

**More Justice from Justice:
The DOJ's Latest Charging, Plea and Sentencing Policies**

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On December 16, 2022, United States Attorney General Merrick Garland issued long-awaited guidance setting forth the Department of Justice's latest charging, plea and sentencing policies. He did so in the form of two memos: one providing general policies for all criminal cases (the "General Memo"),ⁱ and a second providing additional policies for drug cases (the "Drug Memo").ⁱⁱ

These latest DOJ policies are generally consistent in many respects with past policies issued by Attorney General Garland's predecessors, but they break new ground (or revive previously-rescinded policies) in several areas: mandatory minimum statutes, statutory sentencing enhancements, the crack/cocaine sentencing disparity, and pre-trial diversion. All of these new policies tack in the same direction: ameliorating the harshness of the modern-era federal sentencing regime.

I. Background of DOJ Charging, Plea and Sentencing Policies

Since 1980, many Attorneys General have issued written policies expressly setting forth the DOJ's charging, plea and sentencing standards. This practice started with then-Attorney General Benjamin Civiletti, with variations in the precise

articulation of policies over time – both in length and substance – from Attorneys General Richard Thornburgh, Janet Reno, John Ashcroft, Eric Holder, and Jeff Sessions. (As an example, Attorney General Civiletti’s policy was 56 pages long; Attorney General Sessions’ policy was just over a page.) The standards have varied, often tracking the ideological principles of their respective Administrations, but several core principles have remained relatively constant over the years. Thus, all of the policies have stated in some form that: federal prosecutors should bring only cases they think they can win; they ordinarily should charge the most serious readily provable offense; they should make sentencing recommendations based on an individualized assessment of the offender and his or her offense; and they should leave some cases to either other prosecutors (state; local; tribal; territorial) or to non-criminal processes. Attorney General Garland's memos essentially adhere to these core principles.

Though largely consistent with what has come before, there are several notable elements in the 11 pages of guidance set forth in the General Memo and the Drug Memo. What follows is a description of the latest memos' new (or revived) ground - each of which has been the focus of considerable attention by federal practitioners and policy advocates (and, in several cases, mounting criticism) in recent years.

II. Highlights from Attorney General Garland's Memos

A. Mandatory Minimums

The General Memo astutely notes that, in 1980, when the principle of charging the most serious readily provable offense was adopted, mandatory minimum sentencing statutes were "rare" and the Sentencing Guidelines did not exist. By the end of that decade, the state of affairs was different: mandatory minimums were on the rise, and the Guidelines were in effect and were then binding. Fast forward to 2022: as the memo states, statutory charges that carry mandatory minimum prison terms are "common" and also "drive the levels of adjacent Sentencing Guidelines."

Over these decades, mandatory minimums have been subject to increasing scrutiny and criticism - for both their overall harshness, as well as the disparities they spawned in application. An entire organization – Families Against Mandatory Minimums – was created and named itself based on concerns about these problems. Notably, in 2013, Attorney General Holder issued a guidance memo expressly acknowledging that in “some cases” the application of mandatory minimums has “resulted in unduly harsh sentences and perceived or actual disparities.”ⁱⁱⁱ Now, Attorney General Garland's memos state that the “proliferation of provisions carrying mandatory minimum sentences has *often* caused unwarranted disproportionality in sentencing and disproportionately severe sentences.”

The memos endeavor to remedy these issues. The General Memo provides that charges carrying mandatory minimum imprisonment terms should ordinarily be "reserved for" cases in which the remaining charges "would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, harm to victims, or" other sentencing considerations set forth in the memo (*i.e.*, proportionality, punishment, protecting the public, deterrence, and rehabilitation). Put differently (as the memo does), the question for prosecutors is: do the remaining charges "capture the gravamen of the defendant's conduct and danger to the community, and yield a sanction 'sufficient' to satisfy" these considerations?

The General Memo offers one example for when a mandatory minimum charge may be appropriate: for a defendant who commits or threatens violent crimes or has directed others to do so. And the one statute cited in support is actually a mandatory consecutive (rather than a minimum) sentence: charging a 924(c) (18 U.S.C. § 924(c)) violation for a defendant who uses or carries a firearm in furtherance of a violent crime or drug crime, if relying instead on the Guideline firearms enhancement "would not sufficiently account for the defendant's conduct or danger to the community."

The Drug Memo goes further in curtailing the use of mandatory minimum statutes, which historically have been invoked far more frequently in drug cases than any other. This memo actually inverts the charging presumption, stating that such

charges should not be brought so long as several factors are present: the defendant's conduct doesn't involve violence, death or serious bodily injury, weapon possession, or the use of a minor; the defendant doesn't have a significant managerial role in dealing a significant amount of drugs, or significant ties to a large-scale criminal organization or violent gang; and the defendant doesn't have a significant criminal history involving violence, personally distributing significant amounts of drugs on multiple occasions, or possessing illegal firearms. It's a charging "safety valve" of sorts – though the memo makes clear that prosecutors are to assess these criteria without regard to whether a defendant also would qualify for either the statutory sentencing "safety valve" exception that allows judges to sentence below the prison terms set forth in mandatory minimum drug statutes (18 U.S.C. § 3553(f)) or a cooperation-based sentencing reduction below a mandatory minimum that requires a prosecutor's motion asserting a defendant has provided substantial assistance in the investigation or prosecution of others (18 U.S.C. § 3553(e)).

To be clear, this multi-factor discretionary charging standard is not entirely new. Attorney General Holder's 2013 policy on mandatory minimums had a strikingly similar standard, and subsequent data from the U.S. Sentencing Commission revealed that fewer mandatory minimum charges were brought thereafter.^{iv} But the Holder memo's charging policy was expressly rescinded in

2017 by Attorney General Sessions^v – only to be formally revived now five years later by Attorney General Garland in his Drug Memo.

But the Drug Memo goes further. Even if not all of these criteria are met, prosecutors are still cautioned not to "automatically charge" the mandatory minimum "but rather weigh the considerations" set forth in both memos to determine if such a charge is appropriate. The Drug Memo's example: a "drug mule" (courier), who may not meet all the above criteria but for whom the "balance of considerations may still weigh against" pursuing a mandatory minimum charge. And, a prosecutor who pursues a mandatory minimum must obtain supervisory approval, and their office must report to the Executive Office of United Attorneys in Washington, D.C., twice a year, the number and percentage of all charging documents and plea agreements with mandatory minimums.

The upshot of all this? Mandatory minimums are still around, but one can expect some decline, perhaps a quite significant decline, in how often statutory charges carrying mandatory minimum prison terms will be brought by federal prosecutors compared to charging patterns over the last decades.

B. Statutory Sentencing Enhancements

The Memos have relatively little to say about sentencing enhancements, other than to state the same policies governing mandatory minimums generally apply to

them. Here, too, the Drug Memo elaborates further: before invoking the prior felony conviction provision (21 U.S.C. § 851), which significantly increases the statutory penalties for drug offenders with a prior conviction for a serious drug or violent felony crime, prosecutors should consider whether doing so “would create a significant and unwarranted sentencing disparity with equally or more culpable co-defendants.” This directive, too, is a revival of a similar, Holder-era standard that was rescinded by his successor. And as with other charging decisions, the Drug Memo cautions that an 851 charge should not be pursued “simply to exert leverage to induce a plea” or because the defendant went to trial.

C. Crack/Powder Cocaine Disparity

Few federal sentencing laws have attracted as much criticism, and outright condemnation, as the so-called crack/powder cocaine disparity. In its original form – in the Anti-Drug Abuse Act of 1986 – the disparity resulted in drug offenses involving one (1) gram of crack (or cocaine base) being treated as severely as ones involving one hundred (100) grams of cocaine (or cocaine powder). Congress enacted this so-called 100:1 ratio into federal mandatory minimum statutes, premised on claims that crack was a much more dangerous and harmful drug and that crack-related crimes were responsible for greater amounts of violence and thus should be punished more harshly. The U.S. Sentencing Commission, while

developing the original sentencing guidelines that were first effective in 1987, mirrored this disparate treatment of the two drugs.

Before long, the U.S. Sentencing Commission relied on significant data and experience to document flaws with the 100:1 crack/powder ratio. By 1995, it proposed eliminating the disparity, finding that it resulted in "racial imbalance in federal prisons and led to more severe sentences for low-level crack dealers than for wholesale suppliers of powder cocaine."^{vi} But, for the first time ever, Congress enacted legislation that rejected a proposed Guideline amendment – in this case, an amendment that would have equalized crack and powder sentencing rules. In 1997, the Commission proposed reducing the ratio to 5:1.^{vii} But Congress was disinclined to make any changes, and federal court constitutional challenges to the crack/cocaine disparity also foundered.

Eventually, continued criticism of the disparity by the Sentencing Commission and reform advocates took hold. In 2010, Congress passed the Fair Sentencing Act, which reduced the ratio to 18:1. In 2018, it passed the First Step Act, which (among many other sentencing reforms) made the Fair Sentencing Act retroactive to defendants sentenced before passage of that statute.

Nonetheless, criticism of this reduced disparity persisted and then-Presidential candidate Joe Biden's 2020 campaign pledged to "[e]nd, once and for all, the federal crack and powder cocaine disparity."^{viii} In turn, the Department of Justice in June

2021 testified in support of a bill, the EQUAL Act, that would set statutory crack penalties at the same level as powder cocaine. And in September 2021, the U.S. House of Representatives overwhelmingly voted, by a margin of 361-66, to pass the EQUAL Act and finally put an end to the statutory disparity between powder and crack cocaine sentences. But while the EQUAL Act seemingly had significant momentum in the U.S. Senate in 2022, some prominent Republican Senators introduced a competing bill that provided only for a reduction, rather than a full elimination, of the crack/powder sentencing disparity.

As possible statutory reforms are still being debated, Attorney General Garland's Drug Memo seeks to all but do away with the disparity by calling for federal prosecutors to "promote the equivalent treatment of crack and powder cocaine offenses." The Drug Memo directs prosecutors to charge crack offenses as if they were cocaine offenses by using the quantity for cocaine rather than crack. (As to how this should happen, the Drug Memo indicates that the "Criminal Division and the Executive Office for United States Attorneys will issue further guidance on how to structure such charges.") And the Drug Memo also directs prosecutors to advocate at sentencing for punishment in crack cases consistent with the cocaine Guideline range – even going so far as telling prosecutors to argue for a variance from the Guidelines to accomplish that result. Under this new policy, the only barrier to *de facto* abolition of the crack/cocaine disparity will be the sentencing

judge, who may still choose to apply the crack guidelines (notwithstanding unanimous agreement of the parties not to).

Many federal judges are likely to be eager to treat powder and crack cases comparably, but there also likely will be some judges who are disinclined to treat these cases identically while federal statutes and guidelines still call for differential treatment. The U.S. Sentencing Commission should seek to track and report on how DOJ's new instructions for crack cases impact sentencing patterns, as part of its broader responsibilities to measure and assess how charging and sentencing practices impact the criminal justice system's ability to achieve the purposes of sentencing as set forth by Congress.^{ix}

Notably, this new guidance from Attorney General Garland on crack cases was released just as there was, reportedly, a tentative deal struck among U.S. Senate leaders to further reduce the statutory sentencing crack/powder disparity. A subsequent press report stated that the deal to narrow the sentencing disparities between crack and powder cocaine was scuttled after the Attorney General's new policy was released.^x Though there remains considerable bipartisan support within Congress to eliminate, or at least further reduce, the crack/powder disparity, the Drug Memo seems likely to continue (at least in the short term) to complicate statutory reform efforts.

D. Pretrial Diversion

At least as far back as Attorney General Civiletti's 1980 policy guidance, prosecutors have been directed to consider whether there are non-criminal alternatives to federal prosecution that ought to be pursued in any given case. That Attorney General Garland has reiterated this instruction is no surprise. But what appears to be new is his directive that every district in the country should develop a pretrial diversion policy.

This directive is consistent with recent, increased attention to, and use of, alternatives to traditional prosecution and punishment in the federal criminal justice system. Alternative prosecution and sentencing programs have proliferated in recent years, with at least 24 federal districts embracing some form of them for a wide variety of defendants: those with a history of substance abuse or who commit a crime resulting from such abuse, family support deficiencies, or mental health issues, as well as veterans, juveniles and young adults.^{xi} The U.S. Sentencing Commission has recently adopted, as a priority for its 2022-23 amendment cycle, a multi-year study of court-sponsored diversion and alternatives-to-incarceration programs and potential Guideline amendments in this space; although not identified by the Commission, others have advocated for a new downward departure for defendants who successfully complete such programs. Attorney General Garland's directive

provides still more reason to expect that we will soon see more of these programs in other parts of the country.

E. Other Plea and Sentencing Policies

Though both memos are denominated as including the DOJ's plea policies, very little is said on this subject in either memo. The General Memo directs prosecutors to apply the same standards to pleas as they do for charging decisions. It then provides two elaborations: prosecutors shouldn't file charges "simply to exert leverage to induce a plea" and, conversely, prosecutors shouldn't abandon charges "to arrive at a plea bargain that does not reflect the seriousness of the defendant's conduct."

The two memos also pronounce general sentencing standards. The General Memo notes that, in "many cases," a Guideline sentence is the one that prosecutors should advocate for. But it also directs prosecutors to consider if a departure or variance, upward or downward, is appropriate based on "an individualized assessment of the facts and circumstances of the case[.]" The standard is broad indeed: is the Guideline penalty "proportional to the seriousness of the defendant's conduct" and would it "achieve the purposes of criminal sentencing articulated in [18 U.S.C.] § 3553(a)"? This, too, is not really new: Attorney General Reno's 1993 policy had this same standard, almost word-for-word.

Beyond this general standard, prosecutors are left largely to their own discretion, with only procedural guardrails – *i.e.*, factors supporting a departure or variance must be documented in the file, and recommendations for them should be approved by a supervisor – to limit the use of that discretion.

The Drug Memo expands on this guidance, providing examples of when the drug guidelines do not adequately reflect the defendant’s crime and culpability. Thus, a lower-level seller in a large drug organization with large quantities of drugs, or a defendant whose career offender status is predicated on their having committed non-violent drug crimes, may deserve a downward departure or variance. Conversely, if a defendant’s prior crimes involved violence but those crimes don’t qualify as career offender predicates, prosecutors may advocate for an upward variance toward the career offender guideline range.

III. Conclusion

Attorney General Garland deserves credit for attacking head-on some of the federal criminal justice system's most significant shortcomings. Notably, the reforms included in his memos correspond with President Joe Biden's May 2022 Executive Order – a bold initiative, directing pursuit of a wide variety of criminal justice reforms designed to bring more fairness, and less racial disparity, to our federal criminal justice system. The Biden Executive Order directs formulation of

a strategic plan to expand the use of diversion and alternatives-to-incarceration programs. And it decries the "unduly harsh sentences" caused by "harsh mandatory minimums and the unjust sentencing disparity between crack and powder cocaine offenses."

Once can speculate which of these – the Attorney General’s memos, or the President’s Executive Order – is the chicken, and which is the egg. For example, while the Executive Order’s condemnation of the crack/cocaine disparity predated the Drug Memo by over six months and mirrored the Administration’s June 2021 support for legislation abolishing it, then-Attorney General nominee Garland told Congress in February 2021 that there was “no justification” for the disparity that originated in 1986 legislation that then-Senator Biden supported but Presidential-candidate Biden subsequently renounced. In any event, Attorney General Garland’s memos plainly reflect, and seek to effectuate, these Presidential criminal justice priorities.

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ⁱ U.S. Attorney General, *Memorandum to All Federal Prosecutors, General Department Policies Regarding Charging, Pleas, and Sentencing* (December 16, 2022), *reprinted infra* 35 Fed. Sent’g Rep. ____.

ⁱⁱ U.S. Attorney General, *Memorandum to All Federal Prosecutors, Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* (December 16, 2022), *reprinted infra* 35 Fed. Sent’g Rep. ____.

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- ⁱⁱⁱ See U.S. Attorney General Eric Holder, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (Aug. 12, 2013).
- ^{iv} See U.S. Sentencing Commission, *Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 29-36 (July 2017).
- ^v U.S. Attorney General Jeffrey Sessions, *Department Charging and Sentencing Policy to All Federal Prosecutors* (May 10, 2017).
- ^{vi} U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* ____ (February 1995).
- ^{vii} U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 1997)
- ^{viii} The Biden Plan for Strengthening America’s Commitment to Justice, <https://joebiden.com/justice/#>
- ^{ix} 28 U.S.C. § 991(b)(2).
- ^x See Caitlin Emma et al., *Lawmakers unveil government funding bill to stave off Friday shutdown*, Politico, Dec. 19, 2022
- ^{xi} See generally U.S. Sentencing Commission, *Federal Alternative-to-Incarceration Court Programs* (Sept. 2017)