



Office of the Attorney General
Washington, D. C. 20530

December 16, 2022

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL 
SUBJECT: ADDITIONAL DEPARTMENT POLICIES REGARDING
CHARGING, PLEAS, AND SENTENCING IN DRUG CASES

General Department policies regarding charging an offense, entering into a plea agreement, and making sentencing recommendations are set forth in *General Department Policies Regarding Charging, Pleas, and Sentencing* (2022) (hereinafter “General Policies Memorandum”). This memorandum provides additional, specific policies regarding charging, pleas, and sentencing in drug cases -- consistent with the priority the Department has placed on focusing its prosecutorial resources on combatting violent crime.

CHARGING DOCUMENTS AND PLEA AGREEMENTS

Mandatory Minimum Offenses

As stated in the General Policies Memorandum, “charges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges ... would not sufficiently reflect the seriousness of the defendant’s criminal conduct, danger to the community, harm to victims” and “such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” General Policies Memorandum at 2, 3.

This policy applies with particular force in drug cases brought under Title 21 of the United States Code, where mandatory minimum sentences based on drug type and quantity have resulted in disproportionately severe sentences for certain defendants and perceived and actual racial disparities in the criminal justice system. *See* Governor Asa Hutchinson, Statement before the Senate Judiciary Committee 2 (June 22, 2021); Attorney General Holder, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (2013); United States Sentencing Commission, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System* 8, 26, 57 (Oct. 2017). Accordingly, in cases in which Title 21 mandatory minimum sentences are applicable based on drug type and quantity, prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant satisfies all of the following criteria:

- The defendant's relevant conduct does not involve: the use of violence, the direction to another to use violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;
- The defendant does not have a significant managerial role in the trafficking of significant quantities of drugs;
- The defendant does not have significant ties to a large-scale criminal organization or cartel, or to a violent gang; and
- The defendant does not have a significant history of criminal activity that involved the use or threat of violence, personal involvement on multiple occasions in the distribution of significant quantities of illegal drugs, or possession of illegal firearms.

In making the above assessment, prosecutors should consider whether the above criteria are satisfied without regard to whether the defendant would be eligible for a sentence below a mandatory minimum term based on application of the safety valve, 18 U.S.C. § 3553(f), or on substantial assistance under 18 U.S.C. § 3553(e).

In cases in which prosecutors determine that some but not all of the criteria are satisfied, prosecutors should not automatically charge the quantity necessary to trigger the mandatory minimum, but rather weigh the considerations set forth in this memorandum and the General Policies Memorandum to carefully determine, through the exercise of their discretion and in consultation with their supervisors, whether a Title 21 charge with a mandatory minimum sentence is appropriate.¹

As set forth in the General Policies Memorandum, any decision to include a mandatory minimum charge in a charging document or plea agreement must be approved by a supervisory attorney as designated by the United States Attorney or Assistant Attorney General for the relevant litigating division.

If information sufficient to determine that all of the criteria above are satisfied is available at the time initial charges are filed, prosecutors should decline to pursue Title 21 charges triggering a mandatory minimum sentence. If this information is not yet available, prosecutors may file charges involving these mandatory minimum statutes pending further information. If information that the criteria are satisfied is subsequently obtained, prosecutors should pursue a disposition that does not require a Title 21 mandatory minimum sentence. For example, a prosecutor could ask the grand jury to supersede the indictment with charges that do not carry mandatory minimum sentences; a defendant could plead guilty to a lesser included offense that does not carry the mandatory minimum; or a defendant could waive indictment and plead guilty to an information that does not charge the quantity necessary to trigger the mandatory minimum.

¹ For example, in a case involving a defendant who serves only as a "drug mule," but who arguably does not satisfy all of the criteria discussed above, the balance of considerations may still weigh against the filing of a Title 21 charge carrying a mandatory minimum sentence.

Recidivist Enhancements

In deciding whether to file an information under 21 U.S.C. § 851 requiring imposition of enhanced statutory penalties, prosecutors in drug cases should be guided by the same criteria discussed above for charging mandatory minimum offenses, as well as whether the filing would create a significant and unwarranted sentencing disparity with equally or more culpable co-defendants. Prosecutors are encouraged to make the Section 851 determination, and to file any such a notice, at the time the case is charged or as soon as possible thereafter.

As with any filing, a Section 851 enhancement should not be filed simply to exert leverage to induce a plea or because the defendant elected to exercise the right to trial. General Policies Memorandum at 3.

SENTENCING RECOMMENDATIONS

The General Policies Memorandum advises that, although in many cases the appropriate balance among the 18 U.S.C. § 3553(a) factors will lead to a recommendation for a sentence within the advisory range resulting from the application of the Sentencing Guidelines, there are cases in which such a sentence may not be “proportional to the seriousness of the defendant’s conduct” or “achieve the purposes of criminal sentencing as articulated in 18 U.S.C. § 3553(a).” General Policies Memorandum at 5. In such cases, prosecutors may conclude that a request for a departure or variance above or below the guidelines range is warranted. *Id.*

In the context of drug cases, requests for departures or variances may be particularly justified in the following circumstances:

- **Certain cases in which the guidelines range does not adequately reflect the defendant’s crime and culpability:** At times, a low-level seller in a large-scale drug organization may be held responsible under the relevant conduct provisions of the Sentencing Guidelines for a large quantity of drugs that produces an advisory range near the top of the sentencing table. In such cases, prosecutors should consider supporting a downward departure or variance, particularly where all or most of the criteria listed on the first two pages of this memorandum are satisfied. Conversely, where the criteria are satisfied and yet the penalty yielded by the advisory guidelines range is not proportional to the seriousness of the defendant’s conduct, prosecutors may consider seeking an upward departure or variance.
- **Certain cases in which the career offender guidelines range does not adequately reflect the defendant’s crime and culpability:** Similar consideration should be given in a case in which the defendant is subject to sentencing under the career offender guideline, *see* U.S.S.G. § 4B1.1, which is designed to trigger guideline ranges at or near statutory maximum sentences. In a case in which all or most of the listed criteria are present, and the defendant’s status as a career offender is predicated only on the current and previous commission of nonviolent controlled substance offenses, prosecutors should consider

supporting a downward variance to the guidelines range that would apply in the absence of career offender status.² (For purposes of this memorandum, nonviolent offenses are those that do not involve the actual or threatened use of a weapon or other means of violence.) Conversely, if the defendant's prior convictions involved the actual or threatened use of violence, but the crimes do not qualify as career offender predicates under the "categorical approach," if appropriate prosecutors may consider advocating for an upward variance, including toward the career offender range.

Whatever the ultimate sentencing recommendation, prosecutors must always be candid with the court, the probation office, and the public as to the full extent of the defendant's conduct and culpability, including the type and quantity of drugs involved in the offense and the quantity attributable to the defendant's role in the offense, even if the charging document lacks such specificity.

CHARGING, PLEAS, AND SENTENCING IN CRACK COCAINE CASES

The Justice Department supports elimination of the crack-to-powder sentencing disparity and has testified before Congress in support of the EQUAL Act, S. 79, which would remove that disparity. As the Department has explained: "First, the crack/powder disparity is simply not supported by science, as there are no significant pharmacological differences between the drugs: they are two forms of the same drug, with powder readily convertible into crack cocaine. Second, as documented by the Sentencing Commission, the crack/powder sentencing differential is still responsible for unwarranted racial disparities in sentencing. Third, the higher penalties for crack cocaine offenses are not necessary to achieve (and actually undermine) our law enforcement priorities, as there are other tools more appropriately tailored to that end." Justice Department Statement, Senate Judiciary Committee 6 (June 22, 2021).³

Accordingly, prosecutors in crack cocaine cases should take the following steps to promote the equivalent treatment of crack and powder cocaine offenses.

² The Sentencing Commission has documented the increasing frequency of sentencing variances below a career offender range, particularly for those whose career offender status rested on drug offenses rather than violent crimes. The Commission reported that, by fiscal year 2014, judges imposed a sentence below the career offender range in roughly 75% of drug-based career offender cases, frequently choosing a sentence close to the non-career offender drug guideline. United States Sentencing Commission, *Report to the Congress: Career Offender Enhancements* 35 (2016).

³ See Testimony of Acting ONDCP Director, Senate Judiciary Committee, June 22, 2021; U.S. Sentencing Commission Report 1995 (recommending sentencing guidelines amendment that would have equalized the guidelines penalties for powder and crack cocaine offenses based solely on drug quantities).

If charging a mandatory minimum term of imprisonment under Title 21 for a drug offense involving crack cocaine is deemed warranted under this memorandum, prosecutors should charge the pertinent statutory quantities that apply to powder cocaine offenses. The Criminal Division and the Executive Office for United States Attorneys will issue further guidance on how to structure such charges.

At sentencing, prosecutors should advocate for a sentence consistent with the guidelines for powder cocaine rather than crack cocaine. Where a court concludes that the crack cocaine guidelines apply, prosecutors should generally support a variance to the guidelines range that would apply to the comparable quantity of powder cocaine.

As noted above, prosecutors must always be candid with the court, the probation office, and the public as to the full extent of the defendant's conduct and culpability, including the type and quantity of drugs involved in the offense, even if the charging document lacks such specificity.⁴

⁴ The policies contained in this memorandum, and internal office procedures adopted pursuant thereto, are intended solely for the guidance of attorneys for the government. They are not intended to create a substantive or procedural right or benefit, enforceable at law, and may not be relied upon by a party to litigation with the United States. Justice Manual § 9-27.150 (updated Feb. 2018); see *United States v. Caceres*, 440 U.S. 741 (1979).