

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

150 West Flagler Street, Suite 1700
Miami, Florida 33130-1556

Chair: Michael Caruso

Phone: 305.530.7000

March 28, 2018

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: Reply Comment on Proposed 2018 Amendments

Dear Judge Pryor:

Defenders write in reply to the comments by the Department of Justice (DOJ) and the Probation Officers Advisory Group (POAG) regarding synthetic drugs. DOJ claims that increasing sentences of imprisonment for synthetic drugs will serve the purposes of sentencing. None of its comments, however, provide empirical evidence supporting such a position and some of the comments are so obviously incorrect that the Commission should not rely on DOJ's assertions in deciding how to amend the guidelines. While our previous comments provide substantial empirical evidence contradicting DOJ's assertions, we offer a few additional points here. We also offer comments on POAG's suggestion to apply different ratios for smokable synthetic cannabinoids and pure synthetic cannabinoids.

I. DOJ's Approach Will Increase Disparity and Disproportionality.

DOJ's comments demonstrate how the fundamental flaws of drug sentencing under the drug quantity table (DQT), based largely on drug type and quantity, make it impossible to improve sentencing through piecemeal amendment of the guidelines only for fentanyl and synthetic drugs. Moreover, the comments highlight crucial gaps in the record that make amendment of the guidelines premature at this time.

DOJ notes the unusual potency and lethality of fentanyl and synthetic cannabinoids.¹ Defenders agree these are important considerations for setting thresholds in the DQT. But if the guidelines are to be amended to better reflect potency and lethality, the thresholds for many other drugs need to be amended. Focusing on the lethality of one drug while ignoring the lethality of others, such as LSD (the drug with the highest marijuana equivalency, but with no “recorded case[s] of death exclusively attributed to LSD in humans”),² will only result in great disproportionality and disparity in the DQT.

Moreover, when convenient, DOJ ignores how quantities are actually determined under the DQT. It repeats the claim that “a defendant who sells enough fentanyl to kill almost 2,000 people is eligible for probation.”³ But the available evidence suggests that fentanyl is rarely sold to consumers in pure form at the retail level. Much more common is fentanyl pressed into pills along with far less potent and often inert substances and sold as prescription pharmaceuticals like Oxycontin or Xanax.⁴ If an effective dose of fentanyl is pressed into fake oxycodone tablets it is, according to the Commission, likely to weigh about 250 milligrams a piece,⁵ meaning that under the guidelines probation is available only to persons who distribute up to 16 doses.⁶

¹ Letter from Zachary C. Bolitho, *Ex Officio* Member, U.S. Sentencing Comm’n & Associate Deputy General Counsel, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 2, 14 (Mar. 6, 2018).

² Drug Policy Alliance, *LSD Fact Sheet* (Jan. 2017), https://www.drugpolicy.org/sites/default/files/LSD_Facts_Sheet.pdf. *See also* LSD Abuse Help (“overdose deaths are essentially non-existent since a person would need to take 100 to 200 doses at one time”), <http://www.lsdabusehelp.com/how-common-is-ld-overdose>.

³ Letter from Zachary Bolitho, Mar. 6, 2018, at 2.

⁴ *See, e.g.*, http://www.cleburnetimesreview.com/news/texas-of-states-flooded-with-fentanyllaced-pills/article_5d90ad34-c405-11e7-90ca-ebb31c92e530.html.

⁵ USSG §2D1.1, comment. (n. 9).

⁶ *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 7 (Nov. 13, 2017).

Given that quantities under the DQT include the weight of any “mixture or substance containing a detectable amount” of a drug, the Commission has simply not investigated or reported perhaps what are the most important considerations when establishing quantity thresholds:

- How pure and in what form is fentanyl typically weighed for sentencing purposes in the federal courts?
- How frequently is it in pure form?
- How frequently is it highly diluted, or pressed into tablets, or combined with inert ingredients or with other drugs?

Without answers to these questions, it is impossible to establish thresholds that rationally reflect the harms of these drugs as typically found in federal cases.

As discussed in previous Defender comments, maintaining the same thresholds for pure and highly diluted forms creates punishment inversely related to harm.⁷ Quantity-based guidelines often punish least severely the manufacturers and importers at the top of the distribution chain, while punishing most severely the lowest level sellers who typically distribute the drug in the most diluted form.

DOJ does not propose a consistent approach to drug sentencing that can achieve proportionality and reduce unwarranted disparity. It claims that “heroin—a similar but less lethal opioid—is punished more severely than fentanyl and fentanyl analogues.” But heroin is sentenced less severely than fentanyl based on the weight of the mixture or substance under the current DQT.⁸ One can only assume DOJ is

⁷ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 12, 14-15 (Mar. 10, 2017); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 5 (Aug. 7, 2017); Letter from Marjorie Meyers, Nov. 13, 2017, at 8.

⁸ The Commission’s new web-based app for the guidelines manual easily shows how DOJ is fundamentally wrong about how the guidelines currently treat fentanyl, fentanyl analogues, and heroin: 4 grams of fentanyl analogue has a base offense level (BOL) of 18; 4 grams of fentanyl has a BOL of 14; 4 grams of heroin has a BOL of 12. The marijuana

taking into consideration potency and typical dosage size of the pure forms of these drugs. Yet DOJ refuses to adopt that perspective in other situations, such as the appropriate equivalency for synthetic cannabinoids sprayed onto plant material, when doing so would argue for higher thresholds and equivalencies and thus lower sentences.

II. The Proposed Class-Based Definition of Fentanyl Analogue Is Not Well Supported by Witnesses at the Commission's Public Hearing.

DOJ claims that the testimony of Dr. Michael Van Linn and Dr. Barry Logan support the Commission's proposed definition of fentanyl analogue, asserting that both scientists testified "that fentanyl analogues constitute a class of drugs that share a core structure."⁹ The testimony, however, contradicts the position that all fentanyl analogues share a core structure. Dr. Linn's written statement does not contain the word "core."¹⁰ Moreover, Dr. Linn said that traffickers make changes to the chemical structure, noting that "fentanyl analogues have included structural modifications to vary part of fentanyl's chemical structure: the phenethyl group, the piperidine ring, the aniline ring, and the acyl group." His examples of "recent structural modifications to fentanyl observed on the illicit market" show the differences in chemical structures. For example, acetyl fentanyl includes CH₃, but acryl fentanyl includes -CH=CH₂.¹¹ Other fentanyl analogues do not include any CH, e.g., furanyl fentanyl, tetrahydrofuranyl fentanyl, cyclopropyl fentanyl and cyclopentyl fentanyl. Dr. Linn acknowledged that the information shows "structural modifications to every part of fentanyl's chemical structure." And even though he

equivalency ratio for heroin is 1kg and 2.5 kg for fentanyl. Under the current guidelines, a person with 0 criminal history points who traffics 4 grams of fentanyl analogue and receives a 3-level adjustment for acceptance of responsibility faces a guideline range of 18-24 months. A person who traffics 4 grams of fentanyl and receives a 2-level adjustment faces a guideline range of 10-16 months. If the person trafficked 4 grams of heroin, the guideline range would be 6-12 months. And, if the person sold 4 grams of heroin laced with a miniscule amount of fentanyl, he or she would face an 18-24 month guideline range.

⁹ Letter from Zachary Bolitho, Mar. 6, 2018, at 4.

¹⁰ Statement of Michael L. Van Linn, Ph.D., Before the U.S. Sentencing Comm'n, Washington, D.C. (Dec. 5, 2017).

¹¹ *Id.* at 4, tbl. 1.

claimed that a class approach based on structure would capture fentanyl related substances, he did not explain what evidence or rationale would support such an approach.¹²

Dr. Logan took more significant steps in explaining how a class based approach could be defined by identifying the special chemicals that can act as a substitute for other chemicals.¹³ Dr. Logan acknowledged at the Commission's hearing that modifications of the chemicals do impact potency, but he opined that "if you identify the presence of these chemical constituents on the molecule, *if all three of them are present*, then a chemist can recognize them as being related to or derived from fentanyl."¹⁴ That approach is quite different than the Commission's proposal that does not focus on the three main chemicals.

III. DOJ Has Not Focused on High-Level Traffickers.

DOJ makes the pitch for higher sentences for those who distribute fentanyl through the mail, claiming that a person in criminal history category I who distributes 20 grams of pure fentanyl¹⁵ would face a sentence of 27-33 months imprisonment. What DOJ does not discuss is that the Commission's own research shows that the majority of people it has prosecuted for fentanyl drug trafficking function as street-level dealers or couriers/mules.¹⁶ And of all persons prosecuted in FY2016, only 15.7% "clearly knew they had fentanyl."¹⁷ Nor does DOJ acknowledge that a person with 0 criminal history points who distributes 20 grams of pure fentanyl that

¹² *Id.* at 6.

¹³ Statement of Barry K. Logan, Ph.D., Before the U.S. Sentencing Comm'n, Washington, D.C., at 2 (Dec. 5, 2017).

¹⁴ Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C. at 53 (Dec. 5, 2017) (emphasis added).

¹⁵ DOJ doesn't specify pure fentanyl in its comments, but its claim that 20 grams is "sufficient to place approximately 10,000 lethal doses on American streets" makes clear that the 20 grams must be pure form.

¹⁶ USSC, *Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments* (Jan. 2018).

¹⁷ *Id.*

results in death or serious bodily injury faces a base offense level of 38, leading to a guideline range of 168-210 months if the person receives 3 points for acceptance of responsibility and no additional offense level adjustments.

IV. Increasing Guideline Ranges Will Not Provide Specific or General Deterrence.

DOJ asserts, without any empirical evidence, that increasing the guideline range for fentanyl will “provide a modicum of deterrence.”¹⁸ Decades of research, reviewed in previous comment,¹⁹ undercut the notion that increasing the guideline range for trafficking fentanyl and other synthetic drugs will increase general or specific deterrence.

V. Increased Incarceration Rates Will Negatively Impact BOP.

Even though BOP is an agency of DOJ, DOJ’s push for lengthier sentences fails to acknowledge the significant impact prison overcrowding has on BOP’s staff and the ability to maintain secure facilities. When promulgating amendments, the Commission should focus on its responsibilities to structure the guidelines in a way that will “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”²⁰ While the prison population has declined in the past few years, the Bureau of prisons remains overcrowded and the lack of sufficient staff presents significant problems. The low ratio of correctional officers to inmates in federal prisons, and the current administration’s proposed 2019 budget, increases the problems for staff and inmates in federal prisons.

Eric Young, the president of the American Federation of Government Employee’s Council of Prison Locals recently expressed grave concern about the 2019 budget proposal, noting that BOP already “has proposed the elimination of 6,000 unfilled positions” and the FY2019 plan will eliminate “another 1,000 positions and the

¹⁸ Letter from Zachary Bolitho, Mar. 6, 2018, at 3.

¹⁹ Letter from Marjorie Meyers, Oct. 26, 2017, at 2-7.

²⁰ 28 U.S.C. § 994(g).

closure and reorganization of some prisons.”²¹ “According to prisoner projections included in the 2019 budget, that ratio would be approximately one worker for every five prisoners [5-to-1 inmate to staff]”²²—a ratio that is greater than the current 4.3-to-1 ratio,²³ and greater than the 4.4-to-1 ratio the former Director of the BOP told Congress negatively impacted the “ability to effectively supervise inmates and provide inmate programs.”²⁴

Rather than buy into the myth that imprisonment acts as a general deterrent and is always necessary to meet other purposes of sentencing, the Commission should take steps to reduce the prison population, make prisons safer, and acknowledge the empirical data which shows that lesser terms of imprisonment and alternatives to incarceration do not increase the risk of public safety.²⁵

VI. POAG Rightly Supports Separate Ratios for Synthetic Smokable Cannabinoids and Pure Synthetic Cannabinoids.

POAG unanimously agrees that the Commission should adopt different ratios for smokable synthetic cannabinoids and pure synthetic cannabinoids.²⁶ While

²¹ Jessie Bur, *Federal Prison Workers Decrease, Dangers Increase in Trump’s Budget*, *Federal Times* (Feb. 15, 2018). *See also* Office of the Inspector General, *Congressional Justification, U.S. Dep’t of Justice FY2019 Performance Budget 7* (2018) (DOJ “continues to face challenges within the federal prison system,” including “significant overcrowding in the federal prisons, which potentially poses a number of important safety and security issues.”).

²² Bur, *supra* note 21.

²³ BOP, *Program Fact Sheet* (Feb. 2018).

²⁴ Oversight of the Bureau of Prisons, Hearing Before the Committee on Homeland Security and Governmental Affairs (Aug. 4, 2015) (statement of Charles E. Samuels, Jr., Dir., Federal Bureau of Prisons), <https://www.bop.gov/resources/news/pdfs/080415-written-statement.pdf>.

²⁵ Daniel Mears & Joshua Cochran, *Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions*, 55 *J. Res. Crime & Delinq.* 194, 207-217 (2018).

²⁶ Letter from Probation Officers Advisory Group, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 2-3, (Mar. 5, 2018).

Defenders disagree with POAG that the Commission should rely on an arbitrary 1:167 ratio for THC to set an even higher ratio for pure synthetic cannabinoids, Defenders agree that the ratio for smokable synthetic cannabinoids should be lower than the ratio for pure synthetic cannabinoids. Defenders continue to urge that the simplest and best approach is to treat smokable synthetic marijuana on a 1-to-1 basis with marijuana.²⁷ POAG's recommendation, however, to set the ratio for smokable synthetic cannabinoids by dividing the pure form by 14, is consistent with evidence Defenders acknowledged in our earlier comments. Specifically, Defenders noted DEA findings that synthetic marijuana is commonly formed by mixing 1 gram of a substance such as JWH-018 with 13 grams of inert material and suggested that a mixture weighing 14 grams should be treated as if it were 1 gram of pure synthetic cannabinoid.²⁸ Because POAG's proposal is pegged to the ratio for pure synthetic cannabinoids, the appropriateness of the proposal is partly dependent on how high the Commission sets that ratio.

²⁷ Statement of Kevin Butler Before the U.S. Sentencing Comm'n, Washington, D.C., at 19 (Mar. 14, 2018).

²⁸ *Id.* See also Transcript of Public Hearing before the U.S. Sentencing Comm'n, Washington, D.C., at 191 (Apr. 18, 2017) (Dr. Gregory Dudley).

VII. Conclusion

We appreciate the opportunity to reply to comments submitted during the initial comment period. We remain hopeful that in considering whether and how to amend the guidelines, the Commission will acknowledge the empirical data showing that lengthier sentences will not help the drug crisis.

Very truly yours,

/s/ Michael Caruso

Michael Caruso
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*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel