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November 13, 2017

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on Fentanyl and Fentanyl Analogues

Dear Judge Pryor:

The Commission seeks comment on a number of issues related to fentanyl and fentanyl analogues. Because fentanyl and its analogues account for very few federal drug trafficking offenses,¹ and unlike other drugs,² there has been no reported litigation regarding the appropriate drug equivalency or whether a substance was a fentanyl analogue, most of the information the Commission receives during the comment period will not be derived from federal cases.

Defenders have strongly encouraged the Commission to undertake a comprehensive review of the direct harms caused by particular doses of all drugs in the guidelines and amend the guidelines to create proportionate sentences. Such a comprehensive approach is necessary because focusing on a spotlighted drug like fentanyl and its analogues would only exacerbate the disproportionalities in §2D1.1. Much of the disparity created in the drug guidelines is a result of the Commission repeatedly increasing sentences for whatever drug is the current cause célèbre with no evidence that increased penalties reduce use or deter distribution.³

¹ USSC, *Quick Facts: Drug Trafficking Offenses* (July 2017) (in FY 2016, crack cocaine, methamphetamine, powder, heroin, oxycodone, and marijuana accounted for 96.3% of drug trafficking offenses).

² Most of the federal litigation regarding analogues or the appropriate drug quantity has involved synthetic cathinones, cannabinoids, and MDMA even though they account for fewer drug trafficking offenses than the six drugs discussed in the *Quick Facts* report).

³ See, e.g., USSG APP. C, Amend. 125 (Nov. 1, 1989) (methamphetamine and cocaine base); Amend. 321 (cocaine base); Amend. 656 (Oxycontin) (Nov. 1, 2003); Amend. 681 (steroids) (Mar. 27, 2006); Amend. 727 (hydrocodone) (Nov. 1, 2009).

And choosing a single ratio for all fentanyl analogues would create additional disparity because the data on potencies vary widely. For example, carfentanil is considered “approximately 10,000 times more potent than morphine,”⁴ whereas acetylfentanyl is considered 6 or 15 times more potent,⁵ and “butyrfentanil is about 30 times less potent than fentanyl itself.”⁶ If the Commission chooses to amend the guidelines to account for the different potencies in fentanyl analogues, the best and least complicated approach is to include an invited departure based on potency.

Reason for focus on fentanyl and its analogues. Even though MDMA has been relevant to sentencing for synthetic cathinones, which remain a focus of the Commission’s multi-year study, the Commission dropped MDMA off the priorities list and replaced it with a study of fentanyl and fentanyl analogues.

We strongly discourage the Commission from lowering quantity thresholds for fentanyl and its analogues without addressing the gross disparities and disproportionalities created by the rest of the Drug Quantity Table (DQT) and Drug Equivalency Table (DET). Addressing only fentanyl in a piecemeal way will continue the decades-long process of “one-way upward ratcheting,” by which sentencing severity is increased through narrow amendments, but true proportionality is never achieved.⁷ Increases in drug sentences have been the primary driver of the 750 percent increase in the federal prison population since 1980.⁸ Repeated increases in drug sentences “have

⁴ *Research on the Use and Misuse of Fentanyl and Other Synthetic Opioids, Before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations*, 115th Cong. (2017) (statement of Wilson M. Compton, Deputy Director, Nat’l Instit. on Drug Abuse) (carfentanil (approximately 10,000 times more potent than morphine), acetyl-fentanyl (about 15 times more potent than morphine), butyrfentanyl (more than 30 times more potent than morphine), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2017/research-use-misuse-fentanyl-other-synthetic-opioids>).

⁵ *Id.* See also World Health Organization, *Acetylfentanyl: Critical Review Report 12* (2015) (animal testing showed that acetylfentanyl was “considered to be 6x more potent than morphine”).

⁶ World Health Organization, *Butyrfentanyl: Critical Review Report 6* (2016). See also World Health Organization, *Tetrahydrofuranly fentanyl (THF-F): Critical Review Report 10* (2017) (self-reports suggest that “tetrahydrofuranly fentanyl might be less potent than acrylfentanyl”); World Health Organization, *4-Fluoroisobutyrfentanyl (4-FIBF): Critical Review Report 10* (2017) (STRIDA project found that 4-FIBF “may be a less potent opioid receptor agonist”).

⁷ Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 *Stanford L. Rev.* 235, 246 (2005) (“[t]he federal sentencing rulemaking power has become a one-way upward ratchet in which the sentences nominally required by the Guidelines are raised easily and often and lowered only rarely and with the greatest difficulty.”).

⁸ Urban Institute, Charles Colson Task Force on Federal Corrections, *Drivers of Growth in the Federal Prison Population 2* (March 2015) (“length of stay for drug offenders, often dictated by statutory mandatory minimum penalties, has driven most of the recent growth. Though the number of admissions has remained largely constant over time, the number of drug offenders in federal prison has increased

exerted upward pressure on sentences for other federal offenses”⁹ in a vicious cycle of ever-increasing severity and mass incarceration. “The terms being served by these [drug] defendants are long both in absolute terms and by comparison with sentences for other federal crimes and with state drug sentences.”¹⁰

In its comment on proposed priorities, the Department of Justice urged the Commission to amend the DQT to decrease the quantity thresholds for fentanyl and fentanyl analogue in order to increase sentences.¹¹ The Department did not explain in any meaningful detail how the current DQT thresholds result in fentanyl sentences that are too lenient compared to other drugs or other crimes; indeed, it relied on a hypothetical example that misrepresented how the DQT typically works, as discussed below.

Statutory thresholds. With passage of the Anti-Drug Abuse Act of 1986 (ADAA), the Commission abandoned its work developing guidelines for drug offenses based on empirical data and instead linked base offense levels to the quantity thresholds in the mandatory minimum penalties included in the ADAA.¹² Given the limitations of the legislative record, the origins of these thresholds, and how sentences linked to them were intended to achieve the purposes of sentencing, have been a matter of speculation. The Commission has advanced different theories at different times, and has not comprehensively evaluated the current drug guidelines based on any consistent theory. Amendment of the drug guidelines has been piecemeal, often directed by Congress and encouraged by DOJ, based on fluctuating criteria. The result is a patchwork guideline that fails to sentence drug crimes proportionately, fairly, or effectively.

The Department’s request that the Commission lower the thresholds for fentanyl and its analogues is surprising, given that the current thresholds are based on the 1986 statute and have been in place since the guidelines were implemented. The Commission has long felt obliged to link the DQT to the statutory thresholds. After the PROTECT Act, the Department and the

because of people serving longer sentences”),

<https://www.urban.org/sites/default/files/publication/43681/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf>.

⁹ Frank O. Bowman III, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 Col. L. Rev. 1315, 1331 (2005).

¹⁰ *Id.* at 1329.

¹¹ Letter from Kenneth A. Blanco, Asst. Attorney General (Acting), Criminal Division, and Zachary C. Bolitho, *Ex Officio* Member, U. S. Sentencing Comm’n & Counsel to the Deputy Attorney General, to the Honorable William H. Pryor, Jr., Chair, U. S. Sentencing Comm’n, at 7 (July 31, 2017) (*DOJ Annual Letter*).

¹² Ronnie Skotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses*, 26 Crim. Law Bull. 50, 52 (1990).

Commission itself have argued that such linkage is legally required by the Act's provision that the guidelines establish sentencing ranges "consistent with all pertinent provisions of title 18, United States Code."¹³ Defenders have not agreed with this interpretation, and the guidelines do not consistently comply with it, as illustrated by the standardized treatment of LSD under the DQT. But it is nonetheless puzzling to see the Department abandon its previous position when convenient to argue for harsher sentences.

In answer to the Commission's questions whether there are controlled substances regarded as "fentanyl analogues," but which do not meet the statutory definition of an "analogue," Defenders are unaware of any such substance. Only 21 U.S.C. §§ 841(b)(1)(A)(vi) & (b)(vi) and 960(b)(1)(F)&(b)(2)(F) address fentanyl analogues (i.e., a "mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propionamide") and there has been no reported litigation on whether a particular drug falls within the statutory definition. And unlike 21 U.S.C. § 802(32)(A), which defines the term "controlled substance analogue," the statutes prohibiting fentanyl analogues do not define "analogue" or refer to the chemical structure being substantially similar. Because the plain meaning of "analogue" is "something that is analogous or similar to something else,"¹⁴ drugs that are commonly regarded as "fentanyl analogues" are likely to fall within 21 U.S.C. § 841(b)(1)(A)(vi) & (B)(vi) and § 960(b)(1)(F) & (2)(F). Accordingly, absent litigation concluding that a drug regarded as a "fentanyl analogue" is not an analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propionamide, the Commission need not amend the guidelines. If courts ever find that there is such a drug, the Commission should assess its harms in a meaningful way before including it in the guidelines.

If the Commission decides to establish quantity thresholds different from those in the penalty statutes, we urge it to undertake a comprehensive review and amendment of the DQT. The current thresholds utterly fail to advance fair and effective sentencing, as the Commission's own research and our previous comments have repeatedly demonstrated.

¹³ See, e.g., Hon. Patti Sarris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L Rev. 1, 5 (2015) (citing 28 USC § 994(a) as a mandate that the guidelines be "consistent with all pertinent provisions of any Federal statute"); USSC, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 16-17 (2017) ("the Commission has incorporated mandatory minimum penalties into the guidelines since their inception, and has continued to incorporate new mandatory minimum penalties as enacted by Congress"); Brief for the United States, *Kimbrough v. United States*, 552 U.S. 85 (2007) (No. 06-6330), 2007 WL 2461473, at *30 ("Congress has directed the Commission to promulgate guidelines that are 'consistent with all pertinent provisions of any Federal statute.' 28 U.S.C. 994(a). When those provisions contain sentencing directives that bind district courts, the Commission cannot override or ignore them.").

¹⁴ Merriam Webster, *Analogue* (2017). See also *Black's Law Dictionary* (10th ed. 2014) (Analog: "A different material, usu. A chemical or DNA sequence that produces the same result as the specified material when used in a certain way.").

Translating potency into thresholds. If thresholds in the DQT were to be based on various drugs' potency alone, fentanyl and some of its analogues would qualify for among the lowest thresholds. But the statutes and guidelines routinely ignore potency. Offense levels under the DQT are generally based on the weight of any "mixture or substance containing a detectable amount" of a controlled substance—a rule that ensures that sentences do not track potency. Moreover, under the current guidelines, small numbers of doses of relatively less harmful drugs, such as MDMA, are sentenced as severely as much larger numbers of doses of more harmful drugs.¹⁵ The *Guidelines Manual* advises that "[b]ecause of the statutory thresholds, the ratios in the Drug Equivalency guidelines' thresholds, ratios, and equivalencies do not necessarily reflect dosages based on pharmaceutical equivalences."¹⁶ The drug guideline states that a typical dose of pure amphetamine is twice the weight of a typical dose of methamphetamine,¹⁷ but then provides identical thresholds for the two drugs.

As a result, the current DQT provides no anchors by which the proper threshold for fentanyl and its analogues can be determined. Any drug chosen for comparison will have thresholds that misplace that drug in relation to others, in terms of potency, harmfulness, or both. While we welcome attention to potency and typical dosage weight, fairer sentencing cannot be achieved if the Commission focuses on it only for fentanyl and its analogues, as part of a piecemeal argument that sentences for these drugs should be increased, while leaving in place excessive sentences for many others. We encourage the Commission to re-evaluate the guidelines for *all* drugs with potency in mind.

The Department's newfound concern with the potency of fentanyl seems especially cynical given its other positions on this year's priorities. In the same letter in which it urged attention to the potency of fentanyl, the Department urged the Commission to adopt a class-based approach for establishing equivalencies for analogues for which the guidelines provide no specific equivalency.¹⁸ One class the Department proposes is "Synthetic Opioids."¹⁹ Fentanyl is itself a synthetic opioid, and it is not clear how this proposed class would relate to the existing or amended thresholds for fentanyl and its analogues. Conceivably, the class of synthetic opioids would include everything from dextropropoxyphene, which is less potent than heroin,²⁰ to

¹⁵ *Defender August 2017 Letter*, at 6-13.

¹⁶ USSG §2D1.1, comment. (n.8(b)).

¹⁷ USSG §2D1.1, comment. (n.9).

¹⁸ *DOJ Annual Letter*, at 6 -7.

¹⁹ *Id.* at 7.

²⁰ <https://psychonautwiki.org/wiki/Dextropropoxyphene>.

lofentanil, which is over 100 times more potent than fentanyl.²¹ There is no logic in focusing on potency when needed to argue for increased sentences, while ignoring it when arguing one's favored approach to a whole class of drugs.

Fatal dosage weight. The fulcrum of the Department's potency argument involves the amount of fentanyl that can prove fatal. Based on data from the European Monitoring Centre for Drugs and Drug Addiction, the Department asserts that two milligrams of fentanyl is the average lethal dose and that four grams of fentanyl is sufficient to kill approximately 2000 persons.²² From this, it claims that "[a] base offense level of 12 is wholly inadequate for a defendant who has placed that many deadly doses of fentanyl onto our streets. In the Department's view, fentanyl is so dangerous . . . that defendants who distribute seemingly small quantities of fentanyl should face prison time."²³ The Department's position fails to acknowledge several key points.

First, the government can ensure that defendants proved guilty of distributing any amount of fentanyl or a fentanyl analogue that results in death or serious bodily injury receive extremely severe sentences. Regardless of quantity, it can obtain a 20-year mandatory minimum, *see* 21 U.S.C. § 841(b)(1)(A)-(C), a base offense level of 38, and a guideline range of 235-293 months. USSG § 2D1.1(a)(2). If the defendant has a prior felony drug offense and the government files an enhancement under 21 U.S.C. § 851, the statutory sentence is mandatory life, and the guideline range is life. *See* 21 U.S.C. § 841(b)(1)(A)-(C); USSG § 2D1.1(a)(1).

Second, if the government chooses not to charge and prove that death resulted, even a person with 0 or 1 criminal history points with an offense level of 12 currently faces prison time of at least five months, with at least five more months in alternative confinement as part of a split sentence. From FY 2007-2016, only 26 defendants sentenced under §2D1.1 with fentanyl as a drug fell within BOL12; 46.2% received a within guideline sentence, 26.9% received an above range sentence, and 26.9% received a below range sentence.²⁴

It is noteworthy that despite the reported increase in fentanyl-linked overdose deaths, fentanyl was listed as a drug involved for just nine people sentenced in FY 2016 under the provisions of §2D1.1(a)(1)-(4), which govern offenses of conviction that establish that "death or serious bodily injury resulted from the use of the substance." Fentanyl was the primary drug for just one person;

²¹ <https://en.wikipedia.org/wiki/Lofentanil>.

²² *DOJ Annual Letter*, at 7.

²³ *Id.* at 8.

²⁴ USSC, *FY 2007-2016 Monitoring Dataset*.

for the others it was the second or third drug, most commonly listed after heroin.²⁵ Defenders do not believe the draconian sentences recommended for these defendants are appropriate.

Third, the Department's hypothetical ignores how quantities are actually determined under the DQT. Sentences are not based on the weight of the controlled substance itself, but on the weight of any "mixture or substance containing a detectable amount" of the controlled substance. An increasing problem reported by law enforcement with fentanyl and its analogues is that minute amounts of these drugs are mixed with inert ingredients, or other less-potent substances, and marketed as heroin, oxycodone, Percocet, or other opioids of abuse.²⁶ These powders and pills vary in weight depending on the purity and type of inert ingredients. For fentanyl pressed into pills to be marketed as a prescription opioid, between 250-500 milligrams is a reasonable estimate of the weight of a typical pill.²⁷ So the four grams the Department claims is enough to hypothetically "kill approximately 2,000 people" more likely represents, in the real world of guideline calculations, about 8–16 non-lethal doses sold to unsuspecting addicts looking for a cheaper alternative to prescription drugs.

Of course, fentanyl or its analogues might be seized in a relatively pure form, perhaps from a clandestine lab or as a relatively pure powder illegally imported from China, and weighed as such for sentencing purposes. In those cases, relatively small quantities might indeed represent large numbers of doses. A defendant who has the relevant sentencing weight determined from the pure drug receives a much lower sentence than a street-level dealer sentenced to years of imprisonment for inactive ingredients, although upward departure is encouraged in such situations.²⁸ Base offense levels assigned by the DQT, however, are arbitrary, if not inversely related to actual culpability. This is a fundamental problem with the statutes and the DQT generally, not just with the current threshold for fentanyl.

²⁵ USSC, *FY 2016 Monitoring Dataset*.

²⁶ DEA, *2017 National Drug Threat Assessment 59* (Oct. 2017) ("Illicitly-produced fentanyl is increasingly available in the form of counterfeit prescription pills. Fentanyl traffickers use fentanyl powder and pill presses to produce pills that resemble popular prescription opioids, such as oxycodone and hydrocodone.").

²⁷ USSG §2D1.1, comment. (n.9); <https://drugs-forum.com/threads/endocet-10-325mg-pill-weight.132921/> (providing weight of typical unit of MDA, MDMA and mescaline in pill or capsule form).

²⁸ The current guidelines encourage upward departure based on unusually high purity. USSG §2D1.1, comment. (n.27(C)). The unfairness and one-sidedness of the current guidelines' approach to quantity has demonstrated their silence regarding the equally compelling and common circumstance of unusually low purity, where downward departure would be appropriate.

Profit margins associated with fentanyl trafficking. Law enforcement has suggested that people are incentivized to traffic in fentanyl and its analogues because of the high profit margins potentially involved with these offenses.²⁹ By that measure, fentanyl and its analogues are already sentenced far more severely than other crimes, and any lowering of the thresholds for fentanyl and its analogues will only exacerbate disparity, and increase the pressure for additional upward ratcheting.

For example, for a person convicted of embezzlement, forgery, fraud, theft, or tax fraud to face an offense level of 30 under the tables at USSG §2B1.1(b)(1) and §2T4.1, he or she would need to have gained, or caused a loss, of between \$65 and \$150 million dollars. The tables are capped at offense level 36 or 37 with losses and gains of over \$550 million dollars.

By contrast, the DEA recently estimated that a kilo of fentanyl can be produced for \$3,000 to \$4,000. It can then be cut to produce between 16 and 24 kilos of diluted product, which can yield a profit of \$1.3 million dollars.³⁰ That kilo of pure fentanyl, if interdicted in that form and used as the sentencing weight, would yield a BOL of 30 under the current DQT, and a guideline range for a first offender with acceptance of responsibility of 70-87 months. (If it were an analogue, the BOL would be 34, and a guideline range of 108-135 months.). Perversely, if the drug were interdicted after it was cut, when the potency is reduced and thus less dangerous, and when low-level players are distributing it to consumers, the BOL for 16-24 kilograms of a mixture or substance containing fentanyl would be 36, and a guideline range for a first offender with acceptance of responsibility of 135-168 months (for an analogue the BOL would be 38, the highest possible under the DQT, and a guideline range of 168-210 months). Fentanyl traffickers grossing the DEA's estimated \$1.3 million dollars of profit would be facing very serious time in prison.

Alternative ways to address arbitrary variations. The Commission invites comment on whether, and if so how, the guidelines should be amended to account for fentanyl and fentanyl analogues. Rather than change the thresholds for fentanyl and fentanyl analogues or change the drug equivalency table, the Commission should consider one of two alternatives to addressing fentanyl and fentanyl analogues.

²⁹ See, e.g., U.S. Dep't of Just., Drug Enforc. Admin., *2017 Nat'l Drug Threat Assessment* 55 (2017).

³⁰ Vice News, *America's New Deadliest Drug is Fentanyl* (August 30, 2016) ("It costs \$3,000 to \$4,000 to produce a kilo of fentanyl — the same cost as to produce a kilo of heroin, according to Russ Baer, a DEA spokesman. That kilo of heroin sells in the US for \$60,000 or more, with a street value of several hundred thousand dollars when diluted and sold by the gram. But fentanyl's extreme potency means it can be cut and split into many more kilos, increasing a dealer's profits. 'That one kilo of fentanyl can produce between 16 and 24 kilos [of drug product], ultimately yielding profits of \$1.3 million after it's sold on the streets,' Baer said."), <https://news.vice.com/article/americas-new-deadliest-drug-fentanyl>.

Given the vastly different potencies in fentanyl analogues discussed previously, the least complicated option is to add departure provisions. Note 27 of section 2D1.1 should be amended to (1) encourage a downward departure whenever the weight of the mixture or substance containing a detectable amount of a drug exceeds the weight of the active ingredient; and (2) encourage a downward or upward departure whenever the potency of a fentanyl analogue is greater or lesser than Alpha-Menthlfentanyl or 3-Methylfentanyl.

Another option is for the Commission to reconsider how quantity is determined as it did with LSD. As with fentanyl,³¹ the ADAA established quantity thresholds for LSD. Just one gram of a mixture or substance containing a detectable amount of LSD results in a five-year mandatory minimum penalty.³² Common oral doses for LSD are 75-150 micrograms (.000075-.00015 gms),³³ making it one of the most potent of commonly misused drugs. In 1993, the Commission found that “the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself . . . As a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances. . . .”³⁴ To address these disparities and disproportionalities, the Commission established a unique and creative dosage-based system for establishing the quantity of LSD for purposes of the DQT.³⁵ This system was subsequently affirmed by the Supreme Court for guideline purposes.³⁶ Under this system, each dose of LSD is assigned a standardized weight, which is greater than the weight of the pure drug but far less than the combined weight of the LSD and carrier medium. This system successfully eliminated much of the unwarranted disparity in sentencing that could have resulted from arbitrary variations in the weight of inert “mixtures and substances” combined with the drug.

A system that accounts for variations in the weight of the mixture and substances could reduce much of the arbitrariness of base offense level determinations under the DQT. Doses of fentanyl included in counterfeit pills vary widely,³⁷ but can be easily determined. The number of doses of

³¹ 21 U.S.C. § 841(b)(1)(A)(6).

³² 21 U.S.C. § 841(b)(1)(B)(v).

³³ <https://psychonautwiki.org/wiki/LSD>.

³⁴ USSG App. C, Amend. 488 (Nov. 1, 1993).

³⁵ USSG §2D1.1(c)(G); USSG §2D1.1, comment. (n.10).

³⁶ *Neal v. United States*, 516 U.S. 284 (1996).

³⁷ See, e.g., U.S. Dep’t of Just., Drug Enforc. Admin., *2017 Nat’l Drug Threat Assessment* fig. 53 (Oct. 2017) (showing variable doses of active substance in clandestinely manufactured fentanyl pills).

fentanyl packaged as heroin for sale to consumers may present additional, but surmountable, challenges.³⁸ Lab reports of the weight and purity of seized drugs are commonly prepared and available for sentencing; indeed, these reports are already required to determine base offense levels for many drugs where the DQT includes thresholds for “actual” weights.

Translating harmfulness into thresholds. We have argued that, in addition to typical dosage weights, equivalencies in the DQT and DET should reflect the direct harms of various drugs. The risk of overdose deaths highlighted in the DOJ comment and in recent news reports about fentanyl is certainly an important direct harm even though the federal prosecution rates for fentanyl are quite low. Fentanyl, its analogues, and opioids more generally, display among the highest risks of overdose and death.

But proportionate sentencing cannot be achieved by focusing on one serious harm of one particular drug, to argue that its thresholds should be lowered and sentences increased, while ignoring the relative risk of that harm for other drugs. Under the current DQT, several drugs with lower risks of overdose death are punished more severely than opioids.³⁹ Just a small fraction of the typical number of doses of pure methamphetamine, crack, or MDMA receives penalties under the current DQT as severe as far larger numbers of doses of heroin. Proportionate sentencing cannot be achieved by increasing sentences for drugs deemed very harmful, while leaving in place excessively severe sentences for less harmful drugs.

Moreover, many types of harms should be considered when evaluating the harmfulness of different drugs. For example, opioids rank high in terms of emergency room episodes and treatment admission risk (in part due to the availability of methadone and other substitution-based treatments), and in user-rated risks of bingeing, dependency, and craving.⁴⁰ But opioids are not the worst drugs by some measures of toxicity and disease, such as organ damage from chronic use.⁴¹ Accordingly, the Commission should not worsen the disproportionality of the current drug guidelines by focusing on a single harm of fentanyl and its analogues.

³⁸ *Id.* at 59 (“[i]n 2016, an overwhelming majority of fentanyl exhibits in NFLIS were fentanyl alone, without heroin”).

³⁹ Paul J. Hofer, *Ranking Drug Harms for Sentencing Policy*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612654.

⁴⁰ Morgan, C. J., et al., *Harms and Benefits Associated with Psychoactive Drugs: Findings of an International Survey of Active Drug Users*, 27 *J. Psychopharmacology* 497 (2013).

⁴¹ The toxicity of some legal substances, such as alcohol and tobacco, appear as bad or worse than opioids. van Amsterdam J., et al., *Physical Harm Due to Chronic Substance Use*, 67 *Regulatory Toxicology & Pharmacology* 83 (2013).

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Conclusion. Although we are disappointed that the Commission has chosen to prioritize fentanyl and its analogues over MDMA, we appreciate the opportunity to submit comments. We remain hopeful that the Commission will reconsider how to adopt sentencing guidelines for drug offenses that promote fair and just punishment.

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

Chair, Federal Defender Sentencing Guidelines Committee

cc : Rachel E. Barkow, Commissioner
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
Zachary Bolitho, Commissioner *Ex Officio*
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
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