

1 State of Arkansas
2 94th General Assembly
3 Regular Session, 2023
4

As Engrossed: H4/3/23

A Bill

HOUSE BILL 1456

5 By: Representatives Gazaway, *Beaty Jr.*, *M. Berry*, *Lundstrum*, *Maddox*, *S. Berry*, *C. Cooper*, *Eubanks*,
6 *Gonzales*, *Haak*, *Hollowell*, *Long*, *J. Mayberry*, *S. Meeks*, *J. Moore*, *Ray*, *Richmond*, *Rye*, *Watson*,
7 *Wooldridge*
8 By: Senators *Gilmore*, *J. Dismang*, *J. Boyd*, *J. Bryant*, *Crowell*, *B. Davis*, *Dees*, *J. Dotson*, *J. English*,
9 *Flippo*, *K. Hammer*, *Hester*, *Hill*, *Irvin*, *B. Johnson*, *M. Johnson*, *B. King*, *M. McKee*, *J. Payton*, *C. Penzo*,
10 *J. Petty*, *Rice*, *Stone*, *G. Stubblefield*, *D. Sullivan*, *D. Wallace*

For An Act To Be Entitled

11
12 AN ACT CREATING THE FENTANYL ENFORCEMENT AND
13 ACCOUNTABILITY ACT OF 2023; TO DECLARE AN EMERGENCY;
14 AND FOR OTHER PURPOSES.
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16
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Subtitle

18 CREATING THE FENTANYL ENFORCEMENT AND
19 ACCOUNTABILITY ACT OF 2023; CONCERNING
20 FENTANYL AND OTHER CONTROLLED SUBSTANCES;
21 TO ESTABLISH INCREASED PENALTIES; AND TO
22 DECLARE AN EMERGENCY.
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26 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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28 SECTION 1. DO NOT CODIFY. This act shall be known and may be cited as
29 the "Fentanyl Enforcement and Accountability Act of 2023".
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31 SECTION 2. Arkansas Code Title 5, Chapter 10, is amended to add an
32 additional subchapter to read as follows:
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Subchapter 2 – Death by Delivery

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36 5-10-201. Definitions.



1 As used as this subchapter:

2 (1) "Cocaine" includes without limitation cocaine, an analog of
3 cocaine that is a cocaine-related controlled substance, and any chemical
4 structure modification to cocaine or a cocaine analog, including without
5 limitation the isomers, esters, ethers, and salts of cocaine;

6 (2) "Controlled substance" means the same as defined in § 5-64-
7 101;

8 (3)(A) "Convey" means to provide to a person or cause to pass
9 from a person to another person a controlled substance or counterfeit
10 substance.

11 (B) "Convey" does not include a person providing
12 prescription medication in good faith to a family member within the third
13 degree of consanguinity for the purpose of providing short-term relief for a
14 medical condition or physical injury;

15 (4) "Counterfeit substance" means the same as defined in § 5-64-
16 101;

17 (5) "Deliver" or "delivery" means the same as defined in § 5-64-
18 101;

19 (6) "Dispense" means the same as defined in § 5-64-101;

20 (7) "Fentanyl" means the same as defined in § 5-64-101;

21 (8) "Heroin" includes without limitation heroin, an analog of
22 heroin that is a heroin-related controlled substance, and any chemical
23 structure modification to heroin or a heroin analog, including without
24 limitation the isomers, esters, ethers, and salts of heroin;

25 (9) "Methamphetamine" includes without limitation
26 methamphetamine, an analog of methamphetamine that is a methamphetamine-
27 related controlled substance, and any chemical structure modification to
28 methamphetamine or a methamphetamine analog, including without limitation the
29 isomers, esters, ethers, and salts of methamphetamine;

30 (10) "Minor" means a person who is younger than eighteen (18)
31 years of age; and

32 (11) "Practitioner" means the same as defined in § 5-64-101.

33
34 5-10-202. Aggravated death by delivery.

35 (a) A person commits the offense of aggravated death by delivery if:

36 (1)(A) He or she knowingly delivers or conveys fentanyl to

1 another person; and

2 (B) The injection, ingestion, inhalation, or other
3 introduction of the fentanyl, including any adulterants or diluents, is the
4 cause of death of the other person; or

5 (2)(A) He or she knowingly delivers or conveys fentanyl,
6 methamphetamine, heroin, or cocaine to a minor; and

7 (B) The injection, ingestion, inhalation, or other
8 introduction of the fentanyl, methamphetamine, heroin, or cocaine, including
9 any adulterants or diluents, causes the death of the minor.

10 (b)(1) A person who commits the offense of aggravated death by
11 delivery under subdivision (a)(1) of this section upon conviction is guilty
12 of an unclassified felony and shall be sentenced to term of imprisonment of
13 no less than twenty (20) years nor more than sixty (60) years, or life.

14 (2)(A) Except as provided in subdivision (b)(2)(B) of this
15 section, a person who commits the offense of aggravated death by delivery
16 under subdivision (a)(2) of this section upon conviction is guilty of an
17 unclassified felony and shall be sentenced to a term of life imprisonment.

18 (B) A person who commits the offense of aggravated death
19 by delivery under subdivision (a)(2) of this section who is less than three
20 (3) years older than the minor whose death was caused upon conviction is
21 guilty of an unclassified felony and shall be sentenced to a term of
22 imprisonment of no less than twenty (20) years nor more than sixty (60)
23 years, or life.

24
25 5-10-203. Death by delivery in the first degree.

26 (a) A person commits the offense of death by delivery in the first
27 degree if:

28 (1) He or she knowingly delivers or conveys methamphetamine,
29 heroin, or cocaine to another person; and

30 (2) The injection, ingestion, inhalation, or other introduction
31 of the methamphetamine, heroin, or cocaine, including any adulterants or
32 diluents, is the cause of death of the person.

33 (b)(1) Except as provided in subdivision (b)(2) of this section, death
34 by delivery in the first degree is a Class Y felony.

35 (2) Death by delivery in the first degree is a Class A felony if
36 the defendant proves by a preponderance of the evidence one (1) or more of

1 the following factors:

2 (A) The defendant does not have a prior felony conviction;

3 (B) The defendant played a minor or passive role in the
4 delivery or conveyance of the methamphetamine, heroin, or cocaine;

5 (C) The defendant was unaware of adulterants or diluents
6 in the methamphetamine, heroin, or cocaine that accelerated or contributed to
7 the death of the other person; or

8 (D) The defendant possessed the methamphetamine, heroin,
9 or cocaine for personal use and the conveyance was not part of a transaction
10 for which the defendant obtained income, resources, or benefits.

11
12 5-10-204. Death by delivery in the second degree.

13 (a) A person commits the offense of death by delivery in the second
14 degree if:

15 (1) He or she knowingly delivers or conveys to another person:

16 (A) A controlled substance that is not fentanyl,
17 methamphetamine, heroin, or cocaine; or

18 (B) A counterfeit substance; and

19 (2) The injection, ingestion, inhalation, or other introduction
20 of the controlled substance or counterfeit substance, including any
21 adulterants or diluents, is the cause of death of the person.

22 (b)(1) Except as provided in subdivisions (b)(2) and (b)(3) of this
23 section, death by delivery in the second degree is a Class A felony.

24 (2) Death by delivery in the second degree is a Class B felony
25 if the defendant proves by a preponderance of the evidence one (1) or more of
26 the following factors:

27 (A) The defendant does not have a prior felony conviction;

28 (B) The defendant played a minor or passive role in the
29 delivery or conveyance of the controlled substance or counterfeit substance;

30 (C) The defendant was unaware of adulterants or diluents
31 in the controlled substance or counterfeit substance that accelerated or
32 contributed to the death of the other person; or

33 (D) The defendant possessed the controlled substance or
34 counterfeit substance for personal use and the conveyance was not part of a
35 transaction for which the defendant obtained income, resources, or benefits.

36 (3) Death by delivery in the second degree is a Class Y felony

1 if the state proves beyond a reasonable doubt one (1) or more of the
2 following factors:

3 (A) The defendant has a prior felony conviction for
4 delivery of a controlled substance under the Uniform Controlled Substances
5 Act, § 5-64-401 et. seq. or a similar law of another jurisdiction;

6 (B) The defendant manifested extreme indifference to the
7 value of human life during the commission of the offense; or

8 (C) The defendant knew the victim was vulnerable because
9 the victim was a minor, was sixty (60) years of age or older, or was an
10 incompetent person as defined in § 5-64-407.

11
12 5-10-205. Effect of subchapter on Joshua Ashley-Pauley Act.

13 This subchapter does not restrict or interfere with the rights and
14 immunities provided in the Joshua Ashley-Pauley Act, § 20-13-1701 et. seq.

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16 5-10-206. Exemptions.

17 The following are not offenses under this subchapter:

18 (1) An individual practitioner acting in the usual course of
19 professional practice issuing a valid prescription for a controlled substance
20 for a legitimate medical purpose;

21 (2) A pharmacy, pharmacist, or an individual practitioner
22 dispensing, delivering, or administering a controlled substance pursuant to a
23 prescription;

24 (3) A permitted manufacturer, wholesaler, pharmacy, hospital,
25 long-term care facility, or other medical provider delivering, prescribing,
26 administering, or transferring a controlled substance available by
27 prescription for lawful purposes and in compliance with state and federal
28 law; and

29 (4) A pharmaceutical company manufacturing a controlled
30 substance available by prescription in compliance with state and federal law.

31
32 5-10-207. Consensual ingestion not a defense.

33 It is not a defense to a prosecution under this subchapter that a
34 person knowingly and voluntarily consented to the injection, ingestion,
35 inhalation, or other introduction of the controlled substance or counterfeit
36 substance.

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5-10-208. Penalties not exclusive.

This subchapter and the criminal penalties provided in this subchapter are in addition to any other criminal penalty a person may be subject to under the Arkansas Criminal Code or the Uniform Controlled Substances Act, § 5-64-101 et. seq.

5-10-209. Factors considered when determining whether a person possessed a controlled substance for personal use.

For purposes of this subchapter, possession of a controlled substance or counterfeit substance for personal use may be demonstrated through the consideration of certain factors, including without limitation:

(1) The person does not possess the means to weigh, separate, or package the controlled substance or counterfeit substance;

(2) The person does not possess a record indicating a drug-related transaction;

(3) The controlled substance or counterfeit substance is not separated or packaged in a manner to facilitate delivery;

(4) The person does not possess a firearm that is in the immediate physical control of the person at the time of the delivery or conveyance of the controlled substance or counterfeit substance; and

(5) The person does not possess other controlled substances or counterfeit substances at the time of the delivery or conveyance.

5-10-210. Accomplice liability.

An individual who is an accomplice under § 5-2-403 to the delivery or conveyance in § 5-10-202, § 5-10-203, or § 5-10-204 is an accomplice for the purposes of this section.

SECTION 3. Arkansas Code § 5-64-101(12), concerning the definition of "drug paraphernalia" under the Uniform Controlled Substances Act, is amended to add an additional subdivision to read as follows:

(D) "Drug paraphernalia" does not include a disposable, single-use test strip that can detect the presence of fentanyl or fentanyl analogs in a substance;

1 SECTION 4. Arkansas Code § 5-64-421, concerning offenses related to
2 the possession and delivery of fentanyl, is amended to add an additional
3 subsection to read as follows:

4 (i)(1)(A) A person commits the offense of predatory marketing of
5 fentanyl to minors if he or she possesses fentanyl with the purpose to
6 deliver, delivers fentanyl, or manufactures fentanyl; and

7 (B) The fentanyl possessed, delivered, or manufactured is
8 likely to appeal to minors due to the shape, color, taste, or design of the
9 fentanyl or the fentanyl's packaging, including without limitation:

10 (i) Products that are modeled after noncontrolled
11 substance products primarily consumed by and marketed to minors;

12 (ii) Products in the shape of an animal, a vehicle,
13 a person, or a character; or

14 (iii) Products that resemble food or beverages that
15 are attractive to minors and that are commonly sold in retail establishments
16 regardless of whether the food or beverages are generic, trademarked, or
17 branded products, including without limitation products that resemble candy.

18 (2) A person who commits predatory marketing of fentanyl to
19 minors upon conviction is guilty of an unclassified felony and shall be
20 sentenced to a term of life imprisonment and a fine of one million dollars
21 (\$1,000,000).

22
23 SECTION 5. Arkansas Code § 5-64-440(c), concerning the offense of
24 trafficking a controlled substance, is amended to read as follows:

25 (c)(1) Trafficking a controlled substance is a Class Y felony.

26 (2) Trafficking of fentanyl is an unclassified felony with a
27 sentence of imprisonment of not less than twenty-five (25) years nor more
28 than sixty (60) years, or life, and a fine of one million dollars
29 (\$1,000,000).

30
31 SECTION 6. Arkansas Code § 16-93-1802(1)(B), if enacted by SB495 of
32 the Ninety-fourth General Assembly, concerning the list of offenses within
33 the definition of "felony ineligible for earned release credits", is amended
34 to add additional subdivisions to read as follows:

35 (xix) Aggravated death by delivery, § 5-10-202; and

36 (xx) Predatory marketing of fentanyl to minors, § 5-

1 64-421(i).

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3 SECTION 7. Arkansas Code § 16-93-1802(2)(B), if enacted by SB495 of
4 the Ninety-fourth General Assembly, concerning the list of offenses within
5 the definition of "restricted release felony", is amended to add additional
6 subdivisions to read as follows:

7 (liv) Death by delivery in the first degree, § 5-10-
8 203; and

9 (lv) Death by delivery in the second degree, § 5-10-
10 204.

11
12 SECTION 8. DO NOT CODIFY. EFFECTIVE DATE.

13 (a) Sections 6 and 7 of this act shall become effective on January 1,
14 2024, if SB495 of the Ninety-fourth General Assembly is enacted by the
15 General Assembly and becomes an act.

16 (b) If SB495 of the Ninety-fourth General Assembly does not become an
17 act, Sections 6 and 7 of this act shall not become effective.

18
19 SECTION 9. EMERGENCY CLAUSE. It is found and determined by the
20 General Assembly of the State of Arkansas that illegal controlled substances,
21 including fentanyl, are a public health crisis; that the Arkansas State Crime
22 Labratory performed autopsies on four hundred ninety-six (496) drug overdose
23 deaths in 2021, and of those, two hundred eighty-two (282) or fifty-eight and
24 six-tenths percent (58.6%) involved fentanyl; that five (5) years prior, in
25 2016, there were two hundred seven (207) drug overdose deaths; that of those,
26 only eight (8) or three and eight-tenths percent (3.8%) involved fentanyl;
27 that the data reflects a one hundred forty percent (140%) increase in overall
28 drug overdose deaths and a three thousand four hundred twenty-five percent
29 (3,425%) increase in drug overdose deaths involving fentanyl; and this act
30 should become effective immediately to create enforcement and accountability
31 for the distribution of illegal substances and protect the health of Arkansas
32 citizens. Therefore, an emergency is declared to exist, and Sections 1
33 through 5 of this act being immediately necessary for the preservation of the
34 public peace, health, and safety shall become effective on:

35 (1) The date of its approval by the Governor;

36 (2) If the bill is neither approved nor vetoed by the Governor,

1 the expiration of the period of time during which the Governor may veto the
2 bill; or

3 (3) If the bill is vetoed by the Governor and the veto is
4 overridden, the date the last house overrides the veto.

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/s/Gazaway

APPROVED: 4/11/23