
DEPARTMENT OF JUSTICE



OFFICE OF PROFESSIONAL RESPONSIBILITY REPORT

Report of Investigation into Allegations of
Violations of the Department's Fentanyl Guidance
by the U.S. Attorney's Office, District of New Mexico, and
Drug Enforcement Administration, New Mexico District Office

September 3, 2024

I. EXECUTIVE SUMMARY

This matter concerns a December 22, 2023 referral from the U.S. Office of Special Counsel (OSC) to the U.S. Department of Justice (Department) concerning allegations that employees at the Drug Enforcement Administration (DEA) New Mexico District Office (DEA-NM) and the U.S. Attorney’s Office for the District of New Mexico (USAO-NM) engaged in conduct that may constitute a violation of law, rule, or regulation; an abuse of authority; or a substantial and specific danger to public health and safety. Specifically, a DEA Special Agent alleges that “at multiple times in 2023, the [USAO-NM] . . . instructed DEA agents (agents) not to stop vehicles the agents strongly believed were transporting fentanyl,” in purported violation of the Department’s Criminal Division’s guidance and recommendations on managing the risk fentanyl presents in Title III investigations (guidance or fentanyl guidance).¹

Based on its investigation, the Office of Professional Responsibility (OPR) finds that the fentanyl guidance allows investigative teams conducting a Title III investigation to use their discretion and judgment to determine how best to conduct their investigations, reminds teams to balance the risks to public safety of not immediately seizing the suspected drugs with the longer-term goals of the investigation, and includes appropriate supervisory personnel in the decision-making process.² OPR finds that USAO-NM and DEA-NM investigators and prosecutors have, when they concluded it was appropriate, taken actions, or advised taking actions, other than conducting immediate and overt enforcement actions against suspected transfers of narcotics, including fentanyl. However, OPR also finds that in the cases it reviewed, such decisions were made with adequate oversight of USAO-NM personnel and appeared reasonable under the circumstances, and therefore, the conduct alleged by the complainant did not violate the fentanyl guidance or a law, rule, or regulation nor did it constitute an abuse of authority or a substantial and specific danger to public health and safety.

II. OPR’S INVESTIGATION

The Department referred the allegations in the OSC referral to OPR for investigation. OPR investigates allegations of misconduct made against Department attorneys that relate to the attorneys’ exercise of their authority to investigate, litigate, or provide legal advice. OPR also has jurisdiction to investigate allegations of misconduct against Department law enforcement personnel that relate to allegations of attorney misconduct within the jurisdiction of OPR.

As part of its investigation, OPR reviewed the complainant’s allegations and supporting materials he provided, and other materials it received from the DEA-NM, USAO-NM, and the

¹ Although the complainant consented to the disclosure of his name, the designation “the complainant” is used in this report. The pronoun “he” is used in this report regardless of the actual gender of the individual referenced.

² “Title III” is referring to Title III of The Omnibus Crime Control and Safe Streets Act of 1968 that prohibits the unauthorized, nonconsensual interception of “wire, oral, or electronic communications” by government agencies and private parties, establishes procedures for obtaining orders to authorize interception of wire, oral, or electronic communications by government officials, and regulates the disclosure and use of authorized intercepted communications by investigative and law enforcement officers. As used in this report, a Title III investigation is an investigation that involves use of one or more judicial orders authorizing the interception of wire, oral, or electronic communications of suspected drug traffickers.

Criminal Division concerning both the underlying factual allegations and the fentanyl guidance. OPR interviewed the complainant; other DEA-NM employees, including agents and supervisors; AUSAs in the USAO-NM; and current and former attorneys and supervisors in the Criminal Division, including personnel in the Office of Enforcement Operations (OEO), Electronic Surveillance Unit (ESU), the office primarily responsible for reviewing Title III applications submitted by USAOs and law enforcement agencies across the United States and advising on the application of the fentanyl guidance.³

III. ISSUES

OPR focused its investigation on the following issues:

1. Determining what obligations, if any, are imposed by the fentanyl guidance on investigators and prosecutors handling Title III investigations involving suspected fentanyl.
2. Whether, in the specific investigations identified by the complainant, any USAO-NM or DEA personnel violated the fentanyl guidance or otherwise engaged in conduct that may constitute a violation of law, rule, or regulation; an abuse of authority; or a substantial and specific danger to public health and safety regarding whether or how they determined to conduct enforcement actions regarding suspected transfers of fentanyl.

IV. THE FENTANYL GUIDANCE

The fentanyl guidance was issued in 2017 in the wake of law enforcement's increasing recognition of the significant dangers of even small quantities of fentanyl to public health. As a result, the guidance advises law enforcement to consider public safety as a critical factor when making decisions about what actions to take when faced with information indicating the location, either in transport or storage, of any quantity of fentanyl during Title III investigations.

The complainant alleges that USAO-NM attorneys violated the fentanyl guidance by instructing DEA agents not to stop shipments of narcotics that the "agents strongly believed were transporting fentanyl" and that DEA agents violated the guidance by not stopping such shipments. According to the complainant, the fentanyl guidance is not discretionary, and it requires immediate enforcement actions to prevent fentanyl or suspected fentanyl from being distributed to the public. In the complainant's view, agents are required to make reasonable efforts to seize fentanyl or suspected fentanyl, such as by stopping a transporting vehicle, regardless of the consequences to the overall investigation.

To evaluate the allegations, OPR examined the fentanyl guidance, determined how the guidance is applied by the Department's Criminal Division and investigative teams, and

³ All fact witness interviews were conducted under oath. Although OPR conducted a thorough review of the complainant's allegations, because the allegations involve the operations, practices, and procedures of law enforcement entities and at least one pending investigation, OPR does not include confidential or sensitive law enforcement information in this report.

interviewed DEA-NM and USAO-NM personnel about the application of the fentanyl guidance in their Title III investigations, including specific cases identified by the complainant.

A. Analysis of the Fentanyl Guidance⁴

In the complainant's assessment, USAO-NM and DEA-NM personnel violated the plain language of the fentanyl guidance, which he views as *requiring* immediate action by law enforcement to stop any transport or storage of drugs believed to be fentanyl. Therefore, OPR closely examined the language of the guidance to determine whether the only action permitted by the guidance is the immediate seizure of drugs known or believed to be fentanyl.

The fentanyl guidance states that it does not create or confer any legal rights or duties and should not be relied upon by members of the public. The guidance requires investigative agencies and USAOs to be cognizant of evidence indicating that a Drug Trafficking Organization (DTO) is using or distributing fentanyl and to consider the importance of public safety when making decisions about investigative methods and strategies. Nonetheless, the guidance allows for the use of discretion and judgment by the investigative agency and the USAO when handling Title III fentanyl investigations.

To the extent that the fentanyl guidance requires specific action, it is consultive in nature; that is, the USAO's criminal or narcotics chief should be advised of investigations involving fentanyl, and OEO should be advised of evidence involving fentanyl when investigators seek Title III orders. The guidance does not, however, require specific investigation action that must be taken when investigators have probable cause to believe that fentanyl is being transported or stored.

B. The Criminal Division's Interpretation of the Fentanyl Guidance

To understand how law enforcement offices and personnel have applied the fentanyl guidance, OPR interviewed personnel in OEO's ESU, who are the Department's subject matter experts on Title III investigations. OEO is responsible for reviewing Title III order applications for the Department for authorization by a high-level Department official, training Department personnel on the proper procedures to use when applying for Title III orders, and providing the fentanyl guidance to investigators whenever the applications indicate that fentanyl is involved.

OPR interviewed ESU senior managers regarding OEO's interpretation of the fentanyl guidance. In addition, the managers provided context as to the relationship between the Criminal Division and the USAOs and investigative agencies with respect to Title III investigations. Generally, the Criminal Division does not dictate to USAOs or investigative agencies how to manage their investigations. Those decisions are left to the leadership of the USAOs and the investigative agencies. However, when those organizations pursue a Title III order as part of their investigations, the Title III statute requires that any federal Title III application be authorized by a high-ranking official, usually a member of Criminal Division leadership, before the application may be presented to a court. In investigations involving fentanyl, ESU also provides the fentanyl guidance to the USAOs and investigative agencies.

⁴ The fentanyl guidance is not public and therefore is only summarized here.

An ESU manager noted that the fentanyl guidance is “guidance . . . meant to instruct the field and the things that they should be considering when conducting these types of investigations.” The manager stated that requiring the investigative team to review the guidance was intended to make them “aware of their obligations to take reasonable efforts to prevent the distribution” of fentanyl. However, what constitutes “reasonable efforts”

is very much in the context of a specific investigation . . . at its point in time As well as . . . other factors that may be sort of jurisdiction dependent in terms of resources and things like that. So there’s a bunch that goes into it *but there is discretion for them to decide what are reasonable efforts.*⁵

The manager explained that the policy consists of guidelines, not directives. He noted that they are meant to ensure that law enforcement personnel consider that “fentanyl . . . posts a greater risk of harm to the public, and therefore should be treated differently or evaluated differently than [other drugs].” The guidance’s emphasis on public safety is intended to remind investigators that concerns about jeopardizing a wiretap will not necessarily outweigh the need to immediately intervene because of the compelling public safety interest. However, he further explained that the guidance incorporates the concepts of balancing and discretion: “So there is a discretion element that is given to the investigation as a whole to deploy whatever techniques they want to prevent the distribution of fentanyl as they see fit in the context of the investigation.”

The manager also stressed that the guidance is designed to help ensure that more than one person is making the decisions as to the best means of protecting the public. The guidance ensures “[t]hat the appropriate supervisor has been moved in so that if a decision is made, it’s made . . . taking the benefit of that [USAO] leadership structure and full knowledge” of the appropriate supervisors.

A senior Criminal Division official who oversees OEO characterized the fentanyl guidance as a means of risk mitigation. The official said that every case is fact specific, and the official cannot and should not micromanage the decisions the investigative teams make on the ground. Like the ESU manager, the Criminal Division official also stressed that the policy is “just guidance.” The official explained further that investigators “need a little leeway to figure out . . . where [their] wire is going.” Through the fentanyl guidance, OEO is “basically just looking to make sure that everyone understands [fentanyl] is dangerous and we need to make sure we’re doing the best we can to take it off the street.” The official said that every case is very fact specific and involves “tough calls” that the investigative team needs to make regarding whether and, if so, how to stop any particular transfer of fentanyl.

OPR also discussed the fentanyl guidance with a former Deputy Assistant Attorney General (DAAG) who oversaw OEO at the time the guidance was originally finalized and who assisted with drafting them. The former DAAG told OPR that the fentanyl guidance was designed to encourage the USAO and law enforcement agents to work together to make decisions at their discretion about the appropriate course of action in any case involving suspected fentanyl, and they

⁵ Emphasis added.

were not meant to dictate certain actions or have the Criminal Division micromanaging investigations.

The former DAAG also made clear that the investigative team was allowed to consider the goals of its investigation in making decisions. The guidance

allows them to consider . . . all these options. . . . And . . . also the basic point being, if I do a traffic stop today, am I ruining my opportunity to take down a whole drug trafficking operation because I've just blown the whole thing? I've got a Title III, I've got agents in place, I'm working my way through an operation that has a big impact on the community, and I'm going to blow it because I'm going to arrest these two folks in a car. That's the kind of balance they would have to . . . make and it's not . . . an easy thing.

The former DAAG explained that protecting public safety is an important factor to be considered by investigative teams when deciding how long and in what manner an investigation should proceed. However, as he noted, the use of discretion is also part of the guidance, which does not mandate any specific investigative actions.

C. Application of the Fentanyl Guidance by the USAO-NM

To understand the USAO-NM's application of the fentanyl guidance to its investigations, OPR interviewed two AUSAs who were responsible for making decisions about the conduct of Title III investigations of DTOs.

A Deputy Supervisory AUSA oversees all Title III investigations undertaken by subordinate AUSAs at the USAO-NM and is responsible for, among other things, reviewing and approving Title III applications for submission to OEO and advising investigative agencies regarding surveillance and enforcement actions involving significant quantities of narcotics. The Deputy Supervisory AUSA involved in the matters under investigation explained to OPR that any time fentanyl could be involved in a Title III drug investigation, the USAO applies the fentanyl guidance in making investigative decisions. When dealing with fentanyl investigations, the USAO analyzes "what reasonable efforts [they] can make to prevent the distribution," while considering as part of a "thoughtful process" such factors as available manpower and other investigative tools available under the facts and circumstances and any additional risk to the public or the agents tied to fentanyl and the DTO under investigation. These factors are balanced with the goals of the investigation and the potential harm to the investigation that an enforcement action might cause.

A Supervisory AUSA told OPR how, in October 2022, he and the then USAO Criminal Chief contacted ESU to discuss the proper application of the fentanyl guidance. The ESU manager told them that the guidance should be "interpreted reasonably." The USAO supervisors understood from the discussion that the guidance concerned "risk mitigation" but did not require an immediate seizure by law enforcement whenever there was probable cause to believe fentanyl was located someplace. Rather, prosecutors should weigh the many varied risks of a situation against the goals of their long-term investigation in making decisions about enforcement actions.

The Supervisory AUSA acknowledged that the USAO-NM did not instruct agents to stop and seize every fentanyl transport or execute a search warrant immediately at every location whenever they have probable cause to believe fentanyl is present, but he viewed the USAO's decisions as consistent with a reasonable reading of the fentanyl guidance. He explained, "In the middle of a long-term investigation, you weigh the risks, you weigh your investigative objectives against the seizure, and you make a decision."

D. Application of the Fentanyl Guidance by DEA-NM Personnel

OPR interviewed the DEA-NM Assistant Special Agent in Charge (ASAC), group supervisors, and several agents, including the complainant, regarding their application of the fentanyl guidance. Through the course of its investigation, OPR found that agents differed in their interpretation of the guidance and in how they applied them to specific investigations. For example, while the complainant and the former acting group supervisor adopted a strict reading of the guidance, which they viewed as requiring in all cases immediate law enforcement action to seize suspected fentanyl, the ASAC did not view the obligations under the fentanyl guidance to be "that much different" from other types of drug cases. The ASAC stated that the guidance only applies when the agents know that fentanyl is involved. He explained that if "every time we thought there [were] drugs at a location, if we had to take enforcement action . . . that would really impair our ability to . . . operate."

The ASAC, as well as line agents, emphasized the importance of communicating with the USAO-NM:

[I]f there's any question about what we should be doing, and even if we think we know what we should be doing, we're going to discuss it with the [USAO-NM], especially on a wire because they have so many resources dedicated [to the wire]. . . . Before we take action, we are talking with the [USAO-NM].

As one Special Agent described the process and the impact of the fentanyl guidance,

[I]f we . . . have probable cause to believe . . . that there's fentanyl, we consult with our AUSAs; obviously, we consult with our management. We consult with our co-case agent. But . . . once we've done those things, we make reasonable efforts to prevent distribution. . . .

And my understanding is . . . it's our discretion what efforts or what steps we take to mitigate [the public safety] risk, so long as . . . they're reasonable. . . .

[I]t's a collaborative process. . . . There's no right, one-size-fits-all . . . answer to the [fentanyl guidance]. It's simply a process that we work our way through, depending on the facts of a particular case, and depending on how and when and what information we get.

E. Revisions to the Fentanyl Guidance

During OPR's investigation, the Criminal Division promulgated revised guidance for Title III investigations involving fentanyl. The Criminal Division drafted the revision with the assistance of the Attorney General's Advisory Committee of U.S. Attorneys and with input from relevant federal law enforcement agencies. The process for revising the fentanyl guidance began in 2022, before the current allegations were raised and unrelated to OPR's investigation. The revised guidance continues to ensure that law enforcement agencies and USAOs know that long-term Title III investigations involving fentanyl can be conducted, as long as the risks of continuing the investigation are continually considered and weighed against public safety and that the appropriate approvals are received. The revised guidance continues to emphasize communication among the investigative team and appropriate supervisors and permits investigators to refrain from taking certain enforcement actions to achieve broader public safety goals.

F. OPR's Findings with Respect to the Fentanyl Guidance

OPR interviewed numerous Department attorneys and DEA agents with expertise in interpreting, applying, and overseeing Title III investigations. The complainant's concerns appear to be based on his belief that DEA-NM agents and USAO-NM prosecutors are not strictly adhering to a Department policy that he views as requiring law enforcement action to immediately seize fentanyl whenever possible. However, the vast majority of the individuals OPR interviewed in the DEA-NM, USAO-NM, and Criminal Division understand the guidance to allow the use of discretion based on the unique facts and circumstances present in each investigation. The fentanyl guidance necessarily allows for discretionary decisions by investigators and prosecutors. The Department could have drafted a policy that directed investigators to take the non-discretionary action advocated by the complainant—immediate seizure of suspected fentanyl. Instead the policy reflects an approach that balances the real dangers of fentanyl with the recognition that the public may be better protected in certain instances by law enforcement efforts that support the goal of disrupting a large drug trafficking organization rather than making small seizures that may hinder that goal. If the fentanyl guidance contains a mandate, it is only to ensure that investigative agencies communicate with the USAO and that supervisors in the USAO are involved in the decision-making process. There are many ways to effectuate the important goal of protecting public safety beyond immediate enforcement actions to seize the suspected drugs, and the fentanyl guidance allows investigative teams to determine that a different course is advisable.

In sum, the fentanyl guidance allows for a wide range of law enforcement actions to enhance public safety. Discretion is an integral component of the guidance, and investigators and prosecutors may take such investigation actions as they deem reasonable, after considering the public safety interest in removing fentanyl from possible distribution.

V. OPR’S REVIEW OF THE COMPLAINANT’S ALLEGATIONS REGARDING SPECIFIC INVESTIGATIONS

In its referral to the Department, OSC identified several specific investigations that the complainant alleged evidenced violations of the fentanyl guidance. OPR carefully reviewed the three investigations identified by the complainant, obtained and reviewed relevant records, and interviewed investigators and prosecutors involved in the matters, as well as the complainant. Because the investigations involve law enforcement operations, one of which is ongoing, OPR provides only summary information about the underlying facts.

A. Investigation A

From 2021 through 2023, the DEA-NM investigated a poly-drug trafficking organization in New Mexico, using several sources of information and undercover operations. The complainant and Special Agent 1 were the lead agents on the investigation and USAO-NM AUSAs 1 and 2 and the Deputy Supervisory AUSA were responsible for overseeing it. As part of the investigation, the USAO-NM successfully applied for a Title III order for interceptions over the phone of the organization’s leader.

1. Traffic Stop 1

After obtaining the Title III order, the DEA-NM intercepted communications between the DTO leader and a customer indicating that a transaction of fentanyl was about to take place. According to OSC’s referral based on the complainant’s allegations, members of the USAO-NM “insisted” that the complainant allow the transaction to take place rather than stop the vehicle and seize the drugs. “Despite the protests” from the AUSAs, the complainant stopped the vehicle and seized a firearm and several thousand fentanyl pills. According to the complainant, when Special Agent 1 contacted the USAO-NM before the stop, AUSA 1 told him to “just get a license plate [number],” although the AUSA did not specifically tell the agents not to stop the vehicle.

OPR interviewed the AUSAs primarily responsible for overseeing the case, AUSA 2 and the Deputy Supervisory AUSA, about this incident. AUSA 2 told OPR that he discussed with the agents alternatives to the traffic stop to obtain information separate and apart from the Title III interceptions and using that information for a search warrant on the customer’s home. AUSA 2 explained that the USAO-NM did not want the agents to use the information derived from the Title III interceptions as the sole reason to act and that there was a way to conduct a search and seizure that insulated the enforcement actions from the Title III interceptions. Nonetheless, he ultimately told the agents that it was up to them to decide what to do. He discussed the matter with the Deputy Supervisory AUSA, who concurred with the suggested course of action. AUSA 2 denied that he or AUSA 1 advised the agents to just get a license plate number, as they assumed that would be a part of any surveillance and his recollection was that the discussions were much more detailed.⁶

The Deputy Supervisory AUSA’s version of events was consistent with AUSA 2’s. He stated that his preference was for the agents to conduct additional surveillance on the customer’s

⁶ AUSA 1 did not recall discussing the stop with Special Agent 1 prior to it occurring, and he asserted that the complainant’s description of events would have been inconsistent with his regular process for providing input to the agents.

residence, surveil illicit activities there and stop other buyers, and use that new information, separate and apart from the Title III interceptions, to obtain a search warrant. The complainant, however, told OPR that, although conducting surveillance and obtaining a search warrant for the customer's house "could technically be done," he disagreed with that course of action due to a lack of manpower and his concern that the fentanyl could be distributed.

OPR concludes that the fentanyl guidance was followed in this instance. The DEA agents consulted with the line AUSA assigned to the investigation, who consulted his supervisor. The AUSAs advised the agents on ways to remove the fentanyl from circulation *and* protect the overall investigation, which was consistent with the fentanyl guidance. Therefore, the agents and AUSAs followed the lines of communication outlined in the guidance, and the USAO-NM's suggested courses of action were not unreasonable. Although the complainant ultimately disagreed with the suggestions, they were not improper and did not violate any Department policy or any law, rule, or regulation nor did the conduct constitute an abuse of authority or a substantial and specific danger to public health and safety.⁷

2. Traffic Stop 2

As the investigation continued, additional multiple intercepts were initiated regarding other targets, one of whom was a narcotics supplier for the DTO. Intercepted communications indicated that the supplier intended to sell to the leader a substantial quantity of narcotics, which the complainant believed to be fentanyl. According to the complainant, he immediately informed AUSA 2 about the transaction and his plan to conduct a traffic stop to intercept the drugs, and AUSA 2 stated that he would discuss it with his management. Shortly thereafter, AUSA 2 informed the complainant that his "management was uncomfortable" with a traffic stop, but the complainant insisted that the fentanyl guidance required them to make a stop and to seize the drugs. Pursuant to the complainant's suggestion, AUSA 2 discussed the issue with the complainant's supervisor, Group Supervisor 1. Afterwards, Group Supervisor 1 told the complainant that he had permission to proceed with a stop, but that the USAO-NM was "not happy about" the complainant's decision making. After conducting surveillance, the complainant stopped the supplier's vehicle and arrested him while the supplier was travelling to meet with the leader to deliver the narcotics. The subsequent search of the vehicle revealed a firearm and a kilogram of another narcotic, but no fentanyl. The stop took place in the vicinity of the leader, who witnessed it. As with traffic stop A, OSC's referral alleged that the USAO-NM had insisted that the complainant allow the sale to proceed and that this was contrary to the fentanyl guidance.

In addition to the complainant, OPR interviewed the relevant prosecutors and DEA Group Supervisor 1. AUSA 2 told OPR that he discussed the matter with the Deputy Supervisory AUSA. Although the Title III interceptions had not been particularly productive to that point, which was about halfway through the allotted 30 days, the USAO-NM wanted to continue it to the end and attempt to determine, among other things, the supplier's source. Together, they developed several

⁷ As discussed previously, the fentanyl guidance is designed to balance risk mitigation and public safety, and the circumstances of the stop in question created a risk to an innocent third party, a factor that may justify a decision not to make the stop. The complainant also criticized the USAO-NM's decision not to prosecute the customer that he stopped. OPR considered the prosecutors' explanations and concluded that the decision not to prosecute the customer falls within the bounds of reasonable prosecutorial discretion.

investigative options for the complainant to consider and communicated the options to him, which they believed could have led to information supporting a search of the leader's home. DEA Group Supervisor 1 told OPR that he had believed that surveilling and conducting undercover buys from the leader after the transaction was a good plan, but the complainant did not like it and just wanted to stop the supplier.

Convinced that the complainant would likely make a stop regardless of their advice, the AUSAs also advised the agents that if the stop was to be made, it should be made when the exchange was taking place, and both targets should be arrested.⁸ However, the complainant did not follow the advice, choosing instead to stop and arrest the supplier before the transaction occurred and in view of the leader. The DEA-NM's arrest of the supplier in front of the leader, the only individual that was using the wiretapped line for drug trafficking, effectively ended the investigation. After arresting the leader several weeks later, the investigation ended in the indictments of only two individuals, the DTO leader and one supplier.

OPR concludes that the AUSAs did not violate the fentanyl guidance when they advised the complainant against making the traffic stop in favor of pursuing alternative investigative means. The complainant communicated to AUSA 2 about a potential transaction and his intended course of action. AUSA 2 discussed the matter with Group Supervisor 1, and together they devised several reasonable courses of investigative action, while preserving the Title III interceptions. Group Supervisor 1 agreed at the time that alternatives to a traffic stop and immediate seizure were reasonable. In addition, at the time, the investigators had no information about what type of narcotics were being transacted, and the complainant's assumption that it was fentanyl ultimately proved incorrect.⁹ OPR concludes that the AUSAs' conduct, in which they advised DEA agents to pursue a course of action other than a traffic stop, did not violate the fentanyl guidance or a law, rule, or regulation nor did it constitute an abuse of authority or a substantial and specific danger to public health and safety.

B. Investigation B

Dating back several years, federal law enforcement had conducted a large and complex investigation into a DTO with direct ties to Mexican drug cartels. The then head of the DTO was arrested in early 2023, but a new leader assumed control of the DTO, and the investigation into the DTO's activities continued. The investigation into the DTO involved multiple Title III interception orders and years of investigative work, including, but not limited to, undercover and surveillance operations both inside and outside of New Mexico. DEA Special Agents 2 and 3 were the lead agents on the investigation, and USAO-NM AUSA 3 and the Deputy Supervisory AUSA oversaw it. The investigative team successfully applied to, among other things, extend Title III surveillance over the DTO leader's phone.

⁸ In the AUSAs' views, this action would have taken both targets into custody at the same time, rather than allowing the leader to remain free for additional time, and it would have provided a stronger case against both targets.

⁹ AUSA 2 explained to OPR that the intercepted communications leading up to the sale were the first interceptions regarding a drug transaction and while they could tell that a drug transaction was going to occur, there was no information or use of a known code word that indicated what drug would be transacted.

According to OSC's referral, the complainant alleges that he participated in a surveillance operation that he and other agents believed to be a delivery of "tens of thousands of fentanyl pills" that the agents did not stop. The complainant told OSC that he believed the decision not to interdict the drugs was made by the USAO-NM.

In examining the complainant's allegations, OPR considered that he assisted with a single surveillance that was part of a complex and multi-year DTO investigation. The complainant was not involved in planning investigative strategies for this case or operation, either internally at the DEA-NM or between the DEA-NM and the USAO-NM. Based on the complainant's OPR interview, it appears that he had little or no direct information about the matter other than that there was a drug transaction on the specified day, and the DEA-NM did not stop it. OPR carefully examined the events in question through its interviews of the lead case agents and the Deputy Supervisory AUSA.

Special Agent 2 was the lead case agent for the surveillance set up for the transaction occurring on the specified date. Special Agent 2 described to OPR the events leading up to and occurring on the specified day and explained why DEA agents chose not to interdict a drug transaction. On the morning of the day in question, agents had received vague information about a potential drug resupply and other information about a known drug courier for the DTO indicating behavior consistent with an imminent resupply. In the afternoon, agents intercepted a call between the leader and a known cocaine dealer, who wished to purchase narcotics from the leader, indicating that the leader would receive a resupply that day or the next, which Special Agent 2 believed was referring to cocaine.

Later that afternoon, an additional call was intercepted in which the leader, while speaking to a different and new potential purchaser, indicated that drugs were coming in from an identified city in New Mexico. Because Special Agent 2 made an educated calculation that the courier, who was in the identified city, would deliver narcotics to the leader, he set up surveillance at places where he believed the narcotics delivery could take place. Although he suspected a drug delivery would take place in the area, Special Agent 2 did not know whether he was watching the correct courier, what drug was involved, or the specific delivery location.

Over the course of the evening, the agents located the courier at a residence used by the DTO that was under surveillance. Although the DTO leader eventually arrived at the residence, the agents were unable to determine what was being delivered or where the delivery took place. After surveillance was terminated, law enforcement intercepted additional communications that indicated an additional transaction was planned and observed the DTO leader engaging in a transaction with an associate of the new purchaser. None of the individuals observed in the suspected transaction were stopped at the time.

Special Agent 2 told OPR that, in his view, the fentanyl guidance did not apply because, at that time, they did not know what drugs were being transacted, and they did not have probable cause to believe it was fentanyl. In addition, his decision not to interdict the transaction was approved by his supervisor. In support of his allegation that the fentanyl guidance applied, the complainant pointed to a DEA report indicating that the DEA-NM surveilled a purchase of thousands of fentanyl pills on a specified date. Special Agent 2 explained, however, that the report was drafted with the benefit of hindsight five to six weeks after the fact when they had additional

information and time to analyze it. Special Agent 3, who drafted the report but had not participated in the surveillance, confirmed to OPR that at the time of the transaction, the agents did not know fentanyl was involved and did not have probable cause to get a search warrant, noting that the details were uncovered well after the fact with the benefit of additional information and time to decode the DTO's messages.

Special Agent 2 also stated that even if the fentanyl guidance did apply, the agents did conduct additional physical surveillance and used the information obtained from that surveillance to obtain a warrant to track the purchaser's phone. Special Agent 2 pointed to several factors influencing the decision not to make a stop, including that they had little knowledge of what the carrier was transporting, they were working off assumptions regarding the later transactions, and they had little time to arrange for a safe interdiction. Special Agent 2 noted that a traffic stop for a drug interdiction requires the involvement of local police and, given the inherent danger involved, substantial planning. Also, the unique circumstances of the location of the transaction in conjunction with the evening on which it occurred created additional risks to the public, and they did not think that agents could safely conduct an enforcement action.

The Deputy Supervisory AUSA recalled being involved in the discussions about this surveillance operation. He said that they considered various options for interdicting the drugs, including stopping the courier or obtaining a warrant on the gated apartment complex, but the locations and timing of events prevented those options. The Deputy, too, recalled that potential danger to the public was a factor in the decision not to conduct any enforcement action on that date.

OPR concluded that the decisions the DEA-NM made not to interdict the drugs, based on the information the agents had at the time, were reasonable and consistent with the fentanyl guidance. The USAO-NM and DEA-NM were in regular communication about the surveillance, and options for taking enforcement actions were considered. However, the lack of concrete information, the short time frame in which to prepare an enforcement action to immediately seize the drugs, and public safety considerations were reasonable factors to consider when evaluating whether to conduct an enforcement action. OPR also notes that a full take down of the DTO was imminent, and an attempted enforcement action could have tipped off the organization and caused its members to flee the country, potentially ruining years of work. Indeed, when the take down of the DTO occurred, the agents conducted a massive law enforcement operation, executing federal search warrants at numerous residences and seizing substantial quantities of various types of narcotics, including fentanyl, and cash. As part of that operation, the DEA-NM and USAO-NM arrested a large group of individuals, including those involved in the above-described transaction, and charged them with federal drug trafficking offenses. OPR concluded that the conduct alleged by the complainant did not violate the fentanyl guidance or a law, rule, or regulation nor did it constitute an abuse of authority or a substantial and specific danger to public health and safety.

C. Investigation C

After its initial referral, OSC referred an additional allegation relating to an ongoing investigation to the Department for OPR's review. OPR interviewed Group Supervisor 2 and the Deputy Supervisory AUSA regarding the complainant's allegations.

Notably, the complainant's allegations are based on comments he overheard from individuals who are not serving as the lead case agents, supervisors on the investigation, or AUSAs. The complainant was not part of any operational or case discussions, and he does not know what the investigative team considered, what steps the investigative team took leading up to or after the incident, or why the team made the decisions that it made. The complainant only alleges that the investigative team knew of a transport of fentanyl and did not immediately conduct an enforcement action. OPR determined that the fentanyl guidance did not require such action.

OPR learned that, in the investigation at issue, the DEA-NM was in continual contact with the USAO-NM regarding its 2024 surveillance operations. The USAO-NM appropriately considered the fentanyl guidance and made reasonable decisions, in conjunction with the DEA-NM, to conduct extensive surveillance operations and not to attempt immediate enforcement actions. In addition, one of the complainant's concerns was his belief that investigative teams were omitting details in the information that they provide to ESU. OPR finds the complainant's concerns to be unfounded. OPR determined that the investigative team provided detailed information to ESU about these surveillance operations and their decisions to not attempt enforcement actions. The investigative team and ESU discussed these operations in conjunction with the fentanyl guidance, and ESU did not object to the investigative team's decisions. Accordingly, OPR concluded that the conduct alleged by the complainant did not violate the fentanyl guidance or a law, rule, or regulation nor did it constitute an abuse of authority or a substantial and specific danger to public health and safety.

VIII. CONCLUSIONS

OPR finds that the fentanyl guidance necessarily allows investigative teams conducting a Title III investigation involving suspected fentanyl to use their discretion and judgment to determine how best to conduct their investigations. It advises those teams to recognize the danger of fentanyl to the public, balance those dangers with the goals of their investigation, and include the appropriate supervisory personnel in their decision making. OPR finds that USAO-NM and DEA-NM personnel have, when they concluded it was appropriate, taken actions, or advised taking actions, other than conducting immediate and overt enforcement actions against suspected transfers of narcotics, including fentanyl. However, OPR finds that in the cases it reviewed, such decisions were made with adequate oversight by USAO-NM AUSAs and appeared reasonable, and therefore, did not violate the fentanyl guidance or a law, rule, or regulation nor did they constitute an abuse of authority or a substantial and specific danger to public health and safety.

OPR notes that, by design, the fentanyl guidance does not dictate specific actions that investigators or prosecutors must take in investigations involving suspected fentanyl. Discretion and reasonableness are incorporated into the policy. The personnel implementing the guidance

may well disagree regarding how best to implement the policy's overall mandate to protect public safety. Disagreement, however, does not establish that the guidance has been violated.

Also of note, in interviewing investigators, attorneys, and supervisors in multiple agencies, it became apparent, even within the Criminal Division itself, that there were different interpretations of the Criminal Division's fentanyl guidance and views as to how best to follow it. Prior to this complaint, the Criminal Division had taken steps to help ensure a more uniform understanding of risk mitigation in Title III fentanyl investigations. These steps included continuing its training regarding the guidance and obtaining input from the USAOs and investigative agencies to update and clarify the guidance. During the pendency of this investigation, the Criminal Division issued revised guidelines and is in the process of providing further training to investigators and prosecutors in applying the guidance.