

The following excerpt from the March 2023 Statement of Michael Caruso contains Defenders’ comments on Proposed Amendment 11.

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II. Counterfeit Pills

The Commission has also proposed an amendment to respond to “concerns expressed by the Drug Enforcement Administration (DEA)” about “illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills.”⁵⁴ The proposal would add a two-level enhancement to §2D1.1(b)(13) for people who “represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl . . . or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug.”⁵⁵ The Defenders oppose the addition of this enhancement to §2D1.1(b)(13) for three reasons.

First, in the 2018 amendment cycle (the last full cycle the Commission had a quorum), the Commission examined—and rejected—a similar proposal after undertaking a study involving “extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings.”⁵⁶ The current proposal, by contrast, is unsupported by any meaningful administrative record. Instead, the sole basis for this proposed amendment appears to be a one-page letter submitted by the DEA and briefly endorsed in the DOJ’s own submissions to the Commission. We agree that counterfeit pills pose a significant risk to public safety—but are skeptical that increasing penalties for those substances will either reduce their availability or mitigate an increasingly tainted drug supply.

Second, the proposed amendment lacks an adequate *mens rea* standard, placing it out of step with recent Supreme Court jurisprudence emphasizing that “wrongdoing must be conscious to be criminal.”⁵⁷ As the Defenders observed in our annual letter, which urged the Commission to “amend the guidelines to specify that provisions which recommend increased punishment require evidence of intent,”⁵⁸ provisions with inadequate *mens rea* standards stand “in serious tension with deeply rooted principles of

⁵⁴ 2023 Proposed Amendments, at 7228.

⁵⁵ *Id.*

⁵⁶ USSG App. C, Amend. 807 (Nov. 1, 2018); USSG §2D1.1(b)(13).

⁵⁷ *Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022) (cleaned up).

⁵⁸ Defenders’ Annual Letter to the Sentencing Commission at 9 (Sept. 14, 2022).

justice and responsibility.”⁵⁹ *Mens rea* requirements help to “separate those who understand the wrongful nature of their act from those who do not.”⁶⁰ The proposed amendment would undermine this goal and take the guidelines in the wrong direction.

Finally, the amendment is overbroad, as it would likely operate to add a two-level enhancement in every case involving counterfeit pills, regardless of the culpability or role of the person being sentenced.

A. The proposed amendment is not evidence-based or empirically supported and would repeat past mistakes.

During the 2018 amendment cycle, the Commission considered—and rejected—a very similar amendment to the drug guideline to the one the DEA has proposed. That proposed amendment lacked a *mens rea* requirement and would have increased punishment for anyone who misrepresented or mismarketed fentanyl or an analogue as another drug.⁶¹ The Commission rejected this approach and instead, in Amendment 807, added a four-level enhancement for “*knowingly* misrepresenting or *knowingly* marketing” fentanyl or a fentanyl analogue “as another substance.”⁶² The Commission based its decision on a “multiyear study,” which “included extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings.”⁶³ The Commission also explained that it had deliberately included a *mens rea* requirement in this specific offense characteristic “to ensure that only the most culpable offenders are subjected to these increased penalties.”⁶⁴ Perhaps recognizing that illegal drug use inherently carries risk, the Commission explained that it was particularly

⁵⁹ *Id.* (quoting *United States v. Burwell*, 690 F.3d 500, 530 (D.C. Cir. 2012) (Kavanaugh, C.J., dissenting)).

⁶⁰ *Id.* (quoting *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019)).

⁶¹ See USSC, *Notice of Proposed Amendments to Sentencing Guidelines*, 83 Fed. Reg. 3869, 3875 (Jan. 26, 2018) (providing alternative versions of §2D1.1(b)(13)—one with a *mens rea* of knowingly and the other without).

⁶² See Amend. 807 (emphasis added); see also USSG §2D1.1(b)(13).

⁶³ See Amend. 807.

⁶⁴ *Id.*

focused on protecting users who were “inexperienced or unaware of what substance he or she is using.”⁶⁵

That multiyear study remains the Commission’s most recent critical assessment of synthetic drugs. What new information is available to the Commission—*e.g.*, data on emerging trends in how fentanyl and its analogues are produced and distributed—does not support further increasing penalties for fentanyl-related mismarketing. The DEA has explained that “[t]he vast majority of counterfeit pills brought into the United States are produced in Mexico, and China is supplying chemicals for the manufacturing of fentanyl in Mexico.”⁶⁶ The international origins of counterfeit pills make it unlikely that increasing punishment for domestic mismarketing will be effective. Sentencing trends also counsel against the enhancement. Courts continue to vary downward in more than one-third of fentanyl cases and nearly half of fentanyl-analogue cases,⁶⁷ and there is no indication that the few upward variances that occur in these cases—3.5% of variances in fentanyl and 1.7% of variances in fentanyl-analogue cases—are being driven by concerns that §2D1.1(b)(13) is not punitive enough.⁶⁸ With sentencing courts varying upward so rarely, the judiciary is not signaling a need for §2D1.1(b)(13) to be modified.⁶⁹

Defenders are also concerned that expanding §2D1.1(b)(13) this cycle would repeat the mistakes of the past. Drug addiction and overdose are unquestionably pressing public health problems in the United States. But there is over thirty years of evidence that enhancing penalties for drug crimes will not reduce the supply of drugs, the incidence of substance-use disorder, or the number of drug-related deaths. Moreover, the overdose crisis, which

⁶⁵ *Id.*

⁶⁶ See, *e.g.*, Press Release, DEA, *DEA Issues Public Safety Alert on Sharp Increase in Fake Prescription Pills Containing Fentanyl and Meth* (Sept. 27, 2021), <https://tinyurl.com/4f42mzrn>.

⁶⁷ See USSC, *Quick Facts: Fentanyl Trafficking Offenses* at 2 (2021), <https://tinyurl.com/mryxzbvx>; USSC, *Quick Facts: Fentanyl Analogue Trafficking Offenses* at 2 (2021), <https://tinyurl.com/2s3739u6>.

⁶⁸ See *Fentanyl Trafficking Offenses*, *supra* note 67 at 2; *Fentanyl Analogue Trafficking Offenses*, *supra* note 67 at 2.

⁶⁹ Based on a survey of case law and transcripts, Defenders did not find examples of a court asking the Commission to expand §2D1.1(b)(13).

has run parallel to the War on Drugs for the past three decades,⁷⁰ is a clear indictment of the failure of punitive responses to curb drug use.

The War on Drugs started nearly fifty years ago when President Nixon characterized drug abuse as “America’s public enemy number one.”⁷¹ Fifteen years later, President Reagan warned that “illegal drugs were every bit as much a threat to the United States as enemy planes and missiles.”⁷² This rhetoric led to hard-hearted, but ultimately soft-headed, criminal legal policies that continue to bedevil the criminal legal system today.⁷³

The DEA’s effort to expand §2D1.1(b)(13) this amendment cycle is today’s version of this message. Whereas President Nixon described drugs in 1971 as “public enemy number one,” today fentanyl is, according to the DEA, “the single deadliest drug threat our nation has ever encountered.”⁷⁴

⁷⁰ See Hawre Jalal, *et al.*, *Changing Dynamics of the Drug Overdose Epidemic in the United States from 1979 through 2016*, Science (Sept. 21, 2018), <https://tinyurl.com/yckncdsm>.

⁷¹ Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control* (Jun. 17, 1971), <https://tinyurl.com/5n7wn95f>.

⁷² Ronald Reagan, *Remarks on Signing the Just Say No to Drugs Week Proclamation*, Ronald Reagan Presidential Library & Museum (May 20, 1986) <https://tinyurl.com/3xj9cwb9>.

⁷³ See, e.g., Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 213 (2019); Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Ctr. for Am. Progress (May 10, 2019), <https://tinyurl.com/v38ew5ps>; see also USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) (recognizing unfairness of 100:1 crack/powder disparity); *Hearing on Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 117th Cong. (June 17, 2021) (statement of Kyana Givens, Assistant Federal Public Defender); *Hearing on An Epidemic within a Pandemic: Understanding Substance Use and Misuse in America Before the Subcomm. on Health of the H. Energy & Commerce Comm.*, 117th Cong. (Apr. 14, 2021) (statement of Patricia L. Richman, National Sentencing Resource Counsel, Federal Public & Community Defenders); *Hearing on Fentanyl Analogues: Perspectives on Classwide Scheduling Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 116th Cong. (Jan. 28, 2020) (statement of Keven Butler, Federal Public Defender for the Northern District of Alabama).

⁷⁴ DEA, *Fentanyl Awareness*, <https://tinyurl.com/32kd85e9> (last visited Feb. 26, 2023).

Whereas, in 1986, “illegal drugs were every bit as much a threat to the United States as enemy planes and missiles,” today the DEA calls fentanyl a threat to “national security,” and drug warriors seek to have it classified as a “weapon of mass destruction.”⁷⁵

The rhetoric of the War on Drugs led to increased penalties that did nothing to address the drug crisis in this country and instead fueled the crisis of mass incarceration. The Commission should take care not to retread that path. Instead of targeting kingpins and managers, the proposed amendment would disproportionately apply to lower-level drug distributors whose knowledge and wherewithal are limited—a far cry from the manufacturers “producing pills in bright rainbow colors to drive addiction and increase sales.”⁷⁶ It would exacerbate racial disparities in punishment, as people of color comprise over 78% of those sentenced in fentanyl cases and over 86% of those sentenced in fentanyl analogue cases.⁷⁷ And there is no reason to believe it would have any meaningful impact on America’s addiction and overdose crises.⁷⁸

The Commission carefully considered this topic in 2018 and opted not to take the action the DEA now seeks. Therefore, Defenders believe the Commission should not revisit §2D1.1(b)(13) absent further study.

⁷⁵ *Id.*; see Joseph Longley, Regina LaBelle & Shelley Weizman, *Quick Take: Illicitly Manufactured Fentanyl as a Weapon of Mass Destruction: Rhetoric & Reality*, O’Neill Institute, Georgetown Law (Nov. 2022), <https://tinyurl.com/4secuvam>.

⁷⁶ See DEA Letter to the Sentencing Commission at 1 (Oct. 17, 2022); see also Press Release, DEA, *supra* note 66.

⁷⁷ See Fentanyl Trafficking Offenses, *supra* note 67 at 1; Fentanyl Analogue Trafficking Offenses, *supra* note 67 at 1.

⁷⁸ See Bryce Pardo, et al., *The Future of Fentanyl and Other Synthetic Opioids*, Rand Corp. xxvi (2019), <https://tinyurl.com/ycy4rwxu> (“There is little reason to believe that tougher sentences, including drug-induced homicide laws for low-level retailers and easily replaced functionaries (e.g., couriers) will make a positive difference.”).

B. The proposed amendment is inconsistent with basic principles of punishment.

The Defenders are concerned by the lack of an adequate *mens rea* element in the proposed amendment.

In 2018, when the Commission was considering whether to include a *mens rea* requirement in §2D1.1(b)(13), the Defenders pointed to then-recent Supreme Court precedent that supported the inclusion of that element in the guideline.⁷⁹ That same observation applies today, as a series of recent Supreme Court cases have stressed that predicated punishment on scienter—knowledge or consciousness of wrongdoing—is a “basic principle that underlies the criminal law.”⁸⁰ By omitting an appropriate *mens rea* requirement, the proposed amendment contravenes this “basic principle” and risks injecting a “disfavored” form of liability into the guidelines that would stand “in serious tension with deeply rooted principles of justice and responsibility.”⁸¹ The Defenders oppose this move away from an appropriately scienter-based system of punishment.

Defenders are also concerned about the workability of the proposed amendment’s “reason to believe” standard. Courts have struggled to apply such a standard in various contexts, resulting in multiple circuit splits.⁸² These workability concerns underscore that a “reason to believe” standard should not be added into §2D1.1.

⁷⁹ See Statement of Kevin Butler Before the U.S. Sentencing Comm’n, Washington D.C., at 33 (Mar. 14, 2018) (citing *McFadden v. United States*, 135 S. Ct. 2298, 2305 (2015)).

⁸⁰ See, e.g., *Rehaif*, 139 S. Ct. at 2196; *Ruan*, 142 S. Ct. at 2381 (“[A]s a general matter, our criminal law seeks to punish the vicious will. With few exceptions ‘wrongdoing must be conscious to be criminal.’”) (cleaned up).

⁸¹ *United States v. Burwell*, 690 F.3d 500, 430 (D.C. Cir. 2012) (Kavanaugh, C.J., dissenting).

⁸² See, e.g., *United States v. Maley*, 1 F.4th 816, 820 (10th Cir. 2021) (noting circuit split over standard for determining whether police officer has “reason to believe” the subject of an arrest warrant is in a particular dwelling); *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008) (noting circuit split over meaning of “reasonable cause to believe” in 21 U.S.C. § 841(c)(2)).

C. The proposed amendment is overbroad.

Finally, because the enhancement would be triggered by any “reason to believe” that a substance was not legitimate, it would likely apply in every single counterfeit pill case involving fentanyl and fentanyl analogues. The message that many pills are counterfeit is widespread. The DEA, along with state and local governments, has launched a national public awareness campaign to raise awareness among users.⁸³ The topic also receives significant attention from federal, state, and local media outlets.⁸⁴ We expect prosecutors would point to these headlines and media campaigns to argue that our clients had “reason to believe” the substance they were distributing was not legitimate.

By dint of its broad applicability, the proposed amendment would echo the discredited crack/powder model of punishing identical substances differently—simply because of their form and regardless of the culpability or role of the person being sentenced. It would also extend §2D1.1(b)(13) to apply in cases where all parties to the drug transaction knew the substance contained fentanyl, and even to people who, though they may have negligently misdescribed the drugs they were selling, had no reason to believe they were distributing fentanyl. Thus, unlike §2D1.1(b)(13) as it currently stands—which applies only to individuals who knowingly distribute drugs by means of fraud—the proposed amendment would not effectively distinguish between more and less culpable offenses.

We urge the Commission not to adopt this proposed amendment.

⁸³ See, e.g., DEA, *DEA Social Media Communications: “One Pill Can Kill” Social Media Campaign*, <https://tinyurl.com/yuh2djhs> (last accessed February 24, 2023); Gina Jordan, *Florida’s attorney general launches the One Pill Can Kill Website to Combat Fentanyl*, WUSF Public Media (Nov. 4, 2022), <https://tinyurl.com/374zy6jt>.

⁸⁴ See, e.g., Jan Hoffman, *Fentanyl Tainted Pills Bought on Social Media Cause Youth Drug Deaths to Soar*, N.Y. Times (May 19, 2022), <https://tinyurl.com/mthxwbak>; David Ovalle, *Potent, often disguised: What to know about fentanyl causing overdoses in South Florida*, The Miami Herald (Mar. 14, 2022), <https://tinyurl.com/pwue7etd>.