

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

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The Honorable 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. 20002-8002

Dear Judge Pryor,

The Probation Officers Advisory Group (POAG) met in Washington, D.C., on July 25 and 26, 2017, to discuss and formulate recommendations to the United States Sentencing Commission regarding the Commission's Notice of Proposed Priorities and ongoing POAG concerns. POAG comments on the selected Proposed Priorities and proposes additional issues for consideration.

Priority 2: Continuation of its multi-year study of offenses involving MDMA/Ecstasy, tetrahydrocannabinol (THC), synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the Guidelines Manual that may be appropriate. As part of this examination, the Commission more generally intends to study possible approaches to simplify the determination of the most closely related substance under Application Note 6 of the Commentary to USSG §2D1.1.

POAG reviewed and discussed the Commission's request for public comment and the public hearing material from April 18, 2017. POAG supports ongoing research and the collection of information about the chemical compounds and effects of synthetic controlled substances to establish marijuana equivalencies and base offense levels under the guidelines. Broader categories of these substances may help capture the many compounds and their effects, as well as the ever-changing chemical structure of synthetics. A simplified approach, based on scientific information, will ease guideline application, reduce lengthy court hearings regarding conversion ratios, and provide uniformity in sentencing for similar substances across the nation. POAG offers the following comments about specific synthetics:

MDMA/Ecstasy and Methylone

POAG supports the Commission's efforts to find an appropriate marijuana equivalency for MDMA/Ecstasy and Methylone. These cases appeared to have increased over the years, thus creating the need for additional guidance on how to account for these substances in a fair and consistent manner. POAG notes that some judges have held hearings on the appropriate marijuana equivalency for both MDMA and Methylone. POAG members have heard of instances where courts have found a 1:400 MDMA-to-Marijuana equivalency, a 1:200 Methylone-to-Marijuana equivalency, and a 1:250 Methylone-to-Marijuana equivalency. POAG recognizes that the Commission is in a better position to collect testimony and pharmacological evidence in order to set a science-based marijuana equivalency on these substances. Whatever ratio the Commission establishes after the study, POAG recommends the Commission provide the data supporting the ratio to the public so that the judges may have the empirical justification as added support for the adoption of the Commission's established ratios.

POAG agrees with the testimony that a synthetic cathinones category may help alleviate the problems associated with the criminal evolution of molecular changes to substances. POAG recommends that the Commission also look at Ethylone and its similarity to MDEA (with acknowledgement that Ethylone is less prevalent a problem than either MDMA or Methylone).

Synthetic Cannabinoids (JWH-018, AM-2201, XLR-11, UR-144, THJ-2201, AB-FUBINACA, ...)

POAG supports the Commission's efforts to find an appropriate set of ratios for capturing the criminal impact of synthetic cannabinoids in pure form and synthetic cannabinoids that have been infused into inert plant material (synthetic smokable cannabinoids). Under the current guidelines, courts are obligated to calculate pure synthetic cannabinoids in the same fashion as synthetic smokable cannabinoids despite the fact that the pure synthetic cannabinoids mass is smaller because it has yet to be coated over inert plant material.

POAG members discussed the testimony in which a pure form of synthetic cannabinoids could be used to make 14 times the amount of synthetic smokable cannabinoids. This 1:14 difference between the two is an excellent beginning. However, POAG members observed that the testimony the Commission heard on synthetic smokable cannabinoids appeared to presume a natural parity between marijuana and smokable synthetic cannabinoids because the amounts of THC were comparable. POAG respectfully recommends that the Commission investigate whether marijuana and synthetic smokable cannabinoids are in fact equal to each other. Marijuana is a constellation of chemicals, some of which reportedly have a mitigating impact on the more severe aspects of THC; whereas synthetic smokable cannabinoids do not have the other naturally occurring compounds that may mitigate the neurological intensity of the synthetic smokable cannabinoids.

POAG recommends the Commission make an inquiry into whether which synthetic smokable cannabinoids are more serious or damaging than marijuana and whether any degree of seriousness should be factored into the new ratios in the following fashion:

- x = the numeric value representing the degree to which synthetic smokable cannabinoids are more serious than marijuana.
- 1: x = the ratio of marijuana to JWH-018/AM-2201/XLR-11 coated plant material.
- 1:14 x = the ratio of marijuana to JWH-018/AM-2201/XLR-11 in its pure powder form.

POAG does not have an opinion on what *x* should be or the resources available to determine *x*. We suggest this thought process in order to keep the ratios between the coated plant material and the pure form remain connected by the degree of seriousness the Commission attributes to synthetic smokable cannabinoids. If *x* is 1, meaning that marijuana and synthetic smokable cannabinoids are the same for all intents and purposes, then JWH-018/AM-2201/XLR-11 coated plant material is 1:1 and the pure form is 1:14. However, if the Commission determines that *x* is 10, meaning that synthetic smokable cannabinoids are ten times as dangerous/harmful as marijuana, than the ratios become 1:10 and 1:140 respectively.

POAG agrees with the testimony that a synthetic cannabinoids category may help alleviate the problems associated with the criminal evolution of molecular changes to analogous substances.

Fentanyl and Fentanyl Analogues

POAG received feedback from the field on application issues with furanyl fentanyl, which was a fentanyl analogue until November 29, 2016, at which point it was temporarily placed into Schedule I. The existing sentencing guidelines produce disparate results when furanyl fentanyl is treated as a stand-alone substance compared to when it is combined with other substances. Consider a calculation involving solely 6.4 grams of furanyl fentanyl compared to a case involving 6.4 grams of furanyl fentanyl and 100 grams of powder cocaine.

Handled as a stand-alone substance, furanyl fentanyl would be treated as a fentanyl analogue in the Drug Quantity Table and 6.4 grams of a fentanyl analogue would set a base offense level of 20. USSG §2D1.1(c)(10). The conversion ratio implicit in the drug quantity table is 1 gram fentanyl analogue is equivalent to 10 kilograms marijuana.

Adding 100 grams of powder cocaine to the 6.4 grams of furanyl fentanyl produces a different result. In the case example obtained from the field, fentanyl was determined to be the most closely related substance to furanyl fentanyl per DEA testimony and the three-part test in USSG §2D1.1, comment. (n.6).

Controlled Substance	Conversion	Marijuana Equivalency
6.4 Grams Furanyl Fentanyl	1 Gram Fentanyl = 2.5 Kilograms Marijuana	16 Kilograms Marijuana
100 Grams Cocaine	1 Gram Cocaine = 200 Grams Marijuana	20 Kilograms Marijuana
	<i>Total:</i>	<i>36 Kilograms Marijuana Equivalency (BOL: 16)</i>

The combination of converted furanyl fentanyl and cocaine thus results in a base offense level of 16, which is less than furanyl fentanyl as a stand-alone substance. POAG recommends that the Commission remedy this by including fentanyl analogue in the Drug Equivalency Tables at USSG §2D1.1, comment. (n.8(D)) utilizing the same ratio applied in the Drug Quantity Table found in USSG §2D1.1(c). As more fentanyl variants are prosecuted within the context of the national opiate epidemic, courts across the country will have to work around this application discrepancy – and may not even realize the issue exists.

Additional Recommendations Regarding USSG §2D1.1

POAG recognizes that there is an increased influx of synthetic drugs produced abroad and purchased for distribution in the United States. In some of these cases, POAG observed that defendants have used cryptocurrencies or blockchain based commodities (i.e. Bitcoin, Ethereum, Litecoin) to pay for the synthetic drugs. The use of such cryptocurrencies or blockchain based commodities places the purchase outside of the common banking schemes, making the investigation of the trafficking activity more difficult. Additionally, the use of such means of payment shows a higher degree of sophistication than the average drug trafficking defendant. As such, POAG recommends that the Commission consider adding a specific offense characteristic under USSG §2D1.1 for the use of cryptocurrencies or blockchain based commodities to facilitate the purchase or sale of any controlled substances.

Synthetic Drug Landscape by Circuit

The First Circuit reported a Methylone/“Molly” case in which a 1:250 gram marijuana equivalency was used. The First Circuit representative further reported synthetic cannabinoid cases (AB-FUBINACA and XLR-11) where a 1:167 marijuana equivalency was utilized – regardless of form. The First Circuit further reports fentanyl prosecutions.

The Second Circuit has had cases involving “alpha-pyrrolidinopentiophenone” (alpha-PVP) in which the courts used a 1:380 gram conversion ratio from Methcathinone to marijuana equivalency. In so doing, one of the courts rejected the argument that alpha-PVP was most closely related to pyrovalerone. The court in that case held extensive hearings related to determining the similarity of alpha-PVP to Methcathinone. The Second Circuit also has a pending case in which a defendant was distributing e-cigarette cartridges filled with a liquid based cannabis solution and was exploring a per-unit drug weight for the cartridges. The Second Circuit representative is not aware of any MDMA or Methylone cases, but has verified synthetic cannabinoid cases in which the Court applied the 1:167 ratio. The Second Circuit also reports the prosecution of fentanyl and fentanyl analogues.

The Third Circuit representative reported a few MDMA prosecutions for which a 1:500 marijuana equivalency was utilized along with Methylone prosecutions that utilized a 1:250 ratio. The Third Circuit representative was aware of at least one Methylone case that involved an evidentiary hearing.

The Fourth Circuit representative is not aware of any MDMA, Methylone, synthetic cannabinoid, cathinone, or fentanyl cases within her circuit.

The Fifth Circuit has had at least one synthetic cannabinoid case. The Court heard expert testimony regarding an appropriate conversion ratio for AM-2201. The Court agreed that THC is the most closely related substance to AM-2201 and applied the 1:167 ratio. The Court agreed that 1:167 ratio appeared arbitrary but acknowledged that the ratios often seek to outline the relative harm of certain drugs. The Fifth Circuit Court of Appeals upheld the District Court’s decision to use the 1:167 ratio. The Fifth Circuit representative reported that her circuit currently has a Methylone and a MDMA case pending sentencing, but is not aware of any synthetic cathinone or fentanyl cases within her circuit.

The Sixth Circuit has had cases involving MDMA and Methylone. The cases were older and the ratios used were unclear. However, in one of the cases, the defendant was traveling to a drug deal while under the influence of Methylone and inadvertently struck a church van, killing two people. The Sixth Circuit has also had a pending case involving butyryl, acrylentanyl, carfentanil, and furanyl fentanyl. The probation office in this case has recommended that all four substances be treated as fentanyl analogues. The Sixth Circuit representative is not aware of any synthetic cannabinoids or cathinone cases within her circuit.

The Seventh Circuit reported cases involving “alpha-pyrrolidinovalerophenone” (alpha-PVP) and synthetic cannabinoids (JWH-018 and AM-2201). It should be noted that the alpha-PVP cases reported from the Second and Seventh Circuits are different underlying compounds – highlighting the need for a categorical synthetic cathinone conversion. Based on evidence provided by the government, the chemical make-up of alpha-PVP was determined to be similar to methcathinone and a 1:380 ratio was used to determine marijuana equivalency. The chemical make-up of JWH-018 and AM-2201 was determined to be similar effects of THC and a 1:167 ratio was used to determine the marijuana equivalency.

The Eighth Circuit representative reported that there are cases addressing MDMA, Methylone, synthetic cannabinoid, cathinone, or fentanyl cases within her circuit, but that these types of cases continue to be infrequent. The Eighth Circuit has found that a 1:167 tetrahydrocannabinol (THC) to marijuana conversion was appropriate for determining the offense level for synthetic cannabinoids.

The Ninth Circuit representative reports cases involving MDMA and Methylone from at least two districts.

The Tenth Circuit representative is not aware of any MDMA, Methylone, synthetic cannabinoid, cathinone, or fentanyl cases within his circuit.

The Eleventh Circuit reports synthetic cannabinoid cases, MDMA cases, Methylone cases, and fentanyl cases within the circuit. The Eleventh Circuit has had cases involving AM-2201, XLR-11, UR-144, THJ-2201, and AB-FUBINACA. In the synthetic cannabinoid cases, most judges have adopted a 1:167 ratio regardless of whether the synthetic cannabinoids were in pure powder form or coating inert plant material. The 1:167 ratio has been used in approximately a dozen cases. There are at least two cases in which an alternative ratio was used. In one of those cases, the Court used a 1:1 ratio for AM-2201 coated inert plant material. The 1:1 ratio in that case was adopted based on a plea agreement. The other alternative ratio was a 1:14 ratio on AB-FUBINACA and XLR-11 coated inert plant material (not pure powder form of AB-FUBINACA and XLR-11).

The Eleventh Circuit has also observed MDMA and Methylone cases. In the majority of MDMA cases, the Court adopted the 1:500 ratio prescribed by the Commission. In most Methylone cases, the court adopted either a 1:500 or a 1:250 equivalency. There was an alternative ratio for MDMA and Methylone in a case dealing with Methylone; the Court in one case found that an appropriate ratio for MDMA was 1:400 and that Methylone should have a ratio half that of MDMA, finding the appropriate Methylone ratio to be 1:200.

The Eleventh Circuit also reports fentanyl cases, and the courts have been inclined to adopt the fentanyl conversion ratio of 1gm to 2.5 kg.

The DC Circuit representative is not aware of any MDMA, Methylone, synthetic cannabinoid, cathinone, or fentanyl cases within her circuit.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed priorities. POAG supports the Commission’s work on synthetic drugs will continue to solicit feedback from the field in the event this priority takes shape in a formal amendment to the guidelines.

Respectfully,

Probation Officers Advisory Group
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