

To: President-Elect Biden DOJ Agency Review Team

From: Federal Public and Community Defenders

Date: December 4, 2020

Re: Priority # 1: Immediately Reinstate and Expand Smart on Crime Charging Policies

President-elect Biden supports an end to mandatory minimums and has promised to work towards their repeal through legislation.¹ Mandatory minimums have contributed to the mass incarceration of Black and brown communities, distorted the traditional role of the judge, and escalated prison costs. The push to end mandatory minimums is not partisan: lawmakers across the spectrum align on this issue. Although legislation is required to permanently end mandatory minimums, the Biden Administration need not wait for Congress. Once he is sworn in, President Biden can use the power of the Executive to substantially reduce mass incarceration and improve the fairness of the charging and sentencing process.

Under President Obama, then-AG Eric Holder initiated the “Smart on Crime” program, a series of reforms aimed at improving fairness in the federal system. Smart on Crime was a critical first step towards reform—but it was shuttered too soon and replaced with regressive “law and order” policies by Attorneys General Sessions and Barr. The Biden administration must act swiftly and decisively to repair the damage, by reinstating and expanding Smart on Crime. The Administration must also learn from Smart on Crime’s failures, by guarding against a too-narrow policy and a repeat of implementation problems that resulted in many U.S. Attorney’s Offices (USAOs) ignoring the program’s directives.²

The Department of Justice’s charging policy should:

- Reinstate the Holder-era requirement that prosecutors undertake an “individualized assessment”³ of each particular case in making decisions regarding charging, plea agreements, and advocacy at sentencing.
- Expand on Holder-era policies by prohibiting charges that carry a mandatory minimum where an alternate charge is available and declining to seek recidivist enhancements. Statutory and guidelines sentencing ranges almost always suffice to achieve appropriate sentencing purposes without resort to mandatory minimums.
- Revitalize deference to the court. DOJ should revitalize its historic deference to the court as the entity responsible for making the sentencing decision. In the original USAM, drafted by then-

¹ See The Biden Plan for Strengthening America’s Commitment to Justice, <https://joebiden.com/justice/> (last accessed on Nov. 23, 2020).

² See generally Office of the Inspector Gen., U.S. Dep’t of Justice, *Review of the Department’s Implementation of Prosecution and Sentencing Reform Principles Under the Smart on Crime Initiative*, at 11-14 (June 2017) (finding that twenty-one percent of districts did not implement their local policies in accordance with Attorney General Holder’s directive).

³ Mem. from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors on Dep’t Pol’y on Charging and Sentencing (May 19, 2010).

AG Benjamin Civiletti, prosecutors were instructed that there should be a “clear separation of prosecutorial and judicial responsibilities,” with “courts taking the lead role.”⁴

- End the trial penalty. Mandatory minimums and recidivist enhancements should not be used in plea negotiations for the sole or predominant purpose of inducing an individual facing charges to forgo important constitutional rights, such as the right to bail or trial.
- Concentrate federal resources on matters where there is a substantial federal interest. Drawing from the war-on-drugs playbook, AG Sessions & Barr established a series of task forces and enforcement initiatives that prioritized federal prosecution of drug and gun offenses, categories in which non-white defendants are consistently over-represented. Many of these offenses involve mandatory minimums that are significantly higher than penalties in the state, often triggered by prior state convictions for low-level drug offenses.
- Avoid unnecessary requests for sentencing enhancements. Sentencing enhancements increase criminal sentences based on the details of an offense or the characteristics of a defendant.⁵ There is serious doubt about whether the rationales of sentencing support the magnitude of most federal enhancements.⁶ And there is “clear evidence that enhancements based on prior drug convictions exacerbate racial disparities in the criminal justice system.”⁷
- Decline to support new laws that could increase the application of or create new mandatory minimum penalties. For example, DOJ should withdraw the Department’s support for the classwide scheduling of fentanyl analogues. Classwide scheduling of fentanyl-related substances, as proposed by the Department and Drug Enforcement Agency (DEA) is part and parcel of the Trump-era regression to harsh and punitive war-on-drugs policies. Classwide scheduling would facilitate broader prosecutions, with harsher penalties and fewer constitutional protections.⁸ The scheduling action should be allowed to expire in Spring 2021.

⁴ See Principles of Federal Prosecution (1980) at 51-52.

⁵ See, e.g. John Gleeson, *The Road to Booker and Beyond: Constitutional Limits on Sentence Enhancements*, 21 *Touro L. Rev.* 873 (2006) (providing overview of different forms of sentencing enhancements).

⁶ See, e.g., U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 133-34 (2004) (describing how career offender provision in federal sentencing guidelines, which enhances sentences based on prior drug convictions, is imposed disproportionately on African Americans).

⁷ See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 *U.C. Davis L. Rev.* 1135, 1139 n. 13 (2010) (gathering cases).

⁸ *Fentanyl Analogues: Perspectives on Classwide Scheduling: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 116th Cong. (Jan. 28, 2020), <https://docs.house.gov/meetings/JU/JU08/20200128/110392/HHRG-116-JU08-Wstate-ButlerK-20200128.pdf>.