Office of the Attorney General
Washington, D. C. 20530

December 16, 2022

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL

SUBJECT: GENERAL DEPARTMENT POLICIES REGARDING CHARGING, PLEAS, AND SENTENCING

Our justice system places enormous responsibility on federal prosecutors and vests them with "'broad discretion' to enforce the Nation's criminal laws," *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The reasoned exercise of that discretion promotes the fair, evenhanded, and effective administration of those laws.

In every case, prosecutors must conduct an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." Janet Reno, *Memorandum to Holders of United States Attorneys' Manual, Title 9: Principles of Federal Prosecution*, 6 Fed. Sentencing Rep. 352 (1994) (issued on Oct. 12, 1993); *see* Justice Manual (JM) § 9-27.400 (updated Feb. 2018).

At the same time, prosecutors' discretion cannot be unfettered. For over four decades, the *Principles of Federal Prosecution* have provided guidance that helps ensure the reasoned exercise of prosecutorial discretion. Those principles are designed to help achieve "regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility." Benjamin R. Civiletti, Preface, U.S. Dep't of Justice, *Principles of Federal Prosecution* at i (1980). This memorandum reaffirms the central guidance provided by those principles, while announcing new policies that will help ensure the fair administration of justice in decisions regarding charging, plea agreements, and sentencing recommendations. It likewise reaffirms the priority the Department has placed on focusing our prosecutorial resources on combatting violent crime.

CHARGING

Initiating and Declining Prosecution

Threshold Requirement. The longstanding threshold requirement of the *Principles of Federal Prosecution* is that a prosecutor may not commence a prosecution unless it is probable that the admissible evidence will be sufficient to obtain and sustain a conviction. *See* JM § 9-27.200. That is, the prosecutor must believe that the person will more likely than not be found

guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal.

Federal Interest / Non-Federal Alternatives. The *Principles* further provide that, even when the threshold requirement is satisfied, a prosecutor should not commence a prosecution if the prosecution would not serve a substantial federal interest or the person is subject to adequate alternatives to federal prosecution. *See* JM § 9-27.220.

In determining whether a prosecution would serve a substantial federal interest, the prosecutor should weigh all relevant considerations, including: federal law enforcement priorities; the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation or prosecution of others; the person's personal circumstances; the interests of any victims; and the probable sentence or other consequences if the person is convicted. JM § 9-97.230.

In determining whether adequate alternatives to federal prosecution are available, the prosecutor should consider whether the person is subject to effective prosecution by state, local, territorial, or Tribal authorities, JM § 9-27.240, or whether there exists an adequate non-criminal alternative to prosecution, JM § 9-27.250. The latter may include federal or state civil or administrative remedies, or pretrial diversion, JM § 9-27.250; § 9-22.000. Every district should develop an appropriate pretrial diversion policy.

Impermissible Considerations. In determining whether to commence prosecution, a prosecutor may not be influenced by: the person's race, religion, gender, ethnicity, national origin, or sexual orientation; or political association, activities, or beliefs; or the prosecutor's personal feelings or self-interest. JM § 9-27.260. Charges may not be filed, nor the option of filing charges raised, simply to exert leverage to induce a plea.

Selection of Charges

Once a determination has been made that prosecution would satisfy the above requirements, the prosecutor must select the most appropriate charges. Ordinarily, those charges will include "the most serious offense that is encompassed by [the defendant's] conduct and that is likely to result in a sustainable conviction." Civiletti, *Principles*, Part C.1. When the quoted standard was adopted in 1980, however, only "rare federal offenses [carried] a mandatory minimum term of imprisonment," *id.*, and the U.S. Sentencing Guidelines had not yet been promulgated. Today, statutory offenses with mandatory minimum provisions are common, and those provisions also drive the levels of adjacent Sentencing Guidelines.

Accordingly, in selecting the appropriate charges, prosecutors should consider whether the consequences of those charges for sentencing would yield a result that "is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and

rehabilitation." Janet Reno, *Bluesheet on Charging and Plea Decisions*, at 1-2 (May 1, 1994). Such decisions should be informed by an individualized assessment of all the facts and circumstances of each particular case. The goal in any prosecution is a sanction that is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to satisfy these considerations.

Mandatory Minimum Offenses

The proliferation of provisions carrying mandatory minimum sentences has often caused unwarranted disproportionality in sentencing and disproportionately severe sentences. *See Statement of the Judicial Conference of the United States before the House Judiciary Committee* 5, 10 (July 11, 2014). For this reason, charges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges (*i.e.*, those for which the elements are also satisfied by the defendant's conduct, and do not carry mandatory minimum terms of imprisonment) would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, harm to victims, or other considerations outlined above. Prosecutors, in the exercise of their discretion and through discussions with their supervisors, should determine whether the remaining charges would, in fact, capture the gravamen of the defendant's conduct and danger to the community and yield a sanction "sufficient" to satisfy the considerations outlined above.

As a general matter, the decision whether to seek a statutory sentencing enhancement should be guided by these same principles.

In some cases, our duty to ensure that the laws are faithfully executed will require that prosecutors charge offenses that impose a mandatory minimum sentence, particularly where other charges do not sufficiently reflect the seriousness of the defendant's conduct, the danger the defendant poses to the community, or other important federal interests. This may well be the case, for example, for defendants who have committed or threatened violent crimes, or who have directed others to do so.[1]

Department policy requires that prosecutors always be candid with the court, the probation office, and the public as to the full extent of the defendant's conduct and culpability, regardless of whether the charging document includes such specificity.

An accompanying memorandum issued today provides additional specific policies for charging offenses, including mandatory minimum offenses, in drug cases.

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[1] For example, a defendant who commits a federal crime of violence, such as a Hobbs Act robbery or hate crime, or a federal drug-trafficking crime, and who also uses or carries a firearm in furtherance of that crime, may appropriately be charged under 18 U.S.C. § 924(c) even if the prosecutor could potentially proceed by charging the substantive offense alone and seek a firearm enhancement at sentencing, if the latter would not sufficiently account for the defendant's conduct or danger to the community.

Review, Documentation, Approval, and Evaluation of Charging Decisions

To ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney. All but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision. Each United States Attorney's Office and litigating division of the Department must promulgate written guidance describing its internal indictment and plea agreement review process. *See* JM § 9-27.300.

Any decision to include a mandatory minimum charge in a charging document or plea agreement must also obtain supervisory approval. Each United States Attorney and Assistant Attorney General for a litigating division must determine, and designate, the appropriate level of supervisory review of charging documents and plea agreements containing mandatory minimum charges, which must be no lower than section chief or equivalent. The Department will develop and implement a software program that enables real-time, trackable reporting by districts and litigating divisions of all charges brought by the Department that include mandatory minimum sentences. Until that time, each United States Attorney's Office and litigating division must report semi-annually to the Executive Office for United States Attorneys the number and percentage of charging documents and plea agreements in which it has included mandatory minimum charges.

Prosecutors have an ongoing obligation to evaluate a case and the provable evidence, even after offenses have been charged. If a prosecutor determines that, as a result of a change in the evidence or for another reason, a charge is no longer readily provable or appropriate, the prosecutor should dismiss those charges, consistent with the written policies of the district or litigating division and the *Principles of Federal Prosecution.*

PLEA AGREEMENTS

Plea agreements are governed by the same fundamental considerations described above for charging decisions.

Charges should not be filed simply to exert leverage to induce a plea; nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant's conduct.

Each district and litigating division must promulgate written guidance regarding the standard elements required in its plea agreements, including any waivers of defendants' rights.

SENTENCING RECOMMENDATIONS

In 18 U.S.C. § 3553(a), Congress has identified the factors courts must consider when imposing sentences. Prosecutors should be guided by the same considerations and should -- as the section provides -- seek sentences that are sufficient, but not greater than necessary, to: reflect the seriousness of the offense, promote respect for the law, and provide just punishment

for the offense; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed correctional treatment. 18 U.S.C. § 3553(a)(2). Prosecutors should also consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(6), (7). In each case, prosecutors should make sentencing recommendations based on an individualized assessment of the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1); JM § 9-27.730.

In many cases, the appropriate balance among these factors will lead to a recommendation for a sentence within the advisory range resulting from application of the Sentencing Guidelines, and prosecutors should generally continue to advocate for a sentence within that range. Prosecutors should consider whether the departure provisions under the guidelines are appropriate, and, if so, should advocate for their application accordingly. When advocating at sentencing, prosecutors must fully and accurately alert the court to all known relevant facts and criminal history and explain why the interests of justice warrant their sentencing recommendations.

Although consistent application of the guidelines encourages uniformity throughout the federal system, it is appropriate for prosecutors to consider whether the penalty yielded by the advisory guideline range is proportional to the seriousness of the defendant's conduct and would achieve the purposes of criminal sentencing articulated in § 3553(a). Based on an individualized assessment of the facts and circumstances of the case, a prosecutor may conclude that a request for a departure or variance above or below the guidelines range is warranted. All prosecutorial recommendations for departures or variances -- upward or downward -- must be supported by specific and articulable factors and documented in the case file. Recommendations for upward departures and variances should also be approved by a supervisor.

TRAINING AND IMPLEMENTATION

Each district and litigating division must provide training to its prosecutors on the charging, plea, and sentencing policies set forth in this memorandum and the accompanying memorandum regarding drug cases, as well as on any additional criteria developed by the district or division. Supervising attorneys selected to review exercises of discretion should be skilled and experienced prosecutors, who are thoroughly familiar with Department and district or litigating division policies, priorities, and practices. All district- or division-specific policies must be readily available to prosecutors and shared with the Executive Office for United States Attorneys.

In making decisions relating to charging, plea agreements, and sentencing recommendations, prosecutors must also be mindful of their obligations under the Victims' Rights and Restitution Act, 34 U.S.C. § 20141; the Crime Victims' Rights Act, 18 U.S.C. § 3771; the Attorney General Guidelines for Victim and Witness Assistance; and other relevant Department policies and procedures.

An accompanying memorandum issued today provides additional, specific policies regarding charging, pleas, and sentencing in drug cases.

This memorandum and the accompanying memorandum regarding drug cases supersede previous memoranda on Department policy regarding charging, pleas, and sentencing. The Deputy Attorney General will oversee implementation of these memoranda and will issue further guidance as appropriate. She will also undertake a review of the *Justice Manual*, including Title 9, Chapter 27, to conform its provisions to the policies set forth in these memoranda. In the interim, the policies in these memoranda supersede any conflicting provisions of the manual.

APPLICATION TO PENDING CASES

The policies contained in this memorandum and the accompanying memorandum regarding drug cases apply to all prosecutions initiated no later than 30 days after the issuance of these memoranda.

In cases in which charges have already been brought prior to the effective date of these memoranda, but in which a final judgment after sentencing has not been imposed by the district court, future decisions in such cases should be informed by the policies contained in these memoranda. Prosecutors are encouraged in such situations to take steps to render the charging document, any plea agreement, and the sentence consistent with these policies -- to the extent possible and as the prosecutors in their discretion deem appropriate in light of the federal interests involved. In addition, if a defendant has already been convicted at trial or by plea following the filing of a notice seeking a statutory sentencing enhancement that is inconsistent with these policies, prosecutors should withdraw the notice before sentencing.

These policies do not apply to matters in which a final judgment after sentencing has been imposed by the district court.[2]

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As Attorney General Civiletti said in the preface to the first edition of the *Principles of Federal Prosecution*: "Important though these principles are to the proper operation of our federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process." Civiletti, *Principles*, at ii. I am confident that you have those qualities, and I am grateful for the work you do every day to pursue justice for all Americans.

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[2] The policies contained in these memoranda, and internal office procedures adopted pursuant thereto, are intended solely for the guidance of attorneys for the government. They are not intended to create a substantive or procedural right or benefit, enforceable at law, and may not be relied upon by a party to litigation with the United States. JM § 9-27.150; *see United States v. Caceres*, 440 U.S. 741 (1979).