

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
94th General Assembly
Regular Session, 2023

As Engrossed: H4/3/23
A Bill

HOUSE BILL 1456

By: Representatives Gazaway, *Beaty Jr.*, *M. Berry*, *Lundstrum*, *Maddox*, *S. Berry*, *C. Cooper*, *Eubanks*, *Gonzales*, *Haak*, *Hollowell*, *Long*, *J. Mayberry*, *S. Meeks*, *J. Moore*, *Ray*, *Richmond*, *Rye*, *Watson*, *Wooldridge*

By: Senators *Gilmore*, *J. Dismang*, *J. Boyd*, *J. Bryant*, *Crowell*, *B. Davis*, *Dees*, *J. Dotson*, *J. English*, *Flippo*, *K. Hammer*, *Hester*, *Hill*, *Irvin*, *B. Johnson*, *M. Johnson*, *B. King*, *M. McKee*, *J. Payton*, *C. Penzo*, *J. Petty*, *Rice*, *Stone*, *G. Stubblefield*, *D. Sullivan*, *D. Wallace*

For An Act To Be Entitled

AN ACT CREATING THE FENTANYL ENFORCEMENT AND
ACCOUNTABILITY ACT OF 2023; TO DECLARE AN EMERGENCY;
AND FOR OTHER PURPOSES.

Subtitle

CREATING THE FENTANYL ENFORCEMENT AND
ACCOUNTABILITY ACT OF 2023; CONCERNING
FENTANYL AND OTHER CONTROLLED SUBSTANCES;
TO ESTABLISH INCREASED PENALTIES; AND TO
DECLARE AN EMERGENCY.

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

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

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

Subchapter 2 – Death by Delivery

5-10-201. Definitions.



As used as this subchapter:

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

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

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

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

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

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

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

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

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

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

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

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

5-10-202. Aggravated death by delivery.

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

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

another person; and

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

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

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

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

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

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

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

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

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

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

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

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

the following factors:

- (A) The defendant does not have a prior felony conviction;
- (B) The defendant played a minor or passive role in the delivery or conveyance of the methamphetamine, heroin, or cocaine;
- (C) The defendant was unaware of adulterants or diluents in the methamphetamine, heroin, or cocaine that accelerated or contributed to the death of the other person; or
- (D) The defendant possessed the methamphetamine, heroin, or cocaine for personal use and the conveyance was not part of a transaction for which the defendant obtained income, resources, or benefits.

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

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

- (1) He or she knowingly delivers or conveys to another person:
 - (A) A controlled substance that is not fentanyl, methamphetamine, heroin, or cocaine; or
 - (B) A counterfeit substance; and
- (2) The injection, ingestion, inhalation, or other introduction of the controlled substance or counterfeit substance, including any adulterants or diluents, is the cause of death of the person.

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

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

- (A) The defendant does not have a prior felony conviction;
- (B) The defendant played a minor or passive role in the delivery or conveyance of the controlled substance or counterfeit substance;
- (C) The defendant was unaware of adulterants or diluents in the controlled substance or counterfeit substance that accelerated or contributed to the death of the other person; or
- (D) The defendant possessed the controlled substance or counterfeit substance for personal use and the conveyance was not part of a transaction for which the defendant obtained income, resources, or benefits.

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

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

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

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

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

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

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

5-10-206. Exemptions.

The following are not offenses under this subchapter:

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

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

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

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

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

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

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;

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

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

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

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

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

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

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

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

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

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

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

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

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

64-421(i).

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

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

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

SECTION 8. DO NOT CODIFY. EFFECTIVE DATE.

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

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

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

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

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

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

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

/s/Gazaway