PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

United States Sentencing Commission
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Washington, D.C. 20002-8002

Fake Pills Testimony
February 27, 2023

POAG unanimously favored the proposed amendment to USSG §2D1.1(b)(13) to add an alternative two-level enhancement for drugs that are represented or marketed as a legitimately manufactured drug when in fact they are mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenlethyl)-4-piperindinyl] propanamide) ("fentanyl") or a fentanyl analogue which was not the legitimately manufactured drug. District representatives reported that they have seen an increase in cases related to fentanyl and fentanyl analogue related overdoses and deaths and recognized that there is a serious fentanyl epidemic. This alternative enhancement would provide an adjustment not already captured by the guidelines and account for the increased danger of counterfeit pills containing fentanyl or a fentanyl analogue.

After a lengthy discussion, POAG also unanimously opposed including a *mens rea* requirement for the new provision. These drugs are not obtained from a legitimate source, such as from a prescription where the drug is recirculated. These counterfeit pills are usually manufactured through a clandestine pill press operation and without any regulatory or safety oversight. Not knowing how much fentanyl or a fentanyl analogue exists in a particular illicit pill poses a significant danger, particularly considering that the counterfeit pills may contain lethal doses of fentanyl or a fentanyl analogue. The circumstances are further exacerbated by the appearance of safety and legitimacy a pressed pill might present to an unwary user. Given the elevated level of danger these counterfeit drugs represent, the mere possession for distribution and/or distribution of the counterfeit drugs containing fentanyl or a fentanyl analogue should be sufficient to trigger the enhancement. POAG further unanimously recommend that this should be an offense-based enhancement as

opposed to exclusively defendant-based. The support for this offense-based approach deals not only with the danger these pills represent, but also the amount of people involved in pill pressing suggests that all those involved in a conspiracy related to these pills should have the liability. The old Roman adage "caveat emptor" or "may the buyer beware," in this instance should be flipped. If a defendant is engaged in selling pills, they should be strictly liable for the contents of those pills because it could very well be the death of the person to whom they are selling. POAG respectfully recommends the following language:

> (13)(A) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenlethyl)-4-piperindinyl] propanamide) or a fentanyl analogue, increase by 4 levels; or (B) if the offense involved a representation or marketing as a legitimate manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenlethyl)-4-piperindinyl] propanamide) or a fentanyl analogue, the defendant had reason to believe that such mixture or substance was not the legitimate manufactured drug, increase by **2** levels. For purposes of subsection (b)(13)(B), the term "drug" has the meaning given that term in 21 U.S.C. § 321(g)(1).

POAG believes this structure would prevent the defendant, who works to press the pills and then hands them off for distribution, from escaping accountability for that conduct.

At this time, POAG did not identify additional synthetic opioids to include in the new provision but discussed that additional synthetic opioids may need to be included in the future.

POAG also seeks clarification as to the terms "represented" and "marketed" because these terms may have a variety of meanings and, in practice, may be difficult to apply. Therefore, the enhancement may not adequately capture the conduct the enhancement was intended to capture.

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First Step Act – Drug Offenses Testimony
February 27, 2023

Part A: Safety Valve

POAG members were unanimous that USSG §5C1.2 should conform with Section 402 of the First Step Act which expanded the safety valve provision at 18 U.S.C. § 3553(f). POAG discussed the proposed changes to §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115-391 (Dec. 21, 2018).

POAG is in favor of Option 2 of the proposed amendment. POAG recognizes the two conflicting viewpoints presented in the circuit split on the conjunctive versus disjunctive "and" in 18 U.S.C. § 3553(f)(1). This option would impact USSG §2D1.1(b)(18) and §2D1.11(b)(6), which base the two-level reduction on the criteria in §5C1.2(a)(1)-(5), but set forth the criminal history criteria with a more clearly disjunctive "or." Those in favor of the amendment cited that this option would move the guidelines towards a more restrictive structure, in line with the other criteria, by giving relief only to those who have a reduced criminal culpability. POAG observed how, in the circuits that had interpreted 18 U.S.C. § 3553(f)(1) conjunctively, results that are counterintuitive to the purposes of the safety-valve provision started to occur immediately. In one case, a person who had 30 criminal history points was now statutory safety valve eligible. A person who was subject to enhanced penalties under 21 U.S.C. § 851 also received statutory safety valve relief. A person who was subject to a career offender enhancement received statutory safety valve relief. While Option 2 prevents these outcomes within the guidelines, POAG understands that this would not limit eligibility for relief from mandatory minimum sentences in circuits applying the first criminal history criterion as conjunctive.

Those opposed to bifurcating the two-level reduction from the statutory construct under USSG §5C1.2 cited that, historically, the specific offense characteristics at USSG §2D1.1(b)(18) and

§2D1.11(b)(6) track the statute at 18 U.S.C. § 3553(f), which is incorporated through §5C1.2. Some members of POAG expressed concern that, procedurally, this may become very complicated to have two different analyses. In practice, the Courts in the jurisdictions adopting the conjunctive interpretation of 18 U.S.C. § 3553(f)(1) may apply a variance under 18 U.S.C. § 3553(a) equivalent to a two-level reduction. In those limited cases, this amendment would not result in perfectly resolving disparity amongst the circuits.

Additionally, POAG unanimously favored that the Commission provide guidance on what constitutes a "1-point," "2-point," or "3-point" offense, "as determined under the sentencing guidelines," for purposes of §5C1.2. POAG unanimously favored that the Commission include the proposed language in Option 2 of §2D1.1(b)(18)(B) which states "as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category)." In *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022), the majority opinion seems to require the Court to assess points for prior convictions regardless of whether the offense actually garnered criminal history points under the guidelines. Under the guidelines, prior offenses of a certain age, prior offenses treated as part of a single sentence, and certain prior offenses are unscored. This framework is consistent with §4A1.1 and §4A1.2, which operate in tandem.

Looking solely at §4A1.1 of the guidelines would disregard the directives at §4A1.2, which govern the computation of criminal history points. This may result in unintended disparities which preclude a defendant from receiving relief under the safety-valve for a conviction that would not have otherwise received criminal history points under the current framework at §4A1.1 and §4A1.2. For instance, a defendant who has a Criminal History Category I and has zero or one criminal history point may have several prior offenses that did not garner points under the guidelines because of the age of the conviction. See USSG §4A1.2(e). The clarifying language may settle the issue such that the two different standards, guideline safety valve and statutory safety valve, do not further deviate from each other. There is a risk in having two different standards, and POAG favors the Commission acting to provide clarity to aid in interpretation.

Regarding the minimum offense level at §5C1.2(b), POAG unanimously favored keeping the minimum offense level of 17 rather than providing an advisory custodial range. Given the expanded criminal history criteria in the First Step Act, there are defendants who would qualify for safety valve relief that are in higher criminal history categories than Criminal History Category I. By continuing to refer to a specific offense level, in this case offense level of 17, the defendant would still fall within their designated advisory guideline range and also allow for their criminal history category to still be meaningful.

Part B: Recidivist Penalties for Drug Offenders

As to Part B, POAG concurs with the proposed amendments pertaining to the definitions of "serious drug felony," "felony drug offense," and "serious violent felony." POAG agreed that the adjustment to USSG §2D1.1(a)(1) and (3) well clarifies the intent of the Commission and will resolve misunderstandings about what was meant by "similar offense."