

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

801 I Street, 3rd Floor
Sacramento, California 95814

Chair: Heather Williams

Phone: 916.498.5700

May 1, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

**Re: Defender Comment on Offenses Involving Fentanyl,
Fentanyl Analogues, and Other Opioids**

Dear Judge Reeves:

On January 24, 2025, the Commission published an Issue for Comment (IFC) on fentanyl, fentanyl analogues, and other synthetic opioids. Specifically, the Commission asks whether to add enhancements to §2D1.1 proposed by the Department of Justice for: (1) distributing to individuals under 21 years old; (2) using the dark web or other anonymizing technologies; and (3) distributing substances laced with xylazine or medetomidine.¹ The IFC also raises related questions.

With this letter, the Federal Public and Community Defenders respond to this request for comment. [Part I](#) (pp. 3–7) details the history and ramifications of the War on Drugs and why a drug war approach to fentanyl will do more harm than good. [Part II](#) (pp. 7–13) examines data showing that fentanyl-related deaths are declining and explores reasons for the decline. [Part III](#) (p. 13) reviews sentencing data that support lower fentanyl guideline ranges, not higher. Finally, [Part IV](#) (pp. 14–17) considers the interplay between the contemplated enhancements and some of the ameliorative amendments the Commission just voted to adopt.

¹ USSC, [Issue for Comment: Offenses Involving Fentanyl, Fentanyl Analogues, and Other Opioids](#) (Jan. 2025); *see also* [DOJ Comment to USSC on 2024-2025 Proposed Priorities](#) at 5–8 (July 15, 2024).

In short, the Commission should not add these enhancements (which are in tension with recent guideline amendments) to an already-complex guideline riddled with factor creep. For years, judges and other stakeholders have criticized §2D1.1 as too punitive and overly reliant on drug type and quantity as proxies for culpability. Indeed, sentencing data show most fentanyl sentences (like those for other drugs) are below the applicable guideline range. Further, overdose data indicate fentanyl-related deaths are rapidly declining for reasons unrelated to criminal enforcement, with adulterants like xylazine and medetomidine likely playing a role in this decline, undermining calls for enhanced penalties.

As Defenders have urged before, this moment demands public health solutions—not increased sentences.² Instead of an unstudied, fear-based, and reactionary approach to fentanyl and similar opioids that would repeat the historic failures of the “War on Drugs” (with its roundly condemned 1980s crack cocaine sentencing policy), we offer a better path forward: treat opioid use disorder and overdose death like the public health crises they are. We encourage the Commission to resist the well-intentioned but misguided temptation to respond to the rapidly evolving fentanyl market and overdose rates with the higher penalties contemplated, and to study the need for, and utility of, these enhancements. We welcome the opportunity to be involved in this study.

² See, e.g., [Defenders’ Comments on USSC’s 2025 Proposed Amendments: Drug Offenses](#), at 1–7 (March 3, 2025); [Statement of Michael Caruso](#) on behalf of Defenders to USSC at *Public Hearing on First Step Act-Drug Offenses and Counterfeit Pills*, at 17–19 (March 7, 2023); [Statement of Kiyana Givens](#), *Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform*, Hrg. before House Comm. on the Judiciary, Subcomm. on Crime, Terrorism, & Homeland Security (June 17, 2001); [Statement of Patricia L. Richman](#), *An Epidemic within a Pandemic*, Hrg. before House Comm. on Energy and Commerce, Subcomm. on Health (April 14, 2021); [Statement of Kevin Butler](#), *Fentanyl Analogues: Perspectives on Classwide Scheduling*, House Comm. on the Judiciary, Subcomm. on Crime, Terrorism, & Homeland Security (Jan. 28, 2020).

I. The contemplated enhancements would perpetuate the devastating harms of the War on Drugs while failing to stymie fentanyl use and overdose deaths.

More than 50 years ago, President Nixon referred to drug use as “America’s public enemy number one.”³ The War on Drugs began in earnest 15 years later, when President Reagan warned that illegal drugs are “every bit as much a threat to the United States as enemy planes and missiles.”⁴ During this time, police funding and drug-related arrest rates grew significantly, Congress passed steep mandatory minimum sentencing laws and limited resources aimed at prevention and treatment, and the Sentencing Commission tethered its drug guidelines to statutory mandatory minimums.⁵

This drug war, ostensibly designed to eradicate drug supply and misuse, utterly failed to do so.⁶ We now have over 30 years of evidence that enhancing penalties for drug crimes will not reduce demand or supply, the incidence of substance use disorder (which fuels demand), or the number of

³ Richard Nixon, [*Remarks About an Intensified Program for Drug Abuse Prevention and Control*](#) (Jun. 17, 1971).

⁴ Ronald Reagan, [*Remarks on Signing the Just Say No to Drugs Week Proclamation*](#), Ronald Reagan Presidential Library & Museum (May 20, 1986).

⁵ See, e.g., Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 Am. Crim. L. Rev. 1685, 1694 (2021); Nazgol Ghandnoosh & Casey Anderson, The Sentencing Project, [*Opioids: Treating an Illness, Ending a War*](#), at 19 (2017); Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1, 5–6 (2014) (“[T]he original Commission incorporated mandatory minimum penalties into the Guidelines at their inception.”).

⁶ See, e.g., [*Ghandnoosh & Anderson*](#), at 19–20 (“[T]he War on Drugs did not play a major role in ebbing cycles of drug use Aggressive law enforcement did not deter longtime users from the drug or eliminate adaptable drug markets, as revealed by anecdotes of police chiefs, surveys of past users, and comparisons across cities.”); Jeremy Travis et. al., Nat’l Res. Council, [*Incarceration in the United States: Exploring Causes and Consequences*](#), at 154 (2014) (“[T]he best empirical evidence suggests that the successive iterations of the war on drugs—through a substantial public policy effort—are unlikely to have markedly or clearly reduced drug crime over the past three decades.”).

drug-related deaths.⁷ Some experts even contend punitive drug war policies have contributed to an *increase* in drug overdose deaths.⁸

At a minimum, fentanyl overdose death data between 2016 and 2023 show that as fentanyl exploded onto the scene and related federal convictions and sentencings soared, the nationwide overdose death rate rose steadily, until it declined towards the end of 2023, undermining arguments that criminal enforcement efforts curb deaths.⁹ This makes sense: increased fentanyl convictions and sentences do nothing to address “the under-recognized driver[s] of drug mortality [which are] demand and the under-treated root causes of drug demand,” such as mental health crises and

⁷ See, e.g., Michael Collins & Sheila P. Vakharia, The Drug Policy Alliance, [*Criminal Justice Reform in the Fentanyl Era: One Step Forward, Two Steps Back*](#), at 15 (2020) (discussing decades of studies and expert reports revealing that increasing drug penalties “does not dramatically reduce their use or sale, or save lives” and noting that “[t]o date, none of the states that enacted harsher penalties for fentanyl, nor the federal government, have provided evidence that their strategy has contributed to a reduction in fentanyl-involved deaths”).

⁸ Christopher J. Coyne & Abigail R. Hall, Cato Inst., [*Four Decades and Counting: The Continued Failure of the War on Drugs*](#) 1 (Apr. 12, 2017) (“Given the insights from economics and the available data, we find that the domestic War on Drugs has contributed to an increase in drug overdoses and fostered and sustained the creation of powerful drug cartels.”).

⁹ In fiscal year 2016, there were only 51 federal sentences imposed for offenses involving fentanyl; by fiscal year 2023, there were 3,085—a 60-fold increase. Compare USSC, [*Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments January 2018*](#), at 27, with USSC, [*Quick Facts: Fentanyl Trafficking*](#) (FY 2023). During a roughly similar time period, CDC data show that the synthetic opioid overdose death rate continued to rise, until starting to fall in mid-late 2023. See Ctrs. for Disease Control and Prevention, Nat’l Ctr. for Health Stats., [*Provisional Drug Overdose Death Counts*](#) (last accessed 4/30/2025) (note limitations of comparison as these CDC data are not limited to fentanyl deaths and use rolling 12-month time periods). Convictions and sentencings for fentanyl analogues also rose significantly after the DEA administratively scheduled them as controlled substances (in Schedule I) in early 2018, with no impact on the drug overdose rate. Compare USSC, [*Quick Facts: Fentanyl Analogue Trafficking*](#) (FY 2020) showing 47 drug offenses sentenced involving fentanyl analogues in FY 2018, with USSC, [*Quick Facts: Fentanyl Analogue Trafficking*](#) (FY 2023) (showing 269 drug offenses sentenced involving fentanyl analogues in FY 2023).

economic distress.¹⁰ Instead, the drug war has left in its wake a legacy of tragic, widespread, and enduring social consequences, including this country's mass incarceration crisis,¹¹ as well as substantial racial disparities in drug prosecutions and sentencing with poor, Black communities shouldering the brunt of the devastation.¹²

The concerns behind efforts to increase fentanyl sentences are the same that drove drug war mandatory minimums for marijuana, cocaine, crack cocaine, heroin, and methamphetamine. Likewise, today's rhetoric around fentanyl and the resulting federal policy proposals echo those of the crack-era War on Drugs.¹³ But fentanyl is no different than these other

¹⁰ [Statement of Daniel Ciccarone](#), M.D., Ph.D., *Fentanyl Analogues: Perspectives on Classwide Scheduling*, before House Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security, at 5–6 (Jan. 28, 2020).

¹¹ Drug-war era policies like the contemplated enhancements contributed to an explosion in the federal prison population, creating an ongoing crisis at the Bureau of Prisons, which lacks the staff or infrastructure to care for its growing population. See [Defenders' Comments on USSC's 2025 Proposed Amendments: Drug Offenses](#), at 7–13 (March 3, 2025). The Commission is statutorily obligated to “take into account the nature and capacity of the penal, correctional, and other facilities and services available” and to “minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons . . .” 18 U.S.C § 994(g).

¹² See, e.g., [Ghandnoosh & Anderson](#), at 20 (“Despite its limited benefits, the War on Drugs has levied an extraordinarily high economic and social toll—disproportionately on low-income communities of color and with lifelong consequences on employment and access to housing, education, and federal benefits.”); Jefferson Exum, at 1694–95 (discussing racial disparities in drug war arrests, charging, and punishment and arguing law enforcement efforts during this time were “focused on poor, Black communities as a method of social control, as opposed to purely crime control”); Eric L. Jensen et al., [Social Consequences of the War on Drugs: The Legacy of Failed Policy](#), 15 *Crim. Just. Pol’y Rev.* 100, 102–14 (2004) (describing the racially disproportionate explosion in the U.S. prison population between 1980 and 2001, attributable largely to nonviolent drug crimes, and its concomitant negative employment, family stability, health, and political consequences).

¹³ See [Collins & Vakharia](#), at 9–11 (cataloging harsh political rhetoric and state and federal legislative proposals related to fentanyl). The Attorney General during the current President's first administration claimed that trafficking in fentanyl “amounts to outright murder.” William P. Barr, [William Barr: Fentanyl could flood the country unless Congress passes this bill](#), *Washington Post* (January 10, 2020). Some policymakers and law enforcement officials have even sought to have fentanyl legally classified as a “weapon of mass destruction.” See, e.g., [Senate Passes Johnson](#)

drugs—each surged in popularity after a crackdown on a previously popular drug.¹⁴ It is also no different in that increased criminal penalties have failed to reduce the fentanyl supply and demand, are detrimental to public health, and exacerbate the overdose crisis.¹⁵

In keeping with other trends of the failed War on Drugs, federal sentencings for fentanyl trafficking are marked by substantial racial disparities: 77% of people convicted and sentenced for fentanyl trafficking offenses in fiscal year 2023 were Black or brown.¹⁶ The disparity is even greater for fentanyl analogue trafficking sentencings: 83% involved Black or brown people in fiscal year 2023.¹⁷ The Department’s requested enhancements would likely perpetuate (if not exacerbate) these racial disparities. They also are likely to fall most heavily on low-level individuals—particularly street-level dealers (many of whom struggle with substance use disorders themselves)—whose role is far from that of the kingpins, manufacturers, and importers who are responsible for producing synthetic opioids and bringing them into the United States, and whom Congress intended to target.¹⁸

[*Resolution Urging Congress to Declare Fentanyl a Weapon of Mass Destruction*](#), The Ohio Senate (Feb. 27, 2025); [*H. Res. 1172*](#), 117th Cong. (expressing that fentanyl is a weapon of mass destruction). Just yesterday, Attorney General Pamela Bondi claimed that the Administration’s seizure of fentanyl pills “saved 258 million lives”—roughly 75% of the U.S. population. William Vaillancourt, [*Pam Bondi Makes Head-Spinning Claim Trump Saved 258M American Lives*](#), The Daily Beast (May 1, 2025); see also Jim Newell, [*The DOJ Says Trump Has Saved 258 Million Lives. I Asked Them What That’s Based On*](#), Slate (May 1, 2025).

¹⁴ See [*Ciccarone Statement*](#), at 5–6 (“Each era has its problematic drug defined by supply or cultural desire, but the underlying driver of problematic drug use leading to death is independent of the type of drug and getting worse over time. Deaths due to opioids, including fentanyl, is only the latest manifestation of this multi-decade phenomenon.”).

¹⁵ See [*Collins & Vakharia*](#), at 15–16.

¹⁶ [*2023 Fentanyl Quick Facts*](#).

¹⁷ [*2023 Fentanyl Analogue Quick Facts*](#).

¹⁸ See USSC, [*Public Data Briefing: Proposed Amendments on Drug Offenses \(2025\)*](#), at 15 (observing that, out of a sample of fentanyl cases sentenced in fiscal year 2019, approximately 61% of people convicted of fentanyl and fentanyl analogue offenses were at the level of street dealer or below).

In response, advocates are calling on policymakers to move away from “harsh penalties and further criminalization,” toward “evidence-based public health and harm reduction approaches.”¹⁹ Indeed, this past March, drug policy and addiction experts urged the Commission to “treat substance use . . . as [a] public health matter[] outside of the criminal-legal system,”²⁰ and similarly to “incorporate[e] a medical model of substance use . . . into [the guidelines] framework[.]”²¹ But the contemplated enhancements would do just the opposite. They would also conflict with the Commission’s obligation under 28 U.S.C. § 994(g) to formulate sentencing guidelines that “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons[.]”

II. The rapidly declining fentanyl overdose death rates in recent years prove the contemplated enhancements ill-advised and underscore the need for further study.

A. Overdose deaths, including fentanyl deaths, declined sharply in 2024, with many states seeing a decline as early as 2021.

The Department’s request for more fentanyl-related specific offense characteristics (SOCs) is based not just on the faulty premise that longer

¹⁹ [Collins & Vakharia](#), at 4 (recommending that policymakers protect and expand “911 Good Samaritan” laws, access to naloxone, and opioid agonist treatment; improve and make more accessible drug checking and surveillance and collection data; authorize safe consumption sites; and fund pilot injectable opioid treatment); *see also* [Statement of Marc Mauer](#), *Defeating Fentanyl: Addressing the Deadliest Drugs Fueling the Opioid Crisis*, before Senate Comm. On the Judiciary, Subcomm. On Crime and Terrorism, at 3 (Apr. 10, 2018) (“After nearly a half century of responding to drug addiction with punitive policies, many policymakers and the majority of Americans now support pursuing evidence-based policies that prevent and treat drug use disorder rather than fruitlessly, and harmfully, ratcheting up criminal penalties for sellers.”); [Ghandnoosh & Anderson](#), at 22 (urging policymakers to reduce the number of people incarcerated for drug crimes and employ harm-reduction measures to end the opioid crisis).

²⁰ Allison Frankel & Nina Patel, ACLU, [Comment on USSC 2025 Supervised Release Proposed Amendment](#), at 3 (Mar. 3, 2025).

²¹ Reena Kapoor, M.D., [Comment on USSC 2025 Supervised Release Proposed Amendment](#), at 1 (Feb. 27, 2025).

sentences will deter fentanyl trafficking and reduce overdose deaths,²² but also on the assumption the fentanyl overdose crisis is ever-worsening, justifying swift and severe sentencing increases. However, recent overdose data from the Centers for Disease Control and Prevention (CDC) demonstrate that this assumption is flawed, and that more study is needed before we can truly understand recent trends in fentanyl use and how (if at all) the guidelines should attempt to address them.

The CDC's provisional data reflect that in the 12-month period ending in November 2024, overall drug overdose deaths declined more than 26% from the previous 12-month period.²³ Drug deaths dropped from a high of 114,000 in July 2023 to just under 82,000 in November 2024.²⁴ This steep decline in the annual number of overdose deaths is unprecedented.²⁵ The director of the National Institute on Drug Abuse has said that fentanyl overdose deaths saw an even greater decline than overall overdose deaths: they dropped by 30.6% in one year.²⁶ These statistics led one commenter to proclaim that “[t]he deadliest phase of the street fentanyl crisis appears to have ended, as drug deaths continue to drop at an unprecedented pace.”²⁷

Researchers who have taken a more granular look at the data determined that overdose deaths began declining in most states in 2022 and 2023, with many states seeing a decline in deaths in 2021 and 2022, earlier than previously reported.²⁸ And as of August 2024, 19 states had overdose

²² [DOJ Comment on 2024-2025 Proposed Priorities](#), at 6 (referring to the “deterrent effect” of the proposed enhancements, which will be “likely to bring about significant, large-scale change”).

²³ CDC, [Provisional Drug Overdose Death Counts](#) (using predicted values). These data are not limited to fentanyl or fentanyl analogue deaths and include overdose deaths from other drugs.

²⁴ *Id.*

²⁵ Ctrs. for Disease Control and Prevention, [CDC Reports Nearly 24% Decline in U.S. Drug Overdose Deaths](#) (Feb. 25, 2025) (reflecting the decline in projected deaths from September 2023 to September 2024; the number of deaths continued to decline through November 2024, per the latest data on the CDC's [website](#)).

²⁶ Brian Mann, [Deadliest phase of fentanyl crises eases, as all states see recovery](#), NPR (Mar. 10, 2025).

²⁷ *See id.*

²⁸ *See id.*

rates near or even lower than their pre-COVID, January 2020 baseline rates.²⁹ According to experts, the declining overdose rate “is long-term and sustainable,” and “if the current trend holds, the U.S. could return to a level of fatal overdose not seen since 2016, when fentanyl began replacing heroin in the street drug supply.”³⁰

While the overdose death rate is still far too high, policymakers must examine the reasons behind the steep decline and must not rush to act in ways that could prove ineffectual at best or counterproductive at worst. Research into the sharp decline in fentanyl-related overdose deaths is still nascent, with public health experts agreeing the reasons are not yet entirely clear.³¹ The CDC attributes the decline to multiple factors, including more widespread naloxone distribution, better access to evidence-based treatment for substance use disorders, shifts in the illegal drug supply (including decreasing purity, addressed below), and continued investments in prevention and response programs after pandemic-related disruptions.³² The CDC cites these community driven interventions as critical to ensuring that overdose death rates continue to go down.³³

Other researchers similarly attribute the declining fentanyl overdose death rates to harm-reduction strategies such as increasing the availability of naloxone, fentanyl test strips, and sterile needle exchange programs.³⁴ Notably, the drop-off in overdose deaths began in earnest just after the Food and Drug Administration issued guidance in September 2022 that facilitated the wide availability of naloxone by removing barriers to its distribution.³⁵

²⁹ Nabarun Dasgupta, Colin Miller, & Adams Sibley, [Peak OD Phenotypes](#), Opioid Data Lab (Feb. 12, 2025).

³⁰ See Mann, [Deadliest phase of fentanyl crises eases](#).

³¹ *Id.*

³² See [CDC Reports Nearly 24% Decline in U.S. Drug Overdose Deaths](#), CDC Newsroom (Feb. 25, 2025).

³³ *Id.*

³⁴ See Jan Hoffman & Noah Weiland, [What’s Behind the Remarkable Drop in U.S. Overdose Deaths](#), N.Y. Times (Nov. 21, 2024).

³⁵ See U.S. Dep’t of Health and Human Services, Food and Drug Admin., Ctr. For Drug Eval. and Rsch., [Exemption and Exclusion from Certain Requirements of the Drug Supply Chain Security Act for the Distribution of FDA-Approved Naloxone](#)

Experts also point to an uptick in prescriptions for medications that suppress opioid cravings and education campaigns about the harms of fentanyl-laced pills as helping to abate the crisis.³⁶

It is not surprising, given that fentanyl addiction is a public health problem, that public health factors are the primary drivers of the decline in overdose deaths. As the President of the American Society of Addiction Medicine explains: harm reduction policies “are all part of a health response to substance use that is bending the curve.”³⁷ And while some government officials also point to law enforcement strategies, such as crackdowns on Mexican cartels and on the international fentanyl precursor supply chain,³⁸ Defenders are unaware of any experts citing to criminal sentences—particularly those imposed on street-level dealers, who tend to comprise the largest percentage of individuals convicted and sentenced for fentanyl offenses³⁹—as reasons for the declining death rates. Given that the average sentence for a fentanyl trafficking offense has increased by only 5 months from 2016 to 2023, it is difficult to argue that increased sentences have played a role in curtailing the crisis.⁴⁰

B. Emerging research suggests the increasing prevalence of xylazine and medetomidine in the fentanyl supply could be contributing to the decline in overdose deaths.

One enhancement the Commission is considering is for distributing synthetic opioids mixed with xylazine or medetomidine. These are non-opioid

[*Products During the Opioid Public Health Emergency, Guidance for Industry*](#) (Sept. 2022).

³⁶ *Id.*

³⁷ Hoffman & Weiland, [*What’s Behind the Remarkable Drop in U.S Overdose Deaths*](#).

³⁸ *See id.*

³⁹ *See* USSC, [*Public Data Briefing: Proposed Amendments on Drug Offenses*](#), at 15 (2025).

⁴⁰ Compare [*Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments*](#), at 27 (Jan. 2018) (showing that the average sentence for a fentanyl trafficking offense in FY 2016 was 66 months), with USSC, [*Quick Facts: Fentanyl Trafficking*](#) (May 2024) (showing that the average sentence for a fentanyl trafficking offense in FY 2023 was 71 months).

veterinary tranquilizers not approved for use in humans.⁴¹ When combined with opioids such as fentanyl, they can prolong the duration and effects of those drugs.⁴² They are not controlled substances, and drug users typically consume them only in conjunction with other substances.⁴³

Although DOJ concedes that the effects of xylazine and medetomidine on humans “have not yet been fully studied,” it requests this enhancement because these effects “can include heightened sedation and bradycardia.”⁴⁴ According to the DOJ, these substances are “profoundly dangerous because their effects cannot be reversed by life-saving medicines like naloxone (Narcan).”⁴⁵ However, emerging research on these mixing agents indicates their growing presence in the fentanyl supply could be *reducing* overdose deaths—making this enhancement particularly inapt.⁴⁶

Doctors and addiction experts generally agree that “[t]he amount of fentanyl [in the U.S. drug supply] appears to be dropping . . . while the amount of animal tranquilizers, such as medetomidine and xylazine, is rising.”⁴⁷ But they also agree that xylazine and medetomidine “aren’t as immediately lethal as fentanyl.”⁴⁸ According to the National Institute on Drug Abuse, research shows that xylazine *decreases* the odds of fatal overdose when compared to using fentanyl alone.⁴⁹

In a study of patients admitted to emergency departments (EDs) for illicit opioid overdoses, clinical outcomes “were significantly less severe in

⁴¹ See Drug Policy Alliance, [Facts About Xylazine](#), at 1 (June 2024).

⁴² See *id.*

⁴³ See *id.*

⁴⁴ [DOJ Comment on 2024-2025 Proposed Priorities](#), at 7 (July 15, 2024).

⁴⁵ *Id.*

⁴⁶ See, e.g., Mann, [Deadliest phase of fentanyl crises eases](#); Hoffman & Weiland, [What’s Behind the Remarkable Drop in U.S Overdose Deaths](#).

⁴⁷ Brian Mann, [Reporter’s Notebook: 8 theories why fentanyl deaths are plummeting](#), NPR (Mar. 25, 2025).

⁴⁸ *Id.*

⁴⁹ See Nat’l Inst. on Drug Abuse (NIDA), [Xylazine](#) (Sept. 2024) (last accessed Apr. 29, 2025) (“NIDA-funded research found that people with xylazine and fentanyl in their systems at the time of overdose had lower rates of heart attack and coma than those who tested positive for opioids alone.”).

those testing positive for xylazine.”⁵⁰ Patients who had xylazine and fentanyl in their systems had substantially lower heart attack and coma rates than opioid overdose patients who tested negative for xylazine.⁵¹ Some addiction experts posit this is because, while xylazine has its own harmful side effects, including severe skin wounds, it sedates users for hours, preventing them from consuming fentanyl as frequently.⁵²

Additional xylazine and medetomidine studies challenge the DOJ’s proposition that naloxone cannot reverse their effects. Just last year, scientists studying their effects in mice found that, “contrary to commentary from politicians and public health officials, it is unknown how xylazine impacts naloxone efficacy,” and naloxone does, in fact, block xylazine from binding to certain opioid receptors—suggesting xylazine might actually be responsive to naloxone.⁵³

These new discoveries, at a time when fentanyl overdoses have been dropping sharply, make it imperative for the Commission to receive testimony from scientists, medical professionals, and public health experts before adding any fentanyl enhancements—particularly an enhancement based on substances that could actually be *saving lives*. In 2018, when the fentanyl crisis was exploding rather than declining, and when the Commission first adopted a fentanyl-related enhancement for knowingly misrepresenting fentanyl as another substance, it did so only after in-depth study involving “extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings.”⁵⁴ Now, when the

⁵⁰ Jennifer S. Love, et. al., [Opioid Overdoses Involving Xylazine in Emergency Department Patients: A Multicenter Study](#), 61 *Clinical Toxicology* 3, at 2 (Mar. 2023).

⁵¹ *See id.*

⁵² Hoffman & Weiland, [What’s Behind the Remarkable Drop in U.S Overdose Deaths](#) (“People addicted to fentanyl often need the drug numerous time a day. But xylazine can sedate users for hours. If someone consumes fentanyl mixed with xylazine, ‘you might not shoot another bag of fentanyl, because you’re knocked out,’ said Colin Miller, a researcher at the University of North Carolina, Chapel Hill, who has been interviewing drug users in Grand Rapids, Mich., and Pittsburgh about the effects of xylazine in the street supply.”).

⁵³ Madigan L. Bernard, et. al., [Xylazine is an agonist at kappa opioid receptors and exhibits sex-specific responses to opioid antagonism](#), 11 *Addiction Neuroscience* at 2 (June 2024).

⁵⁴ USSG App. C, [Amend. 807](#), Reason for Amendment (Nov. 1, 2018).

tide has suddenly turned and experts are only beginning to understand why, it is even more critical that the Commission conduct rigorous, empirical analysis before increasing penalties.

III. Sentencing trends counsel against the enhancements.

Overdose rates are not the only statistics that counsel against the contemplated enhancements. Saliently, the Commission does not point to any sentencing data suggesting the conduct targeted by any of these enhancements currently leads to above-guideline sentences. Instead, through the iterative process established by the Commission's organic statute, judges are warning, through the sentences they impose, that the fentanyl guidelines are already too high. In FY 2023, only 29% of sentences imposed for fentanyl offenses were within the applicable guideline range, with judges varying or departing upward in only 3% of cases.⁵⁵ The other 68% of fentanyl sentences were below the applicable guideline range, either through downward departures or variances.⁵⁶ The numbers were even more stark for offenses involving fentanyl analogues: only 22% of sentences were within the guideline range, and only 4% of sentences were above the range, while 73% were below the range.⁵⁷ This is not a new trend; Commission data show that in recent years, for fentanyl and analogues alike, judges very rarely sentence above the guidelines and only sentence within the guidelines in less than one third of cases.⁵⁸

The low rates of within- and above-guideline sentences in these cases reflect that §2D1.1 already results in guideline ranges for fentanyl-related offenses that sentencing courts consider too long. Piling on enhancements will only deepen the disconnect between the sentences courts find appropriate and those called for by the guidelines.

⁵⁵ USSC, [2023 Fentanyl Quick Facts](#).

⁵⁶ *See id.*

⁵⁷ USSC, [2023 Fentanyl Analogue Quick Facts](#).

⁵⁸ *See* USSC, *Quick Facts: Fentanyl Trafficking* for [FY 2023](#), [FY 2022](#); and [FY 2021](#); *see also* USSC, *Quick Facts: Fentanyl Analogue Trafficking* for [FY 2023](#), [FY 2022](#), and [FY 2021](#).

IV. The contemplated enhancements are in tension with the Commission’s recent, laudable efforts to simplify the Guidelines Manual and fix the overly punitive drug guideline.

For years, commenters have warned of the dangers of guideline “factor creep”—the proliferation over time of numerous, primarily aggravating SOC’s throughout the Manual, leading to an “inherently unstable” and complex federal sentencing system.⁵⁹ Factor creep, and the resulting complexity of the federal sentencing guidelines, are primary reasons the federal guidelines are more frequently criticized than the Parole Commission guidelines and those adopted by various states.⁶⁰ It is inherently problematic given “there is no practical way to account for the large number of diverse harms arising in different circumstances[.]”⁶¹ Factor creep is especially pervasive in §2D1.1, which started with just one SOC enhancement in 1987, and now contains 16.⁶²

Justice Stephen Breyer, a member of the original Sentencing Commission, warned over 25 years ago about the danger of upward offense level creep:

[T]he Guidelines should contain at least a few distinctions—in the form of offense characteristics that can enhance, or diminish, the base offense level. But it is important to know when to stop[.] There is little if anything to be gained in terms of punishment’s classical objectives by trying to use highly detailed offense characteristics to distinguish finely among similar

⁵⁹ R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 753 (2001); see also, e.g., [Defender’s Comment on the USSC’s Proposed Priorities for the 2024-2025 Amendment Cycle](#) at 2–8 (July 15, 2024) (describing how, over the years, the Commission has made piecemeal additions to the Manual leading to needless complexity, compounding the guidelines’ harshness and discussing ways in which factor creep has led to elevated offense levels under the most commonly-applied guidelines); Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 Hofstra L. Rev. 799, 804 (2018) (criticizing “add-on” SOC’s and recommending simplification of the guidelines).

⁶⁰ See Ruback and Wroblewski, at 762.

⁶¹ *Id.* at 753.

⁶² See [Defender Comment on 2024-2025 Proposed Priorities](#), at 6.

[individuals]. And there is much to be lost, both in terms of Guideline workability and even in terms of fairness Ranking [people] through the use of fine distinctions is like ranking colleges or “liveableness” of cities with numerical scores that reach ten places past a decimal point. The precision is false.⁶³

Justice Breyer urged the Commission to “act[] forcefully to diminish significantly the number of offense characteristics attached to individual crimes” and to include only those “justified . . . by data that shows their use by practicing judges to change sentences[.]”⁶⁴ He acknowledged that eliminating finer offense distinctions risked increasing disparity and decreasing proportionality, but he also admonished: “[T]he goal of the Sentencing Guidelines was not *perfect*, but *increased*, fairness.”⁶⁵ He suggested moving the guidelines toward better “fairness and equity in the individual case” by simplifying their operation, “which entails greater judicial discretion.”⁶⁶

Recognizing these concerns, the Commission has long explored ways to simplify the guidelines’ operation, often listing simplification as a final policy priority.⁶⁷ Thirty years ago—when the guidelines were not even ten years old and contained far fewer SOC’s—the Commission created a staff working group whose mandate was to “reduce the complexity of guideline application” and “improve federal sentencing by working closely with the judiciary and others to refine the guidelines[.]”⁶⁸ Nonetheless, over the last 30 years the guidelines have mostly “grown in complexity and severity as each

⁶³ Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 36 Fed. Sent. Rep. 244, 249 (2024), orig. pub’d 11 Fed. Sent. Rep. 4 (1999).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See, e.g., USSC, [Notice of Final Priorities for 2024-2025 Amendment Cycle](#), at 2 (Aug. 2024); USSC, [Notice of Final Priorities for 2023-2024 Amendment Cycle](#), at 3 (Aug. 2023); USSC, [Notice of Final Priorities for 2014-2015 Amendment Cycle](#), at 5 (Aug. 2014); USSC, Notice of priority areas for Commission research and amendment study and request for public comment, 60 Fed. Reg. 49316, 1995 WL 557121 (Sept. 22, 1995).

⁶⁸ 60 Fed. Reg. 49316, 49316–49317.

Commission has reacted to discrete legal developments and made piecemeal changes to the Manual.”⁶⁹

That is, until this year. Last month, the Commission made significant strides in its simplification endeavors by voting to adopt an amendment removing most departures from the Guidelines Manual—many of which are piecemeal upward departure provisions in chapter two.⁷⁰ By adding unwarranted, piecemeal upward SOC to the fentanyl guidelines, the contemplated amendments would work against the recent Simplification Amendment and the Commission’s 30-year goal to reduce complexity.

Moreover, the Commission’s data show the contemplated enhancements would apply to only a tiny fraction of fentanyl or fentanyl analogue cases.⁷¹ This suggests the conduct targeted is isolated and better addressed through the Court’s § 3553(a) analysis in individual cases. And if history is any indication, there is a risk that if added, the DOJ would seek more or more expansive enhancements covering the same conduct to capture more cases, as it did with the fentanyl misrepresentation enhancement in recent years.⁷² If heeded, these requests would merely contribute to the ever-present problem of factor creep.

⁶⁹ [Defender Comment on 2024-2025 Proposed Priorities](#), at 5 (July 15, 2024); *see also* Breyer, *Suggestions for a Fairer Future*, at 804 (“I made roughly the same recommendations [to simplify the guidelines by removing SOC add-ons] nineteen years ago, and nothing happened.”).

⁷⁰ USSC, [Amendments to the Sentencing Guidelines \(Preliminary\)](#), at 3 (Apr. 11, 2025).

⁷¹ In FY 2023, the contemplated enhancements would have applied in only 1% (distribution to individuals under 21), 1.7% (use of dark web or anonymizing technology), and 2.8% (xylazine or medetomidine adulteration) of cases involving fentanyl or fentanyl analogues. *Compare* [Issue for Comment](#), at 3 *with* [2023 Fentanyl Quick Facts](#) (3,085 total fentanyl sentenced cases); [2023 Fentanyl Analogue Quick Facts](#) (269 total fentanyl analogue sentenced cases).

⁷² *See* [DOJ Comment on 2024-2025 Proposed Priorities](#) at 5. The DOJ attributed the enhancement’s infrequent application to the difficulty of proving mens rea, *see* [DOJ Comment on 2025 Proposed Amendments](#), at 21–26 (March 3, 2025), but the Commission’s March 2025 report on drug overdose deaths reveals a different explanation: courts rarely apply the enhancement because the conduct it targets rarely occurs. *See* USSC, [Overdoses in Federal Drug Trafficking Crimes](#), at 2 (March 2025) (finding less than 5% of sentenced individuals knowingly misrepresented the drugs they were trafficking, and that “most people selling drugs in this study and

The contemplated enhancements also conflict with Part A of the 2025 Drug Offenses Amendment, which lowers certain §2D1.1(a)(5) mitigating role caps and expands the §3B1.2 mitigating role adjustment in drug cases in response to “comment [the Commission has received] over the years indicating that §2D1.1 results in sentences greater than necessary for individuals performing low-level functions in drug trafficking offenses.”⁷³ Eric Sterling, a key architect of the mandatory minimum thresholds in the Anti-Drug Abuse Act of 1986 (ADAA), testified at the Commission’s hearing on this amendment. He acknowledged that these thresholds, which “became the foundation of the drug weights for the sentencing guidelines,” were “based on a hasty reliance on flawed expertise” and have “failed to target kingpins and instead disproportionately punished couriers, street-level dealers, and individuals with minimal control over drug operations.”⁷⁴ Similarly, as we said at the beginning, the contemplated enhancements—like the rest of §2D1.1—would inevitably fall predominantly on low-level individuals, undoing in some cases the Commission’s important work to calibrate their sentencing ranges down.

Of course, this brings us back to where we started. The Commission must avoid the kind of “hasty reliance on flawed expertise” that drove the ADAA and the War on Drugs more than 30 years ago. Having abandoned both the “exercise of its characteristic institutional role,” and “empirical data and national experience” in formulating the drug guidelines,⁷⁵ the Commission now has an opportunity to chart a better course. The mandate that the guidelines “reflect to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process” demands no less.⁷⁶

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most of those who overdosed on these drugs did not know the exact drugs involved in the transaction”).

⁷³ [2025 Preliminary Amendments](#), at 3.

⁷⁴ [Statement of Eric E. Sterling on behalf of LEAP to USSC on Drug Amendments](#), at 3, 4 (Mar. 12, 2025).

⁷⁵ *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

⁷⁶ 28 U.S.C. § 991(b)(1)(C).

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Defenders urge the Commission not to adopt any of the enhancements outlined in its IFC, and to work with Defenders and other stakeholders to continue the progress enjoyed in recent years in reducing overdose deaths. As always, we appreciate the Commission's consideration of our views.

Very truly yours,



Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Sentencing Resource Counsel
Federal Public and Community
Defenders

Cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Scott A.C. Meisler, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel