



# National Judicial Opioid Task Force

## Fentanyl, Carfentanil, and Their Analogs in the Courthouse

With media coverage of overdoses due to fentanyl, and first responders reporting symptoms after having seized fentanyl during drug busts, it is important for personnel who work in courthouses and other court-related facilities to accurately understand what fentanyl, carfentanil, and their analogs are, what risks they present, and learn about precautionary measures implemented by courts.

### What are fentanyl, carfentanil, and their analogs?

Fentanyl and carfentanil are synthetic opioids and powerful anesthetics. Fentanyl is a Schedule II narcotic approved for pain relief for humans by the U.S. Food and Drug Administration (FDA). It is 30-50 times more potent than heroin and 50-100 times more potent than morphine. Carfentanil is a tranquilizing agent for elephants and other large mammals and is 100 times more potent than fentanyl. Because fentanyl and carfentanil are synthesized, chemists can, and do, manipulate the composition of the drugs to create a wide range of similar synthetic opioids with varying potencies (analogs).

Fentanyl, carfentanil, and their analogs are often manufactured in clandestine laboratories in other countries, and China is the biggest source of production for such drugs. Illegal traffickers in the United States can easily import these drugs, and only small quantities are needed to mix with other drugs and cutting agents to produce a large quantity of illegal drugs for retail sale on the street.<sup>1</sup> Fentanyl, carfentanil, and their analogs come in various forms, and once on the street, can be injected, snorted, smoked, taken orally in pill, capsule, or liquid form, or spiked onto blotter paper and absorbed through mucus membranes.

### What are the risks associated with exposure to fentanyl, carfentanil, and their analogs?

In 2017, national media reported a few instances in which first responders became ill during drug seizures after either possibly touching fentanyl or inhaling it from airborne exposure. Upon coming into contact with the drug, the first responders complained of dizziness, rapid heartbeats, sweating, and fainting and were treated for fentanyl exposure. In one case, an officer had naloxone administered to him. Upon hearing these incidents, some doctors and toxicology organizations (see toxicology organizations' safety precautions mentioned below and cited in the resource section) noted that the symptoms experienced by the first responders were markedly different than those for individuals experiencing opioid toxicity, which include euphoria, respiratory depression (*i.e.*, drowsiness), nausea, confusion, sedation, and unconsciousness. They believe that the symptomatic first responders were experiencing anxiety rather than a reaction to the drugs' toxicity.

In July 2017, the American College of Medical Toxicology (ACMT) and the American Academy of Clinical Toxicology (AACT) released a joint safety precautionary statement for first responders who may be exposed to fentanyl.<sup>2</sup> These organizations concluded that incidental skin contact with fentanyl residue or powder is unlikely to cause sickness/opioid toxicity. They recommend the following precautions for first responders who may encounter fentanyl:

1. All persons working with fentanyl and its analogs must be trained to recognize the symptoms of opioid toxicity, which "cannot occur from simply being in proximity to the drug;"
2. All persons must wear nitrile gloves for routine handling of fentanyl;
3. All persons must wear water-resistant coveralls when a small space is "heavily contaminated" with fentanyl;

4. All persons must submit to immediate hand-washing when there is “incidental dermal exposure to fentanyl;”
5. All persons must wear a special mask and respirator “in the unusual circumstance of significant airborne suspension of powdered opioids;”
6. All persons must wear special eye protection when the drugs may be splashed on one’s face; and
7. All persons must be trained in the administration of naloxone to a person showing “signs of hypoventilation from opioid intoxication.”<sup>3</sup>

Despite all of these recommended precautions, it remains unclear whether someone can become ill, much less overdose, from incidental exposure to fentanyl, carfentanil, and their analogs. Similar to the ACMT/AACT precautions, the Centers for Disease Control and Prevention (CDC)

states that fentanyl “is not likely to lead to overdose unless large volumes of highly concentrated powder are encountered over an extended period of time. Brief skin contact with fentanyl or its analogues is not expected to lead to toxic effects if any visible contamination is promptly removed.”<sup>4</sup> Prompt removal usually means thoroughly washing one’s hands after touching a substance containing fentanyl, carfentanil, or their analogs. The safety recommendation from the Office of National Drug Control Policy (ONDCP) of the Executive Office of the President similarly states that incidental skin contact is unlikely to be harmful and that while inhalation of airborne powder may lead to harmful effects, it is less likely to occur than skin contact.

## How have courts dealt with evidence that may contain fentanyl, carfentanil, and their analogs?

Despite all the guidance for first responders, there has been little guidance issued for others, including court personnel who may have to handle packaged evidence of fentanyl, carfentanil, or their analogs. Utilizing the guidance for first responders, some courts and criminal justice stakeholders have promulgated rules for handling these drugs when they are presented as evidence during judicial proceedings.

### Massachusetts – Court-instituted Total Ban Absent Exigent Circumstances

As of January 8, 2018, substances containing any amount of fentanyl or carfentanil have been banned from all state courthouses in the Commonwealth of Massachusetts. The state court system determined that the risk of accidental exposure to these drugs, even when securely packaged, outweighed the need to present the actual drugs in court. The ban permits the parties to introduce secondary evidence, such as photographs, in lieu of the actual drugs. However, if a judge determines that the actual drugs are necessary to prove the prosecution’s case, or to protect the defendant’s constitutional right, they may be introduced but may only be handled by specially-trained personnel.

The Massachusetts Association of Criminal Defense Lawyers has claimed that the restriction to only secondary evidence of these drugs undermines a defendant’s due process rights, as such evidence may not accurately depict the actual evidence. This group compared these drugs to

ballistics evidence, such as ammunition and firearms, which are routinely introduced at trial when securely packaged.<sup>5</sup>

The statewide ban was recently upheld at the trial level, where a judge rejected claims by defense counsel that permitting only photographs would unfairly alert jurors to the significant dangers of fentanyl.<sup>6</sup> To date, there do not appear to be any reported appellate opinions on the ban.<sup>7</sup>

While no other statewide bans have been instituted, other jurisdictions are grappling with whether to similarly ban fentanyl, carfentanil, and their analogs in courthouses and court-related facilities.

### Ohio – Prosecution-driven Restrictions

Franklin County (OH) Prosecuting Attorney, Ron O’Brien, has ordered that any evidence containing fentanyl, carfentanil, and its analogs not be brought into the prosecutor’s office. He also ordered a handful of his assistant prosecutors to get trained on the administration of naloxone.<sup>8</sup> Furthermore, Ohio’s prosecuting attorneys’ association is in discussions about banning substances that contain fentanyl, carfentanil, and its analogs in prosecutor’s offices and, hopefully, in courthouses. One Ohio defense attorney stated that there was no need for the actual drug to be admitted into evidence, as long as a photograph of it would suffice. A common pleas court judge noted that if a substance is dangerous, keeping everyone safe is a priority.<sup>9</sup>

## British Columbia – Court Restrictions/Limitations on Handling Fentanyl

In May of 2017, the Provincial Court in British Columbia, Canada issued a practice directive regarding the introduction of evidence that contain “high potency

narcotics, including fentanyl and carfentanil.”<sup>10</sup> Among other things, such drugs may not be introduced as evidence without the prior permission of a judge. The directive also delineates how the drug must be packaged and labeled if permission is granted by the judge.<sup>11</sup>

## What are the arguments against banning these drugs from courthouses?

Some who work in the substance use disorder arena believe that banning fentanyl, carfentanil, and their analogs from courthouses is an overreaction to some unsubstantiated media reports. Likening a ban to the frenzy regarding allowing liquid Phencyclidine (PCP) into the courtroom in the 1980s, and the fear of treating patients suffering from human immunodeficiency virus (HIV) in the 1990s, many treatment specialists believe that any bans on fentanyl, carfentanil, and their analogs merely reinforce misinformation about the substances.

Recently, two emergency room physicians called the Massachusetts ban “alarmist,” with a potentially destructive effect. They claimed that fentanyl, carfentanil, and their analogs are “dangerous in high quantities when injected or ingested by mouth or vigorous sniffing. But clinical toxicity (let alone a little high) from fleetingly

touching even the purest powder forms of these compounds is simply impossible.”<sup>12</sup> Moreover, they cited a physician at Johns Hopkins University School of Medicine who said that “if users could get their fix by touching fentanyl, they wouldn’t bother injecting it.”<sup>13</sup>

Similarly, the medical director for the Carolinas Poison Center stated that touching or being in a room with an open bag of fentanyl, carfentanil, and their analogs is not dangerous.<sup>14</sup> A professor and director of medical toxicology at Rutgers Medical School stated that there is “limited risk of occupational exposure to fentanyl and its analogs” and that the decision to prevent exposure in the courtroom “should be made with the realistic understanding that exposure to protected product is completely non-threatening.”<sup>15</sup>

## What are practical considerations for courts in addressing evidence that may contain fentanyl, carfentanil, and their analogs?

In arriving at appropriate guidelines for the handling of fentanyl, carfentanil, and their analogs, each court system must balance the safety concerns for court personnel who may have to handle these drugs and the public who may be exposed to these drugs in the course of a judicial proceeding against the rights of parties in judicial proceedings to due process and a fair trial.

In reaching the appropriate decision for each court system, the following safeguards and guidelines should be considered:

1. As with all controlled dangerous substances and any other potentially dangerous evidence such as firearms, these drugs must be secured in approved packaging and should not be permitted into a courthouse or other court-related facility until these packaged drugs are inspected and approved by judiciary security.
2. These packaged drugs must remain in the exclusive possession of law enforcement personnel at all times,

except by approval of the court. Absent approval by the court, these drugs should not be given to, or handled by, court personnel or others involved in judicial proceedings, including attorneys, witnesses, court clerks, and jurors.

3. Under no circumstances should the packaging for these drugs be breached or tampered with.
4. Under no circumstances should these drugs remain in a courthouse or court-related facility during non-business hours unless the court has the means to safely store/secure them. While some advocate that these drugs should be removed from the facility by law enforcement and stored by law enforcement, rules pertaining to the handling of exhibits may prevent their removal from the courthouse. In such a case, safe storage is paramount.
5. All courthouse personnel should be trained to address possible exposure to fentanyl, carfentanil, and their analogs and to properly identify opioid toxicity. Such training should include the administration of naloxone in the event of opioid toxicity.

6. Naloxone should be kept in courthouses and other court-related facilities for emergencies.
7. As noted previously, all of these recommendations are implicitly or explicitly subject to approval by the

court. The court must always weigh the rights of the litigants against the safety interests of the court personnel and the public. As always, the court should articulate the reasons, on the record, for any decision impacting the rights of litigants.

## Resources

- Drugs of Abuse – A DEA Resource Guide, 2017 Edition [https://www.dea.gov/sites/default/files/2018-06/drug\\_of\\_abuse.pdf](https://www.dea.gov/sites/default/files/2018-06/drug_of_abuse.pdf)
- Officer Safety Alert – Carfentanil: A Dangerous New Factor in the U.S. Opioid Crisis <https://www.justice.gov/usao-edky/file/898991/download>
- National Sheriff's Association Video on the Safe Handling of Fentanyl <https://www.youtube.com/watch?v=4ZZ4nrocGGM&feature=youtu.be>
- DEA Targets – Fentanyl: A Real Threat to Law Enforcement [https://www.cnoa.org/documents/DEA\\_Targets\\_Fentanyl\\_A\\_Real\\_Threat\\_to\\_Law\\_Enforcement\\_\(2016\).pdf](https://www.cnoa.org/documents/DEA_Targets_Fentanyl_A_Real_Threat_to_Law_Enforcement_(2016).pdf)
- Fentanyl: A Briefing Guide for First Responders [https://www.iaclea.org/assets/uploads/pdfs/Fentanyl\\_BriefingGuide\\_June2017.pdf](https://www.iaclea.org/assets/uploads/pdfs/Fentanyl_BriefingGuide_June2017.pdf)
- Fentanyl [https://www.deadiversion.usdoj.gov/drug\\_chem\\_info/fentanyl.pdf](https://www.deadiversion.usdoj.gov/drug_chem_info/fentanyl.pdf)
- Position Statement of the American College of Medical Toxicology (ACMT) and American Academy of Clinical Toxicology (AACT): Occupational Fentanyl and Fentanyl Analog Exposure to Emergency Responders [https://www.acmt.net/Library/Positions/Fentanyl\\_PPE\\_Emergency\\_Responders\\_.pdf](https://www.acmt.net/Library/Positions/Fentanyl_PPE_Emergency_Responders_.pdf)
- CDC – Fentanyl: Preventing Occupational Exposure to Emergency Responders (CDC) <https://www.cdc.gov/niosh/topics/fentanyl/risk.html>
- U.S. Customs and Border Protection – Fentanyl: The Real Deal [https://www.youtube.com/watch?v=6Yc9lSaSKls&feature=youtu.be&oref=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3D6Yc9lSaSKls%26feature%3Dyoutu.be&has\\_verified=1](https://www.youtube.com/watch?v=6Yc9lSaSKls&feature=youtu.be&oref=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3D6Yc9lSaSKls%26feature%3Dyoutu.be&has_verified=1)
- ONDCP – Fentanyl: Safety Recommendations for First Responders <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final%20STANDARD%20size%20of%20Fentanyl%20Safety%20Recommendations%20for%20First%20Respond....pdf>
- Commonwealth of Massachusetts' Safety Advisory and Protocols for Fentanyl and Carfentanil (for trial court staff and judicial officers) <https://www.mass.gov/files/documents/2018/01/29/safety-advisory-and-protocols-for-fentanyl-and-carfentanil.pdf>

## Endnotes

- 1 Wilber, Del Quentin, "Fentanyl Smuggled from China is Killing Thousands of Americans," *Los Angeles Times*, October 19, 2018, accessed at: <http://www.latimes.com/politics/la-na-pol-china-fentanyl-20181019-story.html>.
- 2 Although the joint safety precautionary statement mentions only fentanyl, it also applies to carfentanil and all other fentanyl analogs.
- 3 The Drug Enforcement Administration of the U.S. Department of Justice (DEA) and the U.S. Customs and Border Protection also have also released safety advisories to be used for first responders who encounter fentanyl, carfentanil, and their analogs. The DEA has further prepared a briefing guide for first responders which delineates how they should package suspected fentanyl, carfentanil, or their analogs for evidence processing. The guidance requires them to place the evidence into two, DEA-approved evidence bags (*i.e.*, a bag inside of another bag) and clearly mark the outer bag as "suspected fentanyl."
- 4 See "Resources" for links to the CDC, ONDCP, DEA, and Customs.
- 5 Murphy, Pat, "Fentanyl Ban in State Court Draws Fire," *Massachusetts Law Weekly*, March 8, 2018, accessed at: <https://masslawyersweekly.com/2018/03/08/fentanyl-ban-in-state-courts-drawing-fire/>.
- 6 Manginis, Julie, "Drug Ban in Court Upheld," *Salem News*, January 18, 2018, accessed at: [https://www.salemnews.com/news/local\\_news/drug-ban-in-court-upheld/article\\_7f86eef9-5027-5a4a-94b8-7c446d59472e.html](https://www.salemnews.com/news/local_news/drug-ban-in-court-upheld/article_7f86eef9-5027-5a4a-94b8-7c446d59472e.html).
- 7 In a telephone interview with Chief Justice Paula Carey by Susan P. Weinstein on April 23, 2018, Justice stated that the ban was instituted after a great deal of technical research was balanced against the due process rights of defendants. This research included data from the U.S. Environmental Protection Agency's Acute Exposure Guideline Levels for fentanyl, as well as various resources produced by other federal government agencies. Justice Carey also alluded to practical experience in which "properly-bagged evidence" containing drugs (*e.g.*, cocaine) was breached during trials.
- 8 Perry, Kimball, "Prosecutor Concerned About the Risk of Handling Fentanyl Evidence," *The Columbus Dispatch*, April 15, 2017, accessed at: <https://www.dispatch.com/news/20170415/prosecutor-concerned-about-risk-of-handling-fentanyl-evidence>.
- 9 *Id.*
- 10 Practice Direction, CRIM 10, "Introducing Evidence Containing High Potency Narcotics," May 16, 2017, accessed at: <http://www.provincialcourt.bc.ca/downloads/Practice%20Directions/CRIM%2010%20Introducing%20Evidence%20Containing%20High%20Potency%20Narcotics.pdf>.
- 11 *Id.*
- 12 Op-Ed, "Opioid Hysteria Comes to Massachusetts Courts," *New York Times*, January 23, 2018, accessed at: <https://www.nytimes.com/2018/01/23/opinion/opioid-fentanyl-hysteria-massachusetts.html>.
- 13 *Id.*
- 14 Gaita, Paula, "Fentanyl Has Been Banned from Massachusetts Courthouses," *Boston Globe*, January 11, 2018, accessed at: <https://www.thefix.com/fentanyl-has-been-banned-massachusetts-courthouses>.
- 15 Op-Ed, "With Limited Risk, Massachusetts's Plan to Ban Opioid Evidence from Courtrooms is Overreaction," *The Hill*, January 8, 2018, accessed at: <https://thehill.com/opinion/criminal-justice/367861-with-limited-risk-for-sickening-people-massachusetts-plan-to-ban>.

