From:	Betty Dunajski
To:	Public Comment
Subject:	Request for Public Comment (BAC 2210-40)
Date:	Monday, November 13, 2017 9:02:05 PM

Hello, I am submitting the comment below on behalf of my brother, [redacted], who was recently sentenced for illegal importation of a controlled substance:

U.S. Sentencing Commission, Request for Public Comment (BAC 2210-40) / Due November 13, 2017

Regarding Question 2, fentanyl analogues that do not meet the statutory definition; and Question 4, class-based approach to fentanyl analogues:

(All ref.'s are to Sentencing Guideline 2D1.1 and United States Code, Title 21, unless otherwise specified.)

Guideline 2D1.1 incorporates the Code's definition of "controlled substance analogue" both by reference through Application Note 6, and implicitly in the language of the "most closely related controlled substance" evaluation; c.f. Note 6, factors (A),(B); Code Section 802(32)(A)(i),(ii).

Determination of the degree of required similarly that must exist between a drug "not specifically referenced in this guideline," e.g. an unlisted analogue of fentanyl, and

analogue of fentanyl, and a "most closely related controlled substance" that is listed in 2D1.1 can be problematic. This is acutely illustrated with respect to fentanyl in the case of substances like AH-7921 and U-47700 (among others; see 21 C.F.R. 1308.11(b)(4) and (h)(7), rev. to June 7, 2017). These novel substances may exhibit pharmacological effects, and structurally are to a degree, similar to the fentanyl family of drugs. They clearly are not N-4 substituted aryl-4-piperidinyl-N-phenyl propanamides, per se; unlike, e.g. 3-methylfentanyl and carfentanil. But neither is e.g. furanyl fentanyl (it is a carboxamide), it is closer in structure to the prototype fentanyl, but as to "substantial" similarity for App. Note 6 purposes, where is the line drawn?

At what point are structure and/or effects sufficiently dissimilar from one parent compound that it no longer qualifies, under 2D1.1's definition of analogue and the "most closely related" factors found at Note 6, and these properties instead point to another compound? What if a substance is sufficiently novel, and these factors, "to the extent practicable" cannot be applied, as the drug is classified as sui generis? Or there's a lack of experimental data on the substance (as there is with furanyl fentanyl), thus precluding practicable application of these factors? In U.S. v. McFadden, 810 F. 3d 1139 (10th Cir. 2015) then-Circuit then-Circuit Judge Gorsuch, addressing vagueness concerns re the definition of analogue, remarks: "It's an open question, after all, what it means for chemicals to have substantially similar chemical structure - or effect. "

The Commission should not think expert testimony is the easy answer: A brief sentencing matter will turn into "a day-long evidentiary hearing," see e.g. U.S. v. Malone, 828 F. 3d 331 (5th Cir. 2016). With fentanyl-type drugs, as in my case, "such experts are in short supply," and due to hazards and liability issues, "many laboratories

simply will not accept these substances." Sentencing Memorandum, ECF 24, U.S. v. Dunajski, 1:17-cr-3 (W.D.N.C. Oct. 29, 2017).