No.

IN THE
SUPREME COURT OF THE UNITED STATES

LYNELL GUYTON - PETITIONER

VS.

UNITED STATES - RESPONDENT(S)

APPENDIX A
Pages 1-98

Appeal from Judgment Entered on October 12, 2021 in the United States District Court for the Western District of Pennsylvania, at Criminal Number 17-00215-1 by the Honorable David S. Cercone.

Jurisdiction of the appeal was noted on October 10, 2021.

LYNELL GUYTON
Pro Se petitioner

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3093

UNITED STATES OF AMERICA,

v.

LYNELL GUYTON,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:17-cr-00215-001)
District Judge: Honorable David S. Cercone

Argued on June 3, 2025
Before: HARDIMAN, BIBAS, and FISHER, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on June 3, 2025.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the judgment of conviction of the United States District Court for the Western District of Pennsylvania entered October 12, 2021, with respect to count 3 is **VACATED AND REMANDED** for the District Court to enter a judgment of acquittal and the judgment of conviction and sentence of the District Court entered October 12, 2021, as to all other counts is **AFFIRMED**. All of the above in accordance with the Opinion of this Court.

Costs shall not be taxed.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 18, 2025

'Citations to "A No." refer to "Appendix page No."
Which, pinpoints cited exhibits in petition.

PRECEDENTIAL

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(Filed: July 18, 2025)

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

A jury convicted Lynell Guyton of nine drug-trafficking, firearm, and money-laundering offenses. Guyton appeals his judgment of conviction and sentence, citing a host of errors. Most of the arguments he now raises were unpreserved, and some raise questions of first impression. For the reasons that follow, we will affirm the judgment in all respects except one: we will vacate a firearms charge and remand for the District Court to enter a judgment of acquittal on that count.

I

A

Before this federal prosecution, Guyton had many run-ins with the state criminal justice system. Because those state crimes are relevant to Guyton's federal sentence in this case, we recount them in detail.

In March 2009, Pittsburgh Police conducted a controlled purchase of drugs from Guyton but did not arrest him then. On April 8, 2009, Guyton was detained on unrelated charges. Seven months later, while still in custody, Guyton was charged under Pennsylvania law with possession with intent to deliver a controlled substance for the March 2009 transaction. *See* 35 P.S. § 780-113(a)(30). Guyton posted bond for that charge the same day but remained imprisoned on the unrelated offenses. On December 10, 2009, he pleaded guilty to the unrelated charges and was sentenced to the time he served from April 8 to December 10. Guyton was released on bond for the March 2009 offense on December 20, 2009.

Nearly two years later, Guyton was convicted of the March 2009 offense and sentenced to 18 to 36 months' imprisonment followed by three years' probation. The sentencing court credited Guyton with 256 days—the time he was imprisoned from April 8, 2009, to December 20, 2009. His sentence was later reduced to one year, one month, and fifteen days under Pennsylvania's recidivism risk reduction incentive. Guyton was released on July 22, 2012, 220 days after he was sentenced.

B

Five years after he was released from state prison, Guyton engaged in conduct that caught the attention of federal law enforcement: he used Skype to order large quantities of fentanyl analogues from China. In one exchange, Guyton asked the Chinese suppliers for "fentanyl products," and they promised him "a good product of opioids" with a "very strong" effect. Supp. App. 14. Guyton repeatedly asked his suppliers how they "camouflage[d]" the drugs, expressing concern that United States "Customs [has] been very strict lately." Supp. App. 13, 25–26. One supplier sent Guyton "MoneyGram Payment Details" so he could pay for the drugs. Supp. App. 12. MoneyGram records showed that Guyton sent multiple wire transfers to China.

Meanwhile, U.S. Customs and Border Protection intercepted a suspicious package sent from Hong Kong that was addressed to "Avon Barksdale" in Pittsburgh. App. 152–53. The package contained about 100 grams of methoxyacetyl and cyclopropyl fentanyl. Law enforcement replaced the drugs with sham substances and delivered the package as addressed. Minutes later, Guyton arrived on a gold hoverboard, retrieved the package, and was immediately arrested.

After he was released, Guyton continued to deal drugs. He was found in possession of cyclopropyl fentanyl during two different traffic stops. And he continued to mix and package drugs in his neighborhood, sometimes using the homes of Anthony Lozito and James Defide.

As the federal investigation progressed, law enforcement conducted trash pulls at several houses. They found drug paraphernalia in Lozito's and Defide's trash and

two firearms in Guyton's trash. Authorities then executed search warrants at each house. At Guyton's, they found drug paraphernalia, a ballistic vest, and a receipt for ammunition. Law enforcement also searched an apparently abandoned house next door to Guyton's residence. Inside that house, they recovered two firearms in a duffel bag. At Lozito's house, law enforcement found Guyton along with cyclopropyl fentanyl and other drug paraphernalia.

C

A federal grand jury indicted Guyton on nine charges: conspiracy to distribute 100 grams or more of a fentanyl analogue in violation of 21 U.S.C. §§ 841(b)(1)(A)(vi) and 846 (Count 1); possession with intent to distribute 100 grams or more of a mixture containing a fentanyl analogue in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(vi) (Count 2); possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) (Counts 3 and 4); possession with intent to distribute a mixture containing a fentanyl analogue in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (Counts 5 and 6); attempt to distribute ten or more grams of a mixture containing a fentanyl analogue in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(vi) (Count 7); and international money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) (Counts 8 and 9).

The Government filed an information under 21 U.S.C. § 851(a) alleging that Guyton's 2011 conviction triggered the recidivist sentencing enhancements of § 841(b). Those charges were included in the superseding indictment. And the grand jury found that, as to Counts 1, 2, and 7, Guyton was convicted in 2011 for possession with intent to deliver, delivery, or manufacture a controlled substance in violation of

Pennsylvania law. It further found that he "served a term of imprisonment of more than twelve months" for the 2011 conviction and was released "within fifteen years of the commencement of" the offenses charged in Counts 1, 2, and 7. App. 49.

At trial, the prosecutor opened by telling the jury that Defide would testify that Guyton used the derelict house next door as a "mix spot." App. 145. But on the witness stand, Defide did not deliver as promised: he said that he and Guyton never discussed the house. And though Defide identified the firearms from the trash bag outside Guyton's home, he did not offer any testimony about the ones recovered from the derelict house.

The Government also introduced into evidence MoneyGram documents. A spreadsheet showed wire transfers from "Guyton" to several recipients in different cities, including "Beijing" and "Wuhanshi." App. 668, 672. It also contained columns labeled, among other things, "Snd Status," "Rcv Date," and "Rcv Time." App. 667, 671. Specific dates and times were listed under the "Rcv Date" and "Rcv Time" columns. A special agent with Homeland Security Investigations described the MoneyGram spreadsheet to the jury, explaining that Guyton sent $500 to Junyang Lu in Beijing, China, and $450 to Piao Cheng in Wuhanshi, China.

At the close of evidence, Guyton moved for a judgment of acquittal, which the District Court denied. [1] The District Court then instructed the jury. On the knowledge requirement

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[1] Guyton elected to proceed pro se. Midway through trial, he asked standby counsel to take over his representation, which counsel did for the rest of the proceedings.

for the drug possession and distribution counts (Counts 1, 2, 5, 6, and 7), the District Court issued the following instruction:

> Knowingly does not require that the Defendant knew that the acts charged and surrounding facts amounted to a crime . . .
>
> The phrase "knowingly or intentionally," as used in the offense charged, requires the Government to prove beyond a reasonable doubt that Mr. Guyton knew that what he possessed with the intent to distribute was a controlled substance or was an analogue of a controlled substance, that is, that the Defendant knew either the legal status of the substance, or the chemical structure and physiological effects of that substance.

App. 597. In addition, the District Court instructed the jury on the elements of *domestic* money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), even though Counts 8 and 9 of the indictment had charged *international* money laundering under 18 U.S.C. § 1956(a)(2)(A).

The jury returned a guilty verdict on all counts. The jury was not asked to find any facts relating to Guyton's 2011 convictions.

D

Based on the § 851 information, the Presentence Investigation Report (PSR) concluded, in relevant part, that the recidivist enhancements in 21 U.S.C. § 841(b)(1)(A) and (B) applied to Counts 1, 2, and 7. Those enhancements increased the mandatory minimum term of imprisonment from 10 to 15 years on Counts 1 and 2. *See* 21 U.S.C. § 841(b)(1)(A). And on Count 7, the mandatory minimum term of imprisonment increased from 5 to 10 years, and the statutory maximum increased from 40 years' to life imprisonment. 21 U.S.C. § 841(b)(1)(B). Guyton did not object to the PSR.

At sentencing, the District Court adopted the PSR's findings. The Court imposed a sentence of 360 months' imprisonment on Counts 1 and 2 and a concurrent 120-month sentence on the remaining counts, followed by 10 years' supervised release.

Guyton timely appealed.

II[2]

We begin with Guyton's argument that the District Court erred in denying his motion for judgment of acquittal on Count 3, one of the two felon-in-possession-of-firearms charges. *See* 18 U.S.C. § 922(g)(1). He contends that there is insufficient evidence to support his conviction for the two guns found in the derelict house. Guyton concedes he was near the

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[2] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

house (because he lived next door) and had access to it (because the back door was open). But he maintains that there was no evidence that he exercised dominion or control over the house or otherwise knew of the firearms. So he says no reasonable juror could have convicted him of constructively possessing those firearms. We agree.

To prove constructive possession, the Government was required to demonstrate that Guyton knew about the guns and exercised dominion and control over the area where they were found.[3] *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996). Viewing the evidence in the light most favorable to the Government, a reasonable jury could not find that Guyton constructively possessed the firearms stored in the derelict house. *See United States v. Wolfe*, 245 F.3d 257, 261 (3d Cir. 2001). No witness testified to that effect: when asked if Guyton owned any firearms, Defide identified only the ones found in Guyton's trash. And there is no forensic evidence tying Guyton to the guns in the house next door: the Government tested the firearms for fingerprints and DNA but found none. While law enforcement did seize a bulletproof vest and a receipt for ammunition from Guyton's house, no evidence connected those items to the firearms in the derelict house.

Nor was there evidence that Guyton was ever present at the derelict house, much less that he exercised dominion or control over it. *See Jenkins*, 90 F.3d at 818 (noting that "mere

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[3] The Government suggests that the jury could have found actual possession. But the Government offered no proof that Guyton "exercised direct physical control over the weapon[s]." *United States v. Caldwell*, 760 F.3d 267, 278 (3d Cir. 2014). So the Government was limited to a constructive possession theory.

presence on the property" where the contraband is located is insufficient to show dominion or control (citation omitted)). Guyton did not own, rent, or live in the house. He did not possess a key or keep personal belongings in the house. And despite the Government's promises during its opening statement, Defide did not testify that Guyton used the house as a "mix spot." App. 145. To the contrary, Defide testified that he and Guyton never discussed the house. In short, the "decisive nexus of dominion and control between the defendant and the contraband" is absent here. *Jenkins*, 90 F.3d at 820.

The Government concedes that Defide "did not connect Guyton to the abandoned house or the firearms inside." Gov't Br. 29. But it contends that Guyton's proximity plus his motive to conceal contraband was enough to show dominion or control. We disagree.

The Government relies on our decision in *United States v. Foster*, 891 F.3d 93 (3d Cir. 2018), but that case is distinguishable. There, one of the defendants had been seen several times in the driver's seat of a stolen car involved in an armed robbery. *Id.* at 111–12. Shortly after the defendant exited the vehicle, law enforcement recovered a firearm from the back seat. *Id.* at 100–02. We held that the defendant's proximity to the firearm, along with his motive to possess the gun for armed robbery, evasive conduct, and presence in the driver's seat supported the constructive possession conviction. *Id.* at 112.

Unlike *Foster*, this record contains no evidence that Guyton was present where the contraband was found. No one testified about seeing him at or in the derelict house, and he did

not own or rent it.[4] While *Foster* does indicate that a defendant's attempts to hide or destroy contraband may establish dominion and control, there is no such evidence here. The record shows only that Guyton tried to hide *other* contraband: the firearms in the trash in front of his house and the drug paraphernalia at his associates' homes. It does not follow from that conduct that any firearms found in the neighborhood can be attributed to Guyton. Nor does his general motive to evade authorities, without more, permit such an inference. That is especially true here, where there were nearly a dozen other defendants involved in this drug-trafficking conspiracy and the drug operations involved many houses in the same neighborhood.

On this record, a reasonable jury could not infer that Guyton constructively possessed the two firearms found in the derelict house. So we will vacate Guyton's conviction on Count 3 and remand for the District Court to enter a judgment of acquittal on that count.

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[4] For that same reason, the other cases the Government cites are inapt. In *United States v. Benjamin*, the firearm was found in the defendant's basement, and the evidence showed that the defendant had previously used that firearm. 711 F.3d 371, 377 (3d Cir. 2013). Similarly, in *United States v. Walker*, the firearm was found on the floorboard of the car the defendant was driving. 545 F.3d 1081, 1088 (D.C. Cir. 2008). And the record in *United States v. Ingram* showed the defendant's dominion and control over a handgun found below an apartment window: he had been spotted throwing drugs over the apartment's balcony, there was a handgun case and manual inside the apartment, and the window screen of the apartment was ajar. 207 F. App'x. 147, 150, 154–55 (3d Cir. 2006).

III

Guyton also argues that the District Court erroneously charged the jury on the mens rea element of his drug-trafficking charges. He contends that the instructions did not follow *McFadden v. United States*, which sets forth the requirements for proving knowledge of Analogue Act violations.[5] 576 U.S. 186 (2015). We agree. But because Guyton never objected to these instructions as required by Fed. R. Crim. P. 52(b), plain error applies. We will reverse only if (1) there was an "error"; (2) the error was "plain"; (3) the error prejudiced or "affect[ed] substantial rights"; and (4) not correcting the error would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993) (citation modified). As we shall explain, Guyton cannot satisfy prong three.

A

To convict Guyton under 21 U.S.C. § 841, the Government had to prove knowledge. *McFadden*, 576 U.S. at 194. Because Guyton was charged with distributing and possessing analogue substances, the Government could prove its case by showing: (1) that Guyton knew the substance was "actually listed on the federal drug schedules or treated as such by operation of the Analogue Act" or (2) that he knew of "features" that made it an analogue, such as chemical structure

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[5] The Controlled Substance Analogue Enforcement Act of 1986 "identifies a category of substances substantially similar to those listed on the federal controlled substance schedules" and "instructs courts to treat those analogues" as schedule I controlled substances if they are intended for human consumption. *McFadden*, 576 U.S. at 188.

or physiological effects that are "substantially similar" to those of a controlled substance. *Id.* The District Court's instructions were mistaken with respect to both options.

1

The District Court's instruction on the first *McFadden* option contained two errors. The Court instructed the jury that Guyton need not know the acts charged "amounted to a crime." App. 597. That was incorrect because *McFadden*'s first option requires proof that the defendant knew he was violating some federal law. *See* 576 U.S. at 195 n.3. The Government insists that the District Court's "amounted to a crime" language referred only to *McFadden*'s second option, but that reading of the record is untenable. The District Court gave that charge before giving both *McFadden* instructions. It did not restrict the charge to the second *McFadden* option, so it applied equally to the first.

The District Court also erred by instructing the jury that it could find knowledge if Guyton knew the "legal status of the substance." App. 597. That is because *McFadden* requires that the defendant know that the analogue substance is controlled under a *federal* law, not just "some law." 576 U.S. at 195. The Government rejoins that "in the context of the overall charge," the instructions clearly referred to federal law. Gov't Br. 18 (citation omitted). It argues that the phrase "legal status" referred back to "the status of being a 'controlled substance' and 'analogue,' which are terms of federal law." Gov't Br. 17 (citations omitted). So, the Government suggests, the jury understood that the mens rea element required Guyton to know the analogue's status under federal drug laws. That argument is unpersuasive.

"Controlled substance" and "analogue" are not exclusively federal statutory terms. *See, e.g.*, 35 P.S. §§ 780-102, 780-104 (scheduling "controlled substances" and "analogues," respectively). Indeed, just before the charge at issue, the District Court defined "controlled substance" for the jury as "some kind of a prohibited drug," without reference to federal law. App. 596. That ambiguity was exacerbated by the various references to Pennsylvania's controlled substance laws throughout trial. So it is far from clear that "legal status" referred exclusively to federal drug laws, as required by *McFadden*.[6]

2

The District Court's instruction on *McFadden*'s second option was also erroneous. The Court correctly instructed the jury that it could find knowledge if Guyton knew "the chemical structure and physiological effects of that substance." App. 597. But that instruction was incomplete because *McFadden* requires a comparison: that the defendant knew the analogue substance had a chemical structure or a physiological effect

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[6] The Government advances two additional arguments. First, it says that the District Court "never suggested that Guyton could be convicted based on his knowledge of state law." Gov't Br. 17. But the lack of explicit reference to state law does not amount to an affirmative reference to federal law, which *McFadden* requires. Second, the Government emphasizes that the District Court's abridged instruction mirrored language in the Fourth Circuit's *McFadden* opinion on remand from the Supreme Court. But elsewhere in the opinion, the Fourth Circuit described the correct legal standard in full. *See United States v. McFadden*, 823 F.3d 217, 223–28 (4th Cir. 2016).

substantially similar to that of a controlled substance. 576 U.S. at 194.

The Government again argues that, when reviewed in context, this instruction was proper. Earlier in its instructions, the District Court had defined a fentanyl analogue as having a "chemical structure which is substantially similar to the chemical structure of fentanyl," and "a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" that of fentanyl. App. 596. The Government argues that this definition was "permissibly incorporated" into the later charge on the knowledge element. Gov't Br. 19. Once again, we are not persuaded.

The District Court defined "analogue of fentanyl" while instructing the jury on the object of the underlying offense, a distinct element from mens rea. App. 596. And the District Court did not cross reference that definition when it gave the subsequent mens rea instruction. On this record, it is not apparent that the earlier definition was incorporated into the later charge, and we will not assume that the jury drew such an inference.

* * *

The upshot is that the District Court erred in instructing the jury on the mens rea requirement on Counts 1, 2, 5, 6, and 7. And the error was plain because it was "clear" under *McFadden*. *United States v. Adams*, 252 F.3d 276, 286 (3d Cir. 2001) (citation modified).

B

At *Olano*'s third prong, Guyton must show prejudice: "a reasonable probability" that "the outcome of the proceeding would have been different" with properly worded instructions. *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (citation modified). Guyton cannot make that showing here because there is overwhelming evidence that he knew he was trafficking federally controlled substances, which satisfies *McFadden*'s first option.

Guyton knew his drugs were "subject to seizure at customs." *McFadden*, 576 U.S. at 192 n.1. He told Chinese suppliers to "camouflage" his opioid shipments "to pass U.S. customs," which he noted had "been very strict lately." Supp. App. 25–26. And in an inculpatory homage to the drug-trafficking kingpin of the acclaimed television series *The Wire*, Guyton instructed that the shipment be mailed to "Avon Barksdale." Supp. App. 16–17. These efforts to dodge Customs, along with the "concealment of his activities" and other "evasive behavior," provided compelling evidence that Guyton knew the drugs in the intercepted shipment—the basis for Count 7—were federally controlled. *McFadden*, 576 U.S. at 192 n.1.[7]

Because the evidence shows that Guyton had the requisite knowledge under § 841(b), he has not established that

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[7] That evidence also supports Guyton's other drug-related convictions (Counts 1, 2, 5, and 6) because he trafficked the same substance found in the intercepted shipment—cyclopropyl fentanyl. So he continued to know that his substances were subject to seizure by Customs, and thus controlled under federal law.

the District Court's instructional errors affected his substantial rights. So we find no reversible error on this point.

IV

Guyton argues that the District Court constructively amended Counts 8 and 9 of the indictment. Those counts charged him with international money laundering under 18 U.S.C. § 1956(a)(2)(A), alleging that he "transmit[ed] and transfer[ed] funds from a place in the United States to a place outside the United States" to promote drug trafficking. App. 47–48. But when instructing the jury, the District Court charged *domestic* money laundering under 18 U.S.C. § 1956(a)(1)(A)(i). The Court instructed the jury to decide whether "Guyton conducted, or attempted to conduct, a financial transaction, which affected interstate commerce," with criminal proceeds to promote drug trafficking. App. 610. Guyton contends that this instruction amounted to a constructive amendment because it permitted the jury to convict him of an offense different from the one charged in the indictment. *See United States v. Daraio*, 445 F.3d 254, 259–60 (3d Cir. 2006) (explaining that a constructive amendment occurs when evidence, arguments, or jury instructions "modify essential terms of the charged offense" so that "there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from" what the indictment "actually charged").

Relying on *United States v. Carey*, Guyton contends that his motion for judgment of acquittal—which did not mention a constructive amendment—preserved his argument. 72 F.4th 521 (3d Cir. 2023). We disagree because *Carey* held that "attacking the sufficiency of the evidence" in a Rule 29 motion preserved a challenge to an improper variance, not a

constructive amendment. *Id.* at 529 & n.9 (explaining that an improper variance occurs when the trial evidence materially differs from the facts alleged in the indictment); *see* Fed. R. Crim. P. 29. Constructive amendments and variances are distinct arguments that stem from different constitutional provisions. *United States v. Vosburgh*, 602 F.3d 512, 532 n.20 (3d Cir. 2010). In other contexts, Rule 29 motions have been held not to preserve new arguments on appeal. *See, e.g.*, *United States v. Syme*, 276 F.3d 131, 143 n.4 (3d Cir. 2002) (holding that a new argument about the sufficiency of the evidence was unpreserved). Guyton does not provide any good reason to depart from that rule, so we will review for plain error. *See* Fed. R. Crim. P. 52(b). And we need not decide whether the District Court constructively amended the indictment, whether it did so plainly, or whether any error prejudiced Guyton. That is because even if *Olano*'s first three prongs are all met, its fourth prong is not.

At *Olano*'s fourth prong, we may decline to exercise our discretion to reverse constructive-amendment errors "if (1) the charged and uncharged crimes were closely linked and (2) the evidence of guilt on the closely linked but uncharged crime is overwhelming and essentially uncontroverted." *United States v. Greenspan*, 923 F.3d 138, 153 (3d Cir. 2019) (citation modified). Both factors are satisfied here.

First, the two acts of money laundering penalized in each subsection are closely linked. The indictment charged that Guyton "knowingly transmit[ted] and transfer[red] funds from a place in the United States to a place outside the United States" with intent to promote drug trafficking. App. 47–48; *see* 18 U.S.C. § 1956(a)(2)(A). The unindicted act in the jury instructions charged "conduct[ing]"—such as "initiating, concluding, or participating" in—a "financial transaction" with

the intent "to promote the carrying on of illegal drug trafficking." App. 611; *see* 18 U.S.C. § 1956(a)(1)(A)(i), (c)(4). As is apparent from the text of the two subsections, the differences between them are "slight." *United States v. Carr*, 25 F.3d 1194, 1204 (3d Cir. 1994). Their objects—the promotion of drug trafficking—are the same. *Compare* 18 U.S.C. § 1956(a)(1)(A)(i), *with id.* § 1956(a)(2)(A). And the prohibited acts—transmittal/transferal and conducting—are "so closely linked here that we are convinced that the fairness, integrity or public reputation of judicial proceedings is not implicated." *United States v. Gonzalez Edeza*, 359 F.3d 1246, 1252 (10th Cir. 2004) (citation modified).

Second, evidence of the unindicted crime—that Guyton "conducted" a "financial transaction" to promote drug trafficking—is "essentially uncontroverted." *Greenspan*, 923 F.3d at 153. In Skype messages to foreign suppliers, Guyton requested "fentanyl products" and was told that he would receive "a good product of opioids." Supp. App. 14. He repeatedly asked suppliers how they "camouflage[d]" the drugs to evade Customs, expressing concern that U.S. "Customs [has] been very strict lately." Supp. App. 12–13, 26. One supplier sent Guyton "MoneyGram Payment Details" so he could pay for the drugs. Supp. App. 12. MoneyGram records reflect those payments, indicating that multiple monetary transfers made in Guyton's name were sent to recipients in China. Columns in the MoneyGram spreadsheet entitled "Rcv Date" and "Rcv Time" list dates and times next to those transfers, indicating that the transactions were completed. App. 671.

Taken together, this evidence shows that Guyton both "initiat[ed]" and "conduct[ed]" monetary transfers to foreign recipients in exchange for synthetic opioids. App. 611; *see* 18

U.S.C. § 1956(c)(4). Because the unindicted conduct is closely linked to the indicted conduct, and the evidence of the unindicted conduct was overwhelming and essentially uncontroverted, the trial's fairness, integrity, or public reputation would not be affected by letting the alleged error stand. *See Greenspan*, 923 F.3d at 153–54. So the error does not warrant reversal.

V

Guyton also claims, for the first time on appeal, that the District Court erred by imposing recidivist enhancements to three of his drug convictions (Counts 1, 2, and 7) under 21 U.S.C. § 841(b)(1)(A) and (B). The Government filed an information under 21 U.S.C. § 851(a), alleging that Guyton's 2011 conviction under 35 P.S. § 780-113(a)(30) triggered the recidivist sentencing provisions of § 841(b). But the District Court failed to give him a hearing as required by 21 U.S.C. § 851(b). Guyton says this constitutes reversible error.

A

To begin, we must decide a question of first impression for this Court: "whether plain error review should apply if the defendant fails to object to § 851[b] deficiencies." *United States v. Isaac*, 655 F.3d 148, 156 (3d Cir. 2011). Ordinarily, unpreserved errors are reviewed for plain error. Fed. R. Crim. P. 52(b). *See Olano*, 507 U.S. at 731. But Guyton, relying on a decision of another court, argues that we should depart from that rule and apply de novo review. *See United States v.*

Baugham, 613 F.3d 291, 296 (D.C. Cir. 2010) (per curiam). We disagree.

In *Baugham*, the D.C. Circuit held that harmless error review applied to an unpreserved challenge to a district court's failure to colloquy a defendant under § 851(b). *Id.* at 295–96. In reaching that conclusion, the *Baugham* Court appealed to the purpose of § 851(b): "to place the procedural onus on the district court to ensure defendants are fully aware of their rights." *Id.* at 296. It reasoned that penalizing the defendant for the district court's oversight would "pervert the statute." *Id.* *But see id.* at 297 (Brown, J., concurring in the judgment) (arguing that plain-error review should apply).

The Ninth Circuit—the only other appellate court to consider the standard of review for unpreserved § 851(b) objections—went the other way and applied plain error review. *See United States v. Severino*, 316 F.3d 939, 947 & n.7 (9th Cir. 2003) (en banc). *Severino* acknowledged that it was "a bit strange to require that a defendant object to the district court's failure to give him an admonition" under § 851(b). *Id.* at 947 n.7. But the Ninth Circuit "fe[lt] bound by" a Supreme Court decision applying plain error review to defective plea colloquies under Rule 11 of the Federal Rules of Criminal Procedure. *Id.* (citing *United States v. Vonn*, 535 U.S. 55, 73 (2002)).

The Ninth Circuit's approach tracks with decisions of our sister courts that have addressed the standard of review for unpreserved objections to § 851(a) errors. *See, e.g.*, *United States v. Lewis*, 597 F.3d 1345, 1346–47 (7th Cir. 2010) (applying plain-error review where the Government failed to file an information under § 851(a)); *United States v. Beasley*,

495 F.3d 142, 145–46 (4th Cir. 2007) (same); *United States v. Dodson*, 288 F.3d 153, 159–161 (5th Cir. 2002) (same).

We now join the Ninth Circuit and hold that plain-error review applies to unpreserved objections to § 851(b) deficiencies. In doing so, we adhere to the "bright line between harmless-error and plain-error review based on preservation." *Greer v. United States*, 593 U.S. 503, 512 (2021). And we abide by the Supreme Court's repeated admonition against "any unwarranted expansion of Rule 52(b)" of the Federal Rules of Criminal Procedure. *Johnson v. United States*, 520 U.S. 461, 466 (1997); *see also Puckett v. United States*, 556 U.S. 129, 135–36 (2009) ("The real question . . . is not *whether* plain-error review applies when a defendant fails to preserve a claim . . . but rather what conceivable reason exists for disregarding its evident application.").

Guyton counters that applying plain-error review here would "penalize a defendant for not alerting the district court to its failure to alert him" about his rights. Guyton Br. 48 (citation omitted). But the Supreme Court has rejected this argument in a similar context, stressing "that is always the point of the plain-error rule: the value of finality requires defense counsel to be on his toes, not just the judge." *Vonn*, 535 U.S. at 73; *see also Puckett*, 556 U.S. at 139 (expressing doubt that "policy concerns can ever authorize a departure from the Federal Rules"). That logic applies with equal force here. While we recognize that the District Court's failure to colloquy Guyton is a serious matter, "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, 520 U.S. at 466. So we decline to create an exception to the plain-error rule for unpreserved objections to § 851(b) deficiencies.

B

Applying plain-error review, we agree with Guyton that the District Court's § 851(b) error satisfies *Olano*'s first and second prongs. The Government sought enhanced penalties for Guyton's drug convictions under 21 U.S.C. § 841(b) and filed an information under 21 U.S.C. § 851(a). That triggered the requirement that the District Court

> inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and [] inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

21 U.S.C. § 851(b). In disregarding this straightforward command, the District Court plainly erred.

C

Guyton's claim falters at *Olano*'s third step, however. He must show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez*, 578 U.S. at 194 (citation modified). Guyton argues that he has met that burden: the enhanced penalties that the District Court imposed do not apply, and but for those enhancements, his sentence would have been less severe. We are not persuaded.

1

Under 21 U.S.C. § 841(b)(1)(B), the government may seek enhanced penalties if the defendant has a prior conviction

for a "serious drug felony" as defined in 21 U.S.C. § 802(58). That statute, in turn, provides that a "serious drug felony" is an offense described in 18 U.S.C. § 924(e)(2) "for which (A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." *Id.* § 802(58).

The Government's § 851 information alleged that Guyton's 2011 conviction qualified as a serious drug felony. Recall the background of the predicate offense. In March 2009, Guyton committed drug-related offenses but was not immediately arrested. On April 8, 2009, he was detained for charges pertaining to an unrelated case. Seven months later, while still in custody for the unrelated case, Guyton was charged with the predicate offense. He posted bond the same day but remained in jail on the unrelated case. Guyton pleaded guilty to the charges in the unrelated case on December 10 and was sentenced to time served: the pretrial detention he had served from April 8 to December 10. He remained imprisoned until December 20, 2009.

In 2011, Guyton was convicted of the predicate state offense. He was sentenced to 18 to 36 months' imprisonment on that offense on December 15, 2011. But under Pennsylvania's recidivism risk reduction incentive, that sentence was reduced to one year, one month, and fifteen days. As part of that sentence, the state court credited Guyton with the 256 days he was imprisoned from April 9 to December 20, 2009, even though most of that time had been previously credited to the unrelated conviction. Because of that leniency,

Guyton was released on July 22, 2012, after serving only 220 days from the day he was sentenced.[8]

Guyton argues that his 2011 conviction does not qualify as a "serious drug felony" because he did not serve "a term of imprisonment of more than 12 months." 21 U.S.C. § 802(58). Even if pretrial detention counts toward a "term of imprisonment," Guyton reasons, it should not count here because most of the pretrial detention was served on an unrelated offense. Without those 256 days, Guyton argues, he served only 220 days, a term of imprisonment less than 12 months.

2

To resolve this convoluted issue, we must decide another question of first impression: whether "term of imprisonment" in § 802(58) includes time served in pretrial detention later credited to the sentence. We hold that it does.

Start with the text of § 802(58). The statute does not define "term of imprisonment." We generally presume that

---

[8] On appeal, Guyton has submitted state prison records that (1) confirm that his recidivism risk reduction incentive minimum sentence for his 2011 conviction was one year, one month, and fifteen days and (2) demonstrate that he was released on July 22, 2012. Although these records were not before the District Court, we take notice of them. *See In re Indian Palms Assoc.*, 61 F.3d 197, 205–06 (3d Cir. 1995) ("Judicial notice may be taken at any stage of the proceeding, including on appeal, as long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority." (citation modified)).

terms used in statutes carry the same meaning that they have in ordinary usage at the time Congress adopted them. *See Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021). And at the time Congress created the category "serious drug felony," "imprisonment" meant "[t]he act of confining a person," "[t]he quality, state, or condition of being confined," or "[t]he period during which a person is not at liberty." Black's Law Dictionary 875 (10th ed. 2014). These definitions comfortably encompass pretrial detention.

Moreover, nothing in the statute distinguishes time served before conviction from time served after the imposition of the sentence. Had Congress intended to draw such a line, it could have used narrower language, such as "*after* a conviction" or "*following* a conviction." *See e.g.*, Bail Reform Act of 1984, Pub. L. No. 98-473, § 209(d)(4), 98 Stat. 1837, 1987 (adding Federal Rule of Criminal Procedure 46(h), allowing courts to direct forfeiture of property "*after* conviction of the offense charged" (emphasis added)). Sensibly read, "term of imprisonment" includes pretrial detention later credited to the sentence imposed.

Guyton insists that even if "term of imprisonment" includes pretrial detention, it does not do so here because the prearrest detention credited to him was for charges unrelated to the 2011 conviction. He emphasizes that the predicate offense must be the one "for which" he served more than 12 months. Reply Br. 25 (quoting 21 U.S.C. § 802(58)).

That argument does not get Guyton far. "[F]or which" refers to the "serious drug felony"—here, Guyton's drug-related conviction for the March 2009 conduct. 21 U.S.C. § 802(58)(B). And Guyton *did* serve "a term of imprisonment of more than 12 months" for that offense: the 256 days before

he was sentenced plus the 220 days after he was sentenced. *See Spina v. Dep't of Homeland Sec.*, 470 F.3d 116, 128 (2d Cir. 2006) (noting the "common understanding" among the 50 States, the District of Columbia, and the federal government is that "any credited pre-conviction detention effectively becomes time served on the imposed term of imprisonment"). That the sentencing court retroactively converted Guyton's prearrest detention on an unrelated charge to time served on the 2011 conviction makes no difference under § 802(58)(B). Once the sentencing order credited that time to Guyton's sentence, it became part of his "term of imprisonment." *Cf. Moreno-Cebrero v. Gonzales*, 485 F.3d 395, 398–400 (7th Cir. 2007) (pre-conviction detention credited to defendant's sentence counts toward the five-year "term of imprisonment" under 8 U.S.C. § 1182(c)).[9]

---

[9] Guyton also contends that his pretrial detention cannot constitute part of the "term of imprisonment" because most of those 256 days were credited to a previous sentence for an unrelated conviction. Because federal sentencing law prohibits this kind of double counting, he argues that "term of imprisonment" should not be read to encompass it. Guyton raised this argument for the first time in his reply brief, so it is forfeited. *United States v. James*, 955 F.3d 336, 345 n.8 (3d Cir. 2020); *see also* Fed. R. App. P. 28(a)(5). In any event, the argument is unpersuasive. "[T]erm of imprisonment" refers only to time actually "served." 21 U.S.C. § 802(58). Procedural defects like double-counting are not germane to that inquiry. And if that weren't enough, Guyton's interpretation would have the perverse effect of penalizing a recidivist who had committed only one crime more severely than a repeat offender like Guyton.

In sum: we hold that when, as in this case, a defendant is credited with time served in pretrial detention—thereby reducing the time he will have to serve on his term of imprisonment following conviction—that detention is part of the "term of imprisonment" "for which" the offender "served" under 21 U.S.C. § 802(58). As a result, Guyton served more than 12 months' imprisonment for his 2011 conviction and was subject to the "serious drug felony" enhancements in 21 U.S.C. § 841(b)(1)(A) and (B). So the District Court's failure to colloquy him under § 851(b) did not affect the outcome of the proceedings.

VI

In the alternative, Guyton argues that the recidivist enhancements violated his Fifth and Sixth Amendment rights under *Alleyne v. United States*, 570 U.S. 99 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). He did not preserve these arguments, so we review them for plain error.

Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. That rule also applies to facts that increase the statutory minimum sentence for a crime. *Alleyne*, 570 U.S. at 116. Here, the indictment stated that Guyton "served a term of imprisonment of more than twelve months" for the 2011 conviction and was released "within fifteen years of the commencement of" the instant federal offenses. App. 49. Those two facts were necessary for the 2011 conviction to constitute a "serious drug felony." 21 U.S.C. § 802(58). But

the jury was not asked to find them. That was plain error under *Apprendi* and *Alleyne*, which the Government concedes.

But Guyton cannot satisfy *Olano*'s third prong: that this error affected the outcome of the proceeding. *See Molina-Martinez*, 578 U.S. at 194. To make that determination, we must first assess whether the *Apprendi/Alleyne* violation was a mixed trial and sentencing error or a pure sentencing error. *United States v. Johnson*, 899 F.3d 191, 198 (3d Cir. 2018). That classification informs the scope of our prejudice analysis: if the error is a pure sentencing one, we may not consider the trial record; otherwise, we may. *See id.* at 201. A trial error "occurs when the defendant is charged with, convicted of, and sentenced for a crime, but one of the elements of that crime is not submitted to the jury." *Id.* By contrast, a pure sentencing error occurs when "a defendant is charged with and convicted of one crime, but sentenced for another." *Id.*

The *Apprendi/Alleyne* violation here was a mixed "trial and sentencing" error. *Johnson*, 899 F.3d at 198 n.2. The facts increasing the mandatory minimum and maximum sentences were charged in the indictment. But the jury was not asked to find them, either in the instructions or on the verdict form. The District Court imposed a sentence based on those facts anyway. Because this was not a pure sentencing error, we may properly consider the trial record on plain-error review. *See id.* at 201. And the District Court's "failure to instruct on an element listed in the indictment is not plain error if we determine that it is clear beyond a reasonable doubt that a rational jury would have found the element in question absent the error." *Id.* at 200 (citation modified).

Applying that standard, we conclude that the *Alleyne/Apprendi* error did not prejudice Guyton. The record

shows that Guyton served more than a year for the 2011 conviction and that he was released in 2012, well within fifteen years of his 2017 offenses that gave rise to this case. *See Greer*, 593 U.S. at 511 (explaining that "an appellate court conducting plain-error review may consider the *entire* record," including PSRs). In short, there is no reasonable probability that a properly instructed jury would have failed to find the two facts necessary to trigger the recidivist enhancements. So Guyton has not shown an effect on his substantial rights to satisfy the third prong of plain-error review.[10] *See Johnson*, 899 F.3d at 200.

* * *

Guyton's appellate counsel thoroughly examined the record below and skillfully identified many errors in the trial court. But none are reversible except the denial of Guyton's motion for judgment of acquittal on Count 3. Accordingly, we will vacate that conviction and remand for the District Court to enter a judgment of acquittal on Count 3. We will affirm the remaining eight counts and the judgment of sentence.

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[10] Guyton also brings facial and as-applied challenges to his § 922(g) convictions (Counts 3 and 4) under the Second Amendment. As he concedes, these arguments are foreclosed by *United States v. Dorsey*, 105 F.4th 526, 532–33 (3d Cir. 2024). We acknowledge that those arguments are preserved for further review.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	2:17cr00215-001
v.	)	**Electronic Filing**
	)	
LYNELL GUYTON	)	

ORDER OF COURT

AND NOW, this 13th day of August, 2025, in accordance with the Mandate issued by the United States Court of Appeals for the Third Circuit on August 12, 2025, IT IS ORDERED that a Judgment of Acquittal is entered as to Count 3 of the Third Superseding Indictment. The October 12, 2021, Judgment of Conviction and Sentence on all other counts shall remain unchanged. An amended Judgment Order of Conviction and Sentence will follow.

s/David Stewart Cercone
David Stewart Cercone
Senior United States District Judge

cc: Tonya Sulia Goodman, AUSA

(*Via CM/ECF Electronic Mail*)

Lynell Guyton
USMS 73984-007
FCC Allenwood Low
P.O. Box 1000
White Deer, PA 17887

UNITED STATES DISTRICT COURT

Western District of Pennsylvania

UNITED STATES OF AMERICA
v.
LYNELL GUYTON

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-cr-00215-DSC-1
USM Number: 73984-007

Date of Original Judgment: 10/12/2021 *(Or Date of Last Amended Judgment)*

Frank C. Walker, Esquire
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) *1sss, 2sss, 4sss, 5sss, 6sss, 7sss, 8sss, 9sss after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to Distribute and Possess With Intent to Distribute an Analogue of Fentanyl (100 Grams or More)	8/31/2017	1sss

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) *3sss

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/28/2025
Date of Imposition of Judgment

s/DAVID STEWART CERCONE
Signature of Judge

David Stewart Cercone, Senior United States District Judge
Name and Title of Judge

8/28/2025
Date

DEFENDANT: LYNELL GUYTON
CASE NUMBER: 2:17-cr-00215-DSC-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1) and 841(b)(1)(A)(vi)	Possession With Intent to Distribute 100 Grams or More of an Analogue of Fentanyl	8/9/2017	2sss
18 U.S.C.§ 922(g)(1)	Possession of Firearms by a Convicted Felon	8/31/2017	4sss
21 U.S.C.§ 841(a)(1) and 841(b)(1)(C)	Possession With Intent to Distribute a Quantity of an Analogue of Fentanyl	7/31/2017	5sss
21 U.S.C.§ 841(a)(1) and 841(b)(1)(C)	Possession With Intent to Distribute a Quantity of an Analogue of Fentanyl	7/31/2017	6sss
21 U.S.C.§ 846	Attempt to Possess With Intent to Distribute 10 Grams or More of a Fentanyl Analogue	6/1/2017	7sss
18 U.S.C.§1956(a)(2)(A)	Money Laundering - International Wire Transfer With Intent to Promote Drug Trafficking	5/18/2017	8sss
18 U.S.C.§1956(a)(2)(A)	Money Laundering - International Wire Transfer With Intent to Promote Drug Trafficking	5/8/2017	9sss

DEFENDANT: LYNELL GUYTON
CASE NUMBER: 2:17-cr-00215-DSC-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

*360 months at counts 1 & 2 and 120 months at counts 4, 5, 6, 7, 8 & 9 with such terms to run concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LYNELL GUYTON
CASE NUMBER: 2:17-cr-00215-DSC-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

*10 years at counts 1 & 2; 3 years at counts 4, 8 and 9; 6 years at counts 5 & 6 and 8 years at count 7, with all such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: LYNELL GUYTON
CASE NUMBER: 2:17-cr-00215-DSC-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: LYNELL GUYTON
CASE NUMBER: 2:17-cr-00215-DSC-1

ADDITIONAL SUPERVISED RELEASE TERMS

1. Defendant shall not possess a firearm, ammunition, destructive device or any other dangerous weapon;

2. Defendant shall not use or possess controlled substances except as prescribed by a licensed medical practitioner for a legitimate medical purpose;

3. Defendant shall participate in a program of testing and, if necessary, treatment for substance abuse as directed by the probation officer, until defendant is released from the program by the probation officer. Defendant shall submit to one drug urinalysis within 15 days of being placed on supervision and at least two periodic tests thereafter. Defendant shall contribute to the cost of services for any treatment in an amount determined to be reasonable by the probation officer, but not to exceed the actual cost of such treatment;

4. Defendant shall not purchase, possess and/or use any substance(s) designed to simulate or alter in any way his own urine specimen. Defendant likewise shall not purchase, possess and/or use any device(s) designed to submit a urine specimen from another individual;

5. Defendant shall submit his person, property, residence, vehicle, papers, place of business and/or place of employment to a warrantless search conducted and controlled by the United States Probation Office, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. Defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition;

6. The defendant shall cooperate in the collection of DNA as directed by the probation officer,pursuant to 28 C.F.R. § 28.12, the DNA Fingerprint Act of 2005, and the Adam Walsh Child Protection and Safety Act of 2006; and,

7. The defendant shall participate in the United States Probation Office's Workforce Development Program as directed by the probation officer.

DEFENDANT: LYNELL GUYTON
CASE NUMBER: 2:17-cr-00215-DSC-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 800.00	$	$	$	$

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LYNELL GUYTON
CASE NUMBER: 2:17-cr-00215-DSC-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 800.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
defendant's interest in the property identified in the Preliminary Order of Forfeiture entered on October 7, 2021, is forfeited to the United States.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	
	Criminal No. 17-215
v.	
LYNELL GUYTON	

PROPOSED JURY INSTRUCTIONS

AND NOW comes the United States of America, by its attorneys, Scott W. Brady, United States Attorney for the Western District of Pennsylvania, and Shanicka L. Kennedy, Assistant United States Attorney for said district, and hereby submits the following proposed points for charge:[1]:

I. INSTRUCTIONS FOR USE DURING TRIAL[2]

2.09 Opinion Evidence (Expert Witnesses)

The rules of evidence ordinarily do not permit witnesses to state their own opinions about important questions in a trial, but there are exceptions to these rules.

You will hear testimony from Bureau of Alcohol, Tobacco and Firearms ("ATF") Special Agent ("SA") Maurice Ferentino, Allegheny County Medical Examiner's Office ("ME") Scientists Christopher Merrill, Emily Wilkinson, Jason Very and Thomas Morgan. Because of his knowledge, skill, experience, training, or education in the field of firearms and their interstate

[1] The government reserves the right to request changes or to alter the charges based upon the evidence that is presented at trial.

[2] All of the proposed instructions cited in this document refer to the Third Circuit Model Criminal Jury Instructions, unless otherwise noted.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, or gender sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community.

3.02 Evidence

You must make your decision in this case based only on the evidence that you saw and heard in the courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence from which you are to find the facts consists of the following:

(1) The testimony of the witnesses;

(2) Documents and other things received as exhibits; and

(3) Any fact or testimony that was stipulated; that is, formally agreed to by the parties.

(4) Any facts that have been judicially noticed--that is, facts which I say you may accept as true even without other evidence.

The following are not evidence:

(1) The Third Superseding Indictment;

(2) Statements and arguments of the lawyers for the parties in this case;

(3) Questions by the lawyers and questions that I might have asked;

(4) Objections by lawyers, including objections in which the lawyers stated facts;

(5) Any testimony I struck or told you to disregard; and

(6) Anything you may have seen or heard about this case outside the courtroom.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves.

Although the lawyers may have called your attention to certain facts or factual conclusions that they thought were important, what the lawyers said is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision in this case. Also, do not assume from anything I may have done or said during the trial that I have any opinion about any of the issues in this case or about what your verdict should be.

3.03 Direct and Circumstantial Evidence

Two types of evidence may be used in this trial, "direct evidence" and "circumstantial (or indirect) evidence." You may use both types of evidence in reaching your verdict.

"Direct evidence" is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses — something the witness has seen, touched, heard, or smelled.

"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts. A reasonable inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. A reasonable inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.

For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could reasonably find or conclude that it was raining. You would not have to find that it was raining, but you could.

Sometimes different inferences may be drawn from the same set of facts. The government may ask you to draw one inference, and the defense may ask you to draw another. You, and you

alone, must decide what reasonable inferences you will draw based on all the evidence and your reason, experience and common sense.

You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

3.04 Credibility of Witnesses

As I stated in my preliminary instructions at the beginning of the trial, in deciding what the facts are you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Was the witness truthful? Was the witness' testimony accurate? You may believe everything a witness says, or only part of it, or none of it.

You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.

In deciding what to believe, you may consider a number of factors:

(1) The opportunity and ability of the witness to see or hear or know the things about which the witness testified;

(2) The quality of the witness' knowledge, understanding, and memory;

(3) The witness' appearance, behavior, and manner while testifying;

(4) Whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;

possess detailed first-hand knowledge of the events about which they testified. You may consider [witness's] guilty pleas only for these purposes.

4.21 Credibility of Witnesses—Testimony of Addict or Substance Abuser

Evidence was introduced during the trial that *(name of witness) [(was (using drugs)(addicted to drugs)(abusing alcohol) when the events took place) (was abusing (drugs)(alcohol) at the time of trial)]*. There is nothing improper about calling such a witness to testify about events within *(his)(her)* personal knowledge.

On the other hand, *(his)(her)* testimony must be considered with care and caution. The testimony of a witness who *(describe circumstances)* may be less believable because of the effect the *(drugs)(alcohol)* may have on *(his)(her)* ability to perceive, remember, or relate the events in question.

After considering *(his)(her)* testimony in light of all the evidence in this case, you may give it whatever weight, if any, you find it deserves.

4.27 Defendant's Choice not to Testify or Present Evidence [will be provided only if appropriate]

Lynell Guyton did not testify and did not present evidence in this case. A defendant has an absolute constitutional right not to testify or to present any evidence. The burden of proof remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent. You must not attach any significance to the fact that Lynell Guyton did not testify. You must not draw any adverse inference against him because he did not take the witness stand. Do not consider, for any reason at all, the fact that Lynell Guyton did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

4.28 Defendant's Testimony [will be provided only if appropriate]

to it, and I have to make rulings on those objections. And you all have to get the exact same information. So please follow that instruction to not conduct any independent investigations or experiments or research of any kind.

It's also very important that you keep an open mind about this case. The only point in time when you will properly be able to decide this case is after I have given you my final instructions. That's the last thing that happens in the case. Only after both sides have had an opportunity to present evidence and to make final arguments and, as I have said, I instruct you on the law, only then will you have all of the information that you need to properly decide the case. Any thinking about the case or decisions that you may arrive at before that are premature.

For example, you may hear a witness testify, but the witness may not yet have been cross-examined, which may change your perception. And also, in my final instructions, I'm going to give you some things to think about that should help you decide credibility and believability of witnesses, factors that have been time-tested, things that courts have recognized are very important for judges or jurors to take into consideration, not that judges intrude upon the province of a jury, but there will be things that I will point out to you that you should be looking for or you should be aware of when you weigh the testimony of the various witnesses.

Defense Exhibit 2

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LABORATORIES AND SCIENTIFIC SERVICES DIRECTORATE
Chicago Laboratory, 610 South Canal Street, Suite 400 Chicago, IL 60607
312-983-9300; 312-886-2210 (Fax)

LABORATORY REPORT

Lab Report #:	CH20170900	**ID #:**	DHL # 8300592812 & 6051D-1053696
Submitted by:	Abbud Abdal-sami		
Received:	07/06/2017	**Reported:**	01/25/2018
Sample Description:	Two vials of white powder in evidence bag # A3763941		
Sample Components:	Suspected controlled substance.		
Information Requested:	Analyze for controlled substances.		

Narrative:

The sample consisted of two items, listed on 6051 1053696 and received in evidence bag A3763941.

Line item 002, one vial of white powder labeled "1" with a gross weight of 6.76g, was identified as hydrocinnamoyl fentanyl (aka beta'-phenyl fentanyl). At the time of issuance of this report, hydrocinnamoyl fentanyl is not scheduled as a controlled substance under 21 C.F.R. Part 1308.

Line item 004, one vial of white powder labeled "2" with a gross weight of 6.97g, was identified as cyclopropyl fentanyl. At the time of issuance of this report, cyclopropyl fentanyl is a Schedule I controlled substance under 21 C.F.R. Part 1308. However, historically this substance may be treated as an analogue if intended for human consumption. 21 U.S.C. 802(32)(A), 813.

Both samples were consumed in analysis.

CBPL Methods and Procedures: CBPL FO-04 (ASTM E1252), CBPL 29-19, FO-16, 29-17 and CSAM

Analyst	Approved By
Beverly Hong	Paul Iwataki, Assistant Laboratory Director

CBP Form 6415B (02/17)

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A. Yes. There was a previous package that was destined for 1111 Chartiers Avenue that was shipped via DHL, another carrier, and had been detained by Customs. And I believe, if I remember correctly, after the lab report came out, we requested it for trial, I do believe.

Q. Yes. So, now during those testings -- how did the testing results come back for that testing?

I'm sorry. First, before we go that far, I'm sorry -- what did those -- what did that package consist of, the substances for the drugs - --

A. Off the top of my head, I want to say it was the same two substances, methoxyacetyl fentanyl and cyclopropyl. But if you have the lab report I can review it.

Q. -- you would like to see it?

A. That would be great.

Q. Defendant Exhibit 2 for the lab report. Now earlier, while you inspect it -- I don't want to waste time -- earlier I remember you stated that the first package was tested at the Allegheny County Crime Labs and under the Pennsylvania laws, they were controlled substance, Schedule I substances.

So when you done examining that document in front of you, I'll resume.

A. Okay. It looks like there were two vials of white powder submitted to the U.S. Customs and Border Protection laboratory in Chicago. And the one was identified as

hydrocinnamoyl, h-y-d-r-o-c-i-n-n-a-m-o-y-l, fentanyl, aka beta phenyl fentanyl. And the second one was cyclopropyl fentanyl.

Q. Okay. Now for the Courts, the first sample -- could you render to the Courts the result of the first sample?

A. You mean what I just said?

Q. No. The first sample, it consists of two different samples, it says, at time of issuance. Could you give them the date that that sample was received first, or the product was received, the package. It's at the top left corner. That's when this was reported, not when it was received.

A. When it was reported.

Q. That information, could you relay it to the Court all --

A. The lab report is dated January 25, 2018, and it references the DHL tracking number. And it says 6051D; that's one of our forms. And it just says that it's a detained product until or if it becomes a seized product. And there's a lab report number submitted by the person's name -- it does say received -- I'm very sorry, I see that now -- July 6th of 2017.

Q. Okay. The date again, received what date?

A. July 6th of 2017.

Q. And what was the issuance date of that report to the far right, top corner?

A. January 25, 2018.

Q. Okay. If you go to the first paragraph when it starts

to give us analysis, it says six point something was -- the sample was tested or something. I don't have it.

A. Yes. The weight that was tested was 6.76 grams.

Q. For that substance. Could you read that full paragraph -- that full sentence, just for the Courts?

A. Line Item 0021 vial of white powder labeled "1" with a gross weight of 6.76 grams, was identified as hydrocinnamoyl fentanyl, aka beta phenyl fentanyl.

You want me to keep going?

Q. Please.

A. At the time of issuance of this report, hydrocinnamoyl fentanyl is not scheduled as a controlled substance under 21CFR Part 1308.

Q. Okay. And the second sample, could you render the second sample for the Courts?

A. The line Item 004, one vial of white powder labeled "two" with a gross weight of 6.97 grams, was identified as cyclopropyl fentanyl. At the time of issuance of this report, cyclopropyl fentanyl is a Schedule I controlled substance under CFR Part 1308. However, historically, the substance may be treated as an analogue if intended for human consumption, 21 USC, 802:(32)(a), 813.

Q. Thank you. So that document right there, did you notice the distinction between the two substances? One at the issuance was not a controlled substance.

MS. KENNEDY: Objection; relevance.

THE COURT: I'm going to sustain the objection.

MR. GUYTON: Moving forward.

THE COURT: One minute. Mr. Walker, I'd like you to consult with your client. His time is up. But I'll let you speak with him. If you believe there is something of great significance that's been missed, I'll extend it for five more minutes.

(Mr. Walker confers with the Defendant.)

MR. WALKER: He does have one additional, maybe another follow-up, limited to the two questions.

THE COURT: All right.

MR. WALKER: Thank you.

BY MR. GUYTON:

Q. Agent Tetrault, are you aware, statutory and legislatively, if the Controlled Substance Act and Controlled Substance analogue Enforcement Act together permit prosecution before a notice of intent and scheduling orders permit in a -- I mean, is published in the Federal Register?

MS. KENNEDY: Objection; calls for a legal conclusion.

THE COURT: Sustained. She's a fact witness, not a legal expert.

MR. GUYTON: Yes, sir. Yes, sir.

I rest. No further questions.

THE COURT: All right. Any questions?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

	)	**Docket No. 17-215**
UNITED STATES OF AMERICA	)	**MOTION TO DISMISS**
vs.	)	**(Fed. R. Crim. P. 12(b)(1)and(2)**
LYNELL GUYTON,	)	**Hearing Date:**
Defendant	)	**Hearing Time:**
	)	**Courtroom No.:7A**

MOTION TO DISMISS INDICTMENT

AND NOW COMES **LYNELL GUYTON**, defendant in this case by and through his attorney of record **FRANK WALKER** and hereby respectfully submits this Motion To Dismiss Indictment pursuant to **Fed. R. Crim. P. 12(b)(1)** Constitutional violations and **(2)**, for lack of subject-matter jurisdiction, and constitutional violations, in support thereof states as follows:

I.

Statutory Interpretation & Legislative Intent of Title 21 U.S.C § 801 And § 813

This motion to dismiss undertakes statutory interpretations; specifically **§ 813** this added provision is the one here concerned as to what Congress and it's members contemplated of the Attorney General procedurally for analogues. It is this issue that appears primarily dis positive well before it is necessary to reach the primary argument as to constitutionality, among inter alia, and Due Process Violations.

(A). Congress enacted the **Controlled Substance Analogue Enforcement Act** provision of 1986 to legally subject analogous substances of already controlled substances to the existing regulatory requirements already promulgated within the established **Controlled Substance Act**. As Congress added section **813** in the already existing Subchapter1 and Part B- **Authority to Control; Standards and Schedules**, and added paragraph **(32)** to the already existing provision **§ 802 definitions**. Which provides enforcement for the authorized administrative agencies the Attorney General through the (**DEA**) to administer pursuant to Subchapter1 and Part B's counterparts section **§ 811. Authority and**

criteria for classification of substances. And § **812. Schedules of controlled substances**.

As, the Attorney General and the (**DEA**) is the only authorized delegates to exercise such statutory mandates, in respect to the Separation of Powers Doctrine, to initiate regulation proceedings for authority to control analogous substance's to become a Schedule I drug of the **CSA** and legally applicable to the criminal sanctions of this title.

Furthermore, there is no evidence in support of Congressional intent to dispense with all the procedural requirements of the **CSA** and of SubChapter1 and Part B for authority to control and scheduling for analogues. Which naturally leads to the question of timing, as to when the "specific substances" in this indictment became regulated; as the United States Supreme Court in *McFadden*, **192 L. Ed. 2d 260**; held to require: Federal government to show that criminal defendant,"when controlled substance was analogue", knew that he was dealing with substance "Regulated" under **Controlled Substance Act** or **Analogue Act**". In respect to the substance's legal status's as "controlled substance analogues".(Emphasis added)). In compliance with statutory mandates of congressional intent. As § **811(h)** was Congress's added emergency control provision in response to the emerging "designer drugs", which, term was legally changed to the term "controlled substance analogue" since the **CSAEA** enactment of 1986.

The United States Supreme Court in *McFadden*, did not hold: That the federal government to show that criminal defendant,"when controlled substance was analogue", knew that he was dealing with substance of an already regulated substance under the **Controlled Substance Act** or **Analogue Act,** as Judge David Stewart Cercone suggest in Lozito Motion to Dismiss citing, **United States v. Raymer, 1991 U.S. App. LEXIS 10700, 1991 WL 86884, 16n.6 (10th Cir. 1991).** As there is no distinction between *Raymer*, and the case at issue here, which differs in substances, the aspects of timing and as to Judge's David Stewart Cercone's abstract imagination.

Courts cannot interpret federal statutes to negate their own stated purposes. Courts will construe the details of an Act in conformity with it's dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permit so as to carry out in particular cases the generally expressed legislative policy. **810 F. 3d 161:: In re Trump Entm't Resorts Unite Here Local 54:: March 4, 2015.** While we are aware.. that the most authoritative source of legislative intent lies in committee reports. **Wheeling-Pittsburgh Steel Corp. v. United Steel workers of AM. , AFL- CIO, CLC, 791 F. 2d 1074, 1086 (3d.Cir. 1986).**

*The **CSA** and **CSAEA** are to be read in Conjunction.*

The **CSAEA** was not enacted as standalone legislation, but enacted within the overall statutory scheme of the **CSA** itself, and shall be interpreted together as such. Congress simply, extended that framework [in the **CSA** from controlled substances] to analogue substances. Which, is in fact, the only operation of the **CSAEA**. The government, departs from the plain languages of the **CSA** and the **CSAEA** together, circumventing congressional intent; by also, conveying scienter to the other provision at issue here § **802 definitions.**

***Title 21-Chapter 11- Part 1300**—Definitions relating to Controlled Substances.*

(b) As used in Parts 1301-1308 and 1312, and 1317 of this chapter, the following terms shall have the meanings specified. As, in respect to § **802 definitions.** effectiveness of definitions and standards of identity, promulgated in accordance with the provisions of this Act [**21 U.S.C.S §§ 801**] are for the purposes of the enforcement of this Act [**21 U.S.C.S §§ 801**]. District courts improperly conveying scienter to § **802** definitions and meanings of identity, exceeds the scope of the legislator's intent, which thwarts § **802**'s definitions. true purpose. As "terms" and "definitions" primarily exist to legally differentiate their meanings from others used throughout all the provisions of the **CSA**.

Administrative Law § 276; Statutes § 113, 128-Context-other statutes.

4a, 4b, 4c, 4d, 4e. A reviewing court- when analyzing an administration agency's construction of a federal statute that the agency administers- should not confine itself to examining a particular statutory provision in isolation in determining whether Congress has specifically addressed the question at issue, as (1) the meaning-or-ambiguity-of certain words or phrases may only become evident when placed in context, (2) a fundamental canon of statutory construction is that the words of a statute must be read in context and with a view to their place in the overall statutory scheme, and (3) the meaning of one statute may be affected by other statutes, particularly where Congress has spoken subsequently and more specifically to the topic at hand; therefore, a reviewing court must (1) interpret the statute as a symmetrical and coherent regulatory scheme, (2) Fit- if possible- all parts of the regulatory scheme into a harmonious whole and (3) be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. **146 LED2D 121, 529 US 120 FDA V. BROWN & WILLIAMSON TOBACCO 3/21/2000.** We will walk through all of the relevant statutory provisions of Title 21, Chapter 13 Drug Abuse and Prevention Control in the **CSA** and of SubChapter1 and Part B. The government side steps this basic principal by homing in on the statutes **" A controlled substance**

analogue shall, to the extent intended for human consumption, be treated, for the purposes of this title and title III as a controlled substance in schedule 1.“ language in isolation from it's place in the **Controlled Substance Act's** overall scheme.

("Even where the express language would thwart the purpose of the overall statutory scheme, would lead to an absurd result, or would otherwise produce a result 'demonstrably at odds with the intentions of the drafter's."____(quoting **Demarest v. Manspeaker, 498 U.S. 184, 190, 111 S. Ct. 599, 112 L. Ed. 2D 608 (1991); United States v. Schneider, 14 F. 3d 876, 880, (3d Cir. 1994)** ("It is the obligation of the court to construe a statue to avoid absurd results, if alternative interpretations are available and consistent with the legislative purpose.") Accordingly, a provision that may seem ambiguous in isolation can be clarified by the remainder of the statute. The text of **21 U.S.C. §§ 801-846** must therefore be read as a whole, so that the content and operation of one provision (**CSA**) can illuminate the proper construction of another (**CSAEA**).

When Congressional intent is clear from the text of the statute, courts do not delve into legislative history or focus on the statutory scheme. However, in light of the discord among court of appeals, and the apparent tension between **21 U.S.C. §§§ 801, 802(32), 811, 813, 841, and 846** defendant finds it is appropriate to consider the purpose of the statutory scheme to ensure that the interpretation is consistent with Congress's objectives in enacting these provisions. ("As the Supreme Court has explained, the meaning of certain words or phrases may only become evident when placed in context and with a view to their place in the overall statutory scheme"). (quoting **783 F. 3d 421:: Silok v. Mervin:: May 21, 2014**).

The rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit or criminal prohibitions, but also to the penalties they impose." **Albernaz v. United States, 450 U.S. 333, 342, 101 S. Ct. 1137, 67 L. Ed. 2D 275 (1981).**

Examining the Overall Statutory Scheme of ***Title 21 U.S.C.S.***

(B). An inquiry as to the requirements of a statue begins first with construction of the statute, and then inference of the intent of Congress. **Liparota v. United States, 471 U.S. 419, 423, 105 S. Ct. 2084, 2087, 85 L. Ed. 2D 434 (1985).** "The starting point for any issue of statutory interpretation is the language itself. **United States v. Weaver, 659 F. 3d 353 (4th Cir. 2011)** Absent a clearly expressed legislative intention to the contrary, the language of a statue is to be given it's plain and ordinary meaning. **Id. At 356. See also Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et**

al., 447 U.S. 102, 100 S. Ct. 2051, 64 L. Ed. 2D 766 (1980):

Plain and Ordinary meaning of The ***Controlled Substance Act*** *and* ***CSAEA.***

Title 21- Food And Drugs- Chapter 13- Drug Abuse Prevention And Control SubChapter 1. Control and Enforcement

Part A- Introductory Provisions.

Sec. 801. Congressional findings and declarations: controlled substances.
801a. Congressional findings and declarations: psychotropic substances.
802. Definitions.
803. Repealed.

Part B- Authority To Control; Standards And Schedules.

811. Authority and criteria for classification of substances.
812. Schedules of controlled substances.
813. Treatment of controlled Substance analogues.
814. Removal of exemption of certain drugs.

Part D- Offenses And Penalties.

841. Prohibited acts A.
846. Attempt and Conspiracy.

§ 813. A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of this title and tile III as a controlled substance in schedule 1. Pub. L. 91-513. Title II. **§ 203**, as added Pub. L. 99-570, Title I, **§ 1202**, Oct. 27, 1986, 100 stat. 3207-13, and amended Pub. L. 100-690, Title VI, **§ 6470(c)**, Nov. 18, 1988, 102 stat. 4378. **History And Statutory Notes**, Schedule 1 reference to in text, is set out in section **812(c)** of this title.

812(c). Initial Schedules of Controlled Substances- Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section **811** of this title, consist of the following drug or other substances, by whatever official name, common name or usual name, chemical name, or brand name designated: Schedule I **(a)**

Distinctions between Part A- Introductory Provisions and Part D- Offenses And Penalties.

Section 802(32) definition of the term "Controlled Substance Analogue" are not elements of offenses and penalties (*see, § 841 for comparisons*) to be proven beyond a reasonable doubt, by the government or jury at a defendant's trial. Scienter is inapplicable to **§ 802** definitions meanings and, standards of identity of a "Controlled Substance Analogue". No such application is provided by the legislators, and the district courts thwarts **§ 802 definitions** purpose and intent. The "terms" and "definitions" primarily exist to legally differentiate them from others used throughout all the provisions of the **CSA**. Which, was only enacted for the effectiveness of definitions meanings and standards of identity, promulgated in accordance with the provisions of this Act [**21 U.S.C.S §§ 801**] for the purposes of the enforcement of this Act [**21 U.S.C.S §§ 801**].

Section 802. Definitions.

§ 802(32)(A) the term"Controlled Substance Analogue" historically known, as ("Designer Drugs") means a substance--- **(i), (ii), or (iii).**

Control And Enforcement| Chapter 13 Drug Abuse Prevention And Control| Subchapter 1| Part B- Authority to Control; Standards And Schedules:|

Section 811(a),(b),(c), and (h).
(add) (add) (add) (add)

The Attorney General through the **DEA** must first initiate proceedings to control a substance, before prosecutions may be pursued for all controlled substances and other substances (which controlled substance analogues are incorporated therein).

General understanding of the meanings of the words "Treatment and Treated".
Section 813's sub-heading's plain and ordinary meaning; "**Treatment of controlled substance analogues"**. Does not state "**Penalties of controlled substance analogues"**. And **Section 813's** paragraph's directives does not state, "A controlled substance analogue" shall, be penalized, for the purposes of any federal law as a controlled substance in schedule I. The government has arbitrarily thwarted the **CSAEA** purpose and true intent; interpreting this text so far as the meaning of the words fairly permit in respects to the words "treatment" and "treated", consciously substituting their general meanings for "penalized" and "penalties".

Distinctions between Part B- Authority To Control; Standards and Schedules and Part D- Offenses And Penalties.
Isolation of **§ 813's** provision from the overall statutory scheme of the **CSA** is absurd, Congress would not have incorporated **§ 813** herein Subchapter1 of Part B- Authority To Control; Standards And Schedules of the **§ 801 (CSA)** if Congress did not contemplate SubChapter1 and Part B's counterparts to be applied to analogues. Congress may have embedded **Section 813's** provision under Part D- Offenses And Penalties, but Congress did not. The directive in part of **Section 813's** provision, "if intended for human consumption", is pursuant to **Section 811. Authority and Criteria for classification of substances** within this title. Which is to be determined and exercised by the Attorney General as Congress delegated such authority and through the **CSA** itself before initiation of scheduling substances for prosecutions, with respect for a new substance. **§ 813's** directives are not to be determined by the district courts, jurors, or scientific experts opinion's at a defendants trial, debating over if a substance is "substantially similar" to an already controlled substance under schedule I or II.

Congressional findings of "Designer Drugs", referenced herein ***Title 21 U.S.C.S.***

In regards to **§ 813**, statutorily Congress has pre-existing established procedures outlined in **|Title 21 Food And Drugs| Chapter 13. Drug Abuse Prevention And Control |Control And Enforcement| Introductory Provisions| Section 801. Congressional Findings and declarations: Controlled Substances.**

The Congress makes the following findings and declarations: **(1)-(7) (Oct. 27, 1970, P. L. 91-513, Title II, Part A, section 101, 84 stat. 1242.) History; Ancillary Laws And Directives references in text: |Effective date of section:| Short Titles: 11th Sub-Title CSAEA|..**

History; Ancillary Law and Directives of other provisions: effective date of Title II of Act Oct. 27, 1970, P.L. 91-513, Title II, Part-G, § 704, 84. stat. 1284, provides;
Development of model protocols, training materials, forensic field test, and Coordination mechanism for investigations and prosecutions relating to gamma hydroxybutyric acid, other controlled substances, and designer drugs. **Act Feb. 18, 2000, P.L. 106-172, § 6, 114 stat. 11**, provides: "**(a) In general.** The Attorney General, in consultation with the Administrator of the Drug Enforcement Administration and the Federal Bureau Investigation, shall-- **"(1) develop--"(A)** model protocols for the collection of toxicology specimens and the taking of victim statements in connection with investigations into and prosecutions related to possible violations of the **Controlled Substances Act [21 U.S.C.§§§ 801 et seq.** Generally; for full classification, consult USCS Tables volumes]. Or other Federal, or State laws that result in or contribute to rape, other crimes of violence, or other crimes involving abuse of gamma hydroxybutyric acid, other controlled substances, or **designer drugs**; and **"(B)** model training materials for law enforcement personnel involved in such investigations...

First, Supreme Court Precedent Decision in Support of Conjunctive Statutory Construction at issue here.

(C). The Supreme Court in **McFadden v. United States,** interpreted the **CSA** in precisely that manner: "In addressing the treatment of controlled substance analogues under federal law, one must look to the **CSA. "135, S. Ct. 2298, 2300, 192 L Ed. 2D 260 (2015).** "...[T]he **Analogue Act** extends that framework [in the **CSA** from controlled substances] to analogue substances. **"id. At 2301.** Here like, **§ 811(h),** the **Analogue Act** inserted **§ 802(32)(A)** and **§ 813** into the **CSA,** and it is clear that they should likewise be interpreted together with the whole framework of the **CSA.** Congress is never presumed to make sweeping policy changes in a vague or unclear manner; changes to well-settled law require clear intent. **United States v. Langley, 62 F. 3d. 602, 605 (4th Cir. 1995).** A major change in the existing rules would not likely have been made without specific provision in the text of the statue (citation

omitted)." It is most improbable that it would have been made without even any mention in the legislative history."**United States v. Savings Association of Texas v. Timbers of Inwood Forest Associates, LTD, 484, U.S. 365, 380, 108, Ct. 626, 635, 98 L. Ed. 2D 740 (1988).**

Dispensing with the procedural requirements for scheduling a substance that allegedly poses a threat to public safety would indisputably be a sweeping policy change and a vast departure from the clearly laid out and very specific procedures theretofore followed under the **CSA**. A reading of the **CSA** and SubChapter 1 as a whole does not fairly support the proposition that no procedural requirements whatsoever do not apply to analogues; these interpretations support only the conclusion that the overall statutory scheme applies to analogues as well. As various portions of the **CSA** and all other acts relating to the same subject or having the same general purpose, are to be read together as constituting one law such that equal dignity and importance will be given to each. **§§ 801-813** are in Pari Materia, having the same general purpose in the construction of the **Controlled Substance Act** and SubChapter1 and Part B of this title.

Second, Supreme Court Precedent Decision in Support of Statutory Construction at issue here.
(F). In **United States v. Spain,** the Tenth Circuit's conclusions that the section inserted into the **CSA** authorizing temporary scheduling, **§ 811(h),** was "a different and separate addition to the **ACT** with a new purpose and procedure, "was overturned by the Supreme Court in ***Touby***, as recognized in **United States v. Raymer, 1991 U.S. App. LEXIS 10700, 1991 WL 86884, 16n.6 (10th Cir. 1991).** Likewise, the provisions of sections of Subchapter part 1 enacted at different times "do not operate in conflict with each other; rather, the latter continues the statutory scheme of the former. **"146 LED2D 121, 529 US 120 FDA V. BROWN & WILLIAMSON TOBACCO 3/21/2000".** (observing Supreme Court directives to interpret a statue "as a symmetrical and coherent regulatory scheme" and "fit, if possible all parts into an harmonious whole"(internal citations omitted)).

(G). Once again, the **Controlled Substance Analogue Enforcement Act** of 1986 was not enacted as standalone legislation, Congress amended **§ 802 definitions**, adding para **(32)** and added **§ 813's** new section into the existing framework of the **CSA** for controlled substance analogues in SubChapter1 of Part B. Cognitively, Congress intends for the procedural requirements of the **CSA** and of SubChapter1 and Part B- Authority To Control; Standards And Schedules, as a whole to be applied to analogues. Again, which, is in fact the only operation and enforcement of the **CSAEA**. **Section 813** directives is administration law; only to be exercised by the Attorney General to administer through the **CSA** of this title. Not outside law enforcement departments, district courts, or a jury for determinations as to the

determinations if a substance is a "controlled substance analogue".

Whole statue interpretation instructs that portions of a statue should be interpreted in light of the whole, and not as a distinct entity divorced from the statue in which it is embedded. **See Davis v. Michigan Dept of Treasury, 489, U.S. 803, 109 Ct. 1500, 103 L. Ed. 2D 891 (1989)** (rejecting interpretation that failed to read clause "in it's context within the overall statutory scheme"). Case law specific to the statues in question instructs that various parts of Subchapter part 1- which encompass the **CSA**, the **CSAEA**, and other related acts – likewise instructs that they be interpreted as such.

Third, question at issue here, as to Statutory Interpretation in precedent common law.
(H). Statutory interpretation not addressed in *Raymer, and McFadden,* defendant finds it to be unconstrained by prior precedent. Because facial challenges are appropriate when a statue implicates First Amendment rights. **United States v. Mazurie, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2D 706. 409 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2D 706 (2010).** See also ***Klecker,*** citing **United States v. Sun, 278, F. 3D 302, 309 (4th Cir. 2002).** The nature of the analysis, however, first requires a review of the legislation history. These issues of statutory mandate and congressional intent appear all that is necessary to resolve this case before the court.

II.

Legislation History of the CSAEA

(A). In 1970, Congress enacted the **CSA** (hereinafter "**CSA**"); the controlled substances scheme is located in Title 21, Chapter 13, and compromised of Subchapter1, Parts A through F. **21 U.S.C § 801 et, seq**, Part B, Authority to Control; Standards and Schedules, "categorized controlled substances into five schedules (I-V) according to various criteria pertaining to it's potential for medical use or recreational abuse. **21 U.S.C § 812**. Part B also authorized the Attorney General to add or remove substances from the schedules, or to move substances to a different schedule, upon compliance with specified procedures. **21 U.S.C § 811(a)**. Compliance with those procedures, however, took some time and effort. First, the Attorney General must request a scientific and medical evaluation from the Secretary of Health and Human Services (**HHS**), together with a recommendation as to whether the substance should be controlled. A substance cannot be scheduled if the Secretary recommends against it. **§ 201 (b), 21 U.S.C § 811 (b)**.
Second, the Attorney General must consider eight factors with respect to the substance, including it's potential for abuse, scientific evidence of it's pharmacological effect, it's psychic or physiological

dependence liability, and whether the substance is an immediate precursor of a substance already controlled. **§ 201 (c), § 21 U.S.C § 811 (c)**. Third, the Attorney General must comply with the notice-and-hearing provisions of the **Administration Procedure Act (APA), 5 U.S.C §§ 553-559**, which permit comment by interested parties. **§ 201 (a), 21 U.S.C § 811(a)**. In addition, the Act permits any aggrieved person to challenge the scheduling of a substance by the Attorney General in a court of appeals. **§ 507, 21 U.S.C § 877**.

(B). It takes times to comply with these procedural requirements. From the time when law enforcement officials identify a dangerous new drug, it typically takes 6-12 months to add it to one of the schedules. S. Rep. **No. 98-225, p. 264 (1984), U.S. Code Cong. & Admin. News 1984, p. 3182**. Drug traffickers were able to take advantage of this time gap by designing drugs that were similar in pharmacological effect to scheduled substances but differed slightly in chemical composition, so that existing schedules did not apply to them. These "Designer Drugs" were developed and widely marketed long before the government was able to schedule them and initiate prosecutions. ("As now the **CSAEA** subjects analogues historically known as "Designer Drugs" to the **CSA** framework counterparts **§ 812** schedules to initiate prosecutions for a "Controlled Substance Analogue" term referenced in **§ 802** definitions".(Emphasis added)).

See ibid. **Touby v. United States, 500 U.S. 160, 162, 111, S. Ct. 1752, 1754, 114 L. ED. 2D 219 (1992)**. As a result of the "Designer Drug" time lag, the **Controlled Substances Act** was amended in 1984, adding **§ 811(h)** to give Attorney General temporary scheduling authority on an emergency basis as necessary to avoid an imminent hazard to the public safety. The abbreviated procedures for temporary scheduling allowed the government to respond more quickly to emerging designer drugs. Temporary scheduling under **§ 201(h)** allows Attorney General to bypass for a limited time, several of the requirements for permanent scheduling, only considering three of the eight factors required for permanent scheduling. **201(a)(3), 811(h)(3)**. Rather than comply with the Administration Procedure Act (APA) notice and hearing provisions, the Attorney General need provide only 30 day notice of the proposed scheduling in the federal register. **§ 201(h)(4), 21 U.S.C § 811(h)(4)**.
Finally, **§ 201(h)(6), 21 U.S.C § 811(h)(6)**, provides that an order to schedule a substance temporary "is not subject to judicial review." Because it has fewer procedural requirements, temporary scheduling enables the government to respond more quickly to the threat posed by dangerous new drugs. A temporary scheduling order can be issued 30 days after a new drug is identified, and other remains valid for one year. During this 1-year period, the Attorney General presumably will initiate the permanent scheduling process, in which case the temporary scheduling order remains valid for an

additional six months. **§ 201(h)(2), 21 U.S.C § 811(h)(2)**. **Touby, 500 U.S. At 163.** Subsequently, the Attorney General delegated temporary scheduling authority to the **Drug Administration Enforcement (DEA). 28 CFR. § 0.100(b)**.

In ***Touby***, the Supreme Court upheld the constitutionality of the attorney general's delegation of scheduling power to the **DEA. 500 U.S. 160, 111, S. Ct. 1752, 114 L. Ed. 2D 219 (1991)**. At this point, prosecutions for the manufacture, distribution, or possession of a controlled substance were covered under the **Controlled Substances Act (CSA)**, and a "temporary scheduling order could not take effect until the thirty-day notice period had expired, there remained a thirty-day window of time from identification to control, during which prosecutions remained unauthorized by even the abbreviated temporary scheduling procedures enacted in **§ 811(h)**.

(C). Shortly thereafter, the **Controlled Substances Analogue Enforcement Act** of 1986 ("**Analogue Act**") was enacted. 100 stat. 3207, Subtitle E. The **Act** accomplished two things- first, it defined an analogue by inserting Paragraph **(32)(A)** into the existing definitions of **21 U.S.C § 802** contained in Part A- Introductory Provisions Subchapter 1 ("Definitions"). **21 U.S.C 802(32)(A)**. Second, adding **§ 813** into Part B- Authority To Control; Standards and Schedules, embedding both in the existing framework of the **Controlled Substances Act** specifying that a controlled substance analogue shall, to the extent intended for human consumption, be treated, for purposes of any federal law as a controlled substance in schedule 1.Notably, the **Analogue Act** made no further additions to the **Controlled Substances Act** pertaining to procedures; no separate regulatory scheme or procedural treatment for analogues was created, leaving only those already in place for scheduling controlled substances.

Dispensing with procedural requirements for scheduling a substance that allegedly poses a threat to public safety would indisputably be a sweeping policy change and a vast departure from the clearly laid out and very specific procedures theretofore followed under the **CSA**. A reading of the **CSA** as a whole cannot fairly support the proposition that no procedural requirements whatsoever should apply to analogues; these interpretations support only the conclusion that the overall statutory scheme applies to analogues as well.

However, on the contrary, there is no evidence of congressional intent to dispense with all procedural requirements for scheduling for analogues. In fact, the statements of congressional intent made in support of the **Analogue Act's** passage are beyond clear as to the opposite intent:

Rec. 16, 411. The bill was intended to make illegal "chemical substances- so called 'designer drugs'- which are not currently covered by the **Controlled Substances Act**. Id. (emphasis added) In the house, Representative Dan Lungren, the bill's sponsor, remarked that the intent of the bill was to close a loophole in the federal drug laws- "the time lag between the production of these new designer drugs and their subsequent control under the **Controlled Substances Act**. "**131 Cong. Rec. 18, 938;** see also **131 Cong. Rec. 19, 114-15** (statements of Sen. Hawkins) ("[A]s we have discovered, as fast as the government outlaws designer drugs, the chemist can synthesize new ones."); **131 Cong. Rec. 27, 311** (statements of Sen. D'Mato, noting that the bill "closes the loophole in present law that allows the creation and distribution of deadly new drugs without violating federal laws") (emphasis added). **United States v. Fedida, 942, F. Supp. 2d. 1270, 1275 (M.D. Fla. 2013)** (citing portions of numerous remarks in the Senate as to purpose and intent.). Consider also: "This can be done legally because each analogue must go through the procedure required for substances to be put on the controlled substance list and the underground chemist come up with new analogues faster than the **DEA** can get the drugs listed. **Cong. Rec. S17842-04, 1985 WL206395** (daily ed. December 18, 1985) (statements of Sen Hawkins) (emphasis added). "Synthetic narcotics analogues can be developed and produced faster than they can be identified and controlled. Even with the emergency scheduling provisions of the **Controlled Substances Act**, the clandestine labs can always stay beyond the reach of the law with a slightly different compound that is not yet on the schedule of controlled substances. **131 Cong. Rec. E1320-01, 1985 WL 705499** (daily ed. Apr.3, 1985) (statements of Rep. Rangel). (emphasis added).

(D). There is nothing ambiguous about [E]ach new analogue must go through the procedure required for substances to be put on the controlled substance list,"nor is that intent permissive (emphasis added). These findings naturally leads to the question of timing, which is relevant in this case in two respects: statutorily, and constitutionally.

Defendant's position is a matter of constitutional notice, that the Attorney General (notices of intent) in the federal register initiating scheduling for the specific substances methoxyacetyl fentanyl and cyclopropyl fentanyl weren't published until after the time of defendant's alleged conducts.
On this point, the authorized agency, the Attorney General is therefore capable of knowing very soon the precise chemical composition of a substance, and therefore, whether a substance is physically substantially similar to a controlled substance, rendering it an analogue. Further, "**section 811(h)** provides for a summary method to place drugs on schedule I without hearing or findings, "and essentially dispenses with virtually every other scheduling requirement in **811(a)**. **United States v.**

Spain, **825 F. 2D 1426**. "No scientific factors [are] involved nor are outside views provided for on any subject. The ultimate conclusion is as to 'public safety'. "**Id. At 1428**. Thus, apparently, the Attorney General can initiate temporary scheduling armed with little more than a GC/Mass Spec printout and a concern for public safety.

With **§ 811(h)'s** temporary scheduling procedures, it appears the only delay the Attorney General faces in publishing notice of intent to schedule, rendering analogues (specific substances) subject to prosecution, are delays entirely within it's law enforcement's- own control. Here, the question of timing is resolved precisely, as the discovery of methoxyacetyl fentanyl and cyclopropyl fentanyl, which is clearly in violation of what Congress envisioned, and of any reasonable expectation. Especially given the relative speed at which the process can be initiated, and the length of time since discovery, there is no apparent reason that would excuse the failure. These issues of statutory mandate and congressional intent appear all that is necessary to resolve the case before the court. However, with regard to the relevant aspect of timing- under what circumstances the failure to timely schedule undermines constitutional notice.

The federal courts have held that the **Controlled Substance Analogue Enforcement Act** permits investigation at any given time because otherwise, "if no notice and hearing were required [for investigation] every time a new substance is targeted as a potential analogue, the statue would serve no purpose whatsoever. "**United States v. Roberts, 2001 U.S. Dist. LEXIS 20577, 2001, WL 1602123 (S.D. N.Y. 2001)**. The defendant's agrees. The key aspect of this holding, however, is that it applied specifically to investigation. Id. It does not automatically follow that prosecution under the **Controlled Substance Analogue Enforcement Act** is authorized at any time, under any circumstances. Indeed, Congress did not appear to envision that possibility beyond the initial period when the Attorney General encounters a substance of first impression. The defendant believes that the circumstances and timing in this case are not only statutorily unjustified, but also undermined defendant of constitutional notice.

III

Policy Considerations

(A). Lastly, beyond what has already been addressed, there are significant and compelling policy considerations that caution strongly against upholding indictments for analogues when the attorney general has not followed scheduling mandates timely. When the substance is one the Attorney General

failure to timely schedule effectively converted what would have undoubtedly been a simple and quickly- resolved controlled substance case into a complex and protracted analogue prosecution involving numerous pre-trial motions and hearings, and which has already involved expert witnesses to some extent. The larger policy issue here is that when the Attorney General fails to timely move an analogue for scheduling, it effectively enables internet retailers to truthfully state that substances are "not scheduled" in the United States. While technically accurate, this is wildly misleading to any individual without significant legal acumen, as it implies that purchase and possession is entirely legal.

IV.

Attorney General's Failure to Timely Schedule Deprives Defendant of Due Process

(A). It is not disputed that the Attorney General may investigate any substance at any time, regardless of whether it has initiated scheduling procedures, to determine whether it poses a threat warranting control. The Attorney General may seize a substance for analysis in furtherance of that investigation. However, at the time a determination is made that the seized substance is considered to be an analogue and prosecution is initiated, the defendant believes that the Attorney General is then obligated to initiate scheduling procedures, not only for the first defendant prosecuted, after scheduling but for subsequent defendant's, too. That is publication in the federal register and an initiation of the scheduling procedures provides two very important things: first, it provides any defendant who aren't the "underground chemist" targeted by the **Controlled Substance Analogue Enforcement Act** and who don't have background in advanced chemistry- that is, "persons of average intelligence"- notice in terms they can understand, allowing them to tailor their behavior to comport with the law and avoid the substance from that point on. Second, and the bigger picture, is that initiating scheduling procedures also provides due process afforded to all subsequent defendant's because **§ 811(h)(6)** allows "an individual facing criminal charges...[to bring] a challenge to a temporary scheduling order as a defense to prosecution. "**Touby, 500 U.S. At 168, 111, Ct, at 1758**. A defendant can hardly bring a challenge to a temporary scheduling order if there is none-if it is withheld by the Attorney General. Therefore, the Attorney General failure to initiate scheduling timely creates unnecessary concerns for both notice and due process.

V.

Controlled Substance Analogue Promulgated Regulations as Schedule I Drug Legal Status

(A). Title **21 U.S.C. § 811(h)** Drug Abuse Prevention And Control And Enforcement Authority to Control Provisions.

(i). The subject as to which the discretion is exercised (public safety) and the breadth of the discretion given by Congress and the summary internal proceedings are factors to be considered in examining sub delegation to the **DEA**. It must be observed that we are concerned with new executive branch proceedings to create the definition of a felony which are summary and internal in nature.

(ii). Defendant's are not guilty of "controlled substance" offenses where the regulation that considered methoxyacetyl, & cyclopropyl, analogues of an already "controlled substance" fentanyl a schedule II substance under **21 U.S.C. § 812,** which wasn't statutorily and constitutionally legally effective when defendants were criminally charged. Therefore were not in violation of **21 U.S.C. §§ 813, 841** and **846**.

(iii). The Drug Enforcement Administration promulgated a regulation adding methoxyacetyl & cyclopropyl to the schedule of "controlled substances" established by **The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 et seq**. In proposed rules in the federal register on September 12, 2017, & November 21, 2017.

(iv). 21 C.F.R. § 1308.48 provides that as soon as practicable after the presiding officer has certified the record to the administrator, the administrator shall cause to be published in the Federal Register his order in the proceeding, which shall set forth the final rule and the findings of fact and conclusions of law upon which the rule is based. This order shall specify the date on which it shall take effect, which shall not be less than 30 days from the date of publication in the Federal Register unless the administrator finds that conditions of public health or safety necessitate an earlier effective date, in which event the administrator shall specify in the order his his findings as to such conditions.

(B). As the court noted in **Kring v. Missouri 27 LED 506, 107 US 221** Any law is an ex post facto law, within the meaning of the Constitution, passed after the Commission of a crime charged against a defendant, which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage; and no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.

(i) As the courts quotes in **United States v. Turcotte 286 F. Supp. 2D 947: July 2, 2003. 21 U.S.C § 841(a)(1)**, of the **Controlled Substances Act**, clearly contains a knowledge element. But "knowingly" is customarily interpreted as factual knowledge, as distinguished of the law, consistent with maxim that ignorance for the law is no excuse.

VI.

The Attorney General's Publication in the Federal Register before Rules And Regulation may take effect for Methoxyacetyl Fentanyl, and Cyclopropyl Fentanyl

(A). The Attorney General and the **Drug Enforcement Administration** weren't aware of any laboratory identifications of Methoxyacetyl fentanyl,or Cyclopropyl fentanyl prior to 2017.

(i). The **Drug Enforcement Administration** web based, commercial laboratory information management system (STARLiMS), queried on June 19, 2017 for methoxyacetyl fentanyl, the **DEA's** three-factor analysis, & the assistant secretary's July 14, 2017 letter's are available in their entirety under the tab "Supporting Documents" of the public docket of this action at (http://www.regulations.gov) under FDMS Docket ID: DEA-2017-00005 (Document Number DEA-473).

(ii). Also, (STARLiMS) reports were queried on August 25, 2017 for cyclopropyl, the **DEA's** three-factor analysis is available in it's entirety under "Supporting and Related Material" of the public docket for this action at (http://www.regulations.gov) under Docket Number DEA-474.

(iii). The acting administrator Robert W. Patterson transmitted notice of his intent to place methoxyacetyl in Schedule I on a temporary basis to the Assistant Secretary of Health of **HHS** by letter dated: July 5, 2017.

(iv). Then the acting administrator's (intent of notice to the public) acknowledging methoxyacetyl as an analogue of fentanyl was published on September 12, 2017. 82 FR 42754 (/citation/82-FR-42754), which temporary scheduling order effective date was October 26, 2017.

(v). The acting administrator transmitted notice of his intent to place cyclopropyl fentanyl in schedule I on a temporary basis to the Assistant Secretary for Health of **HHS** by letter dated August 28, 2017.

(vi). The acting administrator's (intent of notice to the public) acknowledging cyclopropyl as an analogue of fentanyl was published on November 21, 2017. 82 FR 55333 (/citation/82-FR-55333), which temporary scheduling order effective date was January 4, 2018.

(vii). Prior to the acting administrator Robert W. Patterson's (intent of notice to the public) acknowledging these new substances, now known as "methoxyacetyl" and, "cyclopropyl", which, the Attorney General now consider as analogues of fentanyl. Neither, substance prior to these findings of facts were constitutionally legal to subjection of the administrative, civil, and criminal sanctions and regulatory controls applicable to Schedule I controlled substances under the **Controlled Substance Act 21 U.S.C. §§§ 801, 802, 813, 841 and 846**, on the manufacture, distribution, reverse distribution, possession, importation, exportation, research, and conduct of instructional activities, and "chemical analysis" of these synthetic opioid.

VII.

Violation of the Statutory Provisions/and Lack of Subject-Matter Jurisdiction

(A). Defendant's challenge to this indictment for alleged violations of **21 U.S.C. §§§ 802, 813, 841(a)(1), & 846**, had no legal justification prior to the Attorney General and **DEA** acting administrator Robert W. Patterson's (intent of notice to the public) placing methoxyacetyl fentanyl, & cyclopropyl fentanyl on schedule I of **The Comprehensive Drug Abuse Prevention and Control Act of 1970 (Drug Abuse Act), 21 U.S.C. § 801 et seq**. Which requires examination of the merits of defendant's claims, that the regulatory order upon which this indictment was based was promulgated in violation of the **CSA § 811's Statutory Provisions.**

(i). The general rule is that in the absence of an express provision, an act of congress takes effect on the date of it's enactment. Here, however, because the rule making authority has been delegated to the Attorney General, **§ 811(a) and (h)** of the **Controlled Substances Act** requires publication in the Federal Register at least 30 days prior to the order's effective date unless good cause is shown to fore go the full notice period.

(ii). Thus, since good cause is lacking here, the criminal prohibition against the manufacture, distribution, reverse distribution, possession, importation, exportation, research, and conduct of instructional activities, and chemical analysis of methoxyacetyl fentanyl & cyclopropyl fentanyl wasn't

constitutionally legally effective before the defendant's alleged offenses, which occurred prior to the **Attorney General's** and **DEA's** acting administrator's publications in the Federal Register, and therefore was not in violation of **§§§ 802, 813, 841 (a)(1), and 846**.

(iii). Which defendant's claims are supported by public docket sheets & documents published by the Attorney General in the federal register concurring the substances history & backgrounds at:
https://www.gpo.gov/fdsys/pkg/FR-2017-10-26/pdf/2017-23206.pdf
https://www.gpo.gov/fdsys/pkg/FR-2017-11-21/pdf/2017.pdf

(B). As the courts noted in **United States v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977)** The legislative history 8 of the **APA** reveals that the purpose for deferring the effectiveness of a rule under **§ 553(d)** was to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take other action which the issuance may prompt." **S. Rep. No 752, 79th Cong., 1st Sess. 15 (1946); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946)**. 9 The legislative history also indicates the **APA** was not intended to unduly hamper agencies from making a rule effective immediately or at some time earlier than 30 days. However, proponents of the bill make clear that the good cause exception was not to be an "escape clause which may be arbitrarily exercised but requires legitimate grounds supported in law and fact by the required finding." 10 Legitimate grounds were defined as an "urgency of conditions coupled with demonstrated and unavoidable limitations of time," 11 and that the primary consideration was to be the "convenience or necessity of the people affected.

(i). As the courts noted in ***Gavrilovic,*** we think it clear that congress intended to impose upon an administrative agency the burden of showing a public necessity for an early effective date and that an agency cannot arbitrarily find good cause. In determining whether the good cause exception is to be invoked, an administrative agency is required to balance the necessity for immediate implementation against principles of fundamental fairness which requires that all affected persons be afforded a reasonable time to prepare for the effective date of its ruling. When the consequence of agency rule making is to make previously lawful conduct unlawful and to impose criminal sanctions, the balance of the competing policies imposes a heavy burden upon the agency to show public necessity.
(C). Congress didn't direct the U.S. Attorney General to bypass the usual scheduling procedures of **21 U.S.C.S § 811(h)** or (the public notice requirement) by **§ 553(d)** of the **Administrative Procedure Act** before such a regulation could become effective at the prescribed times of defendant's alleged offenses. As the court noted in ***Gavrilovic***, "Which was not a controlled substance under federal law at the time of conducts, therefore the district court lacked subject-matter jurisdiction.

(i). As the court noted in **United States v. Reynolds, 710. F.3d 498:: November 13, 2012,** administrative agencies are legally bound by their own regulations, & a criminal prosecution founded on an agency rule should be held to the strict letter of the **Administrative Procedure Act**.

(ii). There was no such order issued by **21 U.S.C.S. § 811(h)** as contemplated by the **Controlled Substances Act** or the **Controlled Substances Analogue Enforcement Act**, that methoxyacetyl fentanyl, & cyclopropyl fentanyl, became a Schedule I drug at the prescribed times of alleged offenses. As the court noted in **United States v. Caudle, 828 F.2d 1111 (5th Cir. 1987)** (failure to follow the procedures set forth in **§ 811(h)** requires dismissal of the indictment). As, this indictment is void because the criminal jurisdiction statute 18 U.S.C. § 3231, was never effective, as there were never any criminal offenses committed against the laws of the United States.

VIII.

AUSA Rachael L. Dizard's Admissions on the Record

(A). Consider also, at defendant's **DETENTION HEARING** held on August 16, 2017 in United States District Court, Pittsburgh, Pennsylvania. Before: Lisa Pupo Lenihan District Magistrate; whom ordered Rachael Dizard, esq. Assistant U.S. Attorney to define what a fentanyl analogue was in open court;

AUSA Rachael L. Dizard affirmed on lines 10-25 on page 26, & on lines 10-16 on page 27, of defendant's detention hearing mechanical transcripts, with the **CSA** Statutory Mandates and the Administrative agencies the **DEA** and **FDA** of the Attorney General's notice of intent and regulation orders in the federal register referenced throughout this motion by stating, "there is kind of necessarily a lag time between when law enforcement first encounters new analogues on the street and it seems worthwhile to add it to the schedule because it is becoming prevalent enough and when they get added to the schedule, so, via the **Analogue Act**, they become prosecutable."

As I emphasize, which is only after the specific substance goes through the proper procedures required by statutory mandates prescribed in the **CSA** which then becomes legally "**Controlled Substance Analogues**" as the term defined in Section **802** definitions. As recognized by the *Chevron* courts, (Whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court's determines Congress has not directly addressed the precise question at issue, the courts does not simply impose it's own construction

on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statue. **Chevron, 467 U.S. at 842-43.** Reiterating, **Wiltberger, 18 U.S. (5 Wheat.) at 95** ("[T]he Power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain it's punishment."); **Smith v. United States, 360 U.S. 1, 9, 79 S. Ct. 991, 3 L. Ed. 2D 1041 (1959)** (applying the "the traditional Canon of Construction which calls for the strict interpretation of criminal statues and rules in favor of defendant's where substantial rights are involved," in part to avoid "oppressive and arbitrary proceedings").

Constitutionally, statutorily, and legislatively the **CSA** and the **CSAEA** does not permit prosecution of a defendant before publication of the Attorney General's of the (**DEA**) scheduling order for their authority to control the specific substance at issue in the federal register. .

IX.

Congressional Intent

(A). The only conclusion to be drawn from the statutory framework of the **CSA** and the **CSAEA** together is that Congress did not fail to create a separate procedural scheme for analogues, because Congress unequivocally intend once the Attorney General has identified an analogue, upon discovery, to move for scheduling, as required through the procedures outlined in- and clearly mandated by- the **Controlled Substances Act** and Subchapter 1 as a matter of clear statutory mandate and congressional intent, the Attorney General must adhere to **§ 811** scheduling procedures once an analogue has been discovered. Adherence to the commands of the statue, including in the **CSA**, is required when applying the **CSAEA**. When the **Attorney** fails to follow the "exact statutory procedure" mandated by the **CSA**, the proper remedy is dismissal of the indictment. **United States v. Caudle, 825 F. 2d. 111, 1112, (1987). 8 ct. Spain, 825 F. 2d at 1429** (reversing conviction as remedy for failure to follow directives of statue; subsequently reversed on other grounds). Here, the Attorney General failure to timely comply with this clear statutory mandate warrants dismissal of this indictment. Indeed, though most courts have upheld indictments for analogues, they have done so on different grounds, and under different factual scenarios. The holding in this case is thus easily distinguished from any precedent decision (or quite possibly, all decisions) regarding the **Controlled Substance Analogue Enforcement Act**. Even if it was not, it is well settled that in our hierarchy of laws, in this case of conflict between statue and case law, a statue prevails. Here, the statues directives and Congress intent are legislatively clear.

(B). When we examine the legislative, and draft history of the **CSAEA**, Congress intent defines all logic, the **CSAEA** isn't a oxymoron, it's construct doesn't provide a platform for arbitrary enforcement by Congress. Instead, by the Attorney General which Congress delegated authority to, allowing them to sub-delegate that same authority to the **DEA** through the **CSA.** In this insufficient indictment, which is in violations of defendant's civil rights and is inconsistent with our values our fairness, equality, and justice. The great thing about America is we have a rich history of reversing mistakes and today is no different, if you may grant this motion to dismiss, encouraged by evidence of Congress true intent, you may rest assured that you also will be on the right side of history.

X

Fourth Amendment violations for "Numerous" Unreasonable Searches And Seizures (Cell Phones/Vehicles and Residences) and Due Process Violations

(A). Pursuant to the Fourth Amendment's prohibition on unreasonable searches and seizures, police must generally obtain a search warrant before conducting a search. A valid search warrant must be (1) be based on probable cause; (2) be supported by a sworn affidavit; (3) describe particularity the place of the search; (4) describe particularity the persons or things to be seized. The purpose of the Fourth Amendment's particularity requirement is to prevent general exploratory searches. A warrant offends the particularity requirement when it amounts to a "general warrant" or one that is unconstitutionally over broad. A general warrant "vest[s] the executing officer with unbridled discretion to conduct an exploratory rummaging... in search of criminal evidence."An over broad warrant" described in both specific and inclusive generic terms what it to be seized, but... authorize the seizure of items as to which there is no probable cause. **U.S. v. Dewald:: January 18, 2019:: 2019 U.S. Dist. Lexis 8792.**

In **Bartholomew v. Commonwealth of Pennsylvania, 221, F. 3d 425 (3d Cir. 2000).** In that case, an agent in Pennsylvania's financial investigation unit requested a warrant to search the plaintiffs home and business. The agent also participated in the execution of the warrant to search the business. **Id .at. 426-27.** "The affidavit [offered in support of the search warrant] and the lists of items to be seized were sealed... "i**d. at. 427**.

As recognized in, **United States v. Mejia:: December 8, 2016:: 2016 U.S. Dist. Lexis 172575 quoting *Bartholomew,*** The Third Circuit held that "generally speaking, where the lists of items to be seized does not appear on the face of the warrant, sealing that list, even though it is incorporated in the

warrant, would violate the Fourth Amendment. **id. at 429-30**. The Third Circuit reasoned, in relevant part: Clearly, a problem at least potentially arises when much of the requisite information for a warrant is found in a document other than the warrant itself because, on the face of the warrant, the necessary particularity will be lacking. The Third Circuit concluded, however, along with most courts, that "[w]hen a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used to construing the scope of the warrant ." **Johnson, 690 F. 2d at 64-65.** The requirement that affidavits accompany warrants which themselves lack particularity serves two purposes: one, to limit the agent's discretion as to what they are entitled to seize; and two, to inform the subject of the search what can be seized. See **United States v. McGrew, 122 F. 3d 847, 849 (9th Cir. 1997).** Here, the warrant did in fact reference the lists of items to be seized as Exhibit A and thus,'incorporated' the lists of items. That exhibit, however, was sealed. Before us, then, is the unusual, and largely heretofore undiscussed, question of whether an incorporated but sealed lists of items can be used seized in construing the scope of the warrant in order to determine whether the warrant will pass constitutional muster. What little case law there is suggests it would it would not. As the *McGrew* Court observed, "[I]f the government wishes to keep an affidavit under seal."- in order to protect witnesses, for example- "it must list the items it seeks with particularity in the warrant itself. It is the governments duty to serve the search warrant on the suspect, and the warrant must contain, either on it's face or by attachment, a sufficiently particular description of what is to be seized." **id. At 850.** The District Courts, as we have noted, concluded that because the list was sealed, the warrants themselves were devoid of the requisite specificity and, thus, that the Fourth Amendment was violated... We agree with the District Court that the warrants were not sufficiently particular to satisfy the Fourth Amendment... **id. at 428-29.**

As recognized in, **United States v. Wecht, 619 F. supp. 2D 213, 226(W.D. Pa 2009)** (explaining that search warrant was deficient when it did not incorporate by reference the search warrant application or affidavit of probable cause, nor were such documents attached to the warrant or present at the time of search")(citing **Groh v. Ramirez, 540 U.S. 551, 568, 124 S. Ct. 1284, 157 L. Ed. 2D 1068 (2004)).**

(B). At the time the warrants was signed, the "supporting documents" logically couldn't have been attached, or for this matter, been reviewed thoroughly by the issuing magistrate's. As no modifications were made to the warrants themselves or the supporting documents at issue in this case. The main focus here, is the assessment that despite the magistrate's authorization, (was agent Tetrault, a well trained officer and employee of the Homeland Security Department whom is an overqualified experienced agent assigned to protect our citizen's rights and who is in charge of protecting our national security for

the United States of America) with extensive experience with preparing and executing search warrants knew or should have known that all her searches and seizures was illegal in contrary to the Fourth Amendment particularity requirements, and with disregards to the rights afforded to the defendant and others affected by agent Tetrault's behaviors?

As we're faced with new memories and details from historic events that were inadvertently not made a part of the record, these excuses for all the government's amendment's will not carry the day, as the issuing authority's failed to record his/her reasons for finding probable cause to issue the search warrants.

Noticeably, toward the bottom of the warrant's the issuing authority section; with no written assurances of annotations explicitly stating they've actually reviewed said documents and actually found probable cause in the affiant's supporting documents- as at the time of the searches, no amended affidavit's or amended attachment's had been drafted. Even so, non-existent updated affidavit's or attachment's, like a sealed lists of items to be searched, do not appear on the face of the warrant. (e.g., the warrants contains no language explaining that the probable cause affidavit(s) "must be/or are attached" with explanatory notes of the entirety of the search warrant's applications comprising of a specified amount of pages supporting documents, and failing to state how such information have been sworn to or affirmed before them to assure they've found probable cause to issue warrants before providing their signatures on the face of the warrant's and no proof of recorded testimony on the face of the record).

At this point, the government can't even assure the courts with material facts, that those are in fact authentic signatures actually signed by the issuing magistrate's themselves or signatures forged by agent Tetrault. Paying grave attention to the details of the affiant's personal hand writings on the (warrant's) filled out by herself. As such warrant's can be printed out from the Department Of Justice website online. Which are templates with pretext of inscribed words only requiring the blanks to be filled in.

As mentioned in **C.F. Groh v. Ramirez, supra. At 554-555. 563, and n.6** (declaring unconstitutional a search conducted pursuant to a warrant failing to specify the items the government asked the magistrate permission to seize in part because "officer's leading a search team must 'make sure that they have a proper warrant that in fact authorizes the search and seizures they are about to conduct."(brackets omitted)). Noticeably, toward the bottom of the warrant's the issuing authority section; there were no annotations made by the magistrate's on the face of the warrants indicating proof that they've actually

found probable cause

(C). Moreover, the Third Circuit has recognized that the breadth of items to be searched depends on the particular factual context of each case and also the information available to the investigating agent that could limit the search at the time the warrant application is given to the magistrate."**Yusuf, 461 F. 3d at 395.** Here, the warrant itself does not identify the offenses for which the defendant was being investigated, failing to provide law enforcement with factual context as to the possible contents of the search. See **id. at 395** (recognizing that warrants are limited where they "specifically enumerate federal crimes" for which evidence is being searched).

As recognized in **United States v. Kow, 58 F. 3d 423:: March 17, 1995**

(1). To determine whether a warrant lacks sufficient specificity, an appellate court must examine both the warrant's particularity and it's breadth.) As neither requisite exist on all issued invalid warrants in this case.

(2). Generic classifications in a warrant are acceptable only when a more precise description is not possible.) As, all descriptions of things sought were known to affiant and were possible to present to magistrate; and for the magistrate to annotate such descriptions on the face of all the warrant's at issue here, but more importantly, no generic classifications exists on the face of all issued invalid warrants in this case.

(3). Courts criticize such failure to describe in a warrant the specific criminal activity suspected.) As, none of the issued invalid warrant's in this case describes no such federal criminal offenses for written assurance of the alleged criminal activity suspected.

(4). Severance of sections of a warrant is not always possible. If no portion of the warrant is sufficiently particularized to pass constitutional muster, then total suppression is required.) As, no portion of the issued invalid warrants in this case sufficiently particularize the places to be searched and things to be seized, to pass the constitutional muster to satisfy the Fourth Amendment requirements, warranting total suppression. As severance is not available when the valid portion of a warrant is a relatively significant part of an otherwise invalid search.

(5). Evidence seized pursuant to a facially valid search warrant which later is held to be invalid may nevertheless be admissible if officer's conducting the search acted in good faith and in reasonable reliance on the warrant. The government bears the burden of proving that reliance upon the warrant was

objectively reasonable.) As, in this case evidence was seized pursuant to all facially invalid search warrant's; and conclusive evidence exist to prove all officer's conducting all said searches acted in bad faith and not on any reasonable reliance on the invalid warrant's issued by all the magistrate's in question here.

(6). When a warrant is facially overbroad, absent specific assurances from an impartial judge or magistrate that the defective warrant is valid despite it's over breadth, a reasonable reliance argument fails.) As here in this case, all the issued invalid warrant's on their face were not overbroad, and absolutely absent of specific assurance from impartial judge's and magistrate's and all warrants undermined the Fourth Amendment's requisites and agent's reasonable reliance argument shall fail and she shall be held fully responsible for her deliberate, reckless, and grossly negligence.

(7). An affidavit providing more guidance than an overbroad warrant may cure the warrant's over breadth only if **(1)** the warrant expressly incorporated the affidavit by reference and **(2)** the affidavit is either attached to the warrant or at least accompanies the warrant while agent's execute the search.) As here in this case, the warrant's does not incorporate the affidavit's of probable cause by reference and no overbroad categories of items sought exist and the supporting documents "Attachment A and Attachment B" referenced to in the invalid issued warrants were under seal and in fact not attached to the warrant's or accompanied with said warrant's when agent's executed their illegal searches and seizures.

Inter alia, the Anticipatory Search Warrants for the three residences for; **Case No.17-1008** 1020 Lakewood st., **Case No.17-1009** for 1268 Lakewood st., and **Case No.17-1010** for 7 Bond st. Pittsburgh, PA 15220, were facially deficient, and did not issue in compliance with **Federal Rule of Criminal Procedure 41 (e)(2)(A)(i)** and **(iii)** warrants failed to command the officer's to; execute the warrants within a specified time, no longer than 14 days; and failed to designate the magistrate judge in the warrants, to whom the warrants must be returned to. In violations of defendant's 4th and 5th amendment rights of the U.S. Constitution, for significant prejudice, which offends concepts of fundamental fairness in due process, as all three anticipatory search warrants was inoperative, and all searches and seizures was illegal.

(D). As mentioned in, **United States v. McGrew, 127 F. 3d 847::(9th Cir. 1997)** the "good faith" exception to the exclusionary rule is not available in these instances. In order to avoid the effect of the exclusionary rule, there must be an "objective reasonable basis for the mistaken belief that the warrant

was valid. "**United States v. Michaelian, 803 F. 2d 1042, 1047 (9th Cir. 1986)**. If the "incorporated" affidavit does not accompany the warrant, agent's cannot claim good faith reliance on the affidavit's contents. **United States v. Kow, 58 F. 3d 423, 428-30 (9th Cir. 1995); United States v. Stubbs, 873 F. 2d 210, 212 (9th Cir.1989)**. A reasonably well trained officer would have known that the search was illegal in light of all of the circumstances. Because the warrant's in this case was so facially invalid, no reasonable agent could **{58 f.3d 429}** have relied on it "absent some exceptional circumstance. See **Center Art, 875 F. 2d at 753.** The mere fact that the warrant was reviewed by two assistant united states attorney general's and signed by a magistrate judge does not amount to "exceptional circumstances". Those exact circumstances were present in Center Art and the courts found them insufficient to meet the test. As the courts explained in that case, when a warrant is facially overbroad, absent "specific assurances" from an impartial judge or magistrate that the defective warrant is valid despite it's over-breadth, a reasonable reliance argument fails. id.; see also **United States v. Crozier, 777 F. 2d 1376, 1381-82 (9th Cir. 1985); Spilotro{1995 U.S. App. Lexis 14} 800 F. 2d 959, 968 (9th Cir. 1986).**

13 Other relating matters pertaining to the Leon Court's four distinct situations.

(E). (1) Agent Tetrault deliberately omitted from her affidavit of probable cause for the issuance for all search warrants that she sworn to originally have obtained an Anticipatory Search Warrant for 1111 Chartiers Ave. Pittsburgh, Pa 15220 Apt #1 which would not be used and which was never produced to the government or the defendant for inspection. (2) Deliberately made false assertions that she reached out to U.S.P.I.S and other authorities on May 25th, 2017 after being contacted by CBP TAU specifically relating to May 31st, 2017 Avon Barksdale parcel for their assistance locating it, as such correspondent communications between all party's failed to be turned over by government for inspection by defense, (3) On May 31st, 2017 P.I. Celletti contacted her and she deliberately fabricated meeting him inside the AGH Crime Lab and instructed a Lab Tech to open the Avon Barksdale package in a safe controlled environment due to the possibilities of it containing fentanyl and it tested positive for Methoxyacetyl and Cyclopropyl Fentanyl Schedule I Drugs.

The Lab tech and her manager denied such allegations on recorded jail call with defendant at NEOCC. Stating that she never met the Inspector from the submitting U.S.P.I.S agency and that she could not tell the defendant if P.I. Celletti was a male or female with to acknowledgment of a second persons as to agent Tetrault's presence and that there were only two foils left behind for testing and which testings were completed on June 1st, 2017 for Methoxyacetyl fentanyl and June 9th, 2017 for Cyclopropyl Fentanyl as lab techs stated they were willing to help defendant investigate this matter. (4) Agent

Tetrault deliberately made another false assertion stating that before all agencies conducted June 1st, 2017 controlled delivery, they removed substance's from the target package for the safety of all agent's involved, but in all actuality during their controlled delivery of an empty package was due to the two foils being left at AGH Crime Lab. By P.I. Celletti still pending testings. (5) Agent Tetrault deliberately falsified that defendant voluntarily waived Miranda rights and provided her with information on June 1st, 2017 after an unreasonable search and seizure of defendant, where I was handcuffed and removed to another location in the back of a HSI SUV as later greeted and presented with a HSI consent waiver form by agent Tetrault as I Refused to sign and provide her with statements without an lawyer, as she and others antagonized and intimidated defendant for nearly 40min. to an hour after no actionable information from defendant as sworn by agent Tetrault.

(6) On June 2nd, 2017 agent Tetrault deliberately exceeded the scope of the issuing magistrate's authority in the 17-617 and 17-618 search and seizure warrant's issued in Pittsburgh, Pa the only warrant's where the magistrates actually gave written assurance to conduct searches based on his finding of probable cause (but authorized agent unbridled discretion to rummage through all defendant's property). Stating "During the execution of this search warrant, the law enforcement personnel are authorized to depress the fingerprints and/or thumbprints of **Lynell Guyton** onto the Touch ID sensor of the Apple iphones, **TARGET DEVICES,** with Touch ID in order to gain access to the contents of the devices.". As agent Tetrault or no other officer properly executed said warrant's, as no material facts exist to support defendant's physical prints or DNA being retrieved at said times. As agent Tetrault's June 20th, 2017 HSI affidavit affirms that (CFA) Dave Coleman unconstitutionally Jail broken into said targeted devices to gain access into defendant's private property.

(7) Agent Tetrault then deliberately corroborated false testimony supplied by PPD Narcotic Detective Andrew Shipp from a invalid search warrant executed by PPD on August 5th, 2017 at 226 Dunsieth St. 15213 for the subject of their search William Lewis Henry IV, as government failed to turn over on the face of the record to defendant for inspection, as I personally retrieved and inspected this particular search warrant and inventory forms then placed it in my personal safe at 1020 Lakewood st. which has gone missing to date. (8) Agent Tetrault deliberately submitted sworn testimony of mere conclusory statements in her affidavit of probable cause for the issuance of Three search warrants for the three August 9th residences at 1020 Lakewood st. 1268 Lakewood St. and 7 Bond St. 15220 relayed by PPD Andrew Shipp with no details of the subject's veracity, reliability, or basis of knowledge to establish a nexus between PPD officer's illegal search and seizures at 226 Dunsieth st. residence, the subject residing there, and between the defendant and the targeted residences.

(9) Agent Tetrault deliberately sworn false assertions with an omission from the August 8th, 2017 trash pull events carried out by Andrew Shipp and other PPD Detectives at 1268 Lakewood st. at 4:45am, and 4:50am at 7 Bond st residences; no trash pulls never was conducted at 1020 Lakewood St. residence in agent Tetrault's original August 8th, 2017 affidavit of probable cause and application for the issuance of the Three Anticipatory Search Warrants for the three residences submitted and allegedly approved by Cynthia Reed Eddy at 4:15pm on August 8th, 2017.
Agent Tetrault then deliberately amended the events of August 8th, 2017 trash pull at 1020 Lakewood st. approximately a year later in her HSI supplemental affidavit in 2018, stating that she and TFO Giran conducted a trash pull at defendant's residence 1020 Lakewood and that trash was curbside and they removed the trash bags at took to HSI office for inspection and retrieved firearms and further checks and then turned over firearms to PPD detective Andrew Shipp to take to Crime Lab. For testing.

Which all details of events would have been present in her original affidavit of probable cause application for the issuance of the three Anticipatory Search Warrant for all three targeted residences. And the magistrates and the Clerk of Court would have known of such supplemental information. Also, the defendant was on scene August 8th, 2017. As I personally arrived from the Rivers Casino in a Taxi on this early Tuesday morning, as I previously texted defendant Calvin Armstrong to take out my parents trash from Rivers Casino Poker Room, I arrived in a taxi at 1020 Lakewood while sanitation worker's garbage truck was coming through the alleyway 20ft. From the side of the White Vinyl residence on Lakewood st. I noticed Calvin Armstrong fell back asleep and forgot to place my parent's trash out curb side, as I personally placed three trash bins filled to their capacity's and physically assisted sanitation workers with disposing the effects, as they stated they were to heavy. And they went about their routine, as 5min. After I paid a citizen who pulls scrap material $20, an unknown older white male began knocking hardly on my parent's front porch screen door as I appeared and gestured him to speak, he stated he was with the sanitation worker's, and that they couldn't take a bin which is red tagged, but he will take it this time, as I told him I already disposed the trash here, what are you talking about? He hurriedly exited my property after attempting to obstruct my view of another unknown male leaving the property of 1022 Lakewood residence with a trash bin during our conversation. As they sped off in a MCU vehicle (resembling a kennel box truck with silver back attachment). As I believe to be Zone 6 Eric. Crawford later mentioned in superseding indictment.
As, the government failed to turn over such exhibits and PPD Chain of custody receipts from alleged trash pulls for inspection by the defendant. (10) PPD August 8th, 2017 reports were lacking in establishing a nexus (a direct connection) between I, the targeted defendant, and the three targeted

residences (technically four residences as Agent Tetrault did not have a warrant for 1022 Lakewood residence and no material facts exist or has been submitted for inspection pertaining to consent by property owner of 1022 Lakewood residence from August 8th -9th 2017 or a magistrate judge), with no indicia pertaining to ownership of said residences existed. (11) PPD August 8th, 2017 document for their conducted trash pull at 1268 Lakewood and 7 Bond st. residences was unauthenticated, failing to be verified for supervisor review as other submitted PPD reports in this case. As all this information was based off of false pretenses and stale information which was corroborated to establish probable cause for the issuance of the three search warrants for residences.

(12) Agent Tetrault set in motion two prior unconscionable schemes with PPD Narcotic Detectives, as said Detectives were turning over illegally obtained evidence from their July 20th – and August 2nd 2017 unconstitutional traffic stops. As said detectives had an active harassment claim filed against them for said events with the Municipal Office of Investigations agent Jesse Burks who deliberately informed them and failed to conduct a thorough investigation as his testimony with defendant is recorded on NEOCC phone call as well stating why he didn't do what what inquired of him in his scope of employment.

(13) On March 1st, 2018 agent Tetrault set in motion another unconscionable scheme by obtaining a search and seizure warrant by a Youngstown , Ohio magistrate judge without obtaining approval from my Western District Court Judge David S. Cercone, which pertained to offenses in this Case No. Agent Tetrault along with other agents devised a plan with NEOCC staff by deceiving defendant that I had an attorney visit with new appointed counsel by CJA panel, luring me into an secluded area were agents awaited to extract my DNA by force without any lawyer present or supporting documentation accompanying her search warrant. As I was coerced to sign her invalid search warrant after altercations with NEOCC staff as I informed them all of civil action and advised new appointed counsel Mark A. Sindler and we both advised Judge David S. Cercone and no affirmative action was taken on defendant's behalf.

As the defendant has raised all issues pertaining to the first, second, third and fourth distinct situations recognized by the *Leon* court where the Magistrate issued warrant in reliance on a deliberately recklessly false affidavit; the magistrate's abandoned his/her judicial role and failed to perform his/her neutral and detached function; the warrant was based on an affidavit so lacking indicia of probable cause as to render official belief in it's existence entirely unreasonable; and the warrant was so facially deficient that it failed to particularize the place or things to be searched or the things to be seized. As all

evidence in this entire indictment shall be excluded.

(F). The Supreme Court explained in **180 LED 2D 285, 564 U.S. 229 Davis v. United States March 21, 2011**. The deterrence benefits of exclusion of evidence vary with the culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly negligent disregards for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. Police practices trigger the harsh sanctions of exclusion of evidence only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. **L Ed Digest: Evidence § 681 Exclusion-Deterrence benefits- Police Conduct- L Ed Digest: Evidence § 681 Exclusion-Culpable practices.**

The government may attempt to view the missteps as "clerical errors", and not searches pursuant to invalid warrants. The courts must reject such an argument; a particularity description is the touchstone of a warrant." **Doe, 361 F.3d at 239**. In deed Groh itself stated that a lack of particularity cannot "be characterized as a mere technical mistake or typographical error."**540 U.S. At 558**. The District court must assess all of the facts and circumstances in determining whether the exclusionary rule should apply. See **Murray v. United States, 487 U.S. 533, 543, 108 S. Ct. 2529, 101 L. Ed. 2D 472 (1988).** ("[I]t is the function of the District court rather the Court of Appeals to determine the facts...") **Pullman-Standard v. Swint, 456 U.S. 273, 291, 102 S. Ct. 1781, 72 L. Ed. 2D 66 (1982)**"(when an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings."); **Myers v. Am. Dental Ass'n, 695 F.2d 716, 738(3d Cir. 1982)** ("As we have said innumerable times, it is not the proper role of this court to make findings of fact in the first instance.").This Court has explained that Gross negligence has been described as the want of even scant care and the failure to exercise even that care which a careless person would use." **Fialkowski v. Greenwhich Home for Children, INC., 921 F.2d 459 462 (3d Cir. 1990)(internal quotation marks omitted)**.

Did S.A Tetrault fail to exercise "reasonable care", or did her failure to read the warrants before executing it demonstrate that absence of even "scant care"? Fundamentally, the precautions we would expect an officer to take depend largely on what might happen if she failed to take them. The probable consequences of the failure to exercise care are certainly relevant to the value of deterrence. In addition ,"the value of deterrence depends upon the strength of the incentive to commit the forbidden act. "**Hudson v. Michigan, 547 U.S. 586, 596, 126 S. Ct. 2159, 165 L. Ed. 2D 56 (2006)**.

Accordingly, it makes sense to consider (1) the extent to which the violation in this case undermined the purposes of the Fourth Amendment and (2) what the government gained from the violation. The violations at issue here in fact did undermine the first two purposes of the particularity requirement as these were all general searches, as S.A Tetrault failed to oversee them all and failed to "assure that the other officer's acted in accordance with the warrant's limits, and the defendant argue that no limits were given whatsoever, as none exist on the face of the warrant's issued or the later unsealed "supporting documents". Furthermore, we can ascertain that the magistrate judges abandoned their judicial roles acting as a rubber stamp for S.A Tetrault, and failed to establish probable cause to search and seize every inclusive generic terms of catch-all-phrases of twelve categories of items agent Tetrault sought and listed in her "Attachment B", and not the warrants, which is the only issue relevant here.

At the outset that I do not believe the warrants were either general or overbroad, and that instead, they were simply invalid for lacking any description of the items to be seized. It is clear that this case does not involve **{730 F. Supp. 2D 367}** an overbroad warrant. We need not to consider whether *Groody* allows consideration of the warrant in light of the unincorporated affidavit. The warrant's in this case is not overbroad because it contains no descriptions, specific, vague, or otherwise of the items to be seized from the August 8th, 2017 residences or previous cell phone, and vehicle warrants. Rather, it states in the portion of the warrant for a description of items to be see seized, "See Attachment B" (which was under seal and not attached). Because they contained no such descriptions, the situations recognized by the Third Circuit in Groody, (in which an overborad warrant may be saved by reference **{2010 U.S. Dist. Lexis 20}** to an unincorporated affidavit) simply does not apply. Although it seems the Third Circuit would allow the courts to construe vague warrant terms by referring to an unincorporated affidavit, this by no means opens the door to construing a warrant with no seizure terms by reference to such an affidavit. In this case, we are presented with warrant's that, on their faces, contains no descriptions of items to be seized and includes no attachment meeting the particularity requirement. In *Groh*, the Supreme Court recognized that a search conducted pursuant to **{2010 U.S. Dist. Lexis 24}** to such a warrant is an unconstitutional warrantless search, even when the warrant application sets forth the items to be seized during the search and the agent executing the search limits himself to the scope of the application.

Therefore, the courts must decline to characterize all warrant as "General", because they contain not a vague or generic lists of items to be seized, but rather, as in *Groh*, no description at all. The defendant's argument that the warrants are invalid for lack of particularity is correct. **See United States v. Yusuf,**

461 F. 3d 374, 393, 48 V.I. 980 (3rd Cir. 2006)(discussing *Groh*); **United States v. Wecht 618 F. Supp. 2D 213 (W.D. Pa. 2009)**(Granting a motion to suppress evidence when the affidavit's, which was referred to on the warrant as an "Exhibit" and which contained the list of items to be seized, was sealed and was not attached to the warrant during execution). In other words, a document- usually an affidavit or list of items to be seized- may be construed in conjunction with a warrant to determine whether the requisite information is present. Incorporation by reference is allowed where the warrant (1) uses the appropriate words of incorporation and (2) the supporting documentation accompanies the warrant. See **id. At 147.** When the face of a warrant properly incorporates an affidavit or lists, but that affidavit or list is sealed and does not accompany the warrant, it cannot be used to construe the scope of the warrant and that warrant lacks the particularity required by the Fourth Amendment. **Bartholomew v. Commonwealth, 221 F. 3d 425, 429 (3d Cir. 2000)** ("We held that, generally speaking, where the list of items to be seized does not appear on the face of the warrant, sealing that list, even though it is 'incorporated' in the warrant, would violate the Fourth Amendment"). Agents and Officer's were merely on a fishing expedition.(Emphasis added)).

The *Tracey,* court reaffirmed this ruling. **597 F. 3d at 147, n.6** (observing that the warrant in Bartholomew lacked the particularity required by the Fourth Amendment because the exhibit to which the warrant referred, which contained a list of items to be seized, was sealed). The attachment of an affidavit or list to a warrant which itself lacks the requisite level of particularity satisfies Fourth Amendment requirements. **See Bartholomew 221 F. 3d at 428-29** (citing **United States v. McGrew, 122 F. 3d 847, 849 (9th Cir. 1997)).**

As the courts mentioned in **United States v. Thomas Clay Wade 956 F. Supp. 2d 638:: 2013 U.S. Dist. Lexis 95013** (The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search and seizure, but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree. The fruit of the poisonous tree doctrine does not permit exclusion of evidence simply because it would not have come to light but for the illegal actions of the police. The proper test for exclusion of evidence is whether, granting the establishment of the primary illegality, the evidence has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Although, the government may pursue an argument that the oversight of the AUSA Rachael L. Dizard and the approval of Magistrate Judge Cynthia Reed Eddy and other magistrate's (regarding isolated incidents) is sufficient to establish reasonable reliance on the warrant's at question here, which would

be absurd, as the cases on which I foresee the government relying on, will not involve warrants as facially invalid as all the warrant's involved in this extraordinary case before the Western District Court. As I have emphasized, the warrant's in this case does not list anything specific as to the 4th Amend. Particularity requirements, as no descriptions exist altogether, undermining the fourth amendment purpose and intent, violating the defendant's protections against numerous unreasonable searches and seizures, which involves ten-to-eleven facially invalid warrant's being issued (pertaining to isolated incidents), establishing the affiant's incentives, rendering her culpability as high rendering deliberate, recklessly, and grossly negligence.

XI.

Relief Sought

WHEREFORE, defendant respectfully moves this Honorable Court to grant this motion to dismiss all 10 counts in this indictment without prejudice, and secure the releases of all defendant's, Kristen Shearer, Calvin Armstrong, Anthony Lozito, Trevon Woodson, Drevon Woodson, William H. Lewis, and Lynell Guyton as soon as possible. May Yod-He-Waw-He Bless Pittsburgh, Pennsylvania.

Respectfully submitted by,

Lynell Guyton

years, must justify such requests, for example by proposing development, environmental, and recreation enhancements in a license amendment application accompanied by a request that the Commission extend their license term.[21]

III. Document Availability

21. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

22. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov*, or the Public Reference Room at (202) 502–8371, TTY (202)502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov*.

By the Commission.

Issued: October 19, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–23286 Filed 10–25–17; 8:45 am]

BILLING CODE 6717–01–P

[21] *See, e.g., Idaho Power Co.*, 132 FERC ¶ 62,001 (2010) (10-year extension of the license term due to the costs of replacing the project's existing powerhouse and increasing generating capacity); *PPL Holtwood, LLC*, 129 FERC ¶ 62,092 (2009) (16-year extension of license term due to costs associated with the constructing a new powerhouse, installing two turbine generating units at the existing powerhouse, and various environmental measures).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–473]

Schedules of Controlled Substances: Temporary Placement of ortho-Fluorofentanyl, Tetrahydrofuranyl Fentanyl, and Methoxyacetyl Fentanyl Into Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Temporary amendment; temporary scheduling order.

SUMMARY: The Administrator of the Drug Enforcement Administration is issuing this temporary scheduling order to schedule the synthetic opioids, *N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)propionamide (*ortho*-fluorofentanyl or 2-fluorofentanyl), *N*-(1-phenethylpiperidin-4-yl)-*N*-phenyltetrahydrofuran-2-carboxamide (tetrahydrofuranyl fentanyl), and 2-methoxy-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacetamide (methoxyacetyl fentanyl), into Schedule I. This action is based on a finding by the Administrator that the placement of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl into Schedule I of the Controlled Substances Act is necessary to avoid an imminent hazard to the public safety. As a result of this order, the regulatory controls and administrative, civil, and criminal sanctions applicable to Schedule I controlled substances will be imposed on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical analysis, or possess), or propose to handle, *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl.

DATES: This temporary scheduling order is effective October 26, 2017, until October 28, 2019. If this order is extended or made permanent, the DEA will publish a document in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Michael J. Lewis, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598–6812.

SUPPLEMENTARY INFORMATION:

Legal Authority

Section 201 of the Controlled Substances Act (CSA), 21 U.S.C. 811, provides the Attorney General with the authority to temporarily place a substance into Schedule I of the CSA for two years without regard to the requirements of 21 U.S.C. 811(b) if he finds that such action is necessary to avoid an imminent hazard to the public safety. 21 U.S.C. 811(h)(1). In addition, if proceedings to control a substance are initiated under 21 U.S.C. 811(a)(1), the Attorney General may extend the temporary scheduling [1] for up to one year. 21 U.S.C. 811(h)(2).

Where the necessary findings are made, a substance may be temporarily scheduled if it is not listed in any other schedule under section 202 of the CSA, 21 U.S.C. 812, or if there is no exemption or approval in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 355. 21 U.S.C. 811(h)(1). The Attorney General has delegated scheduling authority under 21 U.S.C. 811 to the Administrator of the DEA. 28 CFR 0.100.

Background

Section 201(h)(4) of the CSA, 21 U.S.C. 811(h)(4), requires the Administrator to notify the Secretary of the Department of Health and Human Services (HHS) of his intention to temporarily place a substance into Schedule I of the CSA.[2] The Administrator transmitted notice of his intent to place *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl in Schedule I on a temporary basis to the Assistant Secretary for Health of HHS by letter. Notice for these actions was transmitted on the following dates: May 19, 2017 (*ortho*-fluorofentanyl) and July 5, 2017 (tetrahydrofuranyl fentanyl and methoxyacetyl fentanyl). The Assistant Secretary responded by letters dated June 9, 2017 (*ortho*-fluorofentanyl) and July 14, 2017 (tetrahydrofuranyl fentanyl and methoxyacetyl fentanyl), and advised that based on review by the Food and Drug Administration (FDA), there are currently no investigational new drug applications or approved new drug applications for *ortho*-

[1] Though DEA has used the term "final order" with respect to temporary scheduling orders in the past, this document adheres to the statutory language of 21 U.S.C. 811(h), which refers to a "temporary scheduling order." No substantive change is intended.

[2] As discussed in a memorandum of understanding entered into by the Food and Drug Administration (FDA) and the National Institute on Drug Abuse (NIDA), the FDA acts as the lead agency within the HHS in carrying out the Secretary's scheduling responsibilities under the CSA, with the concurrence of NIDA. 50 FR 9518, Mar. 8, 1985. The Secretary of the HHS has delegated to the Assistant Secretary for Health of the HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460, July 1, 1993.

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fluorofentanyl, tetrahydrofuranyl fentanyl, or methoxyacetyl fentanyl. The Assistant Secretary also stated that the HHS has no objection to the temporary placement of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, or methoxyacetyl fentanyl into Schedule I of the CSA. The DEA has taken into consideration the Assistant Secretary's comments as required by 21 U.S.C. 811(h)(4). *ortho*-Fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl are not currently listed in any schedule under the CSA, and no exemptions or approvals are in effect for *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl under section 505 of the FDCA, 21 U.S.C. 355. The DEA has found that the control of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl in Schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, and as required by 21 U.S.C. 811(h)(1)(A), a notice of intent to issue a temporary order to schedule *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl was published in the **Federal Register** on September 12, 2017. 82 FR 42754.

To find that placing a substance temporarily into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety, the Administrator is required to consider three of the eight factors set forth in section 201(c) of the CSA, 21 U.S.C. 811(c): The substance's history and current pattern of abuse; the scope, duration and significance of abuse; and what, if any, risk there is to the public health. 21 U.S.C. 811(h)(3). Consideration of these factors includes actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution. 21 U.S.C. 811(h)(3).

A substance meeting the statutory requirements for temporary scheduling may only be placed into Schedule I. 21 U.S.C. 811(h)(1). Substances in Schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. 21 U.S.C. 812(b)(1).

Available data and information for *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl, summarized below, indicate that these synthetic opioids have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. The DEA's three-factor analysis, and the Assistant Secretary's June 9, 2017 and July 14, 2017 letters are available in their entirety under the tab "Supporting Documents" of the public docket of this action at *www.regulations.gov* under FDMS Docket ID: DEA–2017–0005 (Docket Number DEA–473).

Factor 4. History and Current Pattern of Abuse

The recreational abuse of fentanyl-like substances continues to be a significant concern. These substances are distributed to users, often with unpredictable outcomes. *ortho*-Fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl have recently been encountered by law enforcement and public health officials. Adverse health effects and outcomes are demonstrated by fatal overdose cases involving these substances. The documented adverse health effects of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl are consistent with those of other opioids.

On October 1, 2014, the DEA implemented STARLiMS (a web-based, commercial laboratory information management system) to replace the System to Retrieve Information from Drug Evidence (STRIDE) as its laboratory drug evidence data system of record. DEA laboratory data submitted after September 30, 2014, are reposited in STARLiMS. Data from STRIDE and STARLiMS were queried on June 19, 2017. STARLiMS registered four reports containing *ortho*-fluorofentanyl from California and five reports containing tetrahydrofuranyl fentanyl from Florida and Missouri. According to STARLiMS, the first laboratory submissions of *ortho*-fluorofentanyl and tetrahydrofuranyl fentanyl occurred in April 2016, and March 2017, respectively.

The National Forensic Laboratory Information System (NFLIS) is a national drug forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by other federal, state, and local forensic laboratories across the country. Data from NFLIS was queried on June 20, 2017. NFLIS registered three reports containing *ortho*-fluorofentanyl from state or local forensic laboratories in Virginia.[3] According to NFLIS, the first report of *ortho*-fluorofentanyl was reported in September 2016. NFLIS registered two reports containing tetrahydrofuranyl fentanyl from state or local forensic laboratories in New Jersey and was first reported in January 2017. The identification of methoxyacetyl fentanyl in drug evidence submitted in April 2017 was reported to DEA from a local laboratory in Ohio.[4] The DEA is not aware of any laboratory identifications of *ortho*-fluorofentanyl prior to 2016 or identifications of tetrahydrofuranyl fentanyl or methoxyacetyl fentanyl prior to 2017.

Evidence suggests that the pattern of abuse of fentanyl analogues, including *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl, parallels that of heroin and prescription opioid analgesics. Seizures of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl have been encountered in powder form similar to fentanyl and heroin and have been connected to fatal overdoses.

Factor 5. Scope, Duration and Significance of Abuse

Reports collected by the DEA demonstrate *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl are being abused for their opioid properties. Abuse of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl have resulted in mortality (*see* DEA 3-Factor Analysis for full discussion). The DEA collected post-mortem toxicology and medical examiner reports on 13 confirmed fatalities associated with *ortho*-fluorofentanyl which occurred in Georgia (1), North Carolina (11), and Texas (1), two confirmed fatalities associated with tetrahydrofuranyl fentanyl which occurred in New Jersey (1) and Wisconsin (1), and two confirmed fatalities associated with methoxyacetyl fentanyl which occurred in Pennsylvania. It is likely that the prevalence of these substances in opioid related emergency room admissions and deaths is underreported as standard immunoassays may not differentiate fentanyl analogues from fentanyl.

ortho-Fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl have been identified in drug evidence collected by law enforcement. NFLIS and STARLiMS have a total of seven drug reports in which *ortho*-fluorofentanyl was identified in drug exhibits submitted to forensic laboratories in 2016 from law enforcement encounters in California and Virginia and seven drug reports in which tetrahydrofuranyl fentanyl was identified in drug exhibits submitted to forensic laboratories in 2017 from law

[3] Data are still being collected for March 2017–June 2017 due to the normal lag period for labs reporting to NFLIS.

[4] Email from Cuyahoga County Medical Examiner's Office, to DEA (May 8, 2017 02:29 p.m. EST) (on file with DEA).

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enforcement encounters in Florida, Missouri, and New Jersey. The identification of methoxyacetyl fentanyl in drug evidence submitted in April 2017 was reported to DEA from Ohio.

The population likely to abuse *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl overlaps with the population abusing prescription opioid analgesics; heroin, fentanyl, and other fentanyl-related substances. This is evidenced by the routes of drug administration and drug use history documented in *ortho*-fluorofentanyl and tetrahydrofuranyl fentanyl fatal overdose cases. Because abusers of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl are likely to obtain these substances through unregulated sources, the identity, purity, and quantity are uncertain and inconsistent, thus posing significant adverse health risks to the end user. Individuals who initiate (*i.e.* use a drug for the first time) *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, or methoxyacetyl fentanyl abuse are likely to be at risk of developing substance use disorder, overdose, and death similar to that of other opioid analgesics (*e.g.*, fentanyl, morphine, etc.).

Factor 6. What, if Any, Risk There Is to the Public Health

ortho-Fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl exhibit pharmacological profiles similar to that of fentanyl and other m-opioid receptor agonists. The toxic effects of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl in humans are demonstrated by overdose fatalities involving these substances. Abusers of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl may not know the origin, identity, or purity of these substances, thus posing significant adverse health risks when compared to abuse of pharmaceutical preparations of opioid analgesics, such as morphine and oxycodone.

Based on information received by the DEA, the misuse and abuse of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl lead to the same qualitative public health risks as heroin, fentanyl and other opioid analgesic substances. As with any non-medically approved opioid, the health and safety risks for users are high. The public health risks attendant to the abuse of heroin and opioid analgesics are well established and have resulted in large numbers of drug treatment admissions, emergency department visits, and fatal overdoses. *ortho*-Fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl have been associated with numerous fatalities. At least 13 confirmed overdose deaths involving *ortho*-fluorofentanyl abuse have been reported from Georgia (1), North Carolina (11), and Texas (1). At least two confirmed overdose deaths involving tetrahydrofuranyl fentanyl have been reported from New Jersey (1) and Wisconsin (1). At least two confirmed overdose deaths involving methoxyacetyl fentanyl have been repored from Pennsylvania. As the data demonstrate, the potential for fatal and non-fatal overdoses exists for *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl and these substances pose an imminent hazard to the public safety.

Finding of Necessity of Schedule I Placement To Avoid Imminent Hazard to Public Safety

In accordance with 21 U.S.C. 811(h)(3), based on the available data and information, summarized above, the continued uncontrolled manufacture, distribution, reverse distribution, importation, exportation, conduct of research and chemical analysis, possession, and abuse of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl poses an imminent hazard to the public safety. The DEA is not aware of any currently accepted medical uses for *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, or methoxyacetyl fentanyl in the United States. A substance meeting the statutory requirements for temporary scheduling, 21 U.S.C. 811(h)(1), may only be placed in Schedule I. Substances in Schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. Available data and information for *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl indicate that these substances have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. As required by section 201(h)(4) of the CSA, 21 U.S.C. 811(h)(4), the Administrator, through letters dated May 19, 2017 (*ortho*-fluorofentanyl) and July 5, 2017 (tetrahydrofuranyl fentanyl and methoxyacetyl fentanyl), notified the Assistant Secretary of the DEA's intention to temporarily place these substances in Schedule I. A notice of intent was subsequently published in the **Federal Register** on September 12, 2017. 82 FR 42754.

Conclusion

In accordance with the provisions of section 201(h) of the CSA, 21 U.S.C. 811(h), the Administrator considered available data and information, herein sets forth the grounds for his determination that it is necessary to temporarily schedule *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl into Schedule I of the CSA, and finds that placement of these synthetic opioids into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety.

Because the Administrator hereby finds it necessary to temporarily place these synthetic opioids into Schedule I to avoid an imminent hazard to the public safety, this temporary order scheduling *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl is effective on the date of publication in the **Federal Register**, and is in effect for a period of two years, with a possible extension of one additional year, pending completion of the regular (permanent) scheduling process. 21 U.S.C. 811(h)(1) and (2).

The CSA sets forth specific criteria for scheduling a drug or other substance. Permanent scheduling actions in accordance with 21 U.S.C. 811(a) are subject to formal rulemaking procedures done "on the record after opportunity for a hearing" conducted pursuant to the provisions of 5 U.S.C. 556 and 557. 21 U.S.C. 811. The permanent scheduling process of formal rulemaking affords interested parties with appropriate process and the government with any additional relevant information needed to make a determination. Final decisions that conclude the permanent scheduling process of formal rulemaking are subject to judicial review. 21 U.S.C. 877. Temporary scheduling orders are not subject to judicial review. 21 U.S.C. 811(h)(6).

Requirements for Handling

Upon the effective date of this temporary order, *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl will become subject to the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, reverse distribution, importation, exportation, engagement in research, and conduct of instructional activities or chemical analysis with, and possession of Schedule I controlled substances including the following:

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1. *Registration.* Any person who handles (manufactures, distributes, reverse distributes, imports, exports, engages in research, or conducts instructional activities or chemical analysis with, or possesses), or who desires to handle, *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl must be registered with the DEA to conduct such activities pursuant to 21 U.S.C. 822, 823, 957, and 958 and in accordance with 21 CFR parts 1301 and 1312, as of October 26, 2017. Any person who currently handles *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl, and is not registered with the DEA, must submit an application for registration and may not continue to handle *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl as of October 26, 2017, unless the DEA has approved that application for registration pursuant to 21 U.S.C. 822, 823, 957, 958, and in accordance with 21 CFR parts 1301 and 1312. Retail sales of Schedule I controlled substances to the general public are not allowed under the CSA. Possession of any quantity of these substances in a manner not authorized by the CSA on or after October 26, 2017 is unlawful and those in possession of any quantity of these substances may be subject to prosecution pursuant to the CSA.

2. *Disposal of stocks.* Any person who does not desire or is not able to obtain a Schedule I registration to handle *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl, must surrender all quantities of currently held *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl.

3. *Security. ortho*-Fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl are subject to Schedule I security requirements and must be handled and stored pursuant to 21 U.S.C. 821, 823, 871(b), and in accordance with 21 CFR 1301.71–1301.93, as of October 26, 2017.

4. *Labeling and packaging.* All labels, labeling, and packaging for commercial containers of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl must be in compliance with 21 U.S.C. 825, 958(e), and be in accordance with 21 CFR part 1302. Current DEA registrants shall have 30 calendar days from October 26, 2017, to comply with all labeling and packaging requirements.

5. *Inventory.* Every DEA registrant who possesses any quantity of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl on the effective date of this order must take an inventory of all stocks of these substances on hand, pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11. Current DEA registrants shall have 30 calendar days from the effective date of this order to be in compliance with all inventory requirements. After the initial inventory, every DEA registrant must take an inventory of all controlled substances (including *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl) on hand on a biennial basis, pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

6. *Records.* All DEA registrants must maintain records with respect to *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR parts 1304, and 1312, 1317 and § 1307.11. Current DEA registrants shall have 30 calendar days from the effective date of this order to be in compliance with all recordkeeping requirements.

7. *Reports.* All DEA registrants who manufacture or distribute *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl must submit reports pursuant to 21 U.S.C. 827 and in accordance with 21 CFR parts 1304 and 1312 as of October 26, 2017.

8. *Order Forms.* All DEA registrants who distribute *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl must comply with order form requirements pursuant to 21 U.S.C. 828 and in accordance with 21 CFR part 1305 as of October 26, 2017.

9. *Importation and Exportation.* All importation and exportation of *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl must be in compliance with 21 U.S.C. 952, 953, 957, 958, and in accordance with 21 CFR part 1312 as of October 26, 2017.

10. *Quota.* Only DEA registered manufacturers may manufacture *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl in accordance with a quota assigned pursuant to 21 U.S.C. 826 and in accordance with 21 CFR part 1303 as of October 26, 2017.

11. *Liability.* Any activity involving *ortho*-fluorofentanyl, tetrahydrofuranyl fentanyl, and methoxyacetyl fentanyl not authorized by, or in violation of the CSA, occurring as of October 26, 2017, is unlawful, and may subject the person to administrative, civil, and/or criminal sanctions.

Regulatory Matters

Section 201(h) of the CSA, 21 U.S.C. 811(h), provides for a temporary scheduling action where such action is necessary to avoid an imminent hazard to the public safety. As provided in this subsection, the Attorney General may, by order, schedule a substance in Schedule I on a temporary basis. Such an order may not be issued before the expiration of 30 days from (1) the publication of a notice in the **Federal Register** of the intention to issue such order and the grounds upon which such order is to be issued, and (2) the date that notice of the proposed temporary scheduling order is transmitted to the Assistant Secretary. 21 U.S.C. 811(h)(1).

Inasmuch as section 201(h) of the CSA directs that temporary scheduling actions be issued by order and sets forth the procedures by which such orders are to be issued, the DEA believes that the notice and comment requirements of the Administrative Procedure Act (APA) at 5 U.S.C. 553, do not apply to this temporary scheduling action. In the alternative, even assuming that this action might be subject to 5 U.S.C. 553, the Administrator finds that there is good cause to forgo the notice and comment requirements of 5 U.S.C. 553, as any further delays in the process for issuance of temporary scheduling orders would be impracticable and contrary to the public interest in view of the manifest urgency to avoid an imminent hazard to the public safety.

Further, the DEA believes that this temporary scheduling action is not a "rule" as defined by 5 U.S.C. 601(2), and, accordingly, is not subject to the requirements of the Regulatory Flexibility Act. The requirements for the preparation of an initial regulatory flexibility analysis in 5 U.S.C. 603(a) are not applicable where, as here, the DEA is not required by the APA or any other law to publish a general notice of proposed rulemaking.

Additionally, this action is not a significant regulatory action as defined by Executive Order 12866 (Regulatory Planning and Review), section 3(f), and, accordingly, this action has not been reviewed by the Office of Management and Budget.

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Federalism) it is determined that this action does not have sufficient

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federalism implications to warrant the preparation of a Federalism Assessment.

As noted above, this action is an order, not a rule. Accordingly, the Congressional Review Act (CRA) is inapplicable, as it applies only to rules. However, if this were a rule, pursuant to the Congressional Review Act, "any rule for which an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the federal agency promulgating the rule determines." 5 U.S.C. 808(2). It is in the public interest to schedule these substances immediately to avoid an imminent hazard to the public safety. This temporary scheduling action is taken pursuant to 21 U.S.C. 811(h), which is specifically designed to enable the DEA to act in an expeditious manner to avoid an imminent hazard to the public safety. 21 U.S.C. 811(h) exempts the temporary scheduling order from standard notice and comment rulemaking procedures to ensure that the process moves swiftly. For the same reasons that underlie 21 U.S.C. 811(h), that is, the DEA's need to move quickly to place these substances into Schedule I because it poses an imminent hazard to the public safety, it would be contrary to the public interest to delay implementation of the temporary scheduling order. Therefore, this order shall take effect immediately upon its publication. The DEA has submitted a copy of this temporary order to both Houses of Congress and to the Comptroller General, although such filing is not required under the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act), 5 U.S.C. 801–808 because, as noted above, this action is an order, not a rule.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, the DEA amends 21 CFR part 1308 as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

■ 2. In § 1308.11, add reserved paragraphs (h)(15) through (18) and paragraphs (h)(19), (20), and (21) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(h) * * *.

(19) *N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)propionamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other names: *ortho*-fluorofentanyl, 2-fluorofentanyl) ..... (9816)

(20) *N*-(1-phenethylpiperidin-4-yl)-*N*-phenyltetrahydrofuran-2-carboxamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: tetrahydrofuranyl fentanyl) ..... (9843)

(21) 2-methoxy-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacetamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: methoxyacetyl fentanyl) ..... (9825)

Dated: October 17, 2017.

Robert W. Patterson,

Acting Administrator.

[FR Doc. 2017–23206 Filed 10–25–17; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9815]

RIN 1545–BM33

Dividend Equivalents From Sources Within the United States; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and temporary regulations; Correcting amendments.

SUMMARY: This document contains corrections to final and temporary regulations (TD TD 9815), which were published in the **Federal Register** on Tuesday, January 24, 2017.

DATES: *Effective Date:* These corrections are effective October 26, 2017.

Applicability Date: The corrections to §§ 1.1.871–15, 1.871–15T, 1.1441–1(e)(5)(v)(B)(*4*), (e)(6), and (f)(5), 1.1441–2, 1.1441–7, and 1.1461–1 are applicable on January 19, 2017.

FOR FURTHER INFORMATION CONTACT: D. Peter Merkel or Karen Walny at 202–317–6938 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations that are the subject of these corrections are §§ 1.871–15, 1.871–15T, 1.1441–1, 1.1441–2, 1.1441–7, and 1.1461–1, promulgated under sections 871(m) and 7805 of the Internal Revenue Code. These regulations affect foreign persons that hold certain financial products providing for payments that are contingent upon or determined by reference to U.S. source dividends, as well withholding agents with respect to dividend equivalents and certain other parties to section 871(m) transactions and their agents.

Need for Correction

As published, TD 9815 contains errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§ 1.871–15 [Amended]

■ **Par. 2.** Section 1.871–15 is amended by:

■ 1. Removing paragraph (r)(2).

■ 2. Redesignating paragraphs (r)(3), (4), and (5), as (r)(2), (3), and (4), respectively.

§ 1.871–15 [Amended]

■ **Par. 3.** For each section listed in the table, remove the language in the "Remove" column and add in its place the language in the "Add" column as set forth below:

Section	Remove	Add
§ 1.871–15(a)(14)(ii)(B)	ELI.More	ELI. More
§ 1.871–15(l)(1), second sentence	described in this paragraph (l)	described in this paragraph (l)(1)
§ 1.871–15(q)(1)	qualified intermediary agreement	qualified intermediary withholding agreement

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Costs of Compliance

We estimate that this proposed AD will affect 18 products of U.S. registry. We also estimate that it would take about 2.5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,825, or $212.50 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to small airplanes and domestic business jet transport airplanes to the Director of the Policy and Innovation Division.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

Pilatus Aircraft Limited: Docket No. FAA–2017–1079; Product Identifier 2017–CE–039–AD.

(a) Comments Due Date

We must receive comments by January 5, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pilatus Aircraft Limited Model PC–7 airplanes, manufacturer serial numbers 101 through 618, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 32: Landing Gear.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as the brakes remaining activated after release of the brake pedal. We are issuing this AD to prevent the brakes from remaining activated after the brake pedal has been released, which could lead to asymmetric braking and subsequent loss of control.

(f) Actions and Compliance

Unless already done, within the next 90 days after the effective date of this AD, modify the brake pedal interconnecting tie rods by removing the bonding straps and attachment hardware following sections A, B, and C of the Accomplishment Instructions in Pilatus Service Bulletin 32–028, dated September 20, 2017.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Small Airplane Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Standards Branch, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090; email: *doug.rudolph@faa.gov*. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, Small Airplane Standards Branch, FAA; or the Federal Office of Civil Aviation (FOCA), which is the aviation authority for Switzerland.

(h) Related Information

Refer to MCAI FOCA AD HB–2017–002, dated October 20, 2017; and Pilatus Service Bulletin No. 32–028, dated September 20, 2017, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1079. For service information related to this AD, contact PILATUS Aircraft Ltd., Customer Technical Support (MCC), P.O. Box 992, CH–6371 Stans, Switzerland; phone: +41 (0)41 619 67 74; fax: +41 (0)41 619 67 73; email: *techsupport@pilatus-aircraft.com;* Internet: *http://www.pilatus-aircraft.com*. You may review this referenced service information at the FAA, Policy and Innovation Division, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on November 9, 2017.

Pat Mullen,

Acting Deputy Director, Policy & Innovation Division, Aircraft Certification Service.

[FR Doc. 2017–25006 Filed 11–20–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–474]

Schedules of Controlled Substances: Temporary Placement of Cyclopropyl Fentanyl into Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

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ACTION: Proposed amendment; notice of intent.

SUMMARY: The Administrator of the Drug Enforcement Administration is issuing this notice of intent to publish a temporary order to schedule the synthetic opioid, *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylcyclopropanecarboxamide (cyclopropyl fentanyl), into Schedule I. This action is based on a finding by the Administrator that the placement of this synthetic opioid into Schedule I of the Controlled Substances Act is necessary to avoid an imminent hazard to the public safety. When it is issued, the temporary scheduling order will impose the administrative, civil, and criminal sanctions and regulatory controls applicable to Schedule I controlled substances under the Controlled Substances Act on the manufacture, distribution, reverse distribution, possession, importation, exportation, research, and conduct of instructional activities, and chemical analysis of this synthetic opioid.

DATES: November 21, 2017.

FOR FURTHER INFORMATION CONTACT: Michael J. Lewis, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598–6812.

SUPPLEMENTARY INFORMATION: This notice of intent contained in this document is issued pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). The Drug Enforcement Administration (DEA) intends to issue a temporary scheduling order (in the form of a temporary amendment) to add cyclopropyl fentanyl to Schedule I under the Controlled Substances Act.[1] The temporary scheduling order will be published in the **Federal Register**, but will not be issued before December 21, 2017.

Legal Authority

Section 201 of the Controlled Substances Act (CSA), 21 U.S.C. 811, provides the Attorney General with the authority to temporarily place a substance into Schedule I of the CSA for two years without regard to the requirements of 21 U.S.C. 811(b) if he finds that such action is necessary to avoid an imminent hazard to the public safety. 21 U.S.C. 811(h)(1). In addition, if proceedings to control a substance are initiated under 21 U.S.C. 811(a)(1), the Attorney General may extend the temporary scheduling for up to one year. 21 U.S.C. 811(h)(2).

Where the necessary findings are made, a substance may be temporarily scheduled if it is not listed in any other schedule under section 202 of the CSA, 21 U.S.C. 812, or if there is no exemption or approval in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 355. 21 U.S.C. 811(h)(1); 21 CFR part 1308. The Attorney General has delegated scheduling authority under 21 U.S.C. 811 to the Administrator of the DEA. 28 CFR 0.100.

Background

Section 201(h)(4) of the CSA, 21 U.S.C. 811(h)(4), requires the Administrator to notify the Secretary of the Department of Health and Human Services (HHS) of his intention to temporarily place a substance into Schedule I of the CSA.[2] The Acting Administrator transmitted notice of his intent to place cyclopropyl fentanyl in Schedule I on a temporary basis to the Assistant Secretary for Health of HHS by letter dated August 28, 2017. The Assistant Secretary responded to this notice of intent by letter dated September 6, 2017, and advised that based on a review by the Food and Drug Administration (FDA), there are currently no investigational new drug applications or approved new drug applications for cyclopropyl fentanyl. The Assistant Secretary also stated that the HHS has no objection to the temporary placement of cyclopropyl fentanyl into Schedule I of the CSA. Cyclopropyl fentanyl is not currently listed in any schedule under the CSA, and no exemptions or approvals are in effect for cyclopropyl fentanyl under section 505 of the FDCA, 21 U.S.C. 355.

To find that placing a substance temporarily into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety, the Administrator is required to consider three of the eight factors set forth in 21 U.S.C. 811(c): The substance's history and current pattern of abuse; the scope, duration and significance of abuse; and what, if any, risk there is to the public health. 21 U.S.C. 811(h)(3). Consideration of these factors includes actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution. 21 U.S.C. 811(h)(3).

A substance meeting the statutory requirements for temporary scheduling may only be placed in Schedule I. 21 U.S.C. 811(h)(1). Substances in Schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. 21 U.S.C. 812(b)(1).

Cyclopropyl Fentanyl

The recent identification of cyclopropyl fentanyl in drug evidence and the identification of this substance in association with fatal overdose events indicate that this substance is being abused for its opioid properties. No approved medical use has been identified for cyclopropyl fentanyl, nor has it been approved by the FDA for human consumption.

Available data and information for cyclopropyl fentanyl, summarized below, indicate that this synthetic opioid has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. The DEA's three-factor analysis is available in its entirety under "Supporting and Related Material" of the public docket for this action at *www.regulations.gov* under Docket Number DEA–474.

Factor 4. History and Current Pattern of Abuse

The recreational abuse of fentanyl-like substances continues to be a significant concern. These substances are distributed to users, often with unpredictable outcomes. Cyclopropyl fentanyl has been encountered by law enforcement and public health officials beginning as early as May 2017. The DEA is not aware of any laboratory identifications of this substance prior to 2017. Adverse health effects and outcomes of cyclopropyl fentanyl abuse are consistent with those of other opioids and are demonstrated by fatal overdose cases involving this substance.

On October 1, 2014, the DEA implemented STARLiMS (a web-based, commercial laboratory information management system) to replace the System to Retrieve Information from Drug Evidence (STRIDE) as its laboratory drug evidence data system of record. DEA laboratory data submitted after September 30, 2014, are reposited in STARLiMS. Data from STRIDE and STARLiMS were queried on August 25,

[1] Though DEA has used the term "final order" with respect to temporary scheduling orders in the past, this notice of intent adheres to the statutory language of 21 U.S.C. 811(h), which refers to a "temporary scheduling order." No substantive change is intended.

[2] As discussed in a memorandum of understanding entered into by the Food and Drug Administration (FDA) and the National Institute on Drug Abuse (NIDA), the FDA acts as the lead agency within the HHS in carrying out the Secretary's scheduling responsibilities under the CSA, with the concurrence of NIDA. 50 FR 9518, Mar. 8, 1985. The Secretary of the HHS has delegated to the Assistant Secretary for Health of the HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460, July 1, 1993.

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2017. STARLiMS registered a total of three reports containing cyclopropyl fentanyl from California, Connecticut, and New York. Of these three exhibits, one had a net weight of approximately one kilogram. According to STARLiMS, the first laboratory submission of cyclopropyl fentanyl occurred in Connecticut in June 2017.

The National Forensic Laboratory Information System (NFLIS) is a national drug forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by other federal, state and local forensic laboratories across the country. NFLIS registered 10 reports containing cyclopropyl fentanyl from state or local forensic laboratories in Oklahoma in July 2017 (query date: August 29, 2017).[3]

In addition to data recorded in NFLIS and STARLiMS, cyclopropyl fentanyl was identified in drug evidence submitted to state and local forensic laboratories in Georgia and Pennsylvania. Cyclopropyl fentanyl was confirmed in combination with U–47700, another synthetic opioid temporarily controlled in Schedule I of the CSA, in 24 glassine paper packets submitted to a law enforcement forensic laboratory in Pennsylvania.[4] A law enforcement forensic laboratory in Georgia confirmed [5] the presence of cyclopropyl fentanyl in counterfeit oxycodone tablets which also contained U–47700. The distribution of cyclopropyl fentanyl in these forms, and in combination with another synthetic opioid, suggests that this substance was marketed as heroin or prescription opioids in the illicit market.

Evidence suggests that the pattern of abuse of fentanyl analogues, including cyclopropyl fentanyl, parallels that of heroin and prescription opioid analgesics. Seizures of cyclopropyl fentanyl have been encountered in powder form, similar to fentanyl and heroin, and in counterfeit prescription opioid products (*i.e.* counterfeit oxycodone tablets). Cyclopropyl fentanyl was also confirmed in toxicology samples from fatal overdose cases.

Factor 5. Scope, Duration and Significance of Abuse

Reports collected by the DEA demonstrate that cyclopropyl fentanyl is being abused for its opioid properties. Abuse of cyclopropyl fentanyl has resulted in mortality (*see* DEA 3-Factor Analysis for full discussion). The DEA collected post-mortem toxicology and medical examiner reports on 115 confirmed fatalities associated with cyclopropyl fentanyl which occurred in Georgia (1), Maryland (24), Mississippi (1), North Carolina (75), and Wisconsin (14). It is likely that the prevalence of this substance in opioid related emergency room admissions and deaths is underreported as standard immunoassays may not differentiate this fentanyl analogue from fentanyl.

NFLIS and STARLiMS have a total of 13 drug reports in which cyclopropyl fentanyl was identified in drug exhibits submitted to forensic laboratories in 2017 from law enforcement encounters in California, Connecticut, New York, and Oklahoma. In addition to the data collected in these databases, cyclopropyl fentanyl was identified in drug evidence submitted to forensic laboratories in Georgia (counterfeit oxycodone preparation) and Pennsylvania (24 glassine paper packets).

The population likely to abuse cyclopropyl fentanyl overlaps with the population abusing prescription opioid analgesics, heroin, fentanyl and other fentanyl-related substances. This is supported by cyclopropyl fentanyl being identified in powder contained within glassine paper packets and counterfeit prescription opioid products. This is also demonstrated by routes of drug administration and drug use history documented in cyclopropyl fentanyl fatal overdose cases. Because abusers of cyclopropyl fentanyl obtain this substance through unregulated sources, the identity, purity, and quantity are uncertain and inconsistent, thus posing significant adverse health risks to the end user. Individuals who initiate (*i.e.* use a drug for the first time) cyclopropyl fentanyl abuse are likely to be at risk of developing substance use disorder, overdose, and death similar to that of other opioid analgesics (*e.g.*, fentanyl, morphine, etc.).

Factor 6. What, if Any, Risk There Is to the Public Health

With no legitimate medical use, cyclopropyl fentanyl has emerged on the illicit drug market and is being misused and abused for its opioid properties. Cyclopropyl fentanyl exhibits pharmacological profiles similar to that of fentanyl and other m-opioid receptor agonists. The abuse of cyclopropyl fentanyl poses significant adverse health risks when compared to abuse of pharmaceutical preparations of opioid analgesics, such as morphine and oxycodone. The toxic effects of cyclopropyl fentanyl in humans are demonstrated by overdose fatalities involving this substance.

Based on information received by the DEA, the misuse and abuse of cyclopropyl fentanyl lead to, at least, the same qualitative public health risks as heroin, fentanyl, and other opioid analgesic substances. As with any non-medically approved opioid, the health and safety risks for users are high. The public health risks attendant to the abuse of heroin and opioid analgesics are well established and have resulted in large numbers of drug treatment admissions, emergency department visits, and fatal overdoses.

Cyclopropyl fentanyl has been associated with numerous fatalities. At least 115 confirmed overdose deaths involving cyclopropyl fentanyl abuse have been reported from Georgia (1), Maryland (24), Mississippi (1), North Carolina (75), and Wisconsin (14) in 2017. As the data demonstrate, the potential for fatal and non-fatal overdoses exists for cyclopropyl fentanyl and this substance poses an imminent hazard to the public safety.

Finding of Necessity of Schedule I Placement To Avoid Imminent Hazard to Public Safety

In accordance with 21 U.S.C. 811(h)(3), based on the available data and information, summarized above, the continued uncontrolled manufacture, distribution, importation, possession, and abuse of cyclopropyl fentanyl pose an imminent hazard to the public safety. The DEA is not aware of any currently accepted medical uses for cyclopropyl fentanyl in the United States. A substance meeting the statutory requirements for temporary scheduling, 21 U.S.C. 811(h)(1), may only be placed in Schedule I. Substances in Schedule I are those that have a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. Available data and information for cyclopropyl fentanyl indicate that this substance has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. As required by section 201(h)(4) of the CSA, 21 U.S.C. 811(h)(4), the Administrator, through a letter dated August 28, 2017, notified the Assistant Secretary of the DEA's intention to temporarily place this substance in Schedule I.

[3] Data are still being collected for May 2017–August 2017 due to the normal lag period for labs reporting to NFLIS.

[4] Email from Philadelphia Police Department—Office of Forensic Science, to DEA (August 18, 2017 11:09 a.m.) (on file with DEA).

[5] Laboratory report obtained from Division of Forensic Science, Georgia Bureau of Investigation.

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Conclusion

This notice of intent initiates a temporary scheduling process and provides the 30-day notice pursuant to section 201(h) of the CSA, 21 U.S.C. 811(h), of DEA's intent to issue a temporary scheduling order. In accordance with the provisions of section 201(h) of the CSA, 21 U.S.C. 811(h), the Administrator considered available data and information, herein set forth the grounds for his determination that it is necessary to temporarily schedule cyclopropyl fentanyl in Schedule I of the CSA, and finds that placement of this synthetic opioid into Schedule I of the CSA is necessary in order to avoid an imminent hazard to the public safety.

The temporary placement of cyclopropyl fentanyl into Schedule I of the CSA will take effect pursuant to a temporary scheduling order, which will not be issued before December 21, 2017. Because the Administrator hereby finds that it is necessary to temporarily place cyclopropyl fentanyl into Schedule I to avoid an imminent hazard to the public safety, the temporary order scheduling this substance will be effective on the date that order is published in the **Federal Register**, and will be in effect for a period of two years, with a possible extension of one additional year, pending completion of the regular (permanent) scheduling process. 21 U.S.C. 811(h)(1) and (2). It is the intention of the Administrator to issue a temporary scheduling order as soon as possible after the expiration of 30 days from the date of publication of this notice. Upon publication of the temporary order, cyclopropyl fentanyl will be subject to the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, reverse distribution, importation, exportation, research, conduct of instructional activities and chemical analysis, and possession of a Schedule I controlled substance.

The CSA sets forth specific criteria for scheduling a drug or other substance. Regular scheduling actions in accordance with 21 U.S.C. 811(a) are subject to formal rulemaking procedures done "on the record after opportunity for a hearing" conducted pursuant to the provisions of 5 U.S.C. 556 and 557. 21 U.S.C. 811. The regular scheduling process of formal rulemaking affords interested parties with appropriate process and the government with any additional relevant information needed to make a determination. Final decisions that conclude the regular scheduling process of formal rulemaking are subject to judicial review. 21 U.S.C. 877. Temporary scheduling orders are not subject to judicial review. 21 U.S.C. 811(h)(6).

Regulatory Matters

Section 201(h) of the CSA, 21 U.S.C. 811(h), provides for a temporary scheduling action where such action is necessary to avoid an imminent hazard to the public safety. As provided in this subsection, the Attorney General may, by order, schedule a substance in Schedule I on a temporary basis. Such an order may not be issued before the expiration of 30 days from (1) the publication of a notice in the **Federal Register** of the intention to issue such order and the grounds upon which such order is to be issued, and (2) the date that notice of the proposed temporary scheduling order is transmitted to the Assistant Secretary of HHS. 21 U.S.C. 811(h)(1).

Inasmuch as section 201(h) of the CSA directs that temporary scheduling actions be issued by order and sets forth the procedures by which such orders are to be issued, the DEA believes that the notice and comment requirements of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, do not apply to this notice of intent. In the alternative, even assuming that this notice of intent might be subject to section 553 of the APA, the Administrator finds that there is good cause to forgo the notice and comment requirements of section 553, as any further delays in the process for issuance of temporary scheduling orders would be impracticable and contrary to the public interest in view of the manifest urgency to avoid an imminent hazard to the public safety.

Although the DEA believes this notice of intent to issue a temporary scheduling order is not subject to the notice and comment requirements of section 553 of the APA, the DEA notes that in accordance with 21 U.S.C. 811(h)(4), the Administrator will take into consideration any comments submitted by the Assistant Secretary in response to the notice that DEA transmitted to the Assistant Secretary pursuant to section 811(h)(4).

Further, the DEA believes that this temporary scheduling action is not a "rule" as defined by 5 U.S.C. 601(2), and, accordingly, is not subject to the requirements of the Regulatory Flexibility Act (RFA). The requirements for the preparation of an initial regulatory flexibility analysis in 5 U.S.C. 603(a) are not applicable where, as here, the DEA is not required by section 553 of the APA or any other law to publish a general notice of proposed rulemaking.

Additionally, this action is not a significant regulatory action as defined by Executive Order 12866 (Regulatory Planning and Review), section 3(f), and, accordingly, this action has not been reviewed by the Office of Management and Budget.

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Federalism) it is determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, the DEA proposes to amend 21 CFR part 1308 as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

■ 2. In § 1308.11, add paragraph (h)(22) to read as follows:

§ 1308.11 Schedule I

* * * * *

(h) * * *

(22) *N*-(1-phenethylpiperidin-4-yl)-*N*-phenylcyclopropanecarboxamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: cyclopropyl fentanyl) . . . (9845)

* * * * *

Dated: November 13, 2017.

Robert W. Patterson,

Acting Administrator.

[FR Doc. 2017–25077 Filed 11–20–17; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2017–0994]

RIN 1625–AA00

Safety Zone; Spa Creek, Annapolis, MD

AGENCY: Coast Guard, DHS.

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rests.

THE COURT: All right. Ladies and gentlemen of the jury, the Court has to deal with some matters of law. So the jury can have a recess.

I have to step off the bench for a minute to get paperwork. I'll be right back.

(Jury exits courtroom.)

(Recess from 9:58 a.m.-10:04 a.m.)

THE COURT: All right. The Government has rested its case.

Mr. Walker?

MR. WALKER: Yes, Your Honor. Pursuant to my client's request, he wishes to proceed on the motion to dismiss, 12(b)(1) and (2). I believe that's submitted under Document 445 as an attachment. Essentially, the document speaks for itself. The statutory interpretation of what the Government has intended to prove has not been proven at this juncture. And the case is ripe for dismissal pursuant to the Fourth Amendment and the congressional intent of the statutes within the motion, Your Honor.

With that, I have nothing further on that. But I do have a Rule 29 motion on something else.

THE COURT: We'll get to that. Would you like to respond to that?

MS. KENNEDY: Yes. Thank you, Your Honor.

Your Honor, as you are aware in presiding over this case as a whole, Defendant's co-conspirator, Anthony Lozito, filed a similar motion with regards to the issue regarding the Controlled Substance Analogue Enforcement Act. And the Government did provide a response to that at document No. 344.

Your Honor issued a memorandum opinion at document No. 348 wherein the Government would submit that Your Honor has previously addressed the arguments as it relates to the Controlled Substance Analogue Enforcement Act. Specifically, on page 4 of the Court's memorandum opinion, Your Honor citing to United States vs. Raymer, R-a-y-m-e-r, 941 F.2d 1031, page 1046, that's a Tenth Circuit opinion from 1991 where, specifically in the second paragraph of Your Honor's opinion on that page, Your Honor cites to the portion of that opinion which states: The Defendant could be prosecuted for distributing a controlled substance analogue as of the date of the Controlled Substance Analogue Enforcement Act of 1986 that was enacted, even if the controlled substance was invalidated at the period of time alleged in the indictment.

Additionally, Your Honor writes that the Controlled Substance Act at 21, United States Code, Sections 801 and following, makes it unlawful, among other things, for any person unknowingly or intentionally to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1). And therefore, with the combination of the

CSAEA and the CSA, it makes it unlawful for any person knowingly or intentionally to distribute a controlled substance analogue when intended for human consumption.

At this point in the trial, the Government has presented evidence which shows that the Defendant was distributing a controlled substance analogue that was intended for human consumption. Therefore, to the extent the Defendant's motion raises that as an issue, I do believe the Court has already addressed that. And I would ask that, for the reasons previously stated in the Court's memorandum opinion at Document 348, you deny the Defendant's motion at this time.

Additionally, Your Honor, to the extent the Defendant is citing constitutional violations, specifically the Fourth Amendment, the Government would submit that those allegations are inappropriate at this juncture.

However, in noting that some of the things that the Defendant wants to have seized -- he talks about unreasonable seizures of vehicles and residences -- I think that was to his attorney's previous point, that those motions were frivolous. For instance, the Defendant is talking about suppressing information or evidence that was recovered from vehicles. And as Your Honor has sat through trial, there has been no evidence -- there was not any evidence seized from any vehicle. Therefore, there wouldn't be any violation of his rights as it relates to this trial.

Similarly, with some of the residences in question, when the Defendant was acting pro se during this matter, he went out of his way to talk about some of the residences that were searched. And he was very clear to establish that the residences, specifically on Bond Street and 1268 Lakewood Avenue, that he did not reside at those residences.

THE COURT: Mr. Guyton, I'm going to ask you to sit down.

MS. KENNEDY: Therefore, he would not have standing to even challenge those, which goes to the point that those motions were frivolous and would not have been appropriate. Therefore, for all of the reasons stated as well as the Court's prior rulings, I would ask that you deny the motion. Thank you.

THE COURT: All right. With regard to the first issue, I would simply cite this Court's memorandum opinion issued in the case of United States of America vs. Lynell Guyton and Anthony Lozito -- what was the document number?

MS. KENNEDY: Document No. 348, Your Honor.

THE COURT: -- Document No. 348 in which this issue was previously raised, the Court need not repeat the reasoning for the Court 's decision. It appears on page 4. The first full paragraph and the second paragraph that goes onto page 5 sets forth in black and white the Court's ruling and the rationale for the Court's ruling. I cited authority, the Raymer case. So on that basis, the Defendant's motion is denied.