U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 27, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding Firearms Offenses, First Step Act—Drug Offenses, Circuit Conflicts, Crime Legislation, Career Offender, Criminal History, Alternatives to Incarceration Programs, Fake Pills, and Miscellaneous and Technical Matters. We submitted a letter on the remaining matters on February 15, 2023. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 7 and 8, 2023.

We look forward to the hearing and to working with you and the other commissioners during the remainder of the amendment year on all of the published amendment proposals.

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[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts,* 88 Fed. Reg. 7180 (Feb. 2, 2023).

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2. <u>First Step Act—Drug Offenses</u>

The Commission requests comment on proposed amendments to §§5C1.2, 2D1.1, and 2D1.11 in connection with statutory amendments to the "safety valve" provision, 18 U.S.C. § 3553(f).

A. Background

Under 18 U.S.C. § 3553(f), defendants convicted of specified drug offenses "may obtain 'safety valve' relief" if they satisfy certain requirements. *Dorsey v. United States*, 567 U.S. 260, 285 (2012). Such relief allows a district court to impose a sentence below the otherwise-applicable statutory minimum. 18 U.S.C. § 3553(f). Before 2018, safety-valve relief was available only if the court first found that "the defendant d[id] not have more than 1 criminal history point, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (2012 ed.). The statute set forth other eligibility requirements, all relating to the offense of conviction, in four additional paragraphs. *Id.* § 3553(f)(2)-(5).

Section 402 of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, 132 Stat. 5221, amended Section 3553(f) in two ways. First, Section 3553(f) is now applicable to maritime offenses under 46 U.S.C. §§ 70503 and 70506. Second, Section 3553(f)(1) now provides that a defendant is safety-valve eligible if "(1) the defendant does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guideline." 18 U.S.C. § 3553(f)(1).

Since the First Step Act, four courts of appeals have agreed with the Department's position that a defendant is ineligible for the safety valve if he meets any one of the criminal-history factors listed in Section 3553(f)(1)'s subparagraphs.[20] The Ninth and the Eleventh Circuits, however, have adopted a contrary interpretation, holding that a defendant is eligible for safety-valve relief so long as he does not satisfy all three factors.[21] Under this approach, defendants remain eligible for the safety valve despite lengthy criminal histories, including defendants with over a dozen criminal convictions and over 30 criminal history points.[22] The conflict between the Fifth, Sixth, Seventh, and Eighth Circuits, on the one hand, and the Ninth and Eleventh Circuits, on the other hand, is entrenched. Thus, on January 12, 2023, the Department of Justice filed a brief advocating that the Supreme Court grant certiorari and resolve the issue. And today, the Supreme Court granted certiorari in that case.[23]

B. The Commission Proposal to Amend §5C1.2

The Department agrees with the Commission's proposal to amend §5C1.2 to reflect the current statutory language. Section 5C1.2 implements the safety-valve for the purposes of the Guidelines, and it should thus mirror the language of Section 3553(f). The Commission does not

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[20] *United States v. Pulsifer*, 39 F.4th 1018, 1019 (8th Cir. 2022), petition for cert. granted, No. 22-340 (Feb. 27, 2023); *United States v. Palomares*, 52 F.4th 640, 643-44 (5th Cir. 2022), petition for cert. pending, No. 22-6391 (filed Dec. 21, 2022); *United States v. Haynes*, 55 F.4th 1075, 1081 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022).

[21] *See United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), petition for reh'g denied, No. 19-50305, 2023 WL 501452 (9th Cir. Jan. 27, 2023); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc).

[22] *See, e.g.*, *United States v. Jaime Paz*, 20-CR-2198 (S.D. Cal.) (defendant with 33 criminal history points deemed eligible for safety valve); *United States v. Inthavong*, 21-CR-1117 (S.D. Cal.) (defendant with 14 prior convictions and 23 criminal history points deemed eligible for the safety valve).

[23] *United States v. Pulsifer*, *supra* note 20 (https://www.supremecourt.gov/orders/courtorders/022723zor_6537.pdf).

have authority to either expand or contract the eligibility requirements under Section 3553(f), and courts must continue to follow the law of their circuit regarding safety-valve eligibility regardless of the language in §5C1.2. Although the disagreements among the circuits over the proper interpretation of Section 3553(f)(1) will lead to disparate application of mandatory terms of imprisonment, such disparities are inevitable until the Supreme Court resolves the issue, or Congress amends the statute.

The Department does not agree, however, with the Commission's proposal to revise the minimum offense level in §5C1.2(b). At present, §5C1.2(b) provides that "[i]n the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17." That provision, added in Amendment 624 (Nov. 1, 2001), implements Section 80001(b)(1)(B) of the Violent Crime Control and Law Enforcement Act of 1994, which directed the Commission to ensure that the range for a defendant who faces a mandatory minimum term of five years and meets the safety-valve criteria should not be less than 24 months. The Commission applied a minimum base offense level of 17 because an offender in Criminal History Category I at that offense level faces a range of 24 to 30 months.

The Commission's optional proposal would replace the level-17 floor with a statement that "the applicable guideline range shall not be less than 24 to 30 months of imprisonment." But that revision would not adequately account for a defendant with a more serious criminal history. By instead providing for a minimum base offense level, rather than a minimum Guidelines range, the current version of §5C1.2 appropriately recognizes that the Guidelines range for a safety-valve-eligible defendant should depend, at least in part, on the defendant's criminal history. A defendant who is safety-valve eligible because he has little or no criminal history should face a lower Guidelines range than a defendant who is safety-valve eligible despite an extensive criminal history, particularly given that the Guidelines already provide that "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." USSG §4A1.3(b)(1). To provide otherwise would not appropriately account for "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

C. Guidance on what Constitutes a "1-point," "2-point," or "3-point" offense, "as Determined Under the Sentencing Guidelines"

Circuit courts have reached different conclusions as what constitutes a "1-point," "2-point," or "3-point" offense under Section 3553(f)(1). *Compare Haynes*, 55 F.4th at 1080 ("[Section] 3553(f)(1) refers only to 'prior 3-point' and 'prior 2-point violent' offenses 'as determined under the sentencing guidelines'—which means *all* the Guidelines, including §4A1.2(e)."") *with Garcon*, 54 F.4th at 1280-84 (11th Cir.) (en banc) (interpreting subsections 3553(f)(1)(B) and (C) to include offenses that do not contribute to the total criminal-history score). Criminal-history points are determined according to §§4A1.1 and 4A1.2, which—by the Guidelines' own directive—"must be read together." USSG §4A1.1 commentary. The Department believes that this reading of the statute is clear, and the Court in *Haynes* correctly

interpreted it. But in light of the Eleventh Circuit's decision in *Garcon*, the Department supports the Commission's proposal to align the Guidelines text more clearly with the Sixth Circuit's decision in *Haynes*.

D. §§2D1.1 and 2D1.11

The Department recommends that as to §§2D1.1 and 2D1.11, the Commission adopt Option 2, which provides for a two-level reduction in the base offense level for drug offenders only if the defendant does not have any of the criminal history factors listed in Section 3553(f)(1). Option 2 is consistent with the correct interpretation of Section 3553(f). The Department has successfully argued this position in four courts of appeals, *supra* n.20, and by adopting this interpretation in the Guidelines, the Commission would reduce sentencing disparities resulting from the extant conflict over that provision's interpretation. 28 U.S.C. § 911(b)(1)(B).

Moreover, the two-level reduction in §§2D1.1 and 2D1.11 need not depend on, or be coterminous with, Section 3553(f) or its implementing guideline, §5C1.2. Section 3553(f)(1) is fully implemented through §5C1.2, which was first adopted as an emergency amendment in September 1994.[24] The Commission did not adopt the two-level reduction in §2D1.1 until a year later, USSG App. C, Amendment 515 (effective November 1, 1995), and did not further incorporate a similar reduction into §2D1.11 until 2012. *See* USSG App. C, Amendment 763 (effective November 1, 2012). Nor has the two-level reduction's applicability ever been coterminous with the applicability of Section 3553(f)(1). Initially, the two-level reduction applied only to those defendants with an offense level of level 26 or higher. *See* USSG §2D1.1 (1996). The Commission later removed that restriction and subsequently explained that the two-level reduction is broader than Section 3553(f) because its application "does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment." USSG App. C, Amendment 640 (November 1, 2002). In short, the two-level reduction in §§2D1.1 and 2D1.11 need not depend entirely on Section 3553(f) or its implementing guideline, §5C1.2, but rather has been available in narcotics prosecutions whether the defendant faces a statutory mandatory minimum penalty or not.

Finally, Option 2 is more consistent with the underlying purposes of the two-level reduction. When expanding the two-level reduction in §2D1.1 to apply to offenders with an offense level lower than level 26, the Commission explained that the "general principle underlying this two-level reduction" is "to provide lesser punishment for first time, nonviolent offenders." *See* USSG App. C, Amendment 624 (effective November 1, 2001). But, as discussed above, the Ninth and Eleventh Circuits' interpretation of Section 3553(f)(1) has resulted in defendants with extensive criminal histories being deemed eligible for safety-valve relief under Section 3553(f)(1). It would be inconsistent with the purpose of the two-level reduction to reduce the offense level of defendants with such significant criminal histories.

[24] *See* USSG App. C, Amendment 509 (effective September 23, 1994); *see also id.* at Amendment 515 (effective November 1, 1995) (describing emergency amendment).

E. Recidivist Penalties for Drug Offenders

The Department does not believe that it is necessary to amend Section 2D1.1's penalties for offenders with prior similar convictions in order to implement the First Step Act. The recidivism enhancements in Section 2D1.1—which apply only in cases involving death or serious bodily injury, and thus apply relatively infrequently—have never precisely tracked the language of the statute, and the Department is not aware of any reason why the First Step Act requires that they do so now. Moreover, the proposed edits do not treat similarly situated defendants similarly, as they provide for enhancements based on different qualifying predicate convictions depending on whether a defendant was convicted under 21 U.S.C. § 841(b)(1)(A) or (B), on the one hand, and 21 U.S.C. § 841(b)(1)(C) or (E), on the other.

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8. <u>Fake Pills</u>

Currently, §2D1.1(b)(13) provides for a four-level enhancement if "the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue." The Commission proposes to amend §2D1.1(b)(13) to add an alternative two-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The Commission also published issues for comment, asking whether the proposed *mens rea* requirement is appropriate; whether the Commission should instead make §2D1.1(b)(13)(B) an offense-based enhancement (as opposed to exclusively defendant-based); whether the Commission should make the enhancement applicable to other synthetic opioids; and whether there is an alternative approach that the Commission should consider.

We thank the Commission for working with the Department, including the Drug Enforcement Administration (DEA), to address the ongoing crisis of overdose deaths due to fentanyl. In April 2018, the Commission adopted §2D1.1(b)(13) in response to the growing crisis of overdose deaths from synthetic opioids, noting that in 2015—the most recent year for which data were available—there were 9,580 deaths overdose deaths from synthetic opioids, including fentanyl.[83] The problem is significantly worse now; in the twelve months leading up to August 2022, there were 73,102 such deaths—an increase of 663 percent.[84] Indeed, in his State of the Union Address, President Biden noted that "fentanyl is killing more than 70,000 Americans a year," requested a surge to "stop pills and powder at the border," and asked for "strong penalties to crack down on fentanyl trafficking."[85]

The President specifically mentioned "pills" in his State of the Union address because of the acute threat posed by fake pills laced with fentanyl. The DEA reports that it seized more than 50 million fake pills during the 2022 fiscal year and that 6 out of 10 fentanyl-laced fake pills now contain a potentially lethal dose.[86] Nearly every government agency can and should play a role in addressing the current crisis. The Commission can help by putting traffickers on notice that they are risking increased punishment by selling fake pills.

The Department urges the Commission to alter the *mens rea* requirement applicable to these offenses, which will help better deter the distribution of fake pills likely to be deadly. Further, the Department suggests that the enhancement be applicable to all synthetic opioids, in addition to fentanyl and fentanyl analogues.

A. The Enhancement Should Adopt a Rebuttable Presumption for the *Mens Rea* Requirement

The Department believes the Commission should consider amending the *mens rea* requirement. Although most pills sold on the black market are laced with fentanyl, the current four-level enhancement applies infrequently: of 5,711 defendants who were sentenced for trafficking in fentanyl or fentanyl analogues between fiscal years 2019 and 2021, only 57

[83] USSG Appendix C, Amendment 807 ("the Centers for Disease Control and Prevention reported that there were 9,580 deaths involving synthetic opioids (a category including fentanyl) in 2015, a 72.2 percent increase from 2014").

[84] Neeraj Gandotra, M.D., Chief Medical Officer, SAMSA, testimony House Committee on Energy and Commerce Subcommittee on Health Hearing titled "Lives Worth Living, Addressing the Fentanyl Crisis," February 1, 2023 (reporting 73,102 overdose deaths attributable to fentanyl and other synthetic opioids during the 12-month period ending in August 2022). The Commission's own data also reflect these trends in cases sentenced. In July of 2022, the Commission reported that fentanyl trafficking offenders have increased by 950.0% since the 2017 Fiscal Year. Quick Facts on Fentanyl Trafficking Offenses, FY 2021.

[85] Remarks by President Biden, State of the Union Address (Feb. 7, 2023), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-by-president-biden-in-state-of-the-union-address-2/ ("So let's launch a major surge to stop fentanyl production and the sale and trafficking. With more drug detection machines, inspection cargo, stop pills and powder at the border. …Working with couriers, like FedEx, to inspect more packages for drugs. Strong penalties to crack down on fentanyl trafficking.").

[86] Statement of Anne Milgram, Administrator, DEA, Before the Senate Committee on Foreign Relations, February 15, 2023; *see also* DEA, One Pill Can Kill..

received the four-level increase at (b)(13) for misrepresenting fentanyl as another substance.[87] In our experience, subsection (b)(13) is applied so infrequently in part because the current enhancement requires the government to demonstrate actual knowledge that the substance contains fentanyl or a fentanyl analogue. *See United States v. Allen*, 2022 WL 7980905 (6th Cir. Oct. 14, 2022). Although it is common knowledge among drug traffickers that most fake pills contain fentanyl, in practice, Department prosecutors have reported that it is difficult to prove that the defendant knew that the specific pills that they trafficked contained fentanyl, as required for the enhancement, because defendants often claim that they do not know that the pills contain fentanyl, and because traffickers use vague, coded language that makes it difficult to establish that the defendant was discussing fentanyl.

To reflect that reality, the Department recommends that the *mens rea* requirement take the form of a rebuttable presumption. That is, the enhancement would apply presumptively, but a defendant would be permitted to prove that he lacked actual or constructive knowledge, with the defendant bearing the burden of such proof. Such a rebuttable presumption would properly reflect the fact that illegal drug traffickers should know that there is an extremely high probability that the black-market pills they are selling contain deadly fentanyl, and that any proof that the defendant was not (and could not have been) aware of the fact that the pill contains fentanyl lies primarily with the defendant. We thus suggest that any enhancement apply "unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl or a fentanyl analogue."

B. If the Commission Proceeds With a "Reason to Believe" Standard, it Should Define the Term in the Guidelines

If the Commission does adopt a "reason to believe" standard, it would be helpful to define the term. Although the phrase "[r]eason to believe" appears elsewhere in the Guidelines, for example in §2K2.1, it is not defined, and it has arguably been interpreted differently in different contexts. *See United States v. McKenzie*, 33 F.4th 343, 345 (6th Cir. 2022) (discussing meaning of phrase "reason to believe" in the context of the straw-purchaser enhancement). Thus, to avoid inconsistent interpretations, it would be helpful for the Commission to define the term.

One option would be to define the term to require specific and articulable facts, combined with reasonable and common-sense inferences from those facts, that provide an objective basis for believing that the pills are not legitimately manufactured. The Commission could articulate some specific factors that courts should consider when making this evaluation, including the facts and circumstances surrounding the transaction, the price of the pills, the quantity involved, the involvement (or not) of a physician or pharmacist in the transaction, the existence of a written prescription, standard dosage amounts, and other factors that would suggest that the pills were not actually a legitimately manufactured drug. The Commission could also make clear that "reason to believe" standard is not higher than probable cause.

[87] U.S. Dept. of Just., Criminal Division, Office of Policy and Legislation, analysis of USSC Data file.

C. Misrepresentation

The Department also recommends that the Commission consider amending the marketing requirement of both the current enhancement and the newly proposed enhancement. Both require proof related to the defendant's marketing of or representations about the drug involved in the offense. Unfortunately, this formulation does not reflect the reality of the synthetic opioid crisis. As noted above, it is "fake pills" that are driving overdose deaths in America. The market is flooded with pills that appear to be legitimate prescription drugs, either because they have markings that are extremely similar to the markings of a legitimate prescription drug, or—more commonly—because they have markings that are similar enough to legitimate markings to confuse consumers, but do not perfectly match the legitimate pills. Thus, for example, legitimate 30 milligram oxycodone pills are generally blue, with the marking "M 30"; counterfeit pills might have the same "M 30" marking but be rainbow in color. A defendant selling such rainbow-colored pills might not be considered to be "represent[ing] or market[ing]" the pills "as a legitimately manufactured drug." But consumers purchasing the rainbow-colored pills (or even pills without specific markings) might nonetheless reasonably believe that they are purchasing a relatively safe substance produced in a quality-controlled environment, when in fact they are buying fake pills that are very likely to be laced with fentanyl and may contain a lethal dose.

Moreover, as written, the enhancement might apply more regularly to a street-level dealer who dupes a customer about the identity of the drug, rather than to the high-level traffickers who distribute fake pills without making any representations about their content. In the Department's view, the higher-level traffickers who distribute these deadly pills are equally if not more culpable than the street-level dealer and should be subject to the same enhancement. Finally, a defendant convicted of possessing a large quantity of fake pills, with intent to distribute, may not be subject to any enhancement if the government cannot establish that the defendant has yet affirmatively marketed or misrepresented the drugs.

To address those concerns, we recommend that, instead of applying only when the defendant "represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue," the enhancement apply when "the offense involved a substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact another mixture or substance containing fentanyl or a fentanyl analogue."

D. Section 2D1.1(b)(13) Should be Broadened

Finally, the Commission asks whether (b)(13) should be broadened beyond fentanyl and fentanyl analogues to include synthetic opioids. Although the vast majority of fake pills encountered by the DEA contain fentanyl, the DEA has seen an increasing number of fake Xanax pills (3,000 in the last three years) containing Protonitazene and Metonitazene, both of which are nitazenes, a class of synthetic opioids (benzimidazole-opioids) which may be more potent than fentanyl. The DEA has encountered other synthetic opioids (besides fentanyl and fentanyl analogues) in pills, including Isotonitazene, N-Pyrrolidino Etonitazene, Tapentadol, Etodesnitazene, U-47700, and Flunitazene. The DEA has also encountered fake pills containing xylazine, a non-opioid sedative commonly used in veterinary medicine, and for which overdose

is usually fatal in humans. And the DEA regularly encounters fake pills containing methamphetamine, usually marked AD 10, for Adderall.

But the most critical data point on which the Commission should base its decision is the CDC estimate that during the 12 months ending in August of 2022, there were 73,102 fatal overdoses due to synthetic opioids.[88] To address this crisis head-on, we urge the Commission to expand (b)(13) to include all synthetic opioids. If, however, the Commission elects to focus on fentanyl and fentanyl analogues for the time being, we ask that the Commission monitor the situation during the next amendment cycle, and propose additional changes if appropriate, given updated and available scientific data on overdose deaths and synthetic opioids, and possibly other substances found in pills associated with deadly overdoses.

Below we have provided recommended Guidelines language (new language in underline) consistent with the discussion and our recommendations above. Once again, we welcome the opportunity to continue engaging with the Commission as it considers appropriate changes to the Guidelines.

> (13) If the defendant (A) knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels<u>; or (B) If the offense involved an illicitly-manufactured substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide), a fentanyl analogue, or a synthetic opioid, increase by 2 levels, unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl, a fentanyl analogue, or a synthetic opioid.</u>

The commentary could also make clear that in assessing whether a mixture or substance would appear to a reasonable person to be legitimately manufactured, the court may consider any relevant evidence, including but not limited to the form of the mixture/substance (such as a tablet or capsule), the manner in which the drug was marked, labelled or packaged, or any statements or representations made by the defendant or others about the mixture or substance. The commentary could also make clear that the lack of markings or poor-quality markings would not preclude the applicability of this enhancement.

[88] SAMSA, *supra*.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together.

Sincerely,

Jonathan J. Wroblewski

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