NEW YORK
CITY BAR

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December 19, 2014

Monty Wilkinson
Director
Executive Office for United States Attorneys
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Wilkinson:

The New York City Bar Association (the "City Bar") respectfully submits this letter, prepared by its Committee on Criminal Law (the "Committee"), to request a revision to Title 9 of the United States Attorneys' Manual (USAM). Specifically, we request that Section 9-27.300 of the Manual be updated to reflect Attorney General Eric Holder's recent memoranda on the appropriate use of statutory enhancements pursuant to 21 U.S.C. § 851.

The City Bar is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The Committee focuses on a range of issues concerning the practice of criminal law and the criminal justice system. The City Bar has a long-standing history of supporting measures that foster clarity and consistency in the administration of justice. This request for a revision of USAM Section 9-27.300 is consistent with this rich history.

Section 851 of title 21, pertaining to proceedings to establish prior convictions, vests prosecutors with exclusive discretion to elect whether to trigger enhanced mandatory minimum penalties for individuals charged with federal drug offenses based upon prior felony convictions. Section 851 provides in relevant part as follows:

> (a) Information filed by United States Attorney
>
> > (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. . . .

The sentencing impact of § 851 enhancements is severe and mandatory. Where a defendant previously has been convicted of one felony drug offense, the five-year and ten-year mandatory minimums outlined in 21 U.S.C. § 841 are doubled. For a defendant with two or more prior drug felonies, the ten-year mandatory minimum is increased to a mandatory sentence of life imprisonment.[1] The term "felony drug offense"[2] is very broad; it includes any drug felony conviction, even those that resulted in probationary sentences. It also includes felonies from any point in a defendant's life, even those that are decades old.

During his tenure, Attorney General Holder revised Department of Justice policy on the appropriate use of § 851 enhancements. In August 2013, he announced a "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases,"[3] and instructed prosecutors to "decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that is appropriate for severe sanctions." The memorandum outlined factors that prosecutors must consider in making that determination.

In September 2014, Attorney General Holder issued "Guidance Regarding § 851 Enhancements in Plea Negotiations," which instructs prosecutors "to make the § 851 determination at the time the case is charged, or as soon as possible thereafter."[4] This memorandum also announced that Section 851 enhancements must never be filed solely as a consequence of a defendant's decision to proceed to trial.

> [A]n § 851 enhancement should not be used in plea negotiations for the sole or predominate purpose of inducing a defendant to plead guilty.
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> . . . .
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> A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea . . . is inappropriate and inconsistent with spirit of the [May 19, 2010 Department Policy on Charging and Sentencing].

Id.

Despite these changes, the United States Attorney's Manual continues to instruct federal prosecutors to bring Section 851 enhancements in all cases except when the defendant agrees to enter into a negotiated plea:

> Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. § 851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are . . . in the context of a negotiated plea. . . .

USAM § 9-27.300, Comment B.

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[1] 21 U.S.C. § 841(b)(1)(A).

[2] 21 U.S.C. § 802(44) (a "felony drug offense" is any "offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances").

[3] Attached to this letter and available at: http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-departmentpolicypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf

[4] Attached to this letter and 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

This instruction contradicts Department of Justice policy.[5] The number of defendants affected by this contradiction is large. According to the United States Sentencing Commission, "in a majority of districts, at least one-quarter of all drug offenders were eligible for enhancement under section 851." UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 255 (2011). In light of the number of people affected, the severe sentences at stake, and the need for a consistent approach to this issue throughout the country, we respectfully request that Section 9-27.300 of the United States Attorney's Manual promptly be updated to reflect current Department of Justice policy on the proper use of Section 851 enhancements.

Thank you for your consideration of this request.

Very truly yours,

Debra L. Raskin

cc: Manual Staff

Enclosures

[5] USAM §1-1.600 ("Policy changes issued by the Attorney General, Deputy Attorney General, and Associate Attorney General are effective upon issuance.").

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

August 12, 2013

MEMORANDUM TO THE UNITED STATES ATTORNEYS AND
ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION

FROM: THE ATTORNEY GENERAL

SUBJECT: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases

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. To be sure, the exercise of discretion over charging decisions has always been an "integral feature of the criminal justice system," *United States v. LaBonte*, 520 U.S. 751, 762 (1997), and is among the most important duties of a federal prosecutor. Current policy requires 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. When making these individualized assessments, prosecutors must take into account numerous factors, such as the defendant's conduct and criminal history and the circumstances relating to the commission of the offense, the needs of the communities we serve, and federal resources and priorities.[1] Now that our charging decisions also affect when a defendant is subject to a mandatory minimum sentence, prosecutors must evaluate these factors in an equally thoughtful and reasoned manner.

It is with full consideration of these factors that we now refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders. We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation. Moreover, rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs. These reductions in public safety spending require us to make our public safety expenditures smarter and more productive.

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[1] These factors are set out more fully in my memorandum of May 19, 2010 ("Department Policy on Charging and Sentencing") and Title 9 of the U.S. Attorneys' Manual, Chapter 27.

For all these reasons, I am issuing the following policy[2]:

Continuation of Charging and Sentencing Policies: Pursuant to my memorandum of May 19, 2010, prosecutors should continue to conduct "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." While this means that prosecutors "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," the charges always should reflect an individualized assessment and fairly represent the defendant's criminal conduct.

Certain Mandatory Minimum Sentencing Statutes Based on Drug Quantity: Prosecutors should continue to ascertain whether a defendant is eligible for any statutory mandatory minimum statute or enhancement. However, in 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:[3]

- 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.

Timing and Plea Agreements: If information sufficient to determine that a defendant meets the above criteria is available at the time initial charges are filed, prosecutors should decline to pursue charges triggering a mandatory minimum sentence. However, if this information is not yet available, prosecutors may file charges involving these mandatory minimum statutes pending further information and a determination as to whether a defendant meets the above criteria. If the defendant ultimately meets the criteria, prosecutors should pursue a disposition that does not require a Title 21 mandatory minimum sentence. For example, a prosecutor could ask the grand jury to supersede the indictment with charges that do not trigger the mandatory minimum, or a defendant could plead guilty to a lesser included offense, or waive indictment and plead guilty to a superseding information that does not charge the quantity necessary to trigger the mandatory minimum.

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[2] The policy set forth herein is not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding. *See United States* v. *Caceres,* 440 U.S. 741 (1979).

[3] As with every case, prosecutors should determine, as a threshold matter, whether a case serves a substantial federal interest. In some cases, satisfaction of the above criteria meant for low-level, nonviolent drug offenders may indicate that prosecution would not serve a substantial federal interest and that the case should not be brought federally.

Advocacy at Sentencing: Prosecutors must be candid with the court, probation, and the public as to the full extent of the defendant's culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant's role in the offense, even if the charging document lacks such specificity. Prosecutors also should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines. In cases where the properly calculated guideline range meets or exceeds the mandatory minimum, prosecutors should consider whether a below-guidelines sentence is sufficient to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). In determining the appropriate sentence to recommend to the Court, prosecutors should consider whether the defendant truthfully and in a timely way provided to the Government all information the defendant has concerning the offense or offenses that were part of the same course of conduct, common scheme, or plan.

Recidivist Enhancements: 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.

In keeping with current policy, prosecutors are reminded that all charging decisions must be reviewed by a supervisory attorney to ensure adherence to the Principles of Federal Prosecution, the guidance provided by my May 19, 2010 memorandum, and the policy outlined in this memorandum.

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

September 24, 2014

TO: DEPARTMENT OF JUSTICE ATTORNEYS

FROM: THE ATTORNEY GENERAL

RE: Guidance Regarding § 851 Enhancements In Plea Negotiations

The Department of Justice's charging policies are clear that in all cases, prosecutors must individually evaluate the unique facts and circumstances and select charges and seek sentences that are fair and proportional based upon this individualized assessment. "Department Policy on Charging and Sentencing," May 10, 2010. The Department provided more specific guidance for charging mandatory minimums and recidivist enhancements in drug cases in the August 12, 2013, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases." That memorandum provides that prosecutors should decline to seek an enhancement pursuant to 21 U.S.C. § 851 unless the "defendant is involved in conduct that makes the case appropriate for severe sanctions," and sets forth factors that prosecutors should consider in making that determination. Whether a defendant is pleading guilty is not one of the factors enumerated in the charging policy. Prosecutors are encouraged to make the § 851 determination at the time the case is charged, or as soon as possible thereafter. An § 851 enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty. This is consistent with long-standing Department policy that "[c]harges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant's conduct." "Department Policy on Charging and Sentencing," May 19, 2010.

While the fact that a defendant may or may not exercise his right to a jury trial should ordinarily not govern the determination of whether to file or forego an § 851 enhancement, certain circumstances -- such as new information about the defendant, a reassessment of the strength of the government's case, or recognition of cooperation -- may make it appropriate to forego or dismiss a previously filed § 851 information in connection with a guilty plea. A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea, however, is inappropriate and inconsistent with the spirit of the policy.