PREPARED TESTIMONY OF KNUT S. JOHNSON, VICE CHAIR OF THE PRACTITIONER'S ADVISORY GROUP

Thank you, Mr. Chairman. I have been a criminal defense attorney for over thirty years, and have practiced with Federal Defenders of San Diego, Inc., McKenna & Cuneo, and in my own small firm. I represent retained clients as well as clients appointed to me by the court under the Criminal Justice Act.

I want to thank the Commission for my appointment to the Practitioners Advisory Group and for the opportunity to serve currently as its Vice-Chair. I am proud to serve our Chair Ron Levine, the other 15 members of the Practitioners Advisory Group, and the Commission in our efforts to improve federal sentencing.

The Practitioner's Advisory Group, the PAG, has also written the Commission about today's issues in detailed letters. Please allow me to address the issues in this order: First Offender/ Alternatives to Incarceration and then Synthetic Drugs.

(Testimony on First Offenders/Alternatives to Incaceration begins on the next page.)

I. PROPOSED AMENDMENT: FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

(A) Definition of First Offender

The PAG supports the Commission's Option 1, which defines a first offender as a person with no criminal history points (*i.e.*, no prior convictions countable under U.S.S.G § 4A1.2). If the Commission determines that the definition of a "first offender" should be limited to persons with no convictions, **the PAG recommends** that this definition be restricted to no *felony* convictions and that an Application Note to U.S.S.G. § 5C1.1 be added to clarify that U.S.S.G. § 5C1.1(g) is not intended to restrict a court's consideration of alternatives to incarceration only to "first offenders" so defined.

As we have noted before, the Commission's 2004 study supports this position. In 2004, the Commission evaluated offenders with no prior arrests, offenders previously arrested but not convicted, and offenders with prior convictions that did not count towards criminal history. The Commission found all three of these offender groups are readily distinguishable from offenders with one or more criminal history points. In general, they are less likely to go to prison, to use illegal drugs, and to have violent instant offenses. The offender groups are also more likely to be employed, to have a high school degree, and to have financial dependents.

In addition, because recidivism studies by the Commission and others show that length of incarceration has relatively little effect on recidivism, **the PAG also recommends** that the first offender Chapter Two reduction not be limited to defendants under a specified offense level. Research consistently shows that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects." Logically then,

wholesale elimination of eligibility for first offender status based on overall offense level is unwarranted. While certain cases may merit a more significant term of incarceration based on § 3553(a), the sentencing court is best positioned to make that determination on a case-by-case basis.

The PAG supports moving additional low-level offenders into sentencing ranges that will expand the pool of defendants eligible for alternatives to incarceration at the court's discretion. **The PAG supports** Option 2 but **the PAG recommends** that a larger deduction be granted to first offenders when the offense level is 16 or higher. Specifically, **the PAG suggests** a 2-level reduction for offense levels less than 16, and a 3-level reduction for offense levels at and greater than 16.

Finally, if the Commission adopts a rebuttable presumption in favor of the first offender provision, **the PAG recommends** that this provision should not exclude certain categories of non-violent offenses. As the presumption is rebuttable, it is not necessary to restrict further the application of the first offender provision. While there is some empirical support for the proposition that violent offenders recidivate at higher rates and sooner than their non-violent counterparts, there is no empirical evidence to support exclusion of certain categories of non-violent offenses. Studies show no significant difference between recidivism rates for white-collar offenders sentenced to prison and similar offenders who did not receive a prison sentence.

(B) Consolidating Zones B and C

The PAG supports the consolidation of Zones B and C so that courts may, if appropriate, consider community and home confinement alternatives after a lesser term

of imprisonment for defendants who would have fallen within Zone C and who are otherwise ineligible for probation.

The PAG notes its continued concern that offenders sentenced to prison will continue to suffer serious financial and other difficulties from the collateral consequences of not only their non-expungable federal conviction but also from the time they spent in prison, taking them out of the work force. As noted by a recent University of Michigan study, offenders with convictions that are set aside have "a significant increase in employment and average wages" and a lower recidivism rate. PAG members are also aware of offenders who lost jobs because of incarceration, where the employer knew about the felony conviction. Providing more alternatives to incarceration to a range of offenders who are, according to the Commission's study, the least likely to reoffend will also promote the reintegration of those low-risk offenders.

(Testimony on Synthetic Drugs begins on the next page.)

II. Proposed Amendment – Synthetic Drugs

The PAG supports the Commission's prior 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." While not a substantive policy change, that proposal would help to 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.

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, which shows that the substances identified in the proposed amendments involve a relatively low number of offenders. Of those offenders, the majority received either within Guideline range sentences or below range sentences for non-5K1.1 reasons.

For Fiscal Year 2015, the Commission reports the prosecution of only:

- 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 Guideline offenders in Fiscal Year 2015 and only 1.8% (0.018) of offenders sentenced under the drug Guidelines in that year.

- In addition, of the "primary drug type" of offenders sentenced under the drug Guidelines, the "other drug category – which would encompass the drugs at issue –

constitutes 8.2% (0.0815) of drig offenders in Fiscal Year 2015,[1] and this decreased to 6.7% (0.066) in Fiscal Year 2016.[2]

The PAG does not cite these statistics 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 does not** view as necessary or justified the Commission's proposals to set minimum base offense levels or add offense enhancements.

Finally, the **PAG notes** that addressing the overdose epidemic plaguing our country through more severe sentences for certain traffickers, if appropriate to the case, can already be accomplished via statutes and Guidelines already on the books:

- 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).

- Of course, the Guidelines also provide for:

(a) 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);

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[1] *Id.* at Table 33.

[2] U.S.S.C., 2016 Sourcebook of Federal Sentencing Statistics at Table 33, available at https://www.ussc.gov/research/sourcebook-2016.

(b) 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;

(c) 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

(d) the possibility of an upward departure for offenses significantly endangering public health or safety. U.S.S.G. § 5K2.14.

Nonetheless, the PAG will address certain questions posed by the Commission. If the Commission adopts amendments related to synthetic drugs, the PAG would support a class-based approach for synthetic cathiones and synthetic cannabinoids. Also, the PAG supports a minimum base offense level of 12 for synthetic cathinones and synthetic cannabinoids.

For synthetic cathinones the marihuana equivalency should be set at 380 grams, consistent with the equivalent for methcathininone. In United States v. Moreno, 870 F.3d 643 (7th Cir. 2017), the Seventh Circuit affirmed a detailed factual finding by the district court that under the guidelines the equivalent drug for a cathinone was methcathinine. Id. at 647-648. That opinion noted several district court opinions and a Ninth Circuit unpublished opinion that came to the identical conslusion. In addition, although we are not chemists, the PAG supports including methcahinone in the class of synthetic cathinones, which seems to be consistent with the findings of the United

Nations Office on Drugs and Crime.[3] Also, the Commission should define "synthetic cathinones" for clarity.

For synthetic cannabinoids, the PAG supports the 167-gram marijuana equivalency, the same equivalency used for synthetic and organic THC. Given their close chemical and biological properties, this approach would create some 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 reflects the science related to synthetic cannabinoids. Thus, this definition should cover synthetic THC because THC and synthetic cannabinoids work on identical brain cell receptors.

As to fentanyl, the PAG believes that the Commission should not increase the offense levels because doing so would create a separation between the guidelines and the mandatory minimums. The PAG also believes that the Commission should revise 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 Commission should provide for a guided departure or variance (discussed below) for less toxic or addictive substances that would otherwise fall within the new definition of fentynyl.

The PAG also opposes upward adjustments for misrepresenting or marketing fentanyl as another substance. If the Commission adds this adjustment, it should be limited two levels and to situations where an offender did so knowingly.

[3] *See*, https://www.unodc.org/LSS/SubstanceGroup/Details/67b1ba69-1253-4ae9-bd93-fed1ae8e6802

Application Note 18 subsection (b)(13), already provides for a possible upward departure available if an offense involved a threat to the health or safety of law enforcement or emergency personnel if the offense involved the discharge of substances. This application note could be amended to clarify that it covers other situations involving where the guidelines are calculated under §2D1.1.

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.

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.