

SUBJECT: Increasing penalties for manufacture or delivery of fentanyl

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Collier, Cook, A. Johnson, Murr, Vasut
2 nays — Cason, Hinojosa
2 absent — K. Bell, Crockett

SENATE VOTE: On final passage, March 29 — 30-1 (Eckhardt)

WITNESSES: For — (*Registered, but did not testify:* Jennifer Tharp, Comal County Criminal District Attorney; Frederick Frazier, Dallas Police Association/FOP716 State FOP Director; James Parnell, Dallas Police Association; David Sinclair, Game Warden Peace Officers Association; Jessica Anderson, Houston Police Department; Ray Hunt, HPOU; Erleigh Wiley, Kaufman County Criminal District Attorney; Tom Maddox, Sheriffs Association of Sheriffs; Price Ashley, Texas College of Emergency Physicians; Mitch Landry, Texas Municipal Police Association; John Chancellor, Texas Police Chiefs Association; Bonnie Bruce, Texas Society of Anesthesiologists)

Against — (*Registered, but did not testify:* Cynthia Simons, Texas Criminal Justice Coalition)

BACKGROUND: Health and Safety Code ch. 481 is the Texas Controlled Substances Act. The act categorizes illegal substances into penalty groups and provides penalties for the manufacture, delivery, and possession of controlled substances.

Fentanyl, alpha-methylfentanyl, or any other derivative of fentanyl are placed in Penalty Group 1. Health and Safety Code sec. 481.112 establishes the penalty for the manufacture or delivery of a substance in Penalty Group 1, which start at a state-jail felony for an amount of less than 1 gram and increase to life in prison or a term of 15 to 99 years and a

fine up to \$250,000 for 400 grams or more.

It has been noted that fentanyl, a drug that is exponentially more potent than morphine, is responsible for a drastic increase in recent overdose deaths, given that the drug is often combined with cocaine and heroin without the knowledge of the user. There have been calls to ensure that the manufacture or delivery of fentanyl is adequately addressed in the Texas Controlled Substances Act by creating a more stringent punishment system that is appropriately weighted for the drug's lethality.

DIGEST: SB 768 would remove fentanyl, alpha-methylfentanyl, or any other derivative of fentanyl from Penalty Group 1 and place them in a new category, Penalty Group 1-B, under the Texas Controlled Substances Act.

The bill also would create a new offense for the manufacture or delivery of such Penalty Group 1-B substances. The associated penalties would be:

- a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) for an amount of less than 1 gram;
- a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) for an amount of 1 gram or more, but less than 4 grams;
- life in prison or a term of 10 to 99 years and a fine up to \$20,000 for an amount of 4 grams or more, but less than 200 grams;
- life in prison or a term of 15 to 99 years and a fine up to \$200,000 for an amount of 200 grams or more, but less than 400 grams;
- life in prison or a term of 20 to 99 years and a fine up to \$500,000 for 400 grams or more.

Penalties for possession of substances from the new Penalty Group 1-B would be the same as those in Penalty Group 1, which range from a state-jail felony for an amount of less than 1 gram to life in prison or a term of 10 to 99 years and a fine up to \$100,000 for 400 grams or more.

The bill also would extend to the Penalty Group 1-B substances the applicability of other provisions under the Texas Controlled Substances

Act governing delivery of a controlled substance or marijuana to a child and for the possession or transport of certain chemicals with intent to manufacture a controlled substance. The new offense would be treated the same as the manufacture or delivery of a Penalty Group 1 substance as it related to penalty enhancements for offenses committed in certain drug free zones, involving the use of a child in the commission of the offense, or involving the manufacture or delivery of a controlled substances causing death or serious injury.

Eligibility for community supervision, mandatory supervision. A defendant convicted of the new offense for an amount that was 4 grams or greater would not be eligible for judge-ordered community supervision or jury-recommended community supervision, and a defendant charged with the new offense for such an amount would not be eligible for deferred adjudication community supervision. If a defendant was serving time for or previously convicted of the new offense for an amount that was 4 grams or greater, the defendant would not be eligible for mandatory supervision.

Other provisions. For Health and Safety Code provisions relating to mandatory reporting of controlled substance overdoses and for Penal Code provisions relating to the offense of abandoning or endangering a child, Penalty Group 1-B substances would be treated the same as Penalty Group 1 substances.

The conduct constituting the offense of directing the activities of a criminal street gang would be expanded to include knowingly financing, directing, or supervising the commission of, or a conspiracy to commit, as part of the identifiable leadership of a criminal street gang, the manufacture or delivery of a substance in Penalty Group 1-B in an amount that was 4 grams or greater.

The Texas Department of Criminal Justice would have to implement the bill only if the Legislature appropriated money specifically for that purpose. If the Legislature did not appropriate money specifically for that purpose, the department could, but would not be required to, implement

the bill using other appropriations available for the purpose.

The bill would take effect September 1, 2021, and would apply only to an offense committed on or after that date.

NOTES:

According to the Legislative Budget Board, increasing the minimum term of confinement is expected to result in additional demands on correctional resources. The fiscal impact of implementing the bill is indeterminate due to the lack of data to distinguish manufacture or delivery of fentanyl or fentanyl derivatives cases from all other manufacture or delivery of controlled substances in Penalty Group 1 cases. This information is necessary to determine the fiscal implications associated with implementing the proposed penalty changes and modifications to community supervision eligibility.