How a Person Whose Sentence Was Previously Enhanced Based on a "Felony Drug Offense" under 21 U.S.C. § 851 Would Receive a Lower Sentence Today

Many drug offenders received sentence enhancements based on one or more prior convictions under 21 U.S.C. § 851. Section 851 is not the same as the career offender guideline or the Armed Career Criminal Act (ACCA) at 18 U.S.C. § 924(e). Inmates, lawyers, judges, courts of appeals, and news reporters sometimes misuse the word "career offender," which is a guideline classification, to refer to a person who received a statutory enhancement under 21 U.S.C. § 851 or the ACCA. People also use the term "three strikes" to refer interchangeably to § 851 and the career offender guideline. Most important, many do not know the substantive difference between 21 U.S.C. § 851, the career offender guideline, and the ACCA.

This memo explains how § 851 works, and how a client would no longer be subject to it or would otherwise receive a lower sentence today. Separate memos explain how the career offender guideline works and how the ACCA works, and how a client subject to either would receive a lower sentence today.

If you need help:

- If you are a pro bono lawyer, refer to the reference material on the subject posted at https://clemencyproject2014.org/reference, and if your question is not answered in the reference material, please contact appropriate resource counsel through the applicant tracking system.

- If you are a Federal Defender, contact abaronevans@gmail.com.

I. How 21 U.S.C. § 851 works

If the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), and the prosecutor filed a notice before trial or entry of a guilty plea under 21 U.S.C. § 851 of one "prior conviction for a felony drug offense," the statutory range increases from 10 years to life to 20 years to life. If the prosecutor filed a notice of two "prior convictions for a felony drug offense," the statutory range increases from 10 years to life to LIFE.

If the defendant is convicted under 21 U.S.C. § 841(b)(1)(B), and the prosecutor filed a notice before trial or entry of a guilty plea under 21 U.S.C. § 851 of any number of "prior conviction[s] for a felony drug offense," the statutory range increases from 5 to 40 years to 10 years to life. If the prosecutor filed a notice of any number of "prior conviction[s] for a felony drug offense," and death or serious bodily injury resulted from the use of the substance (and under *Burrage v. United States*, 134 S. Ct. 881 (2014), was proved to a jury beyond a reasonable doubt or admitted by the defendant to have been the "but for" cause), the statutory range increases from 5 to 40 years to LIFE.

If the defendant is convicted under 21 U.S.C. § 841(b)(1)(C), and the prosecutor filed a notice before trial or entry of a guilty plea under 21 U.S.C. § 851 of any number of "prior conviction[s] for a felony drug offense," the statutory range increases from zero to 20 years to zero to 30 years.

If the prosecutor filed a notice of any number of "prior conviction[s] for a felony drug offense," and death or serious bodily injury resulted from the use of the substance (and under *Burrage* was proved to a jury beyond a reasonable doubt or admitted by the defendant to have been the "but for" cause), the statutory range increases from zero to 20 years to LIFE.

If the defendant is convicted under 21 U.S.C. § 841(b)(1)(D), and the prosecutor filed a notice before trial or entry of a guilty plea under 21 U.S.C. § 851 of any number of "prior conviction[s] for a felony drug offense," the statutory range increases from zero to 5 years to zero to 10 years.

21 U.S.C.	**Unenhanced minimum /maximum**	**Prosecutor filed notice of 1 prior "felony drug offense"**	**Prosecutor filed notice of 2 or more prior "felony drug offenses"**	**Prosecutor filed notice of any number of "felony drug offense" & instant offense was the "but for" cause of death or serious bodily injury**
§ 841(b)(1)(A)	10 to Life	20 to Life	LIFE	LIFE
§ 841(b)(1)(B)	5 to 40	10 to Life	10 to Life	LIFE
§ 841(b)(1)(C)	0 to 20	0 to 30	0 to 30	LIFE
§ 841(b)(1)(D)	0 to 5	0 to 10	0 to 10	0 to 10

A "felony drug offense" is defined as "an offense that is punishable by imprisonment for more than one year … that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). The term:

- includes simple possession of drugs,[1]
- includes misdemeanors in states where misdemeanors are punishable by more than one year, such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont,
- includes diversionary dispositions where the defendant was not convicted in state court,[2]
- places no limit on how old the conviction or diversionary disposition can be.

When the prosecutor files a § 851 enhancement (and does not withdraw it before sentencing), the judge must automatically apply the enhanced mandatory minimum so long as the conviction or diversionary disposition is final and established beyond a reasonable doubt to exist.

[1] *See Lopez v. Gonzalez*, 549 U.S. 47, 54 & n.4 (2006).

[2] *See United States v. Rivera-Rodriguez*, 617 F.3d 581, 609-10 (1st Cir. 2010); *United States v. Meraz*, 998 F.2d 182, 183-84 (3d Cir. 1993); *United States v. Campbell*, 980 F.2d 245, 251 (4th Cir. 1992); *United States v. Cisneros*, 112 F.3d 1272, 1281-82 (5th Cir. 1997); *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003); *United States v. Ortega*, 150 F.3d 937, 948 (8th Cir. 1998); *United States v. Norbury*, 492 F.3d 1012, 1015 (9th Cir. 2007); *United States v. Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013); *United States v. Fernandez*, 58 F.3d 593, 600 (11th Cir. 1995).

Because there is no staleness limitation on prior convictions that prosecutors can use for § 851 enhancements, even a defendant with no criminal history points under the guidelines may receive these enhancements.

Because a "controlled substance offense" under the career offender guideline does not include simple possession of drugs, and is subject to a staleness limitation, a defendant who is not a career offender under the guidelines can nonetheless receive § 851 enhancements.

Whether a defendant eligible for a § 851 enhancement actually received a § 851 enhancement depends on the district in which he was sentenced, resulting in extreme disparity. "For unknown and unknowable reasons, federal prosecutors have been applying massive numbers of § 851 enhancements in many districts and not in others." *United States v. Young*, 960 F. Supp. 2d 881, 903 (N.D. Iowa 2013) (summarizing the disparity as "stunningly arbitrary"); U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 253, 255 (2011) (reporting a "lack of uniformity" in the application of § 851 enhancements, with prosecutors in some districts filing § 851 enhancements in over 75% of cases in which the defendant was eligible for the enhancement while prosecutors in other districts filing no § 851 enhancements in any case in which the defendant was eligible).

Before the 2013 Holder Memoranda (and continuing today in some districts), § 851 enhancements were routinely used in most districts as a threat to induce defendants to plead guilty and cooperate against others, and to punish defendants who exercised their right to trial or declined to cooperate. *See* Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 5, 2013); *Young*, 960 F. Supp. 2d at 888; *United States v. Kupa*, 976 F. Supp. 2d 417, 419-20 (E.D.N.Y. 2013).

"To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty." *Kupa*, 976 F. Supp. 2d at 420.

Under the 2013 Holder memos, the defendant need not agree to plead guilty or cooperate in return for the prosecutor declining to charge § 851s (or quantity). The Aug. 12 memo says at p. 2 under "Timing and Plea Agreements" that the defendant needs only "meet the criteria." The Aug. 29 memo says that for defendants "charged but not yet convicted," "prosecutors should apply the new policy and pursue an appropriate disposition consistent with the policy's section, 'Timing and Plea Agreements,'" and that for defendants who already pled guilty or were convicted by a jury, prosecutors are "encouraged" to "consider" withdrawing § 851s.

II. Research Guide

For clients whose mandatory minimum was enhanced under § 851, the sentence may be lower today for the following reasons:

- A prior conviction previously counted as a predicate "felony drug offense" would not qualify as a predicate offense under current law. *See* Part II.A.

- A prosecutor would not file one or more § 851 notices under the August 2013 Holder Memoranda. *See* Part II.B.

- In a crack case in which the prosecutor would file the § 851 notice or notices, the Fair Sentencing Act would lower the mandatory minimum. *See* Part II.C.

Below is an overview of relevant law and information to help you determine whether a prosecutor would file a § 851 notice today and what the statutory penalty would be.

For many clients, the § 851 enhancement rendered the otherwise applicable guideline range irrelevant because it was below the mandatory minimum. In the absence of one or more § 851 notices in such cases, the current guideline range may now be higher than any remaining mandatory minimum, or there may no longer be a mandatory minimum, and the guideline range would be the "starting point" and "initial benchmark" for the sentence. *See Gall v. United States*, 552 U.S. 38, 49 (2007).

If you determine that the prosecutor would not file a § 851 enhancement today for one of the above reasons, use the current *Guideline Manual* to determine the guideline range that would apply today based on the facts found by the judge, being sure to check the section entitled Ameliorating Amendments to U.S. Sentencing Guidelines, and then show that the judge would likely sentence below that guideline range today. *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

Keep in mind that even if the prosecutor would not file a § 851 notice today, the client may still be subject to the career offender guideline at USSG § 4B1.1, which recommends severe guideline penalties under similar but, in some ways narrower, criteria. To determine whether the client would be subject to the career offender guideline today, and if so, what the guideline range would be and whether a judge would likely sentence below that range, see How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today.

A. If the client were sentenced today, would the prior conviction no longer qualify as a predicate "felony drug offense" under § 851?

For a small number of clients, one or more prior convictions would no longer qualify as a "felony drug offense" under current law. Determining whether this is so may not be obvious or clear, and the law in this area is evolving. In some cases, circuit precedent squarely holding that a particular prior offense qualifies as a predicate may no longer be good law after a more recent

Supreme Court decision—but the circuit has not yet reversed its prior precedent. The following is a research guide only. It is not a substitute for your own research relating to a client's particular prior conviction(s) and relevant Supreme Court and circuit law.

IF YOU NEED HELP DETERMINING WHETHER A PRIOR CONVICTION WOULD QUALIFY UNDER CURRENT LAW, SEEK ASSISTANCE AS NOTED ABOVE.

1. *Would the prior conviction no longer qualify as a "felony" under the Supreme Court's decision in* Carachuri-Rosendo?

Some offenders received a § 851 enhancement based on prior convictions that would not qualify as a "felony" under current law because they could not actually have been sentenced to 12 months or more in prison under the state sentencing scheme. These will likely be those with prior North Carolina or Kansas convictions. The basics are as follows:

In *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), the Supreme Court addressed whether a prior conviction qualifies as an "aggravated felony" under the Immigration and Nationality Act. The question presented was whether Carachuri had been "convicted of" a drug trafficking crime for which the "maximum term of imprisonment authorized exceeds one year." In 2004, Carachuri was convicted under Texas law for possessing less than two ounces of marijuana (a misdemeanor) and then in 2005 for possessing a Xanax tablet without a prescription. *Id.* at 570-71. Under Texas law, Carachuri could have received an enhanced recidivist sentence of more than 12 months for the 2005 Xanax conviction, but only if the state proved the fact of the 2004 marijuana conviction. Because the record of the 2005 Xanax conviction contained no finding of fact concerning the 2004 marijuana conviction, Carachuri could not have received a sentence in excess of one year for the 2005 Xanax conviction, and was thus not previously convicted of an "aggravated felony." *Id.* at 581-82. The Court emphasized that the question was whether Carachuri was "actually convicted of a crime that is itself punishable as a felony," not whether a hypothetical person could have received a sentence exceeding one year had he been convicted of the recidivist enhancement. *Id.* at 576, 581-82.

In light of *Carachuri-Rosendo,* the Fourth Circuit changed course with respect to prior drug convictions under North Carolina law. Under that state's structured sentencing scheme, the maximum sentence that may be imposed is controlled by the defendant's particular prior record level. In *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011) (en banc), the Fourth Circuit held that a prior North Carolina conviction for possession with intent to sell no more than ten pounds of marijuana was not a "felony drug offense" for purposes of a § 851 enhancement because the defendant, with a "prior record level" of only 1 and where the prosecutor alleged no facts in aggravation sufficient to warrant an aggravated sentence, was subject to a statutory maximum sentence of eight months' community punishment (no imprisonment). *Id.* at 241. As a result, he was not convicted of an offense punishable by imprisonment for more than one year. Under *Simmons*, courts determining whether a prior offense is punishable by a term exceeding one year may no longer look at the maximum sentence that could be imposed on a hypothetical defendant with the hypothetically worst prior record level, but only at the maximum sentence

that could have been imposed on the particular defendant with his actual record level under the law at the time of conviction.

In *United States v. Haltiwanger*, on remand from the Supreme Court for further consideration in light of *Carachuri-Rosendo*, the Eighth Circuit similarly changed course and held that a prior Kansas conviction for possession of a controlled substance without affixing a tax stamp did not qualify as a "felony drug offense" for purposes of § 851 because, as in North Carolina, the "Kansas sentencing structure ties a particular defendant's criminal history to the maximum term of imprisonment." *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011). "[W]here a maximum term of imprisonment . . . is directly tied to recidivism," the "actual recidivist finding. . . must be part of a particular defendant's record of conviction for the conviction to qualify as a felony." *Id*. at 884.

On June 2, 2014, in *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014), the Tenth Circuit held that *Carachuri-Rosendo* invalidated its precedent in *United States v. Hill*, 539 F.3d 1213 (10th Cir. 2008). In *Hill*, it held that the question whether a prior Kansas conviction qualifies as a "felony" for purposes of conviction as a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) depends on the maximum statutory penalty for the aggravated offense, not the lower maximum penalty actually applicable to the individual defendant based on the unaggravated facts of conviction. In *Brooks*, the Tenth Circuit overruled *Hill* and held that a prior Kansas conviction for fleeing and eluding, for which the defendant could not have actually been sentenced to more than 7 months, does not qualify as a "felony" for purposes of the career offender guideline after *Carachuri-Rosendo*.

Under *Simmons*, *Haltiwanger*, and *Brooks*, many defendants with prior North Carolina or Kansas drug convictions were wrongly subject to enhanced mandatory minimums under § 851. Some have gotten relief, including some in post-conviction proceedings. But many have not. If a client received a § 851 enhancement based on a prior drug conviction under North Carolina or Kansas law, you will need to determine whether, under the applicable state law at the time, his prior conviction was not actually for an offense punishable by more than one year.

Be aware that the sentencing schemes of Kansas and North Carolina are complex and difficult to decipher for the inexperienced. Unless you have experience determining actual penalties under Kansas and North Carolina law, seek assistance as noted above. Also seek assistance if the client was convicted of an offense in another state under a statutory scheme that appears to function like the statutes in *Carachuri-Rosendo*, *Simmons*, and *Brooks*, but there is no circuit law addressing the issue.

To determine the statutory penalty that would apply absent one or more § 851 notices, see Appendix 2.

2. Would the prior conviction no longer qualify as a "drug offense" under the "modified categorical approach"?

Because the definition of "drug offense" under § 851 is so broad, most prior drug offenses will qualify as a § 851 predicate. But for some with prior drug convictions under California or Connecticut law, a prior conviction may no longer qualify as a § 851 predicate under the proper application of the "modified categorical approach," as clarified in *Descamps v. United States*, 133 S. Ct. 2276 (2013). The basics are as follows:

Courts apply the "categorical approach" to determine whether a defendant was convicted of an offense with the requisite elements to qualify as a predicate "drug offense" under § 851. *See Descamps*, 133 S. Ct. at 2281-82. Under this "elements-based" approach, the prior conviction must be for an offense having the same (or narrower) elements as the applicable definition of the qualifying offense. *Id.* at 2285-86. If, by its elements, the statute of conviction sets forth a single, "indivisible" crime that applies more broadly than the qualifying offense (i.e., it applies to an offense that is not criminalized under the definition of the qualifying offense), the prior conviction cannot be a predicate. *See id.* at 2285-86, 2293. If the statute of conviction is "divisible" into alternative elements, some of which constitute a predicate and some of which do not, the court is permitted to look beyond the judgment to a limited set of case-specific documentation—*i.e.*, the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial, *Taylor v. United States*, 495 U. S. 575, 602 (1990), and the plea agreement and plea colloquy transcript (or "some comparable judicial record of this information") if the defendant pled guilty, *Shepard v. United States*, 544 U. S. 13, 25-26 (2005)—to determine the elements of the offense of which the defendant was convicted, *Descamps*, 133 S. Ct. at 2283-84. If the elements of the offense of conviction cannot be determined from these documents without regard to the underlying facts, it must be assumed that the conviction was for the least culpable crime, *i.e.*, the non-qualifying offense, *see Johnson v. United States*, 559 U.S. 133, 137 (2010), and thus the prior conviction under that statute cannot qualify as a predicate offense. This is called the "modified categorical approach," and is intended only as a "tool for implementing the categorical approach." *Descamps*, 133 S. Ct. at 2284.

The Supreme Court first adopted the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990). As it recently reiterated, it adopted this approach—rather than a factual approach that would authorize federal sentencing courts to try to discern from a previous trial or plea record facts superfluous to the prior conviction and to find that the defendant was in fact guilty of an offense of which he was not convicted—for three reasons: (1) the categorical approach comports with the text and history of the Armed Career Criminal Act at 18 U.S.C. § 924(e), which requires a mandatory 15-year minimum when the defendant has three prior convictions for a "violent felony" or "serious drug offense"; (2) a factual approach would present practical difficulties and unfairness; and (3) it would violate the Sixth Amendment for the federal court to make findings of fact that belong to a jury. *See Descamps*, 133 S. Ct. at 2287-89.

Courts of appeals have not always been disciplined in using the modified categorical approach in that limited manner, however, expanding its use to apply to statutes that do not have alternative

elements and permitting federal district courts to determine on an unreliable paper record that the defendant in fact committed the generic offense. In *Descamps*, decided in 2013, the Supreme Court clamped down on these loose practices. It clarified that courts may use the modified categorical approach only for "divisible" statutes, under which the "statute sets out one or more elements of the offense in the alternative," not all of which qualify as a predicate. *Id.* at 2281-82. It further clarified that the court may use this modified approach "*only* to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Id.* at 2293 (emphasis added). "The modified approach does not authorize a sentencing court to substitute . . . a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Id.* In other words, as with the categorical approach, the modified approach may be used only to identify the elements of the crime of which the defendant was *convicted*, not to identify and rely on facts superfluous to the prior conviction.

State drug statutes generally have been treated as divisible, permitting use of the modified categorical approach when the statute criminalizes conduct that does not qualify as a § 851 predicate. So far, there have been no decisions after *Descamps* holding that a state drug statute has been wrongly treated as divisible.

However, for a few clients with prior drug convictions under California or Connecticut law, a prior conviction may no longer qualify as a § 851 predicate as a result of a later court determination that the state statute criminalizes some conduct that does not qualify as a "drug offense" and it cannot be established by a proper application of the "modified categorical approach," as clarified in *Descamps*, that the client was necessarily convicted of a qualifying offense.

Each of the four categories of compounds listed in the definition of "felony drug offense" for purposes of § 851—"narcotic drug," "marihuana," "anabolic steroid," and "depressant or stimulant substance"—is defined under the Controlled Substance Act, *see id.* § 802(9), (16), (17), (41)(A), and listed in the federal schedules of controlled substances. Since 1987, a Connecticut drug statute, Conn. Gen. Stat. § 21a-243, has criminalized conduct involving two obscure opiate derivatives, thenylfentanyl and benzylfentanyl. These two substances were controlled under Schedule I of the federal Controlled Substances Act for only one year beginning in 1985. Thus, for example, a defendant who entered an *Alford* plea in 1996 to a charge of violating that Connecticut statute, by which he did not specifically admit to selling any substance controlled under the federal schedule, was not *necessarily* convicted of a "felony drug offense." *See, e.g.*, *McCoy v. United States*, 2011 WL 3439529 (D. Conn. Aug. 4, 2011) (government conceded that prior Connecticut conviction did not qualify as § 851 predicate, but defendant was not entitled to relief because the issue was procedurally defaulted). The conviction would no longer qualify as a predicate offense, and the prosecutor would not file a § 851 notice based on that conviction today. *Cf. United States v. Mattis*, 14 F. App'x 773, 775 (9th Cir. 2001) (recognizing that Cal. Health & Safety Code § 11351 criminalizes offenses involving substances that are not listed in the Controlled Substance Act, such as tilidine, so that the modified categorical approach must be applied to determine whether the defendant's prior offense involved a federally controlled substance).

To determine the statutory penalty that would apply absent the § 851 notice, see Appendix 2.

B. If the client were sentenced today, would the prosecutor decline to file a § 851 enhancement under the August 2013 Holder Memorandum?

To determine whether a prosecutor would file a § 851 enhancement today in the case of a client whose mandatory minimum and/or statutory maximum sentence was increased based on § 851 enhancements, look to the August 12, 2013 Holder Memorandum. *See* Appendix 1. It states that 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[,] . . . consider[ing]" six factors. The defendant need not meet each of the six criteria; instead, it is a totality of the circumstances test. There is no requirement that the defendant pled guilty or cooperated. And the question whether the client was "involved in the use or threat of violence in connection with the offense"—does *not* include relevant conduct, i.e., the conduct of a co-defendant, co-conspirator, or other person involved in the offense.

If you determine that the prosecutor would not file one or more § 851 notices today, go to Appendix 2 to determine the statutory penalty that would apply.

> **EXAMPLE** On January 3, 2002, Client A, a 28-year-old addict who sold small quantities of crack cocaine for his older brother in exchange for crack and small amounts of money, was arrested selling 5 grams of crack to an informant outside the apartment where he and his brother lived. According to the informant, Client A had sold him 5 grams of crack on nine previous occasions. A search of the apartment turned up 150 grams of crack in a drawer in the kitchen, and a single shot .22 caliber handgun on a shelf in a closet in the brother's bedroom.
>
> Client A and his brother were charged with conspiracy to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 846 & § 841(b)(1)(A), and with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c).
>
> Client A had three prior state court convictions: (1) carrying a concealed weapon on June 1, 1992, for which he was sentenced to 30 days in jail; (2) possession with intent to sell cocaine on April 1, 1993, for which he was sentenced to time served of 18 months in jail; and (3) simple possession of crack on February 1, 2000, for which he was sentenced to 36 months' probation.
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> The prosecutor attempted to induce Client A to cooperate against his brother by threatening to file notice of two prior convictions for a "felony drug offense" under 21 U.S.C. § 851, one for the 1993 possession with intent to sell offense, and one for the 2000 simple possession offense.

Client A declined to cooperate, and the prosecutor filed notice of the two prior convictions, thus subjecting Client A to mandatory life under 21 U.S.C. § 841(b)(1)(A).

Client A went to trial. He was convicted of conspiracy to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A). The jury acquitted him of possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c).

Client A's brother pled guilty to the conspiracy count. In exchange for his guilty plea and his cooperation against three street level dealers who sold crack for him, the prosecutor dismissed the § 924(c) charge, agreed that the quantity of crack involved in the conspiracy was at least 50 but less than 150 grams, and agreed to overlook the gun for purposes of calculating the guideline range. As a result, the mandatory minimum was 10 years, and the guideline range was 151-188 months (he had no criminal history). The prosecutor also filed a motion for downward departure based on substantial assistance against others under USSG § 5K1.1, asking for a sentence at the mandatory minimum of 10 years. On June 6, 2003, the judge sentenced Client A's brother to ten years.

On June 15, 2003, the judge reluctantly sentenced Client A to mandatory life in prison, asserting that the sentence was "not fair or appropriate," and was "in fact a gross miscarriage of justice," but "my hands are tied."

Today, the prosecutor should decline to charge the two § 851 enhancements under the Attorney General's charging policy. All six factors militate against it: (1) Client A was not an organizer, leader, manager or supervisor of others within a criminal organization; (2) he was not involved in the use or threat of violence in connection with the offense; (3) two of his three prior convictions are remote, none are serious, and the carrying a concealed weapon offense is not a "crime of violence" under current law,[3] (4) he had no ties large-scale drug trafficking organizations, gangs, or cartels; (5) the filing of the § 851 enhancements resulting in a life sentence created a gross disparity with the 10-year sentence his more culpable brother received; and (6) he was an addict who sold drugs to support his habit. *See* Appendix 1.

If the § 851s were not charged, the statutory range would drop from life to 5-40 years. *See* Appendix 2.

[3] *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (holding that, under *Begay v. United States*, 553 U.S. 137 (2008), carrying a concealed weapon is not a "crime of violence" under the career offender guideline). For guidance regarding whether a prior offense is a "crime of violence," see How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today, Part III.B.

If you have questions about the criteria and how they apply in a given case, seek assistance as noted above.

C. If the client were sentenced today and the prosecutor would file the § 851 notice[s], would the Fair Sentencing Act lower the mandatory minimum?

The Fair Sentencing Act would reduce the mandatory minimum for the following categories of offenders subject to one or more § 851s, depending on the quantity of crack charged:

- Those charged and convicted of 5 grams to less than 28 grams, or of 50 grams to less than 280 grams, where the prosecutor filed a notice of **one** prior conviction for a "felony drug offense" under § 851.

- Those charged and convicted of 5 grams to less than 28 grams of crack, or of 50 grams to less than 280 grams, where the prosecutor filed a notice of **two** prior convictions for a "felony drug offense" under § 851.

To determine whether a client's statutory penalty range would be lower today, and what that range would be, use the chart at Appendix 3.

APPENDIX 1

The August 12, 2013 memo[4] states that prosecutors "should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets *each*" of four criteria:

- "relevant conduct" does not involve violence, credible threat of violence, possession of a weapon, trafficking drugs to or with minors, death or serious bodily injury
- not an organizer, leader, manager, or supervisor of others within a criminal organization
- does not have "*significant* ties" to "*large-scale* drug trafficking organizations, gangs, or cartels"
- does not have a "significant criminal history," "normally evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions." The August 29, 2013 memo[5] states that 3 or more points "may not be significant if, for example, a conviction is remote in time, aberrational, or for conduct that itself represents non-violent low-level drug activity"

The August 12, 2013 memo states that 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[,] . . . consider[ing]" six factors [need not meet *each* of these criteria – it's a totality of the circumstances test]:

- Whether D "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" [*not* relevant conduct]
- "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"
- "Other case-specific aggravating or mitigating factors."

The defendant is not required to plead guilty or cooperate in order to be charged fairly. Rather, the defendant need only "meet[] the above criteria." Holder Memo, Aug. 12, 2013, at 2 ("Timing and Plea Agreements"). For defendants "charged but not yet convicted," "prosecutors should

[4] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

[5] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 1-2 (Aug. 29, 2013).

apply the new policy and pursue an appropriate disposition consistent with the policy's section, 'Timing and Plea Agreements.'" For defendants who already pled guilty or were convicted by a jury but have not yet been sentenced, prosecutors are "encouraged" to "consider" withdrawing § 851s. Holder Memo, Aug. 29, 2013, at 1-2.

The May 19, 2010 Holder Memo[6] states: "Charges should not be filed simply to exert leverage to induce a plea." Section 9-27.320 of the United States Attorney's Manual states: "Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea)."

[6] Memorandum from Eric H. Holder, Jr., Attorney General, to All Federal Prosecutors on Department Policy on Charging and Sentencing 2 (May 19, 2010).

APPENDIX 2

<table>
<tr><th colspan="4">21 USC 841(b)(1)(A)</th></tr>
<tr><th colspan="2">Mandatory 10 Years-Maximum Life
weight of “mixture or substance containing a detectable amount of” the drug</th><th>Mandatory 20 Years-Maximum Life</th><th>Mandatory Life</th></tr>
<tr><td>Heroin</td><td>1,000 grams or more</td><td rowspan="9">• prosecutor files one § 851 enhancement for prior “felony drug offense”

• death or serious bodily injury results</td><td rowspan="9">• prosecutor files two § 851 enhancements for prior “felony drug offenses”

• prosecutor files one § 851 enhancement for prior “felony drug offense” and death or serious bodily injury results</td></tr>
<tr><td>Powder cocaine</td><td>5,000 grams or more</td></tr>
<tr><td>Crack cocaine</td><td>280 grams or more</td></tr>
<tr><td>PCP</td><td>1 kg. or more, or 100 grams or more pure</td></tr>
<tr><td>LSD</td><td>10 grams or more</td></tr>
<tr><td>N-phenyl-N-propanamide</td><td>400 grams or more, or 100 grams or more analogue</td></tr>
<tr><td>Marijuana</td><td>1,000 kg. or more, or 1,000 or more plants</td></tr>
<tr><td>Methamphetamine</td><td>500 grams or more, or 50 grams or more pure</td></tr>
<tr><td colspan="4"></td></tr>
<tr><th colspan="4">21 USC 841(b)(1)(B)</th></tr>
<tr><th colspan="2">Mandatory 5 Years-Maximum 40 Years
weight of “mixture or substance containing a detectable amount of” the drug</th><th>Mandatory 10 Years-Maximum Life</th><th>Mandatory 20 Years-Maximum Life</th><th>Mandatory Life</th></tr>
<tr><td>Heroin</td><td>100 grams or more</td><td rowspan="3">prosecutor files any number of § 851 enhancements for prior “felony drug offense”</td><td rowspan="3">death or serious bodily injury results</td><td rowspan="3">prosecutor files any number of § 851 enhancements for prior “felony drug offense” and death or serious bodily injury results</td></tr>
<tr><td>Powder cocaine</td><td>500 grams or more</td></tr>
<tr><td>Crack cocaine</td><td>28 g or more</td></tr>
</table>

PCP	100 grams or more, or 10 grams or more pure			
LSD	1 gram or more			
N-phenyl-N-propanamide	40 grams or more, or 10 grams or more analogue			
Marijuana	100 kg. or more, or 100 or more plants			
Methamphetamine	50 grams or more, or 5 grams or more pure			

21 USC 841(b)(1)(C)			
0-20 Years	**0-30 Years**	**Mandatory 20 Years -Maximum Life**	**Mandatory Life**
Weight less than above or unspecified for any controlled substance in Schedule I or II except less than 50 kg. or an unspecified weight of marijuana (see below, 841(b)(1)(D)) 50 or more marijuana plants regardless of weight; 10 kg. hashish; 1 kg. hashish oil; any amount of gamma hydroxybutric acid; 1 gram flunitrazepam	prosecutor files any number of § 851 enhancements for prior "felony drug offense"	death or serious bodily injury results	prosecutor files any number of § 851 enhancements for prior "felony drug offense" and death or serious bodily injury results

21 USC 841(b)(1)(D)	
0-5 Years	**0-10 Years**
Less than 50 kg. marijuana or unspecified But "distributing a small amount of marihuana for no remuneration" is punishable as simple possession by not more than 1 year, or by 15 days-2 years if committed after a prior conviction for	prosecutor files any number of § 851 enhancements for prior "felony drug offense"

any drug offense, or by 90 days-3 years if committed after 2 or more prior convictions for any drug offense. 21 USC 841(b)(4), 844.	

APPENDIX 3

Effect of Fair Sentencing Act on Statutory Ranges		
Statutory Range	Pre-FSA	Post-FSA
21 USC 841(b)(1)(A)		
10-life	50 grams or more	280 grams or more
20-life	50 grams or more + one 851	280 grams or more + one 851
	50 grams or more + the drug was the but for cause of death or serious bodily injury	280 grams or more + the drug was the but for cause of death or serious bodily injury
Life	50 grams or more + two 851s	280 grams or more + two 851s
21 USC 841(b)(1)(B)		
5-40 years	5 grams or more	28 grams or more
10-life	5 grams or more + any number of 851s	28 grams or more + any number of 851s
20-life	5 grams or more + the drug was the but for cause of death or serious bodily injury	28 grams or more + the drug was the but for cause of death or serious bodily injury
life	5 grams or more + any number of 851s + the drug was the but for cause of death or serious bodily injury	28 grams or more + any number of 851s + the drug was the but for cause of death or serious bodily injury
21 USC 841(b)(1)(C)		
0-20 years	Less than 5 grams	Less than 28 grams
0-30 years	Less than 5 grams + any number of 851s	Less than 28 grams + any number of 851s
20-life	Less than 5 grams + the drug was the but for cause of death or serious bodily injury	Less than 28 grams + the drug was the but for cause of death or serious bodily injury
life	Less than 5 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury	Less than 28 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury