PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

March 5, 2018

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 February 14 and 15, 2018, to discuss and formulate recommendations to the United States Sentencing Commission regarding the *Proposed Amendments to the Sentencing Guidelines* published on January 19, 2018. POAG appreciates the opportunity to provide ongoing feedback to the Commission in support of its long-term priorities.

Synthetic Drugs Amendment

The Commission's study of synthetic cathinones/cannabinoids and fentanyl/fentanyl analogues has revealed how synthetic drugs have impacted public health institutions, law enforcement and the federal judiciary. As part of its feedback effort, POAG explored the supervision challenges presented by the three classes of substances under review. In districts where synthetic drugs have become prevalent, drug testing is expensive and frequently ineffective. Urinalysis tests for presumptive examinations cost as much as $4 per panel (substance screened), making multi-panel tests very expensive. Additionally, because the initial screening is based on amino acid testing and the confirmation testing requires gas chromatography-mass spectrometry (GCMS) or liquid chromatography-mass spectrometry (LCMS), these secondary tests incur additional costs and confirm positive only a fraction of the time. Supervision officers observe that testing for these substances is generally unavailable, and even where they are, the results are often ineffective because the various synthetic drugs are evolving at a pace faster or equal to the speed at which the testing is evolving, placing detection in most cases just out of reach. Officers have to rely on their ability to recognize aberrant behavior in probationers/releasees who are using synthetic substances and/or rely on admissions. The problem is compounded by the fact synthetic drug users are frequently ignorant of the actual substance they are ingesting. Purveyors of synthetic drugs are also commonly misinformed about the chemical compositions of the substance they are selling.

Fentanyl specifically has created a substantial hazard to drug users and probation officers. Fentanyl has caused many overdose related deaths within the probation/supervised release population. Officers conducting home inspections must now be mindful of inadvertent exposure with fentanyl, as it could be absorbed through the skin and cause them to experience a medical emergency. Probation officers in various areas of the country have been issued Narcan as an emergency measure if they encounter overdoses in the field or become exposed to fentanyl themselves. The emergence of synthetic drugs has been a challenge to probation officers and this trend is not expected to abate.

Synthetic Cathinones

Of all the synthetic drugs, POAG has experienced cases with synthetic cathinones the least – with most of the reporting from districts in larger metropolitan areas and in pockets of very rural areas. POAG unanimously supports the Commission's class-based approach to synthetic cathinones. POAG members have observed District Courts struggle applying the three-part test in USSG §2D1.1, comment. (n.6) in synthetic cathinone cases. The process is laborious and resource intensive, with varied equivalencies being applied by courts. The FY 2015 data analysis revealed four different approaches utilized by District Courts (1 gm = 200/250/380/500 gm of marijuana). The class-based approach will bring simplicity and address disparity associated with the various equivalencies, codifying a unified approach to the system.

While POAG was unanimous in its endorsement of the class-based approach, we were unable to reach consensus on the marijuana equivalence. After reviewing the data briefing and the scientific evidence in the Commission's public hearings, POAG was split between a synthetic cathinone conversion of 1 gm-to-250/380 grams of marijuana.

POAG believes synthetic cathinones as a class are more harmful than powder cocaine, which has a conversion ratio of 1 gm-to-200 gm of marijuana; but that the conversion ratio of 1 gm-to-500 gm marijuana equivalence used for MDMA would be excessive. After being educated on the science of synthetic cathinones through evidentiary hearings or briefs, the majority of District Courts in FY 2015 utilized a conversion ratio of 1 gm-to-250 gm or 1 gm-to-380 gm of marijuana, and POAG recommends adoption of one of these equivalencies.

Lastly, POAG is in favor of eliminating the specific reference to methcathinone in the Drug Equivalency Tables and implicitly folding this substance in with the synthetic cathinone class. Additionally, POAG supports a minimum base offense level of 12 for cases involving a drug in the synthetic cathinone class.

Synthetic Cannabinoids

POAG supports the Commission's proposed amendment establishing a class-based approach for synthetic cannabinoids. Based on the testimony provided to the Commission, POAG unanimously believes that the various substances are sufficiently similar in their pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and associated harms to support the adoption of the class-based approach. POAG referred to the powder format of synthetic cannabinoids as "pure synthetic cannabinoids." During POAG's discussion, the group unanimously agreed on recommending the adoption of the following marijuana equivalency ratios as they pertain to synthetic cannabinoids:

Synthetic Cannabinoids	
Substance	Marijuana Equivalency
Synthetic Smokable Cannabinoids (coated plant material)	1 gm = 24 gm
Synthetic Tetrahydrocannabinol (THC)	1 gm = 167 gm
Pure Synthetic Cannabinoids	1 gm = 334 gm

From the expert testimony provided to the Commission, POAG observed that synthetic tetrahydrocannabinol (THC) is half as potent as synthetic cannabinoids. Additionally, POAG observed from the testimony that a single kilogram of pure synthetic cannabinoids could be used to produce approximately fourteen kilograms of coated plant material or synthetic smokable cannabinoids. In configuring the suggested marijuana equivalency, POAG doubled the ratio of synthetic THC to achieve the pure synthetic cannabinoid ratio of 1 gm-to-334 gm of marijuana. POAG then divided the ratio of 1 gm-to-334 gm by 14 to achieve the synthetic smokable cannabinoid ratio of 1 gm-to-24 gm of marijuana. POAG believes that the 1 gm-to-24 gm ratio appropriately captures the relative harm of synthetic smokable cannabinoids. POAG unanimously believes these ratios appropriately account for the relative harms of these substances and that the ratio difference between synthetic smokable cannabinoids and pure synthetic cannabinoids are sufficient to reflect the harm caused by a defendant – regardless of whether the defendant is apprehended with pure or smokable synthetic cannabinoids, or in circumstances where both forms are involved.

POAG observed in the FY 2015 study of synthetic cannabinoids that District Courts used the 1 gm-to-167 gm equivalency in 92.4% of cases, but in those same cases, the District Courts sentenced the defendant lower than the guideline range in 79% of cases. POAG could not ascertain how many of these cases involved coated plant material and how many involved the pure form, or if the departures/variances were based on other individualized factors. Based on POAG's experience, when a District Court applies the 1 gm-to-167 gm of marijuana equivalency in cases involving synthetic smokable cannabinoids (coated plant material), it frequently results in a guideline range at or above the statutory maximum 20-year term. POAG has directly observed District Judges utilize the 1 gm-to-167 gm equivalence for the coated plant material only to vary from the guidelines, citing the conversion produced an "absurd" result. With a 79% rate of variance/ departure from the guidelines, it appears other District Judges may be drawing this same conclusion. The Commission's solution to the problems synthetic cannabinoids present must include two alternative ratios: one for synthetic smokable cannabinoids (coated plant material) and one for pure synthetic cannabinoids. Without these two alternative ratios, application issues will persist and more culpable defendants higher in the distribution chain will unfairly benefit from a more favorable conversion ratio.

POAG supports the proposed amendment adding a definition for "synthetic cannabinoids" and unanimously preferred "binds to and activates" because it employs simple and direct language the guidelines have adopted in other areas. The Commission should consider including within the definition section, a similar definition for "synthetic smokable cannabinoids." POAG also supports the Commission's proposal to establish a minimum base offense level of 12 for cases involving any substance within the class of synthetic cannabinoids.

Synthetic Tetrahydrocannabinol

As is noted in the table, POAG unanimously supports keeping the existing synthetic THC ratio of 1 gm-to-167 gm of marijuana. The group does not currently see a need for moving synthetic THC from the "Schedule I Marihuana" section. Keeping synthetic THC together with the other substances that contain THC makes intuitive sense and would aid in reducing the error of applying the old ratio with which the District Courts have become familiar.

Fentanyl and Fentanyl Analogues

POAG is in favor of the proposed amendment to the "Notes to Drug Quantity Table" in USSG §2D1.1 defining "fentanyl analogue" as "any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)." Similar to the other synthetic drugs, adopting a class-based approach to fentanyl and fentanyl analogues is appropriate as it would simplify guideline application for substances that involve similar chemical composition and pharmacological effects on the user. POAG also recommends omitting "substantially" from the fentanyl analogue definition, as it is not clarifying and would impose an additional analysis likely requiring professional testimony. The additional analysis undermines the simplification purpose of the amendment. Deleting the references to alpha-methylfentanyl and 3-methylfentanyl and their equivalencies is appropriate and consistent with our other opinions.

In keeping with the class-based approach, POAG is in favor of increasing the penalties for offenses involving fentanyl to match the higher equivalencies currently provided for offenses involving fentanyl analogues. It is believed that quadrupling the penalty for fentanyl (1 gm-to-2.5 kg to 1 gm-to-10 kg) is warranted to account for the increased potential for abuse or addiction, the proliferation and ease of availability, and the significant number of deaths associated with the opioid epidemic that has plagued many of our communities. Indeed, many districts are reporting increases in prosecutions for distribution of fentanyl with death resulting. Marrying the two ratios would also solve an application issue POAG previously identified in combining fentanyl/fentanyl analogues with other substances. Furthermore, laboratory reports on seized fentanyl do not often differentiate fentanyl from a fentanyl analogue and presentence reports often make reference to generic fentanyl when the substance is actually a fentanyl analogue. With both substances carrying the same equivalence, the amendment will prevent the possibility of application error.

POAG was not in favor of the proposed specific offense characteristic at USSG §2D1.1(b)(13) for increasing the base offense level if the fentanyl or a fentanyl analogue was misrepresented or marketed as another substance or for a substantial threat to the public health or safety. POAG was concerned about the potential broad application of the enhancement by unintentionally capturing "street-level" dealers rather than manufacturers or others positioned higher in the distribution chain. Many of these "street-level" dealers often believe they are providing their customers heroin while, unbeknownst to the dealers, the substance is in fact fentanyl or a fentanyl analogue. If the Commission exercises its discretion to proceed with this specific offense characteristic, POAG recommends that it be narrowly tailored and have a knowledge requirement. Notwithstanding, POAG believes the proposed equivalency for fentanyl adequately encapsulates the misrepresentation possibility and that any resulting harm to first responders or the public can be addressed through departures at USSG §5K2.1 (Death), USSG §5K2.1 (Physical Injury), or USSG §5K2.14 (Public Welfare). Additionally, POAG representatives noted that a specific offense characteristics related to fentanyl and fentanyl analogue offenses may ultimately be off-set by variances and departures in some Districts, but not others, and serve to cause disparity.

Illegal Reentry Guideline Enhancements

With regard to the proposed amendments, under USSG §§2L1.2(b)(2) and (b)(3) and Application Note 2, the overwhelming response to the amendments was positive, particularly in Southern Border Districts where this guideline is utilized frequently. The amendment closes clear gaps in application and provides clarity with regard to the Commission's intent regarding the timing of revocation sentences.

Technical Amendments

POAG reviewed the proposed technical amendments and has no comment.

However, POAG did discover a potential error in the commentary of USSG §4A1.3. Specifically, Application Note 3 in USSG §4A1.3 reads –

> ***Downward Departures.***—*A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism."*

This application note discusses the prohibition of downward departures from Criminal History I but refers to subsection (b)(2)(B). Subsection (b)(2)(B) notes the prohibition of downward departures for "ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDERS." POAG believes Application Note 3 should be corrected to read in part, "A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A)," as sub-section (b)(2)(A) refers to prohibition of downward departures for defendants in "CRIMINAL HISTORY CATEGORY I."

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to provide feedback on the proposed amendments.

Respectfully Submitted,

Probation Officers Advisory Group
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