

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

A Bill

HOUSE BILL 1456

5 By: Representative Gazaway
6 By: Senator Gilmore
7

For An Act To Be Entitled

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

Subtitle

15 CREATING THE FENTANYL ENFORCEMENT AND
16 ACCOUNTABILITY ACT OF 2023; CONCERNING
17 FENTANYL AND OTHER CONTROLLED SUBSTANCES;
18 TO ESTABLISH INCREASED PENALTIES; AND TO
19 DECLARE AN EMERGENCY.
20
21

22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
23

24 SECTION 1. DO NOT CODIFY. This act shall be known and may be cited as
25 the "Fentanyl Enforcement and Accountability Act of 2023".
26

27 SECTION 2. Arkansas Code Title 5, Chapter 10, is amended to add an
28 additional subchapter to read as follows:
29

Subchapter 2 – Death by Delivery

5-10-201. Definitions.

As used as this subchapter:

34 (1) "Cocaine" includes without limitation cocaine, an analog of
35 cocaine that is a cocaine-related controlled substance, and any chemical
36 structure modification to cocaine or a cocaine analog, including without



1 limitation the isomers, esters, ethers, and salts of cocaine;

2 (2) "Controlled substance" means the same as defined in § 5-64-
 3 101;

4 (3)(A) "Convey" means to provide to a person or cause to pass
 5 from a person to another person a controlled substance or counterfeit
 6 substance.

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

11 (4) "Counterfeit substance" means the same as defined in § 5-64-
 12 101;

13 (5) "Deliver" or "delivery" means the same as defined in § 5-64-
 14 101;

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

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

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

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

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

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

29
 30 5-10-202. Aggravated death by delivery.

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

32 (1)(A) He or she knowingly delivers or conveys fentanyl to
 33 another person; and

34 (B) The injection, ingestion, inhalation, or other
 35 introduction of the fentanyl, including any adulterants or diluents, is the
 36 cause of death of the other person; or

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

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

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

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

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

20
21 5-10-203. Death by delivery in the first degree.

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

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

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

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

31 (2) Death by delivery in the first degree is a Class A felony if
32 the defendant proves by a preponderance of the evidence one (1) or more of
33 the following factors:

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

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

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

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

7
8 5-10-204. Death by delivery in the second degree.

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

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

12 (A) A controlled substance that is not fentanyl,
13 methamphetamine, heroin, or cocaine; or

14 (B) A counterfeit substance; and

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

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

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

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

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

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

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

32 (3) Death by delivery in the second degree is a Class Y felony
33 if the state proves beyond a reasonable doubt one (1) or more of the
34 following factors:

35 (A) The defendant has a prior felony conviction for
36 delivery of a controlled substance under the Uniform Controlled Substances

1 Act, § 5-64-401 et. seq. or a similar law of another jurisdiction;

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

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

7
 8 5-10-205. Effect of subchapter on Joshua Ashley-Pauley Act.

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

11
 12 5-10-206. Exemptions.

13 The following are not offenses under this subchapter:

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

17 (2) A pharmacy, pharmacist, or an individual practitioner
 18 dispensing, delivering, or administering a controlled substance pursuant to a
 19 prescription;

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

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

27
 28 5-10-207. Consensual ingestion not a defense.

29 It is not a defense to a prosecution under this subchapter that a
 30 person knowingly and voluntarily consented to the injection, ingestion,
 31 inhalation, or other introduction of the controlled substance or counterfeit
 32 substance.

33
 34 5-10-208. Penalties not exclusive.

35 This subchapter and the criminal penalties provided in this subchapter
 36 are in addition to any other criminal penalty a person may be subject to

1 under the Arkansas Criminal Code or the Uniform Controlled Substances Act, §
 2 5-64-101 et. seq.

3
 4 5-10-209. Factors considered when determining whether a person
 5 possessed a controlled substance for personal use.

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

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

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

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

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

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

20
 21 5-10-210. Accomplice liability.

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

25
 26 SECTION 3. Arkansas Code § 5-64-101(12), concerning the definition of
 27 "drug paraphernalia" under the Uniform Controlled Substances Act, is amended
 28 to add an additional subdivision to read as follows:

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

32
 33 SECTION 4. Arkansas Code § 5-64-421, concerning offenses related to
 34 the possession and delivery of fentanyl, is amended to add an additional
 35 subsection to read as follows:

36 (i)(1)(A) A person commits the offense of predatory marketing of

1 fentanyl to minors if he or she possesses fentanyl with the purpose to
 2 deliver, delivers fentanyl, or manufactures fentanyl; and

3 (B) The fentanyl possessed, delivered, or manufactured is
 4 likely to appeal to minors due to the shape, color, taste, or design of the
 5 fentanyl or the fentanyl’s packaging, including without limitation:

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

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

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

14 (2) A person who commits predatory marketing of fentanyl to
 15 minors upon conviction is guilty of an unclassified felony and shall be
 16 sentenced to a term of life imprisonment and a fine of one million dollars
 17 (\$1,000,000).

18
 19 SECTION 5. Arkansas Code § 5-64-440(c), concerning the offense of
 20 trafficking a controlled substance, is amended to read as follows:

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

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

26
 27 SECTION 6. EMERGENCY CLAUSE. It is found and determined by the
 28 General Assembly of the State of Arkansas that illegal controlled substances,
 29 including fentanyl, are a public health crisis; that the Arkansas State Crime
 30 Labratory performed autopsies on four hundred ninety-six (496) drug overdose
 31 deaths in 2021, and of those, two hundred eighty-two (282) or fifty-eight and
 32 six-tenths percent (58.6%) involved fentanyl; that five (5) years prior, in
 33 2016, there were two hundred seven (207) drug overdose deaths; that of those,
 34 only eight (8) or three and eight-tenths percent (3.8%) involved fentanyl;
 35 that the data reflects a one hundred forty percent (140%) increase in overall
 36 drug overdose deaths and a three thousand four hundred twenty-five percent

1 (3,425%) increase in drug overdose deaths involving fentanyl; and this act
2 should become effective immediately to create enforcement and accountability
3 for the distribution of illegal substances and protect the health of Arkansas
4 citizens. Therefore, an emergency is declared to exist, and this act being
5 immediately necessary for the preservation of the public peace, health, and
6 safety shall become effective on:

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

8 (2) If the bill is neither approved nor vetoed by the Governor,
9 the expiration of the period of time during which the Governor may veto the
10 bill; or

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

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36