
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 350 **Hearing Date:** March 23, 2021
Author: Melendez
Version: March 15, 2021
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances*

HISTORY

Source: Author

Prior Legislation: AB 2173 (Parra), Ch. 502, Stats. 2004

Support: California District Attorneys Association; California Peace Officers Association; California State Sheriffs' Association; City of Rocklin; Hill Alcohol and Drug Treatment Center; Kings County Sheriff's Office; Los Angeles County Sheriff's Department; Orange County Sheriff's Department; Riverside County District Attorney's Office; Riverside County Sheriff's Department; Riverside District Attorney's Office; Rocklin Chief of Police; San Bernardino County Sheriff's Department; San Diego County Sheriff's Office; San Luis Obispo County Sheriff's Office; over 250 individuals

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association; Drug Policy Alliance; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Initiate Justice; Law Enforcement Action Partnership; San Francisco Public Defender

PURPOSE

The purpose of this bill is to provide a written advisory to a person convicted of specified drug offenses of the danger of manufacturing and distribution of controlled substances and the potential resulting criminal liability if person dies as a result of that person's actions.

Existing law makes it unlawful for a person to possess for sale or purchase for purpose of sale cocaine, cocaine base, heroin and specified opiates and opioid derivatives. (Health & Saf. Code, § 11351.)

Existing law makes it unlawful for a person to transport, import, sell, furnish, administer, or give away, or offer or attempt to transport, import, sell, furnish, administer, or give away cocaine, cocaine base, heroin and specified opiates and opioid derivatives. (Health & Saf. Code, § 11352.)

Existing law makes it unlawful for a person to manufacture, compound, convert, produce, derive, process, or prepare, either directly or indirectly by chemical extraction or by means of chemical

synthesis any controlled substance, including opiates, opium derivatives, hallucinogenic substances, cocaine, and cocaine base, among others. (Heath & Saf. Code, § 11379.6.)

Existing law defines manslaughter as the unlawful killing of a human being without malice, and provides that there are three kinds: voluntary—upon a sudden quarrel or heat of passion; involuntary—in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; and vehicular. (Pen. Code, § 192.)

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187.)

Existing law provides that malice may be express or implied. Provides that malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen. Code, § 188, subd. (a).)

Existing law provides that if it is shown that the killing resulted from an intentional act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. (Pen. Code, § 188, subd. (b).)

This bill requires the court to advise a person who is convicted of, or who pleads guilty or no contest to, a violation of possession for sale, transporting, importing, selling, furnishing, administering, giving away, or manufacturing specified controlled substances of the following:

“You are hereby advised that the illicit manufacture and distribution of controlled substances, either real or counterfeit, inflicts a grave health risk to those who ingest or are exposed to them. It is extremely dangerous to human life to manufacture or distribute real or counterfeit controlled substances. If you do so, and a person dies as a result of that action, you can be charged with voluntary manslaughter or murder.”

This bill requires the advisory statement to be provided to the defendant in writing, either on the plea form or after sentencing. Requires that the fact that the advisory was given be on the record and recorded in the abstract of the conviction.

COMMENTS

1. Need for This Bill

According to the author:

Fentanyl is a synthetic opiate that can be formulated to be 50 times more potent than heroin. Although fentanyl was formulated nearly 60 years ago, only in recent years have illicit drug manufacturers and distributors discovered that fentanyl offers a very effective replacement or supplement to street-level drugs. For example, fentanyl is often mixed with heroin and cocaine in order to increase its euphoric effects. (CDC, www.cdc.gov/drugoverdose/opioids/fentanyl.html.)

...On the street, fentanyl is often sold in the form of counterfeit pills purporting to contain less powerful opiates, such as hydrocodone and oxycodone. Users have

also been increasingly victimized by street drugs laced with fentanyl without their knowledge and consent. (www.dea.gov/sites/default/files/2020-06/Fentanyl-2020_0.pdf.) Illicit drug manufacturers literally gamble with people’s lives by manufacturing and mixing concentrations of fentanyl without any need to adhere to quality and quantity control standards enforced in our highly regulated pharmaceutical industry.

...

This illicit fentanyl epidemic has also destroyed the lives of many Californians. In California, opioid deaths increased 27% from 2018 to 2019. In recent months, 50% of all overdose deaths in Los Angeles County have been attributed to fentanyl. (Press Enterprise, “Addict Care: A Dose of Change,” Sept. 8, 2020.)

...

Prosecuting overdose-related homicides has always been very difficult in California. To start, societal attitudes have historically tended to cast illicit drug users as primarily responsible – if not exclusively so – for their own demise. Such prejudgments have naturally served to a benefit of criminal offenders dealing in the illicit manufacture and distribution of dangerous drugs like fentanyl. Attitudes are changing, however, and the Legislature should act to encourage this. Moreover, in the few cases where a homicide liability attached to such an offender, the criminal justice system typically relegated it merely to a form of negligence (e.g., involuntary manslaughter).

The illicit manufacture and distribution of fentanyl implicates much more than mere negligence. By requiring those who are successfully prosecuted for the felony manufacture or distribution of fentanyl to explicitly confronted in a court of law with the fact that fentanyl is dangerous to human life, prosecutors will stand in a better position to later prosecute such offenders for second degree murder, should they chose to continue to engage in such a dangerous and destructive endeavor.

2. Advisory Statement in This Bill Mirrors Existing Language In DUI Context

This bill would require the court to advise a person who is convicted of, or who pleads guilty or no contest to, a violation of possession for sale, transporting, importing, selling, furnishing, administering, giving away, or manufacturing specified controlled substances of the following:

“You are hereby advised that the illicit manufacture and distribution of controlled substances, either real or counterfeit, inflicts a grave health risk to those who ingest or are exposed to them. It is extremely dangerous to human life to manufacture or distribute real or counterfeit controlled substances. If you do so, and a person dies as a result of that action, you can be charged with voluntary manslaughter or murder.”

The language in this bill is modeled after the language codified by AB 2173 (Parra), Chapter 502, Statutes 2004, which requires the court to provide a person convicted of a reckless driving offense or DUI with an advisory statement. The advisory in Vehicle Code section 23593 reads:

“You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.”

3. Use of Advisement to Establish Implied Malice in Subsequent Prosecution

Supporters and opponents of this bill assert that the advisory required in this bill will help establish implied malice in a subsequent second-degree murder prosecution in which a person convicted of the drug offenses specified in this bill engages in future drug-related criminal conduct that results in the death of another person. District attorneys and law enforcement agencies view the advisory required by this bill as a useful tool to aid in those prosecutions. Alternatively, defense attorneys and various advocacy organizations have expressed concerns about the use of the advisory in subsequent prosecutions.

As stated above, the advisory in this bill is modeled after the DUI advisory codified in the Vehicle Code. With respect to deaths resulting from DUIs, the California Supreme Court held in *People v. Watson* (1981), 30 Cal.3d 290, 298, in affirming a second-degree murder conviction, that “when the conduct in question can be characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied.” The stated intent of AB 2173 (Parra), Chapter 502, Statutes 2004, was to help prosecutors prove implied malice in second-degree murder cases arising out of DUI cases resulting in death by “making it clear that those individuals were aware of the danger they posed to others by drinking and driving as a result of the statement required by this bill which they signed after the original DUI conviction.” (Assem. Com. on Pub. Safety, Analysis of Assem. Bill 2173 (2003-2004 Reg. Sess.) as introduced February 18, 2004, p. 4.)

As is the case with a DUI in which a drunk driver kills another person, a person engaged in drug-related criminal conduct (e.g., furnishing a controlled substance) that results in the death of another person may be charged with second-degree murder or manslaughter. Murder is defined as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187.) First-degree murder is a murder committed by specified lethal means, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate various specified felonies, or that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death. (Pen. Code, § 189, subd. (a).) All other murder is murder of the second degree. (Pen. Code, § 189, subd. (b).) Malice may be express or implied. (Pen. Code, § 188, subd. (a).) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (*Id.*) If it is shown that the killing resulted from an intentional act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. (Pen. Code, § 188, subd. (b).)

Unlike the DUI advisory in the Vehicle Code, the advisory in this bill includes voluntary manslaughter. Manslaughter is defined as the unlawful killing of a human being without malice. (Pen. Code, § 192.) There are three kinds of manslaughter: voluntary—upon a sudden quarrel or heat of passion; involuntary—in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; and vehicular. (*Id.*)

It is unclear to what extent prosecutors have been more successful in proving implied malice and in securing second-degree murder convictions in DUI cases resulting in death as a result of the passage of AB 2173 or what the effect of this bill may be with respect to drug-related deaths.

4. Argument in Support

According to the Riverside County District Attorney's Office:

SB 350...will enhance murder prosecutions against those who knowingly distribute fentanyl to others which result in death, despite full knowledge that fentanyl is extremely dangerous to human life.

...

In order to effectively and fairly prosecute those who, with full knowledge of the grave health risks and dangers posed to human life, continue to distribute fentanyl and other dangerous drugs that kill too often unsuspecting buyers, we need more effective tools. Currently, prosecuting a drug-poisoning or overdose death as murder is very difficult. Prosecutors may file second-degree murder charges utilizing the *Watson* murder rule, which requires that the fentanyl distributor had specific knowledge that providing the drug to another person to ingest was dangerous to human life but did so despite that knowledge. Proving the drug distributor had such knowledge can be challenging. SB 350 will significantly assist prosecutions under the *Watson* rule because it will statutorily require the court to warn certain convicted drug dealers, manufacturers, and traffickers in writing of the dangerousness of distributing fentanyl and other controlled substances to others.

...

This written advisement by the court provides compelling evidence of an offender's actual knowledge of the inherent dangers of distributing fentanyl and other controlled substances to others. This will greatly aid in the success of future prosecutions should that drug dealer, manufacturer or trafficker later choose to again provide fentanyl to another and that person dies as a result, and the dealer, manufacturer or trafficker is subsequently charged with murder under the *Watson* rule.

5. Argument in Opposition

The California Public Defenders Association writes:

SB 350 would require a court to advise in writing any person convicted of the selling, transporting, furnishing, administering, giving away, or manufacturing of various controlled substances, including, among others, cocaine, fentanyl, peyote, and various other opiates and narcotics. The written advisory would warn against the danger of transactions with these controlled substances and state that if a person from using the controlled substance, the seller, manufacturer or distributor, can be charged with murder. The bill would further require that the advisory be

given on the record in court and recorded on the abstract of conviction. The advisory would be used as a predicate to establish the mental state of malice, required for a murder charge, when the person involved in the drug transaction had no intention of ever killing or injuring the person who knowingly obtained the controlled substance.

CPDA sympathizes with and understands the unintended consequences and impact that the use of unregulated illegal drugs can have on the lives of users, as so many of our clients have had problems with drugs. However, SB 350 by creating another basis for a murder charge is an attempt to resurrect the failed public policy of the past and return to mass incarceration as a solution for societal problems. ...

From our experience as public defenders, we know that many of those who engage in the illegal drug trade are often low-level users of drugs themselves. To punish them for the unintended consequences of engaging in illegal narcotic sales and for outcomes they never intended is contrary to sound public policy and humane treatment in our criminal justice system.

-- END --