



## Changes in Federal Drug Prosecutions -- Spillover in State Court?

**Author :** Jeff Welty

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Earlier this week, United States Attorney General Eric Holder, speaking to American Bar Association, announced a policy change in how drug cases will be charged in federal court. This post summarizes Mr. Holder's speech, the policy change it announced, and its likely impact in federal court. It then considers whether the new policy will have spillover effects in state court.

**The Speech.** Mr. Holder's speech is available in full [here](#). He said that it is "past time . . . to address . . . unwarranted disparities" in the criminal justice system. He declared the system "broken" and not "sustainable," with an "unnecessarily large prison population," citing relevant statistics. He stated that "too many Americans go to too many prisons for far too long . . . for no truly good law enforcement reason." He observed that "young black and Latino men are disproportionately likely to become involved in our criminal justice system – as victims as well as perpetrators," and referred to a study that concluded that "people of color often face harsher punishments than their peers." Turning to solutions to the problems he perceived, he indicated that it was time for "rethinking the notion of mandatory minimum sentences for drug-related crimes" because they "generate unfairly long sentences." Specifically, he "mandated a modification of the Justice Department's charging policies so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences." In all, it was a rather high-sounding speech that sounded like it marked a major shift.

**The Policy.** The policy changed announced in the speech was implemented by a memorandum to federal prosecutors. The memorandum is available in full [here](#). Federal drug defendants are subject to mandatory minimum sentences if their crimes involved certain threshold quantities of drugs. *See generally* 21 U.S.C. § 841. For example, a defendant who sells more than 500 grams of cocaine faces a mandatory minimum sentence of five years, while one who sells more than five kilograms of cocaine faces a mandatory minimum of ten years. But those minimums apply only if the threshold quantities are alleged in the indictment. Under the new policy, drug quantity allegations will be omitted from a defendant's indictment, and the defendant will not be subject to a mandatory minimum sentence regardless of drug quantity, if all of the following obtain:

- The offense did not involve violence, a weapon, serious injury, or a minor
- The defendant did not supervise or manage others in the commission of the offense
- The defendant has no "significant ties to large-scale drug trafficking organizations"
- The defendant has no "significant" criminal history, which "usually" will mean that the defendant has three or fewer criminal history points under the federal sentencing guidelines

**Impact of the Policy.** Despite the Attorney General's powerful rhetoric, this strikes me as a rather minor change, for several reasons. First, many federal prosecutors were already using their discretion to omit drug quantities from indictments in less serious cases. Second, relatively few cases may meet all four criteria. In particular, federal prosecutors tend to focus on defendants who have significant criminal records or who play leadership roles in drug trafficking organizations. And third, the federal sentencing guidelines – which are advisory, but still widely followed by district judges in sentencing – were constructed around the mandatory minimums, so within-guideline sentences will often be at or above the mandatory minimum sentence that would have applied. I don't want to wander too far into the

weeds of federal sentencing. Interested readers can find a more detailed analysis along these lines [here](#) at the Volokh Conspiracy and in the comments to [this post](#) at Sentencing Law and Policy. All of that being said, some defendants will benefit from the new policy.

**Spillover in State Court?** One possible effect of the policy change is an increase in case volume in state court. Mr. Holder noted in his speech that United States Attorneys “cannot – and should not – bring every case or charge every defendant who stands accused of violating federal law,” because “[s]ome issues are best handled at the state or local level.” It may be that his new policy on drug cases will lead federal prosecutors to decline to prosecute some drug cases altogether, which would mean that more of those cases would end up in, or remain in, state court – perhaps including some cases involving large quantities of drugs. A second possible effect of the policy change would be indirect: some state actors could be inspired to mimic some of the federal changes at the state level, by ameliorating drug trafficking sentences. I doubt that this will happen in a systematic way in the near term. The General Assembly made significant changes to the law of sentencing in the Justice Reinvestment Act, but left trafficking alone. And Attorney General Cooper doesn’t supervise the district attorneys in the way the Attorney General Holder supervises the United States Attorneys, so there is no mechanism for top-down administrative change. But individual offices, and individual prosecutors, have virtually complete discretion in handling drug cases, and the broader movement to reform the criminal justice system of which Mr. Holder’s speech was a part may manifest itself at the local level in uneven and unpredictable ways. For those interested in the details of how that could happen, Jamie plans to post tomorrow about ways to dial down trafficking sentences under state law.