

Center on the Administration of Criminal Law

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DOJ's New Policy on Drug Crimes and Mandatory Minimum Sentences

Attorney General Eric Holder took a courageous step this week to dial back the use of mandatory minimum sentences against low-level drug offenders. We as a nation still have a long way to go before our drug policies comport with modern notions of smart policing and smart prosecuting, let alone fairness, but this is an encouraging step in the right direction.

Under DOJ's prior approach to charging drug crimes, the scale overwhelmingly guided federal prosecutors' decision making; that is, the drug's weight determined the charge. And DOJ's overarching policy of charging the highest provable offense generally carried the day. So, a low-level, one-time courier arrested for helping move a little over a kilo of heroin (about the weight of a bag of rice that you can buy in the supermarket), who let's say had a prior burglary conviction from a few years back, for which he served 3 months in jail, would face a minimum of 10 years in federal prison if he didn't know enough about the drug operation to cooperate and earn a reduced sentence. As a former federal prosecutor for 10 years, I saw too many cases like this.

Under the new policy, this hypothetical defendant has a chance to serve about half that amount of time, perhaps even less if the sentencing court feels it is appropriate. The new policy essentially directs prosecutors NOT to seek charges in their indictments that trigger mandatory minimum sentences in drug cases when the defendant did not use violence, did not possess a weapon, did not recruit minors to participate in the drug operation, did not injure anyone, and was not a significant player in the drug operation. This policy helps to restore the federal narcotics laws to serve the purpose they were intended to serve - to go after the kingpins, the major drug dealers or those who would work closely with them.

Does this fairer and more flexible charging policy fix everything? No.

It remains to be seen how prosecutors in the 94 different U.S. Attorneys' Offices around the country interpret some of the new guidelines, which still vest them with extraordinary power and discretion. Specifically, the prosecutor still determines whether the defendant made a good faith effort to cooperate, and the prosecutor assesses the quality and quantity of the defendant's "ties" to a drug organization, when determining whether a defendant deserves the more flexible charging approach. Also, the new policy suggests that defendants with 3 or more criminal history points should not receive the benefit of the more flexible charging policy. If the defendant described in the example above received a 14 month sentence for his prior burglary rather than 3 months, he would have 3 criminal history points and may get no relief from the new policy. Prosecutors must make a meaningful assessment of a drug defendant's prior convictions and not mechanically apply the 3 point cut-off if the true purpose of this new policy is to be achieved.

And at a minimum, DOJ should allow defendants with pending cases that meet the new guidelines to plead to superseding charging documents consistent with the new policy to avoid unwarranted mandatory sentences.

In addition, if a prosecutor intends to seek a sentence that is double the mandatory minimum in a drug case using the recidivist enhancement, he or she should be required to seek approval from DOJ. Current DOJ policy requires a prosecutor to seek Main Justice approval before he or she gets a wiretap or issues a subpoena to a reporter. Shouldn't DOJ require the same level of approval before a prosecutor is authorized to turn a 10-year sentence into a 20-year sentence? Centralizing this kind of decision-making will go a long way to ensure that prosecutors around the country are consistently doubling sentences in only the most serious cases.

Going forward, since DOJ has acknowledged that it needs to drastically change the way it charges drug crimes because, as Attorney General Holder put it, "too many Americans go to too many prisons for far too long and for no good law enforcement reason," shouldn't DOJ take this opportunity to look back? What about the federal inmates who would qualify for the more lenient charging policy if they were charged today, but who will continue to serve out 10 or even 20 year sentences because they were imposed last year? DOJ should designate staff from each of the 94 U.S. Attorney's Offices to evaluate prior closed cases in order to identify defendants who may currently be serving 5, 10 or 20 year mandatory sentences when the facts of their closed cases fit the criteria for more flexible charging decisions today.

One way to deliver relief in meritorious closed cases would be for the Obama administration to breathe some life into our anemic federal Pardon Office. Through that office, with DOJ and bipartisan support from Republicans, certain deserving defendants could have their sentences commuted. The examination of these prior cases would take resources and manpower, but the task could be accomplished through public-private partnerships, including a willing army of law students, law schools, and pro bono attorneys like us:

<http://www.law.nyu.edu/centers/adminofcriminallaw/mercyproject>

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