PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

March 6, 2018

Hon. William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Response to Request for Comment on Amendments

Dear Judge Pryor:

The Practitioners Advisory Group (PAG) respectfully submits this response to the Commission's (January 26, 2018) request for comment on two proposed amendments to the Sentencing Guidelines.[1]

I. PROPOSED AMENDMENT: SYNTHETIC DRUGS

The Commission seeks comment regarding a three-part amendment to the Drug Equivalency Tables in §2D1.1. Parts A and B of the proposed amendments are intended "to adopt a class-based approach to account for" synthetic cathinones and synthetic cannabinoids, respectively. Part C involves proposed amendments relating to fentanyl and "fentanyl analogues," including increasing penalties for fentanyl to establish parity with higher penalties for fentanyl analogues, providing a definition of "fentanyl analogue," and an enhancement when fentanyl or a fentanyl analogue "is misrepresented or marketed as another substance."

With respect to all three Parts of the proposed amendments, the Commission seeks comment on: (1) whether the proposed class-based approaches should be used; (2) whether the substances identified in each part are "sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and

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[1] **The PAG has no objection** to the Technical changes proposed by the Commission.

abuse, patterns of trafficking and abuse, and/or associated harms to support the adoption of a class-based approach for sentencing purposes"; (3) the appropriateness of the specified marijuana equivalency ratios; (4) the appropriateness of the proposed minimum base offense levels for synthetic cathinones and synthetic cannabinoids; (5) the appropriateness of the marihuana equivalency ratio for fentanyl as a class; and 6) "whether the guidelines provide appropriate penalties for cases in which fentanyl or a fentanyl analogue may create a substantial threat to public health or safety."

The PAG reiterates its comment in its February 20, 2017 submission supporting the Commission's then-proposal to amend §2D1.1 to replace the "marihuana equivalency" in the Drug Equivalency Tables with a uniform "converted drug weight" and to change the term "Drug Equivalency Tables" to "Drug Conversion Tables."[2] While not a substantive policy change, that proposal would help alleviate the confusion that currently exists with the use of the "marijuana equivalency" metric.

As to the current proposed amendments, other parties have raised legitimate concerns generally regarding the empirical basis for, and the continued use of, the drug quantity table as presently constructed to drive the sentencing range calculation, and, more specifically, regarding other highly technical, pharmacological issues embedded in the proposed amendments.[3]

The PAG, of course, shares the public health and safety concerns raised by many concerning of the use and abuse of fentanyl and fentanyl analogues and synthetic cathinones and synthetic cannabinoids. However, **the PAG notes** that the Commission's recent public data presentation in connection with these proposed amendments shows that these substances involve a relatively low number of offenders the majority of whom received either within Guideline range sentences or below range sentences for non-5K1.1 reasons. For Fiscal Year 2015, the Commission reports[4] the convictions of only:

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[2] PAG Letter to the U.S.S.C. at 17-18 (Feb. 20, 2017), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170220/PAG.pdf.

[3] *See, e.g.,* Federal Defender Sentencing Guidelines Committee Letters to the U.S.S.C. (Oct. 26, 2017), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171027/FPD.pdf, and (Nov. 13, 2017), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20171113/FPD.pdf.

[4] U.S.S.C., *Public Data Presentation for Synthetic Cathinones , Synthetic Cannabinoids and Fentanyl and Fentanyl Analogues Amendments* (Jan. 2018), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf.

- 191 synthetic cathinone traffickers, none of whom were sentenced above the Guideline range, over 40% of whom were sentenced below the range for *non-5K1.1* reasons, and over 27% of whom were sentenced within range;

- 138 synthetic cannabinoid traffickers, none of whom were sentenced above the Guideline range, over 41% of whom were sentenced below the range for *non-5K1.1* reasons, and 21% of whom were sentenced within range; and

- 51 fentanyl drug traffickers, 6% of whom were sentenced above the Guideline range, over 43% of whom were sentenced below the range for *non-5K1.1* reasons, and over 32% of whom were sentenced within range.

Note that:

- This total of 380 traffickers constitutes ½ of 1% (0.005) of the total number of Guideline offenders in Fiscal Year 2015 and only 1.8% (0.018) of offenders sentenced under the drug Guidelines in that year.[5]

- In addition, of the "primary drug type" offenders sentenced under the drug Guidelines, the "other drug" category – which would encompass the drugs at issue – constitutes only 8.2% (0.0815) of the total number of drug offenders in Fiscal Year 2015,[6] and this figure decreased to 6.7% (0.066) in Fiscal Year 2016 and to 6.8% (0.068) in Fiscal Year 2017.[7]

These statistics are not cited to deprecate the gravity of these crimes. Rather, given the relatively small number of such defendants, and perhaps more importantly, the very large number of offenders receiving within or below Guidelines sentences, **the PAG questions** the necessity and justification for the some of Commission's proposals.

That said, if the Commission nonetheless determines to adopt amendments related to synthetic drugs, **the PAG here weighs in** on certain questions posed by the Commission.

(1) **The PAG would support** a class-based approach for synthetic cathinones and synthetic cannabinoids, and, although we are not chemists, **the PAG would support** including methcathinone in the class of synthetic cathinones, as seemingly consistent with the findings of the United Nations Office on Drugs and Crime. The

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[5] U.S.S.C., 2015 Sourcebook of Federal Sentencing Statistics at Tables 2, 33, available at https://www.ussc.gov/research/sourcebook/archive/sourcebook-2015.

[6] *Id.* at Table 33.

[7] U.S.S.C., 2016 Sourcebook of Federal Sentencing Statistics at Table 33, available at https://www.ussc.gov/research/sourcebook-2016; U.S.S.C., 2017 Sourcebook of Federal Sentencing Statistics at Table 33, available at https://www.ussc.gov/research/sourcebook-2017?utm_medium=email&utm_source=govdelivery.

Commission should also consider defining "synthetic cathinones" for clarity. **The PAG would support** a minimum base offense level of 12 for synthetic cathinones and synthetic cannabinoids.

(2) For synthetic cathinones, a marihuana equivalency set at 380 grams would be consistent with the equivalent for methcathinone. The Seventh Circuit affirmed a detailed factual finding by the district court that under the Guidelines the equivalent drug for a cathinone was methcathinone and noted several district court opinions and a Ninth Circuit unpublished opinion that came to the identical conclusion.[8]

(3) For synthetic cannabinoids, **the PAG would support** the 167-gram marijuana equivalency, the same equivalency used for synthetic and organic THC. Given our understanding of their close chemical and biological properties, this approach would encourage consistency. Also, the proposed definition of the term "synthetic cannabinoid" as "any synthetic substance (other than synthetic tetrahydrocannabinol) that [acts as an agonist at][binds to and activates] type 1 cannabinoid receptors (CB_1 receptors)" is appropriate as it appears to reflect the science related to synthetic cannabinoids. Thus, this definition should cover synthetic THC, because we understand that THC and synthetic cannabinoids work on identical brain cell receptors.

(4) As to fentanyl, **the PAG would oppose** an increase in offense levels because doing so would create a separation between the Guidelines and the statutory mandatory minimums. **The PAG would support** revising the definition of fentanyl analogue to clear up an unintended semantic confusion and to not limit fentanyl to as "N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide." However, **the PAG would recommend** that the Commission provide for a guided departure or variance (discussed below) for less toxic or addictive substances that would otherwise fall within the new definition of fentanyl.

(5) **The PAG would oppose** upward adjustments for misrepresenting or marketing fentanyl as another substance. Trafficking offenses involving Schedule I, II and III substances are already subject to enhanced statutory penalties if death or serious bodily injury results from the use of the substance involved. 18 U.S.C. § 841(b)(1)(A)-(C) (20 years to life imprisonment) and 841(b)(1) (E) (imprisonment up to 15 years).

In addition, of course, the Guidelines also already provide for:

- extremely high base offense level calculations for trafficking if "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance." U.S.S.G. § 2D1.1(a)(1)-(4);
- upward offense level adjustments for victims who are unusually vulnerable due to age, or physical condition or mental condition. U.S.S.G. §3A1.1;

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8 *United States v. Moreno*, 870 F.3d 643, 647-48 (7th Cir. 2017).

- the possibility of an upward departure for deaths or significant physical injury resulting from an offense. U.S.S.G. §§ 5K2.1, 5K2.2; and/or
- the possibility of an upward departure for offenses significantly endangering public health or safety, *e.g.*, by misrepresenting or marketing the drug as another substance. U.S.S.G. § 5K2.14.

Finally, we note that U.S.S.G. § 2D1.1, Application Note 18 presently provides for a possible upward departure if an offense involved a threat to the health or safety of law enforcement or emergency personnel. This application note could be amended to clarify that, if appropriate, it also covers misrepresenting or marketing the drug as another substance. If the Commission determines, nonetheless, to add this upward adjustment, it should be limited two levels and to situations where an offender knowingly misrepresented or marketed the drug as another substance.

(6) For all the synthetic drugs, **the PAG supports** a guided departure or variance for substances that have a similar chemical structure to a named synthetic drug (or which fall within the drug category) but which have a demonstrably lower toxicity, addiction rate, or other mitigating characteristic. In those cases, the sentencing court should be able to consider a guided downward departure or variance.

(7) **The PAG also notes** that in many cases, couriers and other low-level members of narcotics distribution organizations are falsely led to believe that the narcotic in question is marijuana. Thus, **the PAG also supports** a guided downward adjustment, variance, or departure for all drug offenses when an offender believed that the narcotic in question was less toxic or addictive that the narcotic seized. In those cases, **the PAG believes** that the offenders' culpability is reduced, and that lessened culpability should be reflected in the final Guideline range.

II. PROPOSED AMENDMENT: ILLEGAL REENTRY GUIDELINE ENHANCEMENTS

The Commission seeks comment regarding a proposed amendment to U.S.S.G. § 2L1.2 (Unlawfully Entering and Remaining in the United States). The proposed amendment has two parts. **The PAG does not support either Part A or Part B.**

Part A of the proposed amendment addresses what the DOJ perceives as a "gap in coverage" for defendants who engaged in criminal conduct before deportation but did not sustain a conviction until after the deportation or order of deportation. In short, the PAG believes that any so-called gap is filled by the resulting criminal history calculation and that this proposal would cause confusion resulting in unnecessary litigation about when inchoate crimes, and defendants' involvement in them, commenced. The present bright line rule provides clarity and consistency for the courts and litigants. If the Commission feels this issue is not resolved by the criminal history calculation, the PAG suggests, at most, consideration of a guided basis for departure.

Part B of the proposed amendment concerns the U.S.S.G § 2L1.2 enhancements for prior convictions and whether a subsequent violation of probation or other term of release should be included in the "term of imprisonment." In short, **the PAG notes** that multiple courts and the Sentencing Commission itself have recognized that assessing the seriousness of a pre-deportation conviction based solely on the pre-deportation sentence best serves the goal of gauging the seriousness of the illegal-reentry offense and the Guidelines goal of reasonable uniformity in sentencing.[9]

Part A: The Proposed Amendment Would Cause Confusion, Unnecessary Litigation, and Promote Disparity

First, there is no "gap in coverage" because any convictions that a defendant sustains after a deportation will count under the Criminal History calculation. Second, determining when criminal conduct occurred instead of when a conviction occurred will cause confusion and unnecessary litigation.

For instance, at a federal sentencing hearing, a defendant previously convicted of conspiracy or another inchoate offense will have to litigate *when* the crime occurred, and *whether* the defendant's involvement began before the order of deportation. The rules for when an inchoate offense begins (and the mental state required) vary state to state.[10]

In other words, this proposal could force defendants to re-litigate the facts of state court cases in federal court, particularly when the date the offense began was not relevant to the state court conviction. Thus, litigating sentencing for cases in "the gap" could require intensive, time consuming and unnecessary litigation. If the Commission remains concerned about this gap, **the PAG suggests**, at most, consideration of a guided departure.

Part B: The Proposed Amendment Would Treat Similar Defendants Differently.

U.S.S.G. § 2L1.2(b)(2)(B) provides for an adjustment only "[i]f, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained ... a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more[.]" From the beginning, U.S.S.G. § 2L1.2(b) has included upward adjustments for certain prior convictions.

An illegal reentry by a defendant who previously received a sentence of probation (with or without some jail time) is less serious than an illegal reentry by a defendant who

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9 *United States v. Rosales-Garcia*, 667 F.3d 1348, 1353-1354 (10th Cir. 2012); *United States v. Lopez*, 634 F.3d 948, 951-52 (7th Cir. 2011); *United States v. Bustillos-Pena*, 612 F.3d 863, 867-68 (5th Cir. 2010); U.S.S.G. Amendment 764 at 11-12.

10 *See* Larry Alexander, *Mens Rea* and Inchoate Crimes, 87 Journal of Criminal Law and Criminology, 1138 -1140 (1997).

had received a substantial prison sentence for the same offense.[11] In contrast, it would be "counterintuitive" to interpret the guideline to treat the first defendant the same as the second based on unrelated conduct occurring after the reentry simply because it resulted in a revocation and a more severe sentence.[12]

After all, probation revocations are often based on noncriminal and relatively-minor actions or inactions.[13] In fact, probation is sometimes revoked solely because of the defendant's "inevitable" failure to report to his state probation officer because he was deported. *Id.* As a result, sentences imposed for probation revocations do not reflect the seriousness of either the prior crime or the illegal-reentry offense.[14]

PAG members have experienced the "inevitable" failure to report to probation violation that occurs after deportation. For instance, one member of the PAG had a client whose probation was extended 15 years because he could not report to his probation officer for many years after deportation. That case went unreported, but other instances are reported:

- *People v. Tapia*, 91 Cal. App. 4th 738 (2001) (Defendant put on probation and then involuntarily deported. The court violated and sentenced him for failing to report to probation after deportation.)
- *People v. Salas*, 2013 Cal. App. Unpub. LEXIS 5702 (2013) (same)
- *People v. Leiva*, 56 Cal. 4th 498 (2013) (same)
- *People v. Calderon*, 2011 Cal. App. Upub. LEXIS 5664 (2011) (Deported defendant violated probation by not keeping probation apprised of whereabouts.)
- *People v. Galvan*, 155 Cal, App. 4th 978 (2007) (Defendant violated probation by not reporting to a probation officer after deportation.)

A contrary conclusion would treat near identically situated defendants differently. Consider, for example, two defendants who committed the same state crime and received probation. If each of them was deported and illegally returned to the United States, they both committed the same illegal-reentry offense. But suppose one of them had his probation revoked and received a more severe sentence due to the illegal reentry and the other did not. If they were both subsequently brought into federal court to face illegal-reentry charges, under this proposal one would be sentenced more harshly than the other, even *if* the second defendant's state probation was *later* revoked due to the illegal reentry. This would thwart the Sentencing Guidelines' goal of

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11 *Bustillos-Pena*, 612 F.3d at 867.

12 *Id.*

13 *Lopez*, 634 F.3d at 951.

14 *Id.*

reasonable uniformity in sentencing.[15] In 2012, the Sentencing Commission amended U.S.S.G. § 2L1.2 to resolve a circuit conflict. U.S.S.G., Appendix C, Amendment 764 (Nov. 2012). Specifically, it added the following italicized language to the end of the application note defining "sentence imposed" such that it

> includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but *only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.*

U.S.S.G. § 2L1.2, Application Note 1(B)(vii) (Nov. 2012) (emphasis added). This amendment reflected "the Commission's determination that both the seriousness and the timing of the prior offense for which the defendant was deported are relevant to assessing the defendant's culpability for the illegal reentry offense." Amendment 764 at 11.

After considering the cases discussed above, as well as public comments and testimony, the Commission concluded that because "the circumstances under which persons are found present in this country and have their probation, parole, or supervised release revoked for a prior offense vary widely ..., assessing the seriousness of the prior crime based on the sentence imposed *before* deportation should result in more consistent application of the enhancements in § 2L1.2(b)(1)(A) and (B) and promote uniformity in sentencing." *Id.* at 11-12 (emphasis added).

In 2016, the Sentencing Commission overhauled U.S.S.G. § 2L1.2. U.S.S.G., Appendix C, Amendment 802 (Nov. 2016). It had three goals:

(1) to avoid the overly complex and resource-intensive categorical approach;

(2) to ameliorate the effects of the most severe adjustments; and

(3) to account for criminal conduct after the first deportation.

Id. at 155-56. To achieve the first goal, the Commission abandoned identifying prior convictions by category, except for illegal-reentry offenses (which now have their own adjustment under subsection (b)(1)) and certain misdemeanor offenses. U.S.S.G. § 2L1.2(b). Instead, the severity of a prior felony conviction is determined by the "sentence imposed." U.S.S.G. § 2L1.2(b)(2) & (3). Moreover, U.S.S.G. § 2L1.2(b) now divides a defendant's non-immigration "criminal history into two time periods"—subsection (b)(2) covers any convictions "sustained before being ordered deported or removed from the United States for the first time" and subsection (b)(3) covers any convictions "sustained after that event (but only if the criminal conduct that resulted in the conviction took place after that event)." Amendment 802 at 156-57.

The Commission expressly endorsed this view when it resolved the circuit conflict in 2012 and concluded that "assessing the seriousness of the prior crime based on the sentence imposed before deportation should result in more consistent application of the enhancements in § 2L1.2(b)(1)(A) and (B) and promote uniformity in sentencing."

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[15] *Rosales-Garcia*, 667 F.3d at 1354; *Lopez*, 634 F.3d at 951-52; *Bustillos-Pena*, 612 F.3d at 867-68.

Amendment 764 at 12. Likewise, keeping U.S.S.G. § 2L1.2 as it now stands will result in a more consistent application of the Guidelines and promote uniformity. Thus, **the PAG opposes** the proposed amendment.

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we very much appreciate the opportunity to offer the PAG's input regarding the Commission's proposed amendments. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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