Yale Law School

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Hon. Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Dear Attorney General Lynch:

We write to urge you to issue renewed guidance to all U.S. Attorneys to reiterate and enhance compliance with former Attorney General Eric Holder's September 2014 Memorandum ("Holder Memo") instructing U.S. Attorneys not to leverage 21 U.S.C. § 851 enhancements to induce defendants to plead guilty. Recent statements by Steven H. Cook, head of the National Association of Assistant United States Attorneys (NAAUSA), as well as field research being conducted by students at Yale Law School, suggest that at least some federal prosecutors are not consistently complying with this policy. This creates prosecutor-driven disparities that are plainly unwarranted.

As you are well aware, § 851 enhancements dramatically increase mandatory minimum sentences for drug offenses: if a defendant convicted of selling a threshold amount of drugs has one prior felony drug conviction (in state or federal court) and the prosecutor has so informed the court pursuant to § 851, the mandatory statutory range doubles from ten-years-to-life to twenty-years-to-life. If the prosecutor has filed a § 851 notice of two prior felony drug convictions, the statutory range increases to a mandatory life-without-parole sentence. The definition of a "prior felony drug offense" is extremely broad, including even crimes that are classified as misdemeanors under state law, convictions that do not result in jail time, and offenses so old that they are not even calculated as part of the defendant's criminal history under the Sentencing Guidelines, as long as the offense potentially carried a sentence of more than one year in prison. Once a prosecutor files a § 851 enhancement, the sentencing judge has no discretion to impose a sentence below the enhanced mandatory minimum.

In August 2013 (following up on the Department's charging policy announced in May 2010), former Attorney General Holder issued a Memorandum urging prosecutors to decline to file an information pursuant to § 851 "unless the defendant is involved in conduct that makes the case appropriate for severe sanctions" based on six criteria. In September 2014, the former Attorney General clarified that "[w]hether a defendant is pleading guilty is ***not*** one of the factors" prosecutors should consider when assessing whether to file an enhancement (emphasis added). Recognizing the risk that the threat of severe mandatory sentencing terms can create excessive pressure on a defendant to forgo constitutionally protected rights, former Attorney General Holder stated directly that an "§ 851 enhancement should not be used in plea

negotiations for the sole or predominant purpose of inducing a defendant to plead guilty . . . . A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea . . . is inappropriate and inconsistent with the spirit of the [May 2010] policy."

Despite these directives, there is mounting evidence that at least some U.S. Attorneys still consider it appropriate to routinely threaten to file § 851 enhancements if defendants exercise their right to go to trial. Last week, the Washington Post reported that Steven Cook of NAAUSA "said the rates of cooperation have not changed in part because mandatory sentences are still in play as leverage in negotiations. The Holder memo, he said, has been interpreted differently by individual prosecutors, sometimes in the same office. Defense attorneys 'understand that this tool is still in our pocket.'"

Though the study is still ongoing, preliminary inquiries and data analysis by students at Yale Law School likewise reveal inconsistent application of the Holder Memos. Moreover, prosecutors in many districts continue to wield the explicit or implicit threat of § 851 enhancements to induce defendants to plead guilty. In numerous districts across the country, it is common knowledge that a prosecutor will almost certainly file an enhancement if a defendant elects to go to trial. Such practices contravene the spirit and letter of the Holder Memos.

We urge you to issue renewed guidance to all U.S. Attorneys in order to ensure compliance with and consistent application of the August 2013 and September 2014 Holder Memos. Additionally, in order to foster and facilitate consistent application of federal sentencing laws nationwide, we recommend that you (1) include these policies in the U.S. Attorneys' Manual, and (2) require U.S. Attorneys to report when they file § 851 enhancements, and their reasons for doing so pursuant to the Holder Memos.

Sincerely,

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