

# Smart on Crime I

## In This Issue

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# Introduction

*Attorney General Eric H. Holder*

Throughout my career of service to the law—as a federal prosecutor, as a judge, as an attorney in private practice, and as Deputy Attorney General and Attorney General of the United States—I have seen the federal criminal justice system firsthand from nearly every angle. I’ve come to understand, over the years, how crime and well-intentioned policies designed to be “tough on crime” have perpetuated a vicious cycle of criminality and incarceration. And I’ve witnessed how this cycle can trap individuals, break apart families, and devastate entire communities—particularly communities of color.

The evidence of this problem is real, and it is unambiguous. While the United States comprises just five percent of the world’s population, we incarcerate almost a quarter of its prisoners. Since 1980, the federal prison population has grown at a rate approximately 24 times the rate of America’s general population growth. Spending on corrections, incarceration, and law enforcement has dramatically increased. Roughly a third of the Justice Department’s budget now serves to fund the Federal Bureau of Prisons. And most troubling of all: studies indicate that this historic rise in incarceration is not only unsustainable—it has not materially improved public safety, reduced crime, or strengthened communities.

Ultimately, our country’s over-reliance on incarceration has contributed to a culture that sends too many Americans to too many prisons for far too long, often for no good public safety reason. This is why, in August of 2013, I launched a new Smart on Crime initiative to reform and strengthen America’s criminal justice system. This initiative is intended to fundamentally reorient the way that we approach sentencing, incarceration, and rehabilitation at the federal level by relying on evidence-based strategies to make our criminal justice policies both more efficient and more effective. This will enable and encourage legal professionals, lawmakers, and public servants at every level to help ensure that we can apply proven, 21st century solutions to the 21st century challenges we face—increasing our ability to guarantee that, in every case, in every circumstance, and in every community, justice can be done.

Already, the Smart on Crime approach is transforming our response to a range of criminal justice challenges. As a result of changes I have mandated with regard to Justice Department charging policies, today, individuals convicted of low-level, non-violent drug-related crimes will face sentences that are appropriate to their conduct, rather than draconian mandatory minimums that may be better suited to violent traffickers or kingpins. By reserving the most serious penalties for the most dangerous criminals, we can better promote public safety, deterrence, and rehabilitation—all while making our expenditures smarter and more beneficial.

The Justice Department has also increased its emphasis on proven diversion programs like drug courts, veterans courts, and rehabilitation initiatives that focus on providing individuals with the tools they need to get back on constructive paths and stay out of the criminal justice system. In my travels across the country, I have met with jurists, law enforcement leaders, other criminal justice professionals, and participants in these programs. I have personally seen the positive effects that they can have, and the tremendous promise they hold in cases where they are appropriate. And I am confident that more and more jurisdictions will meet with success as they increase their investments in data-driven methods to deliver positive outcomes for all citizens.

Under the Smart on Crime initiative, the Department of Justice is also renewing our commitment to promoting sound and effective reentry policies. Because the overwhelming majority of all incarcerated individuals will eventually be released, it is incumbent upon us to ensure that they have fair opportunities to rejoin their communities as productive, law-abiding citizens. This is why I have directed every U.S. Attorney to designate a Prevention and Reentry Coordinator in his or her district. They will make certain

that reentry remains a focused national priority, and that incarceration will be properly directed towards punishment and rehabilitation—and not merely used to warehouse and forget.

Beyond these efforts, the Department is enlisting partners across the federal government—including the Department of Education and other allies—to disrupt the school-to-prison pipeline that sends too many children on a well-worn path from the schoolhouse to the jailhouse. Through our Office of Juvenile Justice and Delinquency Prevention, we're employing a developmentally-informed approach to end zero-tolerance disciplinary policies that disproportionately affect students of color, and that too often outsource corrective measures for minor infractions from the principal's office to a police precinct. And through programs like President Obama's My Brother's Keeper initiative, we are helping to address persistent opportunity gaps faced by boys and young men of color, and to ensure that *all* young people can reach their full potential.

We are also working closely with law enforcement leaders across the country to forge strong bonds of trust, mutual respect, and cooperation between officers on the streets and the citizens they serve. In too many communities, these relationships are marred by discord, division, and distrust, in some places giving rise to tensions that simmer just under the surface. Fortunately, many outstanding local police officials are working tirelessly to bridge these divides. Through Justice Department-led efforts such as the National Initiative for Building Community Trust and Justice, my colleagues and I are striving to bolster this work at the federal level by using data-informed strategies to help build close engagement between law enforcement officials and community members. And going forward, under the continued leadership of local officials, our Office of Justice Programs, and the Office of Community Oriented Policing Services (COPS), we will continue to foster a climate of compassion, collaboration, and consensus that will keep our neighborhoods safer and more secure.

These, and a range of other Smart on Crime reforms, represent important—and, in many cases, historic—steps in the right direction. Thanks to the work of America's brave law enforcement officials and the efforts of Justice Department leaders, over the past two decades, we've begun to see significant reductions in national crime rates. In fact, the rate of violent crime that was reported to the FBI in 2012 was about *half* the rate reported in 1993. This same rate has declined by more than 11 percent just since President Obama took office, while the rate of incarceration has gone down by more than 8 percent over the same brief period. This is the very first time these two critical markers have declined together in more than 40 years.

Today, the Smart on Crime initiative is allowing us to capitalize upon, and continue, these recent gains—bringing about nothing less than a paradigm shift in the way that our country approaches key criminal justice challenges. This [USA Bulletin](#) will be the first of two that will cover Smart on Crime-related topics. It is my hope that these articles will provide useful information and insights to help drive this critical initiative forward. And as we move ahead with its implementation and institutionalization, we must continue to refine and strengthen the policies it comprises. We must develop new metrics for measuring progress and assessing the impacts of these policies, so we can fine-tune our methods and expand our effort. And we need to keep striving to apply proven, innovative solutions to the full range of law enforcement, public safety, and criminal justice challenges that lie ahead.

These goals will not be met overnight. But I have no doubt that, so long as we continue advancing this new approach—with the help of our dedicated law enforcement partners, guided by our highest ideals, and driven by our deepest values—together, we can make the difference that we seek. We can better protect and strengthen the nation that we love. And we can forge the more perfect Union—and the more just society—that *all* Americans deserve.

# The Legal Basis and Need for the Smart on Crime Initiative

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On August 12, 2013, the Attorney General announced a series of initiatives and reforms collectively labeled “Smart on Crime”: a comprehensive set of policies designed to ensure the fair and efficient enforcement of federal laws in light of experience and budgetary needs. The program is based on the Department of Justice’s (the Department’s) comprehensive review, beginning in early 2013, of the criminal justice system. The review aimed to identify necessary reforms for federal law enforcement in the present era to best ensure public safety and the fair and consistent treatment of criminal offenders, and to most efficiently use limited federal resources. This review resulted in the adoption of new reforms to focus federal law enforcement efforts on the most serious cases that implicate clear, substantial federal interests. While the initiative and its conclusions were only recently accomplished, the need for, and propriety of, this review are as old as the Constitution itself.

Other authors in this volume will address the *what* of Smart on Crime: implementation of the Department’s pronouncements regarding the substantial federal interests that warrant federal prosecution in individual cases; mandatory minimum sentencing; reentry programs for released offenders; diversion programs, such as drug treatment and community service initiatives; and aid to state and local officials. But first, we begin with the *why* of Smart on Crime. The Attorney General’s introduction to this publication explained his thinking and analysis; the following piece by Jonathan Wroblewski addresses the budgetary imperatives; and this article discusses the legal basis and necessity of the program.

## **I. Legal basis for Smart on Crime**

The requirement for the Department to develop and implement new guidelines, particularly with regard to the imposition of mandatory minimum sentences, is rooted in constitutional obligation and is mandated by a series of Supreme Court decisions.

### **A. Prosecutorial discretion**

Various governmental actors play an important role in the process of criminal prosecution. The decision whether to prosecute an individual for a violation of criminal law is a fundamental power of the Executive Branch of our Government. The Legislative Branch, with the approval of the President (or over a Presidential veto), defines criminal conduct and sets the parameters of permissible punishment. The Judicial Branch assures fair compliance with all laws and requirements of due process, and determines the final punishment within statutory limits. However, only the prosecutor is vested with nearly complete discretion to determine whether to prosecute and for what. Not every person who violates a federal criminal statute can, will, or should be prosecuted. The decision is committed to federal prosecutors. The Supreme Court consistently recognizes the essential nature of prosecutorial discretion in the criminal justice process and appropriately guards this power.

[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.

*Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

## **B. Department policies**

Accordingly, it has been incumbent on the Department, throughout its history, to determine its prosecutorial priorities and set policies to ensure the fair, proper, and consistent enforcement of federal law. Its discretion necessarily reaches not only the decision whether to charge an individual, but also the determination of what charges to assert. During the past three decades, the Department has endeavored to set forth in the United States Attorneys' Manual, Title 9, Chapter 27, titled, "Principles of Federal Prosecution," directives to ensure the proper and consistent charging decisions by federal prosecutors. These guidelines have necessarily changed on occasion, over the years, to reflect public safety needs and the views of the country's democratically elected leaders. Recently, in May 2010, Attorney General Holder issued a broad directive to set forth the Department's present approach. In its central paragraph, the policy directed:

[I]n accordance with long-standing principle, a federal prosecutor should ordinarily charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction" [USAM 9-27.300]. This determination, however, must always be made in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime" [USAM 9-27.300]. In all cases, the charges should fairly represent the defendant's criminal conduct, and due consideration should be given to the defendant's substantial assistance in an investigation or prosecution. As a general matter, the decision whether to seek a statutory sentencing enhancement should be guided by these same principles.

Memorandum from Eric H. Holder, Attorney General, Dep't of Justice, to All Federal Prosecutors (May 19, 2010), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

## **C. Supreme Court decisions**

More recently, the scope of prosecutorial charging authority expanded due to a series of significant Supreme Court decisions, all of which the Department, during multiple administrations that include the current one, actually opposed, based on its understanding of pertinent constitutional provisions. This expansion necessitated the Attorney General's August 12, 2013 determination and announcement regarding mandatory minimum sentencing. The decisions at issue may not have dictated the actual content of the policy—other considerations, addressed throughout this issue, informed that—but it mandated that the Department act. In short, as in all significant developments in our tripartite system of balanced government, the Executive Branch is not the only player in the drama.

The expansion began with the Supreme Court's landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that any fact, other than prior conviction, that increases a statutory *maximum* sentence must be treated as an element of a more serious offense and must, therefore, be charged in an indictment and proven to a jury beyond a reasonable doubt. *Id.* at 476. The decision was not based on the limit of prosecutorial discretion but, rather, rested on an interpretation (with which the Government disagreed) of the Sixth Amendment right to trial by jury. *Apprendi* had wide consequences, one of which expands the scope of prosecutorial discretion: if the allegation and proof of an additional fact are required in order to impose an enhanced sentence authorized by statute, it is incumbent on the prosecutor to treat that fact like any other charge and exercise discretion in deciding whether to allege and prove it.

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Supreme Court extended the *Apprendi* rule to mandatory *minimum* sentences established by statute. *Id.* at 2162–63. This decision overturned prior precedent in *Harris v. United States*, 536 U.S. 545 (2002). In *Harris*, the Supreme Court, albeit without a majority opinion, concluded that brandishing a firearm, which results in a mandatory minimum sentence in 18 U.S.C. § 924(c) prosecutions, but does not increase the maximum sentence, is a sentencing factor for the judge to find, and “need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.” *Id.* at 568. The *Harris* Court agreed with the Government’s position that, so long as a sentence did not exceed the *maximum* allowed by statute, a court could impose a *minimum* sentence required by statute upon finding particular facts and without involving a jury in the determination. In *Alleyne*, the Supreme Court overturned that decision and declared the opposite result.

Both *Harris* and *Alleyne* involved prosecutions under 18 U.S.C. § 924(c), which requires a mandatory minimum sentence of five years’ imprisonment for using, carrying, or possessing a firearm in connection with a crime of violence or drug trafficking offense, and allows a maximum sentence of life imprisonment. The statute increases the mandatory minimum to 7 years if the gun was “brandished,” and 10 years if it was “discharged.” 18 U.S.C. § 924(c) (2014). Under *Harris*, once a jury convicted a defendant of a § 924(c) charge (thus requiring at least a five-year sentence), a court could determine at sentencing whether a gun was brandished or discharged, and therefore decide whether an increased mandatory minimum sentence must be applied. Under *Alleyne*, that is no longer permissible. While the court, in its discretion, is allowed to impose any reasonable sentence up to the statutory maximum of life imprisonment for a § 924(c) offense, it is not *required* to impose a minimum 7- or 10-year term unless the pertinent fact of brandishing or discharge is charged in the indictment and proven to a jury beyond a reasonable doubt.

Only the prosecutor can decide whether to bring that charge. Under *Harris*, the prosecutor had little control over the imposition of an enhanced mandatory minimum sentence because this increase was in the hands of the judge. If the Government charged and proved a violation of § 924(c), the court, upon examining the facts, would decide by itself whether the gun was brandished or discharged and, therefore, whether an increased mandatory minimum sentence applied. The prosecutor would certainly present argument on that point, but could not control the final decision. In contrast, under *Alleyne*, the prosecutor, at the outset, has complete control. He or she must exercise increased discretion in deciding whether the allegation of brandishing or discharge is appropriate, and therefore regulates when the enhanced mandatory punishment is available.

## **II. Need for Smart on Crime**

### **A. The role of *Alleyne v. United States***

In federal law, perhaps the most commonly applied mandatory minimum sentences are found in 21 U.S.C. § 841, with gradations that present even greater impact than those at issue in § 924(c). It is well known that for the controlled substances that are most frequently the subject of federal prosecutions—including cocaine, crack cocaine, and heroin—the statute permits a 20-year maximum sentence. *See* 21 U.S.C. § 841(b)(1)(C) (2014). However, proof of specified quantities increases this maximum sentence, and mandatory minimum sentences of 5 years or 10 years apply. *See id.* § 841(b)(1)(A)–(B). Those minimum sentences increase further, to 20 years’ or even life imprisonment, for defendants with specified criminal histories. *See id.* § 841(b)(1)(A).

As discussed above with regard to § 924(c), prosecutors prior to *Alleyne* had minimal control over the imposition of mandatory minimum sentences. The same was true for prosecutions under 21 U.S.C. § 841, the drug trafficking statute. Before *Alleyne*, once the Government elected to charge and prove a violation of § 841 (or of a statute that incorporated the penalty provisions of § 841), the court, on its own, was required to find the quantity involved in the offense and to impose any applicable mandatory

minimum sentence that resulted from the quantity determination and that fell within the statutory maximum. That is no longer the case. Now, after the *Alleyne* decision, unless the prosecutor first decides to charge the fact—that is, the quantity—that produces the mandatory minimum sentence, and the jury finds that fact beyond a reasonable doubt, the mandatory minimum sentence does not apply, and the court may decide, in its discretion, to impose a sentence below that mandatory minimum. Thus, the need for the August 12, 2013 announcement of the Smart on Crime policy and its application to mandatory minimum sentencing in drug cases was established.

The Attorney General began the memorandum as follows:

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Supreme Court held that any fact that increases the statutory mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt. This means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty. The Supreme Court’s decision in *Alleyne* heightens the role a prosecutor plays in determining whether a defendant is subject to a mandatory minimum sentence.

Memorandum from Eric H. Holder, Attorney General, Dep’t of Justice, to the U.S. Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

## **B. The role of *United States v. Booker***

Indeed, the need for a fair and consistent approach to charging facts causing a mandatory minimum sentence under § 841 was heightened by another profound change in sentencing law that resulted from the *Apprendi* revolution: the decision in *United States v. Booker*, 543 U.S. 220 (2005), holding that the U.S. Sentencing Guidelines are advisory, not mandatory.

Interestingly, had the Supreme Court, in 2002, decided *Harris* differently and announced that a court may not, on its own, find a fact increasing a statutory mandatory minimum sentence, there would not have immediately been a significant effect in drug cases. That is because the U.S. Sentencing Guideline for narcotics offenses was itself aligned with the statutory mandatory minima, as the guideline range was determined based on facts found by a judge, and that range was mandatory. In other words, the mandatory guideline sentence would rarely fall below the statutory mandatory minimum sentence, and, consequently, it would not matter whether the Government charged and invoked the statutory mandatory minimum sentence.

The drug quantity table in § 2D1.1 of the U.S. Sentencing Guidelines (U.S.S.G.) was established in relation to the statutory mandatory minimum provisions. The table sets the base offense level for most drug trafficking offenses based on the type and quantity of the drug involved in the offense. The U.S. Sentencing Commission calls this concept “linkage.” Thus, the base offense level for those quantities that produce a statutory mandatory minimum term of 5 years (for example, 500 grams of powder cocaine) was set at Level 26, as that results in a range of 63 to 78 months at criminal history Category I, just above the statutory mandatory. Similarly, the base offense level for those quantities that produce a mandatory minimum term of 10 years (for example, 5 kilograms of powder cocaine), was set at level 32, as that results in a range of 121 to 151 months at criminal history Category I, again just above the statutory mandatory. All other offense levels on the table were set below, between, or above these levels.

It is important to note that in 2014, the U.S. Sentencing Commission reduced all offense levels on the table by two levels, but the linkage concept endures. Now, the ranges for quantities that produce a mandatory minimum embrace, rather than fall, above the mandatory—that is, Level 24 produces a range

at criminal history Category I of 51 to 63 months, which surrounds the 60-month mandatory, while Level 30 produces a range at criminal history Category I of 97 to 121 months, which includes the 120-month mandatory.

In short, when the U.S. Sentencing Guidelines were mandatory, the judge was required to determine the quantity involved in the offense. If that quantity produced a mandatory minimum sentence, it would also produce a mandatory guideline sentence equal to, or above, the mandatory statutory term. The only defendants who might have benefitted from a different outcome in *Harris*, and a holding that a court alone cannot find the fact producing the statutory mandatory minimum, would be those entitled to reductions below the guideline range, usually due to substantial assistance or application of the safety valve, 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, or another of the limited grounds for guideline departures. *Booker* changed that. It ruled that the U.S. Sentencing Guidelines may not constitutionally be applied as mandatory. The result is judicial authority to impose sentences outside the guideline range, and a steady increase year after year in the frequency of below-guideline range sentences. In fiscal year 2013, for example, according to the U.S. Sentencing Commission, only 51.2 percent of all federal sentences nationwide were imposed within the applicable guideline range. In drug cases, that frequency was only 38.8 percent, primarily due to substantial assistance motions and downward variances.

Because of all this, the exercise of prosecutorial discretion in deciding who is subject to stiff mandatory minimum sentences under § 841 is now vital following the *Alleyne* decision. Where the prosecutor decides not to charge in an indictment or information the quantity that requires a mandatory minimum sentence, the court cannot apply that sentence as mandatory, and very possibly will permissibly decide not to apply a sentence that high at all, even if the final guideline range suggests that sentence or a higher term. The prosecutor holds the switch, and he or she must decide, in each case, whether the defendant is deserving of the statutory mandatory penalty. If the prosecutor determines that the defendant so deserves, the prosecutor will charge and prove the quantity, thus producing a floor for the sentence. The prosecutor then assures that the authority granted in *Booker* to vary from the guideline range will not allow a sentence below the statutory mandatory minimum. If, on the other hand, the prosecutor determines that the statutory mandatory minimum sentence is unwarranted, he or she will not charge and prove the quantity. In making these decisions, the prosecutor must ensure that each determination is consistent with both the “Principles of Federal Prosecution” in Title 9 of the United States Attorneys’ Manual and the need to enforce criminal law in a fair, balanced, and efficient manner. This weighty obligation called for the announcement of a Department-wide policy.

On August 12, 2013, the Attorney General announced that policy through the Smart on Crime Initiative. He set forth guidelines to ensure that the charging of the mandatory minimum provisions in narcotics cases will appropriately reflect the severity of the defendant’s conduct and the need for fair and efficient enforcement of the law. “[C]ertain nonviolent, low-level drug offenders,” who have no ties to large-scale organizations, gangs, or cartels, will no longer be charged with offenses that impose draconian mandatory minimum sentences. Memorandum from Eric H. Holder, U.S. Attorney General, Dep’t of Justice to the U.S. Attorneys and Assistant Attorney General for the Criminal Div., at 1. They now will be charged with offenses for which the accompanying sentences are better suited to their individual conduct, rather than excessive prison terms more appropriate for violent criminals or drug kingpins. By reserving the most severe penalties for “serious, high-level, or violent drug traffickers,” *id.*, the Attorney General determined, we can better promote public safety, deterrence, and rehabilitation—while making our expenditures smarter and more productive.

### III. Conclusion

This aspect of the Smart on Crime policy is consistent with our constitutional scheme and tradition in which officers of the Executive Branch are charged with the responsibility of defining law enforcement priorities and determining the most appropriate manner in which to enforce criminal laws. Such discretion now extends to charging mandatory minimum sentencing provisions as well, and the Attorney General has, therefore, defined the manner in which that discretion will be exercised. ❖

### ABOUT THE AUTHOR

□ **Robert A. Zauzmer** has served as an Assistant U.S. Attorney in the Eastern District of Pennsylvania since 1990. He serves as Chief of Appeals, supervising all criminal appeals in the district since 1998. Mr. Zauzmer is the Third Circuit representative on the Appellate Chiefs Working Group of the Attorney General’s Advisory Committee (AGAC), and served as the chair of the working group and as an ex officio member of the AGAC from 2012 to 2014. ✽

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# Budget Realities and Smart on Crime: Rebalancing Public Safety Spending to Reduce Crime in an Era of Governmental Austerity

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### I. Introduction

Throughout the history of the United States, the mission of the federal criminal justice system has always been to improve public safety for citizens across the country. While this goal has not changed, the role of federal criminal justice and the means and methods to achieve this goal have been dynamic, adapting and evolving to reflect new and changing social perceptions of crime and criminal justice and ever-changing budgetary realities that drive and reflect the prevailing policies of any given era.

Few, if any, crimes shake the conscience more than violent crime. Increasing incidence of murder, rape, robbery, and aggravated assault (the FBI’s “index crimes”) played a large role in triggering a dramatic shift in sentencing and corrections policy in the 1970s and 1980s. The policy changed from

one focused on rehabilitation to one based on retribution and incapacitation. Reforms to criminal justice—more police on the streets, more federal investigators and prosecutors, longer prison sentences, and the expansion of prevention and intervention programs, as well as drug treatment—yielded dramatic public safety results. After three decades of skyrocketing violent crime rates, the last 24 years have seen a complete reversal, with the rate of violent crime dropping to generational lows. But, these successes came at great cost.

The Attorney General has spoken often about the human and social costs, which took the form of unprecedented increases in the U.S. prison population. More prisoners required more prisons, and even as the number of prison facilities grew dramatically, prisons today remain overcrowded. The financial costs came in the burgeoning criminal justice budgets required to build new facilities and house more prisoners at both the state and federal levels, along with increased costs for more police, federal investigators, prosecutors, prison staff, and prevention, intervention, and treatment programs. Year after year, the Department of Justice (the Department) requested and received substantial budget increases.

Congressional action in recent years, however, has fundamentally changed the budgetary outlook for the federal criminal justice system for the foreseeable future. The passage of the Budget Control Act of 2011 marked the beginning of a new period of governmental austerity, and the Department has found itself in a fiscal situation unlike any it has faced in recent decades. However, as the overall Department budget began to decrease, the federal prison population and federal prison spending continued to increase. In fiscal year 2011, the year the Budget Control Act was signed into law, the federal prison population increased by about 7,500 prisoners, the equivalent of 5 federal prisons. Federal prison spending was already beginning to crowd out other vital public safety needs like police, investigators, and prosecutors, threatening the remarkable public safety achievements of the last two decades. As the Bureau of Prisons estimated continued growth in the federal prison population far into the future, it became increasingly apparent that the budgetary course the Department was on was no longer sustainable or consistent with increased public safety.

The Smart on Crime Initiative was designed, in part, to address these budget realities, and chart a more sustainable course that controls prison spending while ensuring sufficient resources for robust policing and prosecution, effective prisoner reentry, prevention and intervention programs, and adequate drug treatment. The Initiative has already led to reductions in the federal prison population and a rebalancing of public safety spending that has, in turn, helped the Department begin filling many of the positions lost during the recent hiring freeze. The Smart on Crime Initiative is modeled after the various Justice Reinvestment programs that have been implemented in many states across the country and that have led to a reduction in the overall U.S. prison population *and* continued declines in the overall violent crime rate.

This article explores these themes in greater depth, ultimately concluding that the current budgetary realities dictate Smart on Crime reforms that will allow federal criminal justice to continue to play its critical role in helping to deliver public safety and equal justice for all in the years and decades to come.

## **II. Violent crime in the United States and its impact on sentencing**

In the early 1960s, the nation's violent crime rate began to take a turn for the worse. According to the FBI's Uniform Crime Reports (UCR), in 1960, the U.S. national violent crime rate sat at 161 crimes per 100,000 persons. *See* UNIFORM CRIME REPORTING STATISTICS, available at <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (choose "United States-Total" from box "a," "Violent crime rates" from box "b," and enter "1960" in both boxes, in part "c"). In just one decade, the national violent crime rate had more than doubled, reaching 364 crimes per 100,000 persons in 1970. By 1991, it more than doubled again to the highest level in the post-war period, peaking at 758 crimes per 100,000 persons. *Id.* Overall, the violent crime rate in the United States nearly quadrupled in just over three decades. *Id.* At

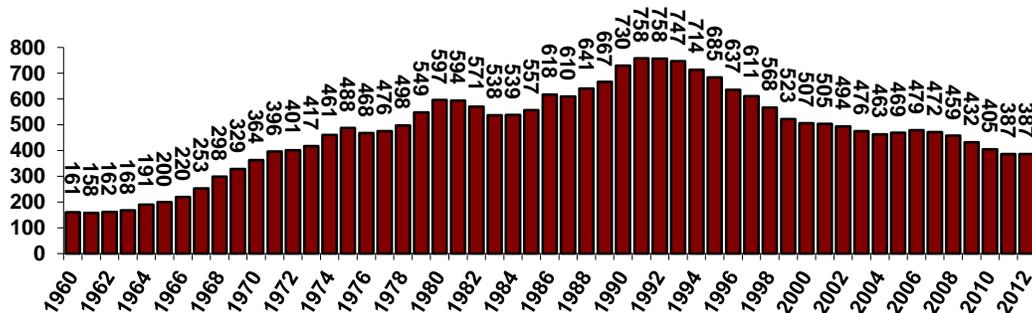
the same time, the murder rate more than doubled, rising from 4.6 murders per 100,000 persons in 1962, to a peak of 10.2 murders per 100,000 persons in 1980, dropping only slightly to 9.8 murders per 100,000 persons in 1991. *Id.* Figure 1.

In the 1970s and 1980s, U.S. sentencing law and policy shifted substantially, in part in response to these trends. In state after state—and in the federal criminal justice system, in the form of the Sentencing Reform Act of 1984—the rehabilitative model of sentencing that had been in place from the earliest days of the Republic was replaced by a new sentencing framework. The foundation of the new system was a belief that reducing reoffending was a fool’s errand—that nothing worked to change offending behavior—and that excessive discretion in charging and sentencing had led to unwarranted disparities and discriminatory impacts on the poor and people of color. It was thought that certainty in sentencing—in both the imposition of a particular sentence for a particular crime and in the time to be served for a sentence imposed—would simultaneously improve public safety by incapacitating the criminal, deter new criminality, and increase fairness in sentencing, by reducing unwarranted sentencing disparities.

This new system of determinate sentencing was only part of a series of policy changes and investments in the U.S. criminal justice system that came in the wake of the unprecedented increases in violent crime in communities across the country. These changes included reforms to policing and increases in the number of police on the streets, a commitment to reducing illegal drug use and drunk driving, increasing treatment capacity, and a new commitment to victims of crime and their right to be treated with dignity and respect. As a country, we steadily increased funding for criminal justice agencies at all levels of government, supporting numerous programs and initiatives that changed the way the nation approached crime and justice.

These and other reforms, in many ways, led to great success. Over the past 20 years or so, violent crime in the United States has been dramatically reduced to near generational lows. *See* CRIME IN THE UNITED STATES 2012, available at [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/cius\\_home](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/cius_home) (choose “Violent Crime” then select “Table 1”) (CRIME IN THE UNITED STATES 2012). Where there were 24,526 murders in 1993 in the United States, there were 14,827 in 2012 (while the population grew by approximately 22 percent). *Id.* Where there were 106,014 rapes reported to law enforcement in 1993, there were 84,376 in 2012. *Id.* Where there were 659,870 robberies reported in 1993, there were 354,520 in 2012. *Id.* Where there were 1,135,607 aggravated assaults reported in 1993, there were 760,739 reported in 2012. *Id.* In just the last 20 years, the overall violent crime rate in the United States decreased by almost half, from 747 crimes per 100,000 persons in 1993, to only 387 in 2012, the lowest level since 1970. *Id.* See Figure 1.

**Figure 1.** U.S. National Violent Crime Rate (per 100,000 Persons), 1960-2012

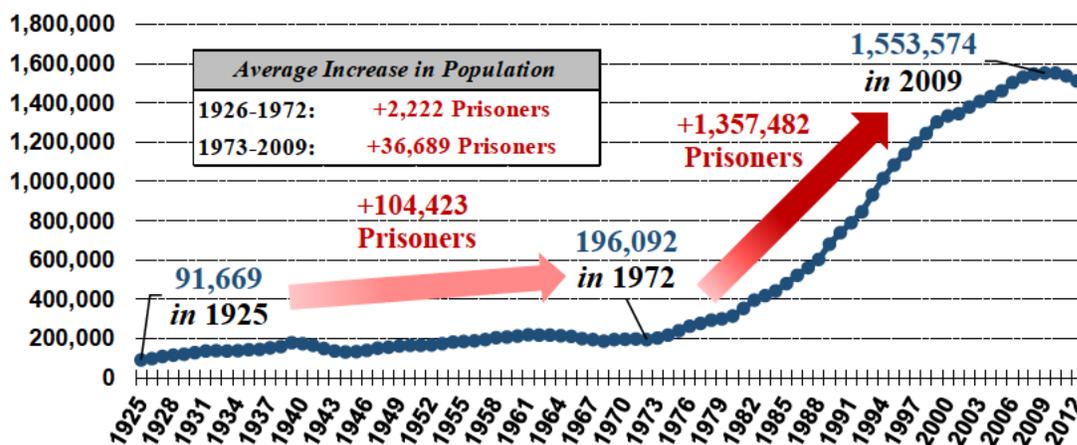


These numbers represent a remarkable success of government. Although we clearly have far more to accomplish in improving public safety, there is still much to celebrate. The successes of the past two decades, however, were not achieved without major costs, as they took a significant human and fiscal toll on our society, the consequences of which policymakers are now grappling with.

### III. The human cost of success: the exploding U.S. prison population

While the U.S. national violent crime rate enjoyed two decades of significant decline, the U.S. prison population exploded to levels and rates never before seen in our nation. For most of the country's history, imprisonment rates were stable at less than 150 persons per 100,000 in population. *See* JOHN SCHMITT ET AL., CTR. FOR ECONOMIC & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 6 (2010). In the last several decades, though, the rate has more than quadrupled to over 700 per 100,000. *Id.* at 3. The hard numbers are perhaps even more stunning: from 1925 to 1972 the number of persons in state or federal prisons rose by a little over 100,000 in 5 decades, from just under 92,000 in 1925 to about 196,000 in 1972. *See* Figure 2; HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2012), available at <http://www.albany.edu/sourcebook/pdf/t6282012.pdf>. But recent history tells a very different story: in just the last *three* decades, the number of persons in state or federal prisons has increased by over 1.3 million, topping 1.5 million total prisoners by 2009, as indicated in Figure 2. *Id.* At the federal level the number of inmates under Bureau of Prisons (BOP) jurisdiction has increased nearly 8-fold, from about 25,000 inmates in fiscal year 1980 to over 219,000 in fiscal year 2012. *See* NATHAN JAMES, CONG. RESEARCH SERV., THE BUREAU OF PRISONS (BOP): OPERATIONS AND BUDGET 1 (2013) (JAMES, OPERATIONS AND BUDGET). These numbers represent an average increase of about 5,900 inmates per year.

**Figure 2.** Total State and Federal Prisoners in the United States, 1925-2012



Staggering numbers such as these have raised serious concerns among citizens and policymakers who pride themselves on individual freedom. Many have documented the impact that such imprisonment rates have had on individuals and communities, including the erosion of trust and confidence in the criminal justice system, particularly in disadvantaged communities and communities of color. And, while vigorous debate may ensue over the efficacy of large scale incarceration, the simple fact is that our nation has reached a crossroads in which such policies are no longer fiscally sustainable and are being questioned in legislatures across the country. Budget realities alone now demand that a change of course take place before our system of justice diminishes in its ability to fulfill its mission.

### IV. The fiscal cost of success and new budgetary realities

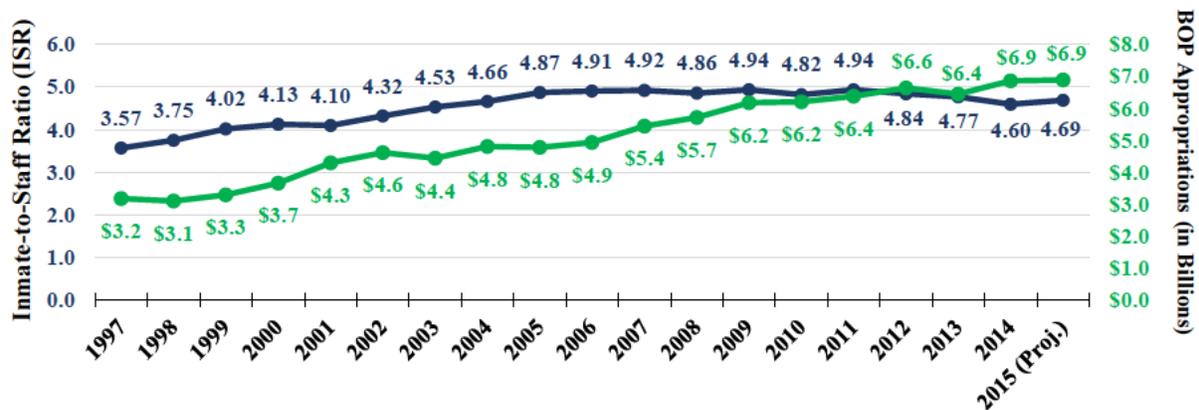
#### A. BOP staffing and appropriations

As the prison population soared to unprecedented levels, the federal criminal justice budget soared along with it. *See* DEP'T OF JUSTICE, FY 2015 PERFORMANCE BUDGET: SALARIES AND EXPENSES

10 (2014) (BOP BUDGET). With more prisoners, the BOP has continually required more funds to build new facilities and keep federal prisons adequately staffed and maintained. *See id.* Even with continuously increasing appropriations, BOP operations have still lagged, with prisons filling beyond capacity and faster than necessary positions could be filled, raising the inmate-to-staff ratio (ISR) to dangerous levels. *Id.* at 12–13.

In its FY 2015 performance budget submission to Congress, BOP emphasized staffing deficiencies and overcrowding, noting that “[a]s of February 27, 2014, system-wide, the BOP is operating at 32 percent over rated capacity and crowding is of special concern at higher security facilities, with 51 percent crowding at high security facilities and 41 percent at medium security facilities.” *Id.* at 10. The budget request further points out that as inmate populations and crowding have increased, the ISR has also increased by over 33 percent since 1997. *Id.* at 12. And, when compared to the 5 states with the highest prison populations in fiscal year 2009, BOP’s ISR for that year was 59 percent higher than the average ISR among those 5 states, 3.10 to 1. *Id.*

**Figure 3.** BOP Inmate-to-Staff Ratio (ISR) and Total BOP Appropriations, FYs 1997-2015



To illustrate the difficulty BOP has faced in keeping staffing levels at pace with the prison population, in fiscal year 2000, the number of inmates in BOP-operated prisons sat at 125,560. *Id.* at 13. By fiscal year 2013, this number reached 176,849, an increase of over 40 percent. *Id.* Meanwhile, BOP operations staff increased by only 22 percent, from 30,382 in fiscal year 2000 to 37,061 in fiscal year 2013, effectively raising the ISR from about 4 inmates per staff member to nearly 5 inmates per staff member in fiscal year 2013, as shown in Figure 3 above. This disparity adversely impacted the BOP’s ability to safely supervise prisoners, requiring leaving posts vacant or forcing non-custody officers to fill in the gaps through a process known as augmentation. *Id.* As the BOP points out, not only does this diminish the normal duties of the augmenting staff, but the level of serious assaults by inmates is greater as the ISR increases. *Id.* Perhaps the most alarming fact is that the BOP is still facing these challenges despite an 87 percent increase in their total appropriations. As Figure 3 demonstrates, there was an increase from \$3.67 billion in fiscal year 2000 to now \$6.86 billion in fiscal year 2014. *See* JAMES, OPERATIONS AND BUDGET, at 1–2. In fiscal year 1980, BOP’s total budget was \$330 million. *Id.* at 1. Since then the budget has increased more than 20-fold, about a \$173.2 million increase per year after adjusting for inflation. *Id.*

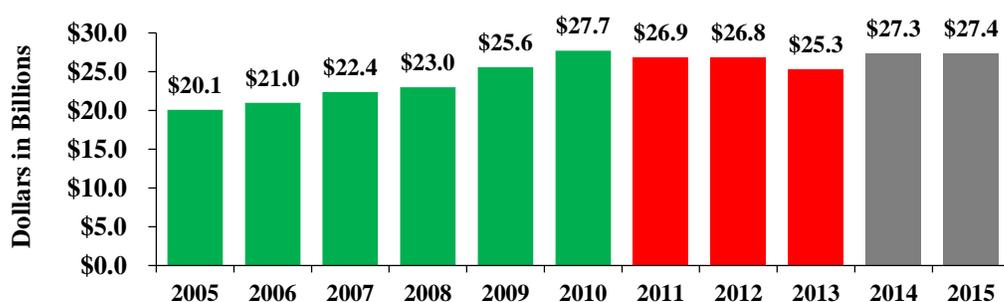
### B. New budgetary realities and the Budget Control Act of 2011

As the annual growth in the federal prison population outpaced the BOP’s prison capacity, Congress continued to appropriate additional funding to build more prisons and hire more employees. From fiscal year 1980 to today, the BOP has increased its number of prisons from 41 to 119. *See* NATHAN JAMES, CONG. RESEARCH SERV., THE FED. PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 52–53 (2014) (JAMES, PRISON POPULATION). In the past, the

Department's sustained budgetary growth was more capable of absorbing these increases. In only 5 years, the Department's discretionary budget authority increased by nearly 38 percent, from about \$20 billion in fiscal year 2005 to nearly \$28 billion in fiscal year 2010, as demonstrated in Figure 4. *See* BUDGET AUTHORITY AND POSITIONS: 2003-2013, <http://www.justice.gov/jmd/budget-authority-and-positions-2003-2013>. Much of this was the result of increases in BOP appropriations, from about \$4.8 billion in fiscal year 2005 to about \$6.2 billion in fiscal year 2010 (along with increases in detention costs and in the Department's national security mission). JAMES, OPERATIONS AND BUDGET, at 11. *See* Figure 3.

When the new decade began, however, a rapid shift in fiscal policy took place that marked a new era of governmental austerity. Congress passed the Budget Control Act of 2011, sending a clear signal that the steady growth experienced over the previous 15 years in the budgets of the Department of Justice, other federal enforcement agencies, and the federal courts, had come to an end. Even before sequestration ultimately took effect in 2013, overall budgets had mostly been flat over the previous four years. *See* Figure 4. Nevertheless, BOP appropriations, with the exception of fiscal year 2013, continued to grow. By fiscal year 2014, BOP's enacted budget reached \$6.8 billion, up 10 percent from fiscal year 2010.

**Figure 4. Total DOJ Discretionary Budget Authority, Fiscal Years 2005-2015**



With the sequester, the challenges for federal criminal justice increased dramatically, and the choices faced by policymakers—Congress, the Judiciary, and the Executive Branch—became that much more stark: control federal prison spending or see significant reductions in the resources available for other criminal justice areas. In fact, the trend of greater prison spending crowding out other crucial justice investments goes back at least a decade and has already caused a significant change in the distribution of discretionary funding among the Department's various activities. In fiscal year 1980, only about 15 percent of the Department's total discretionary budget was allocated to the BOP. *See* JAMES, PRISON POPULATION, at 12. By fiscal year 1998, this proportion rose to 20 percent, and in fiscal year 2014 the BOP's total appropriations comprised more than 25 percent of the Department's total discretionary budget. *Id.*

## V. Smart on Crime is a proven path forward

While there is still much more work to be done, Smart on Crime initiatives have already been at work at the federal level and are yielding some fairly significant results. In November 2013, for example, the Attorney General announced that more than \$62 million in grants had been awarded to strengthen reentry, probation, and parole programs, helping people returning from prison rejoin their communities as productive, law-abiding citizens. *See* Press Release, Dep't of Justice, Justice Department Announces More Than \$62 Million to Strengthen Reentry, Probation and Parole Programs (Nov. 14, 2013), <http://www.justice.gov/opa/pr/justice-department-announces-more-62-million-strengthen-reentry-probation-and-parole-programs>. Other critical public safety investments, like the hiring of Assistant U.S. Attorneys, are similarly beginning to recover.

By the end of fiscal year 2013, drug offenders made up just under 50 percent of the total federal

prison population. *See* BOP BUDGET, at 4. In order to control prison costs and overcrowding, the U.S. Sentencing Commission unanimously voted in April 2014 to amend the sentencing guidelines for federal drug offenders. Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Comm’n Votes to Reduce Drug Trafficking Sentences (Apr. 10, 2014), [http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410\\_Press\\_Release.pdf](http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf). The Commission estimates that moving forward, roughly 70 percent of federal drug trafficking defendants would qualify for the change, with their sentences decreasing an average of 11 months, or 17 percent, from 62 to 51 months. Moreover, although the new guidelines did not formally take effect until November 2014, the Attorney General instructed federal prosecutors in March 2014 to proceed as if the new guidelines had already been implemented.

In July 2014 the Commission went a step further by unanimously voting to apply these new drug sentencing guidelines retroactively, meaning an estimated 46,000 offenders currently incarcerated would be eligible to have their cases reviewed for reduced sentences, beginning November 1, 2014. The Commission estimates that eligible offenders could have their sentences reduced by an average of 25 months, or 18.8 percent. Press Release, U.S. Sentencing Commission, U.S. Sentencing Comm’n Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (July 18, 2014), [http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718\\_press\\_release.pdf](http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf).

While these drug sentencing reforms are expected to bring about considerable reductions in the federal prison population when fully implemented, new trends in the federal prison population have already been revealed. In September 2014 the Attorney General announced that the federal prison population dropped by roughly 4,800 inmates over the course of fiscal year 2014, the first time the federal prison population has dropped since 1980, despite earlier BOP estimates predicting continual increases for the foreseeable future. Looking ahead, BOP now estimates that in fiscal year 2015, the federal prison population will drop by nearly 2,200 additional inmates and, over the course of fiscal year 2016, should drop by nearly 10,000 more. In other words, over the course of fiscal years 2014 to 2016, the overall federal prison population is projected to drop by nearly 17,000 inmates, a decrease of nearly 8 percent from the more than 219,000 BOP prisoners in fiscal year 2013. *See* Press Release, Dep’t of Justice, One Year After Launching Key Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More Than Three Decades (Sept. 23, 2014), <http://www.justice.gov/opa/pr/one-year-after-launching-key-sentencing-reforms-attorney-general-holder-announces-first-drop-0>. Prior to these revised drug guidelines, BOP projected that the federal prison population would reach over 234,000 by fiscal year 2019, bringing BOP facilities to 41 percent over capacity, up from about 33 percent in fiscal year 2014. *See* BOP BUDGET, at 4.

Meanwhile, the total U.S. prison population has already been declining over the last 5 years due to some of the nearly 20 states that have implemented various Justice Reinvestment programs of their own, resulting in combined projected savings of as much as \$4.6 billion and individual decreases in state prison populations ranging from 0.6 to 19 percent. *See* NANCY LAVIGNE ET AL., URBAN INSTITUTE, JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 3 (2014). Despite an influx of newly released prisoners into the general population, the national violent crime rate has continued its historic plunge, decreasing by over 10 percent from 2009 to 2012. *See* CRIME IN THE UNITED STATES 2012 (choose “Violent Crime”). Preliminary data for the first six months of 2013 foreshadows yet another year of major declines, as police hiring is picking up and other crime fighting investments are being made. *See* CRIMINAL JUSTICE INFO. SERVICES DIV., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013, PRELIMINARY SEMIANNUAL UNIFORM CRIME REPORT 2013, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/preliminary-semiannual-uniform-crime-report-january-june-2013> (select “Table 3”).

## VI. Conclusion

The successes already achieved in Justice Reinvestment and Smart on Crime initiatives at both the state and federal levels have proved that, although prison is an effective tool in reducing violent crime and improving public safety, reduced use of imprisonment that leads to an effective rebalance of public safety spending—towards policing, prosecution, treatment, prevention, and reentry—can be just as effective and far more cost efficient at meeting the goals of criminal justice in the United States. Now, more than ever, policymakers at all levels of government are demanding that criminal justice professionals find ways to enhance public safety while spending less, and the austere budgetary policies of this new age of government can be expected to guide decision making into the foreseeable future. ♦

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# Smart on Crime: Strategies to Determine Law Enforcement Needs and to Ensure Substantial Federal Interest in Investigations and Prosecutions

*S. Dave Vatti*  
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*District of Connecticut*

## I. Introduction

In outlining his Smart on Crime strategy, the Attorney General has directed that all investigations and prosecutions initiated by Department of Justice (DOJ) prosecutors serve a “substantial federal interest” and that DOJ resources be deployed in a manner that has a maximum impact in reducing violence in our communities and ensuring public safety. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2 (2013), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>. This policy directive

has raised the question in U.S. Attorneys' offices (USAOs) around the country as to how "substantial federal interest" is defined, determined, and developed. While there are a number of criteria that can be utilized in determining whether a particular investigation or prosecution presents a substantial federal interest, this bedrock principle inherently has the flexibility and discretion that are the very hallmarks of the overall Smart on Crime Initiative. In other words, while there may be some guiding criteria on what constitutes a substantial federal interest, the ultimate determination of whether such an interest exists with respect to a particular investigation or case that is contemplated depends upon the specific needs, crime trends, and law enforcement priorities in each district. However, there are some practical strategies that can be implemented in attempting to ensure that investigative and law enforcement partners in every district identify needs and generate matters that are more likely to fall within the parameters of a "substantial federal interest."

As a preliminary matter, there are a number of criteria that can be utilized as a general framework in determining whether a proposed investigation or prosecution presents a substantial federal interest. First, in April 2011 the Attorney General reiterated the Department of Justice's four essential priorities. These include: (1) protecting Americans from terrorism at home and abroad, (2) fighting violent crime, (3) combatting financial fraud, and (4) protecting the most vulnerable members of our society. *See* JUSTICE NEWS, <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110425.html>. Further, under the broad umbrella of the Attorney General's priorities, each U.S. Attorney likely has articulated priorities specific to each district. These national and more localized priorities should be the starting point for every federal prosecutor conducting intake of a proposed investigation or prosecution. Second, in assessing matters contemplated by the Smart on Crime Initiative, the United States Attorneys' Manual sets forth a number of relevant factors for consideration. These factors include whether the matter falls within established federal law enforcement priorities such as violence reduction, anti-gang enforcement and cartel-related or other large-scale drug trafficking; whether the matter represents more localized and regional priorities that are within the umbrella of federal priorities; the assessment of the nature and seriousness of the offense; the deterrent effect of prosecution; the putative defendant's culpability in connection with the offense; the proposed defendant's criminal history; the potential of eliciting cooperation; and the severity of the sentence likely to result. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.230 (2014) (explaining these factors in great detail). There is little point in simply repeating the factors that are set forth in the United States Attorneys' Manual. The more important point is that, as Smart on Crime moves forward, there are multiple strategies that can be encouraged and adopted by USAOs across the country to ensure that cases generated and developed by their law enforcement partners in their districts will specifically impact violence reduction and consistently satisfy these criteria.

## **II. Strategies**

### **A. Crime data analysis**

First, federal law enforcement efforts need to be driven by crime data analysis, not by the direction of confidential informants (CIs) and cooperating witnesses (CWs). Too often CIs and CWs will identify a potential target and law enforcement will pursue that opportunity without a clear understanding whether the deployment of resources at that target will have any appreciable impact upon violence reduction. On the other hand, analysis of crime statistics is a far more effective method of deploying federal resources that will have a tangible effect on public safety. Every police department in major urban centers maintains crime statistics by precinct or police district, and usually maps the data. In reviewing the data, investigators can easily pinpoint those neighborhoods that have high incidence of homicides, non-fatal shootings, robberies, assaults, and other violent crimes. Once those "hot spots" are determined, intelligence resources can be directed at those neighborhoods, and informants and cooperators familiar with those neighborhoods can be developed from local arrests in those areas. Key individual targets and

groups can be identified, and controlled purchases of guns and narcotics can be made in those neighborhoods.

For example, in Connecticut, the Drug Enforcement Administration's New Haven Resident Office, in conjunction with the New Haven and Hamden Police Departments, utilized this strategy in a very effective violence reduction program in late 2011 and 2012. In 2011 New Haven had 34 homicides. Based on crime data analysis, much of the violence occurred in two neighborhoods. After developing CIs within those neighborhoods, two gangs were identified as principally responsible for the violence arising out of drug turf disputes. Members of these groups were targeted for enforcement activity, and wiretaps were eventually utilized. Ultimately, nearly 100 defendants were prosecuted in May 2012 across 5 separate indictments. Following that effort, the homicide rate dropped 50 percent in New Haven by the end of 2012, a substantial single year reduction. It has held steady since and has shown signs of dropping further in 2014. While many of the charged individuals were prosecuted for narcotics violations, the manner in which the targets were selected ensured that a "substantial federal interest" was served in their investigation and prosecution. To put it bluntly, while the model of reactive CI-driven matters may occasionally lead to a worthwhile case that has a real, tangible impact on public safety, this approach is not a recipe for long-term success. USAOs should encourage federal law enforcement partners to focus on proactive, data-driven enforcement that will result in the identification of "hot spots" for violence, gang activity, and related drug trafficking, and generate cases that are more likely to meet the test of "substantial federal interest" and lead to sustainable violence reduction.

## **B. Federal-state intelligence partnership**

Second, a strong intelligence partnership between federal and local law enforcement, particularly in larger cities, is critical to ensuring that cases eventually selected for federal prosecution serve the substantial federal interest required. Regular, periodic intelligence meetings between local police departments, federal agencies, USAOs, and state prosecutors should be held so that particular individuals—those who have lengthy criminal histories and are known to commit violent acts, have access to firearms, and are known to distribute large quantities of narcotics—can be identified and targeted for enforcement activity. Groups with whom these individuals associate can also be identified. Through these intelligence meetings, which can be aided greatly by the use of statistical research professionals if available funds allow, federal and local law enforcement can and should develop worst offenders lists, which can vary in size depending on the population of the city involved. But, once an individual is on that list, any case that can be developed against that individual presents an opportunity for federal adoption and prosecution that serves a substantial federal interest.

For example, a one-ounce buy of crack cocaine that may be inconsequential against a low-level, non-violent offender may have a significant impact upon a particular neighborhood if the defendant has been deemed a worst offender. Similarly, if a narcotics prosecution of a single individual might lead to cooperation, thereby resulting in a larger-scale investigation of a broader group of individuals who are worst offenders, there is a case to be made that federal prosecution of the initial target would serve a federal interest. In short, a strong intelligence partnership between federal and local law enforcement and the development of a worst offenders list will provide a context for federal prosecution of individual narcotics and firearms cases that will ensure an appreciable effect on violence reduction and avoid the inconsequential low-level, non-violent offender that Smart on Crime seeks to avoid.

## **C. Regular firearms case reviews**

Third, a regular program of firearms case reviews with state prosecutors' offices should be implemented. In urban centers that have a high incidence of violent crime, federal prosecutors should meet with their state counterparts on a periodic basis to review every firearms arrest in the city. It should be determined whether the defendant has a significant criminal history, whether the defendant has a gang

affiliation, whether the defendant is a violent offender by history or credible intelligence, and whether the federal prosecution would result in more stringent penalties. For lower-level offenders, the specter of federal prosecution often leads to appropriate dispositions at the state level. For more significant targets, federal adoption removes violent offenders for lengthy periods of time, has a tremendous deterrent effect, and solidifies a partnership with state prosecutors, which is critical to any violence reduction program. In short, a case review partnership between state and federal prosecutors ensures that cases adopted federally are more likely to satisfy the “substantial federal interest” necessary for prosecution.

#### **D. Traditional multi-defendant narcotics cases**

Finally, the advancement of a “substantial federal interest” still demands pursuit of the traditional, multi-defendant narcotics investigation and prosecution. However, selection of the cases and targets will rest upon the needs and priorities of each individual district. Each USAO is no doubt aware of the trends in their district in narcotics distribution. Some districts are experiencing an alarming rise in heroin trafficking and a corresponding increase in overdose deaths. Others are experiencing a rise in prescription drug abuse and oxycodone distribution that often leads to heroin use and addiction, including among juveniles. Other districts are confronted with the alarming rise in manufacture and distribution of methamphetamine. And yet other communities may fall victim to the gang violence that often accompanies the distribution of cocaine and crack cocaine. Again, crime data analysis and a strong intelligence partnership between state and federal investigative agencies will shed light on the drug trafficking trends that need to be addressed. To the extent that large-scale drug trafficking implicates concerns relating to public safety, the requirement of “substantial federal interest” provides sufficient flexibility and discretion to pursue that investigation and prosecute those targets that are most culpable for that activity, such as the leaders, organizers, repeat offenders, and the significant re-distributors. Moreover, the impact of requiring a “substantial federal interest” for prosecution will be felt when deciding whether the lower-level, non-violent offenders that may ordinarily have been prosecuted in the past for conspiracy-wide quantities or mandatory minimum offenses will be prosecuted at all, will be given diversionary dispositions, will be referred for state prosecution, or will be federally prosecuted for lesser offenses that do not carry mandatory minimum periods of incarceration.

### **III. Conclusion**

In summary, Smart on Crime’s mandate that federal investigations and prosecutions be undertaken only where a “substantial federal interest” is present has done nothing more than require every USAO to focus its mission and deployment of resources in a way that advances public safety and reduces violence in communities in its district. But, underneath that broad policy directive, there is ample flexibility and discretion to tailor enforcement efforts to the individual needs of every district. While every USAO can and will continue to pursue firearms, narcotics, and gang investigations, utilization of crime data analysis, development of intelligence partnerships that meet regularly and prepare worst offenders lists, periodic firearms case reviews with state prosecutors for evaluation of federal adoption, and pursuit of large-scale drug trafficking cases that are geared to distribution trends in the district, will ensure that investigations selected will not only satisfy a “substantial federal interest,” but will also lead to tangible, sustainable violence reduction. ♦

#### **ABOUT THE AUTHOR**

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# Nuts and Bolts of Applying the Retroactive Drug Guideline Amendment

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## **I. Introduction**

On November 1, 2014, Sentencing Guidelines amendment number 782 took effect. It reduces the offense levels in the drug quantity table accompanying the sentencing guideline applicable to drug trafficking offenses, U.S. Sentencing Guideline § 2D1.1. The U.S. Sentencing Commission made the amendment retroactive. However, the Commission ameliorated the retroactive impact of the amendment by delaying the implementation of any sentence reduction for one year, to November 1, 2015.

Federal courts will apply the reduced guidelines to defendants who are sentenced on and after November 1, 2014. For defendants sentenced under the prior guidelines, beginning on November 1, 2014, courts may entertain motions for reductions in sentence, but no reduction will be effective until November 1, 2015.

The practical effect of the delayed retroactive implementation of the amendment is that previously sentenced defendants who are released from incarceration between November 1, 2014, and November 1, 2015, will not reap the benefit of the amendment. Because the Commission made the guideline amendment retroactive, it will result in a vast number of resentencing proceedings for prisoners sentenced under the drug guideline prior to the amendment.

Assistant U.S. Attorneys (AUSAs) who handled resentencing proceedings under the two retroactive amendments to the crack cocaine guidelines may already be familiar with the recommendations made by this article, but may benefit from the collection and listing of resolved issues and rules. Those who are handling resentencing proceedings under a retroactive guideline amendment for the first time may find the recommendations here helpful.

This article will cover highlights of legal issues that have been resolved, recommend procedures which may be helpful in handling resentencing proceedings, list commonly applied resentencing rules, and include tables with mathematical formulae designed to calculate permissible sentence reductions.

## II. Drug quantity tables and defendants affected

### The Amended Quantity Table Effective November 1, 2014

Drug Quantity Table							Marijuana
The chart below reflects the changes to the official Drug Quantity Table that went into effect on <b>November 1, 2014</b> . Controlled Substance quantity is generally measured by weight, and includes "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." See USSG § 2D1.1. Minimum mandatory thresholds are five years at level 24, and ten years at level 30.							6
							any
							8
							1kg
10	Heroin	Cocaine	Crack	Meth	Meth (actual)	LSD	2.5kg
12	any	any	any	any	any	any	5kg
14	10g	50g	2.8g	5g	500mg	100mg	10kg
16	20g	100g	5.6g	10g	1g	200mg	20kg
18	40g	200g	11.2g	20g	2g	400mg	40kg
20	60g	300g	16.8g	30g	3g	600mg	60kg
22	80g	400g	22.4g	40g	4g	800mg	80kg
24	100g	500g	28g	50g	5g	1g	100kg
26	400g	2kg	112g	200g	20g	4g	400kg
28	700g	3.5kg	196g	350g	35g	7g	700kg
30	1kg	5kg	280g	500g	50g	10g	1,000kg
32	3kg	15kg	840g	1.5kg	150g	30g	3,000kg
34	10kg	50kg	2.8kg	5kg	500g	100g	10,000kg
36	30kg	150kg	8.4kg	15kg	1.5kg	300g	30,000kg
38	90kg	450kg	25.2kg	45kg	4.5kg	900g	90,000kg

**The pre-November 1, 2014 Drug Quantity Table**

Drug Quantity Table							Marijuana	
	Controlled Substance quantity is generally measured by weight, and includes "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." See <a href="#">USSG § 2D1.1</a> and <i>Federal Narcotics Prosecutions Chapter 30</i> . Minimum mandatory thresholds are five years at level 26, and ten years at level 32.						6	any
							8	250g
10	Heroin	Cocaine	Crack	Meth	Meth (actual)	LSD	1kg	
12	any	any	any	any	any	any	2.5kg	
14	5g	25g	1.4g	2.5g	250mg	50mg	5kg	
16	10g	50g	2.8g	5g	500mg	100mg	10kg	
18	20g	100g	5.6g	10g	1g	200mg	20kg	
20	40g	200g	11.2g	20g	2g	400mg	40kg	
22	60g	300g	16.8g	30g	3g	600mg	60kg	
24	80g	400g	22.4g	40g	4g	800mg	80kg	
26	100g	500g	28g	50g	5g	1g	100kg	
28	400g	2kg	112g	200g	20g	4g	400kg	
30	700g	3.5kg	196g	350g	35g	7g	700kg	
32	1kg	5kg	280g	500g	50g	10g	1,000kg	
34	3kg	15kg	840g	1.5kg	150g	30g	3,000kg	
36	10kg	50kg	2.8kg	5kg	500g	100g	10,000kg	
38	30kg	150kg	8.4kg	15kg	1.5kg	300g	30,000kg	

The Sentencing Commission prepared a list of defendants likely to be eligible for relief from retroactive application of the drug guideline amendment. The Executive Office for U.S. Attorneys (EOUSA), in turn, separated the data by district, and sent to each district a list of likely eligible defendants in that district. The Sentencing Commission has generated, and EOUSA has distributed, two lists. The first one did not take into account pretrial time served credit, which increases the number of defendants projected to be released prior to November 1, 2015. The second list omits those defendants, and is therefore more accurate. The Sentencing Commission intends to produce an updated list in early 2015, which will include offenders sentenced in fiscal year 2014 and the first month of fiscal 2015 and who did not appear on the initial list. Prosecutors are discovering the Sentencing Commission's list is often incomplete, both over-inclusive and under-inclusive. Still, it provides a useful starting point for identifying eligible defendants.

### III. Legal issues resolved

If there is a silver lining to undertaking a third round of resentencing proceedings, following rounds one and two in connection with the crack guideline amendments, it is that the legal issues have already been addressed and answered. Here, in a nutshell, is a list of some of the principal issues defendants have historically raised that have now been resolved.

1. The defendant does not get a new sentencing hearing to litigate various sentencing issues unrelated to the guideline amendment. The sentencing court is to substitute the amended guideline range for the initial range, and leave all other sentencing issues undisturbed. *Dillon v. United States*, 560 U.S. 817, 831(2010).
2. The defendant has no right to appear before the court or be present for a resentencing hearing. *Id.* at 827–28.
3. *Booker* does not apply to resentencing proceedings. *Id.* at 819. Congress gave the Sentencing Commission authority to designate whether and to what extent guideline amendments may be made retroactive. The Sentencing Commission has stipulated that a new sentence imposed due to the amendment cannot go below the amended guideline range, except in limited circumstances where the original sentence departed below the original guideline range in recognition of substantial assistance, and then the new sentence may depart only to a comparable extent. A defendant’s good conduct since imposition of the original sentence does not enable the court on resentencing to reduce the new sentence below these limits.
4. The defendant is not entitled to counsel upon resentencing. *United States v. Brown*, 565 F.3d 1093, 1094 (8th Cir. 2009) (and cases cited therein, no constitutional right to counsel). Nevertheless, in crack amendments I and II, districts commonly involve the Federal Defender’s Office or its equivalent in helping to process the mass of resentencing proceedings generated by the retroactive amendment, and, for the sake of efficiency, prosecutors welcomed this development. Some courts may follow the same practice again, but some courts have even stated that the court *cannot* appoint counsel to represent a defendant in a sentence modification proceeding under the Criminal Justice Act. *See United States v. Foster*, 706 F.3d 887, 888 (7th Cir. 2013).

### IV. Procedures

Experience in handling resentencing hearings under crack guideline amendments I and II helps develop a road map to handle the mass of resentencing hearings anticipated under the retroactive drug guideline amendment. In the experience of many districts, the courts, Probation offices, U.S. Attorneys’ offices (USAOs), and Federal Defenders’ offices commonly coordinate with one another to formulate a plan to handle the resentencing proceedings. A meeting among representatives of each component to agree upon a plan helps assure a smooth and efficient process. It is helpful if all the judges in a district agree to follow the same plan, and it unduly complicates matters if they do not. Even though the defendant is not entitled to counsel, it is extremely helpful if the Federal Defender’s Office, or the equivalent, participates and plays a key role in the process. The agreed-upon plan should specify how motions for reductions in sentence will proceed through the system, step by step.

Typical steps are:

1. The defendant files a motion for reduction in sentence
2. Upon receipt of the motion, the court enters a form order implementing the plan
3. Screening occurs
4. Probation office document generation occurs

5. Agreed recommendation or opposing pleadings are filed
6. The court enters a final order

### **A. Defendant's motion**

The process starts with the defendant filing a motion for sentence reduction pursuant to 18 U.S.C. § 3582(c). The defendant usually files a pro se motion, unless the Federal Defender's Office (often with the assistance of the USAO and/or the Probation Office) has proactively identified defendants eligible for sentence reductions and sent to them a form motion to be filed.

### **B. Form order**

The form order implements the agreed-upon plan. In our district, for example, under the crack amendments, the Federal Defender's Office agreed to screen the motions to determine the defendants' eligibility for relief. The form order referred the defendant's motion to the Federal Defender's Office and directed the Probation Office to prepare the necessary materials. The order set dates for the Federal Defender to report to the court concerning eligibility and for the Federal Defender and the USAO to file either an agreed recommendation or opposing pleadings. If, in your district, the screening is to be performed differently, the order should reflect that, or, if the screening is done by the court, there may be no order entered until after the screening has occurred. In that event, the order would either dismiss the motion because the defendant is ineligible or set dates for further pleadings by the parties.

### **C. Screening**

Some component needs to conduct a screening process to determine whether the defendant is eligible for relief. In our district, under the crack amendments, the Federal Defender's Office performed that function. In other districts, screening might be performed by the court's staff attorney, the USAO, the Probation Office, or by a committee comprised of two or more of these entities. If the screening results in a report to the court that the defendant is ineligible for relief, the court will enter an order dismissing the motion for the reason identified in the screening process.

### **D. Probation Office document generation**

The Probation Office should prepare a packet of documents consisting of the original presentence investigation report, a report of the guideline calculation under the new guidelines, and a report of prison conduct obtained from the Bureau of Prisons. The form order may direct the Probation Office to prepare this packet, but the Probation Office, in order to manage the expected bulk of resentencing proceedings, may proactively commence preparation of this packet as soon as the defendant files the motion for sentence reduction. For those defendants expected to be released at the outset, the Probation Office may even commence document generation upon receipt of the list of eligible defendants.

Inmate disciplinary records are not public and should be securely maintained. Nevertheless, the Department expects that the AUSA will share these records with defense counsel in connection with any pending motions for reduction in sentence due to drug guideline amendment retroactivity. In the rare case that a disciplinary record contains names and/or identifiers of other inmates, the AUSA should redact such identifiers prior to providing the records to defense counsel.

### **E. Filing of agreed recommendation or pleadings**

Upon receipt of the motion, the form order, the report of the screening process, and the Probation Office documents packet, the USAO will evaluate the case and arrive at a sentencing recommendation (more on this later). The USAO will discuss the recommendation with the Federal Defender, if one has been appointed, or with counsel for the defendant if separately retained by the defendant. If the parties

agree upon a proposed resolution, the parties will file an agreed recommendation. If the parties fail to agree, the USAO and defense counsel will file opposing recommendations, with supporting arguments.

## **F. Entry of dispositive court order**

At the end of the process, the court will enter an order. In most cases, the parties will have filed a joint recommendation, and the court will resentence the defendant in accordance with that recommendation. Where the parties file opposing pleadings, the court will evaluate the arguments advanced and announce the new sentence it finds appropriate. Where the Government objects to relief and the court agrees with the Government, it will enter an order denying the motion or granting a limited reduction. The court, in any order denying a reduction or granting only a partial reduction, should announce the reasons for the denial.

## **V. USAO staffing**

Each USAO will need to decide how to staff handling the resentencing proceedings. Alternatives are to assign all the resentencing proceedings to one or a small group of AUSAs, or to entrust resentencing proceedings to the AUSA who originally handled the case.

Many districts highly recommend assigning one experienced AUSA to handle all retroactivity motions in the office. This method presents tremendous efficiencies of scale, because individual AUSAs need not learn the substantial body of law applicable to retroactive application of a guideline amendment each time an AUSA is assigned to a case. Centralizing responses in one AUSA allows for efficient processing of the huge number of expected cases and also promotes consistency in recommendations. Even offices with sizeable numbers of motions have reported this method is workable.

If this method is not possible, either because the volume of motions in a large office is simply too great for one person (or a small number of AUSAs) to handle, or because a smaller USAO cannot spare the full-time services of an AUSA, then the USAO may decide to assign retroactivity motions to the AUSAs originally assigned to the cases. If the original AUSA has left the USAO, the USAO will need to assign a new AUSA. The USAO could distribute these case assignments among existing AUSAs, striving to equitably spread out the assignments, but that adds a logistic complexity that is best avoided. A better model is to designate a current AUSA to handle all the resentencing proceedings of a departed AUSA. If several AUSAs have left the office, then an equal number of current AUSAs could be designated to step into the shoes of the departed AUSAs. This burden would likely fall upon the AUSAs most recently added to the office. They likely will have fewer resentencing proceedings of their own to handle than would AUSAs who have been with the USAO longer and who have accumulated a larger number of disposed cases of their own eligible for resentencing.

## **VI. USAO decision making**

The AUSA should first confirm the screening process conclusion that the defendant is eligible for relief. A defendant is ineligible if, for example:

- The defendant is not in prison upon the original sentence, is on supervised release, or is in prison upon a revocation of supervised release,
- The defendant will be released prior to November 1, 2015,
- The defendant was sentenced to a mandatory minimum term of imprisonment, or
- The defendant's guideline range was calculated under a guideline not based upon the drug quantity table, or which established a minimum guideline range higher than the range obtained from the drug quantity table (such as career offender, armed career criminal, or continuing criminal enterprise).

In addition, if a defendant sentenced before November 1, 2014, received the benefit of early application of the reduced drug guidelines, either with the Government's agreement under then-existing Department policy or on the court's own initiative, the AUSA should object to any further relief.

The AUSA should then ensure the Probation Office has properly calculated the new guideline range. Here is a list of commonly encountered resentencing rules:

1. Substitute the new drug quantity table in calculating the new guideline range and leave all other guideline calculations unchanged. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(1) (2014). (If the offense level changes from 16 or above to below 16, the acceptance of responsibility reduction may decrease from 3 levels to 2.)
2. The new sentence cannot fall below new guideline range. *Id.* § 1B1.10(b)(2)(A). (Exception for cooperation discussed below at 4.)
3. The statutory mandatory minimums in effect at the time of the original sentencing apply. (Exception for cooperation discussed below at 4.) If the original sentence was imposed before the effective date of Fair Sentencing Act (FSA), the mandatory minimums in effect at the time of original sentencing still apply. Defendants do not get the benefit of FSA reductions in mandatory minimums upon resentencing. *United States v. Black*, 737 F.3d 280, 287 (4th Cir. 2013).
4. If, at the original sentencing, the defendant received a sentence below the guideline range due to a government motion made in recognition of substantial assistance, upon resentencing the defendant is eligible to receive a sentence the same percentage below the new guideline range (subject to any mandatory minimum). U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2)(B) (2014). In addition, if the Government made a motion at the original sentencing permitting the court to impose a sentence below a mandatory minimum due to the defendant's substantial assistance, then upon resentencing the guideline range will be calculated without regard to any mandatory minimum. *Id.* § 1B1.10(c).

If the bottom of the original guideline range was below the mandatory minimum, the calculations may make the defendant eligible for a possible windfall. This may occur because the mandatory minimum became the bottom of the original guideline range. Accordingly, the original sentence is calculated to be a certain percentage below the mandatory minimum (which is a higher percentage than if it were calculated from the bottom of the guideline range without regard for the mandatory minimum). The guidelines instruct, however, that the new sentence is to be calculated to be a similar percentage below the new guideline range, disregarding any mandatory minimum. In the event of a large percentage reduction, you may want to argue for less than the maximum possible reduction. Consider recommending imposition of a sentence a similar percentage below the new guideline range as the original sentence was under the old guideline range, if the bottom of the old guideline range were calculated as though there were no mandatory minimum.

5. If the original guideline range was calculated under a guideline whose range was not lowered by the amendment, such as the career offender guideline, the defendant is not entitled to relief.
6. If the defendant was sentenced under another guideline that establishes a minimum offense level higher than that calculated under the drug quantity table (for example, *id.* § 2D1.1(b)(3)), then the defendant is ineligible for relief. *Id.* § 1B1.10(a)(2)(B) app. 1(A). Similarly, a defendant originally sentenced under the Continuing Criminal Enterprise guideline is ineligible for relief because the CCE guideline establishes a floor at offense level 38, which is the highest level in the drug quantity table.

7. If the defendant received a mitigating role adjustment under § 3B1.2, the defendant was entitled to various adjustments to the defendant's offense level under the drug guideline. *Id.* § 2D1.1(a)(5). Those adjustments varied depending on the Guidelines Manual used, pre-November 1, 2004; November 1, 2004, to November 1, 2010; and November 1, 2010 and after. The best way to handle this is to calculate the offense level based upon the amended drug quantity table, then calculate the mitigating role adjustments, making sure to use the version of the Guidelines Manual in effect at the time the original sentence was imposed.
8. If an 11(c)(1)(C) sentence was calculated in reference to the initial guideline range, the defendant is eligible for relief, but only as far as the bottom of the new guideline range. *Freeman v. United States*, 131 S. Ct. 2685, 2695 (2011) (plurality opinion). If it was a stipulated sentence without regard to the guideline range, one should argue from Justice Sotomayor's concurring opinion in *Freeman* that the defendant is ineligible for relief. *United States v. Lawson*, 686 F.3d 1317, 1320–21, n.2 (11th Cir. 2012).
9. A sentence for violation of supervised release is not affected. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 app. 7(A) (2014).
10. A defendant's sentence cannot be reduced below time served. *Id.* § 1B1.10(b)(2)(C). But, if the defendant otherwise would have been eligible for a greater reduction, the court may take that into account at the time of a motion for early termination of supervision. *Id.* § 1B1.10 app. 7(B).
11. Be aware that a sentence above the top bracket or below the bottom bracket in the original drug quantity table may be unchanged in the new table. The AUSA will have to enter the drug quantity into the new table to make this determination.
12. If, at the original sentencing, the court found a quantity of drugs that was "at least" above the top threshold of the drug quantity table, the court can make additional drug quantity findings based on the existing record and deny a motion for sentence reduction if the evidence from the original hearing supports a quantity above the top threshold of the amended drug quantity table, and the court's findings do not contradict its original findings. *United States v. Hall*, 600 F.3d 872, 876–77 (7th Cir. 2010).

A table that incorporates all these rules and various sentencing scenarios into one helpful resource appears at the end of this article.

If drug and non-drug counts of conviction entered into calculating the defendant's original sentence under the grouping rules, calculate the sentence using the amended guideline table, then work through the grouping rules to ascertain whether the amendment changes the defendant's sentence, subject to any mandatory minimums.

The AUSA should next consider public safety consequences and post-sentencing conduct. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 app. 1(B)(ii)–(iii) (2014).

The AUSA should review the prison conduct report. The AUSA should particularly look for instances of violent misconduct, especially misconduct involving the use of weapons or resulting in injury. Recent violent or injurious misconduct should dictate an objection to relief. A pattern of misconduct in defiance of prison authority may also support an objection to relief. Individual non-violent instances of misconduct, older instances of misconduct followed by a lengthy period without misconduct incidents, or misconduct violating prison rules but not directly defying prison authority, should generally not result in an objection to relief.

After examining the offense conduct, the AUSA may find it appropriate to object to relief or to argue for less than the maximum available sentence reduction due to egregious offense conduct involving violence, use of firearms, or obstruction of justice. An original sentence imposed near the top of, or

above, the old guideline range also will support the AUSA resisting a sentence reduction, or advocating a reduction to a similar place in relation to the new guideline range (for instance, at the top of or above the new guideline range).

Finally, the AUSA should determine the new sentence recommendation.

There are several possible positions to take, and it is helpful to craft a form response tailored to each of these scenarios:

- Option A: Agree to a sentence at the minimum of the new range.
- Option B: Recommend a sentence within the new range at a similar spot within the range as the original sentence.
- Option C(i): Substantial assistance departure a similar percentage below new guideline range as original sentence—no mandatory minimum.
- Option C(ii): Substantial assistance departure a similar percentage below new guideline range as original sentence—mandatory minimum.
- Option D: Recommend a sentence within the new range, but above the minimum, due to public safety reasons.
- Option E: Object to sentence reduction due to public safety concerns.
- Option F: Defendant not entitled to a reduction.

The AUSA should communicate with defense counsel, where there is one, to determine whether the parties can agree on a recommendation to the court. If not, the AUSA should file a statement of the Government's position, with supporting argument.

## **VII. Appeal waivers**

AUSAs should not enforce appeal waivers as to motions for sentence reduction under the retroactive drug guideline amendment, unless the Government made significant concessions in return for the appeal waiver pursuant to previously announced Department policy.

## **VIII. Case files and data entry**

Since a case file is to be opened only if more than one hour of work is devoted to a case, you may want to establish a dummy file in which to keep the defendant's 3582(c) motion, any ensuing court order, and Probation Office generated documents, until the court orders the Government to respond. Once the Government has to respond, open a civil file. Record sentence reductions in case files and in LIONS using code PCSM (18 USC § 3582(c)—modification of an imposed term of imprisonment). Record time spent on resentencing matters using USA-5 Code PC (Prisoner Litigation) and USA-5a Code PCSM (18 USC § 3582(c)—modification of an imposed term of imprisonment).

## **IX. Determining the permissible sentence reduction**

The first step is to answer the questions in the table below, which will provide necessary information. Next, keeping in mind the limitations established by this table, use the table at the end of this article to determine the permissible sentence.

The following key applies to abbreviations used in the table at the end of this article. The table contains formulae that calculate the necessary percentages where there was a substantial assistance motion or a substantial assistance combined with 3553(e) motion, as well as formulae to calculate the new lowest permissible sentence.

- OS = Original sentence imposed
- BOG = Bottom of original guideline range
- BNG = Bottom of new guideline range
- MM = Mandatory minimum
- TOG = Top of original guideline range
- TNG = Top of new guideline range

<b>Answer these questions. Then calculate the new permissible sentence, using the table that follows.</b>	
Drug type and quantity	
Original guideline range	
Original sentence	
Was there a statutory mandatory minimum? If so, what is it?	
Was there a sentence reduction for cooperation?	
If there was a mandatory minimum, was there a 3553(e) motion for cooperation?	
Was there an 11(c)(1)(C) sentence? If so, was it tied in some way to the guideline range?	
Substituting the range from the amended drug quantity table, and applying all the guideline adjustments and calculations originally made, calculate the new guideline range	
In calculating the new guideline range, be mindful of the following:	

<ul style="list-style-type: none"><li>• Did a guideline apply that establishes a minimum offense level (or minimum offense level and minimum criminal history category)? (ACC guideline, career offender, CCE, host of others) If so, this guideline establishes a floor below which the new permissible sentence cannot go.</li> <li>• Was there a mitigating role adjustment? If so, calculate the sentence under the amended drug guideline table, then calculate the mitigating role adjustment using the version of the guidelines that was in effect at the time the original sentence was imposed.</li></ul>	
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<b>Posture of Case</b>	<b>Permissible Relief</b>
<b>No mandatory minimum</b>	
Quantity of narcotics falls into same offense level in new drug quantity table as in old table	Defendant is not entitled to a reduction
OS was within old guideline range	Defendant eligible for a sentence reduction to as far as BNG
OS < BOG, OS > BNG, no substantial assistance motion	Defendant eligible for a sentence reduction to as far as BNG
OS < BOG, OS < BNG, no substantial assistance motion	Defendant is not entitled to a reduction
OS < BOG due to substantial assistance motion	Defendant eligible for a reduction to a similar % below BNG $(OS \div BOG) \times BNG = \text{permissible new sentence}$
<b>Mandatory minimum, no 3553(e) motion</b>	
BNG < MM and OS > MM	Defendant eligible for a sentence reduction to MM
OS = MM	Defendant is not entitled to a reduction
<b>Mandatory minimum, original sentence was below mandatory minimum due to 3553(e) motion</b>	
BOG $\geq$ MM	Defendant eligible for a reduction to a similar % below BNG $(OS \div BOG) \times BNG = \text{permissible new sentence}$
BOG < MM	Defendant eligible for a reduction to a similar % below BNG $(OS \div MM) \times BNG = \text{permissible new sentence}$  (possible windfall, consider recommending sentence of $(OS \div BOG \text{ without regard to MM}) \times BNG$ )
<b>11(c)(1)(C) plea agreement</b>	
OS determined in relation to old guideline range	Defendant eligible for a sentence reduction

<p>Examples:</p> <ul style="list-style-type: none"> <li>• Parties agreed to calculations leading to a specific guideline range</li> <li>• Agreed to bottom 1/3 of guideline range</li> <li>• Agreed to sentence 20 percent below guideline range</li> <li>• Agreed to sentence X levels below guideline range</li> </ul>	<p>to as far as BNG</p> <p>If <math>OS \leq BNG</math>, defendant is not entitled to a reduction</p>
<p>OS determined without relation to old guideline range</p> <p>Example:</p> <ul style="list-style-type: none"> <li>• Parties agree to imposition of a sentence of X months, with no evident relation to original range</li> </ul>	<p>Defendant is not entitled to a reduction</p>
<p><b>Quantities at top or at bottom of drug quantity table</b></p>	
<p>Quantity of narcotics places defendant above the highest level in the new drug quantity table</p>	<p>Defendant is not entitled to a reduction</p>
<p>Quantity of narcotics places defendant below the lowest level in the new drug quantity table</p>	<p>Defendant is not entitled to a reduction</p>

The AUSA may also want to take into consideration where in the guideline range the original sentence fell and mathematically calculate a new sentence recommendation at a similar spot within the new guideline range. For the mathematically inclined who wish to take the extra time and trouble to fine-tune the sentence recommendation to this extent, the following formula calculates such a sentence recommendation:

$$\frac{OS - BOG}{TOG - BOG} \times (TNG - BNG) + BNG = \text{New sentence recommendation} \spadesuit$$

#### ABOUT THE AUTHOR

□ **Daniel L. Bella** has served as an AUSA with the U.S. Attorney’s Office for the Northern District of Indiana since 1991. He has previously served as the District’s Senior Litigation Counsel and in 2002 received EOUSA’s Director’s Award. He is currently the District’s Criminal Division Chief, having served in that position since 2003. Mr. Bella is an at-large representative on the Criminal Chiefs Working Group and served as that group’s Chair in 2013 and 2014. ✉

# Smart on Crime: Charging and Sentencing Recommendations

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On May 19, 2010, the Attorney General issued the first of a series of memoranda providing instruction to prosecutors regarding charging and sentencing decisions, culminating in his memorandum of August 12, 2013 (August 12 Memo), that outlined particularly the Department's policy concerning the charging of mandatory-minimum sentences and 21 U.S.C. § 851 sentence enhancements in drug cases. See Memorandum from Eric H. Holder, Attorney General, Dep't of Justice, to the U.S. Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf>. Recognizing that mandatory minimums and sentence enhancements are triggered only when explicitly charged, the August 12 Memo restores the authority of line prosecutors to exercise discretion in making these consequential charging decisions and identifies multiple factors to be considered. The purpose of this article is to provide guidance concerning the application of these factors in light of the stated purpose of the policy and other relevant considerations.

## I. Background and purpose

The August 12 Memo begins with the following understanding:

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Supreme Court held that any fact that increases the statutory mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt. This means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty.

*Id.* at 1.

Earlier Department guidance required that prosecutors “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.” See Memorandum from John Ashcroft, Attorney General, Dep't of Justice, to All Federal Prosecutors (Sept. 22, 2003) (Ashcroft Memo), available at [http://www.justice.gov/archive/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm). In drug cases, prosecutors were required to charge the highest statutory mandatory-minimum crime that could be proved at trial.

The Smart on Crime policy, as reflected in the Holder sentencing memoranda, rejects this one-size-fits-all approach, instead directing prosecutors to conduct “an individualized assessment of the extent to which charges fit the specific circumstances of the case, are consistent with the purpose of the federal criminal code, and maximize the impact of federal resources on crime.” August 12 Memo, at 1. See also August 12 Memo, at 2 (citing DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.300 (2014)); Memorandum from Eric H. Holder, Attorney General, Dep't of Justice, to All Federal Prosecutors (May 19, 2010) (May 19 Memo), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>. The Attorney General has stated that this

“reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws,” May 19 Memo, at 1, noting that such an approach “has always been an ‘integral feature of the criminal justice system.’ ” August 12 Memo, at 1 (citing *United States v. LaBonte*, 520 U.S. 751, 762 (1997)).

One of the most important exercises of prosecutorial discretion is that of charging drug crimes having statutory mandatory minimums and filing 21 U.S.C. § 851 sentence enhancements (851 enhancements). These particular charging decisions can trigger 10- and 20-year sentences—or even life—from which a judge has no authority to depart. Because of their potentially acute impact, after *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Attorney General issued special guidance concerning the application of statutory mandatory minimum sentences and 851 enhancements, as set forth in the August 12 Memo.

The primary principle by which prosecutors are to be guided in this particular exercise of discretion is that the “most severe mandatory minimum penalties are [to be] reserved for serious, high-level, or violent drug traffickers.” August 12 Memo, at 1. The August 12 Memo explains that “[l]ong sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation” and unnecessarily increase prison costs. *Id.* It also details factors to be considered in determining whether a defendant constitutes a significant drug offender or, instead, a low-level, non-violent offender.

[I]n cases involving the applicability of Title 21 mandatory minimum sentences based on drug type and quantity, prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:

- The defendant’s relevant conduct does not involve the use of 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 is not an organizer, leader, manager or supervisor of others within a criminal organization;
- The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and
- The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

August 12 Memo, at 2.

Similarly, the August 12 Memo enumerates factors for determining whether an 851 enhancement is warranted. Many are the same as or similar to the mandatory minimum factors above.

Prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions. When determining whether an enhancement is appropriate, prosecutors should consider the following factors:

- Whether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization;
- Whether the defendant was involved in the use or threat of violence in connection with the offense;

- The nature of the defendant’s criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses;
- Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels;
- Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants; and
- Other case-specific aggravating or mitigating factors.

August 12 Memo, at 3. Negative answers to these inquiries mitigate against the filing of an otherwise applicable statutory mandatory minimum or 851 enhancement.

## **II. Procedures**

Before exploring these factors and their application, it is important first to note that these charging decisions require supervisory approval. May 19 Memo, at 3; August 12 Memo, at 3. While the Smart on Crime policy recognizes the importance of prosecutorial discretion and the ability of line prosecutors to best assess the circumstances of their cases, fairness continues to require a level of consistency in the sentencing of similarly situated defendants. This consistency takes on a heightened importance when dealing with charging decisions, like these, having the potential to impact sentencing outcomes dramatically. Supervisory attorneys are best situated to monitor the consistency of charging decisions, given their role in reviewing all charging decisions made in their section or office.

The review process can be facilitated through appropriate documentation, such as a defendant information charging sheet that expressly addresses the factors set forth in the August 12 Memo. This form, to be completed by the line prosecutor, can help focus him or her and the reviewing attorney on the pertinent information to be considered in making the charging decision. Similarly, additional documentation should be completed in the event that new evidence is learned after the indictment that warrants the revisiting of an earlier charging decision. That documentation would require the line prosecutor to articulate precisely the basis for the proposed change, thus improving the quality of the decision-making process. Memorializing decisions has the additional benefit of preserving for posterity the rationale for the action taken.

There are additional steps that offices can take to help ensure consistency in charging mandatory minimum sentences and 851 enhancements, even when making individualized charging decisions. One of these steps is the development and dissemination to line prosecutors of their office’s internal guidance concerning the application of the mandatory minimum and 851 enhancement factors. Another step is to provide them with access to documentation summarizing previous charging decisions that have been approved. The creation of these summaries is greatly facilitated when decisions are memorialized using defendant information charging sheets, as discussed above, and case resolution forms. Armed with this information, line prosecutors will be in the best position to make decisions that are both individualized and consistent with the treatment of other defendants by their office.

## **III. Application of mandatory minimum factors**

The application of certain factors set forth in the August 12 Memo—such as whether the defendant possessed a weapon or engaged in violence—are self-evident and do not require extensive discussion, while the meanings of others, including what constitutes a “significant tie to a drug trafficking organization,” are less immediately obvious and are discussed in more detail in this article. In all cases, ambiguities should be resolved with an eye toward the purpose of the policy, which, as described above, is to reserve statutory mandatory minimum sentences and 851 enhancements for the most significant and violent drug offenders.

## **A. Use or threat of violence, possession of weapon, trafficking involving minors, or death or serious bodily injury**

The phrase “use or threat of violence” should be given its common sense meaning when examining this factor. Ambiguity may exist in certain instances as to whether words constitute an actionable threat or, instead, mere puffery. As a general rule, the mandatory-minimum should not be applied unless the nature of the conduct is unambiguous and the defendant was directly involved. The line prosecutor in such cases, however, bears a heightened obligation to examine all of the relevant details of a case to ensure that no true threat, in fact, exists. Similarly, evidence should be clear that a defendant directly possessed a weapon before applying the mandatory minimum sentence. While reference to the U.S. Sentencing Guidelines (Guidelines) enhancement for possession of a dangerous weapon may prove to be a useful starting point in determining whether the defendant possessed a weapon, *see* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2013), nevertheless, it may prove to be too broad in its application, considering that it applies presumptively whenever a weapon is present. *See id.* app. 1. One might question, for example, whether a defendant located inside a stash house is deserving of a mandatory-minimum sentence when a gun that cannot otherwise be linked to the defendant is found in a closet. Moreover, the single fact that a defendant directly possessed a weapon need not be the single dispositive factor in determining whether to charge a quantity triggering a mandatory minimum. There may be circumstances where possession of a weapon alone, without other aggravating factors, would not necessitate a mandatory minimum.

With respect to the trafficking of drugs to or with minors, the August 12 Memo does not explicitly address whether the offending party must have actual knowledge that one or more of his or her coconspirators are a minor, or instead, whether he or she is strictly liable when a minor is involved. The May 19 Memo, however, would appear to resolve this issue in favor of the former approach—that is, requiring actual knowledge. While case law construing the application of charging decisions and enhancements to cases involving minors generally imposes a strict liability requirement, *see, e.g., United States v. McClain*, 252 F.3d 1279, 1286–87 (11th Cir. 2001), the exercise of prosecutorial discretion entails distinguishing that which is legally permissible from that which is prudent. The exercise of prudence here, as elucidated in the May 19 Memo, involves weighing the culpability of a defendant against the backdrop of the general purposes of law enforcement, which are defined to include “punishment, public safety, deterrence, and rehabilitation.” *See* May 19 Memo, at 1. Few, if any, of these purposes would seem to be advanced by increasing the sentence of a defendant because of facts of which he or she is not aware.

By contrast, a prosecutor should consider interpreting broadly the meaning of “serious bodily injury and death” in the context of making charging decisions, even though relevant caselaw provides a very narrow construction of the phrase as applied to drug charging statutes and Guidelines provisions. Relevant case law generally requires a “but-for” connection between the crime and the harm. *See Burrage v. United States*, 134 S. Ct. 881, 892 (2014); *United States v. Rodriguez*, 279 F.3d 947, 951 (11th Cir. 2002). The August 12 Memo places a significant emphasis on the severity of the crime in deciding charging and punishment decisions. A crime that caused serious harm or death, of course, is serious. Whether a defendant could have anticipated that his conduct potentially would create such harm, even indirectly, would certainly seem an appropriate factor to inform a prosecutor’s charging decision. The level of attenuation between the crime and the harm would, again, need to be examined through the lens of the culpability of the defendant, weighed against the purposes of law enforcement described above.

## **B. Organizer, leader, manager, or supervisor within an organization**

The language describing this factor mirrors that found in the Guidelines section addressing role enhancements. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2014). The determination that a defendant qualifies for a role enhancement pursuant to § 3B1.1 will usually indicate that the defendant is

an organizer, leader, manager, or supervisor within an organization, for purposes of analyzing this factor. Conversely, the determination that a defendant qualifies for a role reduction, pursuant to § 3B1.2 of the Guidelines, will generally indicate that the defendant is not an organizer, leader, manager, or supervisor within an organization.

More difficult are situations involving defendants who do not qualify as either. The August 12 Memo expressly reserves the most severe sentences for the most egregious offenders, and exempts from mandatory minimums low-level drug offenders. Many defendants, however, fall somewhere between these two categories. Strict adherence to the Guidelines' construction of "organizers, leaders, managers, and supervisors," which has narrowly prescribed applicability, would suggest that most members of a drug trafficking organization be exempted from the application of the statutory mandatory minimum. Such a categorical approach, however, may prove unnecessarily narrow and rigid when considered against the focus of the policy on prosecutorial discretion, especially in the absence of an explicit policy pronouncement on this point. A better approach, this article posits, would be to weigh the particular circumstances of these cases to determine whether a defendant skews more toward being a significant participant within an organization.

### **C. Significant ties to a large-scale drug-trafficking organization (DTO), gang, or cartel**

By its very terms, this factor requires the prosecutor to make an initial determination as to whether the defendant worked for a DTO, gang, or cartel. Actual membership in the organization should not be dispositive. Individuals contracted by the organization to assist in drug activity, for example, may be deemed, under certain circumstances, to have significant ties to the organization. The nexus to an organization should be supported by evidence or intelligence, and not mere inference, before a defendant may be charged with a crime having a statutory mandatory minimum. (The line prosecutor, however, should still advise the court of any facts that might be suggestive of the defendant's DTO, gang, or cartel involvement.)

A determination must then be made as to whether the "ties" of the defendant to the organization were "significant." Factors one might consider include, but are not limited to:

- Whether the involvement of the defendant in the case was more extensive than a single, isolated event.
- Whether the defendant utilized a specialized skill or exercised meaningful discretion in connection with the illegal activity.
- Whether the defendant inhabited a significant "position of trust" within the organization, as evidenced, for example, by the amount of contraband he or she was allowed to possess, the extent to which he or she was allowed access to the contraband, and the degree to which he or she was permitted to operate outside the supervision or control of another person within the organization.
- Whether the defendant had authority to direct or oversee conspirators in connection with the illegal activity.
- Whether the defendant coordinated the delivery of drugs to or collection of money from coconspirators (as distinct from the physical delivery itself).
- Whether the defendant profited substantially from the illegal activity.
- The quantity of drugs involved.

None of the above factors alone, particularly drug quantity, are intended to be dispositive. Rigid application of any single factor would undercut the flexibility that the August 12 Memo has afforded to prosecutors in evaluating cases and would create the very bright-line rules that this policy seeks to reject. Furthermore, with particular respect to the issue of drug quantities, the organizations sought to be

dismantled and disrupted through federal investigation and prosecution routinely traffic in large quantities of drugs. A categorical rule requiring application of the statutory mandatory minimum to defendants moving large amounts of drugs would potentially eviscerate the Smart on Crime Initiative’s purpose of restoring prosecutorial discretion in making these charging decisions.

Instead, these factors should be considered in combination with, and against the backdrop of, the August 12 Memo’s stated policy of eliminating long sentences for “low-level, non-violent drug offenses.” August 12 Memo, at 1. A non-exhaustive list of examples of situations in which the defendant generally would *not* be deemed to have “significant” ties to a DTO, gang, or cartel includes:

- A drug courier having limited involvement in the charged activity, as evidenced by the amount of time he or she has been involved or the amount of drugs he or she has transported.
- A stash house guardian having limited involvement in the charged activity, as evidence by the amount of time he or she has been involved or by whether he or she has a possessory interest in the stash house.
- A translator providing services for non-leadership organization members.
- A truck driver known to have transported drugs on one occasion, irrespective of the amount of drugs he or she is transporting.

#### **D. Significant criminal history**

Generally, defendants having three or more criminal history points should be assessed the statutory mandatory minimum sentence. *See* August 12 Memo, at 2. If a defendant has fewer criminal history points, a statutory mandatory minimum sentence may nevertheless be warranted, depending on the nature of any prior convictions, particularly when they are of a violent nature. Conversely, a defendant having more than three criminal history points may be excepted from the mandatory minimum if the criminal history overstates his or her prior conduct, for example, when he or she has multiple, older petty theft convictions.

In addition to the factors outlined in the August 12 Memo, the line prosecutor also should consider the Guidelines range for the charged offense, as compared to the statutory mandatory minimum sentence. In the event that a significant disparity exists, consideration should be given to whether the mandatory minimum results in an unfairly high sentence or, alternatively, whether the lack thereof might result in the imposition of an unreasonably low sentence.

#### **IV. Application of 851 sentencing enhancement**

The August 12 Memo addresses 851 sentencing enhancements for prior convictions. *Id.* at 3. Prosecutors should *decline* to file 851 enhancements “unless the defendant is involved in conduct that makes the case appropriate for severe sanctions.” *Id.* The August 12 Memo identifies multiple factors to consider in deciding whether to apply an 851 enhancement. *Id.* These factors largely overlap with those governing the application of mandatory minimums and are addressed above.

It is worth noting that the August 12 Memo explicitly directs the line prosecutor to consider the length of a Guidelines sentence absent the filing of an 851 enhancement. *Id.* A substantial disparity between an 851-enhanced sentence and the otherwise applicable Guidelines sentence should be resolved against the application of the enhancement, absent circumstances clearly demonstrating that such enhancement is warranted. Again, these factors set forth in the August 12 Memo are designed to ensure that 851 enhancements are reserved for only the most deserving defendants. Consequently, the enhancement should be applied sparingly.

Additionally, there are a few procedural points to be noted. The first concerns the timing of 851 charging decisions. Recent Attorney General guidance provides that the decision about whether to apply

an 851 enhancement should be made promptly upon receipt of information necessary to make such a decision. See Memorandum from Eric H. Holder, Attorney General, Dep't of Justice, to All United States Attorneys (Sept. 24, 2014), available at <http://www.fd.org/docs/select-topics/sentencing-resources/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf?sfvrsn=6>. While this decision typically should be made at the time of indictment, there will be occasions when prior convictions and other relevant information cannot be obtained by the time charges are filed. On those occasions, the decision should be made as soon as possible after receipt of the necessary information. *Id.*

Furthermore, this same guidance indicates that 851 enhancements should not be used to influence plea negotiations. Instead, the goal of the line prosecutor with respect to charging decisions, including 851 enhancements, should be to assess and recommend a reasonable sentence, irrespective of its impact on plea negotiations and without regard to how such a decision might advance litigation. August 12 Memo, at 2.

Though not required, prosecutors might consider memorializing any decision *not* to file an 851 enhancement and notifying the defendant of, among other things, the fact that the decision will remain in effect throughout the pendency of litigation unless the Government learns of new information regarding the defendant, his or her offense, or his or her prior conduct.

## V. Conclusion

The true import of Smart on Crime is to encourage prosecutors to be thoughtful and intentional in making charging and sentencing decisions. In exercising their discretion, prosecutors are to be guided by the principle that the most serious charges and sentences are to be reserved for the most serious or violent offenses. The factors enumerated in the August 12 Memo are designed to help prosecutors in exercising their decision-making authority in a consistent manner, while at the same time basing decisions on the individual facts of the cases before them. ♦

## ABOUT THE AUTHOR

□ **G. Scott Hulsey** is an Assistant U.S. Attorney with the U.S. Attorney's Office for the Northern District of Georgia, where he serves as Chief of the Transnational Organized Crime and Narcotics Section. Mr. Hulsey supervises approximately 17 attorneys, who are responsible for prosecuting national and international criminal organizations, including Mexico-based drug cartels. Both as a supervisor and line-assistant, Mr. Hulsey has overseen numerous Title III federal wiretap and money laundering investigations and prosecutions, serving in 2009 as the lead Atlanta prosecutor for the nation-wide La Familia "take-down," which netted more than 1,200 targets across the country. Mr. Hulsey returned in 2010 from a 9-month detail to Bosnia and Herzegovina, where he served as an Intermittent Legal Advisor, providing technical assistance to local prosecutors handling terrorist-financing and other complex cases. Mr. Hulsey also serves as an Adjunct Professor of Law at Georgia State University Law School where he teaches litigation. He has previously worked as a county prosecutor, handling a variety of prosecutions, ranging from murder to drug cases. ✽

# Sentencing Advocacy in the Post-Holder Memo World

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Many of us remember a time in the not-so-distant past when sentencing advocacy on the part of an Assistant U.S. Attorney (AUSA) could have been considered a misnomer. Prior to the Supreme Court's seminal decision in *United States v. Booker*, 543 U.S. 220 (2005), sentencing was largely a mechanical exercise. Figure out the defendant's base offense level, add the appropriate specific offense characteristics, (usually) subtract three levels for acceptance of responsibility and timely plea, and determine the final offense level. Once that was done, figure out the criminal history category and then find the corresponding sentencing range in the table on the inside back cover of the Guidelines book. With the imprisonment range in hand, AUSAs simply had to go to court on sentencing day and ask the judge to impose a term of incarceration within that range. In the narcotics arena, when coupled with the drug table in U.S. Sentencing Guidelines (Guidelines) § 2D1.1 and the presence of statutory mandatory minimum sentences, these guideline ranges were high and practically nonnegotiable. Because, pre-*Booker*, judges had very little discretion to deviate from these ranges, outside a few limited circumstances, the AUSA's job at sentencing was very easy, if not robotic (aside from arguing that particular guideline enhancements should or should not apply). What amounted to advocacy on the part of the AUSA was simply standing up in front of the judge at the hearing and saying, "Judge, please impose a sentence within the guideline range." It was our colleagues sitting at the defense table who had the real advocacy work to perform in that they somehow had to convince the judge to deviate, however slightly, from the then-mandatory guideline range and find some way to get a below-guideline sentence.

Since 2005, however, the landscape has been vastly altered, and it is now necessary for all AUSAs to accept the challenges the times present, especially in the field of sentencing advocacy. Starting with *Booker* in 2005, and continuing with subsequent seminal events such as *Kimbrough v. United States*, 552 U.S. 85 (2007), the passage of the Fair Sentencing Act of 2010, multiple retroactive changes to the Drug Quantity Table in § 2D1.1, *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and Attorney General Holder's August 12, 2013, Memorandum titled, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases," it is now clear that both defense attorneys and government lawyers have an equal role to play in the sentencing process. If we, as federal prosecutors, feel that a particular sentence for a particular defendant is necessary to meet the ends of justice, it is now our responsibility and obligation to advocate for that sentence—be it through putting on evidence at a sentencing hearing, effectively cross-examining defense witnesses, or forcefully using our oral advocacy skills at the sentencing hearing, just as we would at trial. Given the recent sea of changes in the law and departmental policy, we can no longer rely on the Guidelines as a crutch. As AUSAs, we must now bring all of our advocacy skills and talents to bear at the sentencing hearing. Though it may seem onerous to conduct what often amounts to a second mini-trial at the sentencing hearing, as prosecutors, we owe it to the members of the communities we serve to make sure our voices are heard when it comes time for a judge to impose sentence.

To assist in this challenging, yet rewarding task, this article offers some helpful hints and best practices that prosecutors across the country can use when beginning the process of formulating the best approach to take in preparing for a sentencing hearing and then conducting the hearing itself.

## **I. Getting ready for the sentencing hearing**

### **A. Know your judge**

In this climate of advisory guidelines ranges and heightened sentencing discretion provided by 18 U.S.C. § 3553(a), knowing as much as you can about the person behind the bench wearing the black robe is very important in formulating your sentencing arguments. It should come as no surprise that judges develop reputations within their districts as either being guideline or non-guideline sentencers. (Many districts, in fact, collect data concerning the non-guideline sentences imposed by their district court judges.)

Knowing the sentencing patterns of the particular judge you are in front of will give you a road map of the type of arguments you will need to make, and the extent of the evidence you may need to present, to secure the sentence you feel is appropriate for the defendant. Obviously, if you are appearing in front of a judge who routinely imposes a within-guideline sentence for narcotics defendants, you will not need to present as much evidence in aggravation as would be the case if you are appearing in front of a judge who rarely, if ever, imposes a within-guideline sentence. Either way, doing your homework on your judge is always a good first step in developing your arguments for sentencing.

### **B. Know your case**

In addition to familiarizing yourself with the sentencing practices of your particular judge, it is absolutely vital that every AUSA know the facts of his or her particular case inside and out. Even if the case resulted in a guilty plea, there is a wealth of valuable information contained in your case file that can be exploited to great effect at the sentencing hearing. Are informants available to testify about the extent of your defendant's drug trafficking activities? Did your investigation involve a Title III, and if so, how often was your defendant intercepted over the wire? If the defendant was a high-volume interceptee, do the calls show he or she was responsible for additional drug quantities? If there was not a Title III, was your defendant captured on consensual recordings, either over the phone or during in-person meetings? In these recordings, did the defendant describe how often or in what quantities he or she was distributing drugs? Similarly, did the defendant admit on recordings that he or she was engaged in acts of violence or regularly used or possessed firearms? Do you actually have the defendant on tape committing acts of violence in real time?

Your case file will have all of the answers to these questions and more. And being able to go into a sentencing hearing and hit play on a recording that contains the defendant's voice talking about how much dope he or she distributed in your district on a weekly basis, or present testimony from a cooperator who can provide a first-hand account of the role your defendant played in the charged drug trafficking organization, will go a long way toward convincing the judge that the sentence you propose is the right one.

In addition, having a complete mastery of the facts in your case will help you perform what is often one of the most overlooked, yet important tasks an AUSA has during a sentencing hearing: educating the judge about what the case and the underlying investigation are all about. Because over 90 percent of all federal criminal cases are disposed of through guilty pleas, most of the judges before whom we appear have very little understanding of what the investigation was intended to accomplish. The judges may have reviewed the indictment, ruled on some pretrial motions, and read through the factual basis of the plea agreements we give them prior to the Rule 11 plea colloquy. But, unless the case goes to trial and the judge is exposed to the weight of the evidence collected during the investigation, most judges do not really have a sense of what the goals of the investigation were—what drug trafficking organization was targeted, where this organization operated, how many people were involved in the organization, what type of illegal drugs was it responsible for distributing, how much money was generated through the illegal drug activity, and, perhaps most importantly, the impact this drug dealing had on the communities

in which it was taking place. It could be that your investigation targeted a crack cocaine ring in a high crime area of a large city or focused on the distribution of methamphetamine or heroin in rural or suburban communities. Perhaps your investigation concentrated on the command and control structure of international cartels.

Whatever the goals of your investigations are, we as AUSAs, together with our law enforcement partners, have devoted our time, our energies, and our talents to making these cases as successful as possible. And, once these defendants have been charged, convicted, and stand before a judge for sentencing, it is vital for all of us to educate the judge on what the entire case has been about and where the particular defendant being sentenced fits within the whole picture of the investigation. Neglecting to follow through on this important task runs the risk that, at sentencing, the judge will only hear and take into account the oftentimes too narrow perspective of the case a defense attorney will present in mitigation. To allow a judge to rely only on the defendant's view of the case when imposing sentence would be a disservice to the months of hard work you and your agents have spent putting the case together. Take the time at sentencing to make sure the record is complete.

### **C. Know your defendant**

While knowing as much as possible about the sentencing judge and having total command of your case is incredibly important, at bottom, the focus of every sentencing hearing is the particular defendant before the court on that given day. The defendant and his or her attorney do not care about the scope of your investigation, how many other defendants were charged, or what the gross impact of the organization's drug trafficking activities had on the community in which it was operating. The defense attorney's ultimate objective is to put all of that to the side and have the judge focus on the man or woman appearing before the bench. In making his or her § 3553(a) mitigation argument to the court, a defense attorney will highlight every gut-wrenching story in the Presentence Investigation Report about the defendant's childhood. Defense counsel will focus on the defendant's parents, the defendant's lack of formal education, or the defendant's substance abuse problems. He or she will have every single person that knows the defendant, be it family, friends, or clergy members, write heartfelt letters to the court describing how much the defendant means to them and how much damage will be felt if the judge sentences the defendant to a term of imprisonment. As we all know, these mitigation presentations can be incredibly powerful.

Understanding that, it is our obligation to ensure that the sentencing court gets as complete and accurate a picture of the defendant as possible. One component of the § 3553(a) analysis is "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1) (2014). But, that same section states that, together with the background of the defendant, the court is required to also consider "the nature and circumstances of the offense." *Id.* What this means is that, while the defendant and his or her attorney certainly have the right to present as much mitigating evidence as they see fit, the Government equally should, as necessary, offer countervailing aggravation evidence about the defendant and his or her role in the offense. This is perhaps the most difficult part of the Government's advocacy during a sentencing hearing: balancing the defendant's pleas for compassion and mercy with a holistic presentation that addresses available aggravation, an acknowledgement of the mitigating evidence, the need for rehabilitation and treatment, deterrence, and a respect for the law. As a necessary part of this presentation, the judge must be made to understand and remember that the *only* reason the defendant is before the court is because he or she committed a very serious crime and that, in the case of narcotics offenses, that crime has an incredibly harmful impact on our communities.

So, how do you go about doing this? What are some sources of information from which you can draw to make the most effective aggravation arguments? Here are some suggestions.

**Review your case file:** As was mentioned above, one of the single greatest sources of information (both mitigating and aggravating) about your defendant is your case file. Ideally, your file

should contain all manner of evidence about the defendant and his or her role in the organization you have been investigating. Is the defendant a low-level courier or a leader or organizer of the organization? Is the defendant responsible for the movement of narcotics, or is he or she on the money side of the organization? How much dope is the organization involved in distributing, and how much did your particular defendant have his or her hands on? Was your defendant captured on a wiretap or consensually recorded telephone conversations or in-person meetings? Is there violence and/or gun usage attributed to the organization in general or your defendant in particular?

At a sentencing hearing, you should be prepared to present evidence on any or all of these topics (or others that are relevant to your particular case). That evidence can be in the form of exhibits such as photographs, charts, video recordings, and audio recordings, or testimony from law enforcement officers, cooperating individuals, or cooperating defendants. This evidence should clearly establish for the sentencing court what “the nature and circumstances” of the defendant’s offense were such that the court can have the most complete picture possible when applying the § 3553(a) factors. By doing this, the court will be able to consider not only the defendant’s side of things, but also will have the total story, which includes not only the mitigation, but also the serious nature of the defendant’s crime and the negative impact that the crime had on the community it most directly affected.

**Consult with local law enforcement:** Our federal law enforcement partners do an incredible job developing a wealth of incriminating information about the defendants we charge. Our friends in state and local law enforcement are another excellent source of information and intelligence. More often than not, local law enforcement, be it city police departments or county sheriffs, have had numerous contacts with our defendants well before they warrant federal attention. As a result, the locals may have already developed sophisticated dossiers on your defendant that could include information such as gang affiliation, rank within the gang, reputation for violence, and propensity to carry and use firearms. Furthermore, because local law enforcement historically has had more contact with our defendants and usually knows more about their history of criminal activity, you should strongly consider reaching out to the locals prior to sentencing to see if there is any aggravation evidence they have that could assist you in presenting your sentencing argument. It could be that a local officer can testify about a shooting incident your defendant was involved in, or a local cooperator could provide evidence on other instances of drug trafficking that fall outside the scope of your particular indictment. This is all good evidence that you should not leave on the table.

By way of example, it is standard practice in Chicago that the U.S. Attorney’s Office consults with the Chicago Police Department’s (CPD) Organized Crime Division regarding gang defendants we intend to charge federally with narcotics offenses. The idea behind this practice is that, in order to ensure that the potential defendant is “federal worthy,” we need to collect as much information as we can about the target. While it is absolutely the case that the federal agencies have done their due diligence concerning the particular defendant, it is also true that CPD will have had much more street-level interaction with the target and will have information about the defendant’s affiliates, history of gang involvement, area of operation for drug trafficking, and proclivity for violence. Tapping into this information has been a huge plus to us in Chicago in terms of making the initial decision about whether charging the defendant constitutes a significant federal interest.

Additionally, relying on CPD’s gang information has paid dividends when it comes time for sentencing. Recently, there have been instances when, with the assistance of CPD, we have sought to increase a defendant’s sentence in aggravation based on murders (some of which were uncharged in state court) or other acts of violence the defendant has either personally committed or ordered to be committed. For example, earlier this year, the U.S. Attorney’s Office in Chicago proceeded to sentencing in a case involving a defendant who had been convicted at trial of drug trafficking offenses. At the conclusion of the trial, the jury found the defendant guilty of multiple substantive drug offenses, but had not returned a unanimous verdict as to drug quantity such that a mandatory minimum sentence was in play. The

prosecutors in the case wanted to ensure that the judge imposed a significant sentence on the defendant. To meet that goal, the prosecution team worked closely with their counterparts at CPD, who had developed strong evidence that the defendant was involved in the homicide of an off-duty police officer and a female companion a number of years ago. This murder evidence helped show the judge that a lengthy term of imprisonment was necessary and appropriate (especially considering there was no statutory mandatory minimum sentence available because of the initial jury’s special verdict findings).

In terms of the sentencing hearing itself, the Chicago prosecution team put on numerous witnesses, over a multiple-day hearing, that tied the defendant to the murder of the police officer and his friend. The team called CPD detectives, analysts, and civilian eyewitnesses to the murders. It was a hard-fought and contentious hearing that included defense witnesses and a full argument schedule, including a government rebuttal. In fact, for all practical purposes, the hearing was the equivalent of a mini-trial, except that, because this was a sentencing hearing, the burden of proof was preponderance of the evidence. But, the circumstances of the case and the violent background of the defendant (not to mention the needs of the victims’ families for justice and closure) demanded that the prosecution team present all of this aggravation evidence. It paid off in the end. At the conclusion of the hearing, the judge determined that it was “very likely” (remember, that was all that was necessary because the burden of proof was preponderance of the evidence) that the defendant had, in fact, killed the police officer and his friend. Based on all of the evidence, she sentenced the defendant to 35 years in prison—an appropriately serious sentence for a dangerous defendant. The sentence was one that might not have been imposed had it not been for the strong relationship between CPD and the Chicago USAO, and CPD’s willingness to provide us with the information and witnesses needed to prove up these murders.

The take-away is that each USAO has its own unique relationship with its state and local law enforcement partners. These partners have a wealth of information about our federal defendants. Talk with them, find out what they know, and then use it to the maximum advantage at sentencing to get the sentence you feel is most appropriate.

## **II. The sentencing hearing itself**

Once you have collected all of the information, both mitigating and aggravating, you next need to figure out what sentence you are going to advocate for. Basically, as an AUSA, you really only have three options: a within-guideline recommendation, an above-guideline recommendation, or a below-guideline recommendation. It is critically important that you take some reasoned position on where you, as the attorney for the Government, feel the court should impose sentence. It is difficult to envision any situation or circumstance where it would be acceptable for an AUSA to fail to advocate for some sentencing position. As AUSAs, we simply cannot throw up our hands, shrug our shoulders, and say to a sentencing court, “Judge, whatever you think is fine with me.” As government attorneys, we owe it to our client to carry the force of our advocacy all the way through to the end of the case at the sentencing hearing.

### **A. The within-guideline recommendation**

As a general proposition, AUSAs will still largely recommend to the court that it sentence the defendant within the advisory guideline range. As we all know, the Sentencing Guidelines “as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time . . .” *Rita v. United States*, 551 U.S. 338, 349 (2007). Accordingly, because the Sentencing Guidelines are the “product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions,” *Gall v. United States*, 552 U.S. 38, 46 (2007), we as AUSAs should feel comfortable, in most cases, advocating that a defendant be sentenced within the properly calculated guideline range.

This does not mean, however, that we should simply appear before the court on the day of sentencing and say nothing more than “Judge, please impose a sentence within the advisory guideline range.” That is a cop out. If you feel, as the AUSA assigned to a case, that a defendant should get a guideline sentence, then you have an obligation to explain and argue to the judge why you think that is the appropriate sentence. Craft your recommendation for a guideline sentence with the § 3553(a) factors as your benchmark. As part of this, you need to be sensitive to the mitigating aspects of the defendant’s background. You will lose credibility with the judge if you fail to acknowledge that there are redeeming aspects of the defendant’s character. Nevertheless, if you feel that a within-guideline sentence is the appropriate sentence for your defendant, you will need to explain to the judge how serious the crime was that the defendant committed. If your defendant was responsible for distributing kilos of heroin into the communities in your district, then tell the judge about the disastrous impact all of that heroin had on the lives of the users and the families of those users. If your defendant has a horrible criminal history filled with prior convictions for drug dealing and acts of violence, stress that to the judge. In your sentencing memorandum, explain how you have balanced the mitigating evidence with the aggravating evidence and concluded that a within-guideline sentence is the right choice. Then make sure you bring the message home orally during the sentencing hearing. If you feel strongly that a within-guideline sentence is the correct one, you must be ready to bring everything you have at your disposal to bear.

One last point with respect to arguing the § 3553(a) factors in support of a within-guideline sentence is not to forget to argue specific and general deterrence. For the majority of the narcotics defendants charged in federal court, this has not been their first encounter with the criminal justice system. In fact, many federal narcotics defendants have multiple state court (or sometimes even federal) convictions for the very same type of conduct they are currently facing. You are certainly free to argue to a sentencing court that a defendant with a history of past narcotics convictions is someone who simply does not get it. The turnstile of convictions in state courts has not delivered the appropriate message to the defendant that a life of crime does not pay. In these circumstances, consider arguing that the court send a strong message, in the form of a within-guideline sentence, to the defendant to help ensure he or she does not commit the same harmful mistakes in the future. Similarly, do not forget to argue that a within-guideline sentence is necessary as a tool of general deterrence. Although judges may express skepticism about the value of imprisonment as a deterrent threat, as AUSAs, we should not be afraid to stand up and argue that a significant sentence today may stop someone from committing that same crime tomorrow.

## **B. The above-guideline recommendation**

There are going to be times when you feel that, given what you know about the background of the defendant or his or her penchant for violence, a within-guideline sentence is simply not going to be adequate. In those situations, you should not be afraid to advocate for a sentence that is above the guideline range. (A quick note—it is Department of Justice policy that approval to argue for an above- or below-guideline sentence come from a supervisory level AUSA.) However, just as any within-guideline sentence needs to be grounded in the § 3553(a) factors, so too does your argument in favor of an above-guideline sentence. In all likelihood, for an above-guideline sentencing recommendation, the focus of your sentencing argument will be on “the nature and circumstances of the offense” and the “characteristics of the defendant.” 18 U.S.C. § 3553(a)(1) (2014).

Here is an example of a situation where an AUSA in Chicago advocated successfully for an above-guideline sentence, focusing on these specific factors. In 2011 the FBI in Chicago was investigating the drug trafficking activities of members of the Black Disciples street gang. As part of that investigation, the FBI made multiple controlled purchases of crack cocaine from a target I will refer to as Mr. M. In total, the FBI purchased approximately 130 grams of crack cocaine and a minimal amount of marijuana from Mr. M. Because Mr. M. had a fairly significant criminal history, he was not eligible for Holder Memo relief, and he faced a five-year mandatory minimum. According to the Probation

Department, Mr. M.'s advisory guideline range for the offense of conviction, as well as relevant conduct, was 63 to 78 months' imprisonment.

In advance of the sentencing hearing, the AUSA assigned to the case consulted with the FBI case agent, as well as gang specialists with the CPD. As part of that government presentencing investigation, the AUSA discovered a number of very disturbing facts concerning Mr. M.'s role with the Black Disciples. Specifically, the government sentencing team found a number of damning consensual recordings in the case file which showed that Mr. M. (who went by the menacing nickname of "Murder") was well-deserving of an above-guideline sentence. For example, during one recorded meeting, Mr. M. could be heard on tape discussing particular guns he owned and bragging to other gang members about using those guns to shoot people, including rival gang members. He could be heard on tape joking about his shooting victims who screamed for their lives as they tried to run for cover.

While this initial recording was horrifying, it paled in comparison to another video recording the AUSA and the agent had in the case file. In this video, Mr. M. is depicted personally conducting a severe beating of a fellow gang member, while other gang members watched. The video depicts Mr. M. as a vicious and incredibly violent man who repeatedly struck the victim until he stopped screaming. In fact, the video shows Mr. M. actually appearing to take pleasure in the pain and suffering he inflicted on his victim.

At the sentencing hearing, the AUSA and the case agent played these two videos to the sentencing judge, as well as a consensual recording with a cooperating source in which Mr. M. admitted committing murders for hire. This was in addition to evidence clearly establishing that Mr. M. was a drug dealer who helped flood impoverished sections of the south side of Chicago with crack cocaine. With all of this evidence in hand and presented to the judge, the AUSA argued that a sentence within the advisory guideline range of 63 to 78 months (between about 5 to 6.5 years) was woefully inadequate to meet the ends of justice. Instead, using this aggravation evidence and the § 3553(a) factors, the AUSA advocated for an above-guideline sentence of between 8 and 10 years. After listening to this evidence, and expressing disgust at Mr. M.'s apparent pleasure in inflicting pain, the sentencing judge imposed an above-guideline sentence of eight years' imprisonment. It was only through the perseverance and diligence of the AUSA and the investigators that this aggravating evidence was found, collected, and presented to the judge such that a more fitting sentence was imposed against the defendant: a sentence more in line with his history of violence and the impact of his crimes on his community.

### **C. The below-guideline recommendation**

Finally, it is crucial that all AUSAs recognize that there will be situations in which you conclude that the advisory guideline range for a defendant is just too severe. In these situations, it is our duty to recommend that the sentencing court impose a below-guideline sentence. Advocating for a below-guideline sentence does not make us look soft or weak-willed to the court or the defense bar. In fact, in this post-*Booker* and Holder Memo world, the opposite is true. By advocating for a below-guideline sentence in appropriate circumstances, we show the bench and the defense bar that we are compassionate and able to wisely exercise the considerable discretion we possess in the sentencing arena, which provides more weight when above-guideline sentences are recommended.

Just as is the case with above- or within-guideline sentences, the decision to recommend a below-guideline sentence must be grounded in the § 3553(a) factors. If you conclude, after your analysis of the background of the defendant, his role in the offense, the need for deterrence, and the other § 3553(a) factors, that your defendant should be sentenced to 8 years in jail, but his properly calculated advisory guideline range is 121 to 151 months (between about 10 to 12.5 years), then you should affirmatively advocate for the below-guideline sentence. Just as *Booker* gave district courts the discretion to impose sentences that deviated from the guideline range, so too did Attorney General Holder give that same discretion to federal prosecutors in his May 19, 2010, Memorandum concerning Department of Justice

policy on charging and sentencing. In that memorandum, the Attorney General stated, “[i]n the typical case, the appropriate balance [among the § 3553(a) factors] will continue to be reflected by the applicable guidelines range, and prosecutors should generally continue to advocate for a sentence within that range.” Memorandum from Eric H. Holder, Attorney General, Dep’t of Justice, on Dep’t Policy on Charging and Sentencing to All Federal Prosecutors 2 (May 19, 2010), *available at* <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>. However, the Attorney General followed by saying that sentencing advocacy now must be based on an “individualized assessment of the facts and circumstances of each particular case.” *Id.* at 3. If your individualized assessment of your defendant and his role in the offense tell you that a within-guideline sentence is too severe, the Attorney General has given you the discretion (as long as you run your recommendation past your supervisory chain) to recommend a sentence below the guideline range. Don’t be afraid to exercise that discretion when you feel it is right and just to do so.

The most difficult part of the below-guideline sentencing calculus is what sentence to actually recommend. One possibility is to base the recommendation on the Sentencing Guidelines. Perhaps you feel that the defendant’s criminal history is over-represented, and you decide to reduce the criminal history category by one or two levels and then, after considering the § 3553(a) factors, recommend a sentence within the newly-calculated, and lowered, guideline range. Another possibility is that you feel the defendant should not be responsible for a particular drug quantity, and you reduce the base offense level accordingly. With that done, you could recommend a sentence within the reduced guideline range. However, another school of thought is that AUSAs should not be tied to the guidelines at all when they are considering a below-guideline sentence, and they should instead evaluate the § 3553(a) factors and come up with whatever recommendation they feel is appropriate. At bottom, there is no right or wrong way to calculate which below-guideline sentence to recommend, as long as you take a principled approach that you can explain to the sentencing court.

Consider the following recent example from another case here in Chicago. A 57-year-old defendant with no criminal history was charged as part of a heroin trafficking conspiracy. Over the course of a year, the defendant agreed to accept monthly payments from members of a locally-based heroin trafficking organization to store kilograms of heroin in his home. Every month members of the drug trafficking organization would both drop off kilos of heroin to be stored in the defendant’s house and pick up kilos that the defendant had been storing. Over the 1-year time period of his participation in the conspiracy, the defendant admitted storing between 30 and 90 kilos of heroin in his house. He did not sell the heroin, he did not package the heroin, and he did not negotiate for the sale of the heroin. He just stored the heroin in his house in a locked area away from the rest of his family. He agreed to do this because he needed the money to pay his bills.

The defendant’s advisory guideline range was very high. Adding the two-level stash house enhancement to the base offense level of 36 for the amount of heroin he admitted to storing for the organization resulted in an adjusted offense level, after acceptance of responsibility, of 35. With a Criminal History Category of I, his advisory guideline range was 168 to 210 months (14 to 17.5 years). The USAO in Chicago had already determined the defendant was entitled to Holder Memo relief such that there was no statutory mandatory minimum sentence at play. The question for the AUSA, then, was what sentence to recommend. Making the individualized assessment of the defendant’s background (which contained no prior criminal history) and his role in the offense (while storing heroin for a drug trafficking organization is clearly a serious offense, his role as merely the storage agent was significantly less than others who were responsible for selling and distributing the heroin on the street), the AUSA intends to recommend a sentence (the sentencing hearing has not yet occurred) in the 10 to 12 year range. Such a sentence strikes a proper balance between the very serious offense of storing multiple kilos of heroin and the defendant’s lack of criminal history and his relative minor role in the offense compared to others.

One final thought on the efficacy of recommending a below-guideline sentence when the individualized facts of the case warrant it. There is a real danger that AUSAs will begin to lose credibility in front of the judges before whom they appear if they uniformly request within-guideline sentences in every case. Not only are the judges well aware of their own sentencing discretion post-*Booker*, but they are also very familiar with the Attorney General’s recent pronouncements on sentencing policy, beginning in 2010 and continuing through the August 2013 Holder Memo. Judges now have an expectation that we, as AUSAs, will exercise our own sentencing discretion. They expect us to advocate for, and explain why, we are asking for the sentences we are recommending. If all we do is stand in front of the sentencing judge and say during each sentencing hearing, “Please impose a within-guideline sentence,” and we do not show that we have given individualized and particular attention to the specific defendant being sentenced, we run a serious risk that the bench will begin to disregard and marginalize our contributions to the sentencing process. We cannot allow that to happen.

### III. Conclusion

I hope the takeaway from this article is that, as AUSAs, we should embrace our role in the sentencing process. We spend much of our time and energy investigating our cases, arresting the defendants at the time of the takedown, and arguing their guilt at trial. It is only fitting that we continue that same passion and devotion all the way through to sentencing. I certainly understand the impulse to stand up at a sentencing hearing, let the defense counsel and the judge do all the heavy lifting, and then let the chips fall where they may. But, we must not succumb to that impulse. We all became AUSAs because we have a calling to make sure justice is done—that victims are represented, that defendants are held accountable for their crimes, and that our communities are safer for our efforts. The people in the communities we represent expect that we will put our very best foot forward on all aspects of the prosecutions we work so hard on, day in and day out. That includes our investigations and our trials. But, it also includes sentencing. Just like trials, our sentencing hearings deserve our very best advocacy efforts. It is up to us to deliver. ❖

### ABOUT THE AUTHOR

❑ **Christopher Hotaling** has worked as an Assistant U.S. Attorney for the Northern District of Illinois for the past 11 years. He currently serves as the Acting Chief of the Narcotics Section, where he supervises 15 line AUSAs and provides strategic guidance on investigations targeting international drug cartels and violent street gangs. He has also been a Deputy Chief in the Narcotics Section for approximately five years. He serves as Lead Attorney for the Chicago Organized Crime Drug Enforcement Task Forces Strike Force. He previously served as an Acting Deputy Chief in the General Crimes Section for approximately one year. During his time in the U.S. Attorney’s Office, he has investigated and litigated a wide range of criminal matters, including immigration violations, firearms trafficking and possession, white collar fraud (including bank fraud, mortgage fraud, and insurance fraud), child pornography offenses, narcotics trafficking, violent street gangs, bankruptcy fraud, arson, and public corruption. He also serves as an adjunct professor at the Northwestern University School of Law teaching trial advocacy. ✽

# Pre-entry in Peoria—The Pretrial Alternatives to Detention Initiative: Working at the Beginning to Achieve Lasting Results at the End of the Criminal Prosecution Process

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## I. Background

In the early 2000s, the Central District of Illinois was experiencing a flood of methamphetamine manufacturing. Towns across the District were inundated with meth cooking rings and associated violence. Explosions and fires in homes and motel rooms where the cooking was being done became a common occurrence. Farmers reported finding meth labs scattered across the remote parts of their land and began to fear for the safety of themselves and their families from the gun-toting meth cooks. Authorities reported a large increase in children being endangered by parents, who simply left them for days to cook meth or, worse yet, took them along and exposed them to the dangerous chemicals in the cooks. Prosecution of individual cooks did not dent the problem. Incarcerating the cooks simply caused the assistant cooks, pill gatherers, pill buyers, and place providers to self-promote themselves to cooks to feed their meth habits, and the problem continued unabated. One strategy, however, did prove effective. Prosecuting all the members of the meth ring on historical conspiracies dismantled the entire ring and significantly reduced the amount of meth manufacturing. There were, however, two problems with this approach. First, a historical conspiracy investigation and prosecution casts a wide net and usually results in large amounts of meth being charged in the indictment. Charging, convicting, and incarcerating all of the members of the conspiracy lead to minor players receiving long prison sentences. Second, when the minor players cooperated, they received shorter sentences, but when they were released from prison they still suffered from their addiction, and they returned to the meth business. Because their former cook coconspirators were in prison, they often became cooks themselves. The challenge was to dismantle the meth rings without causing irreparable harm to the minor players in the conspiracy, and to release them back to the communities without them being addicted and primed to continue cooking.

U.S. Magistrate Judge John Gorman had seen these issues before when he was the Chief Judge in the Tenth Judicial Circuit of Illinois. There, he and Episcopal priest Tom Murphy designed and ran a program for low-level offenders that gave them the tools they needed to beat their drug addictions so that they did not resume their illegal drug behavior when they returned to the community. He wanted to bring a similar program to federal court.

Working with Chief U.S. Probation Officer Doug Heuermann, Judge Gorman designed the Pretrial Alternatives to Detention Initiative (PADI) program. Their goal was to produce a program where low-level, non-violent offenders could receive the drug treatment they needed and, if they successfully completed the program, avoid prison time altogether. They solicited the support and input of the defense

bar, the U.S. Attorney's Office, and area drug treatment providers. Chief Heuermann drafted the Initial Proposal, the Memorandum of Understanding between the parties, and the Model Participant Agreement. Judge Gorman found funding for the program from the U.S. Marshal's Alternative to Detention Fund (now the Office of Detention Trustee's Fund). In November 2002 they launched the program.

Initially, they met a lot of resistance. Some in law enforcement called the program "hug a thug" and threatened to stop bringing cases to the U.S. Attorney's Office. Also, in the early years, they had difficulty obtaining a steady stream of funding. Naysayers predicted failure.

Today, the success of the program is established. Delegations of judges, prosecutors, defense attorneys, and probation officers visit Peoria to see the program firsthand. The leaders of the program were invited to present on the program at Harvard Law School. The U.S. Sentencing Commission highlighted the program at a recent national conference. Last November, Attorney General Holder visited Peoria, met the participants, took part in the program, and urged other jurisdictions to consider implementing the program in their districts. He also profiled the program in his Re-entry Tool Kit.

As of November 1, 2014, 12 years after the program started, none of those who successfully graduated have received a prison sentence. Very importantly, none have re-offended. Additionally, rural counties across the District report that the meth problem has abated, in large degree due to the aggressive prosecution of historical conspiracy cases and the PADI program. After seeing firsthand the real benefits of PADI, many law enforcement officers, both federal and state, have become the biggest supporters of PADI. In sum, PADI is widely recognized throughout the criminal justice community in the Central District of Illinois as an unqualified success. Here is how it works.

## **II. Selecting the PADI candidates**

The number of defendants who can participate in the PADI program at any one time is constrained by limited resources—limited money for treatment and limited U.S. Probation assets available to dedicate to the program. The limit is 15 candidates at a time. At any given time, there are many more defendants in the system who could benefit from the program than there are slots. Consequently, it is necessary to carefully select which defendants will be given the opportunity to participate in the program.

When Judge Gorman and Chief Heuermann designed the program, they made the U.S. Attorney's Office the initial gatekeeper. Participation must be approved by them. In practice, the recommendation usually comes to the prosecutor from the defense attorney or the case agents. Then the U.S. Attorney's Office considers the recommendation by applying a set of guidelines. Those guidelines include:

1. Has the defendant cooperated with law enforcement?
2. Is the defendant facing a mandatory minimum sentence of no higher than 10 years?
3. Did the defendant's conduct involve a crime of violence?
4. Is the defendant an addict, and did he or she admit that addiction and express a strong desire for treatment?
5. Has the defendant been convicted of a crime of violence?
6. Was there a firearm involved in the offense?
7. Does the defendant have a prior felony drug trafficking conviction?
8. Did the defendant have a previous diversion in either federal or state court?
9. Is the defendant eligible for an offense level increase under Chapter 3 of the U.S. Sentencing Guidelines (for example, role in the offense)?

No one guideline controls. All of them are considered as a whole. In practice, the defense attorney's advocacy of these guidelines has become integral to making the decision as to which defendants should get one of the limited number of spots in the program. Most defense attorneys work closely with the case agents and present a united recommendation to the prosecutor.

The U.S. Probation Office acts as the second gatekeeper. After the prosecutor recommends the defendant to the U.S. Probation Office, that office arranges for the defendant to be assessed by drug treatment professionals. If the assessment indicates that the defendant is an addict and would benefit from in-patient or out-patient treatment, the U.S. Probation Office then recommends the defendant to the court for participation in the program.

The U.S. District Court for the Central District of Illinois is the final gatekeeper. Based on the recommendations of the defense attorney, the prosecutor, and the Probation Office, the court decides whether to enter the defendant in the program. If the court determines that the defendant is an appropriate PADI candidate, the defendant's case is removed from the criminal prosecution track and placed in PADI status.

### **III. Entering the program—the PADI Agreement**

Once the district court approves the defendant's participation in the program, he or she enters the program. The first thing the defendant does is sign the participation agreement, where the defendant agrees to commit no other violations of law; to not use drugs or alcohol; to obey all instructions of the U.S. Pretrial Services Officer; to submit to drug testing; to reside at a residence approved by the pretrial services officer; to enroll in a substance abuse treatment program, either in-patient or out-patient; and to appear in court every other week. The participation agreement is also signed by the defense counsel, the prosecutor, the U.S. Pretrial Services Officer, and the judge running the PADI program. After the candidate enters the program, they receive top quality drug abuse treatment and comprehensive supervision from the U.S. Probation Office. The treatment providers and the probation officers maintain daily contact with the candidates and work to help them in every aspect of their recovery.

### **IV. The bi-weekly court hearings**

Every other week, the judge, the U.S. Pretrial Services Officer, the treatment providers, the prosecutor, and the attorneys for each candidate meet in a jury room to discuss each candidate. The judge leads the discussion. The group reviews each candidate's treatment progress and a wide variety of other issues, such as the candidate's housing, employment, medical needs, education, parenting, and substance abuse and mental health. It is an open discussion. Anyone in the room can comment on any candidate. It is common for one defense attorney to offer suggestions or advice on another attorney's client. Everyone in the room has one goal—for each of the candidates to successfully complete the program.

The candidates are addicts, and addicts often suffer relapses. The group discusses the relapses and reaches a consensus on an appropriate sanction. Chief Heuermann described sanctions as an integral part of the PADI program and explained that they allow for greater defendant accountability and reinforce the rules of the program. Sanctions include a verbal reprimand from the judge, an increase in treatment and reporting requirements, home confinement and electronic monitoring, short periods of detention in the county jail (1 to 10 days), return to in-patient treatment, relocation of where the candidate lives, and longer periods of detention (10 to 30 days).

After the jury room meeting, the group moves into the courtroom, where the candidates await in the jury box, and their friends, family, and other supporters are in the audience. The judge addresses each candidate individually and questions them about how they are doing, how their treatment is progressing, and any issues raised in the jury room meeting. These dialogues with each candidate usually last three to five minutes, or sometimes longer if there are serious issues. If the jury room group decided a sanction

was appropriate for a defendant, the judge discusses the issue with the candidate and administers the sanction during the dialogue. If a candidate is ordered to detention in the county jail, the U.S. Marshals place them in handcuffs and lead them away during the open court session. It is important that the other candidates and the audience see the consequences for violating the rules of the program.

There is no set time period for a candidate to complete the program. Some candidates progress quickly through the program in six to eight months. Other candidates suffer setbacks or have more difficulty with treatment and stay in the program for nearly 24 months. When a candidate has completed all of the treatment requirements and has successfully completed the PADI requirements, the jury room group discusses whether it is time for the candidate to graduate. If they agree that a candidate has earned graduation, that candidate is notified that he or she will graduate at the next session.

At the close of the next session, the judge calls the candidate to the well of the courtroom, where he or she is joined by the treatment provider, the prosecutor, the defense attorney, the U.S. Pretrial Services Officer, and any family or supporters present. The judge makes remarks and presents the candidate with a graduation certificate. The graduate then addresses the other PADI candidates and shares what recovery and the PADI program has meant to them.

## **V. After PADI**

As of November 1, 2014, 104 defendants have successfully completed the program. Not one of them has gone to prison.

After they graduate from the program, the graduates follow one of two paths: (1) supervised release, or (2) pretrial diversion. Most of the graduates return to the criminal courtroom where they plead and are sentenced in one hearing. As a result of their cooperation with the Government and their successful participation in the program, every PADI graduate who has been sentenced has received a sentence of time served followed by a term of supervised release. Other graduates follow a second path, reserved in most instances for defendants who would lose their professional licenses (for example, nurses, teachers, and engineers) if they received a felony drug conviction. The prosecutor moves to dismiss the charges against those defendants, and they enter into the U.S. Probation Office's pretrial diversion program. Under either approach, the graduates continue under the supervision of the probation office for an extended period.

## **VI. Program results**

As of November 1, 2014, 126 candidates entered the PADI program, 104 candidates graduated from the program, and 10 candidates failed to graduate, were removed from the program, and returned to the criminal courts. That is a 91 percent success rate. Presently, there are 12 candidates in the program, and 11 defendants are on the waiting list to enter the program. Over the years since the program was started, approximately 20 defendants were screened by the U.S. Probation Office for entry and denied for various reasons, including not having a serious verified substance abuse problem or not being willing to comply with the requirements of the program. Other defendants were screened and cleared by U.S. Probation for entry into the program, but did not enter the program because no slots were available. Of the 104 defendants who successfully completed the program, 35 received diversion, 57 received a conviction with a sentence of time served, and 5 defendants had their charges dismissed with no supervision to follow. Seven have not yet been sentenced. Looking at the cost of probable sentences of imprisonment and the cost of participation in the PADI program—including drug testing, substance abuse counseling, mental health counseling, and electronic monitoring cost—the U.S. Probation Office calculates the cost savings to the Government to be \$11,150,259.

PADI graduates have provided essential testimony against their former coconspirators in grand jury proceedings and at trial. Law enforcement reports that in many communities that were suffering from the methamphetamine epidemic, the manufacture of methamphetamine has nearly disappeared.

The cost savings and the benefit to the communities are dramatic, but nowhere near as dramatic as the lives that PADI has saved. PADI graduates have gone on to obtain high school, college, and graduate degrees. One is now a licensed substance abuse counselor. Another is an Area Manager for a chain of sandwich shops, and she hires other PADI graduates. Others have gone on to have successful lives as mechanics, teachers, nurses, and engineers. Parents have had their children returned to them. Families have been reunited. In sum, although PADI has saved money, it has—far more importantly—saved lives. And it has achieved its goal: it has made the cities and towns in western Illinois safer, and fewer people have gone to prison. Instead, they have returned to their communities, where they have become working, productive citizens contributing to the health of those communities.

Today PADI is evolving. Judge Gorman recently retired. The program is now led by Chief U.S. District Court Judge James Shadid, with the assistance of U.S. Magistrate Judge Jonathan Hawley. Both are carrying on Judge Gorman's vision of using treatment instead of incarceration to solve the drug problem. With the methamphetamine problem under control in many of the rural communities, the PADI program is shifting its focus to the heroin problem in the urban communities of western Illinois. Heroin addicts bring an entire new set of issues to the PADI table. Only time will tell if PADI can meet and overcome those issues. PADI's success over the last 12 years is a good indicator that it will. ❖

#### ABOUT THE AUTHOR

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## Specialty Courts: Expanding Possibilities for Prosecutors

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### I. Introduction

To paraphrase American psychologist Abraham Maslow—To the man who only has a hammer in the toolkit, every problem looks like a nail. ABRAHAM MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* 15 (1969). To those of us who have spent our legal careers working as prosecutors in the criminal justice system, the hammer—that is, prosecuting the

defendant for the most serious and readily provable offense so that the longest term of imprisonment possible may be achieved—remains, in many instances, the appropriate tool of choice. Yet, increasingly, many are coming to the realization that some of the recurring problems we see may be better addressed with tools other than our hammer. Among the tools which are being used with greater frequency across the districts are specialty courts. These courts, also referred to as problem-solving courts, present a new approach for the criminal justice system. Melding psychology, sociology, and the law, specialty courts are predicated on the notion that justice can be better served if, instead of only punishing offenders, the problems which underlie the crimes they commit are addressed.

## II. The basics

Specialty courts broadly share three common characteristics. First, they generally have a problem-solving orientation. “This principle indicates a focus on solving the underlying problems of litigants, victims, or communities. The concept often implies an interest in individual rehabilitation; but sometimes the defining ‘problems’ of interest belong less to the presenting litigant than to the victims of crime, including the larger community.” RACHEL PORTER, MICHAEL REMPEL & ADAM MANSKY, CTR. FOR COURT INNOVATION, *WHAT MAKES A COURT PROBLEM SOLVING?* iii (2010), available at [http://www.courtinnovation.org/sites/default/files/What\\_Makes\\_A\\_Court\\_P\\_S.pdf](http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf). Second, these courts are generally collaborative in nature, relying upon “the role of interdisciplinary collaboration with players both internal and external to the justice system, including court administrators, judges, attorneys, supervision agencies, service providers, and community members.” *Id.* Finally, they emphasize “accountability” in that the courts focus “on promoting compliance by participants/litigants, quality services among service providers, and accountability by the court itself to the larger community to implement its intended model and track its performance.” *Id.* at iv.

## III. Where it all started

### A. Commencement

Among the very first specialty courts to appear in the United States was the drug court that was established in 1989 in Miami-Dade County, Florida. OFFICE OF JUSTICE PROGRAMS, DEP’T OF JUSTICE, *LOOKING AT A DECADE OF DRUG COURTS* (1998), available at [https://www.ncjrs.gov/html/bja/decade\\_98.htm](https://www.ncjrs.gov/html/bja/decade_98.htm). Unlike the traditional adversarial approach with which so many of us are familiar, this problem-solving court was the first court focused on treatment and rehabilitation of the law-breaker, rather than his or her punishment. The belief was that if the judge, mental health providers, public defenders, probation officials, and the offender worked together to treat the offender’s chronic and underlying problems, the court might succeed in solving the issues that brought the individual into the justice system. Through mandatory drug testing, frequent appearances before the judge, and ongoing community supervision, successful clients were able to spend less time in—or avoid completely— jail, while gaining the added benefit of emerging with a healthier, law-abiding lifestyle.

### B. Expansion

The Miami-Dade Drug Court resulted in a proliferation of drug courts across the country. By 1999, 492 drug courts existed, and by mid-2012, 2,734 drug courts had been established in every state and territory within the United States. The overarching paradigm shared by these drug courts was to use the criminal justice system’s coercive authority to provide treatment to addicts in lieu of incarceration. Despite the rapid expansion in the number of these drug courts, however, there was virtually no guidance on how they should be run until 1997, when the Department of Justice (the Department) published the Ten Key Components of Drug Courts.

“The Key Components” of drug courts are as follows:

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants' compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* iii (1997), available at <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>.

These 10 Key Components “quickly became the core framework not only for drug courts, but for most types of problem-solving court programs.” NAT’L DRUG INST., *THE DRUG COURT JUDICIAL BENCHMARK 2* (Douglas B. Marlowe & Judge William G. Meyer eds., 2011). “Research now confirms that how well drug courts accomplish their goals depends upon how faithfully they adhere to the Ten Key Components.” *Id.*

Data presented by the National Association of Drug Court Professionals suggests that drug courts have been effective in reducing crime, saving money, and ensuring that drug users remain compliant. See NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, available at <http://www.nadcp.org/learn/drug-courts-work>.

#### **IV. Specialty courts in the federal system**

Notwithstanding the spread and seeming success of these drug courts in state and local judicial systems, their adoption for use in the federal judicial system has been less expansive. While the explanations for this diminished use of drug courts in the federal system are likely varied, the primary reason may well be the obvious one. Fewer drug addicted people are prosecuted in federal court than are prosecuted in state and local courts.

Moreover, just as the idea of implementing federal drug courts began to grow, the need for them began to diminish. Budget cuts, staff shortages, and a shift in priorities within the Department combined to result in prosecution thresholds being increased, especially in the area of narcotics. My office, for example, suffered from diminished resources, while also focusing prosecutions on the “worst of the worst.” This combination resulted in the transformation of what was previously a 30-plus defendant Title III drug conspiracy indictment into a 15 defendant indictment. The reason for this shrinkage was because those who had previously represented the bottom rung of the food chain—dealers who were often users and addicts themselves—were no longer being charged federally. Instead these individuals were increasingly being referred for state or local prosecution. However, actual state or local prosecution was not always guaranteed.

Despite the lesser frequency with which drug addicted individuals are being charged in federal court, such individuals do frequently interface with the federal judicial system. The growth of these specialty courts suggests, at least in part, that when it comes to certain criminal justice problems with which we are regularly confronted, we cannot always prosecute our way out of them. This recognition does not mean that we should do anything less than to continue vigorously and aggressively to prosecute those involved in the business of dealing drugs or those who engage in violence in furtherance of their drug activities. However, it does mean that a different route may be called for in those instances in which non-violent offenders commit non-violent offenses as a result of their drug use. In those situations, many are coming to the conclusion that justice might better be served if another choice existed beyond either punishing them or punting on them (by referring them to the state and locals). That other option might be a specialty court.

Aside from the macroscopic perspective of whether specialty courts, in certain situations, present the best (and most cost effective) means to achieve “justice,” most of us, as hard-working and dedicated federal prosecutors, spend much of our day focused on the much narrower perspective of how best to manage the cases and matters that appear on our docket. From that narrower perspective, it is not novel, uncommon, or improper for us to seek, from time to time, to do something other than to pursue the most serious charges and most severe punishment available against each and every offender we encounter. While it is and remains our duty to enforce the law, it is not, nor has it ever been, our obligation to do so without thought.

To illustrate my point, I will draw from my own experience as a young line Assistant U.S. Attorney prosecuting drug cases. At that time, I remember lamenting the fact that my best cases—those in which I had strong evidence and a clear sense that the defendant was a worthy target—always seemed to plead out prior to trial. Only when a more seasoned prosecutor reminded me that I did not have to plead out all of my good cases, that I could save some of them for trial, and that I might want to spend more effort working on resolving my “less attractive cases” did I realize that I was—perhaps unwittingly because of my inexperience—allowing the defense to dictate my caseload. While I was doing my job, I may not have been doing it as smartly as I could.

Specialty courts provide us with another tool that we as prosecutors can use to help us do our jobs more intelligently. First, specialty courts can present us with another option whereby we can avoid charging those cases in which we have serious reservations about whether the circumstances of the offender or the offense warrant prosecution and punishment to the fullest extent of the law. Additionally and alternatively, specialty courts give us another option in those cases in which we do decide to charge an offender and subsequently obtain additional information about the offender or the offense that causes us to reconsider our charging decision. In this light, I do not view specialty courts as necessarily undermining our adversarial system. Rather, they give us another option to deal with the vast array of situations with which we are presented. Neither a panacea nor a poison, specialty courts simply present another possibility.

## **A. Two basic models of specialty courts**

Two general models for drug courts and specialty courts have emerged: (1) deferred prosecution (diversion) programs, and (2) post-adjudication programs. The federal system uses both types of specialty courts. RYAN S. KING & JILL PASQUARELLA, *DRUG COURTS: A REVIEW OF THE EVIDENCE* 3 (2009), available at [http://www.sentencingproject.org/doc/dp\\_drugcourts.pdf](http://www.sentencingproject.org/doc/dp_drugcourts.pdf).

In deferred prosecution or diversion programs, “defendants who meet certain eligibility requirements are diverted into the [specialty court] system prior to pleading to a charge.” *Id.* Unlike traditional pretrial diversion situations, however, the courts, which typically participate in their creation, usually remain primary actors in the programs, helping, in many instances, to guide the participants through the treatment process. In these diversion programs, defendants “are not required to plead guilty,

and those who complete the drug court program are not prosecuted further.” *Id.* Failure to complete the program, however, results in prosecution.

In post-adjudication programs, defendants must plead guilty, “but their sentences are deferred or suspended while they participate in the drug court program. Successful completion of the program results in a waived sentence and sometimes an expungement of the offense.” *Id.* In cases in which individuals fail to meet the drug court requirements, individuals are returned to the criminal court for sentencing on their guilty plea.

## **B. Drug courts in the federal system**

In the early-2000s, the Central District of Illinois (CDIL) became one of the first districts in the nation to establish a drug court. Together, the CDIL’s U.S. Attorney’s Office (USAO-CDIL), the court, the U.S. Probation Office (USPO), and the defense bar, operate the Pretrial Alternatives to Detention Initiative (PADI), which is operated primarily as a diversion court. Under PADI, the USAO-CDIL identifies those individuals whose crimes it believes were motivated by substance abuse and who otherwise present as an appropriate candidate for the program. Such individuals are, in turn, evaluated by a treatment professional to ensure that they have a legitimate substance abuse problem. Upon successful completion of supervision, the participant may expect a range of results spanning from dismissal of the charges (true diversion) to the imposition of a reduced or non-custodial sentence. Memorandum from John A. Gorman, Magistrate Judge, Cent. Dist. of Ill., on the PADI Court to Tate Chambers, Assistant U.S. Attorney, Cent. Dist. of Ill. (2008), available at [http://usanetsp.usa.doj.gov/staffs/otd/Documents/CDIL\\_PADI\\_proposals.pdf](http://usanetsp.usa.doj.gov/staffs/otd/Documents/CDIL_PADI_proposals.pdf).

In April 2013 it was reported that 92 percent (73 of 79 participants) of those accepted into the PADI program had successfully completed it. It was further estimated that over \$6 million had been saved by substituting the reduced costs for supervision with those which would have been incurred had the PADI graduates been incarcerated. Memorandum from Darrell D. Hite, Senior U.S. Probation Officer, Cent. Dist. of Ill., on the PADI Program to John A. Gorman, Magistrate Judge, Cent. Dist. of Ill. (2013), available at <http://usanetsp.usa.doj.gov/Reentry/Documents/2013PADIprogramSummary.pdf>.

Other districts have adopted different methodologies to achieve the drug court objective of providing treatment to addicts in lieu of incarceration. The following are some of the other federal drug court programs across the country:

- The BRIDGES Program in the District of South Carolina, which has both a diversionary and a reentry component, provides treatment in the form of early recovery, primary treatment, and relapse prevention, to participants ranging from those who have not yet been charged to those who are on supervised release following incarceration.
- In the Central District of California (CDCA), the Conviction and Sentence Alternative (CASA) program is a two-track specialty court. The first track is essentially a modified pretrial diversion program for candidates who have minimal criminal histories, while the second track is for those defendants whose criminal conduct has resulted from their substance abuse issues (for example, non-violent bank robberies and frauds committed to support a drug habit). The CASA program team—comprised of representatives from the USAO-CDCA, the Federal Public Defenders, the USPO, and the court—selects those eligible for participation in the program. Once selected, participants, under both track one and track two, enter a plea pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. Intense supervision and support and frequent post-plea hearings follow. Track one participants who successfully complete the program have their charges dismissed, while successful track two participants receive a sentence of no incarceration.
- In the Western District of Washington, the Drug Reentry Alternative Model (DREAM) program operates much like track one of the CASA program.

With these drug courts providing the basic model, other specialty courts have also begun to emerge in the federal system. Increasingly, USOAs working with the judiciary in their districts have established varying specialty courts seeking to address particularized needs which exist in their districts. These specialty courts include both diversion and post-adjudication programs. Some examples of these specialty court programs are provided below.

### **C. Veterans courts in the federal system**

The first specialty court for veterans, similar to the drug courts that largely emerged from the state system, was established in 2008 in Buffalo, New York, by the Honorable Robert T. Russell, Jr., a local court judge in the Western District of New York (WDNY). The Buffalo Veterans Treatment Court diverts eligible veteran-defendants who are charged with felony or misdemeanor non-violent criminal offenses and who have substance dependency and/or mental health issues, to a specialized criminal court docket. After eligibility is determined through evidence-based screening and assessments, participants become involved in a supervised treatment plan developed and implemented by a team of court staff, veteran health care professionals, veteran peer mentors, health care professionals, and mental health professionals. The court has adopted, with slight modifications, the Ten Key Components of Drug Courts set forth. *See Buffalo Veteran's Court: Mentoring and Veterans Hospital Program Policy and Procedure Manual 2-4 (2008), available at <http://www.buffaloveteranscourt.org/sites/g/files/g283702/f/Bufalo%20Policy%20and%20Procedures%20Manual.pdf>.*

With two Veterans Administration Hospital facilities exclusively within federal jurisdiction and located in the Western District of New York, the USAO-WDNY was growing frustrated with the inability of the federal system to deal with the increasing number of addicted or mentally ill veterans who were charged or chargeable in federal court. After viewing an NBC Today Show report about Judge Russell and his court, (*available at <http://www.today.com/id/26184891/vp/18424824#27319834>*), I decided to explore the possibility of establishing a similar veterans court federally for those addicted or mentally ill veterans (many suffering from Post-Traumatic Stress Disorder) who were ending up in federal court and whose offenses were somehow related to their prior service to our country.

I initially approached Judge Russell. After observing how well his court was run and seeing what a comprehensive treatment plan and support network he already had in place, I thought to myself, why reinvent the wheel? Rather than try to improve on the original and duplicate Judge Russell's tremendous and successful efforts in federal court, what if we came up with a mechanism to refer eligible veterans—that is, those who were chargeable with non-violent federal crimes and whose criminal conduct was somehow related to the service of our country—to Judge Russell's court? I approached Michael J. Roemer, Clerk of Court for the Western District of New York and a graduate of the U.S. Military Academy at West Point. After securing his support and, through him, the support of the judges in the district, I reached out to the USPO who also supported the notion and indicated that they, as an added bonus, had funding available to them which would allow them to provide additional treatment support to federal offenders, in addition to that already available through Judge Russell's program.

Having secured the support of the relevant stakeholders, a modified pretrial diversion agreement was drafted that included a condition requiring the veteran offender to successfully complete Judge Russell's Veteran's Court Program. Under the agreement, those individuals who successfully complete Judge Russell's program are not prosecuted, and any charges previously filed against them are dismissed. Those individuals who do not successfully complete the program and violate their diversion agreement, however, are referred back to federal court where they face prosecution.

Federal veterans court programs have also been developed in the Western District of Virginia and the Western District of Pennsylvania.

## D. Other specialty courts in the federal system

Other districts have developed various specialty courts to help them confront the unique problems with which they are routinely confronted. In the Southern District of California, the high number of cases involving young U.S. citizens who were being paid small amounts of money to transport a small number of illegal aliens resulted in the creation of an alien smuggling specialty court. These offenders plead guilty to alien smuggling and are placed on a 12-month period of supervision during which they are monitored by the court, the USAO, the USPO, and the defense, and the circumstances that led to their involvement in alien smuggling are addressed. If they complete the program successfully, their plea is withdrawn and the charges dismissed.

In districts with Indian Country, oftentimes the USAO serves the function of prosecuting conduct that would elsewhere be prosecuted in state or local courts. That fact, combined with many of the socio-economic issues that exist in such locations, suggest that specialty courts may prove especially valuable. In the District of South Dakota, an innovative joint federal/tribal specialty court has been created to deal with juveniles who commit crimes in Indian Country. Juveniles are referred to tribal court, where they are adjudicated juvenile delinquents. Their supervision, however, is conducted by the USPO. Through the program, these juveniles avoid federal conviction while receiving the benefit of the enhanced resources that come with federal supervision.

With state and local courts across the country establishing a variety of other specialty courts, including mental health courts, domestic violence courts, human trafficking courts, and sex offense courts, it seems likely that courts in these and other areas will appear in the federal system in the not too distant future.

## E. Reentry courts

Finally, among the most popular specialized courts in the federal system are reentry courts. Reentry courts and programs are, by definition, designed to be utilized to help those released from prison from becoming recidivists. Therefore, they are distinct from those diversion and post-adjudication courts described above because their participants necessarily have already served some term of incarceration and are on supervised release. Beyond that, however, the reentry court programs are designed and operate very much like the programs described above. From those with drug issues and mental health issues to those who were gang members, these courts and programs employ resources and methodologies similar to those previously described for the specialty courts. Such resources include involvement from the court, the USAOs, the defense bar, mental health professionals, treatment providers, and mentors, all of whom direct their efforts toward ensuring that the offender does not re-offend.

Further details about the many and varied reentry programs that have come into existence in federal courts will be contained in the next issue of the [U.S. Attorneys' Bulletin](#).

## V. Conclusion

Specialty courts provide an opportunity to reduce recidivism, as they address those issues which led to the offender's criminal activity in the first place by providing needed treatment and alternatives to incarceration to appropriate offenders. They provide us, as Assistant U.S. Attorneys, with a versatile tool which we may use, in appropriate circumstances, to accomplish our interest, as expressed by Justice Sutherland nearly 80 years ago, in seeing to it "that justice shall be done." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). ❖

## ABOUT THE AUTHOR

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