
- The substance has a stimulant, depressant, or hallucinogenic effect on the central nervous system or is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than that of a controlled substance listed in Schedule I or Schedule II.<sup>12</sup>

### Fentanyl Test Strip Kit

According to the Centers for Disease Control and Prevention (CDC), fentanyl test strips (FTS) are “small strips of paper that can detect the presence of fentanyl in all different kinds of drugs (cocaine, methamphetamine, heroin, etc.) and drug forms (pills, powder, and injectables).”<sup>13</sup>

The CDC outlines the steps to conduct the test:

- “Put a small amount (at least 10mg) of your drugs aside in a clean, dry container.”
- “Add water to the container and mix together.”
- “Place the wavy end of the test strip down in the water and let it absorb for about 15 seconds.”
- “Take the strip out of the water and place it on a flat surface for 2 to 5 minutes.”
- “Read results.”
  - “Positive results: A single pink line on the left-hand side indicates that fentanyl or a fentanyl analog has been detected in your drugs. If you receive a positive result, it is much safer to discard the batch. Using it could kill you. Illicitly manufactured fentanyl is extremely potent and can be deadly.”
  - “Negative results: Two pink lines indicate that fentanyl or a fentanyl analog has not been detected in your drugs. Remember that no test is 100% accurate and your drugs may still contain fentanyl or fentanyl analogs even if you receive a negative result. You should still take caution as FTS might not detect more potent fentanyl-like drugs, like carfentanil, and fentanyl might not be everywhere in your drugs and your test might miss it.”
  - “Invalid results: A single pink line on the right-hand side or no lines at all, indicates an invalid test. If you get an invalid result, test your drugs again using a new strip.”<sup>14</sup>

### Drug Paraphernalia Statutes

“Drug paraphernalia” includes:

*all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, transporting, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of [the chapter governing drug*

<sup>12</sup> Section 893.0356(2)(a), F.S. (referencing Schedules I and II in s. 893.03, F.S.).

<sup>13</sup> Centers for Disease Control and Prevention, *Fentanyl Test Strips: A Harm Reduction Strategy*, [https://www.cdc.gov/stopoverdose/fentanyl/fentanyl-test-strips.html#:~:text=Fentanyl%20test%20strips%20\(FTS\)%20are,%2C%20powder%2C%20and%20injectables](https://www.cdc.gov/stopoverdose/fentanyl/fentanyl-test-strips.html#:~:text=Fentanyl%20test%20strips%20(FTS)%20are,%2C%20powder%2C%20and%20injectables) (last visited on Mar. 3, 2023) (internal citations omitted).

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

*abuse, prevention, and control*] or [the statute prohibiting the inhalation, ingestion, possession, sale, purchase, or transfer of harmful chemical substances]. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture.<sup>15</sup>

Drug paraphernalia includes testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.<sup>16</sup>

When determining in a criminal case whether an object constitutes drug paraphernalia, a jury or judge must consider, in addition to all other logically relevant factors, all of the following:

- Statements by an owner or by anyone in control of the object concerning its use.
- The proximity of the object, in time and space, to a direct violation of this act.
- The proximity of the object to controlled substances.
- The existence of any residue of controlled substances on the object.
- Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he or she knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.
- Instructions, oral or written, provided with the object concerning its use.
- Descriptive materials accompanying the object which explain or depict its use.
- Any advertising concerning its use.
- The manner in which the object is displayed for sale.
- Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor of or dealer in tobacco products.
- Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.
- The existence and scope of legitimate uses for the object in the community.
- Expert testimony concerning its use.<sup>17</sup>

It is a first degree misdemeanor<sup>18</sup> to:

- Use, or possess with intent to use, drug paraphernalia to test a controlled substance.<sup>19</sup>
- Advertise objects in a publication when it is known or reasonable to know that the purpose is to promote the sale of objects designed or intended for use as drug paraphernalia.<sup>20</sup>

It is a third degree felony<sup>21</sup> to:

<sup>15</sup> Section 893.145, F.S. (referencing ch. 893, F.S., and s. 877.111, F.S.) (emphases added).

<sup>16</sup> Section 893.145(4), F.S.

<sup>17</sup> Section 893.146, F.S.

<sup>18</sup> A first degree misdemeanor is punishable by a term of imprisonment of not more than 1 year and a fine not exceeding \$1,000. Sections 775.082(4)(a) and 775.083(1)(d), F.S.

<sup>19</sup> Section 893.147(1)(a), F.S.

<sup>20</sup> Section 893.147(5), F.S.

<sup>21</sup> A third degree felony is generally punishable by a term of imprisonment of not more than five years and a fine not exceeding \$5,000. Sections 775.082(3)(e) and 775.083(1)(c), F.S. *But see* ss. 775.082(10) and 921.00241, F.S. (providing for prison diversion).

- Deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to test a controlled substance.<sup>22</sup>
- Use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia, knowing or under circumstances in which one reasonably should know that it will be used to transport a controlled substance or contraband.<sup>23</sup>

### **Immunity from Arrest, Charge, Prosecution, or Penalization**

Under the immunity statute,<sup>24</sup> a person acting in good faith who seeks medical assistance for an individual experiencing, or believed to be experiencing, a drug-related overdose may not be arrested, charged, prosecuted, or penalized for possession of a controlled substance, or the use or possession of drug paraphernalia.<sup>25</sup> Similar immunity is provided for the person who experiences, or has a good faith belief that he or she is experiencing, drug-related overdose and is in need of medical assistance.<sup>26</sup>

The immunity statute appears to provide immunity from arrest, etc., for a violation of the use or possession statute,<sup>27</sup> provided an FTS kit was used or possessed and the criteria in the use or possession statute have otherwise been met. However, there are other offenses in the use or possession statute that might be applicable to an FTS kit and that might not qualify as immune from arrest, etc. under the immunity statute.

### **III. Effect of Proposed Changes:**

The bill amends s. 893.145, F.S., the drug paraphernalia statute, to exclude from the definition of “drug paraphernalia” narcotic drug testing products that are used to determine whether a controlled substance contains fentanyl<sup>28</sup> or a fentanyl analog. If so amended, a person who possesses or uses a fentanyl test strip kit would not be subject to arrest and prosecution for any offense under s. 893.145, F.S.

The bill takes effect July 1, 2023.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18 of the Florida Constitution.

<sup>22</sup> Section 893.147(2), F.S.

<sup>23</sup> Section 893.147(4), F.S. (referencing the definition of contraband found in s. 932.701(2)(a)1., F.S.).

<sup>24</sup> See generally s. 893.21, F.S.

<sup>25</sup> Section 893.21(1), F.S.

<sup>26</sup> Section 893.21(2), F.S.

<sup>27</sup> Section 893.147(1), F.S.

<sup>28</sup> The bill references s. 893.03(2)(b)9., F.S., which is the scheduling reference for fentanyl in the controlled substance schedules.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. The Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a "positive indeterminate" prison bed impact (an unquantifiable increase in prison beds).<sup>29</sup>

According to the EDR, "per [Department of Corrections] in FY 18-19, there were 4 new commitments for drug paraphernalia violations under s. 893.147, F.S., and there was 1 new commitment in FY 19-20. In FY 20-21, there was 1 new commitment, and in FY 21-22, there were 2 new commitments. While it is not known how prison admissions will be impacted by this new language, the low number of commitments for the last four fiscal years indicate that there will not be a significant impact on the prison population."<sup>30</sup>

**VI. Technical Deficiencies:**

None.

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<sup>29</sup> Office of Economic and Demographic Research, *HB 165 – Controlled Substance Testing (Identical SB 164)*, (undated) (on file with the Senate Committee on Criminal Justice).

<sup>30</sup> *Id.*

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 893.145 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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