

## A Synopsis of the New Sentencing Policies

By Johanna S. Zapp, Esq.



I have been getting a lot of questions about what the new drug policies mean for individual clients, and the short answer is: if you have a cooperation agreement, the new policies do not help you. If you are safety valve eligible, the new policies do not help you either. It only affects those defendants who fall into a particular category of people who cannot get out from under the mandatory minimums that come with certain drug charges.

In order for a defendant to qualify under the new policies, each of the following criteria must be met:

- The defendant's relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious

bodily injury of any person;

- The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization;

- The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and

- The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

### Here is a hypothetical case:

John Doe, when he was very young, sold a few small bags of cocaine to an undercover officer and was arrested. He pled guilty and was sentenced to 6 months imprisonment. After serving his time, John got a job and started a family.

5 years later, John falls on hard times. He reconnects with an old friend, who introduces John to another friend named Ray. Ray offers John the opportunity to earn

\$1,000 if he will pick up a package at a local DHL location. He is told the package is from Ecuador and will have drugs in it. His job is to deliver the package to a particular person. He agrees and he does this. But on his way to deliver the package, John is pulled over by the DEA. He is arrested and the DEA recovers one kilogram of heroin from inside the package.

John confesses and tries to cooperate but only knows his friend's first name, and he only has a cell number for Ray which doesn't work anymore. He tries to cooperate, but he cannot because his information is useless and old, but more importantly, he does not know enough.

### Old Policy vs. New Policy

Under the old policy, John would be charged with possession with intent to distribute one kilogram of heroin. That crime carries a mandatory minimum sentence of 10 years. Once charged with an offense that carries a mandatory minimum, there are only two ways out from under the mandatory sentence.

The first way is to "safety valve." In this case however, John wouldn't qualify because he has too many criminal history points from his prior drug case. The other way out from

under that mandatory minimum is to cooperate. In our hypothetical, John wasn't able to do so.

Under the new policy, a mandatory 10 year minimum sentence would probably turn into about 5 years more or less. John's crime and background meets all of the criteria set out in the new policy statements: the crime did not involve violence or weapons, he did not have ties to a major drug ring or cartel, he was not a leader in the operation, and he does not have an extensive criminal history. The government may charge John with possessing an unspecified quantity of heroin, thereby permitting the judge to impose a sentence below the mandatory 10 year minimum.

The following excerpt is from *The New York Times* article outlining what the new policies are going to be with regard to mandatory sentencing minimums.

## **Justice Dept. Seeks To Curtail Stiff Drug Sentences**

*By Charlie Savage*

Published in *The New York Times*  
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Washington — In a major shift in criminal justice policy, the Obama administration moved on Monday

to ease overcrowding in federal prisons by ordering prosecutors to omit listing quantities of illegal substances in indictments for low-level drug cases, sidestepping federal laws that impose strict mandatory minimum sentences for drug-related offenses.

“Although incarceration has a role to play in our justice system, widespread incarceration at the federal, state and local levels is both ineffective and unsustainable,” Mr. Holder's speech said. “It imposes a significant economic burden — totaling \$80 billion in 2010 alone — and it comes with human and moral costs that are impossible to calculate.”

Under a policy memorandum being sent to all United States attorney offices on Monday, according to an administration official, prosecutors will be told that they may not write the specific quantity of drugs when drafting indictments for drug defendants who meet the following four criteria: their conduct did not involve violence, the use of a weapon or sales to minors; they are not leaders of a criminal organization; they have no significant ties to large-scale gangs or cartels; and they have no significant criminal history.

For example, in the case of a defendant accused of conspiring to

sell five kilograms of cocaine — an amount that would set off a 10-year mandatory minimum sentence — the prosecutor would write that “the defendant conspired to distribute cocaine” without saying how much. The quantity would still factor in when prosecutors and judges consult sentencing guidelines, but depending on the circumstances, the result could be a sentence of less than the 10 years called for by the mandatory minimum law, the official said.

It is not clear whether current cases that have not yet been adjudicated would be recharged because of the new policy.

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