

March 28, 2018

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

Dear Judge Pryor:

The undersigned organizations appreciate the opportunity to submit comments in reply to issues raised during the initial comment period concerning the United States Sentencing Commission's proposed amendments related to synthetic drugs.

The Commission has proposed amendments that would apply a class-based approach for synthetic cathinones and cannabinoids, putting various forms of these substances into the same class and applying the same penalty of 12 as the minimum base offense level without regard to the significant differences in purity, potency, and potential harm of each substance. The Commission has also proposed an increase in fentanyl penalties by making the marijuana equivalency for fentanyl four times higher and the threshold quantity for the base offense levels four times lower.

We share concerns raised by most commenters about the public health harms stemming from fentanyl and other synthetic drugs and a sense of urgency that something needs to be done. We disagree, however, with commenters who believe that increasing the severity of punishment for fentanyl and applying a class-based approach to synthetic drugs is the appropriate response.<sup>1</sup> Accordingly, we oppose the Commission's proposal to increase fentanyl penalties and adopt a class-based approach for synthetic cathinones and cannabinoids.

The Commission's proposal seeks to punish individuals who sell drug products containing fentanyl or its analogues. In many instances, however, people do not know that they are selling fentanyl as it has been added to the heroin supply up the distribution chain.<sup>2</sup> In fact, Commission data shows that a mere 15% of people sentenced for fentanyl drug trafficking offenses in FY 2016 clearly knew they had fentanyl.

Even when people do know they are selling or possessing fentanyl, they usually do not know its strength or potency since it varies from analogue to analogue and because it is often mixed with other drugs or cutting agents. We agree with commenters that increasing penalties on people who are unaware that they are selling a product that carries the unique risks the Commission is concerned with ignores criminal culpability.<sup>3</sup> The Department of Justice favors blindly applying an enhancement without needing to prove that a defendant knowingly sold fentanyl.<sup>4</sup> We share concern, however, that such an approach would have no deterrent or punitive effect on many drug sellers unaware of the presence of fentanyl or its analogues in the drug supply.<sup>5</sup>

To the extent the Commission is considering an enhancement related to the fraudulent marketing of fentanyl, we concur with commenters who urge the Commission to at least adopt a "knowingly" standard given what has proven true of the fentanyl market and the level of

knowledge people have with respect to the product they are selling.<sup>6</sup> We urge the Commission to reject the Department of Justice’s position that “favors adding the 4-level enhancement without the ‘knowingly’ requirement.”<sup>7</sup>

Commission data also indicates that most defendants sentenced for federal fentanyl offenses are low-level sellers,<sup>8</sup> not the large-scale distributors whose product could potentially reach thousands of people as law enforcement commenters contend.<sup>9</sup> These individuals are already punished harshly since the guidelines are based on the weight of the entire mixture of the substance. We concur with commenters who are very concerned that the Commission’s proposal will result in inequitable sentences that disproportionately impact people convicted of low-level offenses who are not aware that they are selling a product that carries uniquely grave risks.<sup>10</sup>

Law enforcement comment regarding this amendment relied heavily on anecdotal, not empirical evidence, with respect to supporting the severity of the Commission’s proposed amendment.<sup>11</sup> The evidence is clear, however, that measures like those proposed by the Commission will have no deterrent effect. A large body of research demonstrates that increased severity of criminal punishment for drug-related offenses has failed to lower drug use (demand) or sales (supply). For instance, a recent examination by the National Research Council of the causes and consequences of high incarceration rates found that “the best empirical evidence suggests that the successive iterations of the war on drugs—through a substantial public policy effort—are unlikely to have markedly or clearly reduced drug crime over the past three decades.”<sup>12</sup>

In addition, a newly published 50-state study by Pew found no relationship between state drug imprisonment rates and drug use or overdose deaths.<sup>13</sup> The Office for National Drug Control Policy also found that, despite the increase in sentence severity for drug-related crimes, the rates of current use of controlled substances continued to increase among Americans age 12 and older, from 6.7% reporting use in 1990 to 9.2% in 2012.<sup>14</sup> Even the Department of Justice concedes in comments to the Commission that increasing penalties for fentanyl and its analogues will “provide a modicum of deterrence.”<sup>15</sup>

In addition to not deterring drug use, we agree with commenters who warn that the Commission’s proposal will not suppress the illegal sale of fentanyl and other synthetic drugs.<sup>16</sup> Numerous studies have found that the incarceration of people who sell drugs simply results in a “replacement effect,” in which the market responds to the demand for drugs by replacing drug sellers sent to prison with either new recruits or by increased drug selling by actors already in the market.<sup>17</sup> If new or increased criminal sanctions for synthetic drugs neither decrease supply nor demand, then they serve neither a criminal justice nor public health purpose and should be abandoned.

The Commission proposes increasing penalties for fentanyl because of its purported unique public health risks but we share concerns that increasing penalties for fentanyl sale will only exacerbate these public health harms.<sup>18</sup> Increasing penalties for fentanyl could deter street level sellers and users from diluting fentanyl product to lower risk of fatal overdose, since diluted forms of fentanyl would be punished more harshly under the guidelines given that the total weight of the product is taken into consideration.<sup>19</sup> We also share concerns that increasing penalties for fentanyl sale will deter drug sellers who witness a drug overdose from getting help.

People who sell drugs are particularly wary to call 911, especially considering the wave of states and localities designating “crime scenes” where an overdose death occurred and passage of laws that prosecute sellers for the death of the person who overdosed.<sup>20</sup>

We share concerns raised by commenters that establishing a class-based approach to synthetic cathinones and synthetic cannabinoids does not account for the substantial variation in potency and purity—and potential related harms—of different substances within each class and will result in grossly disproportionate and unfair sentencing.<sup>21</sup> The Commission has acknowledged that some drugs within the broad classes are potentially more harmful than others.<sup>22</sup> Commenters have also highlighted the troubling fact that the Commission’s proposal would punish people for the weight of carrier media such as cellophane and inert plant material commonly associated with synthetic cannabinoid products.<sup>23</sup>

Decisions regarding the appropriate sentencing guidelines should be based on the best possible and most rigorous science on this issue, which is still emerging. We join commenters in urging the Commission to deploy a rational system based on the actual danger that different substances pose, and that considers synthetic drug market dynamics, use patterns, and risks to more accurately categorize synthetic drugs relative to their actual medical and public health harm.<sup>24</sup> We agree with commenters that the Commission should adopt a more robust harm-based analysis that accounts for potency and purity and propose guidelines that consistently and accurately reflect set and articulated standards addressing drug harms and accounting for potency and purity.<sup>25</sup>

We join other commenters in urging the Commission to guard against setting policies that merely react to the alarming media and law enforcement accounts attributed to fentanyl and synthetic drugs.<sup>26</sup> We note, as do other commenters, that the desire to increase penalties for fentanyl, synthetic cannabinoids and synthetic cathinones is reminiscent of the response to crack-cocaine in the 1980s.<sup>27</sup> It took decades to partially reverse the many harms that resulted from the excessive prison terms and sentencing disparity inherent in federal cocaine law. The response to crack cocaine was not rational and we fear a similar response to fentanyl and other synthetic drugs.

Certainly, the public health harms associated with fentanyl are greater than cocaine but increasing penalties will only exacerbate the very harm the Commission seeks to eradicate. Law enforcement and others rightly highlight the public health harms from these and other substances, but these harms should, and can be most effectively addressed through public health measures. There are proven public health and harm reduction solutions to synthetic drug use that should be prioritized over punitive policies.

We appreciate this opportunity to reply to comments received by the Commission on its proposed synthetic drug amendment and thank you for considering our views.

American Civil Liberties Union  
Church of Scientology National Affairs Office  
Criminal Justice Policy Foundation  
Justice Strategies

Law Enforcement Action Partnership  
National Action Network  
StoptheDrugWar.org  
The Leadership Conference on Civil and Human Rights  
The Sentencing Project

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<sup>1</sup> See U.S. Department of Justice comment on March 6, p. 3, 8, 12; U.S. Department of Justice comment on March 14, p. 2, 7, 12; Probation Officers Advisory Group comment on March 6, p. 2, 4

<sup>2</sup> U.S. Sentencing Commission Public Hearing on Fentanyl, December 5, 2017, *available at* <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Logan.pdf>

<sup>3</sup> See Federal Public Defenders comment on March 6, p. 32; Probation Officers Advisory Group comment on March 6, p. 4; Drug Policy Alliance comment on March 6, p. 11

<sup>4</sup> See U.S. Department of Justice comment on March 6, p. 6

<sup>5</sup> See Families Against Mandatory Minimums comment on March 6, p. 5

<sup>6</sup> See Families Against Mandatory Minimums comment on March 6, p. 5; Practitioners Advisory Group comment on March 6, p. 9; Probation Officers Advisory Group comment on March 6, p. 4; Federal Public Defenders comment on March 6, p. 3-4, 32; Drug Policy Alliance comment on March 6, p. 12

<sup>7</sup> See U.S. Department of Justice comment on March 6, p. 6

<sup>8</sup> USSC, *Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments* (Jan. 2018) (showing that a majority of defendants sentenced for fentanyl offenses are low-level dealers; of the 51 persons convicted of a fentanyl-related offense in FY 2016, 29 served “street-level dealer” “courier/mule” and “employee/worker” functions).

<sup>9</sup> See U.S. Department of Justice comment on March 6, 2018, p. 2 and US DOJ comment on March 14, 2018, p. 12

<sup>10</sup> See Families Against Mandatory Minimums comment on March 6, p. 2, 5; Federal Public Defenders comment on March 6, p. 24; Drug Policy Alliance comment on March 6, p. 11

<sup>11</sup> See U.S. Department of Justice comment on March 6, 2018, p. 6; Detective Hector Alcala, Kentucky State Police comment, March 14, 2018, p. 2-3; Kevin Graves, The National Narcotics Officers Association Coalition comment, March 14, 2018, p. 4-7

<sup>12</sup> National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, D.C.: The National Academies Press, 2014), p. 154 *available at* <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>

<sup>13</sup> Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems*, (March 2018), *available at* [http://www.pewtrusts.org/~media/assets/2018/03/pspp\\_more\\_imprisonment\\_does\\_not\\_reduce\\_state\\_drug\\_problem\\_s.pdf](http://www.pewtrusts.org/~media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problem_s.pdf)

<sup>14</sup> Office of National Drug Control Policy, *National Drug Control Strategy: Data Supplement 2014* (2014).

<sup>15</sup> See U.S. Department of Justice comment on March 6, p. 3-4

<sup>16</sup> See Federal Public Defenders comment on March 6, p. 11, 23; Drug Policy Alliance comment on March 6, p. 8-9

<sup>17</sup> Roger K. Przybylski, *Correctional and Sentencing Reform for Drug Offenders: Research Findings on Selected Key Issues*, Colorado Criminal Justice Reform Coalition (September 2009), *available at* [http://www.ccjrc.org/pdf/Correctional\\_and\\_Sentencing\\_Reform\\_for\\_Drug\\_Offenders.pdf](http://www.ccjrc.org/pdf/Correctional_and_Sentencing_Reform_for_Drug_Offenders.pdf); Anne Morrison Piehl et al., *Right-Sizing Justice: A Cost Benefit Analysis of Imprisonment in Three States*, Center for Civic Innovation at the Manhattan Institute, Civic Report No. 8 (1999), *available at* [https://www.manhattan-institute.org/pdf/cr\\_08.pdf](https://www.manhattan-institute.org/pdf/cr_08.pdf); Nat'l Res. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 90 (J. Travis, et al., eds. 2014).

<sup>18</sup> See Drug Policy Alliance comment on March 6, p. 10

<sup>19</sup> See Drug Policy Alliance comment on March 6, p. 6, 10

<sup>20</sup> See Drug Policy Alliance comment on March 6, p. 11-12

<sup>21</sup> See Families Against Mandatory Minimums comment on March 6, p. 3; Federal Public Defenders comment on March 6, p. 2; Drug Policy Alliance comment on March 6, p. 5

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<sup>22</sup> See United States Sentencing Commission, Proposed Synthetic Drug Amendments to the Federal Sentencing Guidelines, p. 11 regarding varying potency of synthetic cannabinoids such as JWH-018 and AM-2201, and p. 16 regarding varying potency of fentanyl analogues such as sufentanil and carfentanil.

<sup>23</sup> See Families Against Mandatory Minimums comment on March 6, p. 4; Federal Public Defenders comment on March 6, p. 18

<sup>24</sup> See Families Against Mandatory Minimums comment on March 6, p. 3-4; Federal Public Defenders comment on March 6, p. 2-4; Drug Policy Alliance comment on March 6, p. 7-8

<sup>25</sup> See Families Against Mandatory Minimums comment on March 6, p. 1; Federal Public Defenders comment on March 6, p. 3-4; Drug Policy Alliance comment on March 6, p. 8

<sup>26</sup> See Federal Public Defenders comment on March 6, p. 20-21; Drug Policy Alliance comment on March 6, p. 12

<sup>27</sup> See Families Against Mandatory Minimums comment on March 6, p. 2; Federal Public Defenders comment on March 6, p. 20-22; Drug Policy Alliance comment on March 6, p. 12