

March 6, 2018

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



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Dear Judge Pryor:

I appreciate the opportunity to submit a written statement in advance of my testimony at the United States Sentencing Commission's ("Commission's") March 14, 2018 hearing on proposed amendments related to synthetic drugs on behalf of the Drug Policy Alliance (DPA).

I. BACKGROUND

DPA works to increase the degree to which drug use is treated as a health issue and advances evidence-based drug policy grounded in compassion and human rights. We accordingly oppose policies that predominantly rely on the criminal justice system to address drug use. DPA educates lawmakers at both the federal and state level about illicit drugs and effective policy responses that reduce harms both from drug use and drug prohibition.

With respect to reducing the harms of drug use, including some of the harms noted by the Commission such as death from overdose, DPA promotes educating people on how to prevent, recognize and respond to an overdose, expanding access to the life-saving overdose antidote naloxone, enacting legal protections that encourage people to call for help for overdose victims, implementing safe consumption services, allowing people to test what is in drugs so that they are aware of what they are selling or consuming and how potent it is, increasing access to substance use disorder treatment, particularly with opioid agonist medications such as methadone and buprenorphine, and prioritizing novel treatment research. These measures all have a wealth of scientific evidence demonstrating their effectiveness at decreasing problematic drug use and all associated harms, including transmission of infectious diseases, public nuisance and crime, hospitalizations, and overdose fatalities. They are proven. Unfortunately, ideology and stigma prevent their wide scale acceptance and expansion.

What is allowed to flourish instead are continued efforts to reduce the supply of illicit substances and increasingly punitive sanctions for people who sell and use drugs *despite a complete lack of evidence that* these measures accomplish their stated purposes. What is worse, there is undisputable evidence that our drug laws have actually compounded the problems they sought to eradicate as well as created entirely new ones. Indeed, drug law enforcement efforts have been associated with a number of unintended harms

and consequences, many of which appear paradoxical to the initial intent. These include *reduced price* of illicit drugs, *increased purity*, *health-related harms* such as addiction, blood-borne diseases, and overdose, *social harms* such as gun violence or homicide, and *displacing drug-related problems* into new communities.¹ And this says nothing of the direct and collateral harms to individuals and communities policed and sentenced under these laws, particularly those of color, which have been disproportionately impacted.

Understanding these broad and wide-ranging harms but also acknowledging the political and legal reality under which the Commission operates, we urge the Commission to *at least* structure the sentencing guidelines in the manner that best mitigates foreseeable public health harms and other consequences such as inequitable sentences. The proposed amendments (and the guidelines writ large) appear divorced from an understanding of how regulation of drugs through criminal penalties will impact the black market for those drugs which will impact public health. A class-based approach to synthetic drugs, for instance, incentivizes the development of the most potent substances since they are not punished any more harshly than less potent products having less severe adverse health and public safety impacts. Nor does the Commission articulate how, for instance, increased severity of punishment for fentanyl will reduce overdose deaths given that all available evidence demonstrates that increased sentences do not impact supply or demand whatsoever.

Because DPA is concerned that the proposed amendments will negatively impact public health and subject people to inequitable and unfair sentences, DPA strongly opposes the Commission's proposal to adopt a class-based approach to synthetic drugs, impose base offense levels for synthetic cathinones and cannabinoids, and increase fentanyl penalties.²

II. CLASS-BASED APPROACH (AMENDMENTS A, B, C)

Synthetic drugs fill a particular black market niche that is the direct result of the excessively punitive policies governing controlled substances. Blanket grouping of various substances into the same class without regard to the significant differences in purity, potency, and potential harm will incentivize the foreseeable adaptation of the black market to those new criminal penalties in a manner that will negatively impact public health. DPA accordingly urges

¹ See, e.g., D. Werb et al., *The Temporal Relationship Between Drug Supply Indicators: An Audit of International Government Surveillance Systems*, 3(9) *BMJ OPEN*, e003077 (2013), available at <https://doi.org/10.1136/bmjopen-2013-003077>; D. Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, 22(2) *INT'L J. DRUG POL'Y* 359–363 87–94 (2011); D.A. Bright & A. Ritter, *Retail Price as an Outcome Measure for the Effectiveness of Drug Law Enforcement*, 21(5) *INT'L J. DRUG POL'Y* 359–363 (2010); T. Kerr et al., *The Public Health and Social Impacts of Drug Market Enforcement: A Review of the Evidence*, 16(4) *INT'L J. DRUG POL'Y* 210–220 (2005).

² DPA takes issue with a number of other areas for comment but leaves it to other parties better versed in the technical details, such as the Federal Public Defenders, to articulate those problems.

the Commission to undertake an evidence-based study to first assess the short and long term harms and then more accurately categorize synthetic (and all) drugs relative to their actual medical and public health harm.

A. Criminalization of the Use and Sale of Controlled Substances Has Created a Riskier and More Dangerous Drug Market with a Deleterious Impact on Public Health.

The broad-scale application of restrictive penalties on illicit substance sales and use without regard to their respective potency, purity, and potential harms has resulted in an rapidly changing drug market where manufacturers and distributors are incentivized to create and sell more potent products that will provide similar sensations at a lower dose. When people who use drugs are no longer able to freely access their drug of choice, even though it may be significantly less risky, they will use a more potent and potentially more dangerous substance. This phenomenon is not new.

When the black market for alcohol was highly regulated during prohibition, manufacturers were forced to adapt by transitioning from bulky, less potent forms of alcoholic beverages, such as beer, to highly distilled spirits such as gin and moonshine. The result was undisputed increases in potency—Americans’ expenditure on distilled alcohol as a share of total alcohol sales skyrocketed from around 40% pre-Prohibition to almost 90% directly following; relative to products with lower alcohol content like beer (Prohibition-era cost increase: over 700%), the price of spirits rose much more slowly (Prohibition-era cost increase: 270%); and, the potency of alcohol products during Prohibition is estimated to have risen by more than 150% relative to pre- and post-Prohibition periods.³ Moreover, according to Beletsky and Davis, “in the context of scarcity, legal risk, and opacity, customers may not be able to [access or] afford their preferred [drug] and are less able to act on informed choices.”⁴

These same market dynamics are at work today with respect to synthetic drugs. The emergence of a market for synthetic cathinones and cannabinoids over the last decade can be tied to meeting the demands for banned drugs, such as methamphetamine/MDMA/cocaine and marijuana respectively. Few users demonstrate an actual preference for synthetic drugs but may use them over their first choice because they are cheaper and easier to obtain or are undetectable on a drug test.⁵

³ Leo Beletsky and Corey Davis, *Today’s Fentanyl Crisis: Prohibition’s Iron Law Revisited*, 46 INT’L J. DRUG POL’Y 156, 157 (2017).

⁴ *Id.*

⁵ See, e.g., K.J. Lauritsen & H. Rosenberg, *Comparison of Outcome Expectancies for Synthetic Cannabinoids and Botanical Marijuana*, 42(4) AM. J. OF DRUG & ALCOHOL ABUSE, 377, 382 (2016) (“The [two] most frequently reported reasons for using synthetic cannabinoids were wider availability than botanical marijuana (19%) [and] avoiding a positive drug test for botanical marijuana (12%) . . .”); E.W. Gunderson et al., *A Survey of*

Synthetic drugs can be riskier for people to use, though not necessarily inherently more harmful, because they are often sold as other drugs and have widely varying potencies. People who are seeking “molly” (MDMA) often end up with synthetic cathinones or may end up with a product that is significantly more potent than what they have used in the past even though it is sold as “bath salts.”⁶ Slang terms like “bath salts” and “molly” create an illusion that the words refer to only one drug, but could actually refer to any number of different synthetic cathinone drugs, some of which are riskier than others. Similarly, even though synthetic cannabinoids may be sold as branded products, they often contain an inconsistent and unreliable combination of synthetic cannabinoids,⁷ and even the material within the packet itself may have varying levels of potency, which could result in ingesting very high levels of chemicals unintentionally.⁸

Moreover, as addicted individuals were cut off from a regulated supply of prescription opioids through prescription monitoring systems, abuse-deterrent formulations, and prescription restrictions, they were subject to black market dynamics, including the introduction of easily- and cheaply-made fentanyl into the heroin supply, to meet the demand. The public health impact has been grave. The number of overdose deaths involving synthetic opioids, excluding methadone but including fentanyl, increased by 72% from 2014 to 2015.⁹ Roughly 9,500 people died from overdoses involving synthetic opioids other than methadone in 2015.¹⁰ Provisional data from 2016 indicates that drug deaths involving fentanyl more than doubled from 2015 to 2016.¹¹ Along with other synthetic opioids (other than methadone), fentanyl overdoses resulted in 20,145 deaths last year, significantly above the 15,446 attributed to heroin or the 14,427 attributed to opioid pills alone.¹²

Synthetic Cannabinoid Consumption by Current Cannabis Users, 35(2) SUBSTANCE ABUSE 184, 184–189 (2013) (57% of sample used synthetic cannabinoids to avoid positive drug test, 48% used because they could not get marijuana, 48% used because it synthetic cannabinoids were easy to obtain, and 38% used because it was cheaper than marijuana); R. Vandrey et al., *A Survey Study to Characterize Use of Spice Products (Synthetic Cannabinoids)*, 120(1–3) DRUG & ALCOHOL DEP. 238, 241 (2012) (30% of study participants endorsed using “Spice” products to achieve intoxication while avoiding detection in drug urinalysis testing).

⁶ See, e.g., Joseph Palamar et al., *Detection of “Bath Salts” and Other Novel Psychoactive Substances in Hair Samples of Ecstasy/MDMA/“Molly” Users*, 161 DRUG & ALCOHOL DEP. 200-205 (2016).

⁷ Paul Griffiths et al., *How Globalization and Market Innovation Challenge How We Think about and Respond to Drug Use: ‘Spice’ a Case Study*, 105(6) ADDICTION 951-953 (2010).

⁸ Vandrey, *supra* note 5.

⁹ Centers for Disease Control and Prevention, *Reported Law Enforcement Encounters Testing Positive for Fentanyl Increase Across US*, last modified August 24, 2016, available at <https://www.cdc.gov/drugoverdose/data/fentanyl-le-reports.html>.

¹⁰ *Id.*

¹¹ F.B. Ahmad and B. Bastian, *Quarterly Provisional Estimates for Selected Indicators of Mortality, 2015-Quarter 1, 2017*, National Center for Health Statistics, Vital Statistics Rapid Release Program (2017), available at https://www.cdc.gov/nchs/data/health_policy/monthly-drug-overdose-death-estimates.pdf.

¹² *Id.*

Heightened enforcement in one area causes the market to adjust and new substances with unknown risks are developed and introduced into the market to meet the demand. Ultimately, criminalization of the use and sale of controlled substances has created a more dangerous drug market with a negative impact on public health.

B. A Class-Based Approach to Synthetic Drugs, Including Cathinones (Part A), Cannabinoids (Part B), and Fentanyl Analogues (Part C), Further Entrenches This Risky Drug Market by Not Adequately Accounting for the Unique Harms of Each Substance Within the Broad Classes.

As noted above, the market always adjusts to avoid and lessen risks of criminal penalties. Recognizing that the market responds and can be influenced to respond in ways that are less harmful to public health, we urge a rational system based on the actual danger that different substances pose (combined, of course, with the demand and harm reduction strategies DPA broadly advocates for).

A class-based approach will not result in proportionate and equitable sentences because it does not account for the substantial variation in potency and purity—and potential related harms—of different substances within each class. Moreover, because the black market adapts to new criminal sanctions, a class-based approach will result in the perverse effect of incentivizing the manufacture and distribution of drugs with the greatest potential for harmful public health outcomes.

In determining whether it should adopt a class-based approach to synthetic drugs, the Commission asked and has received testimony with respect to whether synthetic cathinones, synthetic cannabinoids, and fentanyl analogues are “sufficiently similar to one another in chemical structure, pharmacological effects, potential for addiction and abuse, patterns of trafficking and abuse, and/or associated harms, to support the adoption of a class-based approach for sentencing purposes,” and, yet, the Commission appears to rely only on an evaluation of chemical structure and pharmacological effects in making its determination without articulating to what extent the other factors were considered, if at all.

Indeed, the Commission’s proposed amendments rest almost solely on its conclusions, despite some evidence to the contrary, that 1) “there appears to be broad agreement that the basic chemical structure of cathinone remains present throughout all synthetic cathinones (pg. 2),” 2) “. . . experts indicat[e] that, while synthetic cannabinoids may differ in chemical structure, these substances all produce the same pharmacological effects . . . (pg. 12),” and 3) fentanyl analogues are defined as “any substance . . . that has a chemical structure similar to fentanyl . . . (pg. 17).” There appears to be no weighing of

other important factors, including those identified by the Commission itself—potential for addiction and abuse and/or associated harms—or at least no weighing in any proportional manner.

In fact, the Commission acknowledges that some drugs within the broad classes are potentially more harmful than others: “[n]ewer synthetic cannabinoids have been shown to be even more potent than [synthetic cannabinoids such as JWH-018 and AM-2201] (pg. 11),” and “while most fentanyl analogues are typically about as potent as fentanyl itself, some analogues, such as sufentanil and carfentanil, are reported to be many times more potent than fentanyl (pg. 16).”

Not only will treating newer, more potent synthetic cannabinoids the same as, for example, JWH-018 or the risky carfentanil the same as less potent fentanyl analogues be grossly disproportionate and unfair in terms of sentencing, it will also negatively impact public health. A class-wide categorization based solely on chemical structure and pharmacological effect also means the Commission is necessarily attributing the same sentence to future drugs that have not even been developed yet, which may be substantially more or less harmful. The Commission itself states that “. . . new varieties [of synthetic cathinones and synthetic cannabinoids] are regularly developed for illegal trafficking (pgs. 2, 12).” What is ultimately developed could be impacted by how the Commission decides to address synthetic drugs.

In an evaluation of cryptomarkets¹³ dealing in synthetic drugs including fentanyl, for example, Gilbert and Dasgupta observed: “In the case of fentanyl, cryptomarket-focused online forums have been host to conversations about the logic and logistics of so-called volumetric dosing. Strategies for reformulating crystalline powders into more evenly and moderately concentrated liquids for oral and intranasal administration has been an emergent theme in discussions about safer use of fentanyl products.”¹⁴ Less harmful current and future formulations of synthetic drugs should not be subject to the same criminal penalties as more harmful ones.

People who manufacture, distribute, and sell synthetic drugs will have no incentive to offer a less potent, less harmful substance if they will be sentenced the same regardless of what version of synthetic or analogue drugs they put to market—instead, they minimize their legal risk by offering the most concentrated formulations in the smallest doses to avoid penalties tied to quantities. Nor will there be any motivation, for instance, to expend the time and money to formulate a substance with fewer side effects and adverse events, or modify existing substances.

¹³ Cryptomarkets are internet-based platforms that facilitate pseudonymous transactions of information and products, including drugs.

¹⁴ Michael Gilbert and Nabarun Dasgupta, *Silicon to Syringe: Cryptomarkets and Disruptive Innovation in Opioid Supply Chains*, 46 INT’L J. DRUG POL’Y 160, 165 (2017).

Were the Commission to adopt a more robust harm-based analysis that accounted for potency and purity, the accompanying differing sentences would presumably motivate the development and offering of significantly less harmful substances. While there would undoubtedly still be some outliers, the cumulative effect would be a drug market offering less potent drugs (which are what most people want) while mitigating the risks of negative public health outcomes like hospitalizations and deadly overdoses.

C. A Comprehensive Harm-Based Approach Based on Sound Research is Necessary to Ensure Both Equitable Sentencing and Better Public Health Outcomes.

DPA urges the Commission to undertake a comprehensive study of the drug guidelines and adopt a consistent approach to ranking medical and public health drug harms while accounting for dosage weight and potency. Critically, this approach must be based in the most sound research and science available on synthetic drugs as well as address research gaps. Particularly since many of the substances under consideration are relatively novel, little research has been undertaken to fully understand the epidemiology of synthetic drug use and the potential benefits and harms.

Indeed, we do not yet even have a good handle on *who* is using synthetic cathinones or cannabinoids, let alone what the impacts are. The National Survey on Drug Use and Health, which, while methodologically flawed, provides the most comprehensive estimates of lifetime, past-year, and past-month use of a variety of legal and illegal drugs, does not ask about use of synthetic cathinones or cannabinoids.¹⁵ Estimates of the size of the market for illicit drugs, prepared for the Office of National Drug Control Policy, are prepared only for cocaine, marijuana, heroin, and methamphetamine.¹⁶

Of the few studies that do address the implications of synthetic drug use, they only evaluate adverse events and provide relatively little clues as to the actual cause of the actual harm (i.e., was the cause of an excited delirium episode after consuming synthetic cathinones the result of the substance, a unique combination with another substance, or an underlying mental disorder; the pharmacological effects of cannabinoids are often compounded by the presence of more than one synthetic cannabinoid in a single package). Moreover, we do not know, for instance, the portion of synthetic drug users who have never sought help at an emergency room, developed dependency, or

¹⁵ See SAMHSA, *Results from the 2016 National Survey on Drug Use and Health: Detailed Tables* (2017), available at <https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf>.

¹⁶ National Office of Drug Control Policy, *What America's Users Spend on Illegal Drugs: 2000-2010* (Feb. 2014), available at https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/wausid_results_report.pdf.

been arrested for violent behavior.¹⁷ Though evidence is emerging with respect to fentanyl,¹⁸ it is still scant.

Decisions regarding the appropriate sentencing guidelines should be based on the best possible and most rigorous science on this issue, which is still emerging. The Commission should refrain from making a class-based determination until it has a more robust data set to inform its decision. To the extent the Commission feels compelled to act before the gaps in evidence and research have been filled, which is inadvisable, the Commission should at least use what research is available to ensure the guidelines consistently and accurately reflect set and articulated standards addressing drug harms and accounting for potency and purity to ensure its guidelines do not create perverse outcomes that could negatively impact broader public health.

III. MINIMUM BASE LEVELS (AMENDMENTS A, B) AND INCREASED PENALTIES (AMENDMENT C)

The Commission has proposed amendments that would set 12 as the minimum base offense level for synthetic cathinones and cannabinoids. 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. DPA strongly opposes these amendments because there is no evidence that these measures will deter the prohibited conduct. And, with respect to fentanyl in particular, increased penalties are not supported by what we know about the market.

A. Setting Minimum Base Levels for Imprisonment for Synthetic Cathinones and Synthetic Cannabinoids and Increasing Penalties for Fentanyl Will Not Have Any Deterrent Effect.

Empirical evidence finds little support for the idea that sentence severity or imprisonment has a deterrent effect. One evaluation of the data concluded that “existing evidence does not support any significant public safety benefit of the practice of increasing the severity of sentences by imposing longer prison terms” and that “research findings imply that increasingly lengthy prison terms are counterproductive.”¹⁹

¹⁷ R.J. Tait et al., *A Systematic Review of Adverse Events Arising from the Use of Synthetic Cannabinoids and Their Associated Treatment*, 54(1) CLIN. TOX. 1–13 (2016); Joseph Palamar, *Characteristics of Novel Psychoactive Substance Exposures Reported to New York City Poison Center, 2011-2014*, AM. J. DRUG & ALCOHOL ABUSE, 42(1), 39–47 (2016); M.C. Van Hout & E. Hearne, *User Experiences of Development of Dependence on the Synthetic Cannabinoids, 5f-AKB48 and 5F-PB-22, and Subsequent Withdrawal Syndromes*, 15(3) INT’L J. MENTAL HEALTH & ADDICTION 565–579 (2017).

¹⁸ See, e.g., International Journal of Drug Policy special edition, *US Heroin in Transition: Supply Changes, Fentanyl Adulteration and Consequences*, available at http://www.ijdp.org/heroin_transition.

¹⁹ Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project (November 2010), available at

With respect to drug crimes particularly, a large body of evidence demonstrates that neither increased arrests nor increased severity of criminal punishment for drug-related offenses have resulted in less use (demand) or fewer sales (supply). In 2011, for instance, researchers found that “[c]hanges in hard drug arrest rates did not predict changes in [injection drug use] population rates.”²⁰ A recent 50-state study also found no relationship between state drug imprisonment rates and drug use or overdose deaths.²¹ In addition, the Office for National Drug Control Policy has found that, despite the increase in sentences and sentence severity for drug-related crimes, the rates of current use of controlled substances has continued to increase among Americans age 12 and older, from 6.7% reporting use in 1990 to 9.2% in 2012.²²

And supply follows demand, not the other way around. 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.²³ One study concluded that the main effect of imprisoning drug sellers “is merely to open the market for another seller.”²⁴ Indeed, “[m]ost drug policy analysts agree that . . . imprisoning individual drug dealers seldom reduces the availability of drugs or the number of traffickers.”²⁵ 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.

<http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

²⁰ Samuel R. Friedman et al., *Drug Arrests and Injection Drug Deterrence*, 101(2) AM. J. PUB. HEALTH 344-249 (2011).

²¹ Pew Charitable Trusts, *Letter to The President’s Commission on Combating Drug Addiction and the Opioid Crisis RE: The Lack of a Relationship between Drug Imprisonment and Drug Problems*, (June 2017), available at <http://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2017/06/www.pewtrusts.org/~media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf>.

²² Office of National Drug Control Policy, *National Drug Control Strategy: Data Supplement 2014* (2014).

²³ 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.

²⁴ 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.

²⁵ Nat’l Res. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 90 (J. Travis, et al., eds. 2014).

B. Increasing Penalties for Fentanyl is Not Equitable and Will Exacerbate the Public Health Harms the Commission is Concerned with Addressing.

Most people, particularly those primarily being sentenced under the guidelines, do not know that they are selling fentanyl as it has been added to the heroin supply up the distribution chain. 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 cut into other drugs or with cutting agents. The Commission proposes increasing penalties for fentanyl because of its purported unique public health risks and dangerousness, but slapping higher penalties on people who are unaware that they are selling a product that carries these unique risks ignores criminal culpability. Moreover, in order to guard against fatal overdose from a fentanyl product that could be too potent, some street level sellers and users are starting to dilute it but would be punished *more* harshly under the guidelines for doing so given that the total weight of the product is taken into consideration. Public health harms will accordingly be exacerbated by increased penalties for fentanyl sale.

1. Harsher Penalties Absent Knowledge by the Seller of What They Are Selling Is Not Equitable.

Commission data shows that *a mere 15%* of people sentenced for fentanyl drug trafficking offenses in FY 2016 clearly knew they had fentanyl. This should come as no surprise. Dan Ciccarone, Professor at the UCSF School of Medicine and the foremost academic expert on the domestic fentanyl drug market,²⁶ notes that the evidence from a public health standpoint supports cartel based distribution, which is the only explanation for the geographic disparities seen with respect to fentanyl overdose.²⁷ In other words, while there are certainly some exceptions, heroin is widely adulterated with fentanyl before it enters the U.S. market and domestic sellers and users are largely unaware of the composition of their product. Indeed, in testimony before the United States Sentencing Commission in December 2017, Barry K. Logan, a chief scientist at a forensic lab that works with law enforcement to test drugs stated that “[r]ecent studies have demonstrated that drug users cannot reliably differentiate between the effects of fentanyl and other opioids such as heroin.”²⁸ People who unwittingly sell fentanyl, which appear to be the bulk of the sellers, are already punished over harshly since the guidelines are based

²⁶ See, e.g., Dan Ciccarone, *Fentanyl in the US Heroin Supply: A Rapidly Changing Risk Environment*, 46 INT’L J. DRUG POL’Y 107-111 (2017); Dan Ciccarone et al., *Heroin Uncertainties: Exploring Users’ Perceptions of Fentanyl-Adulterated And -Substituted ‘Heroin,’* 46 INT’L J. DRUG POL’Y 146-155 (2017).

²⁷ Communication with Dan Ciccarone, March 5, 2018.

²⁸ U.S. Sentencing Commission Public Hearing on Fentanyl, Fentanyl, December 5, 2017, available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Logan.pdf>.

on the weight of the entire mixture of substance. Increasing these penalties even further in an attempt to address public health will not only exacerbate the very harm it seeks to eradicate, but will result in inequitable sentences for people who demonstrate no higher level of culpability.

2. Increased Fentanyl Penalties Under Guidelines That Do Not Distinguish Between Mixtures and Pure Substances Will Result in Perverse Public Health Impacts.

The Commission’s proposal to increase the severity of the recommended sentence for all fentanyl and fentanyl analogues, without consideration of purity, and including the weight of the entire mixture or substance, will result in perverse public health outcomes. Traci Green, Adjunct Associate Professor of Emergency Medicine and Adjunct Associate Professor of Epidemiology at Brown University, is one of the foremost experts on fentanyl markets with research both forthcoming and published on the issue.²⁹ Though, as noted above, fentanyl is often cut large-scale into the heroin supply at upper distribution levels, Green observes³⁰ that her research participants are purposefully diluted fentanyl with other drugs and cutting agents as a means of reducing overdose and death, often because it is not immediately obvious how potent the fentanyl is. She recommends that cutting the fentanyl supply should be encouraged as much as possible as a harm reduction strategy, as opposed to consuming pure fentanyl or fentanyl analogues. Under the current amendments, however, fentanyl cut with heroin or other substances as a means of warding off fatal overdose will be punished more harshly than those selling the most potent, pure form of the drug.

3. Increased Fentanyl Penalties Will Discourage People From Calling 911 in the Event of an Overdose.

Commission data shows that a majority of defendants sentenced for federal fentanyl offenses are low-level dealers.³¹ These defendants, by virtue of their connection and relationship to the people to whom they are selling, are best positioned to seek emergency help in the event of an overdose. But, the most common reason people cite for not calling 911 is fear of police involvement. People who sell drugs are particularly weary. Indeed, as more states and localities designate “crime scenes” where an overdose death occurred and prosecute sellers for the death of the person who overdosed, for instance, these fears are heightened. In fact, key informant interviews in Illinois have

²⁹ See, e.g., Johns Hopkins Bloomberg School of Public Health, Bloomberg American Health Initiative, *Detecting Fentanyl, Saving Lives*, available at <http://americanhealth.jhu.edu/fentanyl.html>.

³⁰ Communication with Traci Green, March 5, 2018.

³¹ 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).

revealed that many people who sell drugs are scared to call 911 in counties where these kinds of prosecutions are more common, which may be increasing the fatal overdose rate in these counties.³² In a recent published research study, participants, *unprompted*, stated that fear of arrest for murder stemming from the sale of drugs would prohibit them from calling 911.³³ The same reaction can be expected in response to ratcheted-up federal penalties for fentanyl sale, particularly as states are likely to follow suit.

C. To the Extent the Commission Adopts Sentencing Enhancements for Fentanyl, it Must At Least Require That Defendants “Knowingly Misrepresented” the Substance.

Enhancements related to mismarketing of fentanyl will unnecessarily complicate the sentencing guidelines. If cocaine is sold that has been prepared in a location where fentanyl is prepared/cut, and so is indicidentally in the supply, is the seller misrepresenting, negligent, or a victim of poor science/circumstance? To the extent the Commission proceeds with a sentencing enhancement, then, certainly, “knowingly” misrepresent is critical. As noted above, most people selling fentanyl are unaware of the composition of their product. They are already being harshly sanctioned, despite their lack of knowledge. The first option for a sentencing enhancement would extend an already disparate sentence. “Knowingly misrepresent” at least ties the sentencing enhancement to an enhanced level of culpability.

IV. CONCLUSION

Synthetic drugs have been subject to a fair share of media and law enforcement hysteria, similar to that of crack-cocaine in the 1980s. We know the result of codifying that hysteria into law. Public health and harm reduction solutions to synthetic drug use exist, including scientifically sound education, community-based naloxone, safe consumption services, and drug checking among others. These interventions are based in science. If the response to problematic drug use continues to rest with criminal justice sanctions, we ask that they also reflect the available evidence so as to at least minimize their tremendous harms and collateral consequences. The evidence here is still emerging and the Commission should wait until it has enough data to fully understand synthetic drug market dynamics, use patterns, and risks and then more accurately categorize synthetic (and all) drugs relative to their actual medical and public health harm. The Commission should also refrain from increasing penalties when the research that is available is not only

³² Kathy Kane-Willis, Director of Policy and Advocacy, Chicago Urban League, unpublished correspondence.

³³ Amanda Latimore & Rachel Bergstein, *Caught With a Body” Yet Protected By Law? Calling 911 For Opioid Overdose in the Context of the Good Samaritan Law*, 50 INT’L. J. DRUG POL’Y 82, 85 (2017).

sufficient but unequivocal that it is ineffective at reducing drug supply or demand.

Thank you for the opportunity to share our viewpoint,

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