March 6, 2018

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments – Synthetic Drugs

Dear Judge Pryor:

As always, we are happy to share with you and your fellow commissioners the views of the board, staff, and members of FAMM on proposed amendments to the federal Sentencing Guidelines. Most of the 35,000 federal prisoners and 40,000 individuals outside prison with whom we correspond have been affected in one way or the other by the guidelines. Their experiences inform our advocacy.

FAMM has several concerns regarding the proposed amendments for synthetic drugs. One overriding issue regards a problem that has deviled the Commission's approach to drug sentencing since the inception of the guidelines – the lack of a coherent set of standards to guide penalty selection. In our opinion, its manifestation in the drug guidelines stems from their reliance on drug type and quantity to establish base offense levels, a reliance we and others have long and sharply critiqued.[1]

Having settled on type and quantity as the proxy for culpability, the Commission's preliminary step of locating a substance on the drug quantity table takes on outsized significance. That task also suffers from the absence of consistent principles. The process of amending the table for a new drug could provide the Commission the opportunity to bring a more nuanced approach to the task. Rudderless efforts to find the right equivalency and assign the correct value

[1] *See, e.g.*, U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* at 50 (collecting research) (Nov. 2004) Testimony of David Debold, Chair of the Practitioners' Advisory Group before the U.S. Sentencing Comm'n, at 3-5 (March 13, 2014) (pointing out that drug quantity based-sentences originated with the Commission's decision to link guidelines to statutory mandatory minimums and the resulting guidelines result in unjust outcomes); *Id.*, *citing* U.S. Dept. of Justice, Nat'l Inst. Of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 1994) (pointing out that quantity obscures role and serves as a poor proxy for culpability): Letter from Wade Henderson and Nancy Zirkin, Leadership Conference on Civil and Human Rights to Hon. Patti B. Saris, at 3-4 (March 18, 2014); Letter from Thomas Sussman, American Bar Ass'n to Hon. Patti B. Saris, at 1 (March 18, 2014); Letter from Maryanne Trump Barry, Criminal Law Committee, Judicial Conference of the United States to Richard P. Conaboy, U.S. Sentencing Comm'n (Jan. 3, 1996), *cited in* Testimony of Hon. Irene M. Keeley to the U.S. Sentencing Comm'n, at 7-8 (June 10, 2014) (detailing long history of Judicial Conference concern with overreliance on drug quantity for guideline calculation).

to a substance on the Drug Equivalency Tables dominate the process. The implications for getting that equivalency wrong are unduly long sentences. The overbearing influence of drug type and quantity has displaced the search for recommended sentences that meet the purposes of punishment. While the Commission has lowered drug guidelines overall -- after linking them to drug mandatory minimums that were adopted with little debate or proper inquiry -- finding the final range is still dominated by a calculation that has little to do with genuine blameworthiness – for example, punishing couriers and other low level participants based more on the quantity they carry than on the role they play.

The absence of consistent and coherent guidance in establishing severity levels is especially apparent in the choices regarding marijuana equivalencies for the synthetic drugs at issue. Lacking a way to anchor the choices to underlying principles or rationales, the Commission simply proposes a variety of weights, without explanation of why one or the other is better suited to address the ends of sentencing. We simply cannot tell from the proposal why synthetic cathinones should be pegged to 200, 380, or 500 grams of marijuana; or synthetic cannabinoids at 167, 334, or 500 grams; or fentanyl at 10,000 grams -- much less choose among them.

Consequently, if the guidelines are to adopt a class-based approach to the synthetic drugs being considered, we urge that the baseline marijuana equivalencies be set as low as possible to ensure that defendants sentenced for synthetics located on the lower end of the direct harm scale not be subject to guideline ranges that would call for sentences better suited to more harmful forms. Judges can adjust upward, based on specific offense characteristics if need be, to account for harms posed or caused by the drug. Knowing the marijuana equivalency cannot be correct for every case, it should be set low enough so that errors in calculating guideline sentences result in sentences that are too short, rather than in those that are too long. Lenity should be an organizing principle when others cannot be identified. This should be especially true when setting penalties for new drugs, such as synthetics -- the latest drugs de jour.[2]

The Commission is very familiar with the damage done by poorly conceived guidelines that result in unduly long sentences. The poster child for the problem was the original sentencing guideline for crack cocaine. Crack cocaine, like the synthetic drugs of today, triggered significant public concerns. Following the death of Len Bias and in the midst of media reporting that raised the profile of the drug and the perceived harms it caused, Congress set crack cocaine mandatory minimums at the infamous five- and 50-gram levels. The Commission followed suit. It took a dozen years to correct course after many of the assumptions on which crack cocaine sentencing were found to be flawed and sentencing revealed significant racial disparities due to the crack guideline's structure. To its credit the Commission led the way in seeking amendments to the crack cocaine guidelines and the statute itself. While ultimately successful, little could be done to erase the untold extra years spent behind bars by individuals subject to a poorly crafted sentencing guideline. Retroactivity can only do so much in such instances.

More recently, in 2001, the Commission relied in part on research, developed by a scientist whose research was later withdrawn due to serious flaws, to guide its establishment of

[2] *See, e.g.*, CBS News, In Depth, Synthetic Drug Surge, https://www.cbsnews.com/feature/synthetic-drug-surge/ (collecting news stories and other coverage of synthetic drugs) (last visited March 6, 2018).

sentencing guidelines for MDMA, despite the objections of numerous experts.[3] FAMM was deeply involved in bringing some of those experts to the Commission for a hearing on its response to a congressional directive regarding Ecstasy.[4] Their views were largely disregarded however and many years have passed and sentences imposed under a guideline based in part on flawed research and a rush to judgment. Only recently has the Commission turned to amending the MDMA guideline.

Time and again FAMM has urged the Commission to avoid guidelines that have the potential to impose punishment that is unwarranted and unduly severe. Research demonstrates that length of punishment does less to deter criminal conduct than the alacrity and certainty of punishment.[5] Accuracy and, barring that, lenity should govern these choices.

We encourage the Commission to set marijuana equivalencies for these drugs conservatively. Dr. Gregory Dudley recommends synthetic cathinone equivalences ranging from 40 – 100 grams of marijuana and synthetic cannabinoid ranges of between 5 and 14 grams.[6]

We are especially concerned that the Commission's proposed cannabinoid equivalencies appear to be quite overstated and ungrounded in science. While the issues for comment go to pains to assess the relative potency of various synthetic cannabinoids, the reliance on the current THC to marijuana equivalency is unquestioned and unsound. According to Dr. Dudley, the THC equivalency is grossly overstated. He writes:

> The current marijuana equivalency of THC is inconsistent with the amount of THC in marijuana. Illicit marijuana today is commonly ≥ 12% TCH by weight. Thus, 1 gram of THC is contained in as little as 7-8 grams of marijuana. However, the Drug Equivalency Tables identify 1 gram of THC as equivalent to 167 grams of marijuana. . . . The arbitrarily high marijuana equivalency of THC has created problems when comparing sentences for cannabinoid substances that can ambiguously compared to either THC or marijuana."[7]

He recommends an equivalency of 1:7 for THC and an equivalency of 1:14 for synthetic cannabinoids and bases the comparisons on an analysis of the actual amount of the active ingredient in marijuana.[8] We support this common sense, science-based approach that attempts to address the actual potency of these compounds.

We would further encourage that the Commission provide penalties based on the actual amount of synthetic cannabinoid, or, barring that, based on dosage, rather than

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[3] *See, e.g.* Stephen Pincock, *Science* Forced to Retract Article on "Ecstasy," The BMJ, at 579 (Sept. 13, 2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC194116/; *See also*, Testimony of Julie Holland, M.D., Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C. (March 19-20, 2001) (critiquing NIDA-funded research from Johns Hopkins University).
[4] *See Id.*, including testimony from David E. Nichols, Ph.D, Charles S. Grob, M.D., and Dr. Holland.
[5] *See, e.g.*, U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Five Things About Deterrence*, at 1 (June 6, 2016), https://www.ncjrs.gov/pdffiles1/nij/247350.pdf.
[6] Gregory P. Dudley, Ph.D., Opinion Testimony before the US Sentencing Comm'n, at 2 (March 8, 2017).
[7] *Id.*
[8] *Id.*

provide alternatives for carrier media untethered to dosage or the underlying quantity of the synthetic drug. Carriers and mixtures provide at best imprecise measures and can operate to increase punishment in a drug sentencing regime driven by weight. Dosage is a measure that promises better consistency than does using the much more variable weights of mixtures or carriers.[9] Basing punishment on the carrier medium was famously characterized years ago by Judge Richard Posner as "crazy."[10] He continued, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."[11]

Recognizing that carrier media can vary widely, the Commission addressed this issue when establishing a manner to account for LSD. Like synthetic marijuana and synthetic cannabinoids, LSD relies on a carrier medium for ingestion.

> Specific types of cases in which quantity served as a poor proxy for offense seriousness were identified by the Commission and by other observers (For example, the weight of different inactive ingredients mixed with the drug—dilutants, carrier media, and even humidity—can result in disparate sentences for offenders who sell similar numbers of doses of a drug. Subsequently, the Commission developed a standardized weighing method for LSD doses and added other application notes designed to control for these problems, but arbitrary variations due to the weight of inactive ingredients remain.[12]

The Commission established a weight per dose and then determined a means to count the number of doses contained on the blotter and multiplied that number by the weight to come up with a final "quantity." While not exact, the procedure was much more exact than the mixture or substance approach found in statute. Moreover, it is less likely to result in disparate sentences based on different carrier weights. Or, if it does, the differences will not be as stark.

Finally, we address the Commission proposal to enact a specific offense characteristic providing for an enhancement of two to four levels in cases where fentanyl or fentanyl analogue is misrepresented or marketed as another substance. We would discourage adding the enhancement at all given the lengthy sentences provided for fentanyl analogue and contemplated for fentanyl. While the Commission explains only that the proposed increase for fentanyl is to be set at a ratio of 1: 10,000 grams of marijuana to bring it in line with existing penalties for the analogue, we are left with the problem we identified earlier, of not knowing what, other than parity, the equivalency is

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[9] *See* Letter from Marjorie Meyers to Hon. William H. Pryor at 9, nn. 34-36 (March 10, 2017) (referencing sources of suggested dosage measures).
[10] *Chapman v. United States*, 500 U.S. 468, 475 (1991) (Stevens dissenting), *quoting* Judge Posner in *United States v. Marshall,* 908 F.2d 1312, 1333 (Posner dissenting).
[11] *Marshall* at 1333.
[12] U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* at 50 (Nov. 2004) (internal citations omitted).

based on. We don't think this is sound practice and perpetuates unexamined flaws in the analogue equivalency.

Should the Commission adopt an enhancement, we strongly urge it to do so only when the defendant *knowingly* misrepresented or marketed the drug. We can think of no reason to increase the punishment of the unwitting defendant who marketed or misrepresented the drug as another substance. Whatever deterrent or punitive value the Commission would hope to achieve is wasted on the ignorant.

Thank you for considering FAMM's views.

Sincerely,

Kevin A. Ring
President

Mary Price
General Counsel