

Attorney General Holder's Charging Policies

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.”¹ Three 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.”²

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.”³

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.”⁴ For defendants “charged but not yet

¹ 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 at 2 (Aug. 12, 2013) [Holder Memo, Aug. 12, 2013].

² 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 at 1 (Aug. 29, 2013) [Holder Memo, Aug. 29, 2013].

³ Holder Memo, Aug. 12, 2013, at 3.

⁴ *Id.* at 2 (“Timing and Plea Agreements”).

convicted,” “prosecutors should 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.⁵ “Whether a defendant is pleading guilty is not one of the factors enumerated in the charging policy” providing “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 set[ting] forth factors that prosecutors should consider in making that determination.”⁶ “Prosecutors are encouraged to make the § 851 determination [based on those factors] 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.”⁷ “[C]ertain 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.”⁸

“Charges should not be filed simply to exert leverage to induce a plea.”⁹ “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).”¹⁰

⁵ Holder Memo, Aug. 29, 2013, at 1-2.

⁶ Memorandum to Department of Justice Attorneys from the Attorney General, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014).

⁷ *Id.*

⁸ *Id.*

⁹ Memorandum to all Federal Prosecutors from Eric H. Holder, Jr., Attorney General, Department Policy on Charging and Sentencing at 2 (May 19, 2010); U.S. Attorneys Manual, § 9-27.300.

¹⁰ U.S. Attorneys Manual, § 9-27.320.