Office of the Attorney General

Washington, D.C. 20530

August 29, 2013

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

FROM: THE ATTORNEY GENERAL

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

This memorandum provides additional guidance to federal prosecutors for cases that were charged before I issued the August 12, 2013, memorandum setting forth Department policy on charging mandatory minimum sentences and recidivist enhancements in certain drug cases (hereinafter referred to as the "Attorney General's policy memorandum"). In brief, the policy applies as follows:

- For cases charged and awaiting adjudication of guilt: the policy is applicable to all such cases.

- For cases in which guilt has been adjudicated and sentence has not yet been imposed: the policy may be applied in the discretion of the prosecutor, and prosecutors are encouraged to apply the policy in guilty-plea cases where legally and practically feasible.

- For cases in which sentence has been imposed: the policy is not retroactively applicable.

DISCUSSION

The applicability of the Department's policy depends on the stage of the proceeding.

Defendants Charged But Not Yet Convicted. In the case of a defendant who was charged before the policy's issuance, but who has not pleaded guilty or been convicted, prosecutors should apply the new policy and pursue an appropriate disposition consistent with the policy's section, "Timing and Plea Agreements." Application of the policy also may require a motion to withdraw an information previously filed under 21 U.S.C. § 851.

In applying the policy, prosecutors should consider all of the facts and circumstances of a case. In particular, in determining whether a defendant has a "significant" criminal history, prosecutors should evaluate the facts beyond the number of criminal history points. While a significant criminal history is normally evidenced by three or more criminal history points, that is not a mechanical test. A criminal history involving three or more points may not be significant for purposes of the policy if, for example, a conviction is remote in time, aberrational, or for conduct that itself represents non-violent, low-level drug activity.

Defendants Who Have Pleaded Guilty But Have Not Been Sentenced. In cases in which a defendant would not have been charged with the mandatory minimum under the new policy but previously entered a guilty plea and admitted to facts triggering a mandatory minimum, prosecutors are encouraged to seek relief from the mandatory minimum sentence. In determining whether relief is warranted, prosecutors should consider all pertinent facts, including the criteria stated in the Attorney General's memorandum, the need to equitably treat co-defendants charged in the same case, and any other pertinent circumstances regarding the offender and the prosecution.

In many cases, relief from the plea is unnecessary because the defendant qualifies for relief from the mandatory minimum through the safety valve, 18 U.S.C. § 3553(f). It may also be unnecessary if the government files a motion under 18 U.S.C. § 3553(e) to depart from the mandatory minimum based on cooperation. In other cases, prosecutors can seek relief from the prior guilty plea by negotiating a plea agreement in which the defendant agrees to plead guilty to a superseding information charging the drug offense without the pertinent quantity, and the government agrees to move to dismiss original indictment under Federal Rule of Criminal Procedure 48(a).

Alternatively, if permitted by the court, prosecutors may move to dismiss the charged allegation of the enhancement fact. Such a motion is functionally equivalent to dismissing a greater offense, leaving the conviction for a lesser-included offense intact. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013) (describing the allegation of an enhancement fact as that of a greater offense: "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

With respect to defendants who previously pled guilty following the filing of an information under 21 U.S.C. § 851, and have not been sentenced, prosecutors are also encouraged to consider the guidelines stated in the Attorney General's memorandum and, where appropriate, move to withdraw a Section 851 information before sentencing.

Defendants Convicted At Trial. As a general matter, prosecutors should not seek relief for a defendant who was previously convicted at trial where the jury found a drug quantity that requires a mandatory minimum sentence (beyond any relief that a defendant is entitled to under application of the safety valve or based on cooperation with the government). Nevertheless, prosecutors have discretion to seek relief in an unusual case upon determining that the interests of justice so require. Such unusual circumstances may arise, for example, where the defendant persuasively explains that he proceeded to trial only to contest a mandatory minimum provision that would not be charged under the new policy, or where action is required to assure consistent treatment of co-defendants in the same case or closely related cases.

If a decision is made to seek relief, the government may proceed in accordance with the Rule 48(a) procedure stated earlier, that is, by moving to dismiss the count of conviction and replacing it with a plea to a superseding information or by simply moving with the court's permission to strike the conviction for the greater included offense and retain a conviction for the drug offense without the mandatory minimum.

Separately, with respect to defendants who were convicted at trial following the filing of an information under 21 U.S.C. § 851, and have not been sentenced, prosecutors are encouraged to consider the guidelines stated in the Attorney General's memorandum and, where appropriate, move to withdraw an 851 information before sentencing.

Defendants Who Have Been Sentenced. Prosecutors should not disturb the sentence in a case in which the sentence has been imposed, whether or not the case is on direct appeal or in some other stage of post-conviction litigation. *See Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012) (stating with respect to a statutory change that "in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.").

Prosecutorial Discretion. Application of the policy—and any decision to afford relief to those already convicted but not yet sentenced—is an exercise of prosecutorial discretion over charging decisions. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *Wayte* v. *United States,* 470 U.S. 598, 607 (1985); *Rinaldi* v. *United States*, 434 U.S. 22 (1977) (per curiam); see also *United States* v. *Labonte*, 520 U.S. 751, 762 (1997) (similar as to discretionary decision whether to file an enhancement notice under Section 851). Prosecutors should oppose any motion initiated by a defendant, under Rule 11, Rule 33, or any other provision, without the government's consent, to seek relief from a mandatory minimum sentence based on the government's new charging policy.[1]

[1] As stated in the Attorney General's memorandum, the policies set forth in these memoranda are 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).