

THE GRAND JURY OF THE SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

REPORT OF THE GRAND JURY
OF THE SUPREME COURT
STATE OF NEW YORK
FIRST JUDICIAL DISTRICT
CRIMINAL PROCEDURAL LAW
SECTION 190.85 SUBDIVISION (1)(c)

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**SNC 4N ADDITIONAL
GRAND JURY**

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EXECUTIVE SUMMARY

Fentanyl analogs are potent synthetic opioids that operate essentially like fentanyl with only slight chemical deviations from the base compound. Recently, fentanyl analogs have become more prevalent throughout New York City, while most are not illegal substances under New York law. They have contributed to hundreds of overdose deaths in New York City alone, and the numbers continue to rise.

Fentanyl analogs are packaged and sold just like heroin or fentanyl, although they cost less to acquire, leading to higher profits for dealers. Because most analogs are currently legal in this state, it is extremely difficult for law enforcement agencies to intercept these dangerous compounds or disrupt the organizations that are dealing them.

The New York City Police Department Laboratory (“the Police Lab”) has found fentanyl analogs to be present in seized evidence submitted to it in ever-increasing numbers. The Police Lab has attempted to better identify fentanyl analogs in recovered evidence, but its efforts are hampered by the lack of specialized equipment and standards for comparative analysis, as well as the fact that these drugs are not illegal in this state.

The Office of the Chief Medical Examiner (“OCME”) has tracked the harmful effects of these drugs. Through post mortem analysis of overdose deaths in New York City, it has found an increasing number of deaths from overdose to be attributable to fentanyl analogs that are not illegal in New York. Post mortem detection of fentanyl analogs is made difficult by the very low concentrations of these drugs that can cause death, which in turn may cause overdose deaths to in fact be under-reported.

In 2018, our legislature proscribed certain synthetic opioids - including one fentanyl analog, acetyl fentanyl - but the vast majority of fentanyl analogs remain legal substances. The

OCME continues to register increases in fentanyl analog related overdoses, while the NYPD lab continues to see an increase in seized fentanyl analogs. However, these agencies lack the resources to fully combat this crisis. Only if all fentanyl analogs are made illegal in New York State can we ensure that the public safety risk these drugs present will be abated.

It is therefore recommended the New York State Legislature proscribe all fentanyl analogs as Schedule I drugs under New York's Public Health Law. It is also recommended that the New York State Legislature allocate additional funding for laboratories conducting analyses for controlled substances, including police labs and the offices of medical examiners.

After considering evidence before it and legal instruction from the Office of the Special Narcotics Prosecutor, the Grand Jury¹ hereby submits a report, pursuant to Criminal Procedure Law §190.85(1)(c) “[p]roposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings”.

INTRODUCTION

In recent years, potent and harmful substances collectively referred to as fentanyl analogs have appeared on the streets of New York City. Fentanyl analogs are synthetic opioids that have the basic structure of fentanyl and mimic the pharmacological effects of fentanyl with slight changes to their molecular makeup, which make each variation a unique substance. While most known fentanyl analogs are not currently controlled in New York State, they have contributed to hundreds of overdose deaths since 2016, and the number continues to rise. Fentanyl analogs are sold in the same manner as illicit drugs, often in conjunction with other opioids such as heroin or fentanyl. Seizures of fentanyl analogs, whether the only opioid present or mixed with other illicit drugs, have steadily increased since 2016 and have been seized in every borough in New York City.

In New York City, the Office of the Chief Medical Examiner (hereinafter the “OCME”) conducts independent investigations using advanced forensic science in the service of families, communities and the criminal justice system. The OCME strives to provide answers for those affected by sudden and traumatic loss, and helps protect public health. The Grand Jury heard testimony from the OCME regarding the effect fentanyl analogs have on the body, the increasing extent to which they have contributed to overdose deaths in New York City and the challenges the OCME has faced conducting analyses of fentanyl analogs in post mortem investigations.

¹ The Grand Jury was impaneled by the Honorable Abraham Clott upon application of the Special Narcotics Prosecutor Bridget G. Brennan on January 17, 2019, and extended on January 24, 2019 to a term ending May 30, 2019.

The Grand Jury also heard testimony from witnesses from the New York City Police Department Laboratory (hereinafter “the Police Lab”). Among the responsibilities of the Police Lab are providing a full range of laboratory services, including identifying suspected illegal substances in connection with arrests and investigations, and providing expert analysis and witness testimony in connection with criminal prosecutions. Witnesses from the Police Lab testified regarding the increased number and volume of fentanyl analogs recovered from illicit drug distribution rings, and difficulties the Police Lab faces identifying and analyzing fentanyl analogs.

The Grand Jury received testimony from witnesses familiar with how fentanyl analogs are sold in New York City, listened to numerous recorded conversations and reviewed hundreds of communications regarding the methods of obtaining, distributing, packaging and selling these substances. The Grand Jury also heard testimony from undercover police officers involved in purchasing fentanyl analogs, detectives and police officers from the New York Police Department, and Special Agents from the Drug Enforcement Administration involved in investigating the organizations responsible for selling them.

FENTANYL ANALOGS HAVE CONTRIBUTED TO HUNDREDS OF OVERDOSE DEATHS IN NEW YORK CITY

The Grand Jury heard testimony that fentanyl analogs have contributed to hundreds of overdose deaths in New York City in recent years, and that the number of fentanyl-analog-involved overdose deaths in New York City has been increasing steadily. More than ten distinct types of fentanyl analogs have been identified as factors in overdose deaths in New York City since 2016, usually in combination with heroin, fentanyl, or other fentanyl analogs. Acetyl Fentanyl, which is one of a limited number of synthetic opioids proscribed by the New York

State Public Health Law,² has been the most prevalent fentanyl analog connected to overdose deaths since 2017. Fluoroisobutryl Fentanyl (FIBF) is the second most common analog contributing to overdose deaths since 2017 and is not proscribed in New York. The involvement of other fentanyl analogs in deaths has been episodic. Unique and unregulated fentanyl analogs, previously not identified in forensic toxicology reports, emerged as contributing to New York City overdose deaths as recently as 2018, while others previously identified in forensic toxicology analysis, have disappeared. For example, while Furanyl Fentanyl was the third most common analog contributing to overdose deaths in 2017, it was not identified as one of the top five in 2018 or 2019. Valeryl Fentanyl, on the other hand, was rarely identified if ever as contributing to New York City overdose deaths through the first half of 2018. But beginning in July 2018, Valeryl Fentanyl became one of the most frequently identified fentanyl analogs factoring in overdose deaths in New York City. The constant temporal and regional fluctuation of fentanyl analogs presents challenges for forensic toxicology in New York City and across the state.

The Grand Jury learned that fentanyl analogs, which have no legitimate medical use, generally have the same effects on the body as fentanyl, heroin and other opioids, but the intensity of these effects varies widely depending upon the analog's structure and composition. Some fentanyl analogs are similar to fentanyl in potency, while others can be as much as a hundred to a thousand times more potent. Fentanyl analogs, like other opioids, are depressants, which suppress bodily functions, including respiration, and can lead to death. Because many fentanyl analogs are highly potent, a minute amount can have a devastating effect upon the body.

The Grand Jury learned that fentanyl analogs pose unique challenges to the work of the OCME due to their chemical makeup. Because they are so potent, fentanyl analogs tend to

² Acetyl Fentanyl was controlled by New York State effective July 2018.

appear in low concentration in bodily fluids and tissues examined by the OCME, sometimes in ten to twenty times lower concentrations than the concentrations of other opioids detected in the samples examined during forensic toxicology analysis. Detection of comparatively low concentrations of fentanyl analogs is made even more difficult due to the body's metabolizing process, during which consumed substances are broken down and diluted. Instruments which have long been successfully utilized to identify toxic substances which appear in higher concentrations are not as effective when a toxic substance presents in such low concentrations. The difficulty in detection of substances in very low concentrations may lead to underreporting of analogs contributing to death, and make it difficult to fully assess the impact of analogs on the overdose epidemic.

FENTANYL ANALOGS ARE TRAFFICKED IN THE SAME MANNER AS ILLEGAL DRUGS

The Grand Jury heard evidence regarding organizations involved in the sale of fentanyl analogs that fluctuate between mixing analogs with illegal drugs, such as cocaine and heroin, and producing mixtures which contain only unregulated analogs. Illicit narcotic distributors thus appear to alter the composition of black market drugs in response to market demands and shifting supply, resulting in a highly unpredictable product.

The packaging of analogs can leave a buyer unaware as to its actual contents. Whether fentanyl analogs are mixed only with inactive dilutants, or combined with heroin or fentanyl, the packaging and method of sale is indistinguishable. They are all sold in glassine envelopes or ziplock bags. The markings and color on packaging bear no relationship to its contents, although there was evidence that sellers and buyers may be aware of differences between fentanyl and heroin, particularly with regard to taste and effect upon the user. This uncertainty with respect to

the type of substance trafficked presents a serious public health risk. Substance users may be aware of their level of tolerance for heroin or fentanyl, but a substance which contains a highly potent fentanyl analog puts substance users at greater risk for accidental overdose.

This fluctuation and uncertainty regarding the substances being sold also presents significant challenges for law enforcement. Many fentanyl analogs are not controlled in New York State and thus are not illegal to possess or sell despite their lethal potential. An arrest of an individual transporting unregulated fentanyl analogs cannot be prosecuted, even when that individual plays a significant role in a narcotics distribution organization. For example, the Grand Jury heard evidence of a street level organization whose members were selling both illegal drugs and fentanyl analogs and were transporting both heroin and fentanyl mixed with analogs, as well as unregulated fentanyl analogs which were not mixed with other narcotic drugs. More than twenty-five arrests of members and associates of this organization were dismissed and sealed during the course of the investigation due to the lack of a New York State controlled substance being present in the substance seized. The dismissals impeded the investigation and identification of the source of the dangerous substances. For example, the Grand Jury heard testimony concerning an incident in which Furanyl Fentanyl was recovered at the scene of an overdose death; however, because the recovered drug was not an illegal substance, the progress of the investigation into its source was slowed.

Important tools like search warrants, wiretaps, and arrests are unavailable if the substance being distributed is not regulated in New York State. Eavesdropping warrants under Article 700 of the New York State Criminal Procedure Law (wiretaps) may only be utilized when there is probable cause to believe that a particular person has committed or is about to commit a “designated offense”. A “designated offense” defined in Article 700 requires that the offense be

one specified in the New York State Penal Law. While the sale of controlled substances, including heroin, cocaine, and fentanyl, are “designated offenses” pursuant to Article 700, the sale of most fentanyl analogs is unregulated. Similarly, a search warrant issued under Article 690 of the Criminal Procedure Law requires that property subject to seizure be stolen, unlawfully possessed, used or possessed to commit or conceal the commission of an offense against the law of this state, or constitutes evidence that tends to demonstrate that an offense was committed in this state. Because unregulated fentanyl analogs are not controlled substances in New York State, the sale or possession of them does not constitute an offense under Article 690 and therefore law enforcement cannot apply for search warrants in the investigation of drug trafficking organizations where only unregulated fentanyl analogs have been identified.

This also prevents law enforcement from acting quickly to protect the public by dismantling identified organizations whose activities are resulting in overdoses. For example, the Grand Jury heard evidence about an organization which was involved in the sale of fentanyl analogs for more than two years, and two overdoses appeared to be related to its activity. No investigative steps could be initiated related to unregulated analogs, which were sold at the early stages of the investigation. Only when analogs mixed with heroin were recovered, was law enforcement able to intervene effectively.

The Grand Jury also heard evidence regarding the lucrative nature of the sale of unregulated fentanyl analogs—whether sold alone or mixed with heroin or other illegal drugs. The Grand Jury learned that analogs allow dealers to earn higher profits because their wholesale costs for analogs are lower while the potency of the product is higher. The Grand Jury furthermore heard evidence of luxury items purchased with analog trafficking proceeds, and significant amounts of trafficking proceeds confiscated.

To protect their contraband and profits, the Grand Jury learned that some organizations involved in the sale of fentanyl analogs utilize violence and institute security measures. For example, the Grand Jury heard that an organization selling fentanyl analogs maintained loaded firearms and ammunition in stash apartments with reinforced doors, which were used to prepare and package drugs for sale. This organization conducted counter-surveillance to prevent anyone outside the organization from entering the stash apartment and disrupting the flow of customers. The Grand Jury also heard evidence that members of another organization engaged in retaliatory violence and threats after the suspected theft of a portion of the organization's inventory.

Furthermore, the Grand Jury learned that organizations which are trafficking in fentanyl analogs—like many drug organizations that deal in other narcotic drugs—are also engaged in other criminal activities. For example, the Grand Jury learned that the members of one organization selling fentanyl analogs were involved in forgery, credit card fraud and money laundering.

SEIZURES OF FENTANYL ANALOGS HAVE INCREASED IN NEW YORK CITY

The Grand Jury heard testimony from witnesses from the Police Lab describing increased presence of fentanyl analogs in exhibits examined in the past three years, fluctuations in type of fentanyl analogs and the challenges in analyzing and identifying the many distinct fentanyl analogs.

The Police Lab began tracking presence of fentanyl analogs in substances recovered and referred for analysis in March 2016. This timeframe corresponds to OCME findings of higher incidence of analogs present in toxicology related to overdose deaths. That month, there were

thirteen invoices³ submitted to the Police Lab with substances which contained indications of fentanyl analogs⁴. Since then, that number has increased steadily. For example, in the month of January 2019, approximately 139 invoices were analyzed by the Police Lab where the presence of fentanyl analogs was indicated. Since 2016, substances with fentanyl analogs indicated have been seized in every borough in New York City. While each borough saw increases in the amount of invoices with fentanyl analogs indicated between 2016 and 2017, the largest increases were in Brooklyn South and the Bronx. In 2018, the Bronx saw a significant increase over 2017 in the number of invoices where fentanyl analogs were indicated and had the most such invoices in the City (more than 250).

The number of variations of fentanyl analogs which have been seized in New York City has also increased over time with new analogs appearing every year since 2016. In 2016, there were five distinct fentanyl analogs indicated in substances tested by the Police Lab, including Acetyl Fentanyl, Fluorobutyryl Fentanyl (FIBF) and Furanyl Fentanyl. In 2017, there were six new fentanyl analogs indicated, including Desopropionyl Fluorofentanyl and Methoxyacetylfentanyl, in addition to the continued appearance of the five analogs from 2016 for a total of eleven distinct types of fentanyl analogs indicated. That number increased to fourteen distinct analogs indicated in 2018 with six new fentanyl analogs indicated including Valeryl Fentanyl, in addition to eight that continued to appear from 2017. In the first quarter of 2019, twelve different analogs have been indicated including Fluoro Furanyl Fentanyl, an analog never seen before. Of all of these, only Acetyl Fentanyl is an illegal substance in New York.

³ Substances seized by members of the New York City Police Department (NYPD) are submitted to the Police Lab with an “invoice” each of which has a unique number which allows the NYPD to track the seizure.

⁴ The Police Lab analyzes approximately 33% of invoices received. In 2018, the lab received approximately 84,000 invoices containing suspected drug seizures and analyzed approximately 34,000. The numbers cited herein are based on those invoices analyzed.

Acetyl Fentanyl, Fluorobutryl Fentanyl (FIBF) and Furanyl Fentanyl, each of which were first indicated by the Police Lab in 2016, have been the three most frequently seized fentanyl analogs indicated by Police Lab analysis in the past three years. The frequency of detection of each has fluctuated over time in different ways, which suggests a fluid and rapidly changing market for fentanyl analogs. Acetyl Fentanyl began rising rapidly in 2017 from less than ten invoices in June to over 50 in December. It continued to rise in 2018 and 2019 to over 70 invoices in December 2018. Those numbers correspond with the OCME forensic toxicology data which show that Acetyl Fentanyl was the number one analog which has contributed to overdose deaths consistently from 2017 through the first quarter of 2019. The number of invoices containing Fluorobutryl Fentanyl (FIBF) has fluctuated over time, peaking at over 50 invoices in August 2017 but has remained consistently over 20 per month to the present. Correspondingly, Fluoroisobutryl Fentanyl has been the number two analog which has contributed to overdose deaths as examined by the OCME since 2017. Furanyl Fentanyl, on the other hand, peaked with over 70 invoices in January 2017 and then declined over the next 12 months to less than 10 invoices in December 2017 where it has remained since. Correspondingly, OCME data shows that Furanyl Fentanyl was the second highest analog listed as contributing to overdose fatalities in 2017 but was not even among the top five in 2018 or 2019.

Examining fentanyl analogs through both the lens of the toxicology lab at the OCME as well as the controlled substances analysis section of the Police Lab, clearly suggests a correlative relationship between the timing and frequency with which a particular fentanyl analog is seized from the streets of the New York City and the extent to which it is contributing to overdose deaths. For example, Valeryl Fentanyl, which was first seized by law enforcement as indicated

by the Police Lab in 2018 has been one of the most frequently involved fentanyl analogs in overdose deaths in New York City since July of that year.

The Grand Jury heard evidence that communication between the Police Lab and the forensic toxicology lab at the OCME as well as other labs throughout the state with respect to new and prevalent fentanyl analogs seized is critical in helping the OCME to identify analogs which may have contributed to a particular overdose fatality or series of overdoses. Given the challenges faced by the OCME, as outlined above, with respect to identifying compounds in low concentrations, intelligence from the Police Lab and other labs throughout the state regarding what analogs have been identified is critical in assisting the OCME in their work.

However, in spite of the importance of the Police Lab identifying fentanyl analogs quickly, the Grand Jury heard testimony regarding significant challenges the Police Lab, like the OCME, experiences in testing and identifying fentanyl analogs. Currently, the Lab only is able to “indicate” that a fentanyl analog is present in a substance but not “identify” it. A substance is “indicated” but not “identified” when the substances do not meet the parameters set by the Police Lab for identification. In order to definitively identify a particular substance, and meet statutory requirements for criminal prosecution, the Police Lab relies on certified “standards” or reference materials obtained from a reputable supplier which are compared to the results from their instrumentation for the unknown substance seized. Because the molecular structure of fentanyl analogs changes frequently, the Police Lab frequently does not possess the standard for a specific analog. The standard must be ordered at considerable cost in order to conclusively identify newly identified analogs. The Police Lab has also faced additional challenges in positively identifying fentanyl analogs due to limiting factors in their methodology and instrumentalities,

which make it difficult to differentiate between related substances due to the similarity in structure and composition.

Additionally, since many fentanyl analogs are highly potent and frequently mixed with other substances, the analogs may appear in very low concentrations. As was the case with the OCME, substances in low concentrations pose particular challenges for criminalists at the Police Lab conducting analysis. In those cases, criminalists must re-run the sample at a higher concentration in order to positively identify it. This adds considerably to the time it takes to complete analyses thus reducing the available staffing and efficiency of the Police Lab. Better or different instruments than currently utilized at the Police Lab would assist in reducing the amount of analysis that must occur when samples contain potent analogs in low concentrations.

In view of the increasing degree to which fentanyl analogs are contributing to overdose deaths in New York City, the increase in the amount of fentanyl analogs seized and the challenges faced by law enforcement in combating the problem, the Grand Jury has chosen to propose reforms it believes will address the issues raised herein. The Grand Jury therefore proposes the following recommendations.

RECOMMENDATION ONE

The New York State Legislature should pass legislation that prohibits both the sale and possession of any fentanyl analog. Given the rapid fluctuation in types of fentanyl analogs, the legislature should take notice of the ease with which the chemical composition of fentanyl can be tweaked. New analogs have appeared in increasing numbers every year since 2016. Accordingly, it is inadequate for our laws to merely proscribe the handful of fentanyl analogs

currently prohibited in New York State.⁵ Any legislation must cover new fentanyl analogs that merely reflect small changes to fentanyl's molecular composition. Given the demonstrated lethal potential of fentanyl and its analogs, they should be statutorily defined by their basic molecular structure and all should be proscribed.

Fentanyl analogs are being trafficked by organizations also involved in the sale of illegal drugs. These organizations sometimes sell pure fentanyl analogs and other times mix other drugs such as heroin and fentanyl with fentanyl analogs. The inability to distinguish between substances which are illegal and those which are not during the course of an investigation into a drug trafficking organization undermines law enforcement ability to effectively protect the public. Interception of dangerous substances prior to their distribution to those customers who are at serious risk of addiction, overdose or death, requires legal process such as search warrants, electronic eavesdropping warrants, arrests and indictments. Proactive prevention measures are severely limited if the underlying conduct is not proscribed by law. In addition, diversion of substance users into court-mandated treatment programs is not possible if the drug being possessed is an unregulated analog. Given the increasing number of fentanyl analogs being seized and their association with increased overdose deaths, it follows that if law enforcement cannot disrupt the distribution of fentanyl analogs, more will make their way to our communities and more overdoses will occur.

The Grand Jury recommends that the legislature make all fentanyl analogs a proscribed Schedule I drug under the New York State Public Health Law.

⁵ Current schedule I illegal substances are enumerated in the New York State Public Health Law § 3306.

RECOMMENDATION TWO

The legislature should allocate additional funding for laboratories conducting controlled substance analyses for law enforcement, including the Police Lab and the OCME Lab, as well as labs doing similar analysis located throughout the state. The Grand Jury heard about the challenges posed by the testing of fentanyl analogs and the importance of laboratories being able to positively identify these dangerous substances.

Additional funding would allow the purchase of additional standards for both already identified analogs, as well as new analogs as they emerge on the black market. Funding would also allow the purchase of updated instruments and technology to improve laboratory testing. Critical information could then be provided to law enforcement and public health partners who are working to stem the tide of the overdose epidemic.

More accurate information about submitted drug samples would assist law enforcement in their investigations of those individuals who are trafficking dangerous substances. Identification of the seized substances would allow law enforcement to better trace the distribution of these substances by specific drug organizations, and more quickly identify the source of supply. More accurate potency and purity information would increase law enforcement safety by providing timely information to members of law enforcement working in undercover capacities, or involved in the confiscation and analysis of contraband.

Accurate information about emerging analog trafficking and use trends across our state helps law enforcement, first responders, medical professionals, public health professionals and substance abuse treatment professionals to better respond to this crisis and supports the goal of decreasing overdose deaths.

Finally, additional funding should be directed towards increasing community awareness about the dangers of fentanyl analogs and the high risk of overdose. While communities across the state continue to battle this opioid epidemic, it is crucial that individuals – particularly those in communities hardest hit by the proliferation of these analogs – receive up to date information about the volatility of drug mixtures and unpredictability of an unknown mixture’s effect, as well as information about treatment options available for those battling substance use.

WE THE GRAND JURY OF THE SUPREME COURT, STATE OF NEW YORK,
FIRST JUDICIAL DISTRICT, PURSUANT TO THE PROVISIONS OF THE CRIMINAL
PROCEDURE LAW SECTION 190.85(1)(c), BASED UPON OUR STATED FINDINGS,
SUBMIT THIS REPORT RECOMMENDING LEGISLATIVE, EXECUTIVE AND
ADMINISTRATIVE ACTION IN THE PUBLIC INTEREST.