

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 165 Controlled Substance Testing
SPONSOR(S): Judiciary Committee, Hunschofsky and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 164

FINAL HOUSE FLOOR ACTION: 116 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 165 passed the House on May 3, 2023, as CS/SB 164.

Fentanyl is a synthetic opioid analgesic, appearing as crystals or crystalline powder, that is approximately 50 to 100 times more potent than morphine and is currently a Schedule II controlled substance under Florida law. Although prescription fentanyl can be misused, most overdoses and related deaths have been linked to illicitly manufactured fentanyl, including fentanyl analogs. Illicit manufacturers frequently mix fentanyl with other illicit drugs, such as heroin, methamphetamine, and cocaine to increase the potency of the illicit drug and lower the cost of production and also, in increasing frequency, press illicitly-manufactured fentanyl into pills made to look like legitimate prescription opioids.

Section 893.145, F.S., defines the term "drug paraphernalia" as 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 ch. 893, F.S., or s. 877.111, F.S. The term includes testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

Fentanyl test strips (FTS) are low-cost, small strips of paper that can be used to detect fentanyl and fentanyl analogs in all different kinds of controlled substances (heroin, methamphetamine, cocaine, etc.) and forms of controlled substances (pills, powders, and injectables).

Under s. 893.147, F.S., it is a first-degree misdemeanor to use, or possess with intent to use, drug paraphernalia and is punishable by up to one-year imprisonment and a \$1,000 fine. It is a third-degree felony to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia and is punishable by up to five-years imprisonment and a \$5,000 fine.

The bill amends s. 893.145(4), F.S., to exclude narcotic-drug-testing products used solely to test a controlled substance for fentanyl as described in s. 893.03(2)(b)9., F.S., or any other controlled substance specified in s. 893.135(1)(c)4.a., F.S., from the definition of drug paraphernalia. This exclusion does not apply to a narcotic-drug-testing product that can measure or determine the quantity, weight, or potency of a controlled substance. As such, under the bill, a person using, possessing, delivering, or manufacturing FTS is not subject to criminal penalties.

The Criminal Justice Impact Conference reviewed a similar version of the bill on March 27, 2023, and determined the bill may have a negative insignificant impact on jail and prison beds by reducing the number of convictions under s. 893.147, F.S., resulting in fewer jail and prison admissions.

The bill was approved by the Governor on June 27, 2023, ch. 2023-297, L.O.F., and will become effective on July 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Controlled Substances

Controlled Substance Schedules

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 controlled substance 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 and their use under medical supervision does not meet accepted safety standards.⁴
- Schedule II substances have a high potential for abuse and have a currently accepted but severely restricted medical use in the United States, and abuse of the substance may lead to severe psychological or physical dependence.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, and the abuse of the substance may lead to moderate or low physical dependence or high psychological dependence, or in the case of anabolic steroids, may lead to physical damage.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, and abuse of the substance may lead to limited physical or psychological dependence relative to the substances in Schedule III.⁷
- Schedule V substances, compounds, mixtures, or preparation of 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, and abuse of such compound, mixture, or preparation may lead to limited physical or psychological dependence relative to the substances in Schedule IV.⁸

Controlled Substance Analogs

Section 893.0356, F.S., defines a “controlled substance analog” as a substance which, due to its chemical structure and potential for abuse is substantially similar to that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S., and has, is represented to have, or is 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 in Schedule I or Schedule II of s. 893.03, F.S.⁹ Application of

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. 893.02(22), 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 S. 893.0356(2)(a), F.S.

the controlled substance analog definition to new substances prevents them from evading controlling statutory provisions before they are able to be identified and evaluated.¹⁰

The following are exempted from the definition of controlled substance analog:

- A controlled substance;
- Any substance for which there is an approved new drug application;
- Any compound, mixture, or preparation which contains any controlled substance which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse; or
- Any substance to which an investigational exemption applies under s. 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 355, but only to the extent that conduct with respect to the substance is pursuant to such exemption.¹¹

Fentanyl

Fentanyl is a synthetic opioid analgesic, appearing as crystals or crystalline powder, that is approximately 50 to 100 times more potent than morphine and is currently a Schedule II controlled substance.¹² 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.¹³ Although prescription fentanyl can be misused, most overdoses and related deaths have been linked to illicitly manufactured fentanyl, including fentanyl analogs.¹⁴

Illicit manufacturers frequently mix fentanyl with other illicit drugs, such as heroin, methamphetamine, and cocaine to increase the potency of the illicit drug and lower the cost of production and also, in increasing frequency, have been pressing illicitly-manufactured fentanyl into pills made to look like legitimate prescription opioids.¹⁵ When combined with other controlled substances that are in a powder form, fentanyl often mixes unevenly, leaving behind undetectable clumps. In order to fully mix fentanyl with another powder, the mixture must be combined with a liquid and shaken before allowing the liquid to evaporate, returning the mixture to a powdered form. If fentanyl is not fully mixed with another controlled substance there may be hot spots¹⁶ of pure fentanyl in the final product.¹⁷

A lethal dose of fentanyl for a person can range depending on the person's body size, past usage, and tolerance, however, in general, 2 milligrams (mg) is considered a potentially lethal dose.¹⁸ The Drug Enforcement Administration has reported encountering counterfeit opioid pills with from .02 to 5.1 mg of fentanyl per tablet, with 42 percent of pills tested for fentanyl containing at least 2 mg.¹⁹ Nationwide, overdose deaths from fentanyl have nearly doubled annually, with 52.7 percent of all overdose deaths involving fentanyl, although many of those who died did not knowingly ingest fentanyl.²⁰

¹⁰ S. 893.0356(1), F.S.

¹¹ S. 893.0356(2)(b), F.S.

¹² S. 893.03(2)(b), F.S. (However, various fentanyl analogs are found in Schedule I); National Institute on Drug Abuse, *Fentanyl*, <https://www.drugabuse.gov/publications/drugfacts/fentanyl> (last visited Mar. 23, 2023); Centers for Disease Control and Prevention (CDC), *Fentanyl: Incapacitating Agent*, https://www.cdc.gov/niosh/ersbdb/emergencyresponsecard_29750022.html (last visited Mar. 23, 2023).

¹³ National Institute on Drug Abuse, *Fentanyl*, *supra* note 12.

¹⁴ CDC, *Increases in Fentanyl-Related Overdose Deaths-Florida and Ohio, 2013-2015*, <https://www.cdc.gov/mmwr/volumes/65/wr/mm6533a3.htm> (last visited Mar. 23, 2023).

¹⁵ Drug Enforcement Administration (DEA), *Facts about Fentanyl*, <https://www.dea.gov/resources/facts-about-fentanyl> (last visited Mar. 23, 2023).

¹⁶ A hot spot is a high concentration of fentanyl within a mix of other products. National Center for Drug Abuse Statistics, *Fentanyl Abuse Statistics*, <https://drugabusestatistics.org/fentanyl-abuse-statistics/> (last visited Mar. 23, 2023).

¹⁷ *Id.*

¹⁸ Comparatively, a lethal dose of heroin is 100 mg and of cocaine is 250 mg. *Id.*

¹⁹ *Supra* note 12.

²⁰ *Supra* note 13.

In Florida, opioid-related deaths have increased 32 percent between 2016 and 2021.²¹ Specifically, occurrences of fentanyl increased by 10.5 percent and deaths caused by fentanyl increased by 9 percent between 2020 and 2021. Additionally, occurrences of fentanyl analogs increased by 41.5 percent and deaths caused by fentanyl analogs increased by 36 percent during the same time period.²²

Drug Trafficking

Section 893.135(1)(c)4.a., F.S., prohibits trafficking in dangerous fentanyl or fentanyl analogues, which 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 the following controlled substances:²³

- Alfentanil;²⁴
- Carfentanil;²⁵
- Fentanyl;²⁶
- Sufentanil;²⁷
- A fentanyl derivative;²⁸
- A controlled substance analog of any of the substances above;²⁹ and
- A mixture containing any substance described above.³⁰

Drug Paraphernalia

Section 893.145, F.S., defines “drug paraphernalia” as 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 ch. 893 or s. 877.111, F.S.³¹ The term includes testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.³²

Under s. 893.147(1), F.S., it is a first-degree misdemeanor to use, or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance or to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.³³ A first-degree misdemeanor is punishable by up to one-year imprisonment and a \$1,000 fine.³⁴

Under s. 893.147(2), F.S., it is a third-degree felony to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one should reasonably know that it will be used to plant, propagate, cultivate, grow, harvest, manufacture,

²¹ Medical Examiners Commission (MEC), Florida Department of Law Enforcement (FDLE), *Drugs Identified in Deceased Persons by Florida Medical Examiners 2016 Annual Report* (November 2017), <https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2016-Annual-Drug-Report.aspx> (last visited Mar. 23, 2023); FDLE, MEC, *Drugs Identified in Deceased Persons by Florida Medical Examiners 2021 Annual Report* (December 2022), <https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2021-Annual-Drug-Report-FINAL.aspx> (last visited Mar. 23, 2023).

²² MEC, FDLE, *Drugs Identified in Deceased Persons by Florida Medical Examiners 2021 Annual Report* (December 2022), *supra* note 21.

²³ S. 893.135, F.S.

²⁴ S. 893.03(2)(b)1., F.S.

²⁵ S. 893.03(2)(b)6., F.S.

²⁶ S. 893.03(2)(b)9., F.S.

²⁷ S. 893.03(2)(b)30., F.S.

²⁸ S. 893.03(1)(a)62., F.S.

²⁹ S. 893.0356, F.S.

³⁰ S. 893.135(1)(c)4.a., F.S.

³¹ Relating to the inhalation, ingestion, possession, sale, purchase, or transfer of harmful chemical substances. S. 877.111, F.S.

³² S. 893.145(4), F.S.

³³ S. 893.147(1), F.S.

³⁴ Ss. 775.082 and 775.083, F.S.

compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance or to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.³⁵ A third-degree felony is punishable by up to five-years imprisonment and a \$5,000 fine.³⁶

Fentanyl Test Strips

Fentanyl test strips (FTS) are low-cost, small strips of paper that can be used to detect fentanyl and fentanyl analogs in all different kinds of controlled substances (heroin, methamphetamine, cocaine, etc.) and forms of controlled substances (pills, powders, and injectables).³⁷ FTS require the user to mix a small amount of controlled substance with water and place the strip in the mixture for about 15 seconds. The user then takes the strip out of the mixture and lets it stand outside of the water mixture for two to five minutes. The user can then read the results which are shown as either a single pink line on the left-hand side (positive), two pink lines (negative), or a single pink line on the right-hand side or no lines (invalid).³⁸ One caveat is that because FTS only require the user to mix a small amount of controlled substance, the FTS may not detect any hot spots contained in the mixture.

Forty-two states, including Florida, and the District of Columbia capture FTS in their definitions of drug paraphernalia. However, since 2021, at least three states, including Arizona, Tennessee, and Ohio, have removed FTS from the list of prohibited drug paraphernalia. Of the remaining five states, four do not capture FTS in their drug paraphernalia definitions,³⁹ and Alaska has no laws restricting drug paraphernalia.⁴⁰

Effect of the Bill

The bill amends s. 893.145(4), F.S., to exclude narcotic-drug-testing products used solely to test a controlled substance for fentanyl as described in s. 893.03(2)(b)9., F.S., or any other controlled substance specified in s. 893.135(1)(c)4.a., F.S., from the definition of drug paraphernalia. This exclusion does not apply to a narcotic-drug-testing product that can measure or determine the quantity, weight, or potency of a controlled substance. As such, under the bill a person using, possessing, delivering, or manufacturing FTS is not subject to criminal penalties.

The effective date of this bill is July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

³⁵ S. 893.147(2), F.S.

³⁶ Ss. 775.082 and 775.083, F.S.

³⁷ CDC, *Fentanyl Test Strips: A Harm Reduction Strategy*, <https://www.cdc.gov/stopoverdose/fentanyl/fentanyl-test-strips.html> (last visited Mar. 23, 2023).

³⁸ *Id.*

³⁹ Nebraska, South Carolina, Virginia, and Wyoming. Jeffrey A. Singer and Sophia Heimowitz, CATO Institute, *Drug Paraphernalia Laws Undermine Harm Reduction: To Reduce Overdoses and Disease, States Should Emulate Alaska* (June 7, 2022), <https://www.cato.org/policy-analysis/drug-paraphernalia-laws-undermine-harm-reduction-reduce-overdoses-disease-states> (last visited Mar. 23, 2023).

⁴⁰ Jeffrey Singer, American Council on Science and Health, *Fentanyl Test Strips Save Lives, Yet Most States Ban Them as “Drug Paraphernalia”* (Jan. 19, 2023), <https://www.acsh.org/news/2023/01/19/fentanyl-test-strips-save-lives-yet-most-states-ban-them-%E2%80%9Cdrug-paraphernalia%E2%80%9D-16827> (last visited Feb. 16, 2023); Jeffrey A. Singer and Sophia Heimowitz, CATO Institute, *Drug Paraphernalia Laws Undermine Harm Reduction: To Reduce Overdoses and Disease, States Should Emulate Alaska* (June 7, 2022), *supra* note 30.

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference (CJIC) reviewed a similar version of the bill on March 27, 2023, and determined the bill may have a negative insignificant impact on jail and prison beds by reducing the number of convictions under s. 893.147, F.S., resulting in fewer jail and prison admissions. The Department of Corrections reported that there were only four new commitments for drug paraphernalia violations under s. 893.147, F.S., in fiscal year (FY) 2018-2019, one new commitment in FY 2019-2020, one new commitment in FY 2020-2021, and two new commitments in FY 2021-2022. The CJIC reports that the low number of commitments for the last four fiscal years indicates the change made under the bill will not have a significant impact on the prison population.⁴¹

⁴¹ Criminal Justice Impact Conference, CS/HB 165 – Controlled Substance Testing, March 27, 2023, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB165.pdf> (last visited May 2, 2023).