U.S. Department of Justice

March 6, 2018

The Honorable William H. Pryor, Jr.
Acting Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Pryor:

On January 19, 2017, the Commission published proposed amendments and issues for public comment on synthetic drugs and offenses involving illegal reentry into the United States.[1] The Department of Justice is pleased to submit its views on these issues. Thank you for considering the Department's perspective.

I. Fentanyl and Fentanyl Analogues

A. Proposed Change to Offense Levels for Fentanyl

It would be difficult to overstate the impact of the opioid crisis that is currently gripping our nation. The overdose numbers are astounding, and fentanyl and fentanyl analogues are largely responsible for the spike in opioid-related deaths across the country. The lethality of fentanyl and fentanyl analogues is virtually unmatched by any other drugs on the street. But, that unmatched lethality is not

[1] U.S. SENTENCING COMM'N, FEDERAL REGISTER NOTICE OF PROPOSED 2018 AMENDMENTS, January 26, 2018, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180125_rf_proposed.pdf.

currently reflected in the guidelines, which punish fentanyl and fentanyl analogue dealers lighter than those who sell less lethal drugs.

Although opioid tolerance may develop in users, as little as 2 milligrams is a lethal dose for most people.[2] The average lethal dose of fentanyl analogues like the powerful carfentanil is even lower. In contrast, the average lethal dose for heroin is approximately 200 milligrams.[3] Yet, the lowest quantity threshold for fentanyl in the drug quantity table at §2D1.1 is currently 4 grams. Thus, a defendant trafficking in up to 4 grams of fentanyl receives a base offense level of 12—or 10 after the common 2-level adjustment for acceptance of responsibility. For a defendant who pleads guilty and falls within Criminal History Category I, a base offense level of 10 yields a Zone B guidelines range of 6-12 months.[4] Thus, a defendant who sells enough fentanyl to kill almost 2,000 people is eligible for probation. That must be changed. It makes little sense that heroin—a similar but less lethal opioid—is punished more severely than fentanyl and fentanyl analogues.

In July of 2017, the Department asked the Commission to increase the penalties for fentanyl and fentanyl analogues by adjusting the thresholds so that the base offense levels in the drug quantity table would more accurately reflect the dangerousness of fentanyl and fentanyl analogues. The Commission's proposed amendment takes a slightly different approach by (1) changing the base offense levels for fentanyl to parallel those established for fentanyl analogues, and (2) increasing the marijuana equivalency for fentanyl from 1:2,500 to the 1:10,000

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[2] DRUG ENFORCEMENT ADMINISTRATION, FENTANYL FAQ'S, last visited Feb. 18, 2018, https://www.dea.gov/druginfo/fentanyl-faq.shtml; EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, FENTANYL DRUG PROFILE, PHARMACOLOGY, last visited Jan. 28, 2018, http://www.emcdda.europa.eu/publications/drug-profiles/fentanyl; *see also* Ellenhorn, M.J. & D.G. Barceloux, *Medical Toxicology - Diagnosis and Treatment of Human Poisoning,* New York, NY:. ELSEVIER SCIENCE PUBLISHING CO. INC., 745 (1988) (.25 milligrams, reported in micrograms).

[3] EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, HEROIN DRUG PROFILE, PHARMACOLOGY, last visited Jan. 28, 2018, http://www.emcdda.europa.eu/publications/drug-profiles/heroin.

[4] The guidelines provide that if the applicable guideline range is in Zone C, the minimum term may be satisfied by a sentence of imprisonment, ***or***, "a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least ***one-half*** of the minimum term is satisfied by imprisonment." (Emphasis added.) U.S.S.G. § 5 C1.1(d)(2).

equivalency currently applicable to fentanyl analogues. Although the Department would like to have seen the Commission propose an amendment increasing the penalties for both fentanyl and fentanyl analogues, the Department supports the proposed amendment because it will ultimately result in increased penalties for those who traffic in fentanyl.

For example, a defendant who sells 2.5 grams of fentanyl today would receive (before an acceptance of responsibility adjustment) a base offense level of 12 and a guidelines range of 10-16 months. Under the proposed amendment, that same defendant would receive a base offense level of 16 and a guidelines range of 21-27 months. The Department believes the proposed amendment may prove particularly helpful in ensuring that those who distribute fentanyl through the mail are sufficiently punished. As the Commission learned earlier in the amendment cycle, fentanyl is routinely shipped either through the U.S. Mail or commercial delivery services. And, according to federal law enforcement officials, the median amount of fentanyl intercepted in mail packages during 2017 was approximately 20 grams. Although that quantity is sufficient to place approximately 10,000 lethal doses on American streets, it would currently result in a base offense level of 18 (before acceptance of responsibility) and a sentencing range of 27-33 months' imprisonment for a defendant in Criminal History Category I.

Under the proposed amendment, however, a defendant who distributed 20 grams of fentanyl would receive a base offense level of 24 (before acceptance of responsibility). For a defendant in Criminal History Category I, a base offense level of 24 would yield a sentencing range of 51-63 months' imprisonment. There is nothing unreasonable about such a sentencing range for a defendant who has placed thousands of lives at risk. Indeed, even under the proposed amendment fentanyl dealers will continue to receive sentencing ranges lower than defendants who sell far less lethal drugs. Nonetheless, the proposed amendment is an important first step toward ensuring that fentanyl dealers receive sentences that reflect the seriousness of the crime and are sufficient to provide a modicum of

deterrence. The Department supports the proposed amendment and thanks the Commission for proposing the change.

B. Proposed Definitional Change

The Commission has also proposed a new definition for the term "fentanyl analogue" as used in the guidelines. Under the proposed amendment, the term would be defined as "any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that as a chemical structure that is [substantially] similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)." The Commission has correctly recognized that the proposed definition will resolve a potential ambiguity that exists between the existing guidelines definition of "analogue" and the definition of a "controlled substances analogue" set forth in the Controlled Substances Act.

As noted by the Commission, the proposed amendment would treat fentanyl analogues as a class based on their chemical structure regardless of whether the substance has already been controlled. The class-based approach to fentanyl analogues finds support in the testimony of DEA chemist Dr. Michael Van Linn and independent toxicologist Dr. Barry Logan. Both of the scientists testified on December 5, 2017 that fentanyl analogues constitute a class of drugs that share a core structure.[5] Although drug traffickers may occasionally tweak aspects of the chemical structure, the core structure of a fentanyl analogue remains largely the same. Thus, the Department supports the Commission's proposed class-based definition of the term "fentanyl analogue." The Department also agrees with the Commission's proposal to delete the current references in the drug quantity table to alpha-methylfentanyl and 3-methylfentanyl. Those drugs will fall within the new

[5] *Public Hearing on Fentanyl and Synthetic Cannabinoids*, U.S. Sentencing Comm'n (Dec. 5, 2017) (written statement of Michael Van Linn, PhD, DEA Drug Science Specialist at 6) ("We believe a class based on structure would capture fentanyl-related substances."); *Public Hearing on Fentanyl and Synthetic Cannabinoids*, U.S. Sentencing Comm'n (Dec. 5, 2017) (written statement of Barry Logan, PhD, Chief of Forensic Toxicology, NMS Labs at 2) (confirming that "fentanyl analogues constitute a class of drugs subject to core structuring").

definition of a "fentanyl analogue" and, therefore, do not need to be referenced separately.

The Department believes the proposed definition is superior to any definition that would require courts to make a "substantial similarity" determination like that currently set forth in Application Note 6. As the Commission has heard from multiple sources throughout the amendment cycle, Application Note 6's "substantial similarity" standard requires a cumbersome and litigation-intensive process that produces inconsistency. Thus, while the Department supports the proposed definition as currently drafted, it would oppose any changes that would require the courts to make a "substantial similarity" determination.

C. Increased Penalties for Offenses Involving Fentanyl and Fentanyl Analogues Misrepresented as Another Substance

According to testimony presented earlier in the amendment cycle, drug traffickers have begun mixing fentanyl and fentanyl analogues with other drugs such as heroin, cocaine, and methamphetamine. And, drug traffickers are now using commercially available pill presses to produce counterfeit pills that contain fentanyl and fentanyl analogues but appear to be less lethal prescription drugs like hydrocodone and Xanax. Both of these practices are incredibly dangerous and are directly tied to the increase in overdose deaths. As a medical examiner in Ohio explained after 19 people died from using what they believed was cocaine, "[i]f someone is using cocaine, they might not be expecting it to be mixed with fentanyl. . . .It's very dangerous."[6] Or, as the New York Attorney General put it after 500 counterfeit oxycodone pills were found to be laced with fentanyl: "These blue pills are death."[7]

To address this problem, the Commission has proposed a new specific offense characteristic that would increase a defendant's offense level in such cases. The

[6] "Cocaine Laced with Heroin, Fentanyl Linked to String of Northeast Ohio Overdose Deaths," Feb 10, 2017, Cleveland.com, http://www.cleveland.com/metro/index.ssf/2017/02/cocaine_mixed_with_heroin_fent.html.

[7] 'These Blue Pills Are Death': Fentanyl-Placed Drugs Seized in Buffalo," The Buffalo News, Sept. 7. 2017, http://buffalonews.com/2017/09/07/fake-oxycodone-pills-contain-deadly-fentanyl-found-buffalo/.

Commission has sought comment on whether the enhancement should be 2 or 4 levels. The Commission has also sought comment on whether the government should be required to prove that the defendant knowingly misrepresented the contents of the substance. Of the options, the Department favors adding the 4-level enhancement without the "knowingly" requirement. The law is well settled that to convict a defendant of drug trafficking, the government needs to prove that the defendant knowingly sold a controlled substance—it need not prove that the defendant knew that it was a particular controlled substance.[8] The Commission should not depart from that well settled principle here.

Although all fentanyl and fentanyl analogue dealers deserve punishment, those who lace less lethal drugs with fentanyl and fentanyl analogues pose an increased risk to public safety and should receive additional punishment. They are literally selling poison to unsuspecting people like a Maryland woman who overdosed after taking what she believed to be a Xanax pill. After being revived and informed that fentanyl was found in her system, the woman responded: "I didn't take fentanyl, I took Xanax."[9] Those who seek to profit by selling such products are playing Russian roulette with other people's lives. They have more than earned a stiff punishment. Thus, the Commission should adopt the 4-level enhancement.

D. Comment Regarding Possible Increased Penalties for Creating a Substantial Threat to Public Health or Safety

The Commission has asked for comment on whether the guidelines currently provide appropriate penalties in cases where "fentanyl or a fentanyl analogue may create a substantial threat to public health or safety (including the health or safety of law enforcement and emergency personnel)." As the Commission heard during

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[8] *See, e.g.*, *United States v. McKenzie*, 686 F. App'x 77, 79 (2d Cir. 2017) (stating that under "long-established law . . . it is enough for a defendant to know that he was dealing in a controlled substance even if he did not know the specific identity of that substance").

[9] "'Death Pill': Fentanyl Disguised As Other Drugs Linked To Spike In US Overdoses," The Guardian, May 10, 2016, https://www.theguardian.com/society/2016/may/10/fentanyl-drug-overdoses-xanax-painkillers.

the December 5, 2017 hearing, fentanyl and fentanyl analogues pose a danger to law enforcement officers, first responders, and medical personnel who may be exposed to the substances during their daily work. The danger is more than hypothetical. Police officers, paramedics, and nurses in jurisdictions across the country have required treatment after encountering fentanyl and fentanyl analogues.[10] As a result, many law enforcement agencies (including the DEA) have stopped field-testing substances found during arrests and searches.[11] Given the scope of the problem, the Department would fully support a new specific offense characteristic in cases where a law enforcement officer, emergency responder, or medical personnel is harmed by exposure to fentanyl or fentanyl analogues. The Department respectfully suggests that the Commission consider the following language:

> If the offense involved fentanyl or a fentanyl analogue and exposure to the fentanyl or fentanyl analogue resulted in (a) death or serious bodily injury to a law enforcement officer, emergency responder, nurse, physician, or other medical personnel, increase by 4 levels, or (b) bodily injury to a law enforcement officer, emergency responder, nurse, physician, or other medical personnel, increase by 2 levels.

The terms "death or serious bodily injury" and "bodily injury" are already defined in Application Notes 1(B) and (L) to §1B1.1. Thus, they are familiar to federal practitioners and would be easily applied in this new context. The guidelines

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[10] "Three Baltimore County Police Officers Treated For Fentanyl Exposure, Prompting Precinct Evacuation," Baltimore Sun, Dec. 22, 2017, http://www.baltimoresun.com/news/maryland/crime/bs-md-co-officers-exposed-to-fentanyl-20171222-story.html (reporting that three officers in Baltimore were treated after being exposed to fentanyl during a traffic stop); "Hanover Officers Taken To Hospital After Exposure To Fentanyl," The Mercury, Oct. 5, 2017, http://www.pottsmerc.com/article/MP/20171005/NEWS/171009846 (reporting that two officers were treated after being exposed to fentanyl and/or carfentanil); "Three Nurses Revived With Narcan After Opioid Patient Treated at Ohio Hospital," Tribune Media Wire, Aug. 11, 2017, http://wnep.com/2017/08/11/three-nurses-revived-with-narcan-after-opioid-patient-treated-at-ohio-hospital/ (reporting that three nurses in Ohio required Narcan after being exposed to fentanyl while cleaning a hospital room); "Rushing An Overdosing Woman To The Hospital, This Paramedic Overdosed, Too, Police Say," Miami Herald, Nov. 10, 2017, http://www.miamiherald.com/news/nation-world/national/article183986786.html (reporting that a paramedic suffered an overdose after encountering fentanyl while treating a patient).

[11] *See, e.g.* "Opioids Dangers Force Police to Abandon Drug Field Tests," Charlotte Observer, Feb. 21, 2018, http://www.charlotteobserver.com/news/nation-world/national/article201363434.html.

currently provide increased punishments in situations where a drug user suffers death or serious bodily injury,[12] and common sense dictates that increased punishments should also apply where the substance harms an entirely innocent person. The Department, therefore, encourages the Commission to add a specific offense characteristic similar to that set forth above.

II. Synthetic Cathinones

The Commission proposes adopting a class-based approach that would result in a single marijuana equivalency for all synthetic cathinones. The Department supports the class approach and believes it is superior to the process currently prescribed by Application Note 6 to §2D1.1. Unlike the Application Note 6 process, the class approach would conserve scarce judicial resources while promoting consistency and uniformity in sentencing.

As the Commission has heard from numerous witnesses earlier in the amendment cycle, the Application Note 6 process is cumbersome and inefficient. Application Note 6 provides that when a court encounters a drug not referenced in the Guidelines, the court should use the marijuana equivalency set forth for the most closely related controlled substance referenced in the guidelines. This requires multiple steps. First, the court must determine if the drug has a "chemical structure that is substantially similar to a controlled substance referenced" in §2D1.1.[13] Second, the court must determine whether the drug has "a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar" to a controlled substance referenced in the §2D1.1.[14] Finally, the court must determine if "a lesser or greater quantity" of the drug is needed to "produce a substantially similar effect on the central nervous system as a controlled substance" referenced in §2D1.1.[15]

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[12] *See* §2D1.1(a)(1)-(4).
[13] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Appl. Note 6 (2016)
[14] *Id.*
[15] *Id.*

The Application Note 6 process, by necessity, often involves a battle of the scientific experts.[16] And, that battle repeats itself in courtrooms across the country—if an unlisted drug is involved in cases prosecuted in the District of Hawaii, the District of New Jersey, and the Eastern District of Kentucky, each of those courts must independently wade through Application Note 6 to determine the marijuana equivalency. This can result in competing decisions where one district court holds that a substance should have a particular marijuana equivalency and another district court holds that the same substance should have a different marijuana equivalency.[17] It goes without saying that such inconsistency is problematic and in tension with the Commission's goal of promoting uniformity in sentencing. Adopting a single marijuana equivalency for all synthetic cathinones would help ensure that similarly situated defendants receive similar sentencing ranges.

As the witnesses explained at the October 4, 2017 public hearing, the chemical structure and pharmacological effects of different synthetic cathinones are sufficiently similar to treat all synthetic cathinones as a class. All synthetic cathinones share a structural class that is well accepted in the scientific

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[16] For an example of the issues involved in such expert testimony, *see* Document 53-1, U.S. v. Douglas Marshall et al., No. 1:14-CR-00232-TJM (N.D.N.Y May 24, 2016).

[17] *See, e.g.*, United States v. Roche, No. 13-cr-20909 (F.L.S.D.) (applying a 1:250 equivalency); United States v. Arroyo, No. 2:14-cr-186 (N.J.D.) (1:500); United States v. Thammavongsa, (N.V.) No. 13-cr-255 (1:100); United States v. Chong, No. 13-cr-570 (N.Y.E.D.) (1:200); United States v. Lopez, No. 14-cr-5 (N.Y.E.D.) (1:200); United States v. McGuire et al., No. 13-cr-421 (F.L.M.D.) (1:200); United States v. Roche, No. 13-cr-20909 (F.L.S.D.) (1:250); United States v. Beurman et al. No. 13-mj-612 (N.Y.W.D.) (1:250); United States v. Letasi, No. 13-cr-635 (N.J.) (1:250); United States v. Manthei, No. 14-cr-5 (W.I.W.D.) (1:250); United States v. Bouchair, No. 12-cr-266 (V.A.E.D.) (1:250); United States v. Carillo, No. 13-cr-0779 (C.A.C.D.) (1:250); United States v. Farmer, No. 13-cr-20920 (M.I.E.D.) (1:250); United States v. Farrington, No. 13-cr-129 (M.E.) (1:250); United States v. Marte, No. 13-cr-20537 (F.L.S.D.) (1:250); United States v. McLaughlin, No. 13-cr-239 (N.Y.N.D.) (1:250); United States v. Merlin, No. 13-cr-96 (N.V.) (1:250); United States v. Murdough, No. 12-cr-163 (N.H.) (1:250); United States v. Myers, No. 13-cr-117 (N.H.) (1:250); United States v. Orton, No. 12-cr-00117 (M.E.) (1:250); United States v. Safdari, No. 12-cr-249 (V.A.E.D.) (1:250); United States v. Sutton, No. 14-cr-51 (N.Y.N.D.) (1:250); United States v. Taylor, No. 13-cr-233 (P.A.W.D.) (1:250); United States v. Webster, No. 13-cr-44 (N.H.) (1:250); United States v. Konarski et al., No. 13-cr-71 (P.A.W.D.) (1:250); United States v. Borges et al., No. 13-cr-20239 (F.L.S.D.) (1:500); United States v. Falsey et al., No. 12-cr-29 (F.L.M.D.) (1:500); United States v. Guerrero, No. 12-cr-390 (N.J.) (1:500); United States v. Martinez, No. 13-cr-00316 (N.Y.E.D.) (1:500); United States v. Ordonez-Ramos et al., No. 12-cr-20815 (F.L.S.D.) (1:500); United States v. Singh, No. 13-cr-570 (N.Y.E.D.) (1:500); United States v. Poole, No. 13-cr-00066 (O.K.N.D.) (1:500, varied to 1:250). .

community.[18] Thus, the determination of whether a new substance falls within the synthetic cathinone class should be relatively easy and uncontroversial. Indeed, Dr. Gregory Dudley a professor at West Virginia University testified in support of the class-based approach.[19] Similarly, Dr. Michael Gatch a professor at the University of North Texas, informed the Commission that "cathinones have a common and easily identifiable structural identity."[20] The Department does not recall any of the experts who testified at the hearing disagreeing with using a class-based approach to synthetic cathinones.

The area where there is some disagreement is what marijuana equivalency should be assigned to the synthetic cathinone class. The Commission has proposed three options: 1:200, 1:380, and 1:500. In deciding which equivalency to adopt, it makes sense for the Commission to look closely at the equivalencies the courts have adopted in synthetic cathinone cases decided under Application Note 6. According to the Commission's data for fiscal year 2015, the equivalencies applied by courts are available for 186 cases involving the synthetic cathinones Methylone, A-PVP, MDPV, and three other substances. For all of these, the mean equivalency applied

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[18] *Public Hearing on Synthetic Cathinones, Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement of Terrence Boos, Ph.D. and Cassandra Prioleau, Ph.D., Drug and Chemical Evaluation Section, Drug Enforcement Administration), 3-7, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/Boos-Prioleau.pdf ("Cathinones describe a structural class of substances that share pharmacological effects" …"[c]athinone is very similar in chemical structure to amphetamine (1-phenylpropan-2-amine)"… "[t]his structural class is well-established and accepted in the scientific literature"… "[t]he close structural similarity of the cathinones appearing in response to regulatory controls demonstrates the scientific and patent literature is being trolled for potent substances within a drug class."); *see generally* GLOBAL SMART PROGRAMME, UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE CHALLENGE OF NEW PSYCHOACTIVE SUBSTANCES (March 2013); *see also* J.P. Kelly, *Cathinone Derivatives: A Review of their Chemistry, Pharmacology, and Toxicology*, 3 DRUG TESTING AND ANALYSIS, 439-453 (2011); *see also* M. Capriola, *Synthetic Cathinones*, 5 CLINICAL PHARMACOLOGY: ADVANCES AND APPLICATIONS, 109-115 (2013)).

[19] Transcript of U.S. Sentencing Comm'n Public Hearing on Synthetic Cathinones, Testimony of Dr. Gregory Dudley at 76-77 (October 4, 2017) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/transcript.pdf ("In April I advanced the idea of a categorical coverage for synthetic cathinones. This is an idea that I think has merit.

[20] Transcript of U.S. Sentencing Comm'n Public Hearing on Synthetic Cathinones, Testimony of Dr. Michael Gatch 24 (October 4, 2017) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/transcript.pdf

was 1:364, and the median was 1:380.[21] Assigning an equivalency of 1:380 to the class of all currently unlisted synthetic cathinones would, therefore, accurately reflect the results the courts have reached using Application Note 6. And, it bears mentioning that an equivalency of 1:380 would mirror the equivalency proposed for synthetic cathinones in the bipartisan "Stop the Importation and Trafficking of Synthetic Analogues Act of 2017" (SITSA) that is pending before Congress.[22] Accordingly, the Department would have no objection to the Commission adopting the 1:380 marijuana equivalency.

The Department would point out, however, that there is some support in the record for adopting a ratio higher than 1:380. First, as the testimony during the October 4, 2017 hearing established, synthetic cathinones are dangerous and addictive substances. They can cause hyperthermia, fever, confusion, psychosis, paranoia, hallucinations, combativeness, agitation, tremors, seizures, and death.[23] Second, witnesses at the October 4, 2017 hearing explained that the substances endanger first responders and medical personnel because users of synthetic cathinones can be combative and exhibit psychotic behavior.[24] Application Note 6 does not instruct courts to consider such facts when selecting a marijuana equivalency. As a result, relying exclusively on the equivalencies used by the courts

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[21] U.S. SENTENCING COMM'N, Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments January, 2018, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf.

[22]H.R. 2851 Stop the Importation and Trafficking of Synthetic Analogues Act of 2017 (SITSA), https://www.congress.gov/bill/115th-congress/house-bill/2851/text (including a provision in Section 9 that would amend §2D1.1 to include a 1:380 equivalency for synthetic cathinones).

[23] *See Synthetic Cathinones: Hearing Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement of Terrence Boos & Cassandra Prioleau), *(available at* https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-october-4-2017; *see also Medical Toxicology: Hearing Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (statement by Christopher P. Holstege, MD, Department of Emergency Medicine and Pediatrics & Heather Borek, MD, Department of Emergency Medicine, University of Virginia School of Medicine), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/Borek-Holstege.pdf.

[24] *See Public Hearing on Synthetic Cathinones, Before U.S. SENTENCING COMM'N* (Oct. 4, 2017) (written statement of Drs. Christopher Holstege & Heather Borek), at 1. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/Borek-Holstege.pdf.

in Application Note 6 cases may fail to fully account for the dangers presented by synthetic cathinones. Thus, the Department would also have no objection to the Commission adopting the 1:500 marijuana equivalency.

III. Synthetic Cannabinoids

A. Class Approach

For largely the same reasons set forth above, the Department supports the Commission's proposal to create a single equivalency in the guidelines for the class of synthetic cannabinoids. The proposed amendment would address the ongoing problem of new synthetic cannabinoids being regularly introduced into the illicit drug market in a manner designed to circumvent the existing statutory and regulatory framework. As the Commission learned during the December 5, 2017 public hearing, drug trafficking organizations regularly tweak the structure of synthetic cannabinoids in an attempt to avoid the scheduling regime established by the Controlled Substances Act. Given the ever-evolving nature of synthetic cannabinoids, a class approach to synthetic cannabinoids is necessary and appropriate.

Synthetic cannabinoids are dangerous substances that are often marketed to users as a "legal high" or "legal marijuana." Although synthetic cannabinoids are designed to mimic the effects of THC—the primary psychoactive component in marijuana—synthetic cannabinoids are generally more powerful and toxic than THC. They are produced in clandestine laboratories with little to no quality control, and are then sold in gas stations, convenience stores, head shops, and on the streets with seemingly innocent names like "K2" and "spice." And, they are often marketed to youth, those in drug rehab, the homeless, as well as persons attempting to evade drug testing.

Once again, the Commission will have to determine what precise marijuana equivalency should be applied to the synthetic cannabinoid class. The Commission has provided three options: 1:167, 1:334, and 1:500. A review of the cases involving different synthetic cannabinoids demonstrates that many courts have arrived at an

equivalency of 1:167 under the Application Note 6 process.[25] However, as noted above with respect to synthetic cathinones, Application Note 6 does not account for some of the most serious dangers associated with synthetic cannabinoids.

As the Commission heard during the December 5, 2017 hearing, synthetic cannabinoids are more dangerous and toxic than THC and marijuana.[26] The synthetic cannabinoids encountered on the streets are generally more potent than THC, and those that happen to be less potent disappear from the illicit market quickly because they fail to provide users with the desired effects.[27] To illustrate the difference between marijuana, THC, and synthetic cannabinoids, Dr. Jordan Trecki provided the Commission with a helpful continuum:

[25] United States v. Holder et al., No. 14-CR-244 (W.D. Okla.), United States v. Kyle Johnson, No. 14-cr-00260-R-1 (W.D. Okla.); United States v. Kattom et al., No. 13-cr-00197 (E.D. Ark.); United States v. Harris, No. 1:14-cr-190 (E.D. Cal.); United States v. Abdul, No. 8:14-cr-00012 (M.D. Fla.); United States v. Jin Liu, No. 3:14-cr-8(S1) and No. 3:14-cr-157 (M.D. Fla. Rule 20 case from C.D. Cal.); United States v. Uddin, No. 3:14-cr-23 (M.D. Fla.); United States v. Carlson, No. 12-cr-305 (D. Minn.); United States v. Alkadi, No. 14-cr-360 (D. Minn.) ; United States v. Hanson, No. 14-cr-355 (D. Minn.); United States v. E. Ramos, No. 14-cr-2014 (N.D. Iowa); United States v. M. Ramos, No. 13-cr-2034 (N.D. Iowa); United States v. McCauley, No. 14-cr-0094 (N.D. Iowa); United States v. Armstrong, No. 13-CR-253 (N.D.N.Y.); United States v. Mansour et al., No. 13-CR-429 (N.D.N.Y.); United States v. Schiffer, No. 13-CR-160 (N.D.N.Y.); United States v. Tebbetts, No. 12-cr-00567 (N.D.N.Y.); United States v. Makkar, No. 13-cr-205 (N.D. Okla.); United States v. Sweeney, No. 13-cr-446 (N.D. Tex.); United States v. Bays et al., No. 13-cr-357 (N.D. Tex.); United States v. Ways, No. 12-cr-391 (D. Neb.); United States v. Al-Washah, No. 14-cr-1762 (D.N.M.); United States v. Qualtieri, No. 12-cr-00136 (D. Nev.); United States v. Singh-Sidhu, No. 13-cr-32 (D. Nev.); United States v. Dimov et al., No. 3:13-cr-246 (D. Or.); United States v. Morrison, No. 12-cr-40114 (D.S.D.); United States v. Hayhurst, No. 12-cr-40138 (D.S.D.); United States v. Patel, No. 14-cr-0045 (S.D. Ala.); U.S. v. Al-Khafaji, No. 13-cr-895 (S.D.N.Y.); United States v. Libby, No. 13-cr-920 (S.D.N.Y.); United States v. Cochran, No. 13-cr-20216 (W.D. Tenn.); United States v. Johns, No. 2:14-cr-0001 (W.D. Va.); United States v. Samson, No. 12-cr-096 (W.D. Va.); United States v. Serdah, 12-cr-0097 (W.D. Va.); United States v. Coshow & Marg, No. 11-cr-00130 (W.D. Wis.); United States v. Patel, No. 14-CR-0045 (S.D. Ala);, United States v. Kneeland, No. 3:16-cr-122-TMB (D. Alaska).

[26] *Fentanyl and Synthetic Cannabinoids: Hearing before U.S. SENTENCING COMM'N* (Dec. 5, 2017) (written statement of Jordan Trecki, PhD), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Trecki.pdf.

[27] *Fentanyl and Synthetic Cannabinoids: Hearing before U.S. SENTENCING COMM'N* (Dec. 5, 2017) (written statement of Jordan Trecki, PhD), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Trecki.pdf

And, Dr. Trecki testified that the synthetic cannabinoids encountered by DEA "are all substantially more dangerous than THC."[28] In a similar vein, Dr. Michael Gatch from the University of North Texas provided testimony that highlighted several important differences between THC and marijuana and synthetic cannabinoids. For example, Dr. Gatch explained:

- THC is a "low-efficacy partial agonist, whereas the synthetic cannabinoids are all full agonists";
- "Some of the adverse effects of the synthetic cannabinoids are more prevalent, more severe, or require less drug than those in marijuana";
- Cannabinoid hypermesis syndrome, which is characterized by nausea and vomiting, has been shown to occur more quickly with synthetic cannabinoid use than marijuana use;
- "[O]nly the synthetic cannabinoids produce the most severe adverse effects, including central nervous system effects such as extreme agitation, seizures, ischemic stroke, encephalopathy and coma";
- "[M]any of the toxic effects [of synthetic cannabinoids] appear to be caused by activation of CB1 cannabinoid receptors, since the effects are blocked by selective antagonists. THC is only a weak partial agonist at CB1 receptors, which is the most likely reason it does not cause the severe effects.";
- "[S]ome of the more recently seen synthetic cannabinoids are more likely to produce extremely toxic effects than the older synthetics.";
- "[T]he synthetic cannabinoids have many active metabolites, unlike THC, which increase the duration of the effects, and which may interact with other receptor systems, potentially contributing to a range of adverse effects."[29]

[28] Transcript of U.S. Sentencing Comm'n Public Hearing on Synthetic Cannabinoids, Testimony of Dr. Jordan Trecki at 135-36 (Dec. 5, 2017) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/transcript.pdf

[29] *Fentanyl and Synthetic Cannabinoids: Hearing before U.S. SENTENCING COMM'N* (Dec. 5, 2017) (written statement of Michael Gatch, PhD).

Additionally, findings reported in scientific journals concerning health risks of synthetic cannabinoids show that they are more dangerous than marijuana and THC. The Centers for Disease Control and Prevention reported on a multi-state outbreak of kidney injuries resulting from the use of the synthetic cannabinoid XLR-11.[30] The *Journal of Clinical Toxicology* reported an outbreak involving the synthetic cannabinoid AB-CHMINACA causing hospitalizations requiring ventilator support and ICU level care.[31] The journal *Forensic Science International* reported seizures due to the use of ABD-PINACA, at that time an unknown synthetic cannabinoid belonging to the FUBINACA family of substances.[32] Seizures are reported to be one of the most common negative health effects resulting from exposure to synthetic cannabinoids.[33] The *Journal of Clinical Toxicology* reported convulsions associated with MDMB-CHMICA.[34] The *New England Journal of Medicine* reported over 20 deaths resulting from the use of AM2201, JWH-018, JWH-122, UR-144, XLR11, 5F-PB-22, AB-CHMINACA, ABD-FUBINACA, AB-PINACA, THJ-2201, and MAB-CHMINACA, among others.[35]

Furthermore, the American Association of Poison Control Centers continues to report thousands of calls each year regarding adverse effects experienced

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[30] *Acute Kidney Injury Associated with Synthetic Cannabinoid Use — Multiple States, 2012* 62 CENTERS FOR DISEASE CONTROL AND PREVENTION, Morbidity and Mortality Weekly Report (MMWR)93-98 (Feb. 15, 2013).

[31] Joseph A. Tyndall et al., *An Outbreak of Acute Delirium from Exposure to the Synthetic Cannabinoid AB-CHMINACA*, 53 CLINICAL TOXICOLOGY, 1-7 (Nov. 10, 2015).

[32] Michael D. Schwartz et al., *A Common Source Outbreak of Severe Delirium Associated with Exposure to the Novel Synthetic Cannabinoid ADB-PINACA*, 48 JOURNAL OF EMERGENCY MEDICINE, 573-580 (2015).

[33] *Id.*; *see also* Kevin G. Shanks, David Winston, John Heidingsfelder & George Behonick, *Case Reports of Synthetic Cannabinoid XLR-11 Associated Fatalities*, 252 FORENSIC SCIENCE INTERNATIONAL, e1-e4 (2015);

[34] Simon L. Hill et al., *Clinical Toxicity Following Analytically Confirmed Use of the Synthetic Cannabinoid Receptor Agonist MDMB-CHMICA. A Report from the Identification of Novel PsychoActive Substances (IONA) Study*, 54 CLINICAL TOXICOLOGY (June 2, 2016) (in addition to convulsions, also reporting reduced levels of consciousness following the poisoning).

[35] Jordan Trecki, Roy R. Gerona & Michael D. Schwartz, *Synthetic Cannabinoid – Related Illnesses and Deaths*, 373 THE NEW ENGLAND JOURNAL OF MEDICINE, 103-107 (July 9, 2015) (the first author on this article is a DEA employee who appeared before the Commission as a witness during a December 5 2017 hearing).

following the consumption of synthetic cannabinoids containing products.[36] The DEA's National Forensic Laboratory Information System (NFLIS) documents more than 200,000 law enforcement encounters of synthetic cannabinoids in the United States since 2011.[37] Finally, the testimony at the December 5, 2017 hearing established that synthetic cannabinoids also pose a risk to law enforcement and first responders because users can become agitated and experience psychosis with hallucinations.[38] As a result, emergency medical personnel have begun using the drug ketamine in an attempt to sedate synthetic cannabinoid users who are behaving violently and irrationally.[39]

In sum, there is ample evidence demonstrating that synthetic cannabinoids are more toxic and dangerous than THC and marijuana. Moreover, the marketing of the drugs to young people and the manner in which the drugs are designed to avoid detection and evade the requirements of U.S. law differentiate synthetic cannabinoids from THC and marijuana. Accordingly, the Department believes the equivalency for synthetic cannabinoids should be higher than the 1:167 equivalency currently provided for THC. The Department would have no objection to the Commission selecting an equivalency of either 1:334 or 1:500.

B. Synthetic Cannabinoids in Actual Form v. Part of a Mixture

The Commission has asked for public comment on whether the guidelines should distinguish between synthetic cannabinoids in "actual" form (such as in powder or crystalline form) and synthetic cannabinoids that are part of a mixture. The Department believes the Commission should establish a single marijuana equivalency for synthetic cannabinoids, regardless of whether the offense involves a

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[36] American Association of Poison Control Centers, "Synthetic Cannabinoids," http://www.aapcc.org/alerts/synthetic-cannabinoids/ (reporting 1,497 exposures from January 1, 2017 to September 2017, and reporting that in 2015 there were 7,794 reported exposures).

[37] *See e.g.* St. Louis Post Dispatch, "Overdoses Rise Among St. Louis' Homeless, as Dealers Keep Ahead of the Law" (Nov 29, 2016) ("Almost 300 people, most of them homeless and stricken in the neighborhood around the downtown shelter, have been hospitalized since Nov. 7 from overdoses of synthetic versions of THC.").

[38] *Fentanyl and Synthetic Cannabinoids: Hearing before U.S. SENTENCING COMM'N* (Dec. 5, 2017) (written statement of James Chad Curry, Licensed Paramedic).

[39] *Id.*

mixture (e.g., sprayed on or soaked into a plant or other base material) or the cannabinoid is in pure powdered, crystalline, or other unmixed form.

The general rule set forth in the guidelines is that the "weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."[40] The Commission should not depart from this general rule by distinguishing between synthetic cannabinoids in their "actual form" and synthetic cannabinoids after they have been sprayed onto plant matter and packaged for retail sales.

First, there is no reason to reward drug dealers who take the additional (and highly reckless) step of putting on a gas mask, applying synthetic cannabinoids to plant matter with home garden sprayers, stuffing single serving baggies, attaching cute stickers and catchy names designed to attract young people, and then selling this toxic concoction to users who have no idea what it contains. Indeed, the imprecise manner in which synthetic cannabinoids are mixed and then applied to plant matter is actually one of the reasons why the drugs are so dangerous—the drug packets contain unexpected "hot spots" and one packet may contain a higher concentration of the drug than the next packet.

Second, as a practical matter it would be virtually impossible for DEA laboratories to readily determine the amount of a synthetic cannabinoid that has been applied to the plant matter in a particular drug packet. As Dr. Daniel Willenbring informed the Commission: "There's a problem with solubility trying to get the chemical off the leaf. And then, there's also the issue of [the laboratories] having validated methods for every different synthetic cannabinoid . . . .And, even if [the laboratory has] done all of that, due to the way these substances are manufactured, if they open one packet and take a sample of that packet and figure out how much drug is in that particular sample, there's no saying that applies to the rest of the packet or any of the other packets."[41]

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[40] USSG §2D1.1, Drug Quantity Table, Note A.

[41] Transcript of U.S. Sentencing Comm'n Public Hearing on Synthetic Cannabinoids, Testimony of Dr. Daniel Willenbring at 134-35 (Dec. 5, 2017)

There is no good reason for the Commission to depart from the general rule that the "weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."[42] Doing so would provide a windfall to drug traffickers who endanger the lives of others, and it would also pose substantial practical hurdles. Accordingly, the Department would oppose any amendment that distinguishes between "actual" synthetic cannabinoids and synthetic cannabinoids that have been mixed with plant matter for resale.

IV. Proposed Amendment Regarding the Illegal Reentry Guideline

The Commission has proposed a two-part amendment to the illegal reentry guideline, §2L1.2. Part A would address a gap in coverage regarding the treatment of prior convictions. Part B would clarify how §2L1.2's enhancements for prior convictions apply where a defendant's prior conviction included a term of probation, parole, or supervised release that was subsequently revoked and an additional term of imprisonment imposed. The Department supports both parts of the proposed amendment.

A. Gap Regarding the Treatment of Prior Convictions

The Department appreciates the Commission's willingness to address this issue, which the Department raised in its annual letter to the Commission last July. Section 2L1.2 as currently drafted contains what the Department believes is an unintended gap regarding prior convictions in circumstances where a defendant has committed criminal conduct before being removed from the United States, but is not convicted until after his removal. Under subsection §2L1.2(b)(2), a defendant receives an increased offense level if the defendant received a conviction before he or she was ordered deported or ordered removed. Under §2L1.2(b)(3), a defendant also receives an increased offense level if at any time after the defendant was

https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171004/transcript.pdf.

[42] USSG §2D1.1, Drug Quantity Table, Note A.

ordered deported or ordered removed the defendant engaged in criminal conduct resulting in a conviction.

Convictions that occur before a first order of removal, and criminal conduct that occurs after a first order of removal (and results in a conviction) are covered by §2L1.2. But, when a defendant is apprehended and ordered removed before being tried and convicted, the conviction occurs after he or she was ordered removed. Thus, the conviction does not qualify under subsection (b)(2). And, because the underlying criminal conduct resulting in the conviction occurred before the defendant was ordered removed, it does not qualify under subsection (b)(3). There is no indication that the Commission intended this result when it amended §2L1.2 in 2016. Rather, in its published reason for amendment, the Commission notes that the amendments were promulgated in order to more fully account for all of the previous criminal conduct of illegal reentry offenders, regardless of when this conduct occurred.[43]

The Commission proposes amending §2L1.2(b)(2) by replacing "the defendant sustained" with "the defendant engaged in criminal conduct that, at any time, resulted in." The Commission also proposes making conforming changes to (b)(3). The proposed amendment will close the gap and ensure that §2L1.2 operates in the manner the Commission intended it to after the 2016 amendments. Accordingly, the Department supports Part A of the proposed amendment.

[43] *See* AMENDMENTS TO THE SENTENCING GUIDELINES (April 28, 2016), 28 ("[R]esearch identified a concern that the existing guideline did not account for other types of criminal conduct committed by illegal reentry offenders. The Commission's 2015 report found that 48.0 percent of illegal reentry offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first deportations. The amendment addresses these concerns by accounting for prior criminal conduct in a broader and more proportionate manner. The amendment reduces somewhat the level of enhancements for criminal conduct occurring before the defendant's first order of deportation and adds a new enhancement for criminal conduct occurring after the defendant's first order of deportation.")

B. Treatment of Revoked Terms of Probation, Parole, and Supervised Release

In Part B of the proposed amendment, the Commission seeks to address the problem of how to measure the length of a prior sentence when a defendant's prior conviction included a term of probation, parole, or supervised release that was subsequently revoked and an additional term of imprisonment was then imposed. Subsection (b)(2) of §2L1.2 provides an adjustment for convictions occurring before the defendant was first ordered deported or removed, depending on the length of the "sentence imposed." Subsection (b)(3) similarly provides an adjustment for convictions occurring after the defendant was first ordered deported or removed.

As noted by the Commission, under Application Note 2 of the Commentary to §2L1.2, "sentence imposed" includes the original term of imprisonment as well as any term of imprisonment imposed upon revocation of probation, parole, or supervised release.[44] Nevertheless, two courts of appeals (the Ninth and Fifth Circuits) have determined that the term of imprisonment imposed upon revocation is not to be counted if that revocation occurred after the defendant's first order of removal.[45] There is no evidence in the record to suggest that the Commission intended such a result when it amended §2L1.2 in 2016. Thus, the proposed amendment seeks to make clear that the phrase "sentence imposed" includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred. The Department supports this change and believes it will ensure that courts apply §2L1.2 in a manner consistent with the Commission's intent.

[44] U.S. SENTENCING COMM'N, FEDERAL REGISTER NOTICE OF PROPOSED 2018 AMENDMENTS, January 26, 2018.
[45] United States v. Martinez, 870 F.3d 1163 (9th Cir. 2017); United States v. Franco-Galvan, 864 F.3d 338 (5th Cir. 2017).

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Thank you for considering the Department's perspective on these matters. The Commission serves an important purpose in our criminal justice system, and the Department stands ready to assist the Commission throughout the remainder of the amendment cycle.

Respectfully submitted,

s/ Zachary C. Bolitho

Zachary C. Bolitho
Ex Officio Member, U.S. Sentencing Commission
Associate Deputy Attorney General

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel