

S4313 PHILLIPS No Same as

ON FILE: 01/03/18 Penal Law

TITLE....Establishes certain offenses based on homicide due to criminal sale of a controlled substance and the criminal sale of a controlled substance to a child in the first degree

02/09/17 REFERRED TO CODES

01/03/18 REFERRED TO CODES

PHILLIPS, HELMING, KAMINSKY

Amd Pen L, generally

Establishes certain offenses based on homicide due to criminal sale of a controlled substance, establishes the offense of criminal sale of a controlled substance to a child in the first degree, expands the definition of controlled substances with respect to certain offenses, increases the felony classification of certain controlled substance offenses and includes electronic prescriptions and blank prescription forms in the definition of certain controlled substance offenses.

CRIMINAL SANCTION IMPACT.

STATE OF NEW YORK

4313

2017-2018 Regular Sessions

IN SENATE

February 9, 2017

Introduced by Sen. PHILLIPS -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law, in relation to establishing certain offenses based on homicide due to criminal sale of a controlled substance, establishing the offense of criminal sale of a controlled substance to a child in the first degree, expanding the definition of controlled substances with respect to certain offenses, increasing the felony classification of certain controlled substance offenses and including electronic prescriptions and blank prescription forms in the definition of certain controlled substance offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The penal law is amended by adding three new sections
2 125.28, 125.29 and 125.30 to read as follows:

3 § 125.28 Homicide due to criminal sale of a controlled substance in the
4 third degree.

5 A person is guilty of homicide due to criminal sale of a controlled
6 substance in the third degree when he or she:

7 1. Commits the offense of: (a) (i) criminal sale of a controlled

8 substance in the fifth degree as defined in section 220.31 of this chap-
9 ter; (ii) criminal sale of a controlled substance in the fourth degree
10 as defined in section 220.34 of this chapter; (iii) criminal sale of a
11 controlled substance in the third degree as defined in section 220.39 of
12 this chapter; (iv) criminal sale of a controlled substance in the second
13 degree as defined in section 220.41 of this chapter; or (v) criminal
14 sale of a controlled substance in the first degree as defined in section
15 220.43 of this chapter; and

16 (b) the controlled substance sold causes, or contributes to, the death
17 of the person to whom the controlled substance was sold.

18 2. It shall be a rebuttable presumption that the controlled substance
19 sold pursuant to subdivision one of this section caused or contributed

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 to the death of the person where the type of controlled substance sold,
2 alone or in combination with other substances, is determined to be the
3 cause of death of the person when the death occurs within twenty-four
4 hours of the sale.

5 3. The provisions of article two hundred sixteen of the criminal
6 procedure law shall not apply to a violation of this section. Nothing
7 contained in this section shall prevent the court from sentencing a
8 person convicted under this section to any other sentence authorized by
9 law under articles sixty-five and seventy of this chapter.

10 4. Where a person (hereinafter "seller") violates the provisions of
11 paragraph (a) of subdivision one of this section but the seller, in good
12 faith, sought health care for the other person whose death resulted from
13 the ingestion of the controlled substance sold, while that other person
14 was experiencing the drug or alcohol overdose or other life threatening
15 medical emergency that led to that person's death, the seller shall not
16 be charged or prosecuted under this section or article two hundred twenty
17 of this chapter when the sale was not for consideration or other
18 benefit or gain.

19 5. It shall be an affirmative defense to a violation of this section
20 or a violation of article two hundred twenty of this chapter where a
21 seller violates paragraph (a) of subdivision one of this section and the
22 sale was for consideration or other benefit or gain, but the seller, in
23 good faith, sought health care for the other person whose death resulted
24 from the ingestion of the controlled substance sold, while that other
25 person was experiencing a drug or alcohol overdose or other life threat-
26 ening medical emergency that led to that person's death, and the defend-
27 ant has no prior conviction for the commission or attempted commission
28 of a class A-I, A-II or B felony under article two hundred twenty of
29 this chapter.

30 Homicide due to criminal sale of a controlled substance in the third
31 degree is a class D felony.

32 § 125.29 Homicide due to criminal sale of a controlled substance in the
33 second degree.

34 A person is guilty of homicide due to criminal sale of a controlled
35 substance in the second degree when he or she:

36 1. Commits the offense of: (a) (i) criminal sale of a controlled
37 substance in the fifth degree as defined in section 220.31 of this chap-
38 ter; (ii) criminal sale of a controlled substance in the fourth degree
39 as defined in section 220.34 of this chapter; (iii) criminal sale of a
40 controlled substance in the third degree as defined in section 220.39 of
41 this chapter; (iv) criminal sale of a controlled substance in the second
42 degree as defined in section 220.41 of this chapter; or (v) criminal
43 sale of a controlled substance in the first degree as defined in section
44 220.43 of this chapter; and

45 (b) the controlled substance sold causes, or contributes, to the death

46 of the person to whom the controlled substance was sold; and
47 (c) (i) an additional substance was added to the controlled substance
48 sold which enhances the effects of the controlled substance and/or
49 increases the danger of ingestion; or
50 (ii) the person to whom the controlled substance was sold was impaired
51 by one or more substances at the time of the sale; or
52 (iii) the person knew, or had reason to know, that the person to whom
53 the controlled substance was sold was using, or intended to use, one or
54 more other substances in conjunction with the controlled substance sold;
55 or

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1 (iv) the person knew, or had reason to know, that the person to whom
2 the controlled substance was sold had completed a rehabilitation
3 program, or overdosed, within thirty days of the sale.

4 2. It shall be a rebuttable presumption that the controlled substance
5 sold pursuant to subdivision one of this section caused or contributed
6 to the death of the person where the type of controlled substance sold,
7 alone or in combination with other substances, is determined to be the
8 cause of death of the person when the death occurs within twenty-four
9 hours of the sale.

10 3. The provisions of article two hundred sixteen of the criminal
11 procedure law shall not apply to a violation of this section. Nothing
12 contained in this section shall prevent the court from sentencing a
13 person convicted under this section to any other sentence authorized by
14 law under articles sixty-five and seventy of this chapter.

15 4. Where a person (hereinafter "seller") violates the provisions of
16 subdivision one of this section but the seller, in good faith, sought
17 health care for the other person whose death resulted from the ingestion
18 of the controlled substance sold, while that other person was experienc-
19 ing the drug or alcohol overdose or other life threatening medical emer-
20 gency that led to that person's death, the seller shall not be charged
21 or prosecuted under this section or article two hundred twenty of this
22 chapter when the sale was not for consideration or other benefit or
23 gain.

24 5. It shall be an affirmative defense to a violation of this section
25 or a violation of article two hundred twenty of this chapter where a
26 seller violates the provisions of subdivision one of this section and
27 the sale was for consideration or other benefit or gain, but the seller,
28 in good faith, sought health care for the other person whose death
29 resulted from the ingestion of the controlled substance sold, while that
30 other person was experiencing a drug or alcohol overdose or other life
31 threatening medical emergency that led to that person's death, and the
32 defendant has no prior conviction for the commission or attempted
33 commission of a class A-I, A-II or B felony under article two hundred
34 twenty of this chapter.

35 Homicide due to criminal sale of a controlled substance in the second
36 degree is a class C felony.

37 § 125.30 Homicide due to criminal sale of a controlled substance in the
38 first degree.

39 A person is guilty of homicide due to criminal sale of a controlled
40 substance in the first degree when he or she:

41 1. Commits the offense of criminal sale of a controlled substance to a
42 child in the first degree as defined in section 220.49 of this chapter
43 and the controlled substance sold causes, or contributes, to the death
44 of the person to whom the controlled substance was sold.

45 2. It shall be a rebuttable presumption that the controlled substance
46 sold pursuant to subdivision one of this section caused or contributed
47 to the death of the person where the type of controlled substance sold,
48 alone or in combination with other substances, is determined to be the
49 cause of death of the person when the death occurs within twenty-four
50 hours of the sale.

51 3. The provisions of article two hundred sixteen of the criminal

52 procedure law shall not apply to a violation of this section. Nothing
53 contained in this section shall prevent the court from sentencing a
54 person convicted under this section to any other sentence authorized by
55 law under articles sixty-five and seventy of this chapter.

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1 4. It shall be an affirmative defense to a violation of this section
2 or a violation of article two hundred twenty of this chapter where a
3 person (hereinafter "seller") violates subdivision one of this section
4 and the sale was for consideration or other benefit or gain, but the
5 seller, in good faith, sought health care for the other person whose
6 death resulted from the ingestion of the controlled substance sold,
7 while that other person was experiencing a drug or alcohol overdose or
8 other life threatening medical emergency that led to that person's
9 death, and the defendant has no prior conviction for the commission or
10 attempted commission of a class A-I, A-II or B felony under article two
11 hundred twenty of this chapter.

12 Homicide due to criminal sale of a controlled substance in the first
13 degree is a class B felony.

14 § 2. Subdivision 13 of section 220.16 of the penal law, as amended by
15 chapter 75 of the laws of 1995, is amended and a new subdivision 14 is
16 added to read as follows:

17 13. phencyclidine and said phencyclidine weighs one thousand two
18 hundred fifty milligrams or more[+]; or

19 14. one or more preparations, compounds, mixtures or substances
20 containing heroin and said preparations, compounds, mixtures or
21 substances are of an aggregate weight of 1.5 grams or more, or such
22 preparations, compounds, mixtures or substances are packaged in fifty or
23 more containers, packets or "decks".

24 § 3. Subdivision 7 of section 220.18 of the penal law, as amended by
25 chapter 75 of the laws of 1995, is amended and a new subdivision 8 is
26 added to read as follows:

27 7. methadone and said methadone weighs two thousand eight hundred
28 eighty milligrams or more[+]; or

29 8. one or more preparations, compounds, mixtures or substances
30 containing heroin and said preparations, compounds, mixtures or
31 substances are of an aggregate weight of twelve grams or more, or such
32 preparations, compounds, mixtures or substances are packaged in four
33 hundred or more containers, packets or "decks".

34 § 4. Subdivision 2 of section 220.21 of the penal law, as amended by
35 chapter 75 of the laws of 1995, is amended and a new subdivision 3 is
36 added to read as follows:

37 2. methadone and said methadone weighs five thousand seven hundred
38 sixty milligrams or more[+]; or

39 3. one or more preparations, compounds, mixtures or substances
40 containing heroin and said preparations, compounds, mixtures or
41 substances are of an aggregate weight of twenty-four grams or more, or
42 such preparations, compounds, mixtures or substances are packaged in
43 eight hundred or more containers, packets or "decks".

44 § 5. Subdivision 7 of section 220.41 of the penal law, as amended by
45 chapter 75 of the laws of 1995, is amended and a new subdivision 8 is
46 added to read as follows:

47 7. methadone and the methadone weighs three hundred sixty milligrams
48 or more[+]; or

49 8. one or more preparations, compounds, mixtures or substances
50 containing heroin and the preparations, compounds, mixtures or
51 substances are of an aggregate weight of 1.5 grams or more, or such
52 preparations, compounds, mixtures or substances are packaged in fifty or
53 more containers, packets or "decks".

54 § 6. Subdivision 2 of section 220.43 of the penal law, as amended by
55 chapter 75 of the laws of 1995, is amended and a new subdivision 3 is
56 added to read as follows:

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1 2. methadone and the methadone weighs two thousand eight hundred
2 eighty milligrams or more[~~-~~]; or

3 3. one or more preparations, compounds, mixtures or substances
4 containing heroin and the preparations, compounds, mixtures or
5 substances are of an aggregate weight of six grams or more, or such
6 preparations, mixtures or substances are packaged in two hundred or more
7 containers, packets or "decks".

8 § 7. Section 220.48 of the penal law, as added by section 28 of part
9 AAA of chapter 56 of the laws of 2009, is amended to read as follows:

10 § 220.48 Criminal sale of a controlled substance to a child in the
11 second degree.

12 A person is guilty of criminal sale of a controlled substance to a
13 child in the second degree when, being over twenty-one years old, he or
14 she knowingly and unlawfully sells without consideration or other bene-
15 fit or gain a controlled substance in violation of section 220.34 or
16 220.39 of this article to a person less than seventeen years old.

17 Criminal sale of a controlled substance to a child in the second
18 degree is a class B felony.

19 § 8. The penal law is amended by adding a new section 220.49 to read
20 as follows:

21 § 220.49 Criminal sale of a controlled substance to a child in the first
22 degree.

23 A person is guilty of criminal sale of a controlled substance to a
24 child in the first degree when, being over twenty-one years old, he or
25 she knowingly and unlawfully sells a controlled substance for consider-
26 ation or other benefit or gain in violation of section 220.34 or 220.39
27 of this article to a person less than seventeen years old.

28 Criminal sale of a controlled substance to a child in the first degree
29 is a class A-II felony.

30 § 9. The closing paragraph of section 220.50 of the penal law, as
31 amended by chapter 627 of the laws of 1990, is amended to read as
32 follows:

33 Criminally using drug paraphernalia in the second degree is a class [~~A~~
34 ~~misdemeanor~~] E felony.

35 § 10. Section 220.55 of the penal law, as added by chapter 970 of the
36 laws of 1971, is amended to read as follows:

37 § 220.55 Criminally using drug paraphernalia in the first degree.

38 A person is guilty of criminally using drug paraphernalia in the first
39 degree when he commits the crime of criminally using drug paraphernalia
40 in the second degree and he has previously been convicted of criminally
41 using drug paraphernalia in the second degree.

42 Criminally using drug paraphernalia in the first degree is a class [~~D~~
43 C] felony.

44 § 11. Subdivision 15 of section 220.00 of the penal law, as added by
45 chapter 118 of the laws of 1986, is amended to read as follows:

46 15. "Prescription for a controlled substance" means a direction or
47 authorization, by means of an official New York state prescription form,
48 an electronic prescription, a written prescription form or an oral
49 prescription, which will permit a person to lawfully obtain a controlled
50 substance from any person authorized to dispense controlled substances.

51 § 12. Section 220.65 of the penal law, as amended by chapter 31 of the
52 laws of 2014, is amended to read as follows:

53 § 220.65 Criminal sale of a prescription for a controlled substance, a
54 blank prescription form or of a controlled substance by a
55 practitioner or pharmacist.

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1 A person is guilty of criminal sale of a prescription for a controlled
2 substance or of a controlled substance by a practitioner or pharmacist
3 when: 1. being a practitioner, as that term is defined in section thir-
4 ty-three hundred two of the public health law, he or she knowingly and
5 unlawfully sells a prescription for a controlled substance or a blank

6 prescription form. For the purposes of this section, a person sells a
7 prescription for a controlled substance unlawfully when he or she does
8 so other than in good faith in the course of his or her professional
9 practice; or

10 2. being a practitioner or pharmacist, as those terms are defined in
11 section thirty-three hundred two of the public health law, he or she,
12 acting other than in good faith, while purporting to act within the
13 scope of the power, authority and privileges of his or her license, as
14 that term is defined in section thirty-three hundred two of the public
15 health law, knowingly and unlawfully sells a controlled substance or a
16 blank prescription form.

17 Criminal sale of a prescription for a controlled substance or of a
18 controlled substance by a practitioner or pharmacist is a class [E] B
19 felony.

20 § 13. This act shall take effect on the first of November next
21 succeeding the date upon which it shall have become a law.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S4313

SPONSOR: PHILLIPS

TITLE OF BILL: An act to amend the penal law, in relation to estab-
lishing certain offenses based on homicide due to criminal sale of a
controlled substance, establishing the offense of criminal sale of a
controlled substance to a child in the first degree, expanding the defi-
nition of controlled substances with respect to certain offenses,
increasing the felony classification of certain controlled substance
offenses and including electronic prescriptions and blank prescription
forms in the definition of certain controlled substance offenses

PURPOSE:

Establishes certain offenses based on homicide due to criminal sale of a
controlled substance and to the criminal sale of a controlled substance
to a child in the first degree.

SUMMARY OF PROVISIONS:

Section 1. The penal law is amended by adding three new sections 125.28,
125.29 and 125.30.

Section 2. Subdivision 13 of section 220.16 of the penal law, as amended
by chapter 75 of the laws of 1995, is amended and a new subdivision 14
is added.

Section 3. Subdivision 7 of section 220.18 of the penal law, as amended
by chapter 75 of the laws of 1995, is amended and a new subdivision 8 is

added.

Section 4. Subdivision 2 of section 220.21 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 3 is added.

Section 5. Subdivision 7 of section 220.41 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 8 is added.

Section 6. Subdivision 2 of section 220.43 of the penal law, as amended by chapter 75 of the laws of 1995, is amended and a new subdivision 3 is added.

Section 7. Section 220.48 of the penal law, as added by section 28 of part AAA of chapter 56 of the laws of 2009, is amended.

Section 8. The penal law is amended by adding a new section 220.49.

Section 9. The closing paragraph of section 220.50 of the penal law, as amended by chapter 627 of the laws of 1990, is amended.

Section 10. Section 220.55 of the penal law, as added by chapter 970 of the laws of 1971, is amended.

Section 11. Subdivision 15 of section 220.00 of the penal law, as added by chapter 118 of the laws of 1986, is amended.

Section 12. Section 220.65 of the penal law, as amended by chapter 31 of the laws of 2014, is amended.

Section 13. This act shall take effect on the first of November next succeeding the date upon which it shall have become a law.

JUSTIFICATION:

In 2014, Governor Cuomo launched the "Combat Heroin Campaign," which aims to reduce the number of lives lost to substance abuse overdoses. New York State is in the middle of an unprecedented heroin epidemic. With record numbers of illegal drug sales each year, this issue reaches past just heroin. There have been far too many deaths from prescription pills and heroin, notably amongst youth in our state. We must hold those who sell illegal substances accountable for the consequences of their actions, especially when it leads to the death of another individual. This includes stronger penalties and broader ability to prosecute felony charges when illegal substances are involved.

In 1972, precedent was established on this issue. In *The People of the State of New York v. Pinckney*, a defendant was found not guilty of homicide and also of manslaughter, despite selling heroin, and the instruments to inject heroin, to the individual who died the same day from a heroin overdose. The County Court held, "the Penal Law does not contain any provision whereby the sale of a dangerous drug and the means of injecting it, thereby resulting in the death of the user, constitute the crime of manslaughter or criminally negligent homicide."

This bill will reverse the outdated precedent and hold sellers responsible for the deaths they caused by their distribution of illegal drugs. It will allow for the prosecution of drug dealers whose sale leads to the death of an individual to be charged with criminally negligent homicide and/or manslaughter. It will also strengthen the penalty for the sale of illegal substances to minors, especially in the case of death.

Another important provision is to amend the weight requirements for heroin in order to be charged with criminal possession or sale. The average dose of heroin is just 0.03 grams, which means that even an extremely small amount can be deadly. This bill will decrease the weight requirements so that individuals who carry and distribute small, but lethal, amounts of heroin can be charged with a crime.

Finally, it will include the abuse of electronic prescriptions and blank prescription forms as punishable offenses. Currently, neither the sale of an electronic prescription, nor the sale of a blank prescription from a medical provider is included in the criminal sale of prescriptions statute. The addition of these provisions will further limit the ability for abuse from providers and patients in purchasing prescription drugs.

The scourge of illegal drug sales and usage is a complex and widespread problem in our communities. In addition to expanding prevention and treatment services, the penalty for selling drugs that lead to death, especially the deaths of minors, must be strong enough to reflect the severity of the crime. Statutes must also reflect and criminalize the full range of mechanisms through which drug dealers can acquire and sell illegal substances. This bill will further these goals and is an important step forward in solving the epidemic of substance abuse in our state.

EFFECTIVE DATE:

This act shall take effect on the first of November next succeeding the date upon which it shall have become law.