

No. \_\_\_\_\_

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IN THE UNITED STATES SUPREME COURT

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MAXWELL GAFFNEY

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

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**Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

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## **Petition for Certiorari**

### **QUESTION PRESENTED**

Kyle Rodriguez died after voluntarily using heroin. The government proved to a jury he bought it from Petitioner Maxwell Gaffney. The Government also proved that this heroin use was the “but-for cause” of his death. However, there was a multitude of intervening factors (alcohol, tolerance, use of suboxone, induced vomiting) and other potential sources of drugs supplied to Kyle (ignored by the prosecution), which the jury was not allowed to specifically address. This was because, relying on Ninth Circuit precedent, the District Court declined to give an instruction on proximate causation.

The question thus posed, which was deferred in *Burrage v. United States*, 571 U.S. 204 (2014) is whether the enhanced penalty provision of 21 U.S.C. §841(b)(1)(C) requires a showing of proximate causation and therefore the jury should be so instructed.

**PARTIES, RELATED PROCEEDINGS, AND RULE 29.6  
STATEMENT**

The parties to the proceeding below were Petitioner Maxwell Gaffney and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

1. United States v. Maxwell Gaffney, No. 20-50037, U.S. Court of Appeals for the Ninth Circuit. Unpublished Memorandum Decision issued October 20, 2021, attached hereto as Appendix A.
2. United States v. Maxwell Gaffney, No. 20-50037, U.S. Court of Appeals for the Ninth Circuit. Order Denying Petition For Rehearing En Banc issued December 1, 2021, attached hereto as Appendix B.

# **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## **INTRODUCTION**

Overdoses involving opioids have claimed more than 450,000 lives since 1999 – more than the entire population of Portland, Oregon, or Tucson, Arizona. ([Centers for Disease Control and Prevention \(CDC\), Opioid Data Analysis and Resources www.cdc.gov/drugoverdose/data/analysis.html](#))

The epidemic has come in three waves: first, a flood of prescription opioids resulting from profit-driven misleading marketing and uncontrolled distribution by pharmaceutical manufacturers and distributors as well as over-prescription by physicians (See [Scott Higham, Sari Horwitz and Steven Rich, 76 billion opioid pills: newly released federal data unmask the epidemic, Washington Post, July 16, 2019, www.washingtonpost.com/investigations/76-billion-opioid-pills-newly-released-federal-data-unmasks-the-epidemic/2019/07/16/5f29fd62-a73e-11e9-86dd-d7f0e60391e9\\_story.html](#)).

Next, a turn toward heroin as state regulators and law enforcement succeeded in narrowing channels for prescription opioids (See [Steven Rich, Meryl Kornfield, Brittany Renee Mayes and Aaron Williams, How the Opioid Epidemic Evolved, Washington Post, Dec. 23, 2019, www.washingtonpost.com/graphics/2019/investigations/opioid-pills-overdose-analysis/](#)).

Finally, as addressed in the instant case, the dominance of potent, synthetic opioids such as fentanyl, bringing more sudden and frequently irreversible overdoses. ([Centers for Disease Control and Prevention \(CDC\), Opioid Data Analysis and Resources, www.cdc.gov/drugoverdose/data/analysis.html](#)).

Laws commonly known as “Death by Delivery laws” allow prosecutors to seek homicide charges when a drug transaction results in death. Roughly half the states and the federal government have adopted them with varying elements, standards of causation, and sentencing requirements. (See [Strategies for Prosecuting Drug-Induced Homicide Cases](#), Association of Prosecuting Attorneys, and Bureau of Justice Assistance (2017).

These statutes historically have not been used frequently: however, between 2011 and 2016, however, once the “third wave” was recognized, there was a 300% increase in drug-induced homicide charges. (See [Zachary A. Siegel, Despite “Public Health” Messaging, Law Enforcement Increasingly Prosecutes Overdoses as Homicides](#), The Appeal, 11/08/2017, <https://theappeal.org/despite-public-health-messaging-law-enforcement-increasingly-prosecutes-overdoses-as-homicides-84fb4ca7e9d7/> )

It is against this backdrop that Maxwell Gaffney respectfully petitions for a writ of certiorari to review the unpublished Memorandum Decision of the United States Court of Appeals for the Ninth Circuit entered on October 20, 2021.

In said decision, the Ninth Circuit panel affirmed Gaffney’s conviction by a jury of Distribution of Heroin Resulting in Death under [21 U.S.C. § 841\(b\)\(1\)\(C\)](#).



The panel rejected Gaffney’s claim that a jury instruction on proximate causation was required. It held that:

“‘[P]roximate cause is not a required element for conviction and sentencing under § 841(b)(1)(C).’ *United States v. Houston*, 406 F.3d 1121, 1124–25 (9th Cir. 2005). The Supreme Court’s decision in *Burrage v. United States*, 571 U.S. 204 (2014), holding that but-for causation is required, did not call into question the holding or reasoning in *Houston*. See *United States v. Gonzalez*, 906 F.3d 784, 799 (9th Cir. 2018).”

Many people who are admittedly not high-level traffickers are exposed to minimum mandatory sentences even though, as in this case, there may be intervening factors that would interrupt the causal chain. For that reason, this Court should determine whether, given the increased reliance on this statute, it is time to reach the question deferred in *Burrage*.

### **OPINION BELOW**

The Ninth Circuit Court of Appeals affirmed the judgment entered following Gaffney’s conviction. A copy of the decision is attached hereto as Appendix A.

Gaffney petitioned for rehearing en banc. On December 1, 2021, the panel voted to deny the petition for rehearing en banc, and the District Judge sitting by assignment so recommended. The full court was advised of the petition for rehearing en banc, and no judge of the court requested a vote on it. A copy of this Order is attached hereto as Appendix B.

## **JURISDICTION**

This Court has jurisdiction under [28 U.S.C. § 1254\(1\)](#).

## **CONSTITUTIONAL PROVISION AND STATUTE INVOLVED**

The U.S. Const., 5th Amendment states, in part:

No person shall be ... deprived of life, liberty, or property, without due process of law[.]

[21 U.S.C. § 841\(b\)\(1\)\(C\)](#) states, in part:

In the case of a controlled substance in schedule I . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life . . .

## **STATEMENT OF THE CASE**

On February 16, 2017, at approximately 2:30 am, San Diego County Sheriff's Deputies responded to a report of a drug overdose at a residence in Ramona, California. Resuscitation efforts were unsuccessful and a young man named Kyle Rodriguez was pronounced dead at approximately 3:03 am. An official autopsy concluded the cause of death was heroin intoxication.

Approximately 11 months later, Maxwell Gaffney was arrested and indicted for the Distribution of Heroin Resulting in Death (§ 841(b)(1)(C)) which carries a

twenty-year mandatory minimum sentence. Following a 5-day jury trial, Gaffney was convicted on June 24, 2019, and subsequently received the mandatory minimum sentence.

Relying upon binding circuit precedent (*United States v. Houston*, 406 F.3d 1121 and *United States v. Gonzalez*, 906 F.3d 784, the District Court instructed on actual (“but-for”) causation but rejected proposed defense instructions explaining proximate cause.

The aforementioned appellate proceedings followed.

## **REASONS FOR GRANTING THE PETITION**

### **I. WHETHER DISTRIBUTING DRUGS CAUSING DEATH CONTAINS FORESEEABILITY OR PROXIMATE CAUSE REQUIREMENT IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS BEEN DEFERRED BY THIS COURT.**

Review should be granted to determine whether 21 U.S.C. § 841(b)(1)(C)’s enhanced punishment requires a showing of proximate cause, as more and more low level traffickers are being exposed to enhanced penalties even though it is unlikely thaty had any idea the drugs they were selling were laced with lethal levels of fentanyl.

Such a result makes hollow the threat of deterrence that the enhanced penalties are supposed to achieve. The high-level traffickers, who manufactured the adulterated pills or added some fentanyl to maximize the supply of heroin, are not

being prosecuted at the same rate as the street-level dealers or transporters. These street-level dealers are likely addicts who are selling drugs to support their own habit.

## A. INTRODUCTION

In a study entitled “Fentanyl and Fentanyl Analogues - Federal Trends and Trafficking patterns, published in January 2021<sup>1</sup>, (hereinafter “USSC Report”) the United States Sentencing Commission discussed current federal prosecution practices relating to fentanyl and opioid trafficking. Among its findings:

1. “Offenses involving fentanyl and fentanyl analogues have increased at an alarming rate in recent years. This trend is reflected in the federal caseload where the number of drug trafficking cases involving fentanyl and fentanyl analogues has increased exponentially. In fiscal year 2015, the federal courts sentenced 24 fentanyl drug trafficking offenders. In fiscal year 2016, courts sentenced 57 fentanyl drug trafficking offenders. In the following fiscal years, the number of fentanyl cases rapidly increased, with 153 in fiscal year 2017 and 389 in fiscal year 2018. . . . In the fiscal year following the Commission’s amendment, the number of fentanyl cases more than doubled from 389 in fiscal year 2018 to 886 in fiscal year 2019. The number has increased by 3,592 percent from 24 in fiscal year 2015 to 886 in fiscal year 2019. Additionally, though still only a small portion of the overall federal drug trafficking caseload (5.8%), in fiscal year 2019, fentanyl or fentanyl analogues offenders accounted for 74.7 percent of the drug trafficking offenders sentenced where the offense of conviction established that a death or serious bodily injury resulted from the substance’s use.” (USSC Report at page 2)

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<sup>1</sup> attached as Appendix C and located at [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125\\_Fentanyl-Report.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf)

2. “Fentanyl and fentanyl analogue trafficking have increased dramatically. According to the Drug Enforcement Administration, the number of drug seizures involving fentanyl remained under 1,000 per year since 2001 before increasing significantly to 4,697 in 2014, 14,440 in 2015, and 34,199 in 2016.<sup>12</sup> In fiscal year 2017, more than 83,400 domestic drug seizures submitted for forensic testing involved fentanyl or fentanyl analogues, which was almost twice the number in 2016 and almost five times the number since 2015.<sup>13</sup> Additionally, in 2018, of the approximately 318,634 tablets and capsules seized within the United States and subjected to Drug Enforcement Administration laboratory testing, approximately 108,015, or 34 percent, contained fentanyl or a fentanyl analogue as its primary drug, which is nearly five times the number of fentanyl and fentanyl analogue-containing tablets and capsules analyzed by the Drug Enforcement Administration in 2016. (USSC Report at page 6)
3. “This increase in fentanyl cases coincides with a reported rise in prescription and illicit opioid usage.<sup>15</sup> The Centers for Disease Control and Prevention reported that rates of death involving synthetic opioids increased 10 percent from 2017 to 2018 and attribute illicitly manufactured fentanyl and fentanyl analogues as the likely cause of this increase. The Department of Justice has stated that fentanyl is “fueling the opioid epidemic and killing people at an alarming rate.” Congress has also examined the link between fentanyl and opioid abuse. (USSC Report at page 7)
4. “Until very recently, illicitly produced fentanyl, its analogues, and their precursor chemicals were often produced in China—and to a lesser degree Mexico—and shipped to transnational criminal organizations in Mexico, Canada, and the Caribbean. The majority of illicit fentanyl trafficked in the United States is smuggled through international mail facilities, express consignment carrier facilities (e.g., FedEx and UPS), or through ports of entry along the southern U.S. border. (USSC Report at page 7)

5. "While fentanyl and fentanyl analogue offenders remain a small proportion of the overall federal drug trafficking caseload (5.8%), the number of fentanyl offenders and fentanyl analogue offenders has increased sharply over the last several years. As reflected in Figure 10, the prevalence of fentanyl was flat for the ten years from 2005 through 2014. Over the next five years, the trend shifted. Beginning in 2015, the number of fentanyl offenders more than doubled each fiscal year. By fiscal year 2019, the Commission recorded 886 fentanyl drug trafficking offenders, a 3,592 percent increase from 24 offenders in fiscal year 2015. (footnote omitted)" (USSC Report at page 20)
6. With respect to who is being prosecuted and their particular role, in Figure 17 at page 28, the Sentencing Commission noted the following:
  - a. Leaders/organizers comprised 3.5% of fentanyl prosecutions and 3% of fentanyl analogue prosecutions.
  - b. Managers/Supervisors comprised 3.5% of fentanyl prosecutions and 4.7% of fentanyl analogue prosecutions.
  - c. Couriers and mules comprised 12% of fentanyl prosecutions and 1.7% of fentanyl analogue prosecutions.
  - d. Wholesalers comprised 19.6% of fentanyl prosecutions and 18.9% of fentanyl analogue prosecutions.
  - e. Importers and High Level Suppliers Couriers and mules comprised 5.6% of fentanyl prosecutions and 7.3% of fentanyl analogue prosecutions.
  - f. Street level dealers comprised 39.6% of fentanyl prosecutions and 45.5% of fentanyl analogue prosecutions.

In other words, it is those people on the lower end of the distribution network who are experiencing the consequences of criminal activity while those at the top experience little risk of punishment.

The Commission noted that:

"Among the concerns expressed at Commission and congressional hearings, one of the most prevalent related to the knowing and unknowing sale of fentanyl and fentanyl analogues as another drug.

This most commonly occurs when fentanyl or one of its analogues is mixed or cut with heroin or inert fillers to increase profits or to press the mixture into counterfeit pills. Purchasers of these substances most often believe they are buying heroin or a diverted prescription opioid, giving rise to two related concerns. First, the potential for an overdose is compounded because users are unknowingly consuming fentanyl and most fentanyl analogues, which are generally more lethal than those other substances. Relatedly, offenders who knowingly misrepresent fentanyl or its analogues in an attempt to increase profits or the “quality” of their product are viewed as more culpable due to the enhanced risk they are creating.”

(USSC Report at page 32)

The Commission further noted that:

“ . . . rates of death involving synthetic opioids increased ten percent from 2017 to 2018 and the Center for Disease Control and Prevention suggests the cause of this increase is illicitly manufactured fentanyl and fentanyl analogues. The prevalence of overdoses resulting in death and serious bodily injuries associated with fentanyl and its analogues continues to be of concern to the Commission, Congress, the Department of Justice, and many other stakeholders. For this reason, the Commission examined instances where these substances were associated with an overdose.

In fiscal year 2019, the court applied a heightened base offense level under the guidelines because the offense involved death or serious bodily injury in less than one percent (0.8%) of all drug trafficking cases. Fentanyl and fentanyl analogue offenders accounted for nearly three quarters—74.7 percent—of these offenders (Figure 19) In other words, in the majority of drug trafficking cases in which the government had sufficient evidence to prove the substance distributed was the immediate cause of death or serious bodily injury, the substance was either fentanyl or a fentanyl analogue. Furthermore, less than one percent (0.2%) of other drug offenders received the



heightened base offense level for drug trafficking offenses involving death or serious bodily injury, compared to 8.5 percent of fentanyl offenders and 15.9 percent of fentanyl analogue offenders.”

(USSC Report at page 34)

Finally, it stated:

“ A greater proportion of fentanyl analogue offenders (8.2%) were sentenced to the 20-year statutory mandatory minimum sentence for death or serious bodily injury than fentanyl offenders (6.1%). Comparatively, only 25 other drug offenders (0.1%) were sentenced to the 20-year statutory mandatory minimum sentence for death or serious bodily injury.

(USSC Report at page 36)

## **B. A PROXIMATE CAUSE REQUIREMENT IS DICTATED BY THIS COURT’S JURISPRUDENCE**

Under [21 U.S.C. § 841\(b\)\(1\)\(C\)](#), if a death results from the distribution of a controlled substance, then a mandatory minimum term of 20 years applies, and the maximum becomes life without parole. *Id.* Because the death both increases the applicable maximum and triggers a mandatory minimum, it is not a mere sentencing enhancement; it is an element of a greater offense, which must be charged to the jury and proven beyond a reasonable doubt. [Burrage v. United States](#), 571 U.S. at 210, applying [Alleyne v. United States](#), 570 U.S. 99 (2013).

This Court has been clear that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." [Staples v. United States](#), 511 U.S. 600, 604 (1994); [United States v. United States](#)

*Gypsum Co*, 438 U.S. 422, 436–37 (1978). Even when a statute does not explicitly include a mens rea requirement, this Court has ruled that "offenses that require no mens rea generally are disfavored," and courts should look for some indication of congressional intent before mens rea is dispensed as an element of a crime. *Staples v. United States*, at 604.

As the Seventh Circuit put it, proximate cause, also called legal cause, requires proof that the prohibited result was a "reasonably foreseeable consequence" of the defendant's conduct. *U.S. v. Hatfield*, 591 F.3d 945, 948–49 (2010).

This language is not unique to the instant statute. In *U.S. v. Spinney*, 795 F.2d 1410, 1415–16 (9th Cir. 1986) the Ninth Circuit interpreted identical "death results" language following a conviction for conspiracy to commit misdemeanor assault to require not just actual causation but proximate causation.

A basic tenet of criminal law is that the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury. Causation in criminal law has two requirements: cause in fact and proximate cause. W. LaFare & A. Scott, Criminal Law § 35 (1972); C. Torcia, Wharton's Criminal Law § 26 (14th ed. 1978); R. Perkins & R. Boyce, Criminal Law 774 (3d ed. 1982). Cause in fact is relatively simple in this case. . . .

Proximate cause, however, is a more difficult question. "Even when cause in fact is established, it must be determined that any variation between the result intended . . . and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." W. LaFare & A. Scott, Criminal Law § 35 at 246 (1972).

*United States v. Spinney*, 795 F.2d at 1415–1416.

Many other circuits have concluded the same. see *U.S. v. Harris*, 701 F.2d 1095 (4th Cir. 1983)(enhancing language in 18 USC § 241 which provides that “if death results” requires proof of actual and proximate causation); *U.S. v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979) (5th Cir. 1979)(18 USC § 242); *U.S. v. Marler*, 756 F.2d 206, 215–216 (1st Cir. 1985)(18 USC § 242); *U.S. v. Martinez*, 588 F.3d 301, 317–18 (6th Cir. 2009)(18 USC § 1347); *U.S. v. Woodley*, 136 F.3d 1399, 1405–06 (10th Cir. 1998)(18 USC § 245)

21 U.S.C. § 841(b)(1)(C) contains identical language. Nevertheless, in *U.S. v. Houston*, 406 F.3d 1121 (9th Cir. 2005) the Ninth Circuit held that only “cause-in-fact” is required to be proven by the “results” language. It held that proximate cause, at least insofar as it requires that the death have been foreseeable, is not.

Therein, the Ninth Circuit stated:

Proximate cause is not a necessary element of every crime. Although we noted in *U.S. v. Main*, 113 F.3d 1046 (9th Cir. 1997), that “[a] basic tenet of criminal law is that the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury[,]” *id. at 1050*, it was important in *Main* that proximate cause was “implicit in the common understanding of the crime” at issue (involuntary manslaughter<sup>2</sup>). *Id.* (citation omitted) *Main* and the cases upon which it relied involved crimes such as involuntary manslaughter

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<sup>2</sup> The crime for which Appellant was prosecuted would most certainly be prosecutable in California as Involuntary Manslaughter under [Penal Code § 192\(b\)](#). See CALCRIM 581 (elements include “1. The defendant committed a crime; 2. The defendant committed the (crime/ [or] act) with criminal negligence, AND 3. The defendant’s acts caused the death of another person.” “Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; AND 2. A reasonable person would have known that acting in that way would create such a risk.” “[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.”

and conspiracy that impose criminal culpability only when the consequences of the criminal act are reasonably foreseeable. (citations omitted) . Main's holding does not extend to cases, such as this one, where foreseeability is not "implicit in the common understanding of the crime" being prosecuted.

The addition of proximate cause as an element necessary for invoking the twenty-year minimum sentence described in § 841(b)(1)(C) is inconsistent with the statutory language, our circuit's related precedent, and the conclusions of every other federal court of appeals to consider the issue. . . .

*U.S. v. Houston*, 406 F.3d at 1123–1125 see also *U.S. v. Webb*, 655 F.3d 1238, 1250 (11th Cir. 2011)

Petitioner maintains that this analysis was undercut in *Burrage*, which involved the death of Joshua Banka, “a long-time drug user.” On the day Banka died, he smoked marijuana and then injected crushed oxycodone pills he had stolen from a roommate. Later, Banka and his wife bought one gram of heroin from Burrage. Burrage injected some of the heroin and was found dead by his wife a few hours later. The police found several drugs in Banka's house and car, including alprazolam, clonazepam, oxycodone, and hydrocodone. At Burrage's trial, two medical experts testified that the heroin was a contributing factor in Banka's death. But neither was able to say “whether Banka would have lived had he not taken the heroin.”

The trial court not only declined, as requested, to charge on proximate cause but also refused to give a “but-for” instruction, charging instead that it would suffice for conviction if the distribution of the illegal drug to the deceased had been no more

than a “contributing cause?” of the death. Burrage was convicted and sentenced to 20 years. The Eighth Circuit affirmed. This Court granted certiorari on both questions, but reached only the “but for” causation issue, and reversed, stating:

The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. When a crime requires “not merely conduct but also a specified result of conduct,” a defendant generally may not be convicted unless his conduct is “both (1) the actual cause, and (2) the ‘legal’ cause’ (often called the proximate cause) of the result.”

*Burrage v. U.S.*, 571 U.S. at 887.

Because this Court concluded that but-for causation was required, which the evidence in that case could not establish, Burrage’s conviction was reversed. *The Court declined to reach or further discuss the question whether a foreseeable result instruction, which is the heart of proximate causation, was also mandated.*

Although this Court did not need to explicate the proximate cause requirement for criminal cases in *Burrage*, it did so a few weeks later in *Paroline v. U.S.*, 572 U.S. 434 (2014). There, for purposes of calculating restitution, the Court construed the requirements for proving that a victim’s losses resulted from a defendant’s offense of possessing child pornography to require proximate causation, which it said is typically explained in terms of foreseeability or the scope of the risk created by the predicate conduct.

The Third Circuit in *U.S. v. Gonzalez*, 905 F.3d 165, 187–190 (3d Cir. 2018) found the *Paroline* analysis informative:

The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary. It is a flexible concept, . . . A requirement of proximate cause thus serves, inter alia, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.

*U.S. v. Gonzalez*, 905 F.3d at 189.

However, all circuits considering the issue post-*Burrage*, including the Ninth Circuit in *United States v. Gonzalez*, 906 F.3d 784 have concluded that the federal drug-induced death statute does not require proof of proximate cause. See *U.S. v. Alvarado*, 816 F.3d 242, 250 (4th Cir. 2016); *U.S. v. Burkholder*, 816 F.3d 607, 621 (10th Cir. 2016).

While there is no circuit split, not all jurists agree, however. In *Burkholder*, Judge Briscoe dissented, arguing that the statute should be read to include a proximate cause requirement: “I am not persuaded that Congress clearly intended to impose strict liability on a criminal defendant for any death resulting from his drug-trafficking offense.”) see also *U.S. v. Jeffries*, 2018 U.S. Dist., LEXIS 219134 (N.D. Ohio 2018) reversed and remanded, 958 F.3d 517 (6th Cir. 2020) certiorari denied 2020 U.S. LEXIS 5806 (2020)(District Court concluded that *Burrage* and the rule of lenity require proof of proximate causation, but he was reversed on appeal, in dissent, Judge Donald agreed with Judge Briscoe’s conclusion).

In *United States v. Hatfield*, 591 F.3d 945, which also found no proximate causation was required to be proven, Judge Posner stated that the strict liability interpretation “could lead to some strange results.” One “strange result” he

identified was if, unbeknownst to the seller of an illegal drug, the buyer was intending to commit suicide by taking an overdose of drugs, bought from the seller, that were not abnormally strong, and the seller had informed the buyer of the strength of the drugs so that there was no reasonable likelihood of an accidental overdose. *That was the argument made here in this case by trial counsel.*

These dissents and Judge Posner's cautionary warning implicate the concerns expressed in *Burrage* about the imposition of strict liability. The foreseeability and scope of the risk of death arising from a particular distribution and later use of drugs is a classic jury question.

In light of the evidence, there is a reasonable likelihood of a different verdict had the jury been instructed that it had to find that Gaffney's sale of the heroin was the proximate cause of Kyle's death.

The Court should grant certiorari to resolve this previously deferred, but important question. Due to the increasing use of these penalty provisions against low-level dealers who often have no way of knowing that the controlled substances they distribute are fatally powerful, a proximate cause requirement would serve to prevent convictions for events in which the perpetrator had no reasonable basis to believe would take place.

### **THIS CASE PROVIDES AN IDEAL VEHICLE TO RESOLVE THE ISSUE**

This case presents a single discreet legal issue that relies upon a well-preserved record.

## **CONCLUSION**

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Dated: January 12, 2022

By: /s Keith H. Rutman

KEITH H. RUTMAN

Attorney for Petitioner  
MAXWELL GAFFNEY



# **Appendix A**

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 20 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAXWELL JOSEPH GAFFNEY,

Defendant-Appellant.

No. 20-50037

D.C. No.  
3:17-cr-03330-MMA-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Michael M. Anello, District Judge, Presiding

Argued and Submitted October 5, 2021  
Pasadena, California

Before: GRABER and CHRISTEN, Circuit Judges, and SEEBORG,\*\* District Judge.

Maxwell Gaffney appeals his conviction for distribution of heroin resulting in death in violation of 21 U.S.C. § 841(b)(1)(C). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

---

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Richard Seeborg, Chief United States District Judge for the Northern District of California, sitting by designation.

1. The district court did not err in declining to instruct the jury that proximate cause was required to convict Gaffney. We review de novo whether an instruction omitted or misstated an element of the charged offense. *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). “[P]roximate cause is not a required element for conviction and sentencing under § 841(b)(1)(C).” *United States v. Houston*, 406 F.3d 1121, 1124–25 (9th Cir. 2005). The Supreme Court’s decision in *Burrage v. United States*, 571 U.S. 204 (2014), holding that but-for causation is required, did not call into question the holding or reasoning in *Houston*. See *United States v. Gonzalez*, 906 F.3d 784, 799 (9th Cir. 2018).

2. The district did not err in declining to give Gaffney’s proposed jury instructions concerning his theory of defense. We review de novo “[w]hether the other instructions adequately cover the theory of defense.” *United States v. Del Muro*, 87 F.3d 1078, 1081 (9th Cir. 1996). Gaffney’s proposed instructions either were repetitive of instructions given by the court or misstated the law. See *id.*; *United States v. George*, 420 F.3d 991, 1000 (9th Cir. 2005) (holding that a defendant “is not entitled to an instruction that misstates the law”).

3. The district court did not err in admitting images of Facebook messages between Gaffney and another heroin purchaser. We review evidentiary rulings for abuse of discretion. *United States v. Whittemore*, 776 F.3d 1074, 1077 (9th Cir. 2015). The text messages were relevant, probative, and properly authenticated, and

they were not inadmissible hearsay. As the messages were similar to the ones between Gaffney and the decedent Kyle Rodriguez, they were relevant to Gaffney's knowledge, intent, and lack of mistake concerning the sale of heroin to Rodriguez. *See* Fed. R. Evid. 401 ("Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence[.]"); Fed. R. Evid. 404(b)(2). Given the relevance of the messages, any prejudicial effect did not "substantially outweigh[]" their probative value. Fed. R. Evid. 403. The messages were properly authenticated because, among other reasons, the phone number used by the account holder "Max Gaffney" in the messages was Gaffney's phone number. *See* Fed. R. Evid. 901(a).

Additionally, non-constitutional errors in evidentiary rulings are subject to harmless error review. *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002). The messages between Gaffney and the other purchaser only went to the elements of whether Gaffney sold heroin to Rodriguez and whether he knew what he sold was heroin. The government provided other evidence of these elements at trial, including the messages between Gaffney and Rodriguez, and drug paraphernalia found in Gaffney's home. Even if the district court erred in admitting the messages between Gaffney and the other purchaser, "it is more probable than not that the error did not materially affect the verdict." *Id.* (internal quotation marks and citation omitted). Finally, the messages sent to Gaffney were admissible

as non-hearsay evidence because they were admitted to show their effect on Gaffney, not for their truth. *See* Fed. R. Evid. 801(c)(2).

4. Sufficient evidence supports the verdict. Gaffney argues that there was insufficient evidence that Rodriguez had lethal levels of heroin in his system and that the heroin Rodriguez used when he overdosed must have been supplied by someone other than Gaffney. Multiple experts, however, testified that Rodriguez would not have died but for the heroin. The case agent who reviewed the contents of Rodriguez's phone testified that the only messages in which Rodriguez successfully arranged to buy heroin close to the date of his death were the ones with Gaffney. Further, the government also presented evidence that Rodriguez did not use heroin earlier in the evening before his overdose at home. Friends and family testified that Rodriguez did not appear to be on drugs earlier in the day, and that Rodriguez ate a large meal on his way home, which an expert opined he would not have been able to eat if he had already used heroin that evening. Viewing the evidence "in the light most favorable for the prosecution . . . [a] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc) (internal quotation marks and citation omitted).

5. The district court did not abuse its discretion in denying Gaffney's motion for a new trial. *See United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011)

(reviewing for abuse of discretion the denial of a motion for a new trial). Although the standard governing motions for a new trial is “much broader” than the one governing motions for acquittal, *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000) (quoting *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992)), this case is not an “exceptional case[] in which the evidence preponderates heavily against the verdict,” *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981) (internal quotation marks and citation omitted). Instead, the government provided significant evidence to support each of the elements of the offense. Further, Gaffney argues that his prosecution and conviction were unfair given his lack of prior involvement in Rodriguez’s battle with addiction. This argument, however, concerns Congress’s design of the statute, not a lack of evidence to support the conviction.

**AFFIRMED.**

# **Appendix B**

FILED

UNITED STATES COURT OF APPEALS

DEC 1 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAXWELL JOSEPH GAFFNEY,

Defendant-Appellant.

No. 20-50037

D.C. No.

3:17-cr-03330-MMA-1

Southern District of California,  
San Diego

ORDER

Before: GRABER and CHRISTEN, Circuit Judges, and SEEBORG,\* District Judge.

Judges Graber and Christian have voted to deny Appellant's petition for rehearing en banc, and Judge Seeborg has so recommended.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing en banc, Docket No. 37, is DENIED.

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\* The Honorable Richard Seeborg, Chief United States District Judge for the Northern District of California, sitting by designation.



# **Appendix C**



United States Sentencing Commission  
January 2021

# FENTANYL AND FENTANYL ANALOGUES

FEDERAL TRENDS AND TRAFFICKING PATTERNS







# FENTANYL AND FENTANYL ANALOGUES

## FEDERAL TRENDS AND TRAFFICKING PATTERNS

CHARLES R. BREYER

Commissioner

DANNY C. REEVES

Commissioner

PATRICIA K. CUSHWA

*Ex Officio*

CANDICE C. WONG

*Ex Officio*

KENNETH P. COHEN

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JANUARY 2021

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*Research Associate*



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# Introduction and Findings

*This report examines the relatively new and emerging problem of fentanyl and fentanyl analogue trafficking. The United States Sentencing Commission (the “Commission”) issues this report pursuant to its authority to collect, analyze, and report on trends in federal sentencing.<sup>1</sup>*

Fentanyl is a synthetic opioid analgesic that is approximately 30 times more potent than heroin.<sup>2</sup> Fentanyl abuse has become both more prevalent and more dangerous in recent years because of the increasing appearance of substances chemically or pharmacologically similar to fentanyl, collectively classified as “fentanyl analogues.” Many fentanyl analogues are even more powerful than fentanyl and are manufactured by modifying fentanyl’s basic chemical structure.<sup>3</sup> The Centers for Disease Control and Prevention has stated that illicitly manufactured fentanyl and fentanyl analogues likely caused a ten percent increase in the rates of death involving synthetic opioids in only one year, from 2017 to 2018.<sup>4</sup>

Offenses involving fentanyl and fentanyl analogues have increased at an alarming rate in recent years. This trend is reflected in the federal caseload where the number of drug trafficking cases involving fentanyl and fentanyl analogues has increased exponentially. In fiscal year 2015, the federal courts sentenced 24 fentanyl drug trafficking offenders. In fiscal year 2016, courts sentenced 57 fentanyl drug trafficking offenders. In the following fiscal years, the number of fentanyl cases rapidly increased, with 153 in fiscal year 2017 and 389 in fiscal year 2018.

Spurred by these trends, the Commission, Congress, and the Department of Justice have pursued policies intended to increase interdiction and promote appropriate punishment for fentanyl and fentanyl analogue traffickers. In 2018, the Commission amended the drug trafficking guideline to promote more uniform application of the penalties for fentanyl and fentanyl analogue offenders and to add new enhanced penalties for offenders who knowingly misrepresent these substances.<sup>5</sup> The Commission’s action followed a multi-year study that demonstrated the potency, lethality, and increasing prevalence of fentanyl and fentanyl analogues.<sup>6</sup>

Since the Commission’s 2018 amendment, Congress has considered legislation and the Department of Justice has undertaken new enforcement initiatives to address the increased trafficking and harms caused by fentanyl and fentanyl analogues as these trends show no sign of abating. In the fiscal year following the Commission’s amendment, the number of fentanyl cases more than doubled from 389 in fiscal year 2018 to 886 in fiscal year 2019. The number has increased by 3,592 percent from 24 in fiscal year 2015 to 886 in fiscal year 2019. Additionally, though still only a small portion of the overall federal drug trafficking caseload (5.8%), in fiscal year 2019, fentanyl or fentanyl analogues offenders accounted for 74.7 percent of the drug trafficking offenders sentenced where the offense of conviction established that a death or serious bodily injury resulted from the substance’s use.

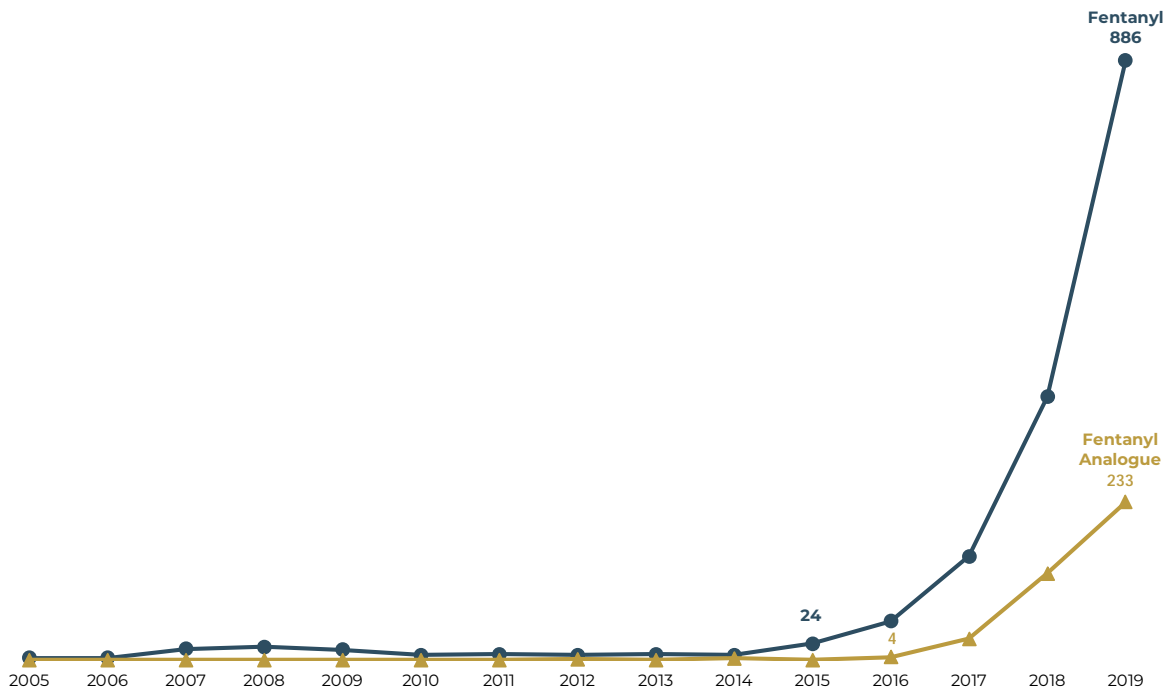
The continued Congressional and Executive Branch interest in fentanyl and its analogues, combined with the rising numbers of these cases and the high risk of harms attributed to these substances, highlights the importance of continued study of fentanyl-related offenses. The Commission, therefore, is issuing this report to inform future deliberations in the federal criminal justice system about fentanyl and fentanyl analogue offenses and offenders.

This publication summarizes the Commission’s policy work on fentanyl and fentanyl analogue offenses. It then discusses the continuing policy-making efforts of Congress and the Department of Justice in this area. Finally, the publication presents data about fentanyl and fentanyl analogue offenses since 2005 and provides an in-depth analysis of fiscal year 2019 fentanyl and fentanyl analogue offenses and offenders.

“

*Fentanyl abuse has become both more prevalent and more dangerous in recent years because of the increasing appearance of substances chemically or pharmacologically similar to fentanyl, collectively classified as “fentanyl analogues.”*

Figure 1. Number of Federal Fentanyl and Fentanyl Analogue Trafficking Offenders Over Time





## Key Findings

**While fentanyl and fentanyl analogue offenders remain a small proportion of the overall federal drug trafficking caseload (5.8%), the number of fentanyl offenders and fentanyl analogue offenders has sharply increased over the last several years.**

- *Since fiscal year 2015, the number of fentanyl offenders reported to the Commission more than doubled each fiscal year, resulting in a 3,592 percent increase, from 24 to 886 offenders.*
- *Since fiscal year 2016, the number of fentanyl analogue offenders increased 5,725 percent, from four to 233 offenders.*

**Many fentanyl and fentanyl analogue offenders trafficked more than one drug type.**

- *Almost half (45.2%) of fentanyl offenders also trafficked at least one other drug. The most common other drugs were heroin (59.8%) and powder cocaine (35.5%).*
- *Over half of fentanyl analogue offenders (58.4%) also trafficked at least one other drug. The most common other drugs were heroin (52.2%), fentanyl (40.4%), and powder cocaine (24.3%).*

**Five fentanyl analogues, carfentanil, furanyl fentanyl, acetyl fentanyl, 4-fluoroisobutyryl fentanyl (or para-fluoroisobutyryl fentanyl), and cyclopropyl fentanyl accounted for 76.4 percent of the fentanyl analogues trafficked in fiscal year 2019.**

**Nearly all fentanyl and fentanyl analogues trafficked in fiscal year 2019 were illicitly manufactured. Only 18 fentanyl offenders and no fentanyl analogue offenders trafficked a diverted prescription form of the substance.**

**For offenders sentenced in fiscal year 2019, fentanyl and fentanyl analogues had distinct trafficking patterns. Fentanyl was more likely to enter the United States through the United States/Mexico border, while fentanyl analogues were more likely to be purchased directly over the Internet or dark web, frequently from China, and shipped by international mail or express package services.**

**Roughly one-third or more of fentanyl and fentanyl analogue offenders (31.0% and 42.9%, respectively) sold these substances as a different drug, almost always heroin or a diverted prescription medication.**

- *Just under five percent (4.5%) of fentanyl offenders and nine percent (9.0%) of fentanyl analogue offenders knowingly misrepresented these substances as another drug during a drug transaction.*

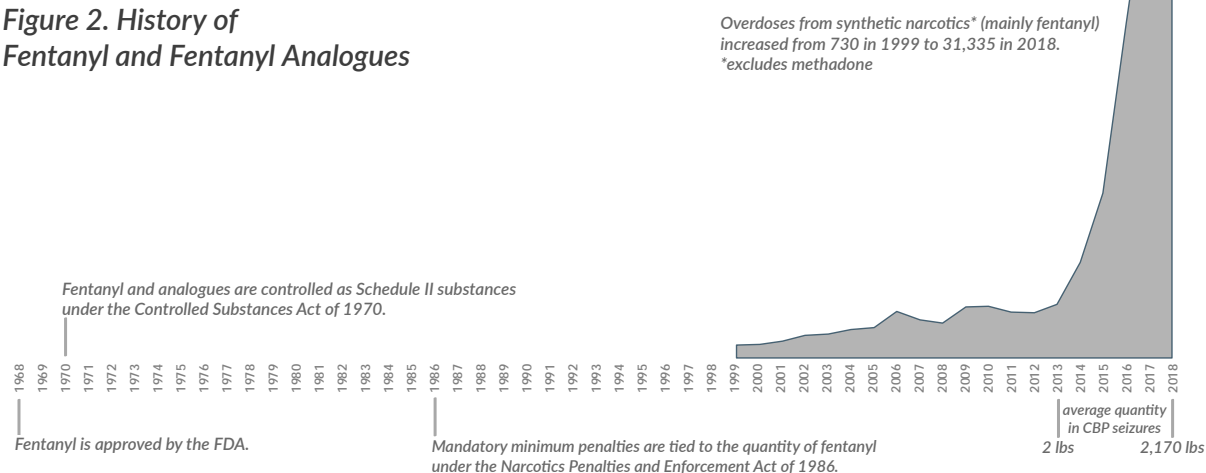
**In fiscal year 2019, fentanyl or fentanyl analogue offenders accounted for almost three-quarters (74.7%) of all drug trafficking offenders sentenced where the offense of conviction established that death or serious bodily injury resulted from the substance's use.**

- *Fentanyl analogues are more lethal than fentanyl, as evidenced by the higher rate of death and serious bodily injury resulting from use. Significantly more fentanyl analogue offenses (29.2%) resulted in a user's death, compared to fentanyl offenses (14.1%).*

**Fentanyl analogue offenders received longer average sentences (97 months) compared to fentanyl offenders (74 months) and had the longest average sentences of any major drug type sentenced in the federal system.**

# Fentanyl and Fentanyl Analogues

**Figure 2. History of Fentanyl and Fentanyl Analogues**



SOURCE: Centers for Disease Control and Prevention, National Center for Health Statistics. Multiple Cause of Death 1999-2018 on CDC WONDER Online Database, released January 2019.

## What are Fentanyl and Fentanyl Analogues

Fentanyl is a prescription opioid analgesic first approved by the Food and Drug Administration in 1968.<sup>7</sup> Several formulations of pharmaceutical fentanyl exist, including single-entity and combination injectables, buccal tablets (i.e., a tablet that is inserted in the buccal pouch (cheek)), transmucosal lozenges (i.e., “lollipops”), transdermal patches, sublingual (under the tongue) spray and tablets, and nasal spray.<sup>8</sup> Since 1968, some fentanyl analogues were also developed and approved in the United States for medical use in humans (e.g., remifentanyl, alfentanil, and sufentanil) and in animals (e.g., carfentanil and thiafentanil).<sup>9</sup> These fentanyl analogues and fentanyl itself are controlled as Schedule II substances under the Controlled Substances Act (CSA) due to their approved medical use and high potential for abuse and dependence.<sup>10</sup> With these notable exceptions, fentanyl analogues are otherwise controlled as Schedule I substances under the CSA because they have no approved medical use in the United States and have a high potential for abuse and dependence.<sup>11</sup>

## Increased Use of Fentanyl and Fentanyl Analogues

Fentanyl and fentanyl analogue trafficking have increased dramatically. According to the Drug Enforcement Administration, the number of drug seizures involving fentanyl remained under 1,000 per year since 2001 before increasing significantly to 4,697 in 2014, 14,440 in 2015, and 34,199 in 2016.<sup>12</sup> In fiscal year 2017, more than 83,400 domestic drug seizures submitted for forensic testing involved fentanyl or fentanyl analogues, which was almost twice the number in 2016 and almost five times the number since 2015.<sup>13</sup> Additionally, in 2018, of the approximately 318,634 tablets and capsules seized within the United States and subjected to Drug Enforcement Administration laboratory testing, approximately 108,015, or 34 percent, contained fentanyl or a fentanyl analogue as its primary drug, which is nearly five times the number of fentanyl and fentanyl analogue-containing tablets and capsules analyzed by the Drug Enforcement Administration in 2016.<sup>14</sup>

Figure 3. Major Sources of Production and Importation of Fentanyl and Fentanyl Analogues



This increase in fentanyl cases coincides with a reported rise in prescription and illicit opioid usage.<sup>15</sup> The Centers for Disease Control and Prevention reported that rates of death involving synthetic opioids increased 10 percent from 2017 to 2018 and attribute illicitly manufactured fentanyl and fentanyl analogues as the likely cause of this increase.<sup>16</sup> The Department of Justice has stated that fentanyl is “fueling the opioid epidemic and killing people at an alarming rate.”<sup>17</sup> Congress has also examined the link between fentanyl and opioid abuse.<sup>18</sup>

#### ***How Illicit Fentanyl and New Fentanyl Analogues are Made and Marketed***

Producers of synthetic drugs such as illicit fentanyl and its analogues modify and experiment with chemical structures to develop new psychoactive substances.<sup>19</sup> Producers exploit legitimate research information in the scientific and patent literature to make small changes to fentanyl’s basic chemical structure, and traffickers distribute the resulting fentanyl analogues in the illicit drug market.<sup>20</sup> By making slight changes to the chemical structures of these synthetic designer drugs, distributors can realize significant profits before these newly developed specific psychoactive substances are scheduled as controlled substances.<sup>21</sup>

After creating a new substance, distributors use the Internet to market it, especially the “dark web”<sup>22</sup> and social media, allowing for its fast adoption and use.<sup>23</sup> Investigations reveal that fentanyl and fentanyl analogues are frequently trafficked in illicit drug marketplaces found on the “dark web.”<sup>24</sup> In fiscal year 2019, the Department of Homeland Security had more than 200 investigations specifically targeting “dark web” illicit drug trafficking organizations.<sup>25</sup>

#### ***Sources and Importation of Fentanyl and Fentanyl Analogues***

Until very recently, illicitly produced fentanyl, its analogues, and their precursor chemicals were often produced in China—and to a lesser degree Mexico—and shipped to transnational criminal organizations in Mexico, Canada, and the Caribbean.<sup>26</sup> The majority of illicit fentanyl trafficked in the United States is smuggled through international mail facilities, express consignment carrier facilities (e.g., FedEx and UPS), or through ports of entry along the southern U.S. border.<sup>27</sup>

The bulk of illicit fentanyl trafficked in the United States first arrives in Mexico where it is often cut with other drugs, like heroin, before being smuggled through ports of entry along the Southwest border by pedestrians, private vehicles,

and commercial vehicles under the direction of Mexican drug cartels.<sup>28</sup> However, the purest and most potent fentanyl enters the United States at international airports, within international mail facilities, and express consignment couriers.<sup>29</sup>

Customs and Border Protection reported seizures of illicit fentanyl and its analogues have increased significantly from approximately two pounds seized in fiscal year 2013 to approximately 2,170 pounds in fiscal year 2018.<sup>30</sup> During this time, fentanyl was the most frequently seized illicit synthetic opioid and Customs and Border Protection reported that it recovered both fentanyl and 25 of its analogues.<sup>31</sup>

The United States Postal Service also reported an increase in seizures of synthetic opioids, including fentanyl and fentanyl analogues, entering the country.<sup>32</sup> In the first three quarters of fiscal year 2019, the United States Postal Service seized 185 synthetic opioid parcels, 153 of which were in the domestic mail system, and an additional 363 parcels containing heroin.<sup>33</sup> These seizures represented a decrease in international seizures of these substances, while domestic seizures were trending up. This suggests that synthetic opioids are increasingly entering the country through means other than international mail before they are distributed domestically through the postal service, express consignment carriers, or traditional drug distribution networks.<sup>34</sup> The Food and Drug Administration reported that in the first three quarters of fiscal year 2019, 99.1 percent of the drugs entering the United States through international mail, including fentanyl and fentanyl analogues, used methods different than those commonly used by providers of legitimate pharmaceutical products.<sup>35</sup>

### ***Distribution Practices of Fentanyl and Fentanyl Analogues***

Once in the United States, fentanyl or its analogues are distributed alone or mixed with other substances, such as heroin, cocaine, and methamphetamine.<sup>36</sup> Heroin, for example, is frequently spiked with fentanyl to increase its drug potency. Alternatively, fentanyl is mixed with adulterants and sold as “synthetic heroin” to stretch the fentanyl and increase profits.<sup>37</sup> This practice

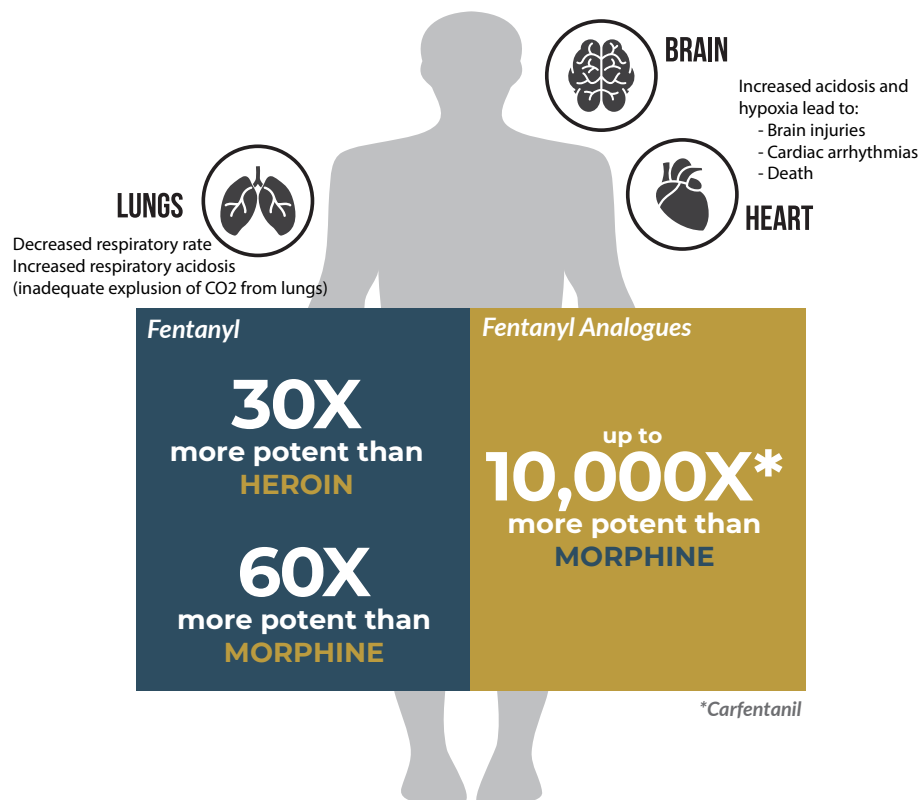
also increases the risk of death or serious injury to heroin users who may unknowingly purchase fentanyl or a drug mixture of unpredictable strength and composition.<sup>38</sup>

Transnational criminal organizations bring fentanyl across the border pressed into pills that resemble prescription opioids.<sup>39</sup> Pressed into a pill form, fentanyl can generate large returns. One kilogram of fentanyl purchased for \$3,000–\$5,200 can be pressed into pills containing 1.5 milligrams of fentanyl and sold for \$10.00 per pill, generating approximately \$6.6 million in revenue.<sup>40</sup> The tools needed to manufacture counterfeit pills, pill presses and molds, are available online and are relatively inexpensive.<sup>41</sup> Traffickers can obtain industrial pill presses from China, India, and Germany, and then operate the fentanyl pill presses in the United States.<sup>42</sup> Federal law requires notice to the Drug Enforcement Administration of the import, export, or domestic sales of all pill press machines; however, these machines are frequently shipped or sold without the required notifications.<sup>43</sup>

### ***Greater Potency of Fentanyl and Fentanyl Analogues Increase the Risk of Death or Injury***

Fentanyl is approximately 30 times more potent than heroin and approximately 60 times more potent than morphine.<sup>44</sup> The fentanyl analogues alfentanil and carfentanil are 600 and 10,000 times more potent than morphine, respectively.<sup>45</sup> Due to the potency of fentanyl and its analogues, there is a greater potential for fatalities among both experienced and inexperienced drug users.<sup>46</sup> This potential for fatality is often increased where users are unaware they are using fentanyl. While some drug users specifically seek out fentanyl for its potency, most do not know, or at least only suspect, it is present in the drugs they use.<sup>47</sup> Users who have extensive histories of heroin use may be accustomed to a specific stable dose that they have used for years.<sup>48</sup> If these users buy their usual dose of heroin not knowing it is laced with fentanyl, they can accidentally overdose.<sup>49</sup>

Figure 4. Physical Effect and Potency of Fentanyl and Fentanyl Analogues



Rising concentrations of fentanyl in the blood causes increased sedation, decreased respiratory rate, and increased respiratory acidosis (inability of the lungs to expel carbon dioxide (CO<sub>2</sub>) from the body adequately).<sup>50</sup> As the acidosis increases, fentanyl bound to proteins in the blood is released, further increasing the concentration of the drug.<sup>51</sup> Eventually, acidosis and hypoxia (oxygen deprivation) lead to cardiac arrhythmias (heart rhythm problems), brain injuries, and death.<sup>52</sup>

Fentanyl and fentanyl analogue overdoses increase the risk of death or serious bodily harm. Individual states report increased death and injuries related to fentanyl and fentanyl analogues abuse.<sup>53</sup> A forensic laboratory providing services to over 2,500 law enforcement agencies reported that, in the 18 months between January 2016 and September 2017, fentanyl was present in over 15,600 cases from medical examiners offices throughout the United States.<sup>54</sup>

Overdoses not resulting in death may nevertheless require resuscitation by first responders and hospitalization for the user. A fentanyl overdose may be reversed using naloxone, a drug that attaches to the same neurological receptors as fentanyl and blocks the effect of the drug.<sup>55</sup> While one or two doses of naloxone may be sufficient for a heroin overdose, multiple doses or a continuous infusion of naloxone may be required for a fentanyl overdose because fentanyl persists longer in the body than either heroin or naloxone.<sup>56</sup> Depending on the degree of overdose and the effects suffered by the user, hospital admission, and advanced life support may be required.<sup>57</sup>

# Statutory and Guideline Penalty Schemes

## Statutory Provisions

Federal drug trafficking offenders are primarily convicted of offenses under Title 21 of the United States Code.<sup>58</sup> These statutes prohibit the distribution, manufacture, importation, and possession with intent to distribute controlled substances and set forth the statutory penalty scheme. The statutory penalties are tied to the type and quantity of controlled substance involved in the offense and may be enhanced further based on an offender's prior record or if the substance caused death or serious bodily injury.

For fentanyl<sup>59</sup> offenses, trafficking involving less than 40 grams, the statutory maximum term of imprisonment is 20 years and there is no mandatory minimum penalty. Trafficking 40 grams or more, but less than 400 grams, triggers a five-year mandatory minimum with a statutory maximum of 40 years. Trafficking 400 grams or more of fentanyl triggers a ten-year mandatory minimum, with a statutory maximum term of life.

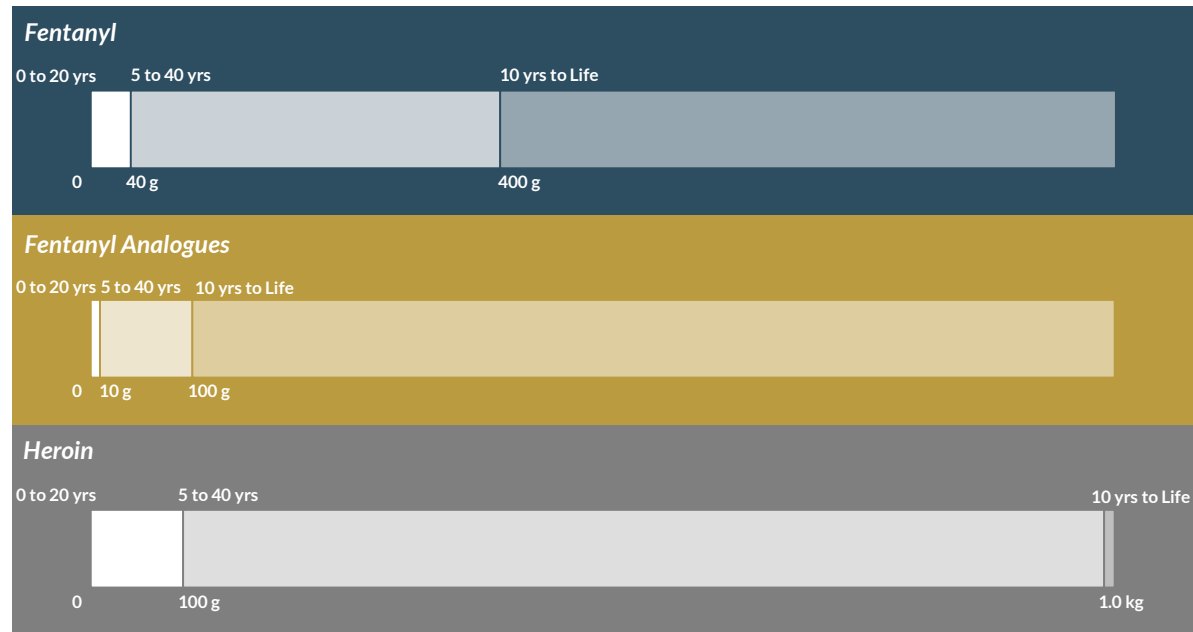
The same statutory penalties are triggered by lesser amounts of a fentanyl analogue. Fentanyl analogue offenses involving less than ten grams have a 20-year statutory maximum (and no corresponding mandatory minimum). The five-year mandatory minimum and 40-year statutory maximum apply to offenses involving ten grams or more, but less than 100 grams, of a fentanyl analogue, while a ten-year mandatory minimum and statutory maximum term of life apply to offenses involving 100 grams or more of a fentanyl analogue.

The penalties for fentanyl and fentanyl analogues are significantly more severe than for other opiates. Figure 5 compares the amounts of fentanyl, fentanyl analogues, and heroin that trigger the statutory penalty scheme discussed above. For example, a ten-year mandatory minimum penalty is triggered by 400 grams of fentanyl or 100 grams of fentanyl analogue compared to one kilogram of heroin.

Offenders are subject to higher mandatory minimum penalties if they have prior convictions for a serious drug felony or a serious violent felony.<sup>60</sup> Offenders who otherwise qualify for the five-year mandatory minimum penalty face an increased statutory range of ten years to life if they have a prior conviction for a serious drug felony offense or serious violent felony.<sup>61</sup> Similarly, a qualifying prior conviction increases a ten-year mandatory minimum to a 15-year mandatory minimum (the maximum remains life). Offenders previously convicted of two or more prior serious drug felonies or serious violent felonies are subject to a 25-year mandatory minimum term of imprisonment.<sup>62</sup>

The mandatory minimum penalties may also be increased if the offense caused death or serious bodily injury.<sup>63</sup> Regardless of the quantity, if death or serious bodily injury resulted from the fentanyl or analogue offense, the mandatory minimum term of imprisonment is 20 years and the maximum is life.<sup>64</sup> Additionally, if the offender was previously convicted of a serious drug felony or serious violent felony and death or serious bodily injury resulted from the use of the substance, the offender is subject to a mandatory minimum term of life imprisonment.<sup>65</sup>

Figure 5. Statutory Penalties and Triggering Drug Quantities for Fentanyl and Fentanyl Analogues



### Sentencing Guidelines Provisions

Drug trafficking offenses involving controlled substances such as fentanyl and fentanyl analogues are sentenced in the guidelines under §2D1.1. Under §2D1.1, unless the defendant is convicted of an offense that establishes death or serious bodily injury, the type and quantity of drugs for which the defendant is held responsible will be the most important factor in determining the sentence. In such cases, the base offense level specified in the Drug Quantity Table applies.<sup>66</sup>

As is the case for all drug types, the base offense levels for fentanyl and fentanyl analogue are set in the Drug Quantity Table so that the statutory mandatory minimum penalties correspond to base offense levels 24 and 30.<sup>67</sup> Accordingly, offenses involving at least 40 grams of fentanyl or at least ten grams of fentanyl analogue are assigned a base offense level of 24, which provides for a guideline range that includes the five-year penalty (51 to 63

months at Criminal History Category I).<sup>68</sup> Similarly, offenses involving at least 400 grams of fentanyl or at least 100 grams of fentanyl analogue are assigned a base offense level of 30, which provides for a guideline range that includes the ten-year penalty (97 to 121 months at Criminal History Category I).<sup>69</sup> Offense levels for other quantities of fentanyl or fentanyl analogue are then established by extrapolating upward and downward.

By comparison, offenses involving at least 100 grams of heroin are assigned a base offense level of 24 and offenses involving at least 1 kilogram of heroin are assigned a base offense level of 30.

Similarly, the Drug Conversion Tables in §2D1.1 contain entries for both fentanyl and fentanyl analogue at levels equivalent to those derived from the five-year and ten-year mandatory minimum sentences in 21 U.S.C. § 841(b)(1). For “fentanyl,”



**Figure 6. Base Offense Levels Derived from Section 841 Five- and Ten-Year Mandatory Minimum Penalties**

Base Offense Level	<i>Fentanyl</i>	<i>Fentanyl Analogues</i>	<i>Heroin</i>
24	At least 40 g, but less than 160 g	At least 10 g, but less than 40 g	At least 100 g, but less than 400 g
30	At least 400 g, but less than 1.2 kg	At least 100 g, but less than 300 g	At least 1 kg, but less than 3 kg

the drug conversion tables at Application Note 8(D) reference the substance identified in section 841, N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, and provide for a conversion ratio of 1:2,500.<sup>70</sup> The drug conversion table also lists “fentanyl analogue” at the 1:10,000 ratio provided in section 841.<sup>71</sup>

In some cases, fentanyl is mixed with other controlled substances or pressed into pills. Under the guidelines, the drug quantity of a controlled substance includes the entire weight of any mixture or substance containing a detectable amount of a controlled substance.<sup>72</sup> If the mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greatest offense level. For example, if a heroin mixture includes a detectable amount of fentanyl (or a fentanyl analogue), the entire mixture is counted as fentanyl (or fentanyl analogue). This is because the offense levels in the Drug Quantity Table for fentanyl (and fentanyl analogue) are greater than heroin and reflect the higher penalties for fentanyl in section 841.<sup>73</sup> The substance or mixture’s entire weight also is used when a drug is mixed with an inert substance, such as a binder or filler used in the production of pills or tablets.<sup>74</sup>

Although the quantity of the substance involved in the offense typically drives the guideline sentence, §2D1.1 also includes alternative heightened base offense levels in cases in which the defendant was convicted under a specific statute listed in the guideline and death or serious bodily injury resulted from the offense.<sup>75</sup> For example, if an offender is convicted of one of the enumerated statutory provisions and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, a base offense level of 38 applies.<sup>76</sup> Additionally, if these criteria are met and the offender has one or more prior convictions for a similar offense, a base offense level of 43 applies.<sup>77</sup> These alternative heightened base offense levels apply regardless of the quantity of drugs involved in the offense and vary depending on whether the defendant committed the offense after one or more prior convictions for a similar offense.<sup>78</sup> For the heightened base offense levels to apply, death or serious bodily injury resulting from the use of the controlled substance must be proved beyond a reasonable doubt by plea or to the factfinder.<sup>79</sup>

# U.S. Sentencing Commission Action

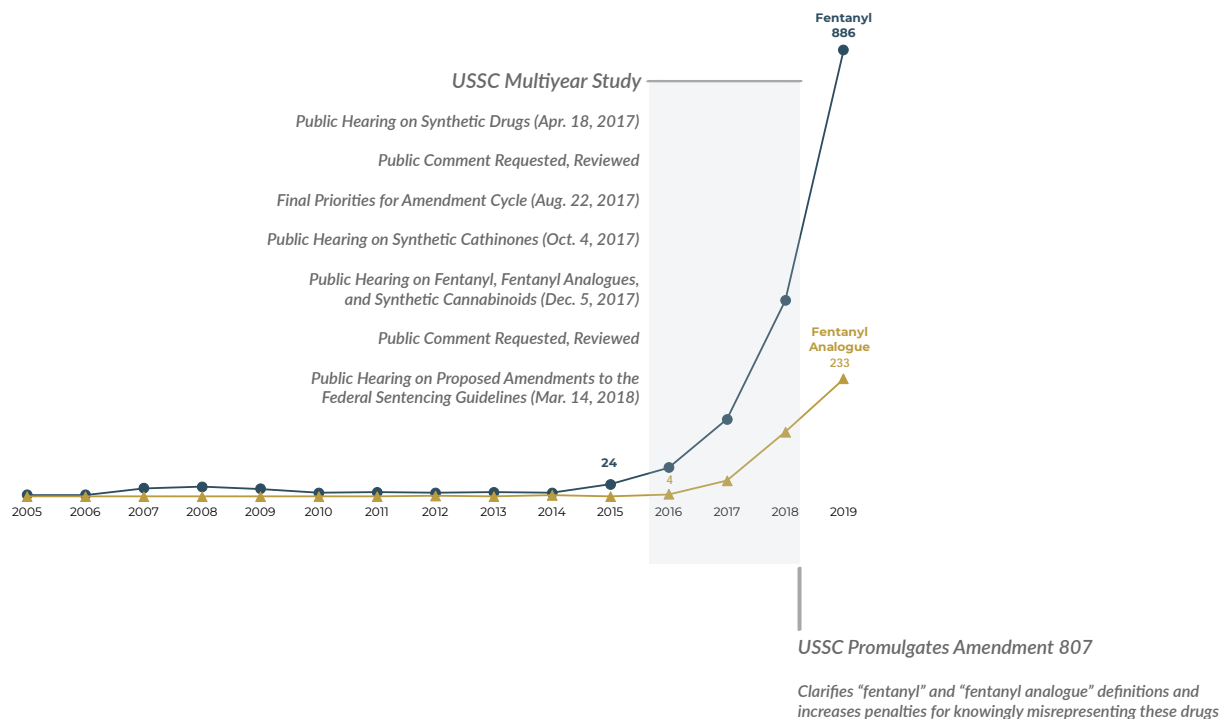
In response to concerns about the increase in fentanyl and fentanyl analogue abuse and the corresponding increase in deaths, in 2017, the Commission undertook an extensive study of offenses involving these substances.<sup>80</sup> As part of this study, the Commission conducted a broad data collection on federal criminal cases involving synthetic drugs, including fentanyl and its analogues, reviewed the available scientific and medical literature, solicited public comment on multiple occasions, and held multiple public hearings.<sup>81</sup> Following the publication of a proposed amendment, the Commission received and considered public comment<sup>82</sup> and conducted another public hearing.<sup>83</sup> Informed by its study, the Commission promulgated an amendment to the drug trafficking guideline effective November 1, 2018, that made several changes relating to fentanyl and fentanyl analogues.<sup>84</sup>

First, the Commission adopted a new enhancement applicable where the presence of fentanyl or one of its analogues is knowingly misrepresented. The Commission considered that fentanyl and its analogues are often trafficked and mixed with other controlled substances, including heroin and cocaine. In other instances, fentanyl or an analogue is placed in pill or tablet form by drug traffickers. Though some purchasers of these substances may be aware that they contain fentanyl, others may believe that they are purchasing heroin or pharmaceutically manufactured opioid pain relievers.

To account for this potential harm, the Commission amended §2D1.1 to add a new specific offense characteristic to provide a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue.<sup>85</sup> The specific offense characteristic includes a *mens rea* requirement to ensure that only the most culpable offenders are subject to these increased penalties.

Next, the Commission amended the Drug Quantity Table to clarify that §2D1.1 uses the term “fentanyl” to refer to the International Union of Pure and Applied Chemistry chemical name.<sup>86</sup> This, in combination with the clarification of the definition of “fentanyl analogue” and the addition of fentanyl analogues to the Drug Equivalency Tables<sup>87</sup> is intended to limit the use of the listing for “fentanyl” only to cases involving the specific substance named in the statute, as opposed to the situation where “fentanyl” may be considered the most closely related controlled substance to fentanyl analogues that are already scheduled as controlled substances.

**Figure 7. U.S. Sentencing Commission's Response to Increases in Federal Fentanyl and Fentanyl Analogue Offenses**



Finally, the Commission adopted a new definition of "fentanyl analogue" in §2D1.1. During its study, the Commission learned that the reference to "fentanyl analogue" in the Drug Quantity Table at §2D1.1(c) interacted in an unintended way with the definition of "analogue" provided by Application Note 6 to §2D1.1 and in 21 U.S.C. § 802(32), which defines "controlled substance analogue."<sup>88</sup> This may have resulted in fentanyl analogue offenses being sentenced at the lower fentanyl ratio (i.e., 1:2,500) rather than the higher ratio applicable to fentanyl analogues (i.e., 1:10,000) in the Drug Quantity Table.<sup>89</sup> To address this problem, the Commission adopted a new definition of "fentanyl

analogue" as "any substance (including any salt, isomer, or salt of isomer), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)."<sup>90</sup> The amendment also deleted the listings for two fentanyl analogues, alpha-methylfentanyl and 3-methylfentanyl, that were previously included in the Drug Equivalency Tables, so that these two substances would be treated like all other fentanyl analogues.

# Congressional and Executive Branch Action

Since the Commission's amendment, Congress and the Executive Branch have continued to take action to address the illicit distribution of fentanyl and fentanyl analogues. The primary concerns of Congress and the Executive Branch, as discussed below, are the (1) detection and interdiction of synthetic opioids, especially fentanyl and its analogues, and (2) identification and quick scheduling of new fentanyl analogues as they appear in the United States.

## *Detection and Interdiction of Fentanyl and Fentanyl Analogues Entering the United States*

In an effort to address the rising prevalence of fentanyl in the United States, Congress has enacted several new pieces of legislation to better detect and stop the importation of fentanyl and fentanyl analogues into the United States.<sup>91</sup> In January 2018, Congress enacted the International Narcotics Trafficking Emergency Response by Detecting Incoming Contraband with Technology (INTERDICT) Act to provide funding to Customs and Border Protection to improve their ability to detect and interdict fentanyl and other narcotics illegally imported into the United States through the use of chemical screening devices (i.e., various scientific instrumentation able to determine the presence of fentanyl or other substances).<sup>92</sup>

In October 2018, Congress enacted the Synthetics Trafficking and Overdose Prevention (STOP) Act as part of the Substance Use—Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act.<sup>93</sup> Among other things, Congress intended the STOP Act to enhance the United States Postal Service's ability to detect and interdict fentanyl and other

narcotics illegally entering the United States through international mail. The STOP Act required customs advance electronic data (AED)<sup>94</sup> on at least 70 percent of aggregate inbound package shipments, including 100 percent of shipments from China by December 31, 2018, and on 100 percent of all inbound international shipments by December 31, 2020.<sup>95</sup>

In December 2019, Congress enacted the Fentanyl Sanctions Act as part of the National Defense Authorization Act for fiscal year 2020.<sup>96</sup> In the Fentanyl Sanctions Act, Congress called on China to follow through on the full implementation of its announcement earlier in the year that it would schedule fentanyl-like substances as a class to control their distribution.<sup>97</sup> In addition to instituting sanctions on foreign traffickers of illicit synthetic opioids, the Act establishes a commission on synthetic opioid trafficking to develop strategies to combat the flow of synthetic opioids into the United States.<sup>98</sup>

In conjunction with these pieces of legislation, Congress has continued extensive information gathering through several hearings on fentanyl and fentanyl analogues. These hearings have focused on several topics, including methods of illegal importation both through couriers carrying the substances through international airports in the United States and other ports of entry along the country's national borders and the use of international mail.<sup>99</sup> Other topics include the increasing use of "darknet" illicit marketplaces to sell fentanyl and opioids.<sup>100</sup>

**Figure 8. Judicial Districts Identified by the U.S. Department of Justice as Operation S.O.S. Districts**



Like Congress, the Executive Branch has taken numerous steps to combat the increasing tide of fentanyl and fentanyl analogue trafficking. Beginning in 2018, the Department of Justice committed additional resources to prosecute offenders trafficking in synthetic drugs, including the introduction of a new program seeking to reduce the supply of synthetic opioids in ten specific high impact areas of the country.<sup>101</sup> As part of the program, Operation Synthetic Opioid Surge (S.O.S.), the Department of Justice initiated an enforcement surge in these ten federal judicial districts.

The Department of Justice selected these districts because they suffered from some of the highest drug overdose death rates in the nation. Each participating United States Attorney's Office was directed to choose a specific county in the district and prosecute every readily provable case involving the distribution of fentanyl, fentanyl analogues, and other synthetic opioids, regardless of drug quantity.

### ***Identification and Scheduling New Fentanyl Analogues***

Congress and the Executive Branch have also continued to consider the scheduling of fentanyl analogues. Both have noted that law enforcement agencies have faced significant challenges in prosecuting these offenses due to the ever-changing nature of the substance. As discussed above, fentanyl analogue manufacturers regularly make small changes to fentanyl's basic chemical structure, enabling illicit drug traffickers to circumvent legislative and regulatory controls. Both Congress and the Department of Justice, through the Drug Enforcement Administration, have sought ways to control these substances as they appear.<sup>102</sup>

Congress addressed scheduling such drugs when it enacted the SUPPORT for Patients and Communities Act by amending the CSA to better account for drug analogues, including fentanyl analogues, before they are scheduled.<sup>103</sup> Among other things, the Act amended 21 U.S.C. § 813 (Treatment of controlled substance analogues) of the CSA<sup>104</sup> by adding six specific factors to consider when making the determination of whether a drug is intended for human consumption.<sup>105</sup>

When new substances appear, the CSA authorizes the Attorney General to schedule them.<sup>106</sup> Between March 2011 and June 2019, the Drug Enforcement Administration used its administrative authority to schedule substances on 23 occasions to place 68 synthetic drugs of all types temporarily into Schedule I of the CSA, including 17 fentanyl-like substances.<sup>107</sup> By comparison, in the first 25 years after Congress granted it this authority, the Drug Enforcement Administration used its authority a total of only 13 times to schedule 25 substances.<sup>108</sup>

While the Drug Enforcement Administration has stated this process works in general, scheduling substances on a one-by-one basis is reactive and lags behind the recent rapid pace of illicit drug producers and distributors.<sup>109</sup> This is particularly problematic for fentanyl analogue enforcement. During the two- to three-year process to schedule a specific fentanyl analogue, illicit drug producers and distributors continue to introduce new substances with slightly modified chemical structures.

To address this seemingly endless cycle, on February 6, 2018, the Drug Enforcement Administration published a temporary order scheduling all fentanyl-related substances that were not already listed in any schedule of the CSA in Schedule I, subject to meeting specific criterion.<sup>110</sup> This new process, which relies on a “class-based approach” to schedule new fentanyl-related substances, augments the one-by-one approach of scheduling fentanyl-related substances.<sup>111</sup>

In the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act, Congress subsequently extended the Drug Enforcement Administration’s temporary authority for this new scheduling approach until May 6, 2021.<sup>112</sup> As part of this legislation, Congress also directed the Government Accountability Office to conduct a study of the classification of fentanyl-related substances as Schedule I controlled substances, research on fentanyl-related substances, and the importation of fentanyl-related substances into the United States. The General Accountability Office is required to submit its report to Congress no later than February 5, 2021.<sup>113</sup>

Recent consideration of legislation regarding a statutory class-based approach for synthetic substances,<sup>114</sup> the upcoming General Accountability Office report on the possible classification of fentanyl-related substances as Schedule I controlled substances, and the impending expiration of the Drug Enforcement Administration’s temporary scheduling order all suggest that Congress and the Executive Branch will continue to consider fentanyl and fentanyl analogues into the next Congress.

The Commission’s study of fentanyl and fentanyl analogues, coupled with these Congressional and Executive Branch concerns, informed the data analyses discussed in the following sections of this publication. The Commission, in turn, intends for these analyses to help further inform Congress and the Executive Branch on the topic.

# Data Analysis Introduction

As discussed above, both before and after the Commission's 2018 guideline amendment, the number of federal fentanyl drug trafficking offenses has significantly increased, growing by 3,592 percent since fiscal year 2015. In light of this trend and the continued interest by policymakers, the Commission collected additional federal sentencing data on fentanyl and fentanyl analogue offenses, focusing on the prevalence of both substances and the patterns of fentanyl and fentanyl analogue trafficking.<sup>115</sup> From this coding project, the Commission identified 1,119 offenders who had fentanyl or a fentanyl analogue as the primary drug involved in their offense and for whom the Commission received sufficient sentencing documentation to perform analyses.<sup>116</sup> Of these 1,119 offenders, 886 had fentanyl as the primary drug involved in the offense and 223 had fentanyl analogue as the primary drug involved in the offense.<sup>117</sup> This section of the report provides the Commission's most extensive analysis of fentanyl and fentanyl analogue offenses in the federal criminal justice system.

The methodology used in this report represents slightly more expansive criteria than the Commission's *Annual Report and Sourcebook of Federal Sentencing Statistics* for identifying fentanyl and fentanyl analogue as the primary drug in order to ensure a robust analysis given that they comprise a relatively small portion of the federal drug trafficking caseload.

As explained above, drug trafficking penalties typically are based on the type and weight of the drug(s) involved in the offense, with the primary drug type being the drug that results in the highest guideline range under the Drug Quantity Table.<sup>118</sup>

## 1,119 total offenders studied

- **886 fentanyl**
- **233 fentanyl analogue**

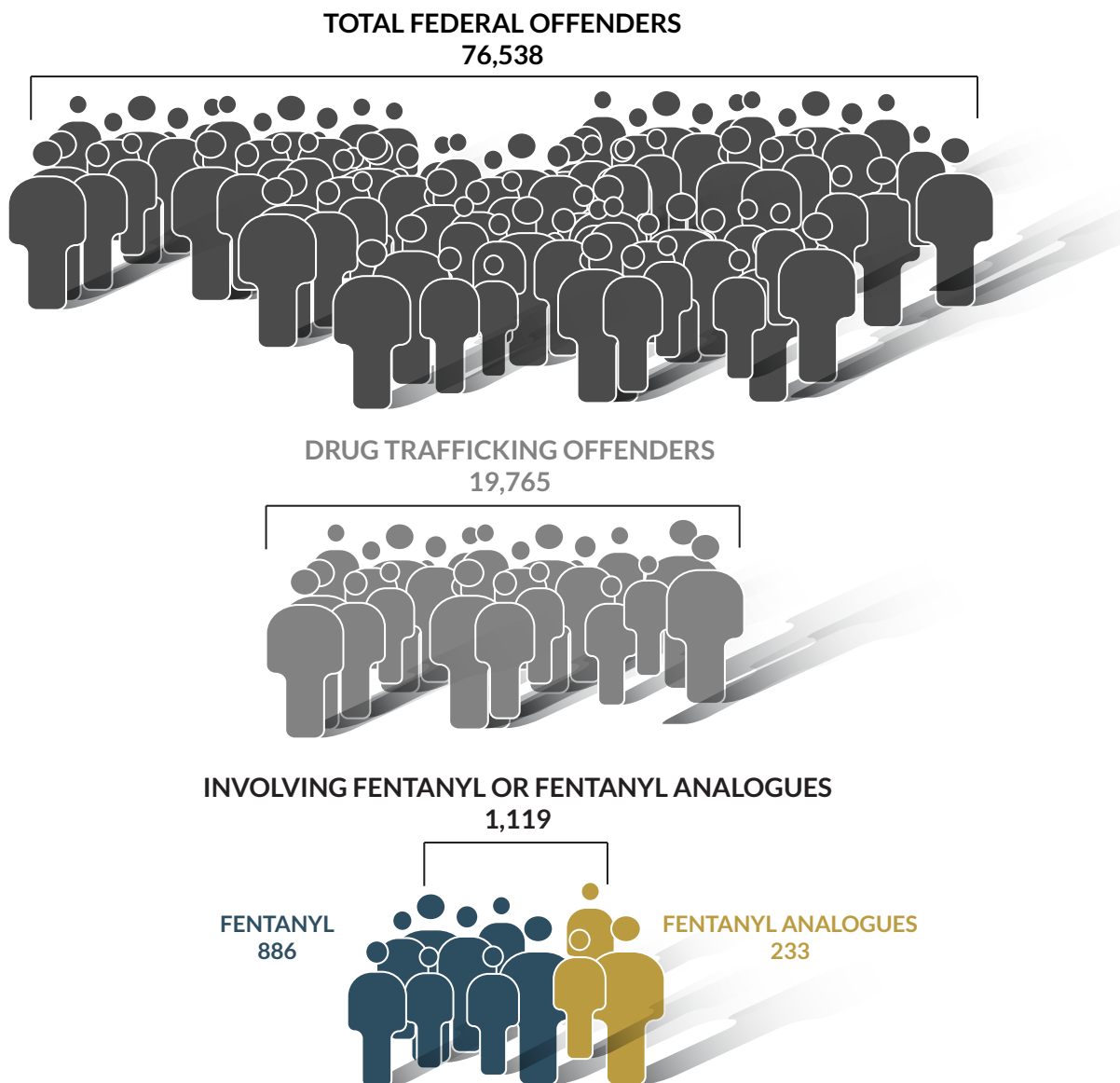
### For this report, fentanyl or a fentanyl analogue was defined as the primary drug when:

the quantity of fentanyl or a fentanyl analogue involved in the offense resulted in the highest guideline range under the Drug Quantity Table;<sup>119</sup>

the fentanyl or fentanyl analogue involved in the offense resulted in a heightened base offense level under subsections §2D1.1(a)(1)–(4) for death or serious bodily injury;<sup>120</sup>

the fentanyl or fentanyl analogue was mixed with another drug,<sup>121</sup> identified as a constituent part of the mixture, and the fentanyl or fentanyl analogue resulted in the highest guideline range.<sup>122</sup>

**Figure 9. Federal Fentanyl and Fentanyl Analogue Offenders Relative to All Federal Offenders and Federal Drug Trafficking Offenders**  
Fiscal Year 2019



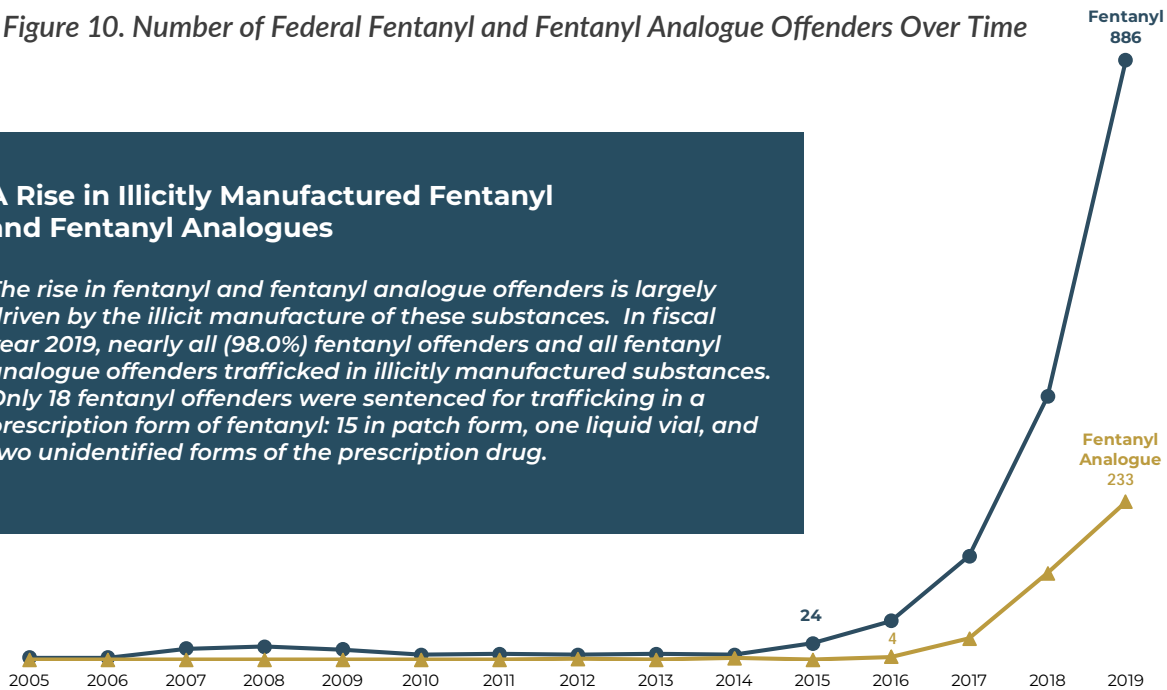


# Prevalence and Geography

Figure 10. Number of Federal Fentanyl and Fentanyl Analogue Offenders Over Time

## A Rise in Illicitly Manufactured Fentanyl and Fentanyl Analogues

The rise in fentanyl and fentanyl analogue offenders is largely driven by the illicit manufacture of these substances. In fiscal year 2019, nearly all (98.0%) fentanyl offenders and all fentanyl analogue offenders trafficked in illicitly manufactured substances. Only 18 fentanyl offenders were sentenced for trafficking in a prescription form of fentanyl: 15 in patch form, one liquid vial, and two unidentified forms of the prescription drug.

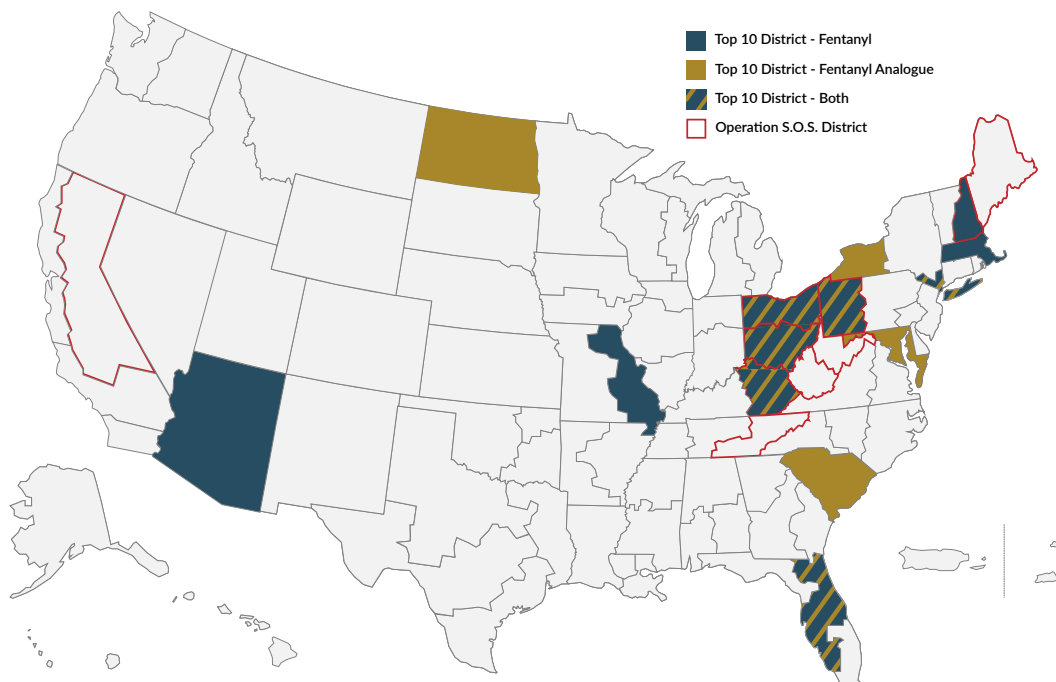


## Trends Over Time

While fentanyl and fentanyl analogue offenders remain a small proportion of the overall federal drug trafficking caseload (5.8%), the number of fentanyl offenders and fentanyl analogue offenders has increased sharply over the last several years. As reflected in Figure 10, the prevalence of fentanyl was flat for the ten years from 2005 through 2014. Over the next five years, the trend shifted. Beginning in 2015, the number of fentanyl offenders more than doubled each fiscal year. By fiscal year 2019, the Commission recorded 886 fentanyl drug trafficking offenders, a 3,592 percent increase from 24 offenders in fiscal year 2015.<sup>123</sup>

The number of fentanyl analogue offenders also has increased precipitously in recent years. The number of such offenders was also largely stable from fiscal year 2012, the year the Commission first recorded a fentanyl analogue offender, through fiscal year 2016. Since fiscal year 2016, however, fentanyl analogue offenders increased 5,725 percent, from four offenders in fiscal year 2016 to 233 offenders in fiscal year 2019.

**Figure 11. Operation S.O.S. Districts and Judicial Districts with Largest Number of Fentanyl and Fentanyl Analogue Offenses**  
Fiscal Year 2019



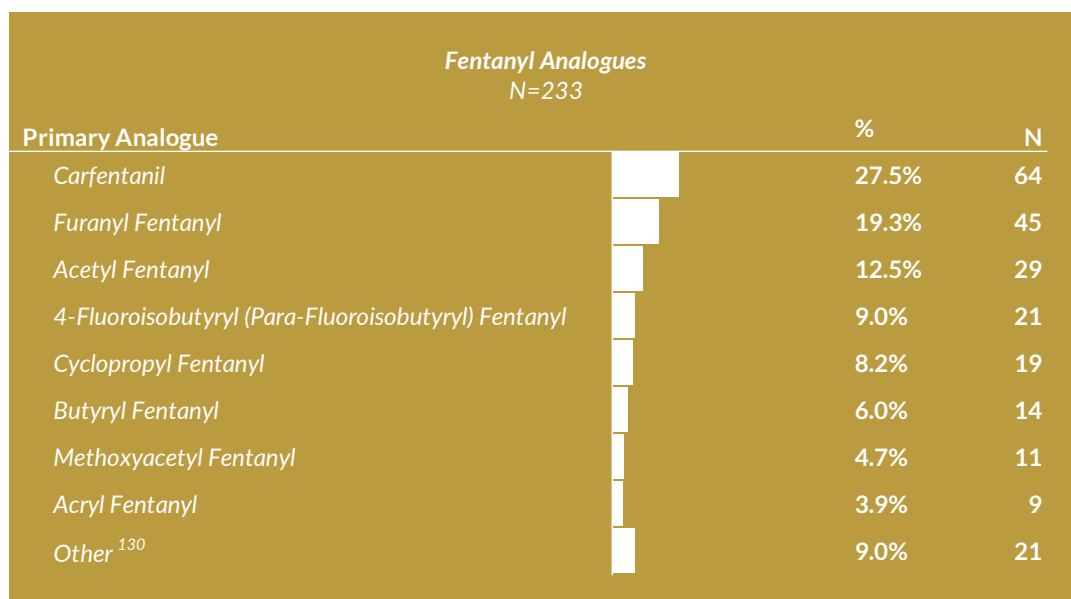
### **Geographic Dispersion of Fentanyl and Fentanyl Analogue Offenders**

Generally, fentanyl and fentanyl analogue offenders were concentrated in districts along the Appalachian Mountains and the Ohio River Valley (see Figure 11). Though there was variation in the top districts for fentanyl and fentanyl analogue offenders, several districts were among the top in both groups of offenders. Those districts include the Middle District of Florida, Eastern District of Kentucky, Northern and Southern Districts of Ohio, Southern District of New York, and Western District of Pennsylvania.

### **Operation Synthetic Opioid Surge (S.O.S.)**

The geographic dispersion of fentanyl and fentanyl analogue offenders overlaps significantly with districts chosen as part of the Department of Justice's Operation Synthetic Opioid Surge (S.O.S.).<sup>124</sup> As previously discussed, the United States Attorneys' Offices selected specific counties within their federal districts for increased federal intervention, based on a high rate of opioid-related overdose deaths. Unsurprisingly, many of the districts selected were already seeing surges in the number of fentanyl and fentanyl analogue cases prior to the establishment of Operation S.O.S. Though they account for only ten of the 94 federal districts, 29.3 percent of fentanyl offenders and 37.8 percent of fentanyl analogue offenders were sentenced within Operation S.O.S. districts in fiscal year 2019. Furthermore, four of the ten Operation S.O.S. districts are in the top ten districts for both substances.<sup>125</sup>

**Figure 12. Types of Fentanyl Analogues in the Federal System**  
Fiscal Year 2019



### **Polydrug Fentanyl and Fentanyl Analogue Traffickers**

The Commission compared fentanyl and fentanyl analogue offenders to offenders sentenced for trafficking a primary drug other than fentanyl or one of its analogues (hereafter “other drug offenders”), to provide information on offense characteristics, demographic characteristics, and sentencing outcomes.<sup>126</sup>

Many fentanyl and fentanyl analogue offenders traffic more than one drug type. These “polydrug” offenders traffic fentanyl or an analogue in addition to another substance. In fiscal year 2019, 26.0 percent of other drug offenders were polydrug offenders, who did not specialize in trafficking a single drug type. By comparison, a greater proportion of fentanyl and fentanyl analogue offenders were polydrug traffickers.<sup>127</sup> Of the 886 fentanyl offenders, 45.2 percent (n=400) also trafficked at least one other drug, most commonly heroin (59.8%) and powder cocaine (35.5%).<sup>128</sup> A

few fentanyl offenders (6.3%) also trafficked a fentanyl analogue during their instant offense.

Of the 233 fentanyl analogue offenders, a majority (58.4%, n=136) also trafficked at least one other drug; heroin (52.2%) and powder cocaine (24.3%) were common among polydrug fentanyl analogue offenders.<sup>129</sup> Forty percent (40.4%) also trafficked fentanyl.

### **Fentanyl Analogue Types**

Carfentanil (27.5%), furanyl fentanyl (19.3%), and acetyl fentanyl (12.5%) were the most commonly trafficked primary fentanyl analogues (Figure 12, above). A minority (22.7%) of the fentanyl analogue offenders in this study were sentenced for trafficking two different fentanyl analogues and 7.3 percent were sentenced for trafficking three different fentanyl analogue types during the same offense. The most common secondary and tertiary fentanyl analogue types were cyclopropyl fentanyl (n=12) and acetyl fentanyl (n=11).<sup>130</sup>



### ***Drug Enforcement Administration's February 6, 2018 Class-Wide Scheduling Order***

The Commission conducted an additional review of all offenses involving fentanyl analogues, regardless of the primary drug, to determine whether any offender was sentenced for a substance that qualified as a “fentanyl-related substance” under the DEA’s February 6, 2018, class-wide scheduling order.<sup>1</sup> Most of the substances identified in the fiscal year 2019 sentencing documents as “fentanyl analogues” are substances listed in a schedule of the CSA before publication of the DEA’s order.

The Commission did, however, find several cases involving substances that were not listed in the CSA before publication of the DEA’s order and appear to qualify as fentanyl-related substances: benzyl fentanyl,<sup>2</sup> and phenyl fentanyl.<sup>3</sup> In all but two of the cases, these two fentanyl-related substances were part of a mixture of fentanyl and other drugs and thus were not the only determinant for sentencing purposes. In the two cases in which phenyl fentanyl was identified as the primary drug, the court determined that the substance was a fentanyl analogue and sentenced the offenders accordingly, but the sentencing documentation did not expressly mention the DEA’s February 6, 2018, scheduling order.

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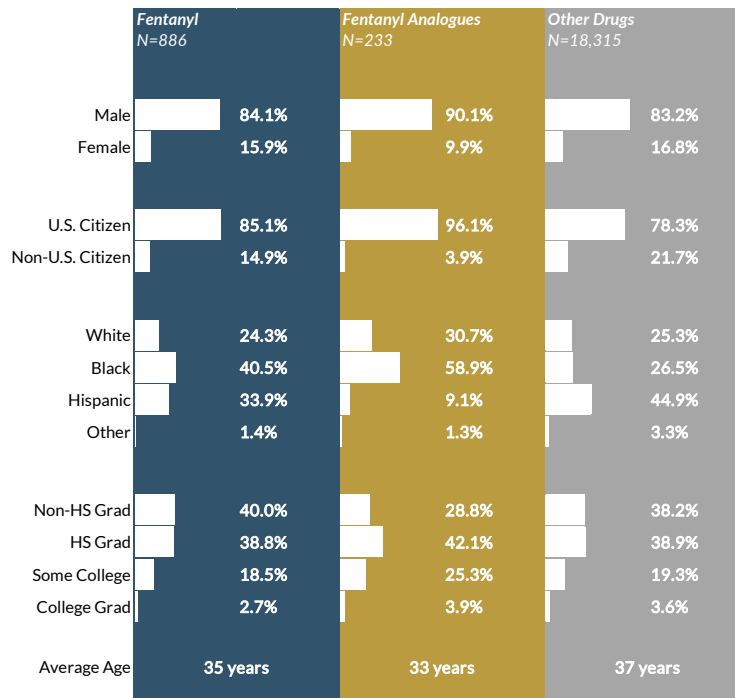
<sup>1</sup> Acetyl fentanyl, acryl fentanyl, butyryl fentanyl, cyclopropyl fentanyl, furanyl fentanyl, methoxyacetyl fentanyl, para-fluoroisobutyryl fentanyl or 4-fluoroisobutyryl fentanyl, valeryl fentanyl, and 3-methylfentanyl are Schedule I controlled substances. See 21 C.F.R. § 1308.11. Carfentanil is a Schedule II controlled substance. See 21 C.F.R. 1308.12(c)(6).

<sup>2</sup> Benzyl fentanyl was scheduled as a list I chemical on May 15, 2020. See 85 FR 20822 (May 15, 2020); 21 C.F.R. § 1310.02(a)(32). Benzyl fentanyl is used in the production of fentanyl and, in the interim period, between February 6, 2018, and May 15, 2020, potentially fell within the scope of the DEA’s order.

<sup>3</sup> A search of the scientific literature on phenyl fentanyl found the results of a test performed by The Center for Forensic Science Research and Education, which classified phenyl fentanyl as a fentanyl analogue. See Center for Forensic Science Research and Education at the Fredric Rieders Family Foundation, PHENYL FENTANYL (Sep. 4, 2018), <https://cfsre.hanlonreview.com/resources/nps-discovery/>.

# Offender and Offense Characteristics

**Figure 13. Offender Characteristics by Drug Type**  
Fiscal Year 2019



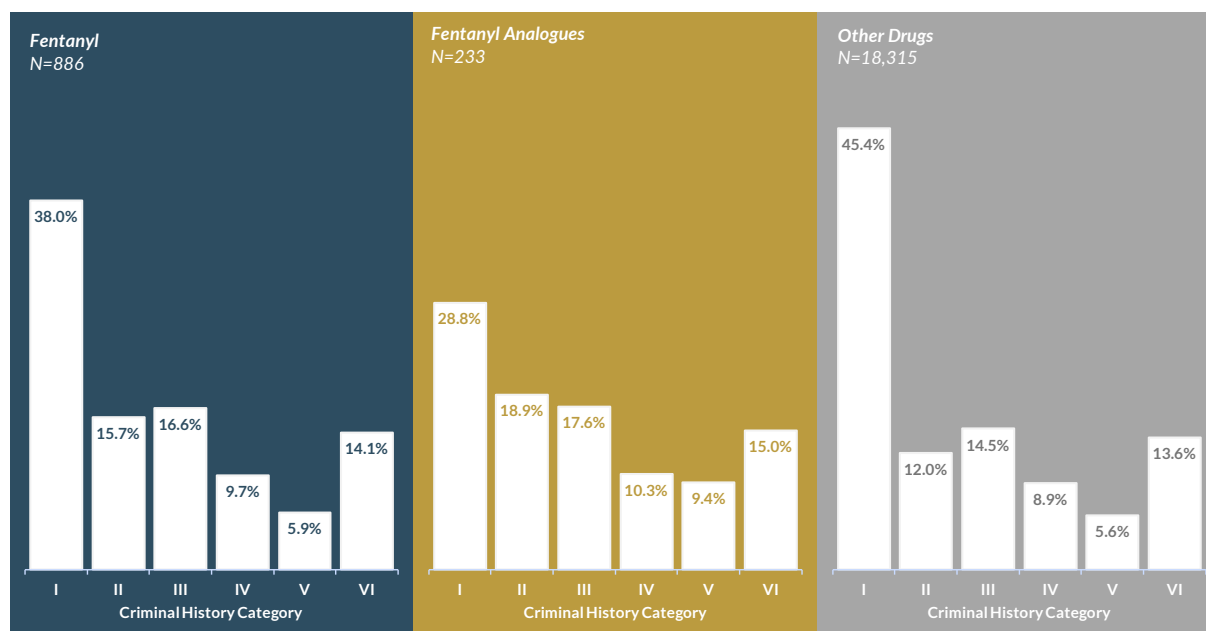
## Demographic Characteristics

Race and citizenship patterns for fentanyl and fentanyl analogue offenders (Figure 13) differed compared to other drug offenders. Most notably, Black offenders constituted a greater proportion of fentanyl and fentanyl analogue offenders (40.5% and 58.9%, respectively) than other drug offenders (26.5%). Conversely, Hispanic offenders represented a smaller proportion of both fentanyl and fentanyl analogue offenders (33.9% and 9.1%, respectively), compared to other drug offenders (44.9%). U.S. citizens were more prominent in fentanyl (85.1%) and fentanyl analogue (96.1%) offenders compared to other drug offenders (78.3%).

When focusing just on the comparison of fentanyl and fentanyl analogue offenders, Black offenders represented the largest group of both fentanyl (40.5%) and fentanyl analogue (58.9%) offenders. However, the representation of Hispanic offenders varied significantly, with Hispanics accounting for 33.9 percent of fentanyl offenders compared to 9.1 percent of fentanyl analogue offenders. This difference among the two groups in part reflects that fentanyl analogue offenders were somewhat more likely to be U.S. citizens (96.1%) compared to fentanyl offenders (85.1%).

**Figure 14. Criminal History Category by Drug Type**

Fiscal Year 2019



The three groups were very similar in terms of gender and age. Males constituted the overwhelming majority of fentanyl (84.1%), fentanyl analogue (90.1%), and other drug (83.2%) offenders. The mean age was 35 years for fentanyl offenders, 33 years for fentanyl analogue offenders. Other drug offenders were slightly older with a mean age of 37 years.

### Criminal History

Both fentanyl and fentanyl analogue offenders had more extensive criminal histories than other drug offenders (Figure 14), with fentanyl analogue offenders having the smallest percentage of offenders in the lowest Criminal History Category.<sup>131</sup> In fiscal year 2019, just under half (45.4%) of other drug offenders were assigned to

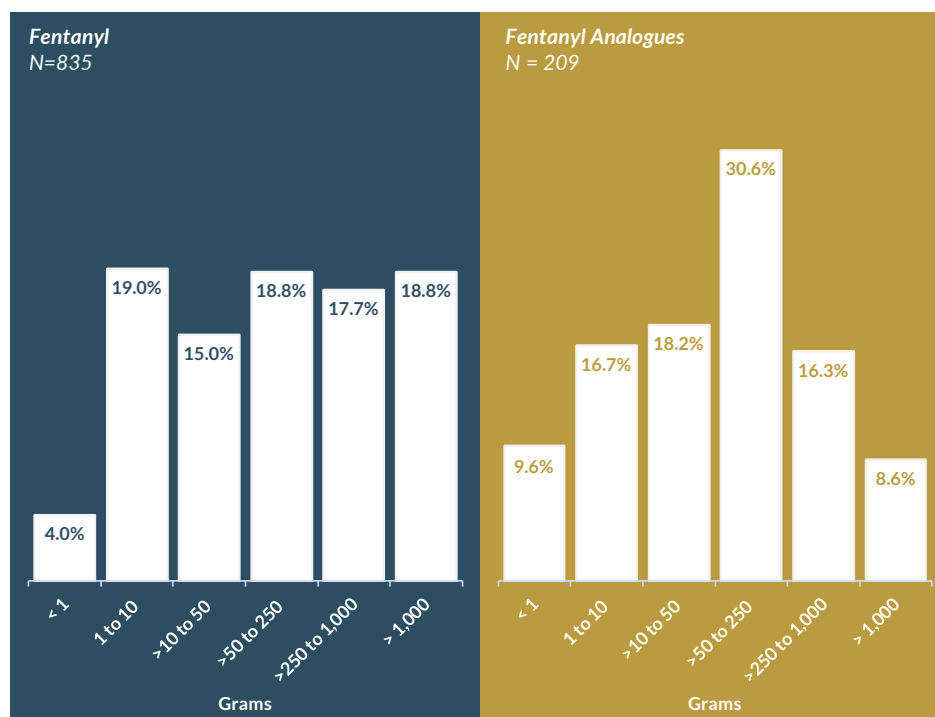
Criminal History Category I (CHC I) compared to 38.0 percent of fentanyl and 28.8 percent of fentanyl analogue offenders.

For offenders in the highest category, CHC VI, there is less variation between fentanyl, analogue, and other drug offenders. In fiscal year 2019, 14.1 percent of fentanyl offenders, 15.0 percent of fentanyl analogue offenders, and 13.6 percent of other drug offenders were in CHC VI.

A similar proportion of fentanyl (8.4%) and fentanyl analogue (8.6%) offenders were sentenced under the Armed Career Criminal Act<sup>132</sup> or Career Offender status, respectively.<sup>133</sup> By comparison, 6.7 percent of other drug offenders were sentenced under the Armed Career Criminal Act or Career Offender status.

**Figure 15. Drug Quantities by Drug Type**

Fiscal Year 2019



### Drug Quantities

Drug quantity varied considerably between fentanyl and its analogues.<sup>134</sup> The drug quantity for fentanyl offenders in fiscal year 2019 ranged from 100 micrograms to 36 kilograms. The average drug weight for the fentanyl offenders was 1.7 kilograms, and the median drug weight was 160 grams (Figure 15).

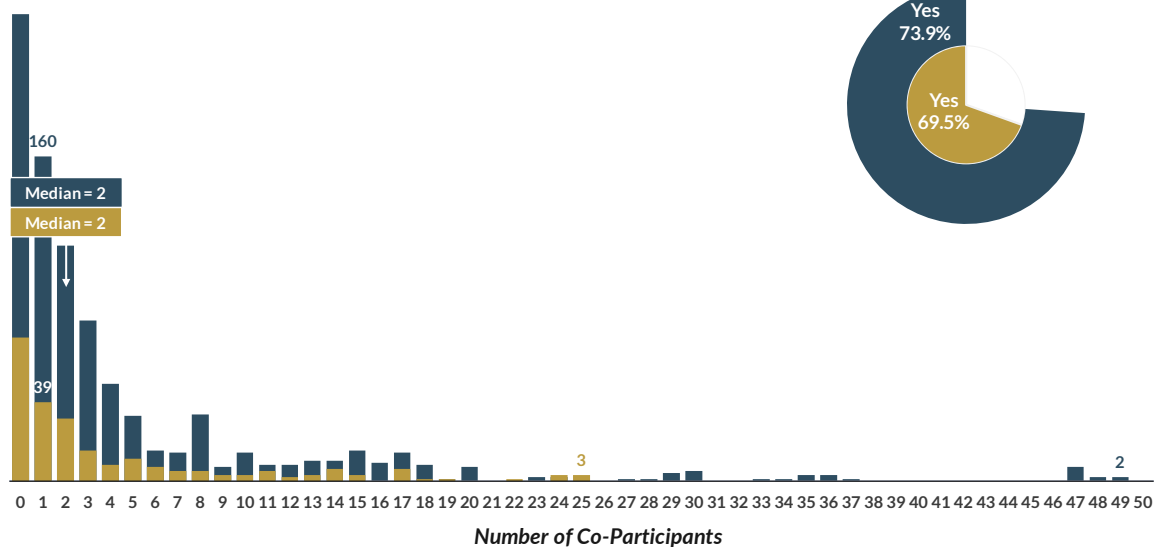
The drug quantity for fentanyl analogue offenders ranged from 70 milligrams to 62.1 kilograms. The average amount of fentanyl analogue trafficked was 764 grams and the median weight was 75 grams.

These weights are not limited to the quantity of pure fentanyl or one of its analogues involved in an offense<sup>135</sup> as these substances are often mixed with other drugs or cutting agents,<sup>136</sup> or are pressed into pills with inert fillers. As discussed above, under the drug trafficking guidelines, the entire weight of any mixture or substance containing a detectable amount of the controlled substance is assigned to the controlled substance that results in the greater offense level.<sup>137</sup>

# Trafficking Conspiracies and Offender Function

**Figure 16. Number of Co-Participants**  
Fiscal Year 2019

**Fentanyl**  
**Fentanyl Analogues**



## Trafficking Conspiracies

In fiscal year 2019, a majority of the 886 fentanyl (73.9%) and 233 fentanyl analogue (69.5%) offenders had at least one other co-participant in their offense.<sup>138</sup> Though these offenses typically involved two co-participants, the largest involved dozens of co-participants (Figure 16).<sup>139</sup>

## Offender Function

Offenders participating in trafficking conspiracies, especially in large conspiracies exhibiting a hierarchical structure, engage in specific activities or functions not present where there are no co-participants. The Commission analyzed the function offenders performed within fentanyl and fentanyl analogue trafficking conspiracies to identify the activities performed by participants and the levels of culpability among individual offenders.<sup>140</sup> The Commission then devised twelve categories of offender functions for this report, from the most serious function of an importer or high-level supplier to the least serious function of user (Figure 17).<sup>141</sup>



**Figure 17. Offender Function in Drug Trafficking Conspiracies**  
Fiscal Year 2019



As Figure 17 shows, the distribution of functions among fentanyl and fentanyl analogue offenders are similar in many respects. The most common function was street-level dealer for fentanyl (39.6%) and fentanyl analogue (45.5%) offenders, followed by wholesaler (19.6% and 18.9%, respectively). The most serious functions of importer/high-level supplier or leader/organizer were also similar, with 9.1 percent of fentanyl offenders and 10.3 percent of fentanyl analogue offenders performing these two functions. Few fentanyl (0.3%) and no fentanyl analogue offenders were medical professionals. This is consistent with the fact that trafficking of diverted prescription fentanyl was rare, and no fentanyl analogue offenders trafficked diverted prescription medications.

A notable difference exists, however, between the two drugs at the courier or mule level, with 12.0 percent of fentanyl offenders serving as couriers or mules compared to only 1.7 percent of fentanyl analogue offenders. These offenders are discussed in more detail in the following section.

# Distribution Practices

In response to the concern that fentanyl and fentanyl analogues increasingly are entering the United States when they are brought across the Southwest Border or shipped via mail or express package services, the Commission reviewed the distribution practices of the 1,119 offenders in this study. The Commission was able to determine definitively from the sentencing documentation that 8.6 percent of the 886 fentanyl offenders and 29.2 percent of the 233 fentanyl analogue offenders trafficked these substances internationally. While it is likely that these percentages underrepresent the prevalence of international trafficking documented by the Customs and Border Protection, the United States Postal Service and the Drug Enforcement

Administration,<sup>143</sup> this section of the report provides further information relating to the distribution practices in these 144 cases the Commission was able to identify.

## International Couriers

Based on its review, the Commission was able to identify approximately five percent of fentanyl offenders (5.1%; n=45) as international couriers (or mules).<sup>144</sup> All 45 international couriers transported fentanyl across the Southwest Border from Mexico, thirty-four of whom were apprehended at the border. The most common border ports of entry were in the District of Arizona (n=16) and the Southern District of California (n=14). Eleven international couriers were apprehended within the United States, after crossing the border.

Of the 45 international fentanyl couriers, 13 offenders trafficked fentanyl resembling prescription medications from Mexico. According to the Drug Enforcement Administration, many counterfeit prescriptions are likely manufactured in Mexico.<sup>145</sup>

International fentanyl couriers trafficked larger quantities than other fentanyl offenders. The average drug weight trafficked among these 45 international fentanyl couriers was 4.5 kilograms and the median drug weight was 1.8 kilograms. This amount of fentanyl is three times the average fentanyl quantity (1.5 kilograms) and 12 times the median amount (142 grams) of all other fentanyl offenders.

The Commission identified only one fentanyl analogue offender in this study who couriered the drug internationally. This offender was apprehended at the Southwest Border.<sup>146</sup>



## Other International Couriers

The Commission identified 70 international couriers sentenced in FY 2019 who trafficked another substance as their primary drug, but also trafficked fentanyl (hereafter referred to as "other drug couriers"). Methamphetamine (90.0%; n=63) was the primary drug for the overwhelming majority of these 70 other drug couriers.

All these other drug couriers transported drugs, including fentanyl, across the Southwest Border from Mexico. These other drug couriers had similar ports of entry to the international fentanyl couriers, the Southern District of California (57.6%; n=38) and the District of Arizona (39.4%; n=26).

The median quantity of fentanyl attributed to these other drug couriers was 1 kilogram, nearly half the quantity attributed to the 45 international fentanyl couriers (1.8 kilograms), but seven times the quantity trafficked by all fentanyl offenders (142 grams).

The analysis of other drug couriers highlights the complex nature of international fentanyl distribution, particularly when more than one drug is involved.

### *International Shipments*

The Commission found that fentanyl analogue offenders were more likely to receive international shipments than fentanyl offenders. As discussed above, the Commission identified 31 fentanyl offenders (3.5%) and 67 fentanyl analogue offenders (28.8%) who received international shipments of these substances via mail or express packaging services.<sup>147</sup>

### *Use of the Internet and Dark Web for International Shipments*

To import these drugs into the United States via international mail, some fentanyl and fentanyl analogue offenders ordered them through the Internet, in particular the dark web.<sup>148</sup> The Commission identified 28 fentanyl offenders (3.2%) as having received an international drug shipment purchased off of the Internet, with 20 (2.3%) as having received a shipment purchased on the dark web.

The Commission identified over one-quarter (28.8%; n=67) of fentanyl analogue offenders as having received an international shipment using the Internet to facilitate the drug transaction. Just under one-fifth (18.5%; n=43) of fentanyl analogue offenders received an international drug shipment purchased on the dark web.

### *International Shipments from China*

Both fentanyl and fentanyl analogue offenders sentenced in fiscal year 2019 received international shipments from China, where the purest and most potent fentanyl is manufactured.<sup>149</sup> The Commission identified relatively few fentanyl cases (2.3%, n=20) in which the substance was shipped from China.<sup>150</sup> By comparison, the Commission identified one-fifth (20.2%; n=47) of fentanyl analogue cases in which the substance was shipped from China.<sup>151</sup>



### **New Chinese Regulations**

On May 1, 2019, China began regulating all fentanyl-related drugs as a class of controlled substances as a way to stem the export of lethal opioids.

The impact of this regulation cannot be measured with the data in this study, as all the cases involving shipments from China pre-date the regulation.

# Misrepresentation

Among the concerns expressed at Commission and congressional hearings, one of the most prevalent related to the knowing and unknowing sale of fentanyl and fentanyl analogues as another drug. This most commonly occurs when fentanyl or one of its analogues is mixed or cut with heroin or inert fillers to increase profits or to press the mixture into counterfeit pills.<sup>152</sup> Purchasers of these substances most often believe they are buying heroin or a diverted prescription opioid, giving rise to two related concerns. First, the potential for an overdose is compounded because users are unknowingly consuming fentanyl and most fentanyl analogues, which are generally more lethal than those other substances.<sup>153</sup> Relatedly, offenders who knowingly misrepresent fentanyl or its analogues in an attempt to increase profits or the “quality” of their product are viewed as more culpable due to the enhanced risk they are creating.<sup>154</sup>

## *Selling or Advertising as Another Substance*

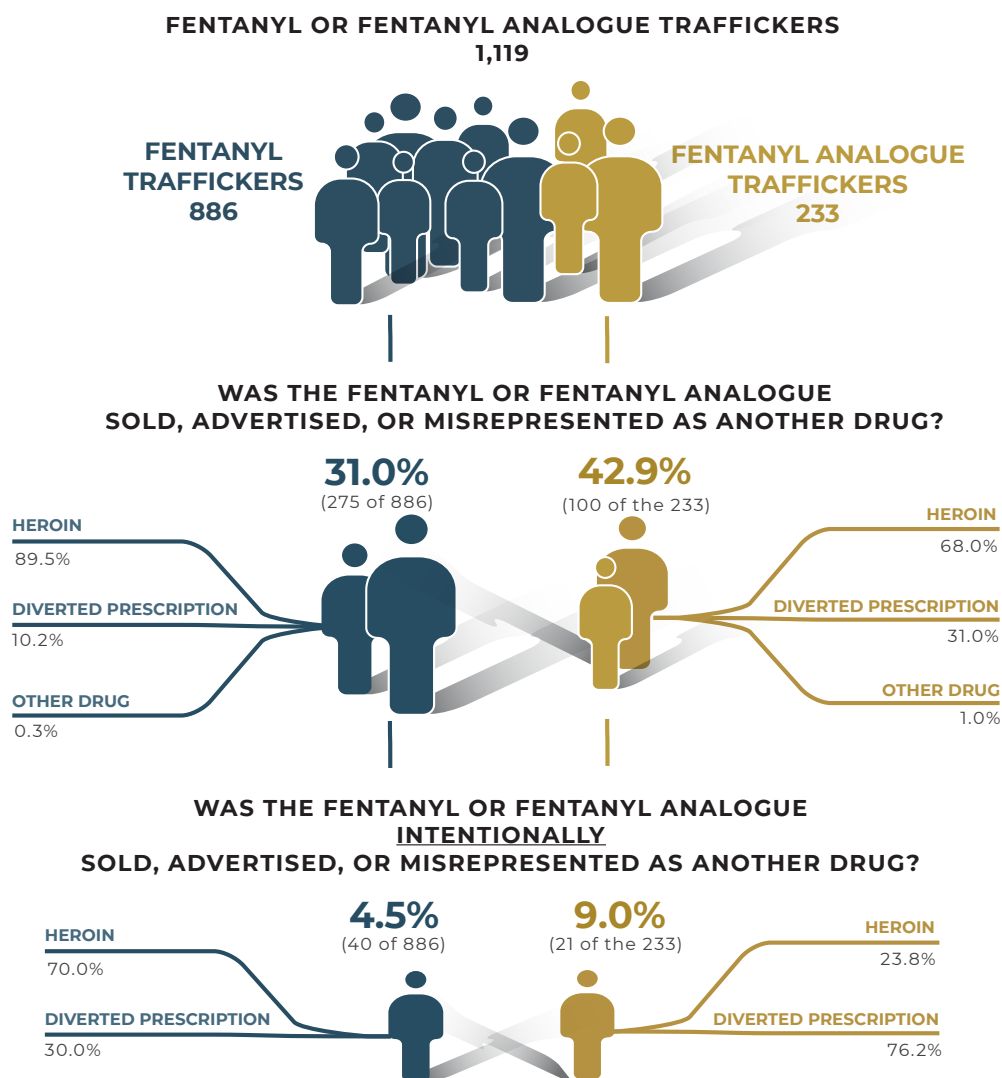
The Commission determined that just under a third of fentanyl offenders and over forty percent of fentanyl analogue offenders sold or advertised these substances as other drugs, creating the potential for harm or overdose. Specifically, in fiscal year 2019, 275 of the 886 fentanyl offenders (31.0%) sold or advertised the fentanyl as another drug.<sup>155</sup> Almost all of these 275 offenders sold or advertised the fentanyl as heroin (89.5%; n=246) or a diverted prescription (10.2%; n=28).<sup>156</sup> Of the 28 offenders who sold or advertised the fentanyl as a diverted prescription, 25 were manufactured to resemble oxycodone and two were manufactured to resemble oxycodone and alprazolam. In one offense, the Commission was unable to determine the type of diverted prescription the fentanyl was intended to resemble.

In fiscal year 2019, 100 of the 233 fentanyl analogue offenders (42.9%) sold or advertised these substances as another drug.<sup>157</sup> Almost all of these 100 offenders sold or advertised these substances as heroin (68.0%; n=68) or diverted prescriptions (31.0%; n=31).<sup>158</sup> Of the 31 offenders who sold or advertised fentanyl analogue as a diverted prescription, 28 were manufactured to resemble oxycodone, two were manufactured to resemble alprazolam, and one was manufactured to resemble both.

## *Intentional Misrepresentation*

Some offenders who misrepresented fentanyl and its analogues engaged in particularly aggravating conduct by intentionally misrepresenting these substances to consumers during a drug transaction.<sup>159</sup> The Commission determined that an offender knowingly misrepresented fentanyl or a fentanyl analogue when the offender specifically sold, advertised, or misrepresented one of these drugs as something other than fentanyl or one of its analogues during a drug transaction with a user, buyer, or co-participant and knew fentanyl or its analogue was present by admission. The Commission accounted for this behavior in its amendment under §2D1.1 adding a 4-level increase that applies when the defendant knowingly misrepresented or knowingly marketed a mixture or substance containing fentanyl or a fentanyl analogue as another substance.

**Figure 18. Misrepresentation of Fentanyl and Fentanyl Analogues**  
Fiscal Year 2019

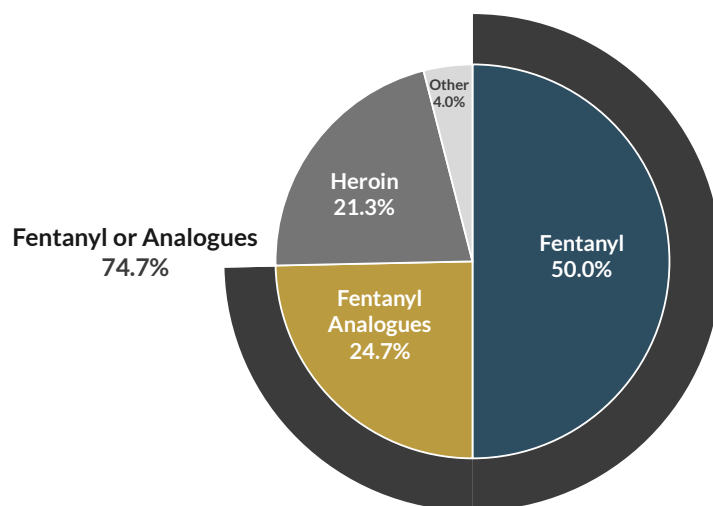


In fiscal year 2019, 40 of the 886 fentanyl offenders (4.5%) knowingly sold, advertised, or misrepresented the fentanyl as another substance. All of these 40 offenders misrepresented the fentanyl as heroin (70.0%; n=28) or diverted prescriptions (30.0%; n=12).

In fiscal year 2019, 21 of the 233 fentanyl analogue offenders (9.0%) knowingly sold, advertised, or misrepresented these substances as another substance. All of these 21 offenders misrepresented the fentanyl analogue as heroin (23.8%; n=5) or diverted prescriptions (76.2%; n=16).

# Death and Serious Bodily Injury

*Figure 19. Application of the Death or Serious Bodily Injury Base Offense Level by Drug Type  
Fiscal Year 2019*

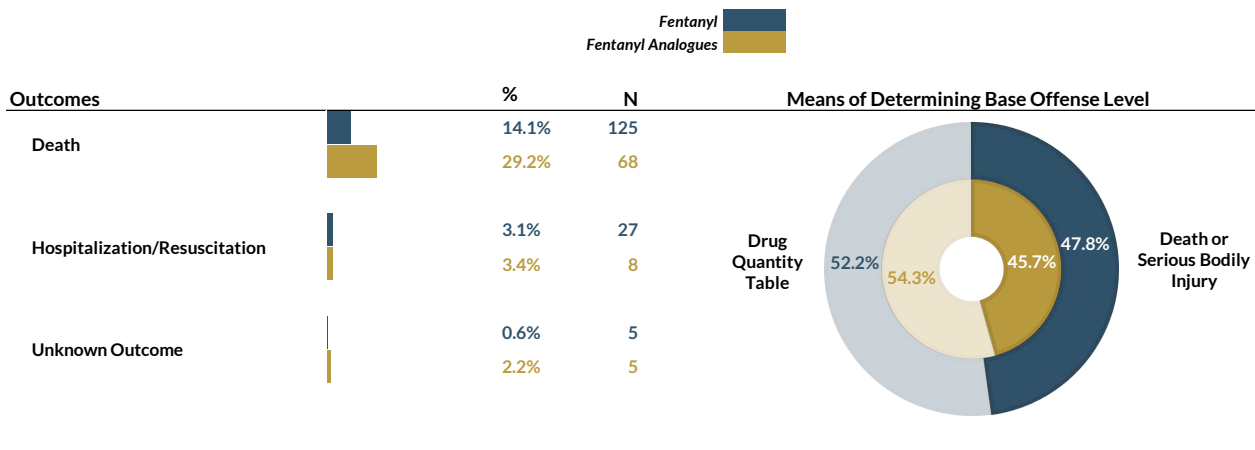


As mentioned above, rates of death involving synthetic opioids increased ten percent from 2017 to 2018 and the Center for Disease Control and Prevention suggests the cause of this increase is illicitly manufactured fentanyl and fentanyl analogues.<sup>160</sup> The prevalence of overdoses resulting in death and serious bodily injuries associated with fentanyl and its analogues continues to be of concern to the Commission, Congress, the Department of Justice, and many other stakeholders. For this reason, the Commission examined instances where these substances were associated with an overdose.

## *Death or Serious Bodily Injury Base Offense Level*

In fiscal year 2019, the court applied a heightened base offense level under the guidelines because the offense involved death or serious bodily injury in less than one percent (0.8%) of all drug trafficking cases. Fentanyl and fentanyl analogue offenders accounted for nearly three quarters—74.7 percent—of these offenders (Figure 19).<sup>161</sup> In other words, in the majority of drug trafficking cases in which the government had sufficient evidence to prove the substance distributed was the immediate cause of death or serious bodily injury, the substance was either fentanyl or a fentanyl analogue. Furthermore, less than one percent (0.2%) of other drug offenders received the heightened base offense level for drug trafficking offenses involving death or serious bodily injury, compared to 8.5 percent of fentanyl offenders and 15.9 percent of fentanyl analogue offenders.<sup>162</sup>

**Figure 20. Cases Involving Overdose - Outcomes and Means of Determining Base Offense Level**  
Fiscal Year 2019



### Offense-related Overdose

The Commission also reviewed the sentencing documentation of fentanyl and fentanyl analogue offenders to determine whether an overdose involving fentanyl or a fentanyl analogue occurred, even in cases in which the heightened base offense level for death or serious bodily injury did not apply.<sup>163</sup> The Commission found that overdoses resulting in death occurred in a significantly higher percentage of fentanyl analogue offenses compared to fentanyl offenses. Death occurred in 29.2 percent (n=68) of fentanyl analogue offenses compared to 14.1 percent (n=125) of fentanyl offenses (Figure 20). Roughly three percent of both fentanyl (3.1%; n=27) and fentanyl analogue (3.4%; n=8) offenses resulted in hospitalization or resuscitation.

Offenders received a heightened base offense level under the guidelines in 47.8 percent of the 157 fentanyl offenses involving an overdose and 45.7 percent of the 81 fentanyl analogue offenses involving an overdose.<sup>164</sup> The base offense level for the remaining fentanyl and fentanyl analogue offenders was determined based on the quantity of the drug involved in the case.



# Sentencing Outcomes

## Statutory Sentencing Considerations

### Mandatory Minimum Penalties

Both fentanyl and fentanyl analogue trafficking offenses are punishable by statutory mandatory minimum penalties when certain drug quantity thresholds are met (see Figure 5). Given their potency, the quantity of fentanyl and fentanyl analogue required to trigger the statutory penalties at 21 U.S.C. §§ 841 and 960 are generally lower than required for other opiates. For example, a ten-year mandatory minimum penalty is triggered by 100 grams of a fentanyl analogue compared to one kilogram of heroin.

In fiscal year 2019, fentanyl and fentanyl analogue offenders were slightly less likely than other drug offenders to be charged with an offense carrying a mandatory minimum penalty. Slightly more than half of fentanyl (57.1%; n=506) and fentanyl analogue (52.8%; n=123) offenders were convicted of an offense carrying a mandatory minimum penalty, compared to two-thirds of other drug offenders (66.2%; n=12,124).

Approximately one-quarter (25.1%) of fentanyl offenders and one-fifth (21.9%) of fentanyl analogue offenders were convicted of an offense carrying a five-year mandatory minimum penalty.<sup>165</sup> A nearly identical proportion of fentanyl (23.7%) and fentanyl analogue (18.9%) offenders were sentenced for an offense carrying a ten-year statutory mandatory minimum (Figure 21). Comparatively, approximately one-quarter (24.8%) of other drug offenders also received a five-year mandatory minimum, but nearly 40 percent (39.1%) received a ten-year minimum.

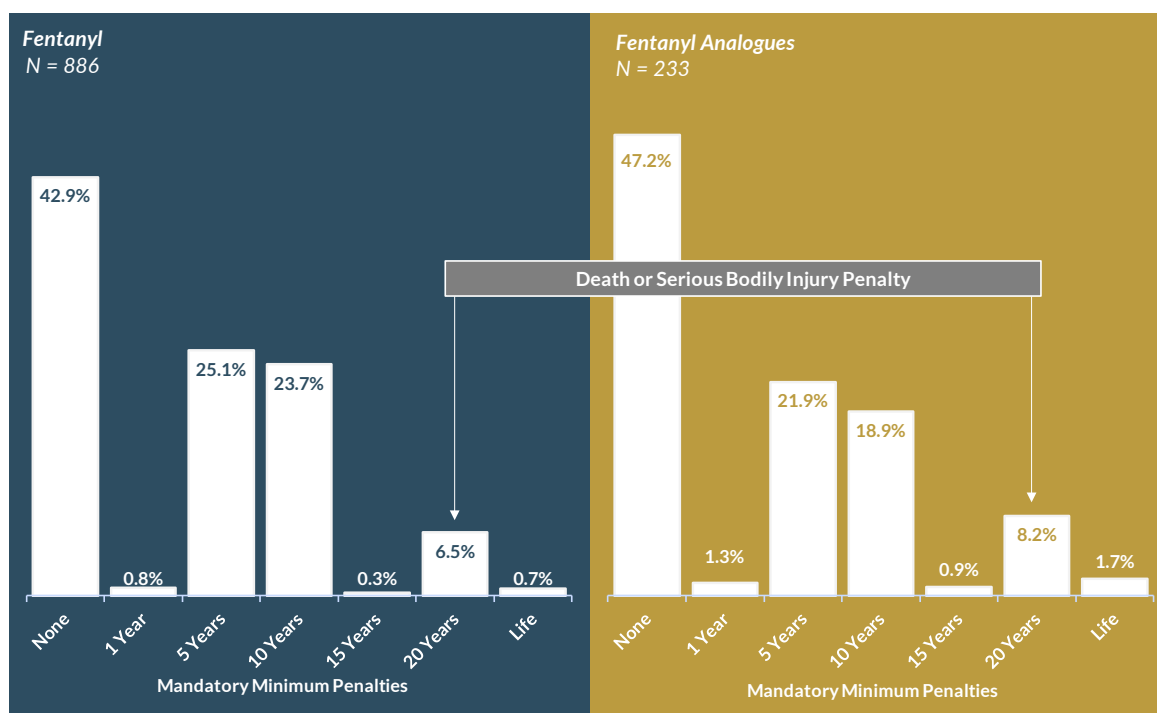
When an offense resulted in death or serious bodily injury from the use of the substance, the offender is subject to the statutory mandatory minimum term of imprisonment of not less than 20 years under 21 U.S.C. §§ 841 and 960. A greater proportion of fentanyl analogue offenders (8.2%; n=19) were sentenced to the 20-year statutory mandatory minimum sentence for death or serious bodily injury than fentanyl offenders (6.1%; n=54). Comparatively, only 25 other drug offenders (0.1%) were sentenced to the 20-year statutory mandatory minimum sentence for death or serious bodily injury.

In addition to the statutory mandatory minimum penalties for certain drug quantities, drug trafficking offenders with qualifying prior offenses may be subject to the recidivist penalties at 21 U.S.C. §§ 841 and 960, commonly referred to as “851 enhancements.”<sup>166</sup> These increased penalties are not automatically triggered upon conviction. Rather, prosecutors must take affirmative steps for these higher penalties to apply, including filing an information pursuant to 21 U.S.C. § 851 specifying the previous convictions<sup>167</sup> to be relied upon.<sup>168</sup> In fiscal year 2019, 11 fentanyl offenders (1.2%) and nine fentanyl analogue offenders (3.9%) received an 851 enhancement.<sup>169</sup> For comparison, in fiscal year 2019, 1.4 percent of other drug offenders received an 851 enhancement.

### Relief from Mandatory Minimum Penalties

Though fentanyl and fentanyl analogue offenders were less likely to be convicted of an offense carrying a mandatory minimum penalty compared to other drug offenders, they also were less likely to receive relief from those penalties at sentencing.<sup>171</sup> More than half (53.0%) of the 506

**Figure 21. Mandatory Minimum Penalties in Fentanyl and Fentanyl Analogue Offenses<sup>170</sup>**  
Fiscal Year 2019



fentanyl offenders and less than half (46.3%) of the 123 fentanyl analogue offenders convicted of a drug mandatory minimum penalty were relieved of that penalty.<sup>172</sup> By comparison, 58.0 percent of the 12,124 other drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty received relief from the penalty.

There were, however, differences in the nature of the relief received. While both groups received substantial assistance in relatively equal proportions—17.4 percent of fentanyl offenders and 22.0 percent of fentanyl analogue offenders—fentanyl offenders received safety valve relief more often than fentanyl analogue offenders (27.5% compared to 17.1%).<sup>173</sup> Less than ten percent of fentanyl (8.1%) and fentanyl analogue (7.3%) offenders received both safety valve and substantial assistance relief.

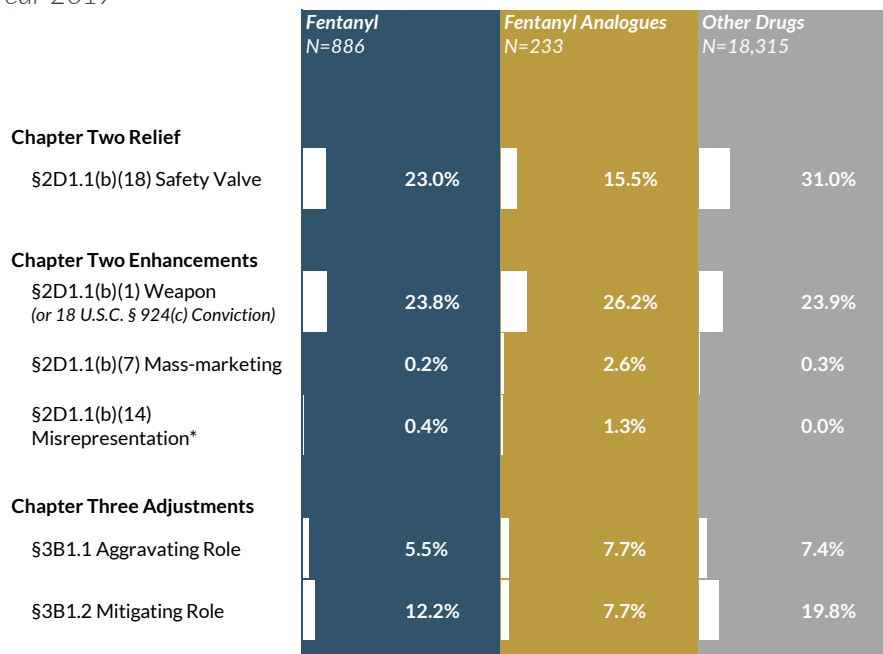
## Chapter Two Specific Offense Characteristics

### Safety Valve

Just under one quarter (23.0%) of fentanyl offenders received the 2-point reduction in their offense level under the guidelines through application of the guideline safety valve provision (Figure 22), while fewer (15.5%) fentanyl analogue offenders received the reduction. Other drug trafficking offenders received the 2-point safety valve reduction at a higher rate (31.0%) than both fentanyl and fentanyl analogue offenders.

**Figure 22. Chapter Two and Three Guideline Application by Drug Type**

Fiscal Year 2019



\* Because §2D1.1(b)(14) was introduced in 2018, it applied only in cases where the 2018 *Guidelines Manual* was applied (681 fentanyl offenses and 155 fentanyl analogue offenses sentenced in fiscal year 2019).

### Weapon Enhancement

Similar proportions of fentanyl (23.8%) and fentanyl analogue (26.2%) offenders received a weapon enhancement for possession of a dangerous weapon (including a firearm) during the commission of the offense (Figure 22).<sup>174</sup> This is nearly the same proportion of other drug trafficking offenders (23.9%) who received this sentencing enhancement.

### Mass Marketing by Means of an Interactive Computer Device

The Internet, particularly the dark web, is frequently cited as a means used by federal drug trafficking offenders to distribute both substances.<sup>175</sup> Only a small proportion of fentanyl (0.2%) and fentanyl analogue (2.6%) offenders received the 2-level enhancement under the guidelines for distribution of a controlled substance through mass-marketing by means of an interactive computer device.<sup>176</sup> Similarly, a very small proportion of other drug trafficking offenders (0.3%) received a mass-marketing enhancement.

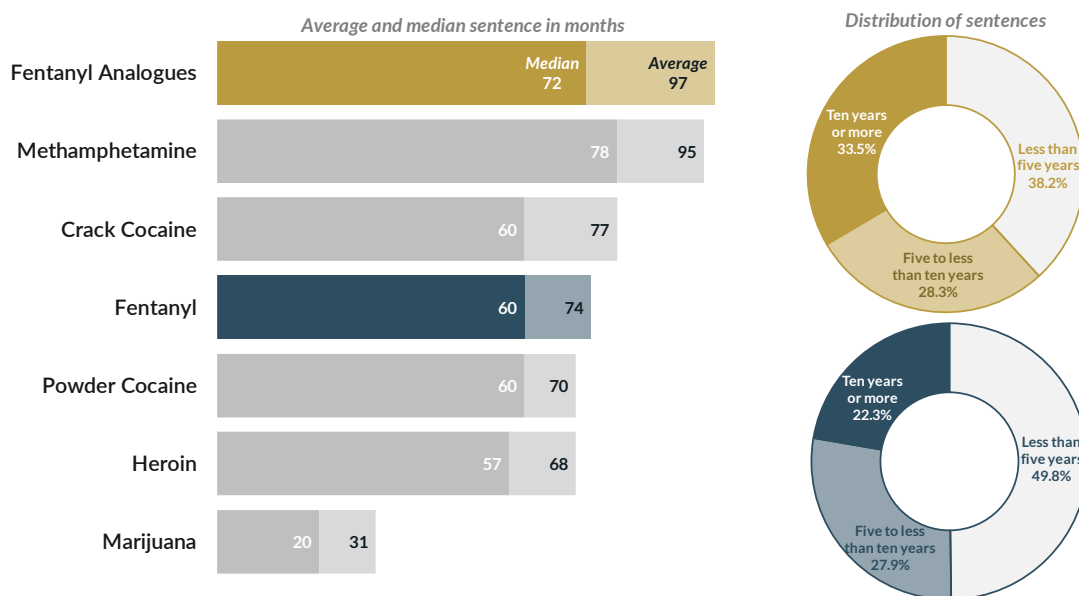
### Misrepresentation

As previously discussed on page 13 of this report, in 2018, the Commission amended §2D1.1 to add a 4-level increase that applies when the defendant knowingly misrepresented or knowingly marketed a mixture or substance containing fentanyl or a fentanyl analogue as another substance.<sup>177</sup> The Commission included a *mens rea* requirement in the enhancement to “ensure that only the most culpable offenders” receive the 4-level increase.<sup>178</sup> The government bears the burden of proving that an offender possessed the requisite *mens rea* to trigger application of §2D1.1(b)(13).

In fiscal year 2019, approximately three-quarters (76.9%) of fentanyl offenders were sentenced under the 2018 *Guidelines Manual*. In those cases, three fentanyl offenders (0.4%) received the 4-level increase for misrepresentation. Two-thirds (66.5%) of fentanyl analogue offenders were sentenced under the 2018 *Guidelines Manual* and two of those offenders (1.3%) received the 4-level increase for knowingly misrepresenting or marketing the substance.

**Figure 23. Sentence Length by Drug Type**

Fiscal Year 2019



### Chapter Three Role Adjustments

Fentanyl offenders received an aggravating role adjustment (5.5%) under §3B1.1 for being an organizer, leader, manager, or supervisor less frequently than their fentanyl analogue counterparts (7.7%) or other drug trafficking offenders (7.4%).

Additionally, fentanyl offenders were slightly more likely than fentanyl analogue offenders to receive a mitigating role adjustment under §3B1.2 for having minimal or minor participation in the drug offense (12.2% compared to 7.7%). Fentanyl and fentanyl analogue offenders both received a mitigating role adjustment less frequently than other drug offenders (19.8%).

### Sentence Length

In fiscal year 2019, nearly all fentanyl and fentanyl analogue offenders pleaded guilty (97.7% and 93.1%, respectively) and were sentenced to prison (97.2% and 97.0%, respectively), which is nearly the same proportion as other drug offenders.

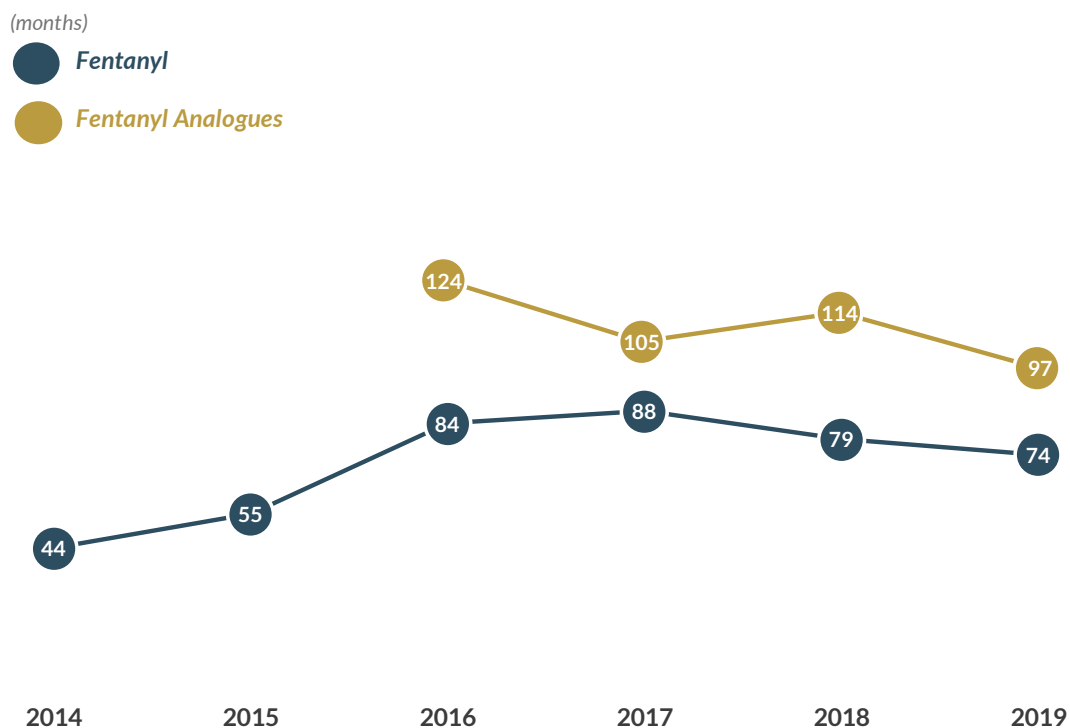
Fentanyl analogue offenders received more severe sentences than fentanyl offenders. The average sentence for fentanyl analogue offenders was 97 months and the median sentence was 72 months. This is roughly the same length as sentences imposed for methamphetamine offenders and longer than any other major drug type (Figure 23). Comparatively, the average sentence for fentanyl offenders was 74 months and the median sentence was 60 months. This is roughly the same sentence length as for both heroin and powder cocaine offenders.

Notably, fentanyl analogue offenders in fiscal year 2019 were split as to which *Guidelines Manual* applied in their case. As previously discussed, the Commission adopted a new definition of “fentanyl analogue” to ensure that all fentanyl analogue offenses are sentenced at the higher penalties applicable to fentanyl analogues, rather than the lower fentanyl penalties in the Drug Conversion Tables.<sup>179</sup> While courts are generally instructed to apply the *Guidelines Manual* in effect at the time of sentencing, the guidelines also provide that the court should use an earlier manual if utilizing the more recent manual would violate the *ex post facto*



Increased sentences for fentanyl analogue offenders sentenced under the 2018 *Guidelines Manual* suggests that the 2018 amendment may be having the intended effect of ensuring that the higher fentanyl analogue penalties are applied to such substances.

Figure 24. Average Sentence Length Over Time



clause. In such a case, the court should apply the *Guidelines Manual* in effect on the date the offense was committed.<sup>180</sup> Since the 2018 amendment effectively increased penalties for fentanyl analogue offenders, courts were required to use an earlier manual for those fentanyl analogue offenders who committed their offenses prior to the effective date of the 2018 *Guidelines Manual*.

As a result, one-third (33.1%) of fentanyl analogue offenders were sentenced under the 2016 edition of the *Guidelines Manual* in fiscal year 2019. The average sentence for those offenders was 92 months and the median sentence was 71 months.<sup>181</sup> By comparison, the average sentence for 66.5 percent of offenders sentenced under the 2018 *Guidelines Manual* was 100 months and the median sentence was 72 months, which was among the longest for all federal drug traffickers sentenced in fiscal year 2019.<sup>182</sup>

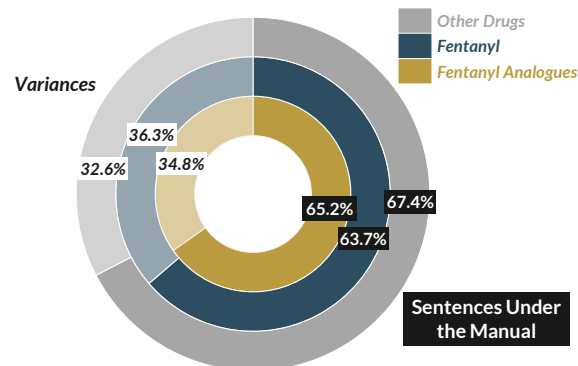
The increased sentences for fentanyl analogue offenders sentenced under the 2018 *Guidelines Manual* suggests that the 2018 amendment revising the fentanyl analogue definition may be having the intended effect of ensuring that the higher fentanyl analogue penalties are applied to such substances.<sup>183</sup>

#### *Sentences Relative to the Guidelines Range*

The position of the sentence relative to the guideline range for both fentanyl and fentanyl analogue offenders was similar to that of other drug trafficking offenders (Figure 25). Nearly two-thirds of fentanyl (63.7%) and fentanyl analogue (65.2%) offenders were sentenced under the *Guidelines Manual*. This is nearly identical to the percent for other drug offenders (67.4%) sentenced under the *Guidelines Manual* in fiscal year 2019.

A similar proportion of fentanyl (35.7%) and fentanyl analogue (33.9%) offenders were sentenced within the guideline range, compared to other drug offenders (34.1%). Roughly one-fifth (19.4%) of fentanyl offenders and a quarter (25.8%) of fentanyl analogue offenders received a downward departure due to substantial assistance

**Figure 25. Sentences Relative to the Guideline Range by Drug Type**  
Fiscal Year 2019



(§5K1.1), compared to 22.7 percent of other drug trafficking offenders. Few fentanyl offenders (3.7%) and no fentanyl analogue offenders received a downward departure for participating in an early disposition program.<sup>184</sup> A smaller proportion of fentanyl offenders (3.7%) received some other downward departure, compared to fentanyl analogue offenders (5.6%). Similarly, few (1.1%) fentanyl offenders and no fentanyl analogue offenders received an upward departure.<sup>185</sup>

Over a third of both fentanyl (36.3%) and fentanyl analogue (34.8%) offenders received a variance, which is similar to the percentage of variances below the guideline range for other drug offenders (32.6%). Roughly one third of fentanyl offenders (34.2%) and fentanyl analogue offenders (30.0%) received a downward variance.

Though relatively few fentanyl (2.1%) and fentanyl analogue (4.7%) offenders received an upward variance, their upward variance rates were nearly triple the 1.3 percent upward variance rate for drug trafficking offenders in fiscal year 2019. The Commission examined the offenders receiving upward variances and noted that for three fentanyl offenders and four fentanyl analogue offenders the court cited death or physical injury as one of the reasons for the variance.<sup>186</sup>

# Conclusion

Following its promulgation of guideline amendments relating to fentanyl and fentanyl analogues in 2018, the Commission has continued its examination of these substances in the years since. Highlighting the concerns and intervening action across all three branches of government, the Commission has seen a sharp increase in the number of offenses involving fentanyl and fentanyl analogues in recent years. Though still only a small portion of the overall federal drug trafficking caseload (5.8%), the number of fentanyl offenders has increased by 3,592 percent from 24 in fiscal year 2015 to 886 in fiscal year 2019. Similarly, the number of fentanyl analogue offenders increased 5,725 percent from four in fiscal year 2016 to 233 in fiscal year 2019.

Relatedly, Commission data regarding the frequency with which these substances result in death and serious bodily injury further informs concerns regarding lethality and dangerousness. In fiscal year 2019, fentanyl or fentanyl analogue offenders accounted for 74.7 percent of the drug trafficking offenders sentenced where the offense of conviction established that a death or serious bodily injury resulted from the substance's use.

The continued Congressional and Executive Branch interest in fentanyl and its analogues, combined with the rising numbers of these cases and the high risk of harms attributed to these substances, highlights the importance of continued study of fentanyl-related offenses. The Commission, therefore, issues this report to inform future deliberations in the federal criminal justice system about fentanyl and fentanyl analogue offenses and offenders.

# Endnotes

- 1 See 28 U.S.C. § 995(a)(12)–(16).
- 2 See, e.g., U.N. Office on Drugs & Crime, *Fentanyl and Its Analogues – 50 Years On*, 17 GLOB. SMART UPDATE (2017), [https://www.unodc.org/documents/scientific/Global\\_SMART\\_Update\\_17\\_web.pdf](https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf) (explaining that there are four fentanyl analogues currently manufactured for legitimate pharmaceutical use, approximately eight additional known fentanyl analogues discovered through pharmaceutical research but currently not manufactured for legitimate purposes, and, in the last five years, at least 17 total fentanyl analogues reported in illicit use, many of which were never developed for any legitimate purpose).
- 3 See Nat'l Inst. on Drug Abuse, *Fentanyl DrugFacts*, <https://www.drugabuse.gov/publications/drugfacts/fentanyl>, NAT'L INST. OF HEALTH (Feb. 2019). Various analogues of fentanyl may have significantly greater potencies, up to 10,000 times the potency of morphine. See Office on Drugs and Crime, *Commission on Narcotic Drugs Takes Decisive Step to Help Prevent Deadly Fentanyl Overdose*, UNITED NATIONS (Mar. 16, 2017), <http://www.unodc.org/unodc/en/frontpage/2017/March/commission-on-narcotic-drugs-takes-decisive-step-to-help-prevent-deadly-fentanyl-overdoses.html>.
- 4 See, e.g., Nana Wilson, Mbabazi Kariisa, et al, *Morbidity and Mortality Weekly Report, Drug and Opioid-Involved Overdose Deaths—United States, 2017–2018* CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 20, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6911a4.htm> [hereinafter *Mortality Weekly Report*] (reporting that rates of death involving synthetic opioids increased 10% from 2017 to 2018 and the increase is likely driven by illicitly manufactured fentanyl, including fentanyl analogues).
- 5 See U.S. SENTENCING COMM'N, *Guidelines Manual*, App. C, amend. 807 (effective Nov. 1, 2018) [hereinafter USSG].
- 6 *Id.*
- 7 Written Statement of Srihari R. Tella, Ph.D., Unit Chief, Drug and Chemical Control Unit, Drug and Chemical Evaluation Section, Diversion Control Div., Drug Enf't Admin. (Dec. 5, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Tella.pdf> [hereinafter Tella Written Statement].
- 8 *Id.* at 2–3.
- 9 *Id.* at 3.
- 10 See 21 U.S.C. § 812 (Schedules of controlled substances).
- 11 See *id.*
- 12 DRUG ENF'T ADMIN., NAT'L FORENSIC LABORATORY INFO. SYS., NFLIS BRIEF: FENTANYL 2001–2015 (2017), <https://www.nflis.deadiversion.usdoj.gov/DesktopModules/ReportDownloads/Reports/NFLISFentanylBrief2017.pdf>; DRUG ENF'T ADMIN., NAT'L FORENSIC LABORATORY INFO. SYS., 2016 ANNUAL REPORT (2018), [https://www.nflis.deadiversion.usdoj.gov/DesktopModules/ReportDownloads/Reports/NFLIS2016AR\\_Rev2018.pdf](https://www.nflis.deadiversion.usdoj.gov/DesktopModules/ReportDownloads/Reports/NFLIS2016AR_Rev2018.pdf). The only previous year in which fentanyl seizures exceeded 1,000 was 2006, with 3,317 reports.
- 13 *The Countdown: Fentanyl Analogues and the Expiring Emergency Scheduling Order, Before S. Comm. on the Judiciary*, 116th Cong. 3 (2019) (statement of Kemp L. Chester, Assistant Dir., Nat'l Opioids and Synthetics Coordination Group, Office of National Drug Control Policy (citing data from the U.S. Department of Justice, Drug Enforcement Administration's STARLiMS forensic drug chemistry database in an analysis by ONDCP through April 15, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Chester%20Testimony.pdf>.
- 14 *Id.* at 4.
- 15 According to data collected by the Centers for Disease Control and Prevention (CDC), approximately 450,000 people died from an overdose involving any opioid, including prescription and illicit opioids, between 1999–2018. See CDC WONDER, *Wide-ranging online data for epidemiologic research* (WONDER), CENTERS FOR DISEASE CONTROL AND PREVENTION (2020), <http://wonder.cdc.gov>.
- 16 See, e.g., *Mortality Weekly Report*, *supra* note 4.
- 17 See Letter from Zachary C. Bolitho, U.S. Dep't of Justice, to Hon. William H. Pryor Jr., Acting Chair, U.S. Sentencing Comm'n 7 (July 31, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/DOJ.pdf>.
- 18 See *Fentanyl: The Next Wave of the Opioid Crisis, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 115th Cong. (2017), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fentanyl-the-next-wave-of-the-opioid-crisis-subcommittee-on>.



19 Written Statement of Joseph J. Schleigh, Acting Section Chief, Synthetic Drugs and Chemicals Section, Div., Drug Enf't Admin. 5 (Dec. 5, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Schleigh.pdf> [hereinafter Schleigh Written Statement].

20 Written Statement of Michael L. Van Linn, Ph.D., Drug Sci. Specialist, Drug And Chemical Evaluation Section, Diversion Control Div., Drug Enf't Admin. 2-3 (Dec. 5, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Van-Linn.pdf>.

21 Schleigh Written Statement, *supra* note 19, at 5.

22 The “dark web” or “dark net” is accessed using “the Onion Router” or “TOR” network, which is a collection of computers designed to obfuscate the origin of online communications. See UNITED STATES DEP'T OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROP. SECTION, CYBERSECURITY UNIT, LEGAL CONSIDERATIONS WHEN GATHERING ONLINE CYBER THREAT INTELLIGENCE AND PURCHASING DATA FROM ILLICIT SOURCES, 1 (2020), <https://www.justice.gov/criminal-ccips/page/file/1252341/download>. The TOR network encrypts and routes communications through a series of relays around the world to thwart efforts to trace their origin. The “dark web” may only be accessed using a TOR browser. Because the location of sites operating as TOR hidden services is concealed and difficult to trace, TOR hidden services are a preferred technique to host sites associated with illegal activities. “Dark Web” may have several variations including “darknet,” “deep net,” or “deep web.” *Id.*

23 Schleigh Written Statement, *supra* note 19, at 5.

24 *Oversight of Federal Efforts to Combat the Spread of Illicit Fentanyl, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. 3 (2019) (statement of David A. Prince, Deputy Assistant Dir., Transnational Organized Crime – I, Homeland Sec. Investigations, U.S. Immigration and Customs Enf't, Dep't of Homeland Sec.), <https://docs.house.gov/meetings/IF/IF02/20190716/109817/HHRG-116-IF02-Wstate-PriceD-20190716.pdf> [hereinafter Prince Statement]; *Oversight of Federal Efforts to Combat the Spread of Illicit Fentanyl, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. 3 (2019) (statement of Gary R. Barksdale, Chief Postal Inspector, U.S. Postal Inspection Serv.), <https://docs.house.gov/meetings/IF/IF02/20190716/109817/HHRG-116-IF02-Wstate-BarksdaleG-20190716.pdf> [hereinafter Barksdale Statement].

25 *Id.* See also Press Release, Fed. Bureau of Investigation, Joint Criminal Opioid Darknet Enforcement Task Force (J-CODE), J-CODE Announces 61 Arrests in its Second Coordinated Law Enforcement Operation Targeting Opioid Trafficking on the Darknet (March 26, 2019), <https://www.fbi.gov/news/pressrel/press-releases/j-code-announces-61-arrests-in-its-second-coordinated-law-enforcement-operation-targeting-opioid-trafficking-on-the-darknet>.

26 Schleigh Written Statement, *supra* note 19, at 3. While shipments of fentanyl, fentanyl analogues, and precursor chemicals are still shipped from China, the number of mailed parcels from China to the United States has decreased. See, e.g., *Combating the Opioid Crisis: Oversight of Implementation of the STOP Act, Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Government Affairs*, 116th Cong. 2 (2020) (testimony of Thomas F. Overacker, Exec. Dir., Cargo and Conveyance Sec., Office of Field Operations, U.S. Customs and Border Protection, U.S. Dep't of Homeland Sec.), <https://www.hsgac.senate.gov/imo/media/doc/Overacker%20Testimony.pdf> [hereinafter Overacker Testimony I].

27 Testimony of Robert E. Perez, Acting Exec. Assistant Comm'r, Office of Operations Support, U.S. Customs and Border Protection, Dep't of Homeland Sec. before the U.S. Sentencing Comm'n, 1 (Dec. 5, 2017) (<https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Perez.pdf> [hereinafter Perez Testimony]).

28 *Id.* at 2; *Oversight of Federal Efforts to Combat the Spread of Illicit Fentanyl, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. 4 (2019) (statement of Matthew Donahue, Reg'l Dir., North and Cent. Americas Div., Drug Enf't Admin.), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony%20-%20Donahue%2020190716.pdf> [hereinafter Donahue Statement].

29 *Oversight of Federal Efforts to Combat the Spread of Illicit Fentanyl, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. 2 (2019) (testimony of Thomas F. Overacker, Exec. Dir., Cargo and Conveyance Sec., Office of Field Operations, U.S. Customs and Border Protection, U.S. Dep't of Homeland Sec.), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony%20-%20Overacker%2020190716.pdf> [hereinafter Overacker Testimony II].

30 *Id.* at 1.

31 *Id.*

32 See Barksdale Statement, *supra* note 24, at 3.

33 *Id.*

34 *Id.*

35 See *Oversight of Federal Efforts to Combat the Spread of Illicit Fentanyl, Before the Subcomm. on Oversight and Investigations of the*

H. Comm. on Energy and Commerce, 116th Cong. 3 (2019) (testimony of Carol Cave, Dir., Office of Enf't and Import Operations, Office of Regulatory Affairs, Food and Drug Adm., Dep't of Health and Human Servs.), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-oversight-of-federal-efforts-to-combat-the-spread-of-illicit> [hereinafter Case Testimony].

36 Schleigh Written Statement, *supra* note 19, at 3.

37 Perez Testimony, *supra* note 27, at 2.

38 *Id.*

39 See *Fentanyl: The Next Wave of the Opioid Crisis, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 115th Cong. 1 (2017) (statement of Louis Milione, Assistant Admin'r., Diversion Control Div., Drug Enf't Admin.), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Testimony-Milione-OI-Hrg-Fentanyl-Opioid-Crisis-2017-03-21.PDF>.

40 Schleigh Written Statement, *supra* note 19, at 3.

41 *Id.* at 4.

42 *Id.*

43 *Id.*

44 Tella Written Statement, *supra* note 7, at 7.

45 *Id.* at 5.

46 Testimony of Roger A. Mitchell, Jr., MD, Chief Med. Exam'r, Washington, DC before the U.S. Sentencing Comm'n 2–3 (Dec. 5, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Mitchell.pdf>.

47 Statement of Brian Browne, MD, Chair and Professor, Dep't of Emergency Med., Univ. of Md. Sch. of Med. 3 (Dec. 5, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Browne.pdf> [hereinafter Browne Written Statement]; Testimony of Barry K Logan PhD, F-ABFT, Chief Scientist, NMS Labs, Inc. before the U.S. Sentencing Comm'n 3 (Dec. 5, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Logan.pdf> [hereinafter Logan Testimony]. See also Matthew K. Griswold, Peter R. Chai, Alex J. Krotulski, Melissa Friscia, Brittany Chapman, Edward W. Boyer, Barry K. Logan, Kavita M. Babu, *Self-identification of Nonpharmaceutical Fentanyl Exposure Following Heroin Overdose*, 56 CLIN. TOXICOLOGY 37 (2017).

48 Browne Written Statement, *supra* note 47, at 3.

49 *Id.*

50 *Id.* at 1.

51 *Id.*

52 *Id.*

53 For example, New Jersey reported that fentanyl and its analogues accounted for a 163% increase in the number of drug-related deaths the state experienced between 2010 and 2016 and Maryland experienced significant increases in deaths related to fentanyl. See Statement of Major Juan Colon, Commanding Officer, N.J. State Police, Office of the Drug Monitoring Initiative, N.J. Att'y Gen.'s Office 1 (Dec. 5, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Colon.pdf>; Browne Written Statement, *supra* note 47, at 1–2.

54 Logan Testimony, *supra* note 47, at 2.

55 Browne Written Statement, *supra* note 47, at 1. Naloxone is marketed under the trade name Narcan among others. See, e.g., Nat'l Inst. on Drug Abuse, *Opioid Overdose Reversal with Naloxone*, NAT'L INST. OF HEALTH (Feb. 2020), <https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-reversal-naloxone-narcan-evzio>.

56 *Id.*

57 *Id.* at 3.

58 21 U.S.C. §§ 841, 960.

59 Congress included fentanyl as a Schedule II controlled substance in Title 21 of the U.S. Code, along with heroin and other opiates. See 21 U.S.C. § 812 (Schedule II at (b)(6)). While the term fentanyl does not again appear in Title 21 of the U.S. Code, sections 841 and 960 establish penalties for a substance called “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propenamide.” See 21 U.S.C. §§ 841(b)(1)(A)(vi); 960(b)(1)(F). A federal regulation explains that this is the substance “commonly known as fentanyl.” See 28 C.F.R. § 50.21(d)(4)(vi).

60 These increased mandatory minimum penalties are applicable only if the government provides notice pursuant to 21 U.S.C. § 851, which provides that “[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.”

61 See 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2).

62 See 21 U.S.C. § 841(b)(1)(A).

63 See 21 U.S.C. §§ 841(b) and 960(b).

64 The substance distributed by the offender must be the immediate cause of death or serious bodily injury to receive the enhanced mandatory minimum. See *Burrage v. United States*, 571 U.S. 204, 218–19 (2014) (explaining that “at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury”).

65 See 21 U.S.C. §§ 841(b) and 960(b).

66 USSG §2D1.1(a)(5).

67 Application Note 8(A) at §2D1.1 notes that this parallel is intentional. See USSG §2D1.1 comment. (n.8(A)).

68 Defendants with no prior convictions or minimal prior convictions are assigned to Criminal History Category I.

69 See USSG §2D1.1. In 2014, the Commission amended the Drug Quantity Table to reduce by two levels the offense levels assigned to the quantities that trigger mandatory minimum penalties, resulting in corresponding ranges that include the mandatory minimum penalties. See USSG App. C, amend. 782 (effective Nov. 1, 2014). Prior to the amendment, the base offense levels assigned corresponded to guideline ranges that were slightly above the statutory mandatory minimum penalties. Offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level 26 (63 to 78 months for a defendant in Criminal History Category I) and offenses involving drug quantities that trigger a ten-year statutory minimum were assigned a base offense level of 32 (121 months to 151 months for a defendant in Criminal History Category I).

70 The Commission uses the penalties provided in, and equivalences derived from, 21 U.S.C. § 841(b)(1), as the primary basis for the guideline sentences. See USSG §2D1.1 comment. (n.8(A)). The statute, however, provides direction only for the more common controlled substances, such as heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. To provide a means to combine differing controlled substances to obtain a single offense level, the guidelines use the conversion ratios in the Drug Conversion Tables that are derived from § 841. For example, trafficking in 400 or more grams of fentanyl triggers the ten-year mandatory minimum at § 841(b)(1)(A)(vi). By comparison, the ten-year mandatory minimum penalty is triggered by 1,000 kilograms of marijuana. Thus, the conversion ratio of fentanyl to marihuana is 1:2,500. That is, it takes 2,500 times the quantity of marihuana to trigger the same statutory punishment as fentanyl. This relationship is the ratio reflected in the Drug Conversion Tables. However, because of the statutory equivalences, the ratios in the Drug Conversion Tables do not necessarily reflect dosages based on pharmacological equivalents. See USSG §2D1.1 comment. (n.8(B)).

71 See USSG §2D1.1 comment. (n.8(D)).

72 See USSG §2D1.1(c), Note(A).

73 *Id.* An example of this is where a mixture weighs 50 grams and is comprised of 49 grams of heroin and one gram of fentanyl, under the guidelines the entire mixture is treated as 50 grams of fentanyl and assigned a base offense level of 24 instead of base offense level 18, the base offense level applicable to 50 grams of heroin. See USSG §2D1.1(c), Level 24 and Level 18, respectively.

74 For example, in the case of a pill comprising five milligrams of fentanyl and 325 milligrams of an inert filler material, the pill’s total weight is treated as fentanyl. Two hundred such pills have a total weight of 66 grams (0.005 grams fentanyl plus .325 grams inert filler multiplied by 200), which results in a base offense level of 24 when the total drug quantity of fentanyl is one gram (0.005 grams fentanyl multiplied by 200), which carries a base offense level of 12. See USSG §2D1.1(c), base offense level 24 and base offense level 12, respectively.

75 USSG §2D1.1(a)(1)–(4).

76 See USSG §2D1.1(a)(2).

77 See USSG §2D1.1(a)(1).

78 *Id.*

79 See USSG App. C, amend. 123 (effective Nov. 1, 1989) (“[t]he purpose of this amendment [limiting the application of §2D1.1(a)(1), (a)(2)] is to provide that subsections (a)(1) and (a)(2) apply only in the case of a conviction under circumstances specified in the statutes cited.”). Amendment 727 added §2D1.1(a)(3)–(4) as a response to the Ryan Haight Online Pharmacy Consumer Protection Act, Pub. L. No. 110–425 (2008) (“[T]he amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance.”). See USSG App. C, amend. 727 (effective Nov. 1, 2009).

80 The Commission expanded its ongoing study of synthetic drugs begun in the 2016–2017 amendment cycle to include fentanyl and fentanyl analogues. In August 2017, the Commission published as a priority

[c]ontinuation of its multiyear study of offenses involving synthetic cathinones (such as methylone, MDPV, and mephedrone) and synthetic cannabinoids (such as JWH-018 and AM-2201), as well as tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues, and consideration of appropriate guideline amendments, including simplifying the determination of the most closely related substance under Application Note 6 of the Commentary to §2D1.1

See Final Priorities for Amendment Cycle, 82 FR 39949 (Aug. 22, 2017).

81 Public Hearing on Alternatives to Incarceration Court Programs and Synthetic Drugs before the U.S. Sentencing Comm’n, (Apr. 18, 2017), <https://www.uscourts.gov/policymaking/meetings-hearings/public-hearing-april-18-2017>; Public Hearing on Synthetic Cathinones before the U.S. Sentencing Comm’n, (Oct. 4, 2017), <https://www.uscourts.gov/policymaking/meetings-hearings/public-hearing-october-4-2017>; Public Hearing on Fentanyl, Fentanyl Analogues, and Synthetic Cannabinoids before the U.S. Sentencing Comm’n, (Dec. 5, 2017), <https://www.uscourts.gov/policymaking/meetings-hearings/public-hearing-december-5-2017>; Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines before the U.S. Sentencing Comm’n, (Mar. 14, 2018), <https://www.uscourts.gov/policymaking/meetings-hearings/public-hearing-march-14-2018>.

82 See Public Comment on Proposed Amendments to the Federal Sentencing Guidelines in Response to 83 FR 3869 (Mar. 6, 2018), <https://www.uscourts.gov/policymaking/public-comment/public-comment-march-6-2018>; Reply Comment Received on Proposed Amendments (83 FR 3869) (Mar. 28, 2018), <https://www.uscourts.gov/policymaking/public-comment/reply-comment-march-28-2018>.

83 See Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines before the U.S. Sentencing Comm’n (Mar. 14, 2018), <https://www.uscourts.gov/policymaking/meetings-hearings/public-hearing-march-14-2018>.

84 See USSG App. C, amend. 807 (effective Nov. 1, 2018). This amendment also made changes to address synthetic cathinones and synthetic cannabinoids.

85 See USSG §2D1.1(b)(13).

86 See PubChem, *Fentanyl*, 2.1.1, NAT’L INST. OF HEALTH, <https://pubchem.ncbi.nlm.nih.gov/compound/fentanyl#section=Names-and-Identifiers>. The International Union of Pure and Applied Chemistry, or IUPAC, is the “world authority on chemical nomenclature.” See Int’l Union of Pure and Applied Chemistry, *What We Do* (2020), <https://iupac.org/what-we-do/>.

87 In a separate amendment promulgated in the same year, the Commission renamed the Drug Equivalency Tables to Drug Conversion Tables. See USSG App. C, amend. 808 (effective Nov. 1, 2018).

88 See 21 U.S.C. § 802(32). Section 802(32) states in full:

- (A) Except as provided in subparagraph (C), the term “controlled substance analogue” means a substance
- (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or II;
  - (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or
  - (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II.
- (B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.
- (C) Such term does not include—
- (i) a controlled substance;
  - (ii) any substance for which there is an approved new drug application;
  - (iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or
  - (iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

89 When a controlled substance is not listed in the guidelines, Application Note 6 to §2D1.1 (Drug Trafficking) instructs the court to use the equivalency for the most closely related controlled substance referenced in §2D1.1 to determine the base offense level. See USSG §2D1.1 comment. (n.6). The test presented in Application Note 6 is derived from the definition of “controlled substance analogue” at 21 U.S.C. § 802(32)(A). See 21 U.S.C. § 802(32)(A). Because the guideline incorporated by reference the statutory definition of “controlled substance analogue” at section 802(32), and that definition expressly excludes already listed “controlled substances,” it appeared that a scheduled fentanyl analogue could not constitute a “controlled substance analogue,” and thus did not constitute a fentanyl “analogue” for purposes of §2D1.1. See 21 U.S.C. § 802(32)(C)(i) (stating that “controlled substance analogue” does not include a controlled substance).

90 See USSG App. C, amend. 807 (effective Nov. 1, 2018); USSG, §2D1.1(c), Note(J). Public comment and Commission research consistently indicated that fentanyl and its analogues are a well-defined structural class and that it is highly predictable that substances with a structure analogous to fentanyl will behave in pharmacologically similar or identical ways by acting on the body’s opioid receptors.

91 Congress has held hearings into the increased importation and trafficking of fentanyl and fentanyl analogues and how federal agencies are responding. See, e.g., *Oversight and Investigations, Oversight of Federal Efforts to Combat the Spread of Illicit Fentanyl Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. (2019), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-oversight-of-federal-efforts-to-combat-the-spread-of-illicit>.

92 See Pub. L. No. 115–112, 131 Stat. 2274 (2018).

93 See Pub. L. No. 115–271, 132 Stat. 3894, 4073 (2018).

94 AED includes the sender’s full name and address (including full business name), the recipient’s full name and address, the stated content description, unit of measure, and the quantity, weight, value, and date of the mailing. Barksdale Statement, *supra* note 24, at 1, 4.

95 Pub. L. No. 115–271, 132 Stat. 3894, 4075 (2018); Barksdale Statement, *supra* note 24, at 4. The Department of Justice has informed the Commission that the 2020–2021 global pandemic caused by COVID-19 may require some exceptions to the December 31, 2020 deadline.

96 See Pub. L. No. 116–92, 133 Stat. 1198, 2262 (2019).

97 See, e.g., Donahue Statement, *supra* note 28, at 3.

98 Prior to the enactment of the Fentanyl Sanctions Act, Congress held hearings into the source of fentanyl and fentanyl analogues entering the United States and identified China as a major source. See, e.g., *Confronting Threats From China: Assessing Controls on Technology and Investment, and Measures to Combat Opioid Trafficking, Before the S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. (2019), <https://www.banking.senate.gov/hearings/confronting-threats-from-china-assessing-controls-on-technology-and-investment-and-measures-to-combat-opioid-trafficking>.

99 See, e.g., *Fentanyl: The Next Wave of the Opioid Crisis, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 115th Cong., (2017) <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fentanyl-the-next-wave-of-the-opioid-crisis-subcommittee-on>; *Tackling Fentanyl: Holding China Accountable, Before the Subcomm. on Africa, Glob. Health, Glob. Human Rights and Int’l Org. of the H. Comm. on Foreign Affairs*, 115th Cong. (2018), <https://www.congress.gov/event/115th-congress/house-event/108650>; *Oversight of Federal Efforts to Combat the Spread of Illicit Fentanyl, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. (2019), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-oversight-of-federal-efforts-to-combat-the-spread-of-illicit>. Witnesses from six federal agencies appeared before the subcommittee to testify about their agencies’ efforts to stem the increased distribution of these substances, including The Office of National Drug Control Policy (ONDCP); U.S. Customs and Border Protection (CBP); Drug Enforcement Administration (DEA); Food and Drug Administration (FDA); U.S. Immigration and Customs Enforcement (ICE); and U.S. Postal Service (USPS).

100 See Prince Statement, *supra* note 24, at 3.

101 See Press Release, Dep’t of Justice, *Attorney General Jeff Sessions Announces the Formation of Operation Synthetic Opioid Surge* (S.O.S.) (July 12, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-formation-operation-synthetic-opioid-surge-sos> [hereinafter Sessions Press Release].

102 Congress has considered extensive changes to the Controlled Substances Act to address the appearance of new substances by authorizing the Department of Justice and the Drug Enforcement Administration to more easily schedule such substances when they appear. However, to date, such legislation has not garnered sufficient support to be enacted. See, e.g., *Stop the Importation and Trafficking of Synthetic Analogues Act of 2017* (SITSA), H.R. 2851, 115th Cong. (2017) <https://www.congress.gov/bill/115th-congress/house-bill/2851?s=4&r=2851>. Similar legislation was introduced in the Senate as S. 1327, 115th Cong., (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1327>.

103 See Pub. L. No. 115–271, 132 Stat. 3894 (2018).

104 “A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in Schedule I.” See 21 U.S.C. § 813(a).

105 The six factors are codified at 21 U.S.C. § 813(b) and include:

- (1) The marketing, advertising, and labeling of the substance.
- (2) The known efficacy or usefulness of the substance for the marketed, advertised, or labeled purpose.
- (3) The difference between the price at which the substance is sold and the price at which the substance it is purported to be or advertised as is normally sold.
- (4) The diversion of the substance from legitimate channels and the clandestine importation, manufacture, or distribution of the substance.
- (5) Whether the defendant knew or should have known the substance was intended to be consumed by injection, inhalation, ingestion, or any other immediate means.
- (6) Any controlled substance analogue that is manufactured, formulated, sold, distributed, or marketed with the intent to avoid the provisions of existing drug laws.

106 See 21 U.S.C. § 811. The CSA authorizes the Attorney General to schedule new substances on a temporary basis upon a determination that the substance presents an “imminent hazard to the public safety.” See 21 U.S.C. § 811(h)(1). The temporary scheduling lasts for an initial two-year period and can be extended by an additional one year. See 21 U.S.C. § 811(h)(2). During temporary scheduling, the Drug Enforcement Administration, in collaboration with the Department of Health and Human Services, evaluates the substance under a variety of factors to determine whether to schedule the substance permanently. See 21 U.S.C. § 811(b)–(c). The factors include: (1) the substance’s actual or relative potential for abuse; (2) scientific evidence of its pharmacological effect, if known; (3) the state of current scientific knowledge regarding the drug or other substance; (4) its history and current pattern of abuse; (5) the scope, duration, and significance of abuse; (6) what, if any, risk there is to the public health; (7) its psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of a substance already controlled under the CSA. Based on the outcome of this review, the substance’s temporary scheduling may expire, or the substance may be placed permanently in one of the five controlled substance schedules. See 21 C.F.R. § 1308.11–1308.15.

107 See *The Countdown: Fentanyl Analogues and the Expiring Emergency Scheduling Order*, Before S. Comm. on the Judiciary, 116th Cong. 2 (2019) (statements of Amanda Liskamm, Dir., Opioid Enf’t and Prevention Efforts, Office of the Deputy Att’y Gen. and Greg Cherundolo, Chief of Operations, Office of Glob. Enf’t, Drug Enf’t Admin.), <https://www.judiciary.senate.gov/imo/media/doc/Liskamm-Cherundolo%20Joint%20Testimony.pdf>.

108 *Id.*

109 *Id.*

110 See 83 FR 5188 (Feb. 6, 2018). Comparison of the sentencing guidelines’ definition of “fentanyl analogue” (i.e., “any substance . . . that has a chemical structure that is similar to fentanyl”) and the DEA’s definition of “fentanyl-related substance” (i.e., “substance is structurally related to fentanyl”) indicates that the agencies have adopted substantially similar definitions as it is similarity of a given substance’s structure to that of fentanyl that determines whether the definition is met.

111 See 83 FR 5188 (Feb. 6, 2018). The class-based approach places any new fentanyl-related substance in Schedule I if that substance is structurally related to fentanyl by one or more of the following modifications:

- (A) Replacement of the phenyl portion of the phenethyl group by any monocycle, whether or not further substituted in or on the monocycle;
- (B) substitution in or on the phenethyl group with alkyl, alkenyl, alkoxy, hydroxyl, halo, haloalkyl, amino or nitro groups;
- (C) substitution in or on the piperidine ring with alkyl, alkenyl, alkoxy, ester, ether, hydroxyl, halo, haloalkyl, amino or nitro groups;
- (D) replacement of the aniline ring with any aromatic monocycle whether or not further substituted in or on the aromatic monocycle; and/or
- (E) replacement of the N-propionyl group by another acyl group.

112 See Pub. L. No. 116–114, 134 Stat. 103 (2020). The February 6, 2018 order was set to expire on February 6, 2020. However, the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act extended the temporary control of fentanyl-related substances until May 6, 2021. In April 2020, the Drug Enforcement Administration published a correcting amendment that reflected the new expiration date for the temporary scheduling order. See 85 FR 20155 (Apr. 10, 2020). Congress held hearings on the DEA’s scheduling order before enacting the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act. See *The Countdown: Fentanyl Analogues & the Expiring Emergency Scheduling Order*, Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 116th Cong. (2019); *Fentanyl Analogues: Perspectives on Classwide Scheduling*, Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 116th Cong. (2020) (<https://www.judiciary.senate.gov/meetings/the-countdown-fentanyl-analogues-and-the-expiring-emergency-scheduling-order>; <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2731>).

113 See Pub. L. No. 116–114, 134 Stat. 103 (2020), sec. 3(b). The Act states that the GAO is to complete its study not later than one year after the date of enactment of the Act. *Id.*



114 See, e.g., *supra* note 102. See also, Federal Initiative to Guarantee Health by Targeting Fentanyl Act, S. 2701, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2701?r=1&s=5> (amending the Controlled Substances Act to list fentanyl-related substances as Schedule I controlled substances); Stopping Overdoses of Fentanyl Analogues Act, S. 3148, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/3148?r=1&s=3> (same); Federal Initiative to Guarantee Health by Targeting Fentanyl Act, H.R. 5771, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/5771?q=%7B%22search%22%3A%5B%22H.R.+5771%22%5D%7D&s=2&r=1> (same); Stopping Overdoses of Fentanyl Analogues Act, H.R. 2935, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/2935?r=3&s=7> (same plus additional specific fentanyl analogues); Stopping Overdoses of Fentanyl Analogues Act, S. 1622, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1622?r=12&s=10> (same); SIFT Act of 2019, H.R. 5421, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/5421?r=9&s=7> (same).

115 As part of this special coding project, the Commission collected data on federal fentanyl and fentanyl analogue offenders, beyond the information regularly reported in the Commission's annual datafile. The Commission regularly collects information for every federal felony and Class A misdemeanor offense sentenced each year, to carry out its various statutory responsibilities (28 U.S.C. § 995(a) (12) and (14)–(16)). Sentencing courts are statutorily required to submit five sentencing documents to the Commission within 30 days of entry of judgment in a criminal case: (1) the charging document, (2) the plea agreement, (3) the Presentence Report, (4) the Judgment and Commitment Order, and (5) the Statement of Reasons form. 28 U.S.C. § 994(w). The Commission extracts and codes data from these documents to compile its databases. For each case in its Offender Datafile, the Commission routinely collects sentencing data, demographic variables, statutory information, guideline application decisions, and departure and variance information.

116 The Commission identified 1,764 offenders who had fentanyl, or a fentanyl analogue involved in their offense; 1,634 were sentenced under one of the seven drug trafficking guidelines. Drug trafficking guidelines information is obtained from the Presentence Report and is based on the guidelines in USSG Chapter Two, Part D. The seven guidelines (USSG §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.8, 2D1.10, and 2D1.14) represent the guidelines in Chapter Two, Part D that utilize the drug quantity table in USSG §2D1.1 (Drug Trafficking) to determine the base offense level. Of the offenders in this study, 98.5% were sentenced under §2D1.1 (Drug Trafficking), 1.4% were sentenced under §2D1.2 (Protected Locations), and two offenders (0.1%) were sentenced under §2D1.8 (Rent/Manage Drug Establishment). Of these 1,634 offenders, 28 offenders were omitted from this study because the Commission did not receive complete sentencing information. An additional 15 cases were added that did not note fentanyl was present but was determined from a separate analysis of offenders who received the base offense level under §2D1.1(a)–(d). Fentanyl or a fentanyl analogue was the primary drug in 1,119 cases.

117 While these 1,119 offenders were utilized for most of the analyses in this report, the Commission also identified an additional 500 offenders who trafficked fentanyl or a fentanyl analogue, but had another substance identified as the primary drug. The Commission utilized data from these 500 for select analyses, as noted below.

118 For more information about how the guidelines are computed in a drug case, see U.S. SENTENCING COMM'N, DRUG GUIDELINES PRIMER (2020), [https://www.ussc.gov/sites/default/files/pdf/training/primers/2020\\_Primer\\_Drugs.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Drugs.pdf).

119 The quantity of a drug is recorded as either a range or specific drug weight, expressed as whatever unit of measurement is in the Presentence Report. Examples of the types of units recorded include grams, kilograms, ounces, pounds, and transdermal patches in some fentanyl cases.

120 The Commission included drug trafficking offenders whose sentences were based on death or serious bodily injury because of the concern expressed by Congress and the Department of Justice regarding the high rate of overdose deaths related to fentanyl and its analogues. In cases where the use of a controlled substance resulted in death or serious bodily injury, alternative heightened base offense levels apply regardless of the quantity of drug or type of drug involved in the offense. In these instances, death or serious bodily injury was associated with fentanyl or fentanyl analogue use and therefore, these substances were driving the offenders' sentences.

121 This category includes instances where the drug quantity was missing for drug mixtures.

122 USSG §2D1.1 provides the process for calculating drug quantities. See Note (A) to the Drug Quantity Table.

123 It is possible that sentencing documents, until recently, did not have sufficient information for the Commission to identify all fentanyl or fentanyl analogue offenders. Drug trafficking offenses often involve multiple drug types; offenders who trafficked fentanyl or one of its analogues also may have trafficked heroin or drug mixtures that included fentanyl. Because of the burdens of time and cost associated with testing for every substance involved in an offense, fentanyl or one of its analogues may not have been identified as an offender's primary drug, when heroin or drug mixtures were present.

124 The remaining Operation S.O.S. districts are the Eastern District of California, District of Maine, District of New Hampshire, Eastern District of Tennessee, the Northern District of West Virginia, and the Southern District of West Virginia. See Sessions Press Release, *supra* note 101.

125 *Id.*

126 In fiscal year 2019 there were 18,315 drug offenders sentenced for trafficking a primary drug other than fentanyl or one of its analogues for whom the Commission had complete sentencing information necessary for this analysis.

- 127 The analysis of polydrug offenders includes any time that a fentanyl or fentanyl analogue offender trafficked any other substance.
- 128 Approximately 60 percent (60.3%) of the 400 polydrug fentanyl offenders trafficked one additional drug while 39.7 percent trafficked two or more additional drugs.
- 129 Exactly half (50.0%) of the 136 polydrug fentanyl analogue offenders trafficked two or more additional drugs.
- 130 Other analogues include benzyl fentanyl (2.1%), valeryl fentanyl (1.7%), 3-methylfentanyl (1.3%), and phenyl fentanyl (1.3%). For six offenders (2.6%), the type of analogue was unknown.
- 131 The criminal history guidelines and the determination of the offender's Criminal History Category (CHC) measure the seriousness of the offender's prior conduct and likelihood to recidivate. Courts determine an offender's CHC based on a point system which takes into account the length of a sentence imposed for a prior conviction and whether the offender was still serving a sentence in another case while committing the instant offense (e.g., the offender was on probation or parole). See USSG, Ch. 4, Pt A, Criminal History.
- 132 The Armed Career Criminal Act (ACCA), codified at 18 U.S.C. § 924(e), requires imposition of a minimum 15-year term of imprisonment for recidivists convicted of unlawful possession of a firearm under 18 U.S.C. § 922(g), who have three prior state or federal convictions for violent felonies or serious drug offenses.
- 133 A career offender is someone who commits a crime of violence or a controlled substance offense after two prior felony convictions for those crimes. The sentencing guidelines assign all career offenders to CHC VI and to offense levels at or near the statutory maximum penalty of the offense of conviction. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-CareerOffenders.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-CareerOffenders.pdf).
- 134 Drug weights were not present for 51 fentanyl offenders and 24 fentanyl analogue offenders. These offenders either had no drug weight provided in the sentencing documents, were sentenced under a death or serious bodily injury base offense level, or the court changed the base offense level in the Statement of Reasons but did not revise the drug weight.
- 135 Purity is defined as a measure of the amount of an illicit substance present in a sample compared to other substances in the sample such as adulterants, diluents, or solvents. See DRUG ENF'T ADMIN., 2019 NATIONAL DRUG THREAT ASSESSMENT 44 (2019) ([https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020\\_Low\\_Web-DIR-007-20\\_2019.pdf](https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf) [hereinafter DEA THREAT ASSESSMENT]). The DEA noted that, through in-depth chemical analyses, purity levels in fentanyl powder ranged from 0.05 percent to 98.1 percent, with the average fentanyl purity of 9.7 percent. For more information on the DEA regional laboratories, see DRUG ENF'T ADMIN., FENTANYL SIGNATURE PROFILING PROGRAM REPORT (2019), [https://www.dea.gov/sites/default/files/2019-10/DEA\\_Fentanyl\\_Signature\\_Profiling\\_Program\\_Report-Oct-2019.pdf](https://www.dea.gov/sites/default/files/2019-10/DEA_Fentanyl_Signature_Profiling_Program_Report-Oct-2019.pdf)
- 136 As previously discussed, the total weight of a drug mixture is attributed to the drug within the mixture that has the highest Converted Drug Weight. In fiscal year 2019, one-third (31.5%) of fentanyl offenders and just under 45 percent (43.8%) of fentanyl analogue offenders trafficked a drug mixture. An additional 6.6 percent of fentanyl offenders and 16.3 percent of fentanyl analogue offenders trafficked illicitly manufactured pills.
- 137 Drug mixtures, such as those in pills, where a large percentage of the pill's weight may be another substance, likely skewed the average drug weight for both fentanyl and fentanyl analogue offenders. For example, one offender had 62.1 kilograms of pills containing a fentanyl analogue, which represented a small quantity of the actual drug relative to the much greater weight of the pills' binder. Only 18 fentanyl analogue offenders had more than one kilogram of the substance.
- 138 The Commission coded the number of identifiable co-participants from information found in the sentencing documents, including unindicted co-conspirators. Offenders who did not have any identifiable co-participants were coded as having none.
- 139 Twelve fentanyl offenders and one fentanyl analogue offender were involved in conspiracies where the number of co-participants was unknown.
- 140 An offender's function was determined by reviewing the offense conduct section of the presentence report. The Commission assessed the most serious function an offender performed during an offense, independent of any application of sentencing enhancements and reductions. In those cases where an offender performed different functions at different times, the offender function was assigned based on the most serious function performed by the offender in the drug offense, even if the offender more frequently performed a less serious function.
- 141 The special coding for function in this report was similar to the coding project the Commission undertook for an earlier analysis, with some variations. For example, some drug functions noted in previous reports, such as growers, were excluded because they do not apply to fentanyl or fentanyl analogues. Other functions were added, such as medical professionals, because fentanyl can come in prescription form. See U.S. SENTENCING COMM'N, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.



142 Other functions include runners, package recipients, or prescription recipients.

143 As noted above, both the Customs and Border Protection and the United States Postal Service have noted these increases in their testimony to Congress. See *supra* Sources and Importation of Fentanyl and Fentanyl Analogues, notes 27–36. Specifically, Customs and Border Protection noted that fentanyl was the most frequently seized illicit synthetic opioid during fiscal year 2018. See Perez Testimony, *supra* note 27, at 2. Similarly, the Drug Enforcement Administration has observed that fentanyl and fentanyl analogues typically enter the United States when they are brought across the Southwest Border or shipped via mail or express package services. See DEA THREAT ASSESSMENT, *supra* note 135, at 9, 15.

144 Sixty fentanyl offenders (6.8%) were domestic couriers, transporting drugs within the United States. One fentanyl offender performed the function of a courier but was not transporting fentanyl.

145 See DEA THREAT ASSESSMENT, *supra* note 135, at 15–16.

146 Three fentanyl analogue offender were domestic couriers, transporting drugs within the United States.

147 Ten fentanyl offenders (1.1%) and five fentanyl analogue offenders (2.1%) used domestic mail or packaging services to ship or receive these substances within the United States.

148 For additional information regarding the “dark web,” see *supra* note 22.

149 Overacker Testimony II, *supra* note 29, at 2; Cave Testimony, *supra* note 35, at 4–5.

150 Seven of the 28 fentanyl offenders who made Internet purchases received international shipments from an unknown country. Of the remaining 21 fentanyl offenders, 19 offenders (90.5%) ordered shipments off of the Internet from China; one offender purchased from Canada and one offender purchased from the United Kingdom.

151 Eighteen of the 67 fentanyl analogue offenders who made Internet purchases received international shipments from an unknown country. Of the remaining 49 fentanyl analogue offenders, 47 offenders (95.9%) ordered shipments off of the Internet from China (this included one offender receiving packages from Hong Kong); one offender purchased from Canada and one offender purchased from Germany.

152 Perez Testimony, *supra* note 27, at 2; Donahue Statement, *supra* note 28, at 3.

153 Perez Testimony, *supra* note 27, at 2; Donahue Statement, *supra* note 28, at 1.

154 See USSG §2D1.1(b)(13). The Commission adopted a new enhancement applicable where the presence of fentanyl or one of its analogues is knowingly misrepresented. The Commission considered that fentanyl and its analogues are often trafficked and mixed with other controlled substances, including heroin and cocaine. Though some purchasers of these substances may be aware that they contain fentanyl, others may believe that they are purchasing heroin or pharmaceutically manufactured opioid pain relievers. To account for this potential harm, the Commission amended §2D1.1 to add a new specific offense characteristic to provide a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. See USSG App. C, amend. 807 (effective Nov. 1, 2018).

155 The Commission determined that 121 fentanyl offenders (13.7%) accurately marketed these substances during drug transactions. An additional 81 fentanyl offenders (9.1%) knew what they were trafficking, but there is no indication that they sold or advertised these drugs during a transaction. For approximately a third of fentanyl offenders (36.9%) in this study, the sentencing documents did not provide sufficient evidence to determine if the offenders knew what substance was being trafficked and the offender did not sell or advertise these substances.

156 One fentanyl offender (0.3%) sold these substances as something other than heroin or a diverted prescription medication.

157 The Commission determined that 21 fentanyl analogue offenders (9.0%) accurately marketed these substances during drug transactions. An additional 36 fentanyl analogue offenders (15.5%) knew what they were trafficking, but there is no indication that they sold or advertised these drugs during a transaction. For approximately a third of fentanyl analogue offenders (30.5%) in this study, the sentencing documents did not provide sufficient evidence to determine if the offenders knew what substance was being trafficked and the offender did not sell or advertise these substances.

158 One fentanyl analogue offender (1.0%) sold these substances as something other than heroin or a diverted prescription medication.

159 If the offender denied knowledge of fentanyl or a fentanyl analogue, even if the declaration appeared deceitful, the Commission considered that offender as not having definitive knowledge of the drugs present in their conduct. Fifty-two fentanyl offenders (5.9%) and ten fentanyl analogue offenders (4.3%) sold the drug directly to a consumer as another drug without knowing the substance contained fentanyl or a fentanyl analogue.

160 See, e.g., *Mortality Weekly Report*, *supra* note 4.

161 See USSG §2D1.1(a)(1)–(4). As previously discussed, these base offense levels only apply if the defendant was convicted under a specific statute listed in the guideline and death or serious bodily injury resulted from the offense.

162 Five fentanyl offenders also were given the departure for death or physical injury, see USSG §5K2.1 (Death (Policy Statement)) and §5K2.2 (Physical Injury (Policy Statement)).

163 The Commission determined that an overdose occurred when an offender directly or indirectly sold or supplied the drug to a victim who subsequently overdosed or toxicology reports indicated that the fentanyl or a fentanyl analogue supplied by the offender resulted in an overdose. See 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C); 21 U.S.C. § 960(b)(1), (b)(2), (b)(3); 21 U.S.C. § 841(b)(1)(E); 21 U.S.C. § 960(b)(5).

164 No fentanyl or fentanyl analogue offenders were sentenced under §2D1.1(a)(3)–(4).

165 Seven fentanyl offenders and three fentanyl analogue offenders were convicted of an offense carrying a one-year mandatory minimum sentence under 21 U.S.C. § 860 for distributing or manufacturing a controlled substance in or near a school or college.

166 The five-year mandatory minimum based on drug quantity increases to ten years. The ten-year mandatory minimum increases to 15 (with one qualifying prior conviction) or 25 years (with two or more qualifying prior convictions). See 21 U.S.C. §§ 841 and 960. The First Step Act made changes to these recidivist penalties. For a more detailed discussion of those changes, see U. S. SENTENCING COMM’N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831\\_First-Step-Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf) [hereinafter FIRST STEP ACT IMPLEMENTATION REPORT].

167 The First Step Act changed the prior offenses that trigger an 851 enhancement from any “felony drug offense” to either a “serious drug felony” or a “serious violent felony.” For a more detailed discussion of these triggering offenses, see FIRST STEP ACT IMPLEMENTATION REPORT, *supra* note 166.

168 See 21 U.S.C. § 851(a)(1) (“No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.”).

169 Eighteen of the 20 offenders subject to the 851 sentencing enhancement were sentenced after the effective date of the First Step Act (Dec. 21, 2018).

170 Twenty-one other drug offenders received mandatory minimum sentences other than those most commonly associated with drug offenses.

171 Offenders may receive relief from a drug mandatory minimum penalty, including a recidivist enhancement, in two ways. First, if the prosecution files a motion based on the defendant’s “substantial assistance” to authorities in the investigation or prosecution of another person, a sentencing court may impose a sentence below the statutory minimum pursuant to 18 U.S.C. § 3553(e). Second, if the defendant meets the “safety valve” criteria provided in 18 U.S.C. § 3553(f), the statute provides that the court shall impose a sentence pursuant to the sentencing guidelines without regard to the otherwise applicable statutory minimum.

172 Unlike a substantial assistance departure—which applies to all federal offenses carrying a mandatory minimum penalty—the safety valve statute applies only in cases in which a defendant faces a mandatory minimum penalty after being convicted of a drug trafficking offense listed in the statute.

173 Section 402 of the First Step Act expanded the eligibility criteria for the statutory safety valve. For a more detailed discussion of these changes, see FIRST STEP ACT IMPLEMENTATION REPORT, *supra* note 166. In fiscal year 2019, 26 fentanyl offenders (2.9%) received only the statutory safety valve with no reduction under §2D1.1(b)(18), the guidelines safety valve provision; of those, 12 were newly eligible for the safety valve under the First Step Act. Six fentanyl analogue offenders (2.6%) received statutory safety valve; all were eligible for relief at sentencing through the new criminal history provisions set forth in the First Step Act.

174 Weapon enhancement is defined as either a guideline specific offense characteristic relating to a weapon (§2D1.1(b)(1)) or a conviction under 18 U.S.C. § 924(c) for using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a “crime of violence” or “drug trafficking crime. The specific offense characteristic results in 2-level increase in the offense level. In the case of a section 924(c) conviction, the court must impose a consecutive statutory minimum penalty of 5, 7, 10, 25 or 30 years, depending on the conduct involved.

175 See U.S. DEP'T OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROPERTY SECTION, CYBERSECURITY UNIT, LEGAL CONSIDERATIONS WHEN GATHERING ONLINE CYBER THREAT INTELLIGENCE AND PURCHASING DATA FROM ILLICIT SOURCES, 1 (2020), <https://www.justice.gov/criminal-ccips/page/file/1252341/download>.

176 See USSG §2D1.1(b)(7)

177 See USSG App. C, amend. 807 (effective Nov. 1, 2018).

178 *Id.*

179 *Id.*

180 See USSG §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)); see also *Peugh v. United States*, 569 U.S. 530, 533 (2013) (holding that “there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.”)

181 One fentanyl analogue offender was sentenced under the 2015 edition of the *Guidelines Manual* and received a sentence of 12 months.

182 Thirty-two offenders sentenced under the 2018 *Guidelines Manual* were sentenced using a ratio other than the ratio provided in the manual.

183 See USSG App. C, amend. 807 (effective Nov. 1, 2018).

184 See USSG §5K3.1 (Early Disposition Programs (Policy Statement)). As discussed above more fentanyl offenders were non-citizens, compared to fentanyl analogue offenders, a prerequisite for participation in an early disposition program.

185 Ten fentanyl offenders received an upward departure, five of whom were given the departure for death or physical injury, see USSG §5K2.1 (Death (Policy Statement)) and §5K2.2 (Physical Injury (Policy Statement)). No fentanyl analogue offenders received an upward departure.

186 One of these offenders received a heightened base offense level for death or serious bodily injury under §2D1.1(a)(1)–(4) and an upward variance for death.





## United States Sentencing Commission

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### **Certificate of Service**

I hereby certify that on January 12, 2022, I electronically filed the instant Petition for a Writ of Certiorari, Appendix with the Clerk of this Court.

I also mailed a copy to:

Elizabeth Prelogar

Solicitor General of the United States

Room 5614 Department of Justice

950 Pennsylvania Avenue, N.W.

Washington, D.C. 20530-0001

and

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Respectfully submitted,

Dated: January 12, 2022

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