Office of the Inspector General
U.S. Department of Justice

Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the *Smart on Crime* Initiative

Evaluation and Inspections Division 17-04 June 2017

EXECUTIVE SUMMARY

Introduction

In August 2013, the U.S. Department of Justice (Department) and then Attorney General Eric H. Holder, Jr., announced the *Smart on Crime* initiative, which highlighted five principles to reform the federal criminal justice system. *Smart on Crime* encouraged federal prosecutors to focus on the most serious cases that implicate clear, substantial federal interests. In the first principle, the Department required, for the first time, the development of district-specific prosecution guidelines for determining when federal prosecutions should be brought, with the intent of focusing resources on fewer but the most significant cases. The second principle of *Smart on Crime* announced a change in Department charging policies so that certain defendants who prosecutors determined had committed low-level, non-violent drug offenses, and who had no ties to large-scale organizations, gangs, or cartels, generally would not be charged with offenses that imposed a mandatory minimum prison sentence.

The Office of the Inspector General (OIG) initiated this review to evaluate the Department's implementation of the first two principles of *Smart on Crime,* as well as the impact of those changes to federal charging policies and practices. We assessed the 94 U.S. Attorney's Office districts' implementation and the impact of the *Smart on Crime* policy on not charging drug quantities implicating mandatory minimum sentences in circumstances where the defendants were low-level, non-violent offenders with limited criminal histories. We also assessed the implementation and impact of the policy that required prosecutors to consider certain factors before filing a recidivist enhancement that would increase the sentence of a drug defendant with a felony record pursuant to 21 U.S.C. § 851.

On May 10, 2017, the Attorney General issued a new charging and sentencing policy to all federal prosecutors that effectively rescinds the specific charging policies and practices outlined by *Smart on Crime*.[1] We did not review this new policy as part of this review, which examined the implementation of the prosecution and sentencing reform principles under the *Smart on Crime* initiative. Nevertheless, we believe that the lessons learned from the Department's implementation of the *Smart on Crime* initiative, and the challenges faced in

[1] The Department's new charging policy states that it is a "core principle" that all federal prosecutors should charge and pursue "the most serious readily provable offense… By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences." Prosecutors may make exceptions from this policy, based upon careful consideration, with supervisory approval, for reasons that must be documented in the file. Additionally, the new policy provides that prosecutors in most cases should recommend sentences within the advisory guidelines range, again absent supervisory approval for reasons documented in the file. The memorandum indicated that the Deputy Attorney General had been directed to oversee implementation of the new policy and to issue any clarification and guidance he deemed appropriate "for its just and consistent application." See Memorandum to all Federal Prosecutors, from Attorney General, Jefferson B. Sessions III, Department Charging and Sentencing Policy, May 10, 2017.

assessing its impact, can be of assistance to the Department when seeking to implement its new and any future charging policies and practices.

Results in Brief

We found that the Department made progress implementing the first two *Smart on Crime* principles, but we also identified several shortcomings in its efforts, including some failures to update national and local policies and guidelines and a lack of communication with local law enforcement partners regarding changes to these polices and guidelines in some instances.

We found that, while the Department issued policy memoranda and guidance to reflect its *Smart on Crime* policies, the U.S. Attorneys' Manual (USAM), a primary guidance document for federal prosecutors, was not revised until January 2017, more than 3 years after *Smart on Crime* was launched, even though Department officials established a deadline of the end of 2014 to do so. Further, we determined that 74 of 94 districts had developed or updated their local policies to reflect the *Smart on Crime* policy changes regarding mandatory minimum charging decisions. Of the remaining 20 districts, some provided incomplete information to the OIG as to whether they had updated their prosecution guidelines or policy memoranda to reflect the *Smart on Crime* policy changes regarding mandatory minimum charging decisions in drug cases; in others, the district policies provided appeared to be inconsistent with the *Smart on Crime* policies in whole or in part; and some told us that they relied on the Holder memoranda for direction but did not develop or update any of their district policies or guidance documents to reflect the *Smart on Crime* policy changes.

We also found that 70 of 94 districts had incorporated *Smart on Crime* recidivist enhancement policy changes into their districts' prosecution guidelines or policy memoranda. However, of the remaining 24 districts, 20 provided information to the OIG with respect to recidivist enhancements that appeared to be inconsistent with the 2013 Holder memoranda in whole or in part, or reported to the OIG that they followed the Holder memorandum but did not specifically revise their district policies to reflect *Smart on* Crime policy changes. The four remaining districts provided information that did not reflect the *Smart on Crime* policy changes on filing recidivist enhancements. Finally, we found that 10 districts failed to update their policies to reflect *Smart on Crime* policy changes with regard to both mandatory minimum charging decisions and recidivist enhancements.

While most districts updated their prosecution guidelines, it is not clear whether all districts worked in conjunction with their law enforcement partners to develop or update existing district-specific prosecution guidelines for determining when federal prosecutions should have been brought and in what priority areas, consistent with the first principle of *Smart on Crime.* In our interviews, 3 of 14 U.S. Attorneys did not recall having these discussions. In addition, 19 of 25 Drug Enforcement Administration and Federal Bureau of Investigation Special Agents in Charge either could not recall having these discussions or were not aware of whether they had occurred. In response to our survey of U.S. Attorney's Offices, Criminal Chiefs from nine districts responded that their district did not work with

law enforcement partners to develop or revise district guidelines and Criminal Chiefs from four districts responded that they were not sure whether this had occurred.

We further found that the Department's ability to measure the impact of the first two *Smart on Crime* principles is limited because it does not consistently collect data on charging decisions. For example, while the Legal Information Office Network System (LIONS), the U.S. Attorneys' Offices' case management system, allows federal prosecutors generally to track information about their cases, data fields relevant to *Smart on Crime* were not always present or updated.

Due to these limitations, the Department has relied on U.S. Sentencing Commission (USSC) data to assess the impact of the first two *Smart on Crime* principles. However, using USSC data to measure the impact of *Smart on Crime's* charging policies is challenging because the USSC collects data from courts on sentencing decisions by judges and does not receive data from prosecutors about their charging decisions. In that regard, the USSC data does not allow assessments regarding charges that prosecutors could have brought but chose not to bring.

Nevertheless, based on our own analysis of USSC sentencing data over the period from 2010 through 2015, we found that sentencing outcomes in drug cases had shifted in a manner that was consistent with the first two principles of *Smart on Crime.* This was reflected by significantly fewer mandatory minimum sentences being imposed in drug cases nationwide, as well as a decrease in mandatory minimum sentences for those defendants who might otherwise have received such a sentence in the absence of the 2013 Holder memoranda. For example, the rate of federal drug offenders sentenced without a mandatory minimum rose from 40 percent in 2012 to 54 percent in 2015.

In addition, we found that the percentage of federal drug offenders with two criminal history points who were not subject to a mandatory minimum sentence increased from 44 percent in FY 2012 to 64 percent in FY 2015. Generally, these offenders were eligible for relief under the *Smart on Crime* policy but were not eligible for "safety valve" relief (a provision that allows judges to sentence offenders below a mandatory minimum) because they had more than one criminal history point.

With regard to the use of recidivist enhancements, USSC estimates and OIG survey results indicated that such enhancements have become less common since *Smart on Crime.* For example, USSC data sampling reflected that prosecutors filed recidivist enhancements in about 20.6 percent of eligible cases in FY 2012, but did so in only about 17.6 percent of eligible cases in FY 2014. Moreover, this decline occurred despite a rise in the percentage of defendants eligible for such an enhancement.

We also found that some regions in the country diverged from these overall national trends. For example, while drug convictions decreased nationally by 19 percent, the decrease was far larger in the Southwest Border region. Further, the West, Pacific Northwest, and Hawaii and Island Territories regions actually

showed increases in the number of drug convictions. As a result, we determined that national trends should not be interpreted in such a way as to conclude that *Smart on Crime* had a uniform impact across all the nation's districts.

In order for the Department to be able to more accurately assess the implementation and impact of its charging policies and practices, whether related to *Smart on Crime* or otherwise, we believe the Department needs to collect relevant and timely charging data. Similarly, it should ensure that the USAM accurately reflects Department charging policies and that all districts have local prosecution guidelines in place that reflect those policies.

Recommendations

In this report, we make three recommendations to ensure that all federal prosecutors have clear and consistent guidance and fully understand all Department charging policies, and to enable the Department to more accurately measure the effectiveness of its charging policy decisions.

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INTRODUCTION

Background

On August 12, 2013, then Attorney General Eric H. Holder, Jr., gave a speech to the American Bar Association's Annual Convention that outlined the U.S. Department of Justice's (Department) *"Smart on Crime*" initiative.[2] *Smart on Crime* resulted from a review of the criminal justice system to "identify reforms that would ensure federal laws are enforced more fairly and — in an era of reduced budgets — more efficiently."

The five announced *Smart on Crime* principles were: (1) prioritize prosecutions to focus on the most serious cases; (2) reform sentencing to eliminate unfair disparities and reduce overburdened prisons; (3) pursue alternatives to incarceration for low-level, non-violent crimes; (4) improve reentry to curb repeat offenses and re-victimization; and (5) "surge" resources to prevent violence and protect the most vulnerable populations.

The cost of maintaining the federal prison system imposes a heavy burden on taxpayers and, as the Department has acknowledged, results in less funding for the Department's other critical law enforcement and national security missions. For fiscal year (FY) 2016, the Federal Bureau of Prisons' (BOP) budget was $7.5 billion and accounted for 26 percent of the Department's discretionary budget. Moreover, at the end of FY 2016, the BOP operated at 16 percent over capacity.[3] As the Department has previously stated, overcrowding presents critical safety challenges for both BOP staff and inmates and has a negative impact on the ability of the BOP to promptly provide inmate treatment and training programs that promote effective reentry and reduce recidivism.

In implementing *Smart on Crime,* the Department stated that it was designed, in part, to address these budget realities and to chart a course that controls prison overcrowding and spending while ensuring sufficient resources for policing and prosecution, effective prisoner reentry, prevention and intervention programs, and adequate drug treatment.

The first *Smart on Crime* principle changed Department policies to focus more directly on what were identified as the most serious cases that implicated clear, substantial federal interests which, according to the Department, included protecting Americans from national security threats, violent crime, and financial fraud, as well as protecting the most vulnerable members of society. Also, for what the Department described as the first time, district-specific prosecution guidelines

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[2] U.S. Department of Justice (DOJ), *Smart on Crime: Reforming the Criminal Justice System for the 21st Century (*August 2013).

[3] Although that rate is down from the 30 percent over capacity rate as of the end of FY 2014, the Department projects that BOP institutions will remain overcrowded through FY 2017 and beyond.

were required to determine when federal prosecutions should be brought, based on priorities that "will often depend on local criminal threats and needs."[4]

The second *Smart on Crime* principle sought to "reform sentencing to eliminate unfair disparities and reduce overburdened prisons" by revising Department charging policies so that certain defendants who have committed low-level, non-violent drug offenses and who have no ties to large-scale organizations, gangs, or cartels, would no longer be charged with offenses that trigger the imposition of mandatory minimum sentences.[5] According to a memorandum issued by Attorney General Holder on the same day he announced the *Smart on Crime* initiative, prosecutors were instructed to decline to charge the quantity of drugs necessary to trigger a mandatory minimum sentence under Title 21 of the U.S. Code for defendants who met each of the following criteria (the "Holder factors"):

- 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.

The Holder memorandum also provided that prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 that would increase a defendant's sentence based on prior felony drug convictions unless the defendant "[was] involved in conduct that makes the case appropriate for severe sanctions," and it provided a similar but not identical list of factors that prosecutors should have considered in making this decision.[6]

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[4] DOJ, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century (*August 2013).

[5] The second principle of *Smart on Crime* also stated that the Attorney General planned to work with Congress to pass legislation that would reform mandatory minimum laws. We did not review this aspect of *Smart on Crime* as part of this review.

[6] We use "Holder memorandum" to refer to any of the following, by year: Eric Holder, Jr., Attorney General, memorandum to All Federal Prosecutors, Department Policy on Charging and Sentencing, May 19, 2010; memorandum to Heads of Department of Justice Components and United States Attorneys, Federal Prosecution Priorities, August 12, 2013; memorandum to United States Attorneys and Assistant Attorney General for the Criminal Division, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases, August 12, 2013; (Cont'd)

In February 2015, Attorney General Holder stated that "preliminary" data showed that *Smart on Crime* worked "exactly as intended" and had "a real and measurable impact on the decisions made by federal prosecutors from coast to coast."[7] Attorney General Holder stated that data showed federal prosecutors were more selective in bringing certain drug prosecutions; the most serious drug crimes were attracting the highest scrutiny; and the Department experienced a "historic" decline in the number of mandatory minimum sentences sought by federal prosecutors.

In March 2016, the Department reported that U.S. Sentencing Commission (USSC) data for FY 2015 showed that charging decisions made by federal prosecutors were focused on more serious drug cases and federal prosecutors brought fewer indictments carrying a mandatory minimum.[8] Also, according to BOP data, as of September 2016, the federal prison population had decreased by more than 12 percent, or over 26,000 inmates, from its peak in 2013.

Although the Office of the Inspector General (OIG) has conducted reviews related to other aspects of *Smart on Crime,* including our recent review on the use of pretrial diversion and diversion-based court programs discussed below, the OIG had not examined whether *Smart on Crime's* directives had the intended impact on federal charging practices. For this review, we focused on the first two principles of *Smart on Crime*. Specifically, we assessed the 94 U.S. Attorney's Office (USAO) districts' implementation of the initiative's first principle that required the establishment of district-specific policies for prioritizing prosecutions and the second principle that gave prosecutors discretion to not charge drug quantities implicating mandatory minimum sentences in circumstances where the defendants were low-level, non-violent offenders with limited criminal histories, as well as discretion regarding whether to file recidivist enhancements pursuant to 21 U.S.C. § 851 that increases sentences of defendants with prior felony drug convictions.[9]

As the OIG was finalizing this report, we were informed that the Department was preparing to release a new charging and sentencing policy. This policy was

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and memorandum to Department of Justice Attorneys, Guidance Regarding § 851 Enhancements in Plea Negotiations, September, 24, 2014. See Appendices 3–6, respectively, for the memoranda.

[7] DOJ Press Release, "Attorney General Holder Delivers Remarks at the National Press Club," www.justice.gov/opa/pr/attorney-general-holder-delivers-remarks-national-press-club, February 17, 2015 (accessed June 14, 2017).

[8] DOJ Press Release, "New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants," https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and, March 21, 2016 (accessed June 14, 2017).

[9] 2013 Holder memorandum on Charging Mandatory Minimum Sentences and Recidivist Enhancements (see Appendix 5).

21 U.S.C. § 851 requires prosecutors to file one or more notices of prior felony drug convictions in order to trigger enhanced sentences for drug offenses, for example, from a mandatory sentence depending on drug type and quantity of 5 to 10 years, from 10 to 20 years, or from 20 years to life.

released on May 10, 2017, and effectively rescinded the charging and sentencing policies established in the *Smart on Crime* initiative.[10] We did not review the Department's new policy as part of this review. Nevertheless, we believe that the lessons learned from the Department's implementation of the *Smart on Crime* initiative, and the challenges faced in assessing its impact, can be of assistance to the Department when seeking to implement its new and any future charging policies and practices.

In this section, we describe the guidance in the U.S. Attorneys' Manual (USAM), which federal prosecutors look to in the discharge of their duties, and Attorney General Holder's August 12, 2013, memorandum to federal prosecutors regarding charging certain drug cases (the 2013 Holder memorandum). We also discuss the Department's efforts to assess the impact of *Smart on Crime,* particularly focusing on how these reforms have affected the sentences of defendants charged with certain drug offenses since the reforms were launched. Finally, we discuss our previous work related to the *Smart on Crime* reforms.

The USAM and the *Smart on Crime* Charging Principles

For nearly 3 decades, the USAM's "Principles of Federal Prosecution" have guided federal prosecutors in the discharge of their duties and helped to ensure federal cases are prosecuted according to consistent standards.[11] Over the years, the USAM and its Principles of Federal Prosecution have been updated and refined to reflect changes in the law and Department policies.[12]

Originally promulgated by Attorney General Benjamin R. Civiletti on July 28, 1980, the Principles of Federal Prosecution direct that federal prosecutors "should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."[13] In a 1993 memorandum, Attorney General Janet Reno adopted this language but supplemented it with a requirement that federal prosecutors' charging decisions should be based on "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, as consistent with the criminal code, and maximize the impact of

[10] The Department's new charging policy states that it is a "core principle" that all federal prosecutors should charge and pursue "the most serious readily provable offense… By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences." Prosecutors may make exceptions from this policy, based upon careful consideration, with supervisory approval, for reasons that must be documented in the file. Additionally, the new policy provides that prosecutors in most cases should recommend sentences within the advisory guidelines range, again absent supervisory approval for reasons documented in the file. The memorandum indicated that the Deputy Attorney General had been directed to oversee implementation of the new policy and to issue any clarification and guidance he deemed appropriate "for its just and consistent application." See Jefferson B. Sessions III, Attorney General, memorandum to All Federal Prosecutors, Department Charging and Sentencing Policy, May 10, 2017.

[11] USAM, 9-27.001, *et seq*.

[12] USAM, 9-27.300.

[13] USAM, 9-27.001 and 9-27.300.

federal resources on crime."[14] In a September 2003 memorandum, Attorney General John Ashcroft eliminated the requirement of an "individualized assessment" and instructed federal prosecutors that they "must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case."[15]

On May 19, 2010, Attorney General Holder issued a memorandum to all federal prosecutors regarding the Department's policy on charging and sentencing decisions. The 2010 Holder memorandum expressly superseded the 2003 Ashcroft memorandum, scaled back the mandatory language, and stated that a federal prosecutor "should ordinarily charge" the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction. Further, the 2010 Holder memorandum states that this determination must always be made in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal Criminal Code, and maximize the impact of federal resources on crime."[16]

As referenced above, in August 2013, Attorney General Holder announced reforms associated with *Smart on Crime* and concurrently released two memoranda to U.S. Attorneys (USA) and Department components to outline specific policy changes.[17] The first memorandum addressed the initiative's first principle regarding prioritizing prosecutions, and required "all USAs, in conjunction with their law enforcement partners, to develop — or update existing — district specific guidelines for determining when federal prosecutions should be brought and in what priority areas."[18] The second memorandum addressed reforms to charging and sentencing practices, and revised the Department's charging policies regarding drug quantities that trigger mandatory minimum sentences for certain non-violent, low-level drug offenders and provided guidance to federal prosecutors limiting the filing of recidivist enhancements in some drug cases pursuant to 21 U.S.C. § 851.

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[14] Janet Reno, Attorney General, memorandum to Holders of U.S. Attorneys' Manual, Title 9, Reno Bluesheet on Charging and Plea Decisions, October 12, 1993.

[15] John Ashcroft, Attorney General, memorandum to All Federal Prosecutors, Memo regarding Policy on Charging of Criminal Defendants, September 22, 2003, 2.

[16] 2010 Holder memorandum, 3 (see Appendix 3).

[17] 2013 Holder memorandum on Federal Prosecution Priorities and 2013 Holder memorandum on Mandatory Minimum Sentences and Recidivist Enhancements (see Appendices 4 and 5, respectively).

[18] District-specific prosecution guidelines determine when federal prosecutions should be brought and in what priority areas by defining what cases serve a district's substantial federal interests. District guidelines are informed by a number of factors, including both national and local law enforcement priorities.

The Department's Efforts to Assess the Impact of the *Smart on Crime* Charging Policies

In order to assess the impact of the *Smart on Crime* policies, the Department developed a tracking document in 2013 that included the *Smart on Crime* goals; a process to measure the initiative's effects; a timeline for implementation of the initiative; and a series of milestones (completed, in-process, and future). As part of its plan for measuring changes in how defendants were charged, the Department selected metrics to track over the 2 years following the initiative's implementation, including the number of defendants sentenced to mandatory minimums under 21 U.S.C.§ 841.

The tracking document also measured the use of the "safety valve" and the frequency with which low-level, non-violent drug offenders received mandatory minimum sentences.[19] Further, the Department determined the number of sentences enhanced pursuant to 21 U.S.C. § 851. This included an analysis of conviction data on a quarterly basis from FY 2010 to the present, with the end of FY 2013 serving as a baseline measure. In addition to generally requiring USAOs to track data on charging decisions, the Department's tracking document called for USAOs to update their district-specific prosecution guidelines by September 2014, and for the Department to update the USAM to be consistent with the *Smart on Crime* policies by the end of 2014.

Since the Department has not historically collected charging or conviction data, it relied on data collected by the USSC in order to measure the impact of *Smart on Crime.*[20] The USSC is an independent agency located in the judicial branch of government, which was created by the *Sentencing Reform Act of 1984* to, among other things, reduce sentencing disparities and promote transparency and proportionality in sentencing through its promulgation of federal sentencing guidelines. The USSC collects, analyzes, and distributes a broad array of information on federal sentencing practices, including data on the number of defendants who were sentenced to 5- or 10-year mandatory minimum sentences, and 21 U.S.C. § 851 recidivist enhancements according to drug type, but it does not track the charging decisions prosecutors make that underlie those judicial sentencing decisions.

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[19] The "safety valve" refers to 18 U.S.C. § 3553(f), which provides that the court shall impose a sentence without regard to an otherwise applicable statutory mandatory minimum sentence when a defendant meets certain conditions enumerated in the statute and truthfully provides to the government all relevant information and evidence the defendant may have. The other conditions establishing eligibility to be sentenced under the safety valve are similar to, but somewhat more limited than, the Holder factors. Separate from the safety valve, the court also may impose a sentence below an otherwise applicable mandatory minimum sentence based upon a government motion establishing that the defendant has provided "substantial assistance in the investigation or prosecution of another person." U.S.S.G. 5K1.1 and 18 U.S.C. 3553(e).

[20] DOJ, *Smart on Crime* Briefing Metrics "tracking" document, September 2013, 4–5.

Previous Work Examining Aspects of *Smart on Crime*

OIG, Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration, *Audit Report 16-19 (July 2016)*

Smart on Crime reforms outlined a range of options for federal prosecutors to consider to ensure just punishments for low-level, non-violent offenders, including the increased use of alternatives to incarceration such as pretrial diversion and diversion-based court programs. In the OIG's July 2016 report, we found that the availability and use of these programs varied substantially across federal judicial districts, that the Department had not evaluated the effectiveness of the USAOs' use of pretrial diversion or their participation in diversion-based court programs, and that the USAOs did not maintain sufficient reliable data to enable the OIG to comprehensively evaluate the effectiveness of these programs.[21] We also found that the pretrial diversion information that the Executive Office for United States Attorneys (EOUSA) captured may have been underreported or inconsistently reported, and we determined not only that the number of successful pretrial diversion program participants varied greatly among the USAOs, but also that the USAOs' participation in diversion-based court programs was limited.

OIG, Review of the Impact of an Aging Inmate Population on the Federal Bureau of Prisons, *Evaluation and Inspections Report 15-05 (May 2015)*

Pursuant to the second principle of *Smart on Crime,* the BOP expanded its compassionate release criteria for aging inmates. However, the Department significantly limited the number of inmates eligible for this expanded compassionate release policy by imposing several requirements, including that inmates be at least age 65 to be eligible and have served at least 10 years of their sentence. The OIG found in its May 2015 review that only two inmates had been released under this new provision in the year since it was adopted and that, according to institution staff, it is difficult for aging inmates to meet all of the eligibility requirements of the BOP's new provisions. The OIG's analysis showed that if the BOP reexamined these eligibility requirements in a manner consistent with *Smart on Crime* goals, its compassionate release program could result in significant cost savings for the BOP, as well as assist in managing the inmate population.[22]

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[21] In 2016, the U.S. Government Accountability Office (GAO) also found that the Department does not reliably track the use of some alternatives to incarceration, including the use of pretrial diversion. The GAO concluded that, by revising the Department's system to track the different types of pretrial diversion programs and issuing guidance as to when staff are to enter their use into its database, the Department would have more reliable and complete data. See GAO, *Federal Prison System: Justice Has Used Alternatives to Incarceration, But Could Better Measure Program Outcomes,* GAO-16-516 (June 2016).

[22] In 2013, the OIG found that the BOP's compassionate release program had been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided. See DOJ OIG, *The Federal Bureau of Prisons' Compassionate Release Program,* Evaluation and Inspections Report I-2013-006 (April 2013).

U.S. Government Accountability Office, Federal Prison System: Justice Could Better Measure Progress Addressing Incarceration Challenges, *GAO-15-454 (June 2015)*

The U.S. Government Accountability Office (GAO) reviewed the Department's 16 *Smart on Crime* indicators and found that, while they were well-linked to the effort's overall goals, in many cases the indicators lacked other key elements of successful performance measurement systems, such as clarity and context.[23] For example, the GAO found that 7 of the 16 indicators were confusing or did not represent the information the indicator name implied and that 13 of the 16 indicators lacked the needed contextual information to appropriately interpret their results. The GAO recognized that measuring performance can be a challenge, especially for prosecutorial agencies such as the Department, but noted that improved data collection and clearly defined goals and progress measures can assist agencies in developing effective performance measurement systems. The GAO noted that the Department would have been better positioned to more effectively measure its *Smart on Crime* efforts by relying on such options.

Scope and Methodology of the OIG Review

This review examined how the Department established policies following its *Smart on Crime* announcement to prioritize prosecutions to focus on the most serious cases and whether charging practices changed in a manner consistent with *Smart on Crime* principles and implementing memoranda. Our fieldwork occurred from January 2016 through July 2016 and consisted of document reviews, data analysis, and interviews. We analyzed USSC data from FY 2010 through FY 2015 and how the Department collects and analyzes data related to *Smart on Crime.* We also analyzed USAO staffing data from the same period that might be relevant to overall case numbers and charging practices.

We prepared and conducted a comprehensive survey of Criminal Chiefs, supervisory attorneys, and line attorneys in all 94 USAO districts, addressing their district policies, practices, and their views regarding *Smart on Crime.*[24] Additionally, we requested and reviewed information and documentation from each district on its local prosecution guidelines and policies regarding charging mandatory minimums and recidivist enhancements. We also interviewed staff from the Office of the Deputy Attorney General, the Office of Policy and Legislation, the Office of Legal Policy, EOUSA, and the USSC. Additionally, we interviewed USAs and Criminal Chiefs in selected districts, as well as Special Agents in Charge at Federal Bureau of Investigation and Drug Enforcement Administration field offices. See Appendix 1 for more information about the OIG's methodology.

[23] See page 18 for further discussion regarding the 16 *Smart on Crime* indicators.

[24] Our survey contained 32 multiple-choice and open-ended questions regarding how the districts' prosecution priorities and charging policies have been affected by *Smart on Crime* and the issuance of the 2013 Holder memoranda. See Appendix 1 for more information and Appendices 4 and 5 for the applicable memoranda.

RESULTS OF THE REVIEW

While the Department Made Progress Implementing Its *Smart on Crime* Policies, We Found Shortcomings, Including Failures to Update National and Local Policies and a Lack of Communication with Local Law Enforcement Partners, which Could Have Limited the Potential Effectiveness of the Initiative

We found that overall the U.S. Attorney's Office (USAO) districts took steps to implement the *Smart on Crime* policy changes, such as generally updating their local policies and charging practices. However, the Department failed to update the U.S. Attorneys' Manual (USAM) to reflect the *Smart on Crime* policy changes, which could have resulted in federal prosecutors receiving inconsistent guidance when charging certain drug cases. Although most districts developed or updated their policies to reflect the *Smart on Crime* reforms related to charging mandatory minimums and/or recidivist enhancements, some districts did not develop or update their policies as directed, while others developed policies that are in whole or in part inconsistent with *Smart on Crime,* particularly regarding recidivist enhancements. Finally, it is not clear that the USAOs in some districts consulted their law enforcement partners when updating their local prosecution guidelines as required by *Smart on Crime.*

The Department Failed to Update the USAM to Reflect Smart on Crime *Policy Changes, which Could Have Resulted in Federal Prosecutors Receiving Inconsistent Guidance When Charging Certain Drug Cases*

The USAM's Principles of Federal Prosecution are, among other things, designed to "assist in structuring the decision-making process of attorneys for the government," "facilitate the task of training new attorneys in the proper discharge of their duties," and "contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of all United States Attorney's offices."[25] As discussed elsewhere in this report, the Department developed a tracking document with milestones for the completion of tasks related to the implementation of *Smart on Crime.* One of these milestones required the completion of USAM revisions by the end of 2014 to ensure federal prosecutors throughout the country had consistent guidance when charging drug cases. We found that the Department did not update the USAM until January 2017, more than 3 years after *Smart on Crime* was launched.

Prior to January 2017, the USAM contained language directing prosecutors to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," and did not discuss any of the specific directives contained in *Smart on Crime* policies.[26]

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[25] USAM, 9-27.001.

[26] We also found that the USAM did not include or reference additional guidance to federal prosecutors for cases that were charged before the issuance of the 2013 Holder memoranda (see (Cont'd)

While USABook, the internal informational portal for USAOs maintained by the Executive Office for United States Attorneys (EOUSA), did have a page on the *Smart on Crime* initiative with links to the *Smart on Crime* policy and supporting memoranda, we believe that the failure of the Department to update the USAM could have been confusing for federal prosecutors given its importance in guiding prosecutorial discretion and because the *Smart on Crime* policies required them to consider several factors (the "Holder factors") in certain drug cases when charging low-level, non-violent drug offenders with limited criminal histories.

Also prior to January 2017, we found that the USAM did not include the Holder factors that federal prosecutors must consider in cases involving the applicability of Title 21 mandatory minimum sentences based on drug type and quantity, or the similar but somewhat distinct factors they were to consider when deciding whether to file recidivist enhancements.[27] In fact, as to the latter, we found that the USAM appeared to have retained a presumption in favor of the filing of 21 U.S.C. § 851 recidivist enhancements that was inconsistent with the *Smart on Crime* initiative and the Holder memorandum. Specifically, prior to January 2017, Section 9-27.200(B) provided in pertinent part as follows:

> Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. § 851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which the sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney or within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing. Such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming

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Appendices 4 and 5). See also Eric Holder, Jr., Attorney General, memorandum to All United States Attorneys and the Assistant Attorney General for the Criminal Division, Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases, August 29, 2013.

We use "Holder memorandum" to refer to any of the following, by year: Eric Holder, Jr., Attorney General, memorandum to All Federal Prosecutors, Department Policy on Charging and Sentencing, May 19, 2010; memorandum to Heads of Department of Justice Components and United States Attorneys, Federal Prosecution Priorities, August 12, 2013; memorandum to United States Attorneys and Assistant Attorney General for the Criminal Division, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases, August 12, 2013; and memorandum to Department of Justice Attorneys, Guidance regarding § 851 Enhancements in Plea Negotiations, September, 24, 2014. See Appendices 3–6, respectively, for the memoranda.

[27] See Appendix 5 for the applicable 2013 Holder memorandum.

> to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement; (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence; and (3) dismissing a previously filed enhancement.

The Chief of Staff to then Deputy Attorney General Sally Q. Yates told us that federal prosecutors need to follow the USAM, and she acknowledged that the USAM should have been updated to include the *Smart on Crime* charging policies and that it was the Office of the Deputy Attorney General's responsibility to finalize USAM revisions. Nonetheless, the Deputy Attorney General's Chief of Staff said that the lack of USAM revisions should not have prevented Assistant U.S. Attorneys (AUSA) from following the *Smart on Crime* policies because "all AUSAs have a copy of these policies and they are on-line and the policies make clear that they supersede the things in the USAM, which is a compilation of what gets rolled out over time. So, technically, these policies supersede it."

Nevertheless, since AUSAs are required to follow the USAM, which is widely viewed as a seminal guidance document for federal prosecutors across the country, we believe that the Department's delay in updating the USAM could have created a risk that defendants could be charged and sentenced in a manner that was inconsistent with the *Smart on Crime* policy, with defendants serving potentially disparate sentences as a result. This risk could have logically increased if a district failed to update its local prosecution guidelines to reflect the *Smart on Crime* policy changes.

Smart on Crime also called for the USAM to be updated to reflect the requirement that U.S. Attorneys (USA) develop district-specific prosecution guidelines to assist AUSAs in determining when federal prosecutions should have been brought because "each U.S. Attorney is in the best position to articulate the priorities that make sense for that area."[28] However, prior to January 2017, we found that the USAM was not updated to reflect this *Smart on Crime* requirement either. We discuss the efforts the districts made to develop or update their district-specific prosecution guidelines below.

Most Districts Updated or Revised Their Charging Policies Related to Mandatory Minimum Sentences in Certain Drug Cases

According to the Holder memorandum, "prosecutors should continue to ascertain whether a defendant is eligible for any statutory mandatory minimum statute or enhancement."[29] However, in cases involving the applicability of Title 21 mandatory minimum sentences based on drug type and quantity, prosecutors were

[28] See DOJ, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century* (August 2013).

[29] See Appendix 5 for the applicable 2013 Holder memorandum.

instructed to decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant met each of the four specified criteria described above.[30]

The OIG requested prosecution guidelines, policy memoranda, checklists, and worksheets related to charging practices in drug cases from each of the 94 USAOs to determine whether they incorporated the directives contained in the Holder memoranda.

We found that 74 of 94 districts' (79 percent) local charging policies reflected the policy changes outlined in the Holder memoranda for assessing cases prior to indictment, or for filing enhancements. In most cases, districts simply added the Holder memoranda language to their local drug prosecution guidelines, developed a worksheet or checklist to ensure AUSAs considered the Holder factors before making charging decisions, or issued a separate memorandum to AUSAs regarding this policy change.[31]

We further found that in 8 of 94 districts (9 percent), while the districts reported to us that they relied on the Holder memoranda for direction, they had not developed or updated any district policies or other guidance documents to reflect the *Smart on Crime* policy changes. In response to our survey, two Criminal Chiefs from one district said that they noticed fewer drug cases where mandatory minimums were charged for low-level drug defendants. However, two Supervisors and an AUSA from this same district said that they continued to charge and approve charging mandatory minimums for such defendants.

Also, while most survey respondents from one district said that they were less likely to charge or approve mandatory minimums for low-level drug defendants, the Criminal Chief and a Supervisor in this district said that there are more drug cases where such defendants are currently charged with mandatory minimums. Even though this district may be charging drug cases with more mandatory minimum sentences because it is focusing on the most serious defendants, one AUSA from this district said that the initiative "implies that we prosecute low-level drug dealers as a general practice — that assumption is insulting."

In addition, in 4 of the 94 districts (4 percent), the documentation provided to the OIG appeared to be inconsistent with the Holder memoranda in whole or in part. Generally, these districts sent an email or memorandum to their AUSAs that required them to assess their cases in light of the *Smart on Crime* policy, but the districts did not update their existing prosecution guidelines. For example, the

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[30] These criteria are hereinafter referred to as the "Holder factors."

[31] We did not distinguish among these districts based on the method by which they communicated the Holder factors. We do believe that, even where districts have adopted worksheets or checklists, or issued policy memoranda, they also should have revised their district charging policies so that the relevant and most current policy is consistent with district practice and is available to all AUSAs and law enforcement agencies with whom they work in a single, readily accessible location.

current Criminal Division Manual for one of the districts did not reflect the *Smart on Crime* policy changes regarding mandatory minimums, yet this district's prosecution memorandum template, which was updated in January 2015, required an analysis of the Holder factors prior to the indictment of a case.[32]

In addition, one district issued a policy on August 15, 2014, that appeared to us to effectively abrogate the Holder memoranda policy changes for at least some defendants because the district included two additional factors to be considered when determining whether to charge a mandatory minimum sentence. However, in a follow-up interview and subsequent email, the Criminal Chief for this district indicated that the language used to describe the additional factors was "in-artfully drawn," and that the language served in practice to exclude charging mandatory minimums and filing 21 U.S.C. § 851 enhancements against minor offenders such as a drug mule.[33]

Finally, 8 of 94 districts (9 percent) did not initially provide complete information to the OIG to indicate that they had updated their local policies to reflect the *Smart on Crime* policy changes.[34] We found that, generally, these districts' policies predated *Smart on Crime,* made no mention of the Holder memoranda, or contained guidance related only to their internal policies regarding recidivist enhancements. In response to our survey, Criminal Chiefs, Supervisors, and line attorneys for these eight districts said that their districts were less likely under *Smart on Crime* to charge or approve charging low-level defendants with drug quantities that trigger mandatory minimum sentences. Line attorneys responded that they incorporated an analysis of the Holder factors into their prosecution memoranda and templates.

However, the prosecution memorandum template that we reviewed from one of the districts did not include any language to indicate that such an analysis was required or occurred on a regular basis. In fact, the prosecution guidelines provided by this district regarding charging, plea agreements, and sentencing was dated September 2010, predating the 2013 Holder memoranda. Although this district provided a "mandatory minimum checklist" dated December 29, 2014, that included the Holder factors, its Criminal Chief indicated in response to our

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[32] As a result of the OIG's inquiry regarding this district's prosecution guidelines, this district removed language from its prosecution guidelines that still allowed AUSAs to file 21 U.S.C. 851 enhancements and use them as leverage in plea negotiations or as a trial penalty.

[33] Of course, many such defendants might have been eligible for a sentence below an otherwise applicable mandatory minimum based either upon the safety valve or a government motion based upon substantial assistance. It is beyond the scope of this review to determine whether, in practice, the implementation of the *Smart on Crime* principles significantly changed sentencing outcomes for such individuals.

[34] Throughout the OIG's work on this report, we followed up with those districts that failed to respond to our requests for information to attempt to obtain the most complete information for our analysis. See Appendix 1 for more information on our methodology.

September 2016 follow-up request that the district had not formally updated its prosecution guidelines, as required.

Most Districts Updated or Revised Their Charging Policies Related to Recidivist Enhancements

The Holder memorandum stated that "prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions." It further provided that, "when determining whether an enhancement is appropriate, prosecutors should have considered a list of factors similar, but not identical to the Holder factors for deciding whether to charge mandatory minimum-inducing drug quantities.[35]

In addition, the Department policy as set forth in the September 2014 Holder memorandum prohibited federal prosecutors from using recidivist enhancements "for the sole or predominant purpose of inducing a defendant to plead guilty" and encouraged them to make the § 851 filing decision at the time the case is charged or soon after.[36]

We found that 70 of 94 districts (74 percent) incorporated the *Smart on Crime* recidivist enhancement policy changes into their district prosecution guidelines or policy memoranda. In most cases, the districts updated their prosecution guidelines, policy memoranda, templates, or worksheets to reflect the *Smart on Crime* policy. However, we found that 14 districts' prosecution guidelines regarding recidivist enhancements appeared to be inconsistent with the Holder memoranda in whole or in part, and 10 others either provided documentation to the OIG that did not reflect *Smart on Crime* policy changes with respect to 21 U.S.C. § 851 recidivist enhancements or told us that they did not update their policies, but that they nevertheless relied on the 2013 Holder memoranda.

Specifically, some of the policies we reviewed allowed prosecutors to use recidivist enhancements as a trial penalty, thereby inducing a defendant to plead guilty. For example, one district's guidance stated that "in order to trigger enhancement provisions concerning multiple drug convictions or dangerous drug offenders, statutes require the Government to file an 'Enhancement Information' prior to the entry of a plea of guilty or the selection of a jury." While "dangerous drug offenders" are the type of defendants discussed in the Holder factors that would be subject to "severe sanctions," under the *Smart on Crime* guidance, the § 851 filing decision should have occurred at the time the case was charged or soon after, and not simply prior to the entry of a guilty plea or before jury selection, which, while compliant with the statute, could have opened the door to potential misuse of the enhancement. Similarly, another district's prosecution guidelines allowed prosecutors to file enhancements "before trial or guilty plea, and also

[35] See Appendix 5 for the applicable 2013 Holder memorandum.

[36] See Appendix 6 for the 2014 Holder memorandum.

before *Jencks* material was provided to the defense. Timely guilty pleas may warrant agreement not to file an 851."[37]

In addition, we found it more problematic that two districts developed additional factors for an AUSA to consider when making enhancement decisions that may have been contrary to the spirit and intent of the *Smart on Crime* policy regarding recidivist enhancements. In one of the districts, a memorandum on 21 U.S.C. § 851 enhancements appropriately discussed the Holder factors, but this district's § 851 approval form contained 15 other factors, two of which required AUSAs to consider a possible guilty plea when making § 851 recidivist enhancement determinations.

Four of 94 districts (4 percent) provided documentation to the OIG that did not reflect *Smart on Crime* policy changes with respect to 21 U.S.C. § 851 recidivist enhancements. The USAs of two districts told us in interviews that they were being much more selective when using recidivist enhancements, yet the documentation provided did not reflect the policy changes. One of the USAs told us that in the past this district used these enhancements as a bargaining tool; however, the district no longer uses them to negotiate plea agreements, "since that is now against the rules." The other USA told us that the district "never used it as a bargaining tool, but used it to charge all eligible defendants with the enhancements."[38]

The responses to our survey for the remaining two of these four districts indicated that AUSAs in these districts either reviewed the Holder memoranda at intake or when drafting charges, referred to the specific Holder factors that are incorporated in their districts' prosecution guidelines, or included the basis for filing a 21 U.S.C. § 851 enhancement in pre-indictment prosecution memoranda.[39]

Finally, the six remaining districts reported to the OIG that they followed the Holder memoranda, but they did not provide any supporting documents to show that the guidance regarding 21 U.S.C. § 851 recidivist enhancements was communicated in their districts. Responses to our survey from these districts were split, indicating that they either updated their prosecution priorities or that their

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[37] "Jencks" or "Jencks material" refers to evidence used during the course of a federal criminal prosecution in the United States that usually consists of documents relied upon by government witnesses who testify at trial. The material is described as inculpatory, favoring the government prosecution of a criminal defendant. "Jencks" is typically provided to the defense in advance of a witness's testimony at trial.

[38] In a follow-up discussion with the Deputy Criminal Chief for this district, we were told that this district rarely files recidivist enhancements and that criminal AUSAs were trained on the requirements for filing these enhancements in an October 2014 training session.

[39] We reached out to two of the districts for clarification regarding these issues. The Criminal Chief for one of the districts said AUSAs draft an email to include the basis for filing a 21 U.S.C. § 851 enhancement. Also, the USA and the First Assistant U.S. Attorney reviewed the district's prosecution guidelines when the Holder memorandum was issued and believed that it satisfied the Holder memorandum, but they planned to update their local policies to include specific guidance regarding recidivist enhancements. The Deputy Criminal Chief for the other district told us in an email that "the unwritten policy is that the factors in the Narcotics Section Charging Policy [which discusses the Holder factors] were used in determining whether to file 851 enhancements."

district already followed policies similar to Smart on Crime policy when making § 851 enhancement determinations.

Most Districts Required Supervisory Approval for Drug Cases in Which a Mandatory Minimum Is Charged or a Recidivist Enhancement Is Filed

After setting forth the factors to be considered in charging both mandatory minimum triggering drug quantities and recidivist enhancements, the 2013 Holder memorandum "reminded" prosecutors "that all charging decisions must be reviewed by a supervisory attorney to ensure adherence to the Principles of Federal Prosecution" and the policies set forth in the 2010 and 2012 memoranda. We found that most districts required supervisory approval before a case could be indicted with a drug quantity that will trigger a mandatory minimum sentence (84 percent of districts) and before an AUSA could file a 21 U.S.C. § 851 recidivist enhancement (89 percent of districts). Supervisory approval is generally required from the AUSA's direct supervisor, the Branch Chief, Criminal Chief and/or Deputy Criminal Chief, a Senior Litigation Counsel, or, in some cases, the First Assistant U.S. Attorney or the USA.

However, in some districts, while supervisory approval was required, the documents we were provided did not specify this requirement. When we requested clarification on this issue, district officials told us that all indictments triggering mandatory minimums or filing recidivist enhancements required supervisory approval. Some of the districts we spoke with provided additional worksheets, indictment approval forms, or checklists to illustrate the requirement for supervisory approval. Other districts told us that they would update their policies in the future to ensure this requirement is documented in their district policies. As noted above, we believe that the Department should ensure that supervisory approval is required, communicated, and documented in district policies to reflect the current Department policy.

While Most USAOs Updated Their District Guidelines, It is Not Clear Whether All USAOs Consulted with Their Law Enforcement Partners as Required by the Smart on Crime *Initiative*

To ensure that federal law enforcement priorities align with the prosecution goals of all districts, *Smart on Crime* policy required that USAs develop or update existing district-specific guidelines, "in conjunction with their law enforcement partners."[40] In response to our survey of all 94 districts, 51 of 64 districts' Criminal Chiefs (80 percent) who responded to this question indicated that they worked in conjunction with their law enforcement partners as required by *Smart on Crime* policy. However, the remaining 13 districts (20 percent) responded that they did not work with their law enforcement partners to develop or revise district guidelines (9 districts) or that they were not sure (4 districts). Also, 3 of the 14 USAs

[40] See Appendix 4 for the applicable 2013 Holder memorandum.

(21 percent) that we interviewed said they could not recall working with law enforcement to develop or update their prosecution guidelines.[41]

Further, five of 25 Drug Enforcement Administration (DEA) and Federal Bureau of Investigation (FBI) Special Agents in Charge (SAC) that we interviewed (20 percent) said that they could not recall having worked with the USAs in their district to develop or revise district guidelines that align with *Smart on Crime.* We note that an additional 14 of the 25 SACs (56 percent) had started in their positions after the Department implemented *Smart on Crime* and were not aware of whether the USAs in their district had worked with the previous SAC to develop or revise district guidelines. While it is possible that discussions between USAs and SACs regarding districts' prosecution priorities may have occurred on an ongoing basis, we found that three of the SACs we spoke with had not become familiar with *Smart on Crime* until they prepared for our interview. For example, an FBI SAC we interviewed stated that he did not learn about *Smart on Crime* until the week before our interview.

Example of Strong Collaboration – Southern District of Florida

Based on our review of the 94 USAO districts' policies, we found that the Southern District of Florida was an example of a district that worked particularly collaboratively with its state, local, and federal law enforcement partners in updating its district-specific prosecution guidelines and training its staff on *Smart on Crime* policy changes. This USAO's leadership consulted with its law enforcement partners and determined that the district's prosecution guidelines, while broad, were consistent with the Holder memoranda and allowed the district to handle new priorities as they arose. The district also provided information to the OIG noting its efforts to collaborate with federal law enforcement partners, including the DEA; the FBI; the Bureau of Alcohol, Tobacco, Firearms and Explosives; the U.S. Secret Service; and others by providing training at various management conferences and interagency working groups regarding the development of district-specific prosecution guidelines consistent with *Smart on Crime.*

By failing to work with their federal law enforcement partners to develop or update district-specific prosecution guidelines, or to keep these partners informed of significant changes in Department policy, districts were not only out of compliance with the Holder memoranda, but they could have risked creating a disconnect between investigative agencies and the prosecutors who handle their cases, which may have led to the use of limited federal law enforcement resources on investigations that ultimately may not have resulted in expected federal prosecution. Conversely, by working with law enforcement partners to develop or update district-specific prosecution guidelines and by keeping them informed of any major changes in Department policy, districts can maximize resources and focus on the most serious investigations (see the text box above). While the charging and sentencing practices set forth in the *Smart on Crime* initiative have been effectively rescinded by the Attorney General's May 10, 2017, memorandum, we believe that it remains important for the Department to ensure appropriate coordination between federal prosecutors and their law

[41] Three USAs that we interviewed were appointed after the Department had implemented *Smart on Crime* and speculated that the previous USA in their district may have had these discussions with their district law enforcement partners.

enforcement partners in order to target prosecution efforts at the most serious "local criminal threats and needs."

The Department's Ability to Measure the Impact of *Smart on Crime* or Other Charging Policies Has Been Limited because Data on Charging Decisions Has Not Been Consistently Collected

The first two principles of *Smart on Crime* directed federal prosecutors' priorities and charging decisions. However, senior Department officials told us that the EOUSA case management system, the Legal Information Office Network System (LIONS), would not be useful for tracking *Smart on Crime's* impact on charging decisions, particularly regarding what would otherwise be safety valve cases and recidivist enhancements.[42]

Department officials said that LIONS is a user-driven system and that its core functions involve tracking information such as when a case was opened, when it was charged, what statute was charged, and what sentence the defendant received.[43] While, for example, LIONS allows federal prosecutors to track information on recidivist enhancements that are charged, federal prosecutors are not required to track this data.

A June 2015 U.S. Government Accountability Office (GAO) report found that the Department had not established an effective performance measurement system for *Smart on Crime*.[44] In April 2014, the Department had identified 16 categories of data, or "key indicators," to assess the effectiveness of *Smart on Crime.* Of those key indicators, 10 involved data collected by the U.S. Sentencing Commission (USSC) relevant to *Smart on Crime* principles on prosecutorial priorities and charging policies, such as the number of drug defendants who received mandatory minimum sentences, the number of drug defendants who possessed a weapon, and the number who received a recidivist enhancement.[45]

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[42] As discussed above, the safety valve allows a judge to sentence drug offenders below the mandatory minimum term if certain conditions, similar to but somewhat more limited than the Holder factors, are met.

[43] LIONS is the database used by the 94 USAOs to track case information. According to the LIONS user manual, the database's functions allow offices to meet notification requirements for victims and witnesses, create caseload calendars, monitor workloads, make case assignments, and respond to data inquiries. Also, EOUSA uses LIONS data to respond to statistical information requests from the Office of Management and Budget, Congress, and the public. Further, LIONS data provides the figures for the Attorney General's Annual Report and the United States Attorneys' Annual Statistical Report and is used to formulate budget estimates, justify budget requests, and allocate resources, including personnel, among the various districts.

[44] GAO, *Federal Prison System: Justice Could Better Measure Progress Addressing Incarceration Challenges*, GAO-15-454 (June 2015).

[45] Specifically, the ten indicators were: "(1) Number of defendants subject to (sentenced to) mandatory minimum sentence under 21 U.S.C. § 841; (2) (Number of defendants sentenced to) no mandatory minimum; (3) (Number of defendants sentenced to) 5-year mandatory minimum; (4) (Number of defendants sentenced to) 10-year mandatory minimum; (5) No mandatory minimum plus safety valve (number of drug defendants not charged with an offense carrying a drug mandatory minimum that also qualified for the safety valve); (6) Mandatory minimum plus safety valve (number of drug defendants charged with an offense carrying a drug mandatory minimum that also qualified for the safety valve);

(Cont'd)

The Department, however, did not publicly specify how it would interpret these indicators to assess whether *Smart on Crime* was successfully implemented. The GAO recommended that the Department establish target directions for the indicators to better reflect elements of effective performance measurement systems, but the Department did not concur with this recommendation, arguing that prosecutors must charge cases in a manner appropriate to the individual circumstances of cases rather than with the goal of advancing national numerical targets.

Using these same indicators, however, in March 2016, the Department reported that its assessment of trends in USSC data showed that *Smart on Crime* was having the desired impact.[46] Specifically, the Department reported, based on these sentencing trends, that federal prosecutors:

- Took on fewer and more serious drug cases: The number of drug offenders convicted decreased nationwide, while the percentage of drug offenders with a weapon or an aggravating role increased.

- Referred more safety valve cases to state prosecutors: The percentage of drug offenders who qualified for the safety valve (first-time, non-violent drug offenders whose cases did not involve guns) decreased.[47]

- Charged fewer mandatory minimums: The percentage of offenders sentenced to mandatory minimum terms decreased even while prosecutors pursued more serious cases.

- Experienced no negative impact on defendant cooperation with the government: The rates of drug offenders pleading guilty and cooperating with the government to make cases against others stayed constant. Federal prosecutors' ability to obtain defendants' cooperation did not decline as a result of the reduced number of mandatory minimums charged and recidivist enhancements filed.

While we agree with the Department that certain USSC data points can be used to draw inferences as to how *Smart of Crime* is affecting sentencing proceedings, we do not believe that the USSC data is a substitute for the Department collecting data that it is uniquely positioned to gather and that would allow it to undertake a more consequential and meaningful analysis of the impact of *Smart on Crime* or other charging policies. There are significant limitations on the extent to which USSC data can inform the Department and the public as to

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(7) Number of drug defendants with weapon involvement; (8) Number of drug defendants with an aggravating role adjustment; (9) Number of drug defendants with a mitigating role adjustment; and (10) Number of 851-enhanced charges (number of 851-enhanced mandatory minimum sentences)." The remaining six indicators addressed other *Smart on Crime* principles such as reentry programs and drug diversion courts.

[46] DOJ Press Release, "New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants," March 21, 2016.

[47] We did not examine federal referrals of cases to state prosecutors or state sentencing data, which would help to confirm whether low-level drug offenders were referred more often to state prosecutors. Further, we are unaware of any such analysis by the Department. Absent such information, we are unable to assess the Department's claim that a decline in the number of federal safety valve cases means that federal prosecutors referred more safety valve eligible cases to state prosecutors.

(a) whether prosecutorial charging decisions are being made consistent with *Smart on Crime* or other charging policies and (b) the impact of *Smart on Crime* or other charging policies on sentencing outcomes. Perhaps the most significant limitation is that the USSC collects data from judges on the sentencing decisions that they have made but does not receive data from prosecutors about their charging decisions.

Thus, while the USSC data informs the public on how judges sentenced defendants based on charges that were actually brought by prosecutors *and* that ultimately resulted in a conviction, the data does not allow for any assessment as to charges that (a) could have been but were not brought by prosecutors or (b) did not result in a sentencing proceeding (i.e., where a defendant was acquitted on all counts or the charges were dismissed). Similarly, the USSC does not have data on what a convicted defendant's minimum sentence would have been had prosecutors sought a mandatory minimum charge or recidivist enhancement at sentencing. Accordingly, we believe that the Department's limited collection of relevant and reliable data on charging decisions presents challenges for its and the public's further assessment of the implementation and effectiveness of *Smart on Crime* or other charging policies.

USSC Data Reflects that There Have Been Shifts in Drug Sentencing Consistent with *Smart on Crime's* First Two Principles, but Some Regions and Districts Have Diverged from National Trends

According to the Department's statements at the time of the *Smart on Crime* announcement, the first two principles of *Smart on Crime* were designed to focus scarce federal law enforcement resources on the most serious cases that clearly align with federal interests and to reserve the most severe penalties in drug cases for serious, high-level, or violent offenders. Our analysis of USSC and other data shows that drug sentences have shifted, in some areas substantially, in a manner consistent with these first two *Smart on Crime* principles. Specifically, we found that during the implementation of *Smart on Crime*, there were fewer mandatory minimum sentences imposed in drug cases, more drug offenders received weapon or aggravating role enhancements at sentencing, and there were fewer sentencings of low-level drug offenders federally. Additionally, while there was limited data available for analysis, we also found indications of a reduction in the number of recidivist enhancements sought by prosecutors at sentencing.

Another goal of the first two *Smart on Crime* principles was to reduce the burden on federal prisons that were over capacity. We noted that the federal prison population began to decline in 2014 for the first time in over 30 years. While this decline coincided with the announcement of *Smart on Crime,* it also coincided with the USSC's adoption of its Drugs Minus Two guidelines amendment, which lowered the base offense level by two levels for most drug offenses, and its decision to make that guideline amendment retroactive, both of which became effective on November 1, 2014.[48] As evidenced by the data developed by the USSC regarding

[48] The Federal Sentencing Guidelines assign each offense a base offense level, ranging from 1 to 43, primarily determined by the seriousness of a particular offense. More serious types of crime (Cont'd)

the impact of its guideline decisions, the decisions not only had an immediate impact on thousands of pending federal sentencings involving drug offenses, but also impacted the release date for thousands of inmates convicted of drug sentences that had already been imposed.[49] By contrast, the Department did not have sufficient data regarding prosecutorial charging decisions to allow us to analyze whether the Department's policy changes had an immediate effect on the federal prison population or whether that effect would be seen over a period of time. Accordingly, we did not undertake such an evaluation.

USSC Data Indicates that the Implementation of Smart on Crime's *First Two Principles Had an Impact at the National Level*

The OIG used USSC data and the Department's list of *Smart on Crime* key indicators to conduct an analysis that covered several of the data categories mentioned in the Department's March 2016 press release. We found similar indications that *Smart on Crime* may have had the nationwide effects desired by the Department when it announced the initiative in 2013.[50]

Fewer Mandatory Minimum Convictions in Drug Cases

As part of *Smart on Crime,* the Department directed federal prosecutors to decline to charge the quantity of drugs necessary to trigger a mandatory minimum sentence in cases when certain factors were present.[51] We found that there has been a significant increase in the percentage of drug offenders not sentenced to mandatory minimum sentences nationally since *Smart on Crime* was announced. Specifically, the percentage of federal drug offenders not sentenced to a mandatory minimum term rose from 39.7 percent in FY 2012 to 49.9 percent in FY 2014. By FY 2015, over half of all federal drug offenders, 54.2 percent, were sentenced with

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have higher base offense levels, which are then increased or decreased by specific offense characteristics that may be typical of the offense. Other adjustments discussed below, such as those made for aggravating or mitigating roles, can also affect the final adjusted offense level for a particular defendant. The total adjusted offense level for the offense or offenses of conviction and the defendant's criminal history category are used to arrive at the sentencing guideline range, which the sentencing court considers in imposing sentences, subject to any applicable mandatory minimum sentence as discussed herein, or to any statutory maximum that may apply.

[49] See § 2D1.1 of the Federal Sentencing Guidelines for the complete Drug Quantity Table. The amendment to the Federal Sentencing Guidelines became effective on November 1, 2014.

[50] DOJ Press Release, "New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants." USSC data provided to the OIG yielded slightly different figures in our analysis than the Department cited in its press release, but these variations were minor. The variations were caused by differences in methodology between the USSC's publication of data in its sourcebook, which was also the methodology that the Bureau of Justice Statistics used to provide data to the OIG, and the data the USSC provided to the Department. These methodological differences included the exclusion of cases missing guideline information and offenders sentenced for simple possession, counting mandatory minimums of less than 5 years as if they were not mandatory minimums, and the inclusion of mandatory minimums over 10 years with the count of 10-year mandatory minimums.

[51] See Appendix 5 for the applicable 2013 Holder memorandum.

no mandatory minimum, according to USSC data.[52] Conversely, USSC data shows that the percentage of 5-year mandatory minimum cases decreased, from 28.0 percent of federal drug offenders' sentences in FY 2012 to 20.8 percent by FY 2015. Similarly, the percentage of federal drug offenders sentenced with a 10-year mandatory minimum or greater, typically based on larger quantities of drugs, fell from 32.4 in FY 2012 to 25.0 in FY 2015.

In order to further evaluate whether *Smart on Crime* had an effect on prosecutors' charging decisions, we examined data on the rates of defendants with mandatory minimum sentences who received relief under the safety valve provision and the rates of defendants with two criminal history points at higher base offense levels who received a mandatory minimum sentence. Additionally, we analyzed prosecutors' survey responses regarding their charging practices.

- **Mandatory Minimum Convictions and Safety Valve Relief**

The safety valve is a statutory exception for drug offenders who meet certain conditions similar to, but more limited than, the Holder factors. Under the safety valve provision, even if a defendant is charged with and convicted of a mandatory minimum offense, a sentencing judge is not required to impose a mandatory minimum sentence if the defendant meets the safety valve conditions. The most significant difference between the safety valve conditions and the Holder factors is that, under the safety valve, defendants can have no more than one criminal history point, while the *Smart on Crime* policy applied to drug offenders who do not have "a significant criminal history," which will "normally be evidenced by three or more criminal history points," but may involve more or fewer depending on the nature of the prior convictions.

Although there is overlap between the safety valve and the Holder factors, some defendants who appeared to have met the Holder factors' criteria might still have received safety valve relief at sentencing rather than benefiting from *Smart on Crime* at the charging stage of a case. For example, when a defendant is determined to have one criminal history point, a prosecutor could determine based upon the defendant's prior conviction record that the nature of the defendant's prior convictions constituted a significant criminal history, and therefore, the prosecutor decided to charge the defendant with an offense carrying a mandatory minimum sentence, while the judge

[52] We note that the most common types of primary drug offenses shifted over this time period and that each drug requires different quantities to trigger a mandatory minimum sentence. For example, the percentage of federal drug convictions involving methamphetamine and heroin rose every year from FY 2010 to FY 2015, while the percentage involving cocaine fell. We observed that methamphetamine offenders experienced the largest drop in the rate of 10-year mandatory minimum sentences after *Smart on Crime,* with 60.5 percent of methamphetamine offenders receiving 10-year mandatory minimums in FY 2012 but only 35.4 percent receiving 10-year mandatory minimums in FY 2015. Additionally, from FY 2012 to FY 2015, the percentage of methamphetamine offenders who were sentenced with no mandatory minimum of any length rose from 16.7 to 45.5 percent. We were unable to determine what effect, if any, this shifting of the types of drugs being prosecuted had on the Department's charging decisions separate and apart from the impact of *Smart on Crime.*

might nevertheless determine that the defendant's criminal history is not that significant and grant the defendant relief under the safety valve provision.

We found that there has been a substantial decrease in the percentage of convictions where the defendant received the safety valve at sentencing since *Smart on Crime* was announced. Given the data cited previously showed a decrease in the percentage of drug offenders being convicted of mandatory minimum offenses, this decrease is to be expected given that there are fewer mandatory minimum offenders who need the benefit of the safety valve. We also found a substantial increase since the implementation of *Smart on Crime* in the percentage of offenders who were not eligible to receive safety valve relief but who nevertheless were not convicted of a mandatory minimum offense, a category that would include defendants who met the Holder factors and were charged in a manner consistent with *Smart on Crime* principles.[53]

Nevertheless, the percentage of drug offenders who received the safety valve in FY 2015 was still significant, at just over 13 percent. We had expected this amount to be lower because most of these defendants would also have met the criteria of *Smart on Crime* and therefore would have been within the universe of defendants that the Holder memorandum determined should not have been charged with a mandatory minimum offense by the prosecutor. However, given the absence of Department charging data, we were unable to assess the reasons why these defendants were charged with mandatory minimum offenses. See Table 1 for the percentage of drug offenders who received mandatory minimums and who qualified for the safety valve during the years for which the OIG received USSC data, FY 2010 through FY 2015.

Table 1

Percentage of Drug Offenders Receiving Mandatory Minimums or the Safety Valve, FY 2010 – FY 2015

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
% No Mandatory Minimum Conviction/Would Not Have Been Safety Valve Eligible	21.5%	23.4%	24.6%	27.2%	32.3%	34.9%
% Mandatory Minimum Conviction/Not Eligible for Safety Valve	41.5%	38.6%	36.9%	38.1%	34.4%	32.9%
% No Mandatory Minimum Conviction/Would Have Been Safety Valve Eligible	13.3%	15.0%	14.7%	10.2%	17.2%	19.1%
% Mandatory Minimum Conviction/Received Safety Valve	23.7%	23.0%	23.8%	24.5%	16.1%	13.1%

Source: OIG analysis of USSC data

[53] The safety valve does not repeal or eliminate mandatory minimum sentences. See Appendix 7 of this report and 18 U.S.C. § 3553(f).

Table 1 reflects that charging decisions shifted in FY 2014 and 2015, after *Smart on Crime.* Specifically, in FY 2010, prior to *Smart on Crime,* the largest category of drug offenders (41.5 percent) were those sentenced with mandatory minimums who did not receive safety valve relief, followed by about half as many offenders who obtained relief from mandatory minimums through the safety valve (23.7 percent). With these two categories combined, almost two-thirds of all federal drug cases sentenced in that year resulted in the imposition of mandatory minimum sentences or would have done so absent relief under the safety valve.

However, by FY 2015, safety valve relief had become less essential in helping offenders avoid mandatory minimums. As a result, safety valve relief from mandatory minimums dropped over 10 percentage points, to only 13.1 percent of FY 2015 drug offenders, while defendants given mandatory minimum sentences fell to 32.9 percent, meaning that with these two categories combined, less than half of all federal drug cases resulted in mandatory minimum sentences or would have done so without application of the safety valve. Similarly, offenders who would not have been eligible for the safety valve and who nevertheless were not charged with an offense triggering a mandatory minimum made up the largest category of drug convictions (34.9 percent).

- **Mandatory Minimum Rates for Offenders with Two Criminal History Points**

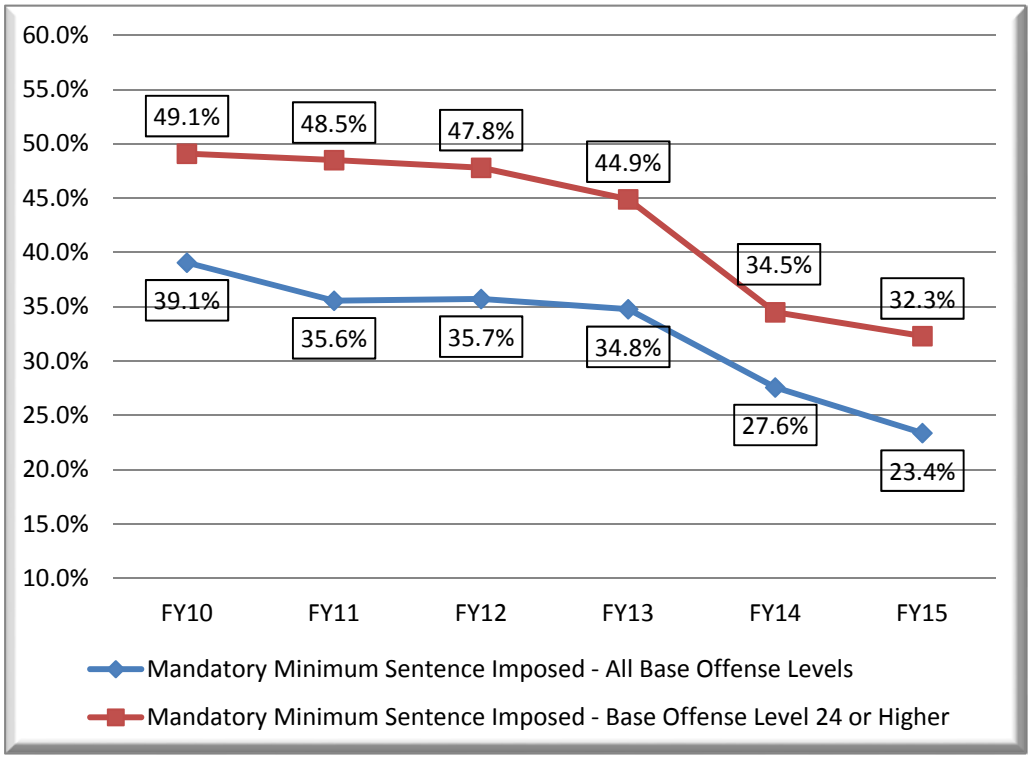
In addition, we analyzed the mandatory minimum sentence rates of drug offenders who were sentenced with two criminal history points and at base offense levels 24 or higher.[54] As stated previously, these offenders would not have been eligible for relief under the safety valve provision due to their criminal history but could have fallen within the *Smart on Crime* criteria. Therefore, these drug offenders potentially stood to benefit the most from *Smart on Crime* policies because they are a category of drug offenders who previously might have received a mandatory minimum sentence but were able to avoid this under the initiative. We found that a higher percentage of these offenders were sentenced without mandatory minimums in FY 2014 and FY 2015 compared to the previous fiscal years. See Figure 1 below for the percentage of offenders with two criminal history points who were sentenced with mandatory minimums.[55]

[54] Drug offenders with two criminal history points comprised 1,125 offenders sentenced with a primary drug offense on average each fiscal year.

[55] This analysis did not exclude offenders who received an adjustment in their sentence for providing substantial assistance since the rate of these offenders remained constant throughout our scope.

Figure 1

Percentage of Offenders with Two Criminal History Points and Base Offense Level 24 or Higher Receiving Mandatory Minimums FY 2010 – FY 2015



Source: OIG analysis of USSC data

- **Survey Data on Charging Drug Quantities That Trigger Mandatory Minimums**

The OIG's survey data also suggests that charging practices changed since *Smart on Crime.* Nearly half of the respondents to the OIG's survey (49.4 percent, or 404 of 817 AUSAs) stated that the *Smart on Crime* criteria affected their charging decisions with regard to low-level, non-violent drug offenders without significant criminal histories.[56] Specifically, these prosecutors and supervisors responded that they were now less likely to recommend or approve charging drug quantities that would trigger mandatory minimum sentences for low-level drug defendants. A further 19.7 percent of the survey respondents (161 of 817 AUSAs) stated that it was already their practice prior to *Smart on Crime* not to charge low-level, non-violent defendants with mandatory minimum-triggering drug quantities.

[56] The 817 respondents were those AUSAs who responded substantively to the question regarding mandatory minimums. This number excludes those respondents who skipped the question or marked "not applicable" as an answer. See Appendix 2 for a summary of the OIG's survey results.

The Prioritization of Federal Drug Prosecutions

As noted above, the Department had previously cited several metrics which showed that its *Smart on Crime* policy changes met their intended outcomes and that the Department prosecuted fewer but more serious cases to better prioritize resources. These metrics included a drop in the overall number of federal drug convictions, a rise in the percentage of offenders with a weapon or aggravating role as an indication that more serious offenders were being prosecuted, and a drop in the percentage of offenders who were eligible for the safety valve as an indication that fewer low-level offenders were being prosecuted.

Our analysis found these trends as well. However, the metrics the Department used and the available sentencing data limited our ability to draw definitive conclusions regarding the influence the *Smart on Crime* charging policies had because these trends could be influenced by a number of other factors and do not include information on the reasons for charging decisions. We discuss our analysis of the metrics and their limitations below.

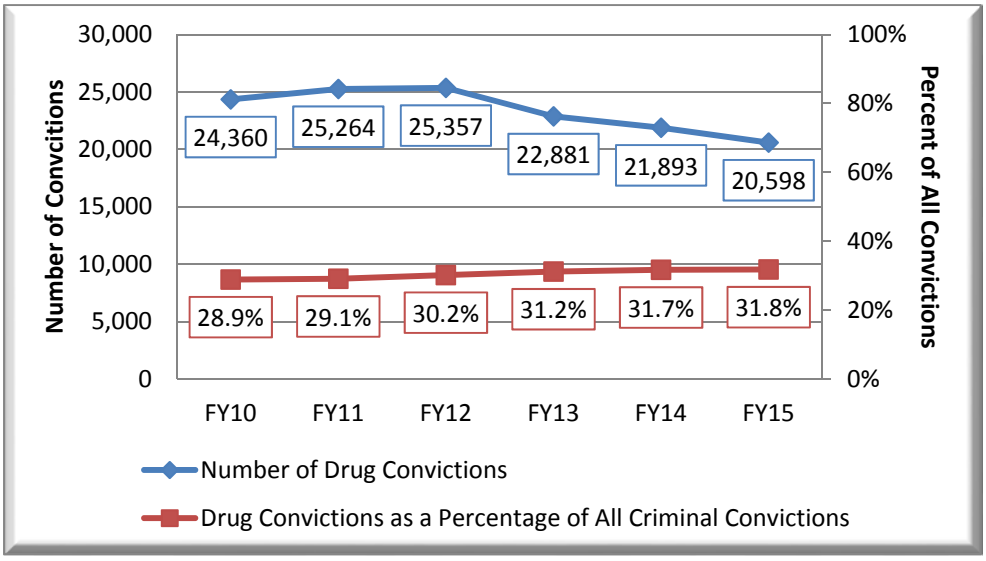
- **The Number of Federal Drug Convictions**

We found that the overall number of federal drug convictions decreased by 18.8 percent between FY 2012 and FY 2015, but this decrease occurred within the context of shifting trends in federal criminal cases as whole, making it difficult to identify the causes for the decrease. For example, during this period, the number of all federal criminal convictions decreased by 15.6 percent and drug cases as a percentage of all criminal cases actually increased. According to the USSC, in FY 2010, defendants with a drug crime as the primary offense accounted for 28.9 percent of federal convictions, rising to 30.2 percent in FY 2012 and then to 31.8 percent by FY 2015. In comparison, the next largest offense category, immigration, made up 34.4 percent of federal convictions in FY 2010 but decreased to 32.2 percent in FY 2012 and then to 29.3 percent by FY 2015. See Figure 2 below for the number of federal drug offenders during the years for which the OIG received USSC data, FY 2010 through FY 2015.[57]

[57] Department and USSC officials we interviewed also suggested that declines in USAO attorney staffing levels resulting from a Department hiring freeze, as well as the 2013 budget sequestration, may have had an influence on trends in the number of federal drug convictions over our period. We found that a third of districts were understaffed by 10 percent or more on average from FY 2012 through 2015. However, the OIG's analysis of USAO staffing data did not find a statistically significant correlation between understaffing in the districts and changes in the number of drug cases.

Figure 2

Number of Federal Drug Convictions and the Percentage of Drug Convictions to All Federal Criminal Convictions FY 2010 – FY 2015



Source: OIG analysis of USSC data

- **More Serious Drug Offenders Prosecuted**

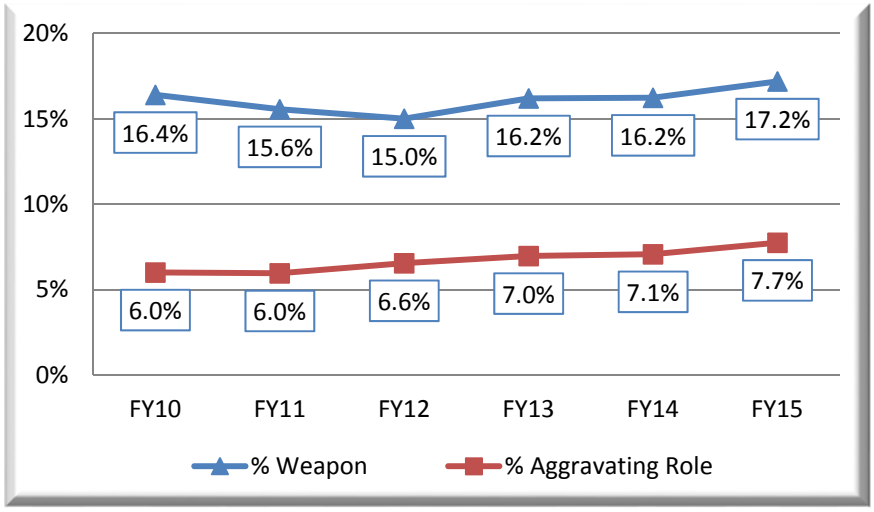
We found that the percentage of drug defendants who possessed a weapon rose from 15 percent in FY 2012 to 16.2 in FY 2014, and to 17.2 percent in FY 2015. The percentage of defendants with an aggravating role in the offense, such as leadership of a drug conspiracy, under the sentencing guidelines also increased, from 6.6 percent of drug offenders in FY 2012 to 7.1 percent in 2014 and 7.7 percent in 2015.[58] See Figure 3 below for the percentage of drug offenders with a weapon or aggravating role from FY 2010 through FY 2015.[59]

[58] In determining a defendant's offense level, adjustments may be made for the defendant having an "aggravating" or "mitigating" role. The aggravating role adjustment relates to whether the defendant is an organizer, manager, or leader of the criminal activity at issue. If the defendant has such a role, the adjusted offense level can be increased by up to four offense levels.

[59] The percentage of defendants who received a mitigating role adjustment of two to four offense levels downward, for playing a minor or minimal role in a drug conspiracy, showed a less distinct trend, remaining close to 18 percent from FY 2010 through FY 2013, rising to 19.1 percent in FY 2014, and then falling to 16.7 percent in FY 2015.

Figure 3

Percentage of Drug Offenders with a Weapon or an Aggravating Role, FY 2010 – FY 2015



Source: OIG analysis of USSC data

Another indication that federal prosecutors may have been focusing on more serious drug cases is that they were prosecuting drug offenders with larger drug quantities. The base offense level is the starting point for determining the seriousness of an offense, with larger drug quantities having higher base offense levels. While the average base offense level for drug offenders remained relatively similar in each fiscal year, we found that the percentage of drug offenders with a base offense level of 24 or higher had increased. Specifically, from FY 2011 to FY 2012, 73 to 74 percent of drug offenders had a base offense level of 24 or higher, as compared to FY 2013 to FY 2015, where 77 to 79 percent of these drug offenders had a base offense level of 24 or higher.[60]

- **Fewer Low-Level Drug Offenders Prosecuted**

Our analysis also showed that offenders who were eligible for the safety valve (first-time, non-violent drug offenders whose cases did not involve guns) fell from 38.5 percent of those federally sentenced in FY 2012 to 32.3 percent by FY 2015. In addition, the percentage of drug offenders with a limited criminal history (those with three or fewer criminal history points in Criminal History Categories I or II) saw a modest decline.[61] Defendants with such lesser criminal

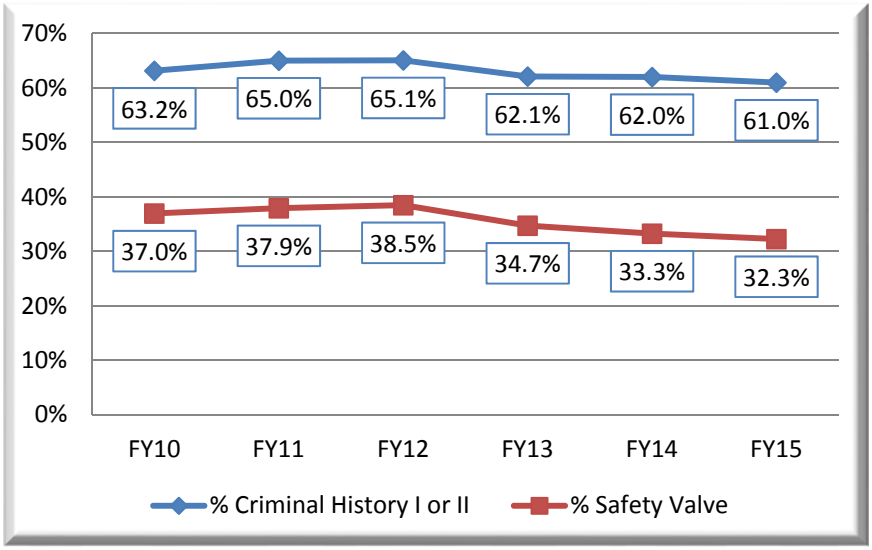
[60] As noted above, in November 2014, the USSC enacted the Drugs Minus Two guidelines amendment, which decreased the overall base offense levels for most drug offenses by two offense levels. Therefore, the increase in the number of drug offenders who were sentenced at offense level 24 or higher also seems to indicate that they had even higher drug quantities, but benefited from the overall two-level reduction promulgated under the amendment.

[61] According to the Federal Sentencing Guidelines, defendants are assigned criminal history points based upon prior criminal sentences, and then placed in one of six Criminal History Categories. (Cont'd)

histories went from 65.1 percent of all federal drug offenders in FY 2012 to 61 percent in FY 2015. See Figure 4 for the percentage of drug offenders with a Criminal History Category of I or II or who were eligible for the safety valve from FY 2010 through FY 2015. The decline in these percentages may indicate that federal prosecutors were charging relatively fewer low-level drug defendants while *Smart on Crime* was in effect.

Figure 4

Percentage of Drug Offenders with a Criminal History Category of I or II or Who Were Eligible for the Safety Valve FY 2010 – FY 2015



Source: OIG analysis of USSC data

The Number of Recidivist Enhancements Filed Appears to Have Declined since the Implementation of Smart on Crime

The 2013 Holder memorandum directed federal prosecutors to decline to file recidivist enhancements unless the defendant's conduct made the case appropriate for severe sanctions.[62] The Department provided to the OIG a summary of a USSC project conducted to estimate the number of recidivist enhancements filed under

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Criminal History Category I is the least serious category and includes many first-time defendants. Criminal History Category VI is the most serious category and includes offenders with extensive criminal records. Defendants with two or three criminal history points are in Criminal History Category II.

[62] 21 U.S.C. § 851 requires prosecutors to file an information setting forth any prior felony drug conviction that will be used to increase a defendant's sentence and provides procedures by which a defendant can challenge any such conviction, which, if applied by the court, can potentially enlarge a mandatory minimum sentence from 5 to 10 years, from 10 to 20 years, or from 20 years to life. We were unable to fully assess this key aspect of *Smart on Crime's* second principle because, as previously discussed, the Department collects limited data on recidivist enhancements. See Appendix 5 for the applicable Holder memorandum and the factors discussed therein.

21 U.S.C. § 851.[63] Our review of the USSC project summary found that the Department's use of recidivist enhancements since the implementation of *Smart on Crime* appeared to have declined.

According to the USSC, in FY 2012, federal prosecutors filed recidivist enhancements in approximately 20.6 percent of eligible cases, but in only 17.6 percent of eligible cases in FY 2014.[64] Also, this decline in the rate of recidivist enhancements occurred despite a rise in the percentage of eligible defendants. An estimated 27.9 percent of drug offenders (7,078 of 25,357 defendants) were eligible for a recidivist enhancement in FY 2012, while 31.8 percent (6,972 of 21,893) were eligible in FY 2014.

In addition, of the recidivist enhancements that federal prosecutors filed, many were withdrawn. In FY 2012, prosecutors withdrew 17.8 percent of filed recidivist enhancements prior to sentencing. The percentage increased to 26.1 in FY 2014, resulting in a total of approximately 1,200 recidivist enhancements applied at sentencing in FY 2012 and 905 in FY 2014. Finally, the percentage of federal drug defendants who actually received a recidivist enhancement in FY 2012 was estimated at 3.4 percent (approximately 850). The percentage decreased to 2.9 percent (approximately 625) in FY 2014.

Our survey results supported the USSC's findings based on its sampling project. Approximately 51.6 percent of our survey respondents (428 of 829 AUSAs) indicated that since *Smart on Crime* they became less likely to file recidivist enhancements when a defendant is eligible. An additional 20.6 percent of survey respondents (171 of 829 AUSAs) stated that it was already their practice prior to *Smart on Crime* not to file these enhancements in most cases when the defendant was eligible.[65]

Some Regions Diverged from National Trends in Number of Drug Cases and Mandatory Minimums

While the total number of federal drug convictions decreased nationwide following the implementation of *Smart on Crime,* we found noticeable variations in the number of drug convictions and mandatory minimums in different regions of the country. In some regions, the number of drug convictions increased, while other

[63] At the time of our review, the USSC's project provided the only available data on the rates of recidivist enhancement filings for the fiscal years immediately before and after *Smart on Crime* (FY 2012 and FY 2014).

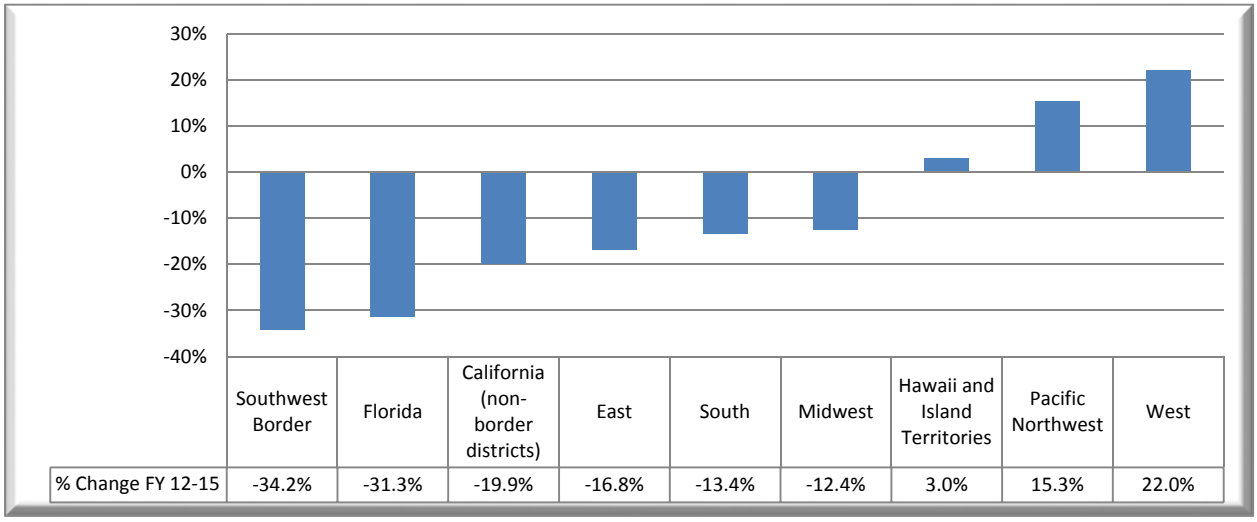
[64] The USSC stated that it determined eligibility by identifying those cases in its sample in which the offender had previously been convicted of a drug trafficking, drug possession, or other type of drug offense and in which the sentence imposed was 13 months or longer. Offenders meeting these criteria were deemed to have been convicted of a prior felony drug offense and thus met the requirement for application of an 851 enhancement.

[65] The 829 respondents were those AUSAs who responded substantively to the question regarding recidivist enhancements. This number excludes those respondents who skipped the question or marked "not applicable" as an answer. See Appendix 2 for a summary of the OIG's survey results.

regions saw significantly larger declines, proportionally. See Figure 5 for the percent changes in the number of drug convictions by region from FY 2012 through FY 2015.

Figure 5

Percent Changes in the Number of Drug Convictions by Region FY 2012 – FY 2015



	Southwest Border	Florida	California (non-border districts)	East	South	Midwest	Hawaii and Island Territories	Pacific Northwest	West
% Change FY 12-15	-34.2%	-31.3%	-19.9%	-16.8%	-13.4%	-12.4%	3.0%	15.3%	22.0%

Source: OIG analysis of USSC data

As Figure 5 shows, the West region, which includes districts such as Idaho, Wyoming, and the non-border districts of Texas (the Northern and Eastern Districts of Texas), taken together, saw a 22 percent increase in the number of drug convictions from FY 2012 to FY 2015. The Pacific Northwest region (Oregon, Washington, and Alaska), as well as the region consisting of Hawaii and the Island Territories (Puerto Rico, Guam, the Northern Mariana Islands, and the Virgin Islands), also experienced an increase in the number of drug convictions following the implementation of *Smart on Crime.*

We found that many states and several territories in these regions had a relatively high proportion of methamphetamine offenders, which made up 50 percent or more of all drug sentences. For example, in Guam and the Northern Mariana Islands, 100 percent of drug offenders sentenced in FY 2015 were convicted of methamphetamine offenses, while in Hawaii the proportion was 94 percent. In Montana, Wyoming, Utah, and Idaho — all in the West region — the proportions were 92, 74, 72, and 71 percent, respectively. Across all 94 districts, there was a statistically significant positive correlation between the percentage of methamphetamine offenders in FY 2015 and the percentage increase in the number of drug cases from FY 2012 to FY 2015. According to the USSC, the number of federal methamphetamine offenders rose across the country by 41 percent from FY 2011 to FY 2015, and these offenders also made up the highest percentage of drug offenders in 27 states in FY 2015, mostly in the South, Midwest, and Western regions.

We also found that districts in the Southwest Border region (Arizona, New Mexico, Southern California, Southern Texas, and Western Texas) collectively saw a 34.2 percent decrease in the number of drug convictions from FY 2012 to 2015. By comparison, all other regions combined experienced an 11.3 percent decrease in the number of drug convictions. Other regions with large declines in the number of drug convictions were Florida, the East (from Maine to the District of Columbia), and California (excluding the border). The Midwest and the South saw more moderate decreases.[66]

Weapons and Aggravating Roles at the District Level

As discussed above, the Department identified cases in which a weapon was involved or the offender had an aggravating role as indicative of more serious drug offenders. The percentage of drug cases in which a weapon was involved increased nationally from 16.4 percent to 17.2 percent from FY 2010 to FY 2015, and the percentage of defendants with an aggravating role increased from 6.0 percent to 7.7 percent during the same period. At the district level, however, these two indicators varied and showed a less clear trend than the aggregated data.

Specifically, in 40 of 94 districts the percentage of offenders with a weapon and the percentage of defendants with an aggravating role trended in opposite directions from FY 2012 to FY 2015. In 18 districts, the percentage with a weapon rose while the percentage with an aggravating role fell. In 22 districts, the percentage with a weapon fell and the percentage with an aggravating role rose. In 15 districts, both the percentage with a weapon and the percentage with an aggravating role trended downward. In the remaining 39 districts, both indicators increased during the period of our review. Nevertheless, the fact that these indicators so often displayed contradictory trends at the district level suggests that local crime conditions may play a significant role in these numbers and that caution should be exercised in drawing a conclusion from the national trend that prosecutors have charged more serious offenders since *Smart on Crime.*

The Impact of the Southwest Border Region on National Trends

We found that the Southwest Border region faced a number of unique circumstances that made its districts outliers from national trends identified through our analysis of USSC data. A senior Department official told us that due to its location, this region handles more drug cases that involve border crossings of foreign nationals (often low-level, non-violent drug offenders) as compared to other regions. Because many of these border region offenders are foreign nationals, they are almost always prosecuted federally. These border drug offenders also often have little or no criminal history in the United States.

During FYs 2012 through 2015, the Southwest Border region's five districts were responsible for a range of 26 to 33 percent of all drug convictions annually. This region significantly contributed to the 19 percent decrease in drug convictions

[66] We discuss the unique circumstances of the Southwest Border region further in "The Impact of the Southwest Border Region on National Trends" below.

nationally from FY 2012 to FY 2015. We found that if we removed the Southwest Border region from our analysis the decrease in drug convictions nationally would be only 11 percent.

Also, this region consistently had the highest percentage of offenders who were eligible for safety valve relief and a high percentage of offenders with three or fewer criminal history points compared to other regions. From FY 2012 through 2015, more than half of drug offenders each year in the Southwest Border region were eligible for safety valve relief, approximately twice the percentage in all other regions combined. In addition, this region had the highest proportion of marijuana offenders compared to other regions, ranging from 59 percent of its drug offenders in FY 2012 to 42 percent in FY 2015. Finally, as Table 2 shows, all regions of the country saw increased percentages of drug offenders sentenced without a mandatory minimum from FY 2012 through FY 2015, but the Southwest Border Region consistently had the highest percentage over this time period.

Table 2

Percentages of Drug Offenders Sentenced with No Mandatory Minimum, by Region FY 2012 – FY 2015

Region	FY 2012	FY 2014	FY 2015
Southwest Border	47.0%	59.8%	65.4%
South	43.4%	55.3%	60.8%
East	42.9%	52.6%	52.5%
Pacific Northwest	36.6%	49.7%	52.0%
Midwest	32.3%	42.6%	51.6%
West	30.7%	41.3%	43.8%
California	28.0%	38.4%	41.1%
Florida	27.0%	40.7%	37.0%
Hawaii and Island Territories	21.0%	22.1%	26.2%

Source: OIG analysis of USSC data

Given that the Southwest Border region was a major driver of many of the national trends, and in light of the significant divergence reflected in Table 2, national trends should not be interpreted in such a way as to conclude that *Smart on Crime* had a uniform impact across all of the nation's districts.

CONCLUSION AND RECOMMENDATIONS

Conclusion

The OIG found overall that the Department took a number of actions to implement the first two principles of *Smart on Crime*, but we also identified several shortcomings in its efforts. While the Department issued policy memoranda and guidance for the application of *Smart on Crime* policy changes, the U.S. Attorneys' Manual, used by federal prosecutors to make charging decisions consistent with Department policy, was not revised to reflect *Smart on Crime* policies until January 2017, more than 3 years after *Smart on Crime* was launched.

We found that most districts had updated local prosecution guidelines to reflect local priorities as required by *Smart on Crime* and had adopted policies and procedures to implement the initiative's provisions regarding the use of mandatory minimums and recidivist enhancements. The latter was done, in most cases, by updating prosecution guidelines, policy memoranda, templates, or worksheets to reflect the policy changes. We believe that the Department should ensure that all districts update their policies to ensure that they are consistent with current Department charging policies.

We also found that most districts required supervisory approval before a case could be indicted with a drug quantity that would trigger a mandatory minimum sentence and before an Assistant U.S. Attorney could file a 21 U.S.C. § 851 recidivist enhancement. However, in some districts, the supervisory approval process was not documented in the policies we were provided. We believe that the Department should ensure that supervisory approval is required, communicated, and clearly documented in each district. Further, while most U.S. Attorney's Offices (USAO) had updated their guidelines, it is not clear whether all districts had consulted with their law enforcement partners, as required by *Smart on Crime.* This obviously needs to occur on an ongoing basis.

The Department's ability to measure the effectiveness of *Smart on Crime* or other charging policies is limited because it does not consistently collect data on charging decisions. The U.S. Attorneys' case management system does not keep track of all the requisite information, and what information it collects is not always updated. Due to these limitations, the Department has relied on U.S. Sentencing Commission (USSC) data to assess the effectiveness of *Smart on Crime.* However, we believe that the Department cannot rely solely on after-the-fact sentencing information that does not contain all the requisite data, and that USAOs should collect and report charging data so that the Department can accurately measure the implementation and impact of its charging polices.

Nevertheless, based on our own analysis of USSC data, we found that the Department's *Smart on Crime* plan had an impact on charging decisions, as reflected in shifts in a number of different metrics that we believe to be consistent with the initiative's first two principles and the responses we received from our survey to all of the USAOs. We also found that some regions diverged from national trends. For example, while drug convictions decreased nationally by

19 percent, we found that the Hawaii and Island Territories Region, the Pacific Northwest Region, and the West Region had an increase in the number of drug convictions.

Recommendations

In order to ensure that all federal prosecutors have clear and consistent guidance regarding Department charging policies, we recommend that the Department:

1. Ensure that the U.S. Attorneys' Manual accurately reflects Department charging policies.

2. Ensure that all U.S. Attorney's Offices consult with their law enforcement partners to make sure that their policies are current and consistent with local prosecution priorities.

In order for the Department to accurately measure the impact of its charging policies, we recommend that the Department and the Executive Office for United States Attorneys:

3. Require all U.S. Attorney's Offices to collect charging data that will enable the Department to determine whether its charging and sentencing policies are being effectively implemented.

METHODOLOGY OF THE OIG REVIEW

In this review, the OIG examined how the Department prioritized prosecutions to focus on the most serious cases, as well as the implementation of the *Smart on Crime* charging reforms that were intended to eliminate what the former Administration characterized as unfair disparities in the criminal justice system. The review covered the period from FY 2012 through FY 2015. Our fieldwork, performed from January 2016 through July 2016, included data analysis, a survey of U.S. Attorney's Office (USAO) district Criminal Chiefs and Assistant U.S. Attorneys (AUSA), document analysis, and interviews. It did not assess the new charging and sentencing policy announced by the Attorney General by memorandum dated May 10, 2017. The following sections provide additional information about our methodology.

Standards

The OIG conducted this review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation* (January 2012).

Data Analysis

The OIG requested U.S. Sentencing Commission (USSC) data related to *Smart on Crime,* broken down by USAO district. In accordance with USSC and Department policy, the OIG requested this data via the Criminal Division, which functions as the Department's official representative to the USSC. However, breaking down the USSC data by USAO district was a project that the Criminal Division said it was not in a position to undertake.

The OIG then requested and timely received this same district-level USSC data from the Bureau of Justice Statistics (BJS), also broken down by fiscal year from FY 2010 through FY 2015. The data the BJS provided used methodology identical to the USSC's methodology for producing its online interactive sourcebook data tables and was based on raw data that the USSC publishes annually in the form of large and highly complex data files that are made available online for researchers and the general public. Specifically, the BJS provided to the OIG district-level breakdowns by fiscal year of the information contained in Drug Data Tables 33 and 37 – 45 of the USSC's online interactive sourcebook, covering:

- Primary Drug Type of Offenders Sentenced Under Drug Guidelines;
- Criminal History Category of Drug Offenders in Each Drug Type;
- Plea and Trial Rates of Drug Offenders in Each Drug Type;
- Weapon Involvement of Drug Offenders in Each Drug Type;
- Role Adjustment of Drug Offenders in Each Drug Type;
- Acceptance of Responsibility of Drug Offenders in Each Drug Type;

- Drug Offenders Receiving Mandatory Minimums in Each Drug Type;
- Drug Offenders Receiving Safety Valve and Mandatory Minimums in Each Drug Type;
- Drug Offenders Receiving Safety Valve in Each Drug Type; and
- Sentences Relative to the Guideline Range for Drug Offenders in Each Drug Type (12 categories).

The OIG used these district-level data tables as the basis for our own further analysis of national, regional, and district-level trends. Of particular note in the USSC and BJS methodologies for analyzing the data was that (1) simple possession cases were included, (2) mandatory minimums of less than 5 years were included with the "no mandatory minimum" sentences, and (3) mandatory minimums of greater than 10 years were included with the 10-year mandatory minimum sentences. In some tables, including the table on the primary drug type of offenders sentenced under drug guidelines, the data excluded cases missing complete guideline information.

To perform a regional analysis of the data, the OIG assigned the districts in various states to approximate regions of the country as follows:

- **California (non-border):** California Central, Eastern, and Northern Districts;
- **East:** Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont;
- **Florida:** Middle, Northern, and Southern Districts of Florida;
- **Hawaii and Island Territories:** Guam, Hawaii, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands;
- **Midwest:** Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, and Wisconsin;
- **Pacific Northwest:** Alaska, Oregon, and Washington;
- **South:** Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia;
- **Southwest Border:** Arizona, California Southern, New Mexico, Texas Southern, and Texas Western; and
- **West:** Colorado, Idaho, Montana, Nevada, Texas Eastern, Texas Northern, Utah, and Wyoming.

Additionally, the OIG used the USSC's publicly available raw data files to perform an analysis on federal drug offenders with two criminal history points to

determine trends in mandatory minimums for these offenders, as well as an analysis of trends in base offense levels, generally following a methodology similar to the BJS's methodology for reproducing the USSC's online interactive sourcebook data tables.

Finally, the OIG requested and received from the Executive Office for United States Attorneys (EOUSA) data on the number of AUSA positions allocated, vacant positions, and AUSAs on board each fiscal year from 2010 through 2015. We used this EOUSA staffing data to examine national and district-level USAO staffing trends and to further analyze the USSC data for trends according to district sizes, as determined by the number of AUSA positions, as well as the degree of AUSA understaffing in districts and regions, though we were unable to draw any correlations between district staffing and charging practices. Additionally, the OIG requested and received from EOUSA data on the total numbers of sentences for drug offenses as well as total numbers of sentences for other broad categories of offenses, including immigration, white collar, violent crime, and all criminal offenses, for FY 2013 through FY 2015. The OIG analyzed this data to examine whether significant changes occurred in the proportions of these broad categories of offenses over the period.

Survey

The OIG surveyed Criminal Chiefs, supervisory attorneys, and line attorneys in all 94 USAO districts on their practices and views with regard to *Smart on Crime.* The survey contained 32 multiple choice and open-ended questions regarding how each district's prosecution priorities and charging policies were affected by *Smart on Crime* and the issuance of the 2013 Holder memoranda. See Appendix 2 for a summary of the survey questions and results and Appendices 4 and 5 for the 2013 Holder memoranda.

Document Analysis

We requested and reviewed documentation related to *Smart on Crime* from the Office of the Deputy Attorney General, the Criminal Division, EOUSA, the Federal Bureau of Prisons, the Federal Bureau of Investigation (FBI), and the Drug Enforcement Administration (DEA). The documents we reviewed included memoranda, policies, reports, meeting agendas, presentation materials, budget documents, strategic objective review documents prepared for the Office of Management and Budget, the results of an earlier EOUSA survey of the districts, case management system user guides, and emails. The OIG also received copies of emails summarizing the USSC's research on recidivist enhancements via the Criminal Division.

Additionally, we requested and reviewed information and documentation from each district on its local prosecution guidelines and policies regarding charging mandatory minimums and recidivist enhancements. On February 29, 2016, the OIG made an initial request to Criminal Chiefs of the 94 USAOs for "any internal prosecution guidelines, prosecution thresholds, or other related policies that respond to the Attorney General's directive, found in the attached August 12, 2013,

memorandum entitled Federal Prosecution Priorities," that all U.S. Attorneys "develop — or update existing — district-specific guidelines for determining when federal prosecutions should be brought and in what priority areas." The OIG also requested "any internal office policies or checklists that relate to (1) your office's charging practices with respect to mandatory minimum sentences for drug offenses, and (2) your office's filing or utilization of recidivist enhancements under 21 USC 851." In order to obtain a response from all the districts, we made additional requests on March 23 and June 24, 2016.

Interviews

We interviewed staff from the Office of the Deputy Attorney General, the Office of Policy and Legislation, the Office of Legal Policy, EOUSA, the USSC, and the BJS. We also interviewed 14 U.S. Attorneys and 3 Criminal Chiefs in the District of Columbia, Maryland, and the Eastern District of Virginia, as well as 30 Special Agents at field offices and headquarters of the FBI and the DEA. The OIG selected these interviewees based on a preliminary data analysis that showed particularly high or low rates of mandatory minimum sentences.

SUMMARY OF SURVEY RESULTS

Overall Number of Respondents

Positions	Number of Respondents
Line Attorney/Line Assistant	1,064 (68.6%)
Supervisor	293 (18.9%)
Criminal Chief	79 (5.1%)
Other	114 (7.4%)
Grand Total	**1,550**

Are you familiar with the *Smart on Crime* initiative and issuance of the Attorney General's related August 2013 memorandum?

Position	No	Not sure	Yes	Grand Total
Line Attorney/Line Assistant	23 (2.2%)	40 (3.8%)	1,001 (94.1%)	1,064
Supervisor	-	-	293 (100%)	293
Criminal Chief	-	-	79 (100%)	79
Grand Total	**23**	**40**	**1,373**	**1,436**

Did you receive any training regarding the principles underlying the *Smart on Crime* initiative?

	Regularly Handle Drug or Violent Crime Cases			
Positions	**Yes**	**Not Sure**	**No**	**Grand Total**
Criminal Chief	**76 (96.2%)**	**-**	**3 (3.8%)**	**79**
Received training	75 (98.7%)	-	3 (100%)	78
Not sure	1 (1.3%)	-	-	1
Line Attorney/Line Assistant	**740 (69.5%)**	**7 (0.7%)**	**317 (29.8%)**	**1,064**
Received training	664 (89.7%)	7 (100%)	249 (78.5%)	920
Did not receive training	76 (10.3%)	-	68 (21.5%)	144
Supervisor	**219 (74.7%)**	**-**	**74 (25.3%)**	**293**
Received training	210 (95.9%)	-	64 (86.5%)	274
Did not receive training	9 (4.1)	-	10 (13.5%)	19
Grand Total	**1,035**	**7**	**394**	**1,436**

The August 2013 *Smart on Crime* memorandum directed USAOs to develop or update existing district-specific guidelines or action plans to focus on the most serious cases. Has your district done so?

Response	Criminal Chief	Line Assistant	Supervisor	Grand Total
(No response)	-	2 (0.3)	2 (0.9%)	4
No, neither formally nor informally	-	15 (2.0%)	1 (0.5%)	16
Not sure	3 (3.9%)	195 (26.4%)	16 (7.3%)	214
Not yet, but development of a formal policy is in progress.	-	4 (0.5%)	1 (0.5%)	5
Yes, informally, but no written policy document has been issued or distributed.	9 (11.8%)	108 (14.6%)	37 (16.9%)	154
Yes, my district has developed or updated formal written guidelines.	64 (84.2%)	416 (56.2%)	162 (73.9%)	642
Grand Total	**76**	**740**	**219**	**1,035**

Has your district worked with its law enforcement partners in developing or revising the district's guidelines in light of *Smart on Crime?*

Response	Criminal Chief	Supervisor	Grand Total
Yes	58 (76.3%)	142 (64.8%)	200
Not sure	6 (7.9%)	56 (25.6%)	62
No	11 (14.5%)	17 (7.8%)	28
(No response)	1 (1.3%)	4 (1.8%)	5
Grand Total	**76**	**219**	**295**

How has the implementation of your district's guidelines since *Smart on Crime* affected your office's prosecution priorities?

Response	Criminal Chief	Line Assistant	Supervisor	Grand Total
Our district's prosecution priorities have changed since implementation of the new guidelines.	27 (35.5%)	273 (36.9%)	82 (37.4%)	382
The new guidelines have not affected our office's prosecution priorities — we were already following similar principles prior to implementation.	41 (53.9%)	223 (30.1%)	105 (47.9%)	369
Not sure	2 (2.6%)	192 (25.9%)	9 (4.1%)	203
Other (please specify in the space below)	4 (5.3%)	29 (3.9%)	13 (5.9%)	46
The new guidelines have not affected prosecution priorities — we were not following these principles beforehand and still are not.	2 (2.6%)	15 (2.0%)	4 (1.8%)	21
(No response)	-	1 (0.1%)	2 (0.9%)	3
Not applicable (e.g., our district has not issued new guidelines)	-	7 (0.9%)	4 (1.8%)	11
Grand Total	**76**	**740**	**219**	**1,035**

Approximately how many of your attorneys' cases include defendants who are low-level, non-violent drug offenders who do not have significant criminal histories as defined in the Smart on Crime initiative (fewer than three criminal history points)?

Response	Criminal Chief	Line Assistant	Supervisor	Grand Total
All or almost all	-	12 (1.6%)	2 (0.9%)	14
Almost none	37 (48.7%)	324 (43.8%)	125 (57.1%)	486
Half or more	3 (3.9%)	62 (8.4%)	9 (4.1%)	74
Less than half	17 (22.4%)	200 (27.0%)	35 (16.0%)	252
None	15 (19.7%)	123 (16.6%)	44 (20.1%)	182
Not sure	4 (5.3%)	19 (2.6%)	4 (1.8%)	27
Grand Total	**76**	**740**	**219**	**1,035**

Have the new *Smart on Crime* criteria affected your charging decisions with regard to such defendants?

Response	Criminal Chief	Line Assistant	Supervisor	Grand Total
(No response/did not receive question)	16 (21.1%)	127 (17.2%)	45 (20.5%)	188
No, I handle few cases involving such defendants.	4 (5.3%)	102 (13.8%)	27 (12.3%)	133
No, I was already generally approving/recommending not to charge mandatory minimum-triggering drug quantities against such defendants and continue to do so.	14 (18.4%)	113 (15.3%)	34 (15.5%)	161
No, in the past I have generally recommended charging drug quantities that trigger mandatory minimums whenever available and continue to do so.	-	33 (4.5%)	2 (0.9%)	35
No, my attorneys handle few cases involving such defendants.	1 (1.3%)	-	4 (1.8%)	5
Not applicable	-	28 (3.8%)	2 (0.9%)	30
Not sure	-	30 (4.1%)	3 (1.4%)	33
Other (please specify in the space below)	7 (9.2%)	31 (4.2%)	8 (3.7%)	46
Yes, I am now less likely to approve/recommend charging drug quantities that trigger mandatory minimums against such defendants.	34 (44.7%)	276 (37.3%)	94 (42.9%)	404
Grand Total	**76**	**740**	**219**	**1,035**

Have the new *Smart on Crime* criteria affected your decisions to refer such defendants to state courts for prosecution rather than charging them federally?

Responses	Criminal Chief	Line Assistant	Supervisor	Grand Total
(No response/did not receive question)	15 (19.7%)	125 (16.9%)	45 (20.5%)	185
No, I continue to charge such defendants federally.	7 (9.2%)	121 (16.4%)	18 (8.2%)	146
No, my attorneys/I handle few cases involving such defendants.	8 (10.5%)	144 (19.5%)	37 (16.9%)	189
No, I was already generally sending such defendants to state courts.	23 (30.3%)	103 (13.9%)	59 (26.9%)	185
Not applicable	1 (1.3%)	45 (6.1%)	3 (1.4%)	49
Not sure	1 (1.3%)	50 (6.8%)	2 (0.9%)	53
Other (please specify in the space below)	6 (7.9%)	32 (4.3%)	12 (5.5%)	50
Yes, I am now more likely to refer such defendants for state prosecution.	15 (19.7%)	120 (16.2%)	43 (19.6%)	178
Grand Total	**76**	**740**	**219**	**1,035**

Please choose the analysis that best describes how your attorneys determine whether a defendant meets the *Smart on Crime* criteria for declining to charge drug quantities that would trigger mandatory minimums. (Please check all that apply.)[67]

Responses	Criminal Chief	Line Assistant	Supervisor	Grand Total
Attorneys are required to review the *Smart on Crime* memorandum at intake or when drafting charges.	20 (15.7%)	156 (14.7%)	50 (15.2%)	226
Attorneys refer to the specific *Smart on Crime* criteria that are incorporated in our district prosecution guidelines.	24 (18.9%)	234 (22.1%)	84 (25.5%)	342
Attorneys fill out a worksheet, checklist, or charge sheet to document the basis for charging quantities that trigger mandatory minimums.	25 (19.7%)	176 (16.6%)	57 (17.3%)	258
Attorneys set forth the basis for charging quantities that trigger mandatory minimums on a pre-indictment prosecution memorandum.	50 (39.4%)	373 (35.2%)	119 (36.2%)	542
Other	8 (6.3%)	28 (2.6%)	8 (2.4%)	44
Attorneys in our district do not undertake this kind of analysis.	-	20 (1.9%)	2 (0.6%)	22
Not sure	-	42 (3.9%)	3 (0.9%)	45
Not applicable	-	31 (2.9%)	6 (1.8%)	37
Grand Total	**127**	**1,060**	**329**	**1,516**

[67] For questions with "check all that apply," the grand total will be the number of responses, not the number of people who responded.

Since the implementation of *Smart on Crime,* are there more, fewer, or about the same number of cases in your office in which prosecutors decline to charge drug quantities that would trigger mandatory minimums?

Responses	Criminal Chief	Supervisor	Grand Total
About the same number of cases	14 (18.4%)	37 (16.9%)	51
Fewer cases	13 (17.1%)	17 (7.8%)	30
More cases with mandatory minimum-triggering drug quantities NOT charged	31 (40.8%)	102 (46.6%)	133
Not applicable	-	2 (0.9%)	2
Not sure	3 (3.9%)	16 (7.3%)	19
(No response/did not receive question)	15 (19.7%)	45 (20.5%)	60
Grand Total	**76**	**219**	**295**

At what point do your attorneys typically file a 21 U.S.C. § 851 information?

Responses	Criminal Chief	Line Assistant	Supervisor	Grand Total
(No response/did not receive question)	7 (9.2%)	356 (48.1%)	55 (25.1%)	418
At indictment or soon after	35 (46.1%)	168 (22.7%)	97 (44.3%)	300
During plea negotiations	-	7 (0.9%)	-	7
Immediately prior to trial	3 (3.9%)	34 (4.6%)	6 (2.7%)	43
It depends on the circumstances of the case/investigation at hand.	27 (35.5%)	162 (21.9%)	56 (25.6%)	245
Not applicable	1 (1.3%)	1 (0.1)	-	2
Not sure	1 (1.3%)	7 (0.9%)	2 (0.9%)	10
Other (please specify)	2 (2.6%)	5 (0.7%)	3 (1.4%)	10
Grand Total	**76**	**740**	**219**	**1,035**

Is this a change from your attorneys' practice prior to the implementation of *Smart on Crime?*

Responses	Criminal Chief	Line Assistant	Supervisor	Grand Total
(No response/did not receive question)	7 (9.2%)	358 (48.4%)	56 (25.6%)	421
No, I followed the same practice prior to *Smart on Crime.*	26 (34.2%)	238 (32.2%)	87 (39.7%)	351
Yes, I used to file a 21 U.S.C. § 851 information later in the process.	18 (23.7%)	56 (7.6%)	32 (14.6%)	106
Not applicable	3 (3.9%)	40 (5.4%)	6 (2.7%)	49
Not sure	4 (5.3%)	30 (4.1%)	11 (5.0%)	45
Yes, I used to file a 21 U.S.C. § 851 information earlier in the process.	5 (6.6%)	18 (2.4%)	6 (2.7%)	29
No, my attorneys followed the same practice prior to *Smart on Crime.*	8 (10.5%)	-	13 (5.9%)	21
Yes, my attorneys used to file a 21 U.S.C. § 851 information later in the process.	3 (3.9%)	-	7 (3.2%)	10
Yes, my attorneys used to file a 21 U.S.C. § 851 information earlier in the process.	2 (2.6%)	-	1 (0.5%)	3
Grand Total	**76**	**740**	**219**	**1,035**

Have the new *Smart on Crime* criteria related to 21 U.S.C. § 851 recidivist enhancements affected your charging decisions?

Responses	Criminal Chief	Line Assistant	Supervisor	Grand Total
Yes, I am now less likely to file/approve filing a 21 U.S.C. § 851 recidivist enhancement in cases where the defendant is eligible.	48 (63.2%)	267 (36.1%)	113 (51.6%)	428
No, charging decisions regarding 21 U.S.C. § 851 recidivist enhancements have not changed — absent extraordinary or special circumstances, my attorneys file them if the defendant is eligible.	1 (1.3%)	48 (6.5%)	13 (5.9%)	62
No, charging decisions regarding 21 U.S.C. § 851 recidivist enhancements have not changed — I (or my attorneys) rarely file them when the defendant is eligible.	7 (9.2%)	121 (16.4)	43 (19.6%)	171
No, my district typically has few defendants eligible for 21 U.S.C. § 851 enhancements.	3 (3.9%)	8 (1.1%)	6 (2.7%)	17
Other	13 (17.1%)	41 (5.5%)	19 (8.7%)	73
Not sure	2 (2.6%)	72 (9.7%)	4 (1.8%)	78
Not applicable	1 (1.3%)	39 (5.3%)	2 (0.9%)	42
(No response/did not receive question)	1 (1.3%)	144 (19.5%)	19 (8.7%)	164
Grand Total	**76**	**740**	**219**	**1,035**

Please choose the analysis that best describes how your attorneys determine whether a defendant meets the *Smart on Crime* criteria for § 851 recidivist enhancements. (Please check all that apply.)

Responses	Criminal Chief	Line Assistant	Supervisor	Grand Total
Attorneys are required to review the *Smart on Crime* memorandum at intake or when drafting charges.	19 (12.7%)	157 (15.2%)	61 (16.3%)	237
Attorneys refer to the specific *Smart on Crime* criteria that are incorporated in our district prosecution guidelines.	27 (18.0%)	216 (20.9%)	86 (22.9%)	329
Attorneys fill out a worksheet, checklist, or charge sheet to document the basis for filing 21 U.S.C. § 851 enhancements.	35 (23.3%)	175 (16.9%)	66 (17.6)	276
Attorneys set forth the basis for filing a 21 U.S.C. § 851 enhancement on a pre-indictment prosecution memorandum.	55 (36.7%)	353 (34.1%)	132 (35.2%)	540
Other (please specify in the space below)	14 (9.3%)	40 (3.9%)	20 (5.3%)	74
Attorneys in our district do not undertake this kind of analysis.	-	17 (1.6%)	3 (0.8%)	20
Not sure	-	53 (5.1%)	3 (0.8%)	56
Not applicable	-	24 (2.3%)	4 (1.1%)	28
Grand Total	**150**	**1,034**	**375**	**1,560**

Since *Smart on Crime,* are there more, fewer, or about the same number of cases in your office where prosecutors decline to file 21 U.S.C. § 851 informations?

Row Labels	Criminal Chief	Supervisor	Grand Total
More cases	36 (47.4%)	94 (42.9%)	130
About the same number	15 (19.7%)	52 (23.7%)	67
Fewer cases	17 (22.4%)	25 (11.4%)	42
Not sure	6 (7.9%)	27 (12.3%)	33
Not applicable	-	1 (0.5%)	1
(Did not answer)	2 (2.6%)	20 (9.1%)	22
Grand Total	**76**	**219**	**295**

Does your district have a supervisory review process in place to ensure that prosecutors are considering *Smart on Crime* principles when making charging decisions? (Please check all that apply.)

Responses	Criminal Chief	Line Assistant	Supervisor	Grand Total
Yes, supervisors must sign off on prosecutors' written explanations for charging mandatory minimum-triggering drug quantities to ensure that they are consistent with the principles of *Smart on Crime.*	61 (46.2%)	502 (43.4%)	171 (45.8%)	734
Yes, supervisors must sign off on prosecutors' written explanations for charging 21 U.S.C. § 851 recidivist enhancements to ensure that they are consistent with the principles of *Smart on Crime.*	59 (44.7%)	403 (34.9%)	153 (41.0%)	615
Yes, our district uses another method of supervisory review to ensure compliance with *Smart on Crime* (please specify in the space below).	10 (7.6%)	122 (10.6%)	43 (11.5%)	175
No, there is no supervisory review process in place to ensure compliance with the principles of *Smart on Crime.*	2 (1.5%)	25 (2.2%)	1 (0.3%)	28
Not sure	-	104 (8.9%)	5 (1.3%)	109
Grand Total	**132**	**1,156**	**373**	**1,661**

HOLDER MEMORANDUM, DEPARTMENT POLICY ON CHARGING AND SENTENCING, MAY 19, 2010

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

May 19, 2010

MEMORANDUM TO ALL FEDERAL PROSECUTORS

From: Eric H. Holder, Jr.
Attorney General

Subject: Department Policy on Charging and Sentencing

The reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws. Decisions about whether to initiate charges, what charges and enhancements to pursue, when to accept a negotiated plea, and how to advocate at sentencing, are among the most fundamental duties of federal prosecutors. For nearly three decades, the Principles of Federal Prosecution, as reflected in Title 9 of the U.S. Attorneys' Manual, Chapter 27, have guided federal prosecutors in the discharge of these duties in particular and in their responsibility to seek justice in the enforcement of the federal criminal laws in general. The purpose of this memorandum is to reaffirm the guidance provided by those Principles.

Persons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly. Unwarranted disparities may result from disregard for this fundamental principle. They can also result, however, from a failure to analyze carefully and distinguish the specific facts and circumstances of each particular case. Indeed, equal justice depends on individualized justice, and smart law enforcement demands it. Accordingly, decisions regarding charging, plea agreements, and advocacy at sentencing must be made on the merits of each case, taking into account an individualized assessment of the defendant's conduct and criminal history and the circumstances relating to commission of the offense (including the impact of the crime on victims), the needs of the communities we serve, and federal resources and priorities. Prosecutors must always be mindful of our duty to ensure that these decisions are made without unwarranted consideration of such factors as race, gender, ethnicity, or sexual orientation.

Charging Decisions: Charging decisions should be informed by reason and by the general purposes of criminal law enforcement: punishment, public safety, deterrence, and rehabilitation. These decisions should also reflect the priorities of the Department and of each district. Charges should ordinarily be brought if there is probable cause to believe that a person has committed a federal offense and there is sufficient admissible evidence to obtain and sustain a conviction, unless "no substantial Federal interest" would be served, the person is subject to

"effective prosecution" elsewhere, or there is "an adequate non-criminal alternative to prosecution" [USAM 9-27.200 et seq.].

Moreover, in accordance with long-standing principle, a federal prosecutor should ordinarily charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction" [USAM 9-27.300]. This determination, however, must always be made in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime" [USAM 9-27.300]. In all cases, the charges should fairly represent the defendant's criminal conduct, and due consideration should be given to the defendant's substantial assistance in an investigation or prosecution. As a general matter, the decision whether to seek a statutory sentencing enhancement should be guided by these same principles.

All charging 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 therein. Each office shall promulgate written guidance describing its internal indictment review process.[1]

Plea Agreements: Plea agreements should reflect the totality of a defendant's conduct. These agreements are governed by the same fundamental principle as charging decisions: prosecutors should seek a plea to the most serious offense that is consistent with the nature of the defendant's conduct and likely to result in a sustainable conviction, informed by an individualized assessment of the specific facts and circumstances of each particular case. 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. All plea agreements should be consistent with the Principles of Federal Prosecution and must be reviewed by a supervisory attorney. Each office shall promulgate written guidance regarding the standard elements required in its plea agreements, including the waivers of a defendant's rights.

Advocacy at Sentencing: As the Supreme Court has recognized, Congress has identified the factors for courts to consider when imposing sentences pursuant to 18 U.S.C. §3553. Consistent with the statute and with the advisory sentencing guidelines as the touchstone, prosecutors should seek sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford deterrence, protect the public, and offer defendants an opportunity for effective rehabilitation. In the typical case, the appropriate balance among these purposes will continue to be reflected by the applicable guidelines range, and prosecutors should generally continue to advocate for a sentence within that range. The advisory guidelines remain important in furthering the goal of national uniformity throughout the federal system. But consistent with the Principles of Federal Prosecution and given the advisory

[1] This memorandum has no impact on the guidance provided in the September 22, 2003 memorandum and elsewhere regarding "fast-track" programs. In those districts where an approved "fast-track" program has been established, charging decisions and disposition of charges must comply with the Department's requirements for that program.

nature of the guidelines, advocacy at sentencing—like charging decisions and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case. All prosecutorial requests for departures or variances—upward or downward—must be based upon specific and articulable factors, and require supervisory approval. Each office shall provide training for effective advocacy at sentencing.

With respect to charging decisions, plea agreements, and advocacy at sentencing, the mechanisms established for obtaining supervisory approval should be designed to ensure, as much as possible, adherence to the Principles of Federal Prosecution and the guidance provided by this memorandum, as well as district-wide consistency. Supervisory attorneys selected to review exercises of discretion should be skilled, experienced, and thoroughly familiar with Department and district-specific policies, priorities, and practices. All guidance described above must be shared with the Executive Office for U.S. Attorneys upon promulgation.

This memorandum supersedes previous Department guidance on charging and sentencing including the September 22, 2003 memorandum issued by Attorney General John Ashcroft ("Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing"), the July 2, 2004 memorandum issued by Deputy Attorney General James Comey ("Department Legal Positions and Policies in Light of *Blakely v. Washington*"), and the January 28, 2005 memorandum issued by Deputy Attorney General James Comey ("Department Policies and Procedures Concerning Sentencing").

HOLDER MEMORANDUM, FEDERAL PROSECUTION PRIORITIES, AUGUST 12, 2013

Office of the Attorney General

Washington, D.C. 20530

August 12, 2013

MEMORANDUM TO HEADS OF DEPARTMENT OF JUSTICE COMPONENTS
AND UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Federal Prosecution Priorities

We must always endeavor to ensure we use our limited resources in a manner that is consistent with our responsibility to effectively enforce the criminal law. With the current strains on Department of Justice resources, we must maximize efforts to prosecute the right criminal cases consistent with our mission. Our reaction to these budget challenges should not be driven by statistics alone. Rather, we must set quality, evidence-based priorities for the types of cases we bring with an eye toward promoting public safety, deterrence, and fairness. This necessarily will mean focusing our resources on fewer but the most significant cases.

In order to initiate charges against a defendant, prosecutors must determine not only that the person's conduct constitutes a federal offense and admissible evidence is sufficient to obtain and sustain a conviction, but also that the prosecution serves a substantial federal interest, the person is not subject to effective prosecution elsewhere, and there is no adequate non-criminal alternative to prosecution. *See* Attorney General Holder Memorandum (May 19, 2010); USAM 9-27.220.

Of these criteria that must be satisfied before bringing a case, it is of primary importance to assess whether a prosecution serves a substantial federal interest. For this reason, I am asking all United States Attorneys, in conjunction with their law enforcement partners, to develop – or update existing – district-specific guidelines for determining when federal prosecutions should be brought and in what priority areas.

Your local guidelines should define what cases serve a district's substantial federal interests and should be informed by a number of factors, including both national and local law enforcement priorities. Nationally, the Department's priorities are (1) protecting Americans from national security threats; (2) protecting Americans from violent crime; (3) protecting Americans from financial fraud; and (4) protecting the most vulnerable members of our society. Locally, a particular district's priorities will often depend on local criminal threats and needs, and each United States Attorney is in the best position to clearly articulate his or her priorities.

The United States Attorney's Manual already contains specific guidance to prosecutors on determining whether a prosecution would serve a substantial federal interest. *See* USAM 9-27.230. While designed to help prosecutors analyze individual cases, the USAM also will

inform United States Attorneys in shaping their district-specific criteria. In addition, the below list of factors relevant to assessing the federal interest in different types of criminal cases should supplement the USAM's excellent guidance and further inform your efforts.

Finally, it is important that federal law enforcement agency priorities in each district align with our prosecution goals. For this reason, your evaluations should be conducted jointly with federal law enforcement leaders and in consultation with state, local, and tribal law enforcement as appropriate.

I am confident that these thoughtful and reasoned assessments will better advance our shared law enforcement mission.

Factors to Consider when Developing District Investigative and Prosecution Priorities

Explicit Federal Priorities

- Does the matter fall within the Department's four law enforcement priorities?
- If the offense charged does not fall within the Attorney General's stated priorities, does the defendant's ancillary or underlying conduct nevertheless implicate the Department's stated priorities?
- Is the matter part of a program or priority for which Congress, the Department of Justice, or another federal agency has provided specific funding?
- Would accepting the case potentially lead to another case implicating more significant Department or Government-wide priorities?

Primary or Exclusive Jurisdiction

- Did the criminal conduct occur on a federal enclave, such as a national park or a military base where the U.S. Attorney's office has exclusive jurisdiction?
- Does the primary criminal conduct to be addressed involve statutory schemes, such as immigration laws, that are enforced exclusively by the federal government?
- Does the crime have international, interstate, or multi-district impact?
- Is a federal agency or employee a victim of the crime?

Effective Alternatives

- Is the defendant currently serving a state or federal sentence of imprisonment for other criminal conduct, and if so, is the defendant unlikely to be released soon?

- Does the state or local government have a statute and sentencing scheme that adequately addresses the criminal conduct?
- If the criminal conduct occurred in Indian Country, will tribal statutes and available sentences adequately address the criminal conduct?
- Is the matter a "complex" case requiring resources or evidence collection capabilities beyond the scope of local abilities?
- Would taking the case federally be a particularly effective mechanism for removing a violent person or repeat offender from society?
- When a case involves a matter that, pursuant to the above criteria, would be more appropriately brought by the state, does the case nevertheless address an extraordinary public safety or public health concern to which the U.S. Attorney's Office is particularly able to respond? If so, is the case part of a carefully-designed local program or initiative coordinated between the United States Attorney and local law enforcement?

HOLDER MEMORANDUM, DEPARTMENT POLICY ON CHARGING MANDATORY MINIMUM SENTENCES AND RECIDIVIST ENHANCEMENTS, AUGUST 12, 2013

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

August 12, 2013

MEMORANDUM TO THE UNITED STATES ATTORNEYS AND
ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION

FROM: THE ATTORNEY GENERAL

SUBJECT: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases

In *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Supreme Court held that any fact that increases the statutory mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt. This means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty.

The Supreme Court's decision in *Alleyne* heightens the role a prosecutor plays in determining whether a defendant is subject to a mandatory minimum sentence. To be sure, the exercise of discretion over charging decisions has always been an "integral feature of the criminal justice system," *United States v. LaBonte*, 520 U.S. 751, 762 (1997), and is among the most important duties of a federal prosecutor. Current policy requires prosecutors to conduct an individualized assessment of the extent to which charges fit the specific circumstances of the case, are consistent with the purpose of the federal criminal code, and maximize the impact of federal resources on crime. When making these individualized assessments, prosecutors must take into account numerous factors, such as the defendant's conduct and criminal history and the circumstances relating to the commission of the offense, the needs of the communities we serve, and federal resources and priorities.[1] Now that our charging decisions also affect when a defendant is subject to a mandatory minimum sentence, prosecutors must evaluate these factors in an equally thoughtful and reasoned manner.

It is with full consideration of these factors that we now refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders. We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation. Moreover, rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs. These reductions in public safety spending require us to make our public safety expenditures smarter and more productive.

[1] These factors are set out more fully in my memorandum of May 19, 2010 ("Department Policy on Charging and Sentencing") and Title 9 of the U.S. Attorneys' Manual, Chapter 27.

For all these reasons, I am issuing the following policy[2]:

Continuation of Charging and Sentencing Policies: Pursuant to my memorandum of May 19, 2010, prosecutors should continue to conduct "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime." While this means that prosecutors "should ordinarily charge the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," the charges always should reflect an individualized assessment and fairly represent the defendant's criminal conduct.

Certain Mandatory Minimum Sentencing Statutes Based on Drug Quantity: Prosecutors should continue to ascertain whether a defendant is eligible for any statutory mandatory minimum statute or enhancement. However, in cases involving the applicability of Title 21 mandatory minimum sentences based on drug type and quantity, prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:[3]

- 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.

Timing and Plea Agreements: If information sufficient to determine that a defendant meets the above criteria is available at the time initial charges are filed, prosecutors should decline to pursue charges triggering a mandatory minimum sentence. However, if this information is not yet available, prosecutors may file charges involving these mandatory minimum statutes pending further information and a determination as to whether a defendant meets the above criteria. If the defendant ultimately meets the criteria, prosecutors should pursue a disposition that does not require a Title 21 mandatory minimum sentence. For example, a prosecutor could ask the grand jury to supersede the indictment with charges that do not trigger the mandatory minimum, or a defendant could plead guilty to a lesser included offense, or waive indictment and plead guilty to a superseding information that does not charge the quantity necessary to trigger the mandatory minimum.

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[2] The policy set forth herein is not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding. *See United States* v. *Caceres,* 440 U.S. 741 (1979).

[3] As with every case, prosecutors should determine, as a threshold matter, whether a case serves a substantial federal interest. In some cases, satisfaction of the above criteria meant for low-level, nonviolent drug offenders may indicate that prosecution would not serve a substantial federal interest and that the case should not be brought federally.

Advocacy at Sentencing: Prosecutors must be candid with the court, probation, and the public as to the full extent of the defendant's culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant's role in the offense, even if the charging document lacks such specificity. Prosecutors also should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines. In cases where the properly calculated guideline range meets or exceeds the mandatory minimum, prosecutors should consider whether a below-guidelines sentence is sufficient to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). In determining the appropriate sentence to recommend to the Court, prosecutors should consider whether the defendant truthfully and in a timely way provided to the Government all information the defendant has concerning the offense or offenses that were part of the same course of conduct, common scheme, or plan.

Recidivist Enhancements: Prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions. When determining whether an enhancement is appropriate, prosecutors should consider the following factors:

- Whether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization;
- Whether the defendant was involved in the use or threat of violence in connection with the offense;
- The nature of the defendant's criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses;
- Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels;
- Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants; and
- Other case-specific aggravating or mitigating factors.

In keeping with current policy, prosecutors are reminded that all charging decisions must be reviewed by a supervisory attorney to ensure adherence to the Principles of Federal Prosecution, the guidance provided by my May 19, 2010 memorandum, and the policy outlined in this memorandum.

HOLDER MEMORANDUM, GUIDANCE REGARDING § 851 ENHANCEMENTS IN PLEA NEGOTIATIONS SEPTEMBER 24, 2014

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

September 24, 2014

TO: DEPARTMENT OF JUSTICE ATTORNEYS

FROM: THE ATTORNEY GENERAL

RE: Guidance Regarding § 851 Enhancements In Plea Negotiations

The Department of Justice's charging policies are clear that in all cases, prosecutors must individually evaluate the unique facts and circumstances and select charges and seek sentences that are fair and proportional based upon this individualized assessment. "Department Policy on Charging and Sentencing," May 10, 2010. The Department provided more specific guidance for charging mandatory minimums and recidivist enhancements in drug cases in the August 12, 2013, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases." That memorandum provides that prosecutors should decline to seek an enhancement pursuant to 21 U.S.C. § 851 unless the "defendant is involved in conduct that makes the case appropriate for severe sanctions," and sets forth factors that prosecutors should consider in making that determination. Whether a defendant is pleading guilty is not one of the factors enumerated in the charging policy. Prosecutors are encouraged to make the § 851 determination at the time the case is charged, or as soon as possible thereafter. An § 851 enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty. This is consistent with long-standing Department policy that "[c]harges 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." "Department Policy on Charging and Sentencing," May 19, 2010.

While the fact that a defendant may or may not exercise his right to a jury trial should ordinarily not govern the determination of whether to file or forego an § 851 enhancement, certain circumstances -- such as new information about the defendant, a reassessment of the strength of the government's case, or recognition of cooperation -- may make it appropriate to forego or dismiss a previously filed § 851 information in connection with a guilty plea. A practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea, however, is inappropriate and inconsistent with the spirit of the policy.

U.S. SENTENCING COMMISSION FEDERAL SENTENCING GUIDELINES MANUAL, § 5C1.2., "SAFETY VALVE"

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases "the Safety Valve"

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

Commentary

Application Notes:

1. "More than 1 criminal history point, as determined under the sentencing guidelines," as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

2. "Dangerous weapon" and "firearm," as used in subsection (a)(2), and "serious bodily injury," as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

3. "Offense," as used in subsection (a)(2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.

4. Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

5. "Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

6. "Engaged in a continuing criminal enterprise," as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor of others in the offense."

7. Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.

8. Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Fed. R. Crim. P. 32(f), (i).

9. A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.

Background: This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). See also H. Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

Historical Note: Effective September 23, 1994 (see Appendix C, amendment 509). Amended effective November 1, 1995 (see Appendix C, amendment 515); November 1, 1996 (see Appendix C, amendment 540); November 1, 1997 (see Appendix C, amendment 570); November 1, 2001 (see Appendix C, amendment 624); October 27, 2003 (see Appendix C, amendment 651); November 1, 2004 (see Appendix C, amendment 674); November 1, 2009 (see Appendix C, amendment 736).

THE DEPARTMENT'S RESPONSE TO THE DRAFT REPORT

U.S. Department of Justice

950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

JUN 0 6 2017

MEMORANDUM

TO: Nina S. Pelletier
Assistant Inspector General
Evaluation and Inspections
Office of the Inspector General
Department of Justice

FROM: Scott N. Schools
Associate Deputy Attorney General
Office of the Deputy Attorney General

Monty Wilkinson
Director
Executive Office for United States Attorneys

SUBJECT: Response to OIG's Review of the Smart on Crime Initiative, Assignment Number A-2015-008

The Office of the Deputy Attorney General (ODAG) and the Executive Office for United States Attorneys (EOUSA) appreciate the opportunity to comment on the final draft report (May 23, 2017) of the review undertaken by the Office of the Inspector General (OIG) regarding the Department's implementation of prosecution and sentencing reform principles under the Smart on Crime Initiative. We appreciate the effort the OIG undertook to review the initiative and the acknowledgement of the progress that the Department made in implementing policies under the initiative. The Department remains committed to the principles of prioritizing federal prosecutions on the most serious threats to public safety and ensuring the fair and impartial administration of justice. As the draft report notes, however, the Department issued a new charging and sentencing policy on May 10, 2017, rescinding aspects of the Smart on Crime Initiative. Nevertheless, the recommendations in the draft report are relevant to the implementation of the new charging and sentencing policy, and the Department concurs with the recommendations as follows.[1]

[1] Recommendations #1 and #2 are directed to the Department. Recommendation #3 is directed to the Department and EOUSA. This response is submitted on behalf of the Department and EOUSA.

Recommendation 1. Ensure that the U.S. Attorneys' Manual accurately reflects Department charging policies.

The Department concurs that the United States Attorneys' Manual (USAM) should accurately reflect the policies set forth in the Attorney General's May 10, 2017 memorandum, "Department Charging and Sentencing Policy." The Department will make appropriate changes to the USAM.

Recommendation 2. Ensure that all U.S. Attorney's Offices consult with their law enforcement partners to make sure that their policies are current and consistent with local prosecution priorities.

The Department concurs that the United States Attorneys' offices should consult with their law enforcement partners in establishing local prosecution priorities. As noted in the draft report, most United States Attorneys' offices already work in conjunction with their law enforcement partners in developing local prosecution priorities. Moreover, the Attorney General has emphasized this principle in the context of violent crime. In his March 8, 2017 memorandum to all federal prosecutors, "Commitment to Targeting Violent Crime," the Attorney General directed the United States Attorneys to coordinate with federal, state, tribal, and local law enforcement in identifying and pursuing violent criminals. Accordingly, the Department will require United States Attorneys to confirm that they have consulted with their law enforcement partners as required by the March 8, 2017 memorandum.

Recommendation 3. Require all U.S. Attorney's Offices to collect charging data that will enable the Department to determine whether its charging and sentencing policies are being effectively implemented.

The Attorney General's May 10, 2017 memorandum setting forth the Department's charging and sentencing policy directs United States Attorneys and Assistant Attorneys General to ensure that deviations from the memorandum's general charging and sentencing directives be approved by a delegated supervisor and documented in the case file. The Department has traditionally ensured compliance with a charging policy in this manner, particularly by examining whether the United States Attorneys' offices have instituted processes to facilitate compliance, such as supervisory reviews of charging decisions, training on charging policies, and case reviews between or among AUSAs and their supervisors. The Department's new charging and sentencing policy directs all USAOs to document the file when an exception to the policy is approved. Accordingly, the Department will require that such documentation be maintained so that EOUSA can periodically request the USAOs to identify the number of exceptions granted for comparison against the number of defendants charged. This method of tracking compliance is consistent with the Attorney General's memorandum and with our understanding of the intent of the recommendation.

OIG ANALYSIS OF THE DEPARTMENT'S RESPONSE

The OIG provided a draft of this report to the Department of Justice (Department), including the Criminal Division, the Drug Enforcement Administration, the Executive Office for United States Attorneys (EOUSA), the Federal Bureau of Investigation, and the Office of the Deputy Attorney General (ODAG) for comment. ODAG and EOUSA responded on behalf of the Department (see Appendix 8) and stated that the Department remains committed to the principles of prioritizing federal prosecutions on the most serious threats to public safety and ensuring the fair and impartial administration of justice. While the Department issued a new charging and sentencing policy on May 10, 2017, rescinding aspects of the *Smart on Crime* initiative, the Department acknowledged that the recommendations in the OIG's report are relevant to the implementation of the new policy. Recommendations 1 and 2 are directed to the Department, and Recommendation 3 is directed to the Department and EOUSA. The Department concurred with all of the recommendations as follows. We discuss the OIG analysis of the Department's response and the actions necessary to close the recommendations below.

Recommendation 1: Ensure that the U.S. Attorneys' Manual accurately reflects Department charging policies.

Status: Resolved.

Department Response: The Department concurred with the recommendation and stated that appropriate changes will be made to the U.S. Attorneys' Manual (USAM) to accurately reflect the policies set forth in the Attorney General's May 10, 2017, memorandum, "Department Charging and Sentencing Policy."

OIG's Analysis: The Department's actions are responsive to our recommendation. By August 25, 2017, please provide copies of all updates to the USAM to reflect the changes set forth in the Attorney General's May 10, 2017, memorandum.

Recommendation 2: Ensure that all U.S. Attorney's Offices consult with their law enforcement partners to make sure that their policies are current and consistent with local prosecution priorities.

Status: Resolved.

Department Response: The Department concurred with the recommendation and stated that the U.S. Attorney's Offices (USAO) should consult with their law enforcement partners in establishing local prosecution priorities. The Department further indicated that the Attorney General emphasized this principle, in the context of violent crime, in a March 8, 2017, memorandum to all federal prosecutors, "Commitment to Targeting Violent Crime," which directed the U.S. Attorneys to coordinate with federal, state, tribal, and local law enforcement in

identifying and pursuing violent criminals. The Department will require U.S. Attorneys to confirm that they have consulted with their law enforcement partners as required by the Attorney General's memorandum.

OIG's Analysis: The Department's actions are responsive to our recommendation. By September 29, 2017, please describe how the Department will require U.S. Attorneys to confirm that they have consulted with their law enforcement partners to identify and pursue violent criminals, and whether the Department's requirement applies to consultations with law enforcement partners regarding all local prosecution priorities.

Recommendation 3: Require all U.S. Attorney's Offices to collect charging data that will enable the Department to determine whether its charging and sentencing policies are being effectively implemented.

Status: Resolved.

Department Response: The Department did not expressly concur with the recommendation, but stated that the Attorney General's May 10, 2017, memorandum that set forth the Department's charging and sentencing policy directs U.S. Attorneys and Assistant Attorneys General to ensure that deviations from the memorandum's general charging and sentencing directives be approved by a delegated supervisor and documented in the case file. The Department indicated that it has traditionally ensured compliance with a charging policy in this manner, particularly by examining whether the USAOs have instituted processes to facilitate compliance, such as supervisory reviews of charging decisions, training on charging policies, and case reviews between or among Assistant U.S. Attorneys and their supervisors. The Department's new charging and sentencing policy directs all USAOs to document the file when an exception to the policy is approved. Accordingly, the Department indicated that it will require that such documentation be maintained so that EOUSA can periodically request the USAOs to identify the number of exceptions granted for comparison against the number of defendants charged. It indicated that this method of tracking compliance is consistent with the Attorney General's memorandum and with the Department's understanding of the intent of the recommendation.

OIG's Analysis: The Department's actions are responsive to our recommendation. By September 29, 2017, please provide specific details on when and how EOUSA plans to request the number of exceptions granted for comparison against the number of defendants charged, as well as how it will track and use this information.

The Department of Justice Office of the Inspector General (DOJ OIG) is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in the Department of Justice, and to promote economy and efficiency in the Department's operations. Information may be reported to the DOJ OIG's hotline at www.justice.gov/oig/hotline or (800) 869-4499.

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