

# CORRECTIONS IMPACT STATEMENT

SESSION: 17RS BILL #: HB 333 SCS 1 BR #: 1132 DOC ID#: HB033340.100 - 1132 - 7140

BILL SPONSOR(S): Rep. K. Moser, J. Fischer, R. Benvenuti III, J. Blanton, D. Elliott, D. Graham, C. Morgan, J. Richards, S. Santoro, D. St. Onge, J. Wayne, S. Westrom AMENDMENT SPONSOR(S): Rep. Moser

SUBJECT: AN ACT relating to controlled substances.

## SUMMARY OF LEGISLATION:

Amend KRS 218A.010 to define "fentanyl," "carfentanil," and "fentanyl derivatives"; amend KRS 218A.020 to expand the authority of the Office of Drug Control Policy to request the rescheduling of a substance; amend KRS 218A.050 to schedule fentanyl derivatives as Schedule I controlled substances; amend KRS 218A.1410 to include carfentanil, fentanyl, or fentanyl derivatives; amend KRS 218A.1412 to make trafficking in any amount of fentanyl, carfentanil, or fentanyl derivatives subject to elevated penalties; amend KRS 218A.142 to include carfentanil, fentanyl, or fentanyl derivatives; amend KRS 218A.205 to require state licensing boards to promulgate regulations limiting prescriptions for Schedule II controlled substances for acute pain to a three day supply, with certain exceptions; create a new section of KRS Chapter 218A to create a new offense of trafficking in a misrepresented controlled substance.

SCS1- The senate committee substitute speaks to the definition of fentanyl derivative(s) and industrial hemp, trafficking in any quantities of heroin and fentanyl, and review of prescribing practices.

This  bill  amendment  committee substitute is expected to:

Have the following Corrections impact  Have no Corrections impact

- |   |  |
|---|--|
| <input checked="" type="checkbox"/> Creates new crime(s)                              | <input type="checkbox"/> Repeals existing crime(s)               |
| <input checked="" type="checkbox"/> Increases penalty for existing crime(s)           | <input type="checkbox"/> Decreases penalty for existing crime(s) |
| <input checked="" type="checkbox"/> Increases incarceration                           | <input type="checkbox"/> Decreases incarceration                 |
| <input type="checkbox"/> Reduces inmate/offender services                             | <input type="checkbox"/> Increases inmate/offender services      |
| <input type="checkbox"/> Increases staff time or positions                            | <input type="checkbox"/> Reduces staff time or positions         |
| <input checked="" type="checkbox"/> Changes elements of offense for existing crime(s) |  |
| <input type="checkbox"/> Otherwise impacts incarceration (Explain) _____              |  |

**STATE IMPACT:** Class A, B & C felonies are based on an average daily prison rate of \$66.82. Most Class D felons are housed in one of 76 full service jails for up to 5 years. DOC's cost to incarcerate a felony inmate in a jail is \$31.41 per day (includes jail per diem, medical & central office costs), not including substance abuse treatment. Projections are based on the daily rate x 365 x number of years.

Projected Impact:  NONE  MINIMAL  MODERATE  SIGNIFICANT

Potential Impact:

The bill provides a definition for carfentanil, fentanyl, and fentanyl derivatives. An addition to the definition of marijuana excludes a cannabidiol product approved as prescription medication by the FDA. The bill also outlines guidelines for prescribing opioids for chronic pain. Fentanyl derivatives are added as a Schedule I controlled substance.

The bill establishes a crime of Importing Carfentanil, Fentanyl, or Fentanyl Derivatives, which is a Class C felony. It is not known how many additional offenders would be convicted of Importing Carfentanil, Fentanyl, or Fentanyl Derivatives.

An offender is guilty of Trafficking in a Controlled Substance 1st Degree with any quantity of carfentanil, fentanyl, and fentanyl derivatives under this legislation. Currently, the Department has 7 offenders serving on Trafficking in Controlled Substances 1st Degree - Fentanyl.

The proposed legislation requires that anyone convicted of Trafficking in Fentanyl 1st Offense, regardless of the quantity, shall be guilty of a Class C felony. Under current statute, Trafficking in Fentanyl 1st degree under 2 Grams is a Class D felony for a first offense. By removing the quantity threshold for fentanyl, incarceration timeframes would increase from 1-5 years (Class D felony) to 5-10 years (Class C felony) with increased costs associated with longer periods of incarceration. In addition, offenders guilty of Trafficking in Fentanyl 2<sup>nd</sup> or Subsequent Offense would be elevated to a Class B felony.

The number of offenders currently incarcerated for Trafficking in Fentanyl is not significant as the designation for Fentanyl in the penal code occurred only a few years ago. Unfortunately, it is not possible to predict the number of additional offenders who would be charged with Trafficking in Fentanyl; however, offenders entering the criminal justice system under Fentanyl charges are expected to increase.

The legislation requires that anyone convicted of a Class C Trafficking in Fentanyl serve 50% of the sentence imposed prior to release on probation, shock probation, parole, conditional discharge, or other early release. Under current statute, an inmate convicted of a Class D Trafficking in Fentanyl would be subject to 20% of the sentence prior to becoming eligible for parole. Increasing the parole eligibility rate from 20% to 50% would increase costs associated with a longer period of incarceration.

Class D Fentanyl traffickers currently serve an average of 282 days before release on parole. Class C Fentanyl traffickers, on average, currently serve 1825 days before reaching 50% parole eligibility. The difference between the two is the additional time that Class D Fentanyl traffickers would serve before becoming parole eligible under the proposed legislation. If HB 333 had been law at the time of their convictions, the 7 currently incarcerated Fentanyl traffickers would serve at least an additional 1543 days of incarceration until they meet 50% parole eligibility. At \$66.82 per day, the estimated cost would be \$721,722.82. This calculation assumes that all offenders would parole at 50%. In addition, this calculation does not include second or subsequent offenders.

Aggravated Trafficking in a Controlled Substance 1st Degree adds 28 grams or more of fentanyl or 10 grams or more of carfentanil or fentanyl derivatives and is a Class B felony. Incarceration costs for a Class B felon is between \$243,910 to \$487,820 for a 10-20 year sentence. It is not known how many offenders would be convicted of Aggravated Trafficking in Fentanyl, but the number is not expected to be significant.

A new crime of Trafficking in a Misrepresented Controlled Substance is created when an individual knowingly or unlawfully sells or distributes a Schedule I controlled substance, carfentanil, or fentanyl while misrepresenting the identity of the controlled substance being sold or distributed as a legitimate pharmaceutical product. Trafficking in a Misrepresented Controlled Substance would be a Class D felony, and considered as a separate offense to other violations under KRS 218A occurring during the same course of conduct. It is unknown how many additional Class D offenders would be convicted under Trafficking in a Misrepresented Controlled Substance.

#### Senate Committee Substitute 1:

The senate committee substitute expands the definition of fentanyl derivative(s) and adds wording related to industrial hemp. The committee substitute also contains additional exceptions for the prohibition beyond a three day supply of a schedule II controlled substance prescription, including major surgeries, treatment of significant trauma, or administration in an inpatient setting. Sections 9 and 10 are added to the legislation referring to prescribing practices and investigative reviews for controlled substances.

The senate committee substitute would have a significant impact to length of incarceration due to increased felony levels and parole eligibility timeframes.

Under the senate committee substitute, anyone convicted of Trafficking in Heroin or Fentanyl, regardless of the quantity, shall be guilty of a Class C felony for a first offense and a Class B felony for a second or subsequent offense. Currently, Trafficking in Heroin 1st degree less than 2 Grams is a Class D felony for a first offense. By removing the quantity threshold for heroin, incarceration timeframes would increase from 1-5 years (Class D felony) to 5-10 years (Class C felony) with increased costs associated with longer periods of incarceration.

Class D offenders are housed in local jails at a cost to the Department of \$31.34 per day for housing. If the Class C felon is not statutorily eligible to be housed in a jail facility, higher incarceration costs are incurred at \$66.82 per day for housing at a state prison facility. All offenders convicted of a second offense must be housed in an institution.

Currently there are 793 offenders incarcerated for Trafficking in First Degree for Heroin or Fentanyl. Of these, 497 show a record of Class D Trafficking 1st Offense less than 2 Grams. Under this legislation future convictions for Trafficking in Heroin or Fentanyl would become a higher felony class, subject to a Class C felony.

There are an additional 66 offenders incarcerated for Trafficking in Controlled Substance 2nd or Greater Offense for Heroin (Class C). Under this legislation, offenders convicted of this offense in the future will be Class B felonies.

Additionally, there are 1,268 offenders on supervision for Trafficking in Heroin. Eight hundred ninety-nine (899) of these are Class D Trafficking 1st Offense less than 2 Grams. Under this legislation, with no distinction for amounts, offenders convicted of Trafficking in Heroin in the future will be Class C felonies.

Under current statute, any person convicted of a Class C felony or higher shall be subject to parole eligibility at 50% of their sentence. Under this legislation, this would include any person convicted of trafficking in fentanyl or trafficking in heroin. Currently, an inmate convicted of a Class D trafficking in heroin while possessing drug paraphernalia indicative of commercial activity would be subject to 50% of the sentence imposed prior to becoming eligible for parole, unless they are determined to have a substance use disorder at which they would be subject to 20% parole eligibility. Remaining Class D heroin traffickers are subject to 20% parole eligibility.

Increasing the parole eligibility rate for all heroin and fentanyl traffickers to fifty percent would increase costs associated with a longer period of incarceration.

Class D Heroin/Fentanyl traffickers historically serve an average of 304 days before release on parole. Class C Heroin traffickers, on average, serve 1223 days before reaching 50% parole eligibility. The difference between the two is the additional time that Class D Heroin traffickers would serve before becoming parole eligible under the proposed legislation. If this legislation had been law at the time of their convictions, the 497 incarcerated offenders estimated to be impacted by this legislation would serve at least an additional 919 days of incarceration until they meet 50% parole eligibility. At \$66.82 per day, the estimated cost would be \$30,519,567.26. This calculation assumes that all offenders would parole at 50%. In addition, this calculation does not include second or subsequent offenders.

Overall, the continued effects of the heroin and fentanyl epidemic will have a significant impact for the Department of Corrections.

A Class B Felony sentence is 10 to 20 years	10 Class B Felons cost \$2.4M to \$4.878M
1 Class B Felon costs KY \$243,910 to \$487,820	100 Class B Felons cost \$24.4M to \$48.8M
A Class C Felony sentence is 5 to 10 years.	10 Class C Felons cost \$1.2M to \$2.4M
1 Class C Felon costs KY \$121,955 to \$243,910	100 Class C Felons cost \$12.2M to \$24.4M
A Class D Felony sentence is 1 to 5 years.	10 Class D Felons cost \$114,640 to \$573,200
1 Class D Felon costs KY \$11,464 to \$57,320	100 Class D Felons cost \$1.146M to \$5.7M

**LOCAL IMPACT:** Local governments are responsible for the cost of incarcerating individuals charged with Class A or B misdemeanors and felony defendants until disposition of the case. While the expense varies by jail, this estimated impact will be based on \$31.34 per day, which equals the per diem and medical that DOC pays jails to house felony offenders.

**Projected Impact:**  NONE  MINIMAL  MODERATE  SIGNIFICANT

Potential Impact:

HB 333 is expected to minimally impact the county jails because the trafficking of fentanyl was already a felony level offense, regardless of the amount.

A Class C offender must be within 24 months of the parole eligibility date and meet community custody classification requirements in order to be housed at a county jail. Some of the increased number of Class C felons under this legislation could continue to be housed in a county jail if certain classification criteria are met. Other offenders that previously would have been Class D felons housed at a county jail would now be Class C felons that may not meet the eligibility criteria for housing at a county jail. This would decrease revenue for jails.

Trafficking in a Misrepresented Controlled Substance would be eligible for placement at a county jail as a Class D felony.

**The following offices contributed to this Corrections Impact Statement:**

Dept. of Corrections  Dept. of Kentucky State Police  Administrative Office of the Courts  Parole Board  Other

**NOTE: Consideration should be given to the cumulative impact of all bills that increase the felon population or that impose new obligations on state or local governments.**

**APPROVED BY:**

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Commissioner, Kentucky Department of Corrections

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Date