

November 13, 2017

Judge William H. Pryor, Jr., Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

RE: Request for Public Comment (BAC 2210-40) – Fentanyl and Fentanyl Analogues

Dear Judge Pryor:

The undersigned organizations appreciate this opportunity to provide comments as the Commission undertakes a multiyear study of offenses involving fentanyl, fentanyl analogues, synthetic cathinones and synthetic cannabinoids, as well as tetrahydrocannabinol, with the intent of determining appropriate sentencing guideline amendments. The focus of these comments relates to the Commission’s study of fentanyl and fentanyl analogues.

Pharmaceutical fentanyl is a synthetic opioid pain reliever typically used for treating advanced cancer pain.¹ The distribution and use of pharmaceutical fentanyl for illicit purposes is typically diverted from healthcare settings in small amounts and for personal use.² The large-scale appearance of fentanyl in the heroin market is not attributed to pharmaceutical fentanyl. Indeed, though the number of prescriptions for fentanyl has remained stable, the number of law enforcement fentanyl encounters has more than doubled from 5,343 in 2014 to 13,882 in 2015.³ The number of states reporting 20 or more fentanyl confiscations every six months is increasing as well.⁴ From July to December 2014, 18 states reported 20 or more fentanyl drug confiscations,⁵ up from only six states in 2013.⁶

The Centers for Disease Control and Prevention has accordingly concluded that most of the increase in fentanyl use does not involve prescription fentanyl, but instead is related to illicitly-made fentanyl that is mixed with or sold as heroin or increasingly as counterfeit prescription opioid pills.⁷ Illicit fentanyl is often added to heroin supplies in an uneven manner, meaning someone buying heroin could end up with a supply with significantly more illicit fentanyl in it than the next person who buys from the same “batch.” Increased fentanyl use, either intentionally or, more often, without the user’s knowledge, is most common in areas where white powder heroin is prevalent—particularly across the eastern United States—because fentanyl is often mixed with or disguised as white powder heroin.⁸ On the west coast, tar heroin is more typically used, making it more difficult to cut with fentanyl.

Illicit fentanyl is generally manufactured in China and imported directly to Mexico where it is mixed with heroin before distribution to the United States.⁹ DEA spokesman Rusty Paine has stated: “China is by far the most significant manufacturer of illicit designer synthetic drugs. There is so much manufacturing of new drugs, [it’s] amazing what is

coming out of China. Hundreds of [versions], including synthetic fentanyl and fentanyl-based compounds.”¹⁰ Louis Milione, who runs the DEA Diversion Control Center, confirms that “China is the primary source of fentanyl.”¹¹ The DEA is also aware of illicit labs in Mexico producing fentanyl from precursors manufactured in China.¹²

While there is some limited evidence that illicit fentanyl is being obtained through the darknet (commercial websites functioning as black markets) from China and pressed into counterfeit opioid pills in the United States,¹³ the DEA has not found any illicit fentanyl labs operating in the United States¹⁴ and has found, according to a spokesperson, “little evidence” that fentanyl is added to heroin from locations within the United States.¹⁵ Even if fentanyl were added to heroin in the United States, it would most likely be done at the top of the distribution chain, and many street-level sellers, like users, are unaware of its presence.

Recent epidemiological research on the changing nature of the heroin market confirms that while some people who use illicit opioids report being able to discern the presence of fentanyl in heroin by color and consistency, many people at the bottom of the distribution chain and end users are often unaware of the product they are selling or consuming.¹⁶ Similarly, Rhode Island ethnographic research in 2016 found that most users do not appear to be seeking fentanyl and are not aware that their illicit drugs may contain fentanyl. Low-level drug sellers may not know their heroin and cocaine products are tainted and do not want to be associated with deaths among users they have supplied.¹⁷

Because people are largely unaware that what they believe to be heroin is either fentanyl or has been cut with fentanyl, they are not focused on how to mitigate the potential risks of use, including overdose. Likely as a result, the number of overdose deaths involving synthetic opioids, excluding methadone but including fentanyl, increased by 72% from 2014 to 2015.¹⁸ Provisional data from 2016 indicates that drug deaths involving fentanyl and other synthetic opioids more than doubled from 2015 to 2016.¹⁹ The most significant increases in fentanyl-related deaths appear to be in the Northeast.

Massachusetts, for instance, had virtually no fentanyl related deaths prior to 2015 when it jumped to over 50% of overdose deaths for the year.²⁰ Also in 2015, Rhode Island approached nearly 50% of overdose deaths attributed to fentanyl.²¹ In 2016, fatalities involving fentanyl reached more than 65% of overdose deaths in the state of New Hampshire.²² A New York City Health Advisory in October 2016 noted that between July and October 2016, nearly half (47%) of confirmed drug overdose deaths involved fentanyl compared to 16% in 2015.²³ Initial data from Maryland indicate an increase from 192 fentanyl overdose deaths during 1/2015–10/2015 to 738 during 1/2016–10/2016.²⁴ Some of the observed increase in fentanyl related overdoses may be attributable to improved toxicologic testing and reporting of specific drugs related to overdose deaths.²⁵

The CDC confirms that most recent increases in non-fatal and fatal fentanyl-involved overdoses are linked to illicitly manufactured fentanyl, not prescription fentanyl.²⁶ The Massachusetts Epi-Aid investigation similarly found that of the fentanyl-related overdose deaths they reviewed, 82% were attributed to illicitly manufactured fentanyl compared

with only 4% attributed to pharmaceutical fentanyl (14% were attributed to an unknown source).²⁷

These numbers indicate that fentanyl is increasingly becoming ubiquitous with heroin in the Northeast United States. In other words, it is becoming more difficult to obtain heroin that has not been adulterated with at least some fentanyl.

Formerly incarcerated people, who are at an especially high risk of a fatal drug overdose, may be especially susceptible to the risks of heroin that has been adulterated with fentanyl.²⁸ The lack of effective drug treatment in prisons— including in the federal Bureau of Prisons where medication-assisted treatment is not available outside of a pilot program—returns people with opioid use disorders to their communities often with lower tolerance for the drugs.

While the risks of fentanyl use can be grave, they have also been grossly overstated. As just one example, media, law enforcement and others perpetuated inaccurate information about the risks that fentanyl poses to first responders, including concerns that skin and clothing contact with fentanyl is life threatening. In fentanyl guidelines released for first responders this year, the White House National Security Council highlighted that “misinformation and inconsistent recommendations regarding fentanyl have resulted in confusion in the first responder community.”²⁹

Moreover, the risks associated with fentanyl, including overdose, may be attributed more to the lack of knowledge of what one has ingested as opposed to an inherent danger of the drug itself. Indeed, if consumers knew they were ingesting fentanyl, they could significantly lower their risk by, for instance, using a smaller amount, ensuring they do not use alone, and ensuring multiple doses of naloxone are on hand. Consumers should also have access to drug checking methods that conduct a chemical analysis of a drug sample and confirm the presence of fentanyl or analogues. Without access to drug checking methods, it is impossible for a consumer to know the chemical composition of a substance, and be informed so that they can lower their risk.

Based on the above findings, the Commission should consider the following factors when amending the sentencing guidelines in this area:

- Many people who use or sell fentanyl appear to be doing so unwittingly: Initial research indicates that people are not seeking out fentanyl. Supply is not meeting demand here; rather, the supply is being passed off as what people want—heroin—with an adulterant that is cheaper to produce. Regardless of the circumstances involving a person’s use or sale of fentanyl or fentanyl analogues, there are already harsh federal penalties in place. Increasing those penalties will not serve as a deterrent. And while data is emerging to help us begin to understand the fentanyl market, it is critically important that the Commission’s evaluations of fentanyl and fentanyl analogues be informed by additional epidemiological research that surveys a broad population to better understand how prevalent the use of fentanyl and fentanyl analogues is as well as adverse effects

from using these substances. Decisions regarding the appropriate sentencing guidelines should be based on the best possible and most rigorous science on this issue, which is still emerging.

Little is known about standard fentanyl “doses”: There is a lack of collective understanding as to what constitutes an ordinary psychoactive dose for fentanyl and fentanyl analogues, particularly since many people do not know that the substance they are in possession of contains fentanyl. People are likely being charged with distributing or intending to distribute what is in fact intended to be possession of a quantity of fentanyl or fentanyl analogue for personal use. This is particularly true because fentanyl is often not evenly distributed within a heroin supply. The average amount that a person possesses at any given time for personal consumption is often contingent upon an individual’s tolerance level for a drug and the quantity of a drug purchased for personal use.

- Doubling penalties is counterproductive: People who use and sell heroin are already subject to punitive penalties, including existing federal mandatory minimum sentences for heroin and fentanyl. Furthermore, we are not addressing a new category of people. Layering additional penalties for people whose heroin contains fentanyl serves little purpose, and has been proven harmful.³⁰ Since the weight of a substance is a factor in assessing penalties, the commission should also refrain from attaching penalties to the total weight of a substance that do not reflect the actual chemical composition of that substance. Illicit fentanyl is typically mixed in with heroin supplies. It is also not uncommon to find licit substances in drug supplies, such as baking soda and caffeine. A person should not be charged with supplying or possessing a gram of fentanyl when they actually supplied one gram of heroin that is one-tenth fentanyl. The weight of a substance that is assessed should be the actual weight and not the inflated weight, and the volume of drugs should be considered in the context of the defendant’s role. Law enforcement agencies should be required to conduct the chemical analysis of seized drugs and report its contents for sentencing purposes.
- Pharmaceutical fentanyl, illicitly manufactured fentanyl, and fentanyl analogues carry unique and differing levels of risk: As noted above, the Centers for Disease Control and Prevention concluded that most of the increases in fentanyl deaths do not involve prescription fentanyl, but instead are related to illicitly-made fentanyl that is mixed with or sold as heroin or increasingly as counterfeit prescription opioid pills. Moreover, given the differences in potency and other pharmacological properties of fentanyl analogues that have been identified on the illicit market, and the varying degrees to which some of these substances may pose health risk, we urge the Commission to not hold all of these substances to one standard for the purpose of sentencing a person to a term of incarceration, as would be the case with a broad-class based approach to fentanyl and fentanyl analogues for sentencing purposes. Health risks between pharmaceutical fentanyl and illicit fentanyl must also be considered. Although both forms of fentanyl

carry specific health risks, pharmaceutical fentanyl is less likely to contain fentanyl analogues and other adulterants that pose additional health risk.

- The risks and harms associated with fentanyl will only be made worse by strict sentencing guidelines that enhance criminal penalties for fentanyl sale or use: Law enforcement crackdowns on the heroin and fentanyl supply have incentivized the illicit manufacture and distribution of fentanyl analogues such as carfentanil and acetylfentanyl. Fentanyl analogues are chemically similar to fentanyl but are often more potent.³¹ New formulations of fentanyl analogues have emerged in recent years, as illicit chemists attempt to work around laws prohibiting them. In other words, strict prohibitions on fentanyl will likely result in the emergence of new substances that are even more dangerous.
- Enhancing penalties for people who sell and use drugs, including opioids, amplifies harms associated with the criminalization of people who use drugs: These harms include the risk of fatal overdoses and diseases, and increased stigma and marginalization that drives people away from needed treatment, health and harm reduction services.³² Ultimately, the most effective way to reduce overdoses associated with fentanyl and fentanyl analogues involve approaches that reduce harm and promote health, such as prevention education, drug checking, harm reduction education, and access to effective and affordable treatment.

The Commission's decision-making on guidelines with respect to fentanyl and fentanyl analogues may influence lawmakers at both the federal and state level. A decision to make sentencing guidelines for offenses involving the specified compounds excessively punitive could influence lawmakers to pursue more aggressive criminalization with serious public health and public safety consequences. In recent years, lawmakers in Congress and at the state level have already proposed mandatory minimum and enhanced sentences for fentanyl-related offenses which will only exacerbate harms.

Thank you for the opportunity to comment and considering our views.

Sincerely,

American Civil Liberties Union
Criminal Justice Policy Foundation
Drug Policy Alliance
The Sentencing Project

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