

MANDATORY MINIMUMS AND FEDERAL SENTENCES

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Abstract

For decades, advocates, lawmakers, and scholars have lambasted mandatory minimum sentencing laws, especially for drug crimes. In 2013, Attorney General Eric Holder attempted to reduce sentences for low-level, nonviolent drug trafficking defendants by instructing all federal prosecutors to stop charging mandatory minimums against such defendants. This paper examines how this charging policy worked. It finds evidence of meaningful compliance with the policy change but only weak evidence that the change reduced sentences for the defendants it sought to benefit. Difference-in-difference estimates suggest the policy change did not at all reduce sentences for eligible defendants, while simple first-difference estimates suggest an effect on sentence length that is roughly one-fourth the size of the policy's effect on charging.

The paper considers three plausible explanations for the findings. First, it argues that Holder's reform failed to account for the many ways in which mandatory minimums are reinforced by other aspects of federal criminal law, policy, and practice, a phenomenon I call *mandatory minimum entrenchment*. Second, it considers—but does not find evidence to support—the theory that by targeting defendants who already had opportunities to avoid mandatory minimum sentences before the policy change, the policy exemplifies *redundant leniency*. Third, it finds *spillover* effects in a small class of defendants: ineligible defendants that are prosecuted alongside at least one eligible co-defendant.

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Introduction

The United States incarcerates an enormous number of people: more—in both raw numbers (2.1 million) and as a percent of its population (0.7 percent)—than any other country in the world. Our criminal system is also characterized by extreme racial inequality. In 2019, Black residents were imprisoned at more than five times the rate of White residents and Hispanic residents were imprisoned at roughly 2.5 times the rate of White residents.²

Prosecutors, whose decisions determine who enters prison and heavily influence sentences, unquestionably contribute to America’s mass and racially disparate incarceration (Bazelon, 2019; Davis, 2007; Pfaff, 2017). Prosecutorial power is especially forceful in cases in which mandatory minimums are at stake for two reasons.³ First, mandatory minimum sentencing laws allow the prosecutor to impose a floor on the defendant’s sentence via charging. Prosecutors enjoy nearly unfettered discretion in deciding and pursuing charges. Mandatory minimums—especially lengthy ones—mechanically constrain judges’ discretion over sentencing defendants. Second, mandatory minimum provisions affect the plea-bargaining dynamics between prosecutors and defendants. In particular, a prosecutor can use the threat of charging an offense carrying a mandatory minimum to induce a defendant to plead guilty to a lesser offense or to cooperate with the government in another case (Lynch, 2016).⁴

Sympathetic to the idea that mandatory minimums lead to excessive sentences for low-level drug-trafficking defendants, Attorney General Eric Holder announced a sweeping change to mandatory minimum charging policy in an August 12, 2013 memo (“the Holder Memo”). The Holder Memo instructed all federal prosecutors to stop charging mandatory minimums in drug trafficking cases involving low-level, nonviolent defendants. The Holder Memo clearly communicated one central goal: to reduce sentences for these defendants.⁵

² E. Ann Carson, Prisoners in 2019 (Oct. 2020), available at: <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>.

³ As the name suggests, a *mandatory minimum*, also called a *statutory minimum*, is a penalty provision of a criminal statute that sets a minimum term of imprisonment if the defendant is convicted of the crime defined in the statute.

⁴ In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the U.S. Supreme Court approved of this practice. In fact, one of the arguments that early supporters offered in favor of mandatory minimums for federal drug offenses was that harsh mandatory minimums would induce cooperation (U.S. Sentencing Commission, 1991, 14). It is by intentional, legislative design—not mere coincidence—that the two mechanisms for avoiding a mandatory minimum in federal drug prosecutions both involve providing information to the government.

⁵ Holder Memo at 1.

Despite the charging policy's import, this paper presents the first scholarly evaluation of whether it worked—that is, whether Holder's policy change reduced sentences for the defendants it targeted. To date, the only other evaluation of the policy is contained in a flawed report produced by the Department of Justice's Office of the Inspector General, which conflates reductions in mandatory minimum *charging* with mandatory minimum *sentencing*. In contrast to the OIG report, this paper shows that the Holder Memo did not work as well as intended. I first document meaningful compliance with the charging policy—mandatory minimum charging fell by around 24 percent among defendants most likely to be eligible for Memo leniency, while remaining stable among other federal defendants. Despite strong evidence of compliance, however, sentences for these eligible defendants remained almost unchanged, decreasing by at most around seven percent.

These findings offer important lessons for federal and state criminal reform. The Holder Memo was a centerpiece of the Obama administration's criminal policy. Holder announced the August 2013 charging policy change in a speech to the annual meeting of the American Bar Association's House of Delegates, describing the initiative as the result of "fundamentally rethinking the notion of mandatory minimum sentences for drug-related crimes."⁶ In a speech at the NAACP Conference two years later, President Obama highlighted the policy, describing, "Under the leadership of Attorney General Eric Holder—now continued by Loretta Lynch—prosecutors...refocus[ed] efforts on the worst offenders, pursuing mandatory minimum sentences 20 percent less often than they did the year before... And it turns out that we're solving just as many cases and there are just as many plea bargains, and it's working. It's just that we've eliminated some of the excess."⁷

The policy change lasted less than four years. Attorney General Jeff Sessions rescinded the policy four months into the Trump presidency. *[Placeholder: keep updated with Biden admin plans—has not yet reinstated but anecdotally some districts are following.]*

⁶ U.S. Dep't of Justice, *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates*, Aug. 12, 2013, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

⁷ Archived Obama White House Website, *Remarks by the President at the NAACP Conference*, July 14, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

This paper explores three possible explanations for the Holder reform’s failure to effectively translate reductions in charging to reductions in sentencing for eligible defendants. First, I present evidence that the Memo suffered due to behavioral and institutional *entrenchment* of mandatory minimums in the law, policy, and practice of federal drug prosecutions. Second, I consider but do not find evidence to support the idea that the Memo created *redundant leniency* given that many of the defendants targeted by the policy change were previously able to avoid application of a mandatory minimum through other statutory escape valves. Third, I find suggestive evidence of one particular type of *spillover*: ineligible defendants who are prosecuted with an eligible co-defendant appear to have indirectly benefitted from the Memo.

The paper proceeds as follows. Section I provides an overview of the legal and empirical landscape surrounding mandatory minimum charging and sentencing in federal drug trafficking cases. Section II describes the data and presents descriptive statistics and figures. Section III lays out the empirical strategy. The bulk of the empirical analysis is contained in Section IV, which estimates the effects of the Holder Memo using a difference-in-differences design and follows with robustness checks. Section V examines several potential explanations for the findings. Section VI concludes.

I. The Holder Memo and Mandatory Minimums for Federal Drug Crimes

This section explains how mandatory minimums operate in federal criminal cases. Subsection I.A describes the formal legal rules and policies that govern mandatory minimum charging and sentencing, including the Holder Memo. Subsection I.B reviews quantitative and qualitative empirical accounts of how mandatory minimums operate in federal drug prosecutions.

A. Formal Rules for Mandatory Minimum Charging and Sentencing

This section describes the Holder Memo and other formal policies that federal prosecutors must follow in charging defendants with crimes. It also describes how mandatory minimums operate in federal sentencing, including the two statutory mechanisms through which defendants who are convicted of an offense carrying a mandatory minimum can be sentenced below their mandatory minimum.

1. Mandatory Minimum Charging and the Holder Memo. Under the federal Controlled Substances Act, mandatory minimums for federal drug trafficking offenses range from five

years to life imprisonment. Since their enactment 34 years ago, defendants, advocates, scholars, elected officials, and other government actors have attacked these mandatory minimum provisions with limited success. Since the early 2000s, efforts to eliminate or reduce mandatory minimums for federal drug offenses have enjoyed bipartisan support, and mandatory minimums are deeply unpopular. In 2016, nearly 80 percent of Americans favored ending them (Pew, 2016).

Most federal defendants facing mandatory minimums are charged with drug-trafficking offenses defined in the Controlled Substances Act.⁸ The Controlled Substances Act prescribes mandatory minimum sentences that vary based on the quantity and type of drugs attributed to the defendant, the physical harm that resulted from the offense, and the nature of the defendant’s past criminal record. For example, a defendant with no prior felony convictions who distributes more than one kilogram of heroin is subject to a ten-year mandatory minimum sentence, unless the offense resulted in serious bodily injury or death, in which case the defendant is subject to a twenty-year mandatory minimum.⁹ In addition to drug offenses, several other federal crimes carry mandatory minimums, including offenses involving firearms,¹⁰ sexual offenses involving minors,¹¹ and others. However, defendants charged with drug offenses make up the majority of federal defendants who face a mandatory minimum.

In 2013, the Supreme Court decided *Alleyne v. United States*,¹² which changed the ways in which prosecutors could use mandatory minimums. The Court in *Alleyne* held that any fact that increases the mandatory minimum sentence for a crime must be submitted to

⁸ 21 U.S.C. § 841. The Controlled Substances Act also criminalizes drug possession, 21 U.S.C. § 844. If a person is found guilty of possession of a controlled substance, they are subject to a mandatory minimum sentence of fifteen days if they have a prior drug conviction or 90 days if they have more than one prior drug conviction.

⁹ 21 U.S.C. § 841(B)(1)(A). This statutory provision lists minimum quantities of eight types of drugs that trigger a ten-year mandatory minimum. However, if “death or serious bodily injury results from the use of such substance,” the mandatory minimum is twenty years. If the defendant has a “prior conviction for a serious drug felony or serious violent felony,” the mandatory minimum is fifteen years, unless death or serious bodily injury results, in which cases the mandatory minimum is life imprisonment. If the defendant has two or more prior convictions for “a serious drug felony or serious violent felony,” the mandatory minimum is twenty-five years, unless death or serious bodily injury results, in which case the mandatory minimum is life imprisonment.

¹⁰ 18 U.S.C. § 922

¹¹ For example, 18 U.S.C. § 2252(b) sets mandatory minimum penalties for people who “knowingly transport[] or ship[] . . . , any visual depiction [of] . . . a minor engaging in sexually explicit conduct.”

¹² 570 U.S. 99 (2013).

the jury—not simply found by the judge at sentencing.¹³ After *Alleyne*, if a prosecutor simply omits the quantity of drugs from the indictment, the defendant will not be subject to the mandatory minimum, even if the judge is to make factual findings as to drug quantity later on in the case (as judges typically do).

Shortly after *Alleyne* was decided, Holder issued a memorandum that laid out a Department-wide policy for charging mandatory minimums in drug cases (the “Holder Memo”). The Holder Memo, titled “Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases,” is reproduced in Appendix A. The Memo “refine[d] [DOJ] charging policy regarding mandatory minimums for certain nonviolent, low-level drug defendants,” and emphasized the importance of “ensur[ing] that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers.”¹⁴ The Memo justified this change on the grounds that “[l]ong sentences for low-level, nonviolent drug offenses do not promote public safety, deterrence and rehabilitation” and that “rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs.”¹⁵ By directing federal prosecutors to stop charging mandatory minimums for low-level, nonviolent drug defendants, the Holder Memo deviated from longstanding DOJ charging policy, which had consistently instructed prosecutors to charge the most serious readily provable offense.¹⁶

The Holder Memo ordered prosecutors to decline to bring mandatory minimum charges if the defendant met four criteria¹⁷: (1) their relevant conduct must not have been violent or involved a weapon; (2) they must not have been a leader of others within a criminal organization; (3) they must not have had “significant ties to large-scale drug trafficking organizations, gangs, or cartels;” and (4) they must not have had a significant criminal history, which the Memo clarified, “will normally be evidenced by three or more criminal

¹³ 570 U.S. at 116.

¹⁴ Memo at 1.

¹⁵ Memo at 1.

¹⁶ General DOJ charging guidance typically changes—albeit minimally—between administrations. In general, Attorneys General appointed by Republican presidents tend to use more exacting language, while Attorneys General appointed by Democratic presidents tend to allow for consideration of other factors (compare Reno (1993) (Democratic-appointed Attorney General) with Ashcroft (2003) (Republican-appointed Attorney General)).

¹⁷ Memo at 2.

history points but may involve fewer or greater depending on the nature of any prior convictions.”

As I describe in section II.B, this reform was expansive—in the data, I estimate that around half of all drug defendants were potentially eligible for lenient treatment.¹⁸ The Holder Memo governed until May 10, 2017, when Attorney General Jeff Sessions issued a memorandum that rescinded the charging policies laid out in the Holder Memo (the “Sessions Memo”).¹⁹

The Holder Memo also addressed another, smaller subset of defendants: those subject to recidivist enhancements under 21 U.S.C. § 851.²⁰ The Memo instructed prosecutors not to pursue recidivist enhancements for defendants “unless the defendant is involved in conduct that makes the case appropriate for severe sanctions,” and laid out six factors for prosecutors to consider in deciding whether a defendant fell into this category.²¹ Defendants eligible for charging leniency under the first part of the Memo would not have been at risk of receiving a § 851 enhancement because this enhancement is reserved for defendants with more significant criminal records.

2. Mandatory Minimum Sentencing. Mandatory minimum provisions generally prohibit judges from sentencing defendants below their statutory minimum.²² Federal sentencing law, however, recognizes two exceptions to this rule: substantial assistance reductions and safety valve relief.

¹⁸ In the data used in this paper around 47 percent of drug defendants are defined as likely to be eligible for Memo treatment. However, these eligibility criteria are likely over-inclusive because the data does not report whether the defendant has any ties to a large-scale drug trafficking organization, which would render that defendant ineligible for the charging policy.

¹⁹ The Sessions Memo instructed prosecutors to “charge and pursue the most serious, readily provable offense” and defined “the most serious offenses” as “those that carry the most substantial guidelines sentence, including mandatory minimum sentences.” The Sessions Memo—like many charging memos before it—recognized that “[t]here will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted.” The Sessions Memo allowed that in such situations, the prosecutor could seek approval from a supervisor to vary from the charging policy laid out in the Memo.

²⁰ In prosecuting a defendant for a drug offense, § 851 allows the prosecutor to file an information with the court alleging that the defendant has previously been convicted of a felony drug offense. If the government does not withdraw the information before sentencing, the defendant will be subject to an increased mandatory minimum.

²¹ The six factors are: (1) “[w]hether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization;” (2) whether the offense was violent or threatened violent; (3) “[t]he nature of the defendant’s criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses;” (4) “[w]hether the defendant has ties to large-scale drug trafficking organizations, gangs, or cartels;” (5) “[w]hether the filing would create a gross sentencing disparity with equally or more culpable co-defendants;” or (6) “other case-specific aggravating or mitigating factors.”

²² I use the terms “mandatory minimum” and “statutory minimum” interchangeably throughout this paper.

First, upon motion of the government, a judge may sentence a defendant below the statutory minimum if the defendant provides “substantial assistance in the investigation or prosecution of another person who has committed an offense.”²³ In fiscal year 2017, roughly eleven percent of all federal defendants and 21 percent of defendants prosecuted for drug offenses earned substantial assistance reductions.

Second, the safety valve exception allows a judge to sentence a defendant below the statutory minimum. Safety valve relief is only available to drug-trafficking defendants. To be eligible for safety valve relief, a drug-trafficking defendant must satisfy five criteria. First, they must have minimal criminal history.²⁴ Second, the defendant must not have been a leader, organizer, or supervisor in the commission of the offense. Third, the defendant must not have used violence in the commission of the offense, and fourth, the offense must not have resulted in serious injury. Fifth, the defendant must make a truthful proffer to the government of all that they know about the offense and any related misconduct.²⁵ In fiscal year 2017, roughly 31 percent of defendants charged with drug offenses received safety valve relief.²⁶

Defendants convicted of drug offenses that carry a mandatory minimum but who receive either a safety valve or substantial assistance reduction (or both) are regularly sentenced below their mandatory minimum. For example, in fiscal year 2017, 33 percent of drug defendants received safety valve relief. Among these defendants facing a mandatory minimum, only seventeen percent were sentenced at or above the minimum. In contrast, among drug defendants who faced a mandatory minimum but did *not* receive safety valve relief, 78 percent were sentenced at or above the statutory minimum. The numbers are similar

²³ 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1. Motions for substantial assistance are usually made at sentencing under § 5K1.1, but the government may also make a substantial assistance motion after the defendant is sentenced, pursuant to Federal Rule of Criminal Procedure 35(b). Both the statutory and Guideline provisions make clear that substantial assistance reductions are available upon motion of the government, suggesting that a judge may not award the reduction based on their own determination of the defendant’s cooperation and assistance.

²⁴ Specifically, the defendant must “not have more than four criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines.” 18 U.S.C. § 3553(f)(1)(A). This provision was recently amended by the First STEP Act. Until 2018, defendants could only qualify for safety-valve relief if they had one or zero criminal history points.

²⁵ 18 U.S.C. § 3553(f).

²⁶ In addition to relief from a statutory minimum, defendants who satisfy the safety-valve criteria also earn a two-level reduction in their offense level under U.S.S.G. § 2D1.1(b)(18). In the data, a defendant is coded as receiving safety-valve relief if they receive this reduction—regardless of whether they face a statutory minimum.

for drug defendants receiving substantial assistance reductions. Among drug defendants facing a mandatory minimum and receiving a substantial assistance reduction in fiscal year 2017, 24 percent received a sentence at or above the statutory minimum. Among drug defendants facing a mandatory minimum who did not receive substantial assistance reductions, 75 percent were sentenced at or above the statutory minimum.

B. Mandatory Minimums in Practice

Scholars have long been interested in how prosecutors and judges respond to mandatory minimums: how they are charged, how they are used during plea bargaining, and how they affect sentencing outcomes. This paper is most closely related to David Bjerk's work examining mandatory minimum sentencing for federal drug crimes (Bjerk, 2017). Bjerk studied federal drug defendants sentenced in fiscal years 2011 and 2012, ending his sample roughly one year before the Holder Memo took effect. One of Bjerk's key findings was that many drug-trafficking defendants are sentenced below their mandatory minimum, which I suggest in section V.A can partly explain why the Holder Memo did not achieve its stated goal of meaningfully reducing sentences for low-level, nonviolent drug defendants.

Much prior work has also documented the ways in which prosecutors use mandatory minimums strategically. For example, scholars who have examined the effects of *United States v. Booker*²⁷ and its progeny have found that mandatory minimum charging increased after the U.S. Sentencing Guidelines became advisory (Fischman & Schanzenbach, 2012; Lynch & Omori, 2014). Other scholars argue that when *Booker* reduced prosecutors' power to control defendants' sentences through mandatory application of the Guidelines, prosecutors responded by exercising this control through mandatory minimums (Starr & Rehavi, 2013).²⁸

Scholars have also consistently documented racial disparities in the application of mandatory minimums. For example, M. Marit Rehavi and Sonja Starr find that mandatory minimum charging can explain a significant portion of Black-White sentencing disparity (Rehavi & Starr, 2014). Similarly, Joshua Fischman and Max Schanzenbach report that racial

²⁷ In *Booker*, 543 U.S. 220 (2005), the U.S. Supreme Court held that Congress cannot constitutionally require judges to sentence within the U.S. Sentencing Guidelines range. Prior to *Booker*, federal statutory law required judges to impose a sentence within the Guidelines range. After *Booker*, that statutory provision was "severed and excised" from the federal sentencing statute, and the U.S. Sentencing Guidelines became advisory.

²⁸ This hypothesis—the trading off of discretion between judges and prosecutors—is popularly called the "hydraulic" theory of discretion. (Miethe, 1987; Starr & Rehavi, 2013)

sentencing disparities increased after *Booker*, “primarily due to the increased relevance of mandatory minimums,” (Fischman & Schanzenbach, 2012). Rehavi, Starr, and Crystal Yang have all found that mandatory minimums are more likely to be charged against Black defendants after *Booker* (Rehavi & Starr, 2014; Yang, 2015). A new working paper by Cody Tuttle similarly finds that Black and Hispanic federal defendants are more likely to be prosecuted in cases involving mandatory minimum-triggering quantities of crack-cocaine, and that this racial disparity can be largely explained racial animus rather than other characteristics of defendants and their cases, suggesting that race-based discrimination is to blame (Tuttle, 2019).

This prior work, as well as a growing body of legal scholarship, suggests many potential impediments to Holder’s plan to reduce sentences for low-level, nonviolent drug defendants by excising mandatory minimum charges from their cases. First, individual prosecutors—spread across 94 federal judicial districts in the United States and operating under different local norms—might simply disobey a leniency instruction from their boss in Washington, DC (Davis, 2019; Ouziel, 2020; Richman, 2006; Sklansky, 2017). Second, the policy change could exacerbate racial disparities if it is applied unequally, as mandatory minimums themselves have been shown to be applied (Rehavi & Starr, 2014; Tuttle, 2019; Yang, 2015). Third, the Memo did not account for the important ways that mandatory minimums are entrenched in the federal criminal system—both formally and informally (Didwania, 2020). Finally, the policy could be redundant of other pre-existing opportunities for leniency given that it only applied to low-level, nonviolent defendants: the most frequent beneficiaries of progressive criminal justice reforms (Hofer, 2013; O’Hear, 2017; Pfaff, 2017).

I am aware of only one empirical analysis of the Holder Memo, which was published by the DOJ’s Office of the Inspector General.²⁹ While this report is a good first step in understanding many dimensions of the charging policy, its most important shortcoming is that it does not analyze whether the Holder Memo achieved its stated goal—to reduce sentences for eligible defendants. In fact, contrary to the findings in this paper, the Inspector General’s report asserts that the Memo’s charging policy reduced sentence length for drug

²⁹ As described above, the Memo is one of the policy documents that the DOJ issued as part of its *Smart on Crime* initiative.

defendants.³⁰ To support this assertion, the Inspector General’s report cites the fact that “the rate of federal drug defendants sentenced without a mandatory minimum rose from 40 percent in 2012 to 54 percent in 2015.”³¹ The Inspector General’s analysis makes a critical error, however, which is that it conflates mandatory minimum *charging* with ultimate *sentencing* outcomes. For example, one of its findings is that:

[T]here has been a significant increase in the percentage of drug defendants not **sentenced** to mandatory minimum sentences nationally since *Smart on Crime* was announced. Specifically, the percentage of federal drug defendants not sentenced to a mandatory minimum term rose 39.7 percent in FY 2012 to 49.9 percent in FY 2014. By FY 2015, over half of all federal drug defendants, 54.2 percent, were sentenced with no mandatory minimum, according to USSC data.³²

The terminology the Inspector General’s report uses— “sentenced to mandatory minimum sentences”—is incorrect. The report appears to refer to the percent of defendants who were *charged* with a mandatory minimum. But being charged with a mandatory minimum is not the same as being sentenced to a mandatory minimum. Before, during, and after the Holder Memo, many drug defendants were ultimately sentenced to a term of imprisonment that was less than their statutory minimum through the safety valve and substantial assistance mechanisms described above. By failing to analyze changes in sentence length, the Inspector General’s report falls short of understanding the Memo’s most important effects.

II. Data and Descriptive Statistics

I investigate the effects of the Holder Memo on charging and sentencing using the United States Sentencing Commission’s annual data files for individual defendants sentenced under the Guidelines (the “Commission data”). In sections IV.D and V.C, I supplement the Commission data with federal case data published by the Executive Office of United States Attorneys. This section first describes these two datasets, and then presents summary statistics and preliminary figures.

A. Description of the Data

³⁰ In particular, the IG report states, “[W]e found . . . 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.”

³¹ *Id.* at iii.

³² *Id.* at 21-22 (emphasis added).

The U.S. Sentencing Commission (the “Commission”) publishes annual data files that include detailed information about defendants sentenced in federal courts. The Commission compiles this data from sentencing documents submitted by the federal district courts and reviews the data for completeness and quality before making the files available to the public on its website.

The Commission’s individual defendant files contain detailed case information for nearly all defendants sentenced in federal courts.³³ For example, the data includes demographic characteristics about each defendant (such as the defendant’s age, sex, race, Hispanic ethnicity, citizenship, and educational attainment); information about the defendant’s criminal history (both before and after any Guidelines adjustments); information about the offense(s) for which the defendant was convicted (including the type of offense; the statute(s) of conviction; the statutory minimum and maximum; and the type and quantity of drugs involved (if applicable)); and sentencing variables (such as the defendant’s recommended Guidelines range at sentencing and the sentence imposed).

The Commission data, however, lacks several important variables that I use in sections IV.D and V.C. First, the Commission data identifies the federal judicial district in which each defendant was sentenced, but nearly all federal districts include multiple courthouses (sometimes called *branches*) to which defendants, judges, attorneys, and court staff are non-randomly assigned. Ideally, researchers would control for geographic differences based on the geographic unit at which cases are assigned, but this is not possible with the Commission data. Second, the Commission data does not indicate cases in which defendants were prosecuted together as co-defendants.

To fill these gaps, I use data from the Legal Information Office Network System (the “LIONS” data). LIONS is the computer program that the Executive Office for United States Attorneys (EOUSA) uses to track cases. In response to Freedom of Information Act requests, the EOUSA regularly publishes data from LIONS. The LIONS data is made up of many discrete text files that can be linked using case and participant identification numbers that are provided with the data. The LIONS data is expansive, covering all cases in which a USAO

³³ The Commission data includes defendants convicted of felonies and Class A misdemeanors. It excludes cases involving: juvenile defendants, defendants convicted of Class B and C misdemeanors, and death penalty cases (Reedt, Semisch and Blackwell 2013).

was involved. Critically, the LIONS data indicates the precise geographic location in which the defendant’s case was prosecuted, rather than the federal district. In section IV.D, I show that the results are robust to accounting for this narrower level of geography. The LIONS data also identifies defendants who were co-defendants in the same case, which I use to investigate spillover effects of the policy change in section V.C.

It is important to note a few important shortcomings of the LIONS data. First, unlike the Commission data, it does not appear that the LIONS data is cross-checked for accuracy with court documents. Second, the LIONS data contains many more missing values than the Commission data, making it appear less reliable. For this reason, the main analysis relies on Commission data, with the LIONS data filling in the holes.

B. Descriptive Statistics

I compile Commission data on defendants sentenced under the Guidelines, although the analysis focuses on drug defendants. I remove defendants sentenced after October 2014 to avoid conflating the effect of the Holder Memo with the 2014 Drug Guidelines Amendment, which took effect in November 2014.³⁴ To equalize the lengths of the pre- and post-periods, I include defendants sentenced between July 2012 and October 2014.

I define a case as decided in the post-Holder period if the defendant was *sentenced* after the Holder Memo was promulgated. I use the defendant’s sentencing date to determine eligibility because Holder issued a second memo (the “Retroactivity Memo”) that clarified that the policy change should apply retroactively to pending cases, including to defendants who had already been charged with a mandatory minimum but not yet sentenced.³⁵ The Retroactivity Memo is reproduced in Appendix A. The results are robust to using the date of case initiation as the cut-off for Holder Memo treatment.³⁶

³⁴ The 2014 Drug Guidelines Amendment reduced the offense levels associated with drug quantity by two levels for drug trafficking defendants. The Amendment took effect on November 1, 2014. The US Sentencing Commission predicted that this Amendment would reduce penalties by around 11 months for 70 percent of drug trafficking defendants. The Amendment applied retroactively to currently imprisoned defendants. The Commission data used in this paper reports the *original* sentences that these defendants received, so the retroactive nature of the 2014 Amendment will not affect the estimates here of the effect of the Holder Memo. The Commission tracks re-sentencings in a separate datafile that is not available for researchers (email correspondence with Commission staff on file with the author).

³⁵ The Retroactivity Memo suggests that prosecutors could accomplish this by agreeing to superseding charges that don’t specify drug quantity or—if the court allows—by dismissing the charged allegation of quantity.

³⁶ Results on file with the author.

I define Holder Memo eligibility using variables from the Commission data. As described in subsection I.A.1, the Holder Memo’s charging policy applied to defendants who met four criteria. Broadly summarized, the offense must not have been violent, the defendant must not have been a leader within a criminal organization, the defendant must not have had significant ties to a drug-trafficking organization, and the defendant must not have had significant criminal history.

The Commission data includes several variables that allow me to proxy for whether a drug defendant was likely to be eligible for Holder Memo treatment. For example, I can define eligibility based on the defendant’s criminal history points because the Commission data reports this variable and the Holder Memo expressly stated that “[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.” I also investigate other potential proxies for eligibility, including whether the defendant was charged under 18 U.S.C. § 924(c) or is subject to a weapon enhancement; whether the defendant received an aggravated role adjustment under Guideline 3B1.1; and whether the defendant received an adjustment for the use of a minor in the commission of a crime under Guideline 3B1.4. According to the Memo, each of these factors would trigger ineligibility.

It is important to note that these enhancements are endogenous because the prosecutor decides whether to request them. One might find, for example, that the Holder Memo induced prosecutors to increasingly argue for aggravated role adjustments to ensure eligibility to defendants, or vice versa. In this case, the adjustment would not be a sensible proxy for defining the eligibility.

To determine whether any of these variables are appropriate for defining eligibility, Figure 1 compares their prevalence in the pre- and post-periods. Panel A is a histogram of criminal history points before and after the Holder Memo was distributed.³⁷ Defendants on the margin of eligibility are those with two (eligible) or three (ineligible) criminal history points. Panels B through D are column graphs showing the fraction of defendants with a weapon charge or adjustment (panel B), the share of defendants receiving an aggravated role

³⁷ For purposes of this figure only, criminal history points are truncated at 13 for presentation. Less than five percent of defendants have more than 13 criminal history points. In the regression analyses, the full measure of criminal history points is used.

adjustment (panel C), and the share of defendants receiving an adjustment for the use of a minor in the commission of a crime (panel D), by criminal history points in the pre and post periods.

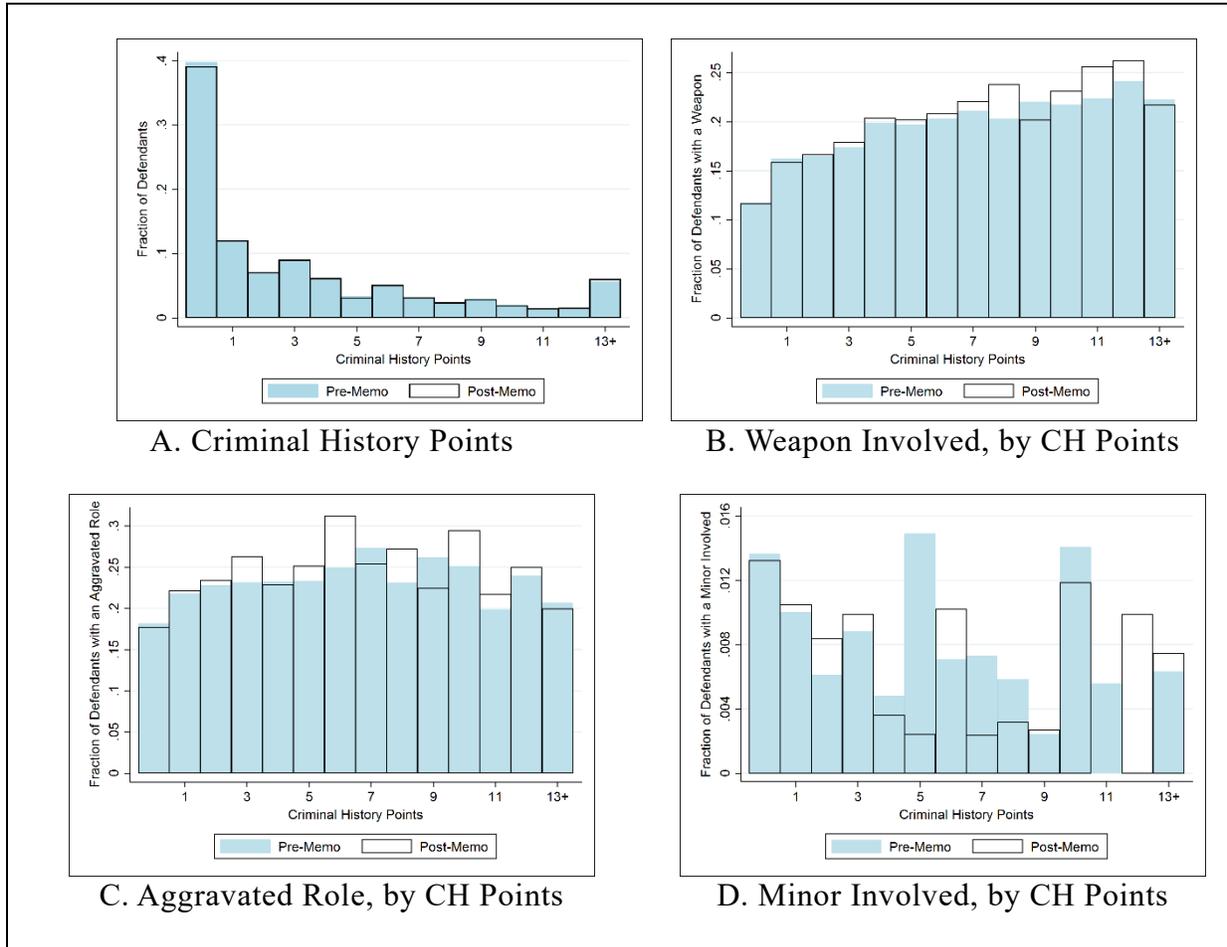


Figure 1. Prevalence of Eligibility Criteria Before and After the Holder Memo

Figure 1 demonstrates that the prevalence of a defendant’s criminal history points and the presence of a weapon do not appear to be affected by the Memo. In panel A, the distribution of criminal history points is virtually identical in the pre- and post-periods, which makes sense because it is difficult for a person to alter their criminal record ex post. In Panel B, the prevalence of weapons charges across criminal history points is also very similar in the pre- and post-periods. There are increases in weapons charges among defendants with more than seven criminal history points, but defendants with these criminal history scores are not on the margin of eligibility for Holder Memo treatment so this should not compromise

the validity of the results if the weapon variable is used to code eligibility. As a result, I use the weapons variables along with the defendant's reported criminal history points to code defendants' eligibility.

On the other hand, the distribution of adjustments for aggravated role and the use of a minor are more different in the pre- and post-periods. Aggravated role adjustments are increasingly applied for defendants with three criminal history points in the post-period, and there are also differences for many defendants who have five or more points. For defendants with three criminal history points, such adjustments might affect eligibility for Holder Memo treatment. For this reason, I do not use the aggravated role variable to define eligibility, although the results are robust to doing so, as shown in section IV.D. The prevalence of adjustments for the use of a minor are also different in the pre- and post-periods, but these adjustments are rare—applying in around one percent of cases. The adjustments are more common in the post-period among defendants on the margin of eligibility with two criminal history points, as well as for most defendants with more than two points. Therefore, I do not use this variable to proxy for eligibility, although the results are robust to doing so, as shown in section IV.D.

Table 1 presents sample means for all defendants convicted of offenses involving drugs in the sample (column 1), drug defendants coded as likely to be eligible for treatment by the Holder Memo (column 2), drug defendants likely to be ineligible for treatment by the Holder Memo (column 3), and defendants whose cases did not involve drugs (column 4). The defendant groups differ in demographic and case characteristics. The majority of eligible drug defendants (58 percent) are Hispanic, while a plurality of ineligible drug defendants (38 percent) are Black. Non-Hispanic White defendants are represented roughly equally in the two groups of defendants convicted of drug offenses (comprising 21 percent of eligible defendants and 26 percent of ineligible defendants), as are defendants of another race (comprising three percent of both eligible and ineligible defendants). Among defendants in cases involving drugs, women, defendants who are not U.S. citizens, and college graduates are more prevalent in the eligible population, which is not surprising given that defendants with these characteristics tend to have lower criminal history scores—a critical factor in determining eligibility.

Eligible and ineligible defendants do not differ much in terms of their base offense levels (27.5 points in the eligible group versus 27.0 in the ineligible group), but ineligible defendants have larger final offenses levels (21.1 in the eligible group versus 26.2 in the ineligible group), implying that on net they receive fewer downward adjustments and/or more upward adjustments based on the characteristics of their offenses. Nearly all safety-valve reductions are awarded to eligible defendants because the safety-valve reduction was only available to defendants with zero or one criminal history point during the sample period.³⁸ Critically, more than two-thirds of all eligible defendants earn safety-valve reductions. Substantial assistance reductions are more common in drug than non-drug cases, applying in around 28 percent of drug cases and only seven percent of non-drug cases.

In terms of case outcomes, defendants in cases involving drugs tend to receive more severe sentences than non-drug defendants, and ineligible defendants receive particularly long sentences: around 95 months on average. On the other hand, perhaps reflecting what judges view as undue harshness of the drug Guidelines,³⁹ drug defendants are also more likely to receive sentences below their recommended Guidelines range than non-drug defendants. While just under half of all non-drug defendants receive below-Guidelines sentences, nearly two-thirds of drug defendants receive a below-Guidelines sentence.

Because the eligible and ineligible groups differ in demographic and case characteristics, it is important to verify that they exhibit parallel trends in the pre-period. The next subsection presents such evidence.

C. Preliminary Figures

Figure 2 depicts the share of defendants in the raw data charged with an offense carrying a mandatory minimum sentence by quarter over time. Panel A plots the prevalence of defendants with any mandatory minimum and Panel B plots the prevalence of defendants with a drug mandatory minimum. The solid blue line plots the share of mandatory minimums for drug defendants **eligible** for treatment by the Holder Memo; the red dashed line plots the share for drug defendants facing mandatory minimums who were **ineligible** for treatment by the Holder Memo; and the green dotted line plots the share for **non-drug** defendants. “Drug

³⁸ The 2018 FIRST STEP Act expanded safety-valve eligibility to defendants with four or fewer criminal history points as long as the defendant’s criminal history includes no three-point sentences and no two-point violent sentences.

³⁹ U.S. Sentencing Commission (2010).

defendants” are defined as broadly as possible in case there is manipulation in charged offenses after the Memo took effect—a defendant is considered a “drug defendant” if any drugs were reported to the U.S. Sentencing Commission as part of the case. The red vertical line marks the quarter in which the Holder Memo took effect.

Figure 2 suggests that the Holder Memo affected charging behavior on the ground. In both panels, eligible (solid blue) and ineligible (red dashed) drug defendants faced mandatory minimum sentences at relatively stable and similar rates in the pre-period, with eligible drug defendants charged with mandatory minimums less often. Once the policy change took effect, the eligible group experienced a sharp decline in the fraction of defendants facing a mandatory minimum charge, while ineligible drug defendants experienced just a slight decrease, a trend that looks like it might have started before the Memo was distributed. Non-drug defendants rarely face mandatory minimums, although their prevalence steadily increased over the sample period.

Figure 2 also demonstrates that many drug defendants are not charged with mandatory minimums, even in the pre-period. One reason is that some drug offenses do not involve enough drugs to trigger a mandatory minimum. For example, many drug defendants whose cases involve marijuana do not have the requisite quantity to trigger even a five-year mandatory minimum, which applies only when the defendant has 100 kilograms of marijuana or at least 100 marijuana plants. It is also possible that, prior to the Holder Memo, some prosecutors voluntarily opted to not allege quantity and judges opted not to make factual findings as to drug quantity, allowing defendants to avoid a mandatory minimum charge.

On the other hand, one might wonder why mandatory minimum charging did not fall to zero in the eligible group after the Holder Memo was distributed. This might be a sign of intentional resistance on the part of some AUSAs. It is also likely that the proxy for eligibility captures some ineligible defendants. For example, the Commission data does not report whether the defendant is affiliated with a drug trafficking organization, gang, or cartel, which would render them ineligible for Memo treatment.

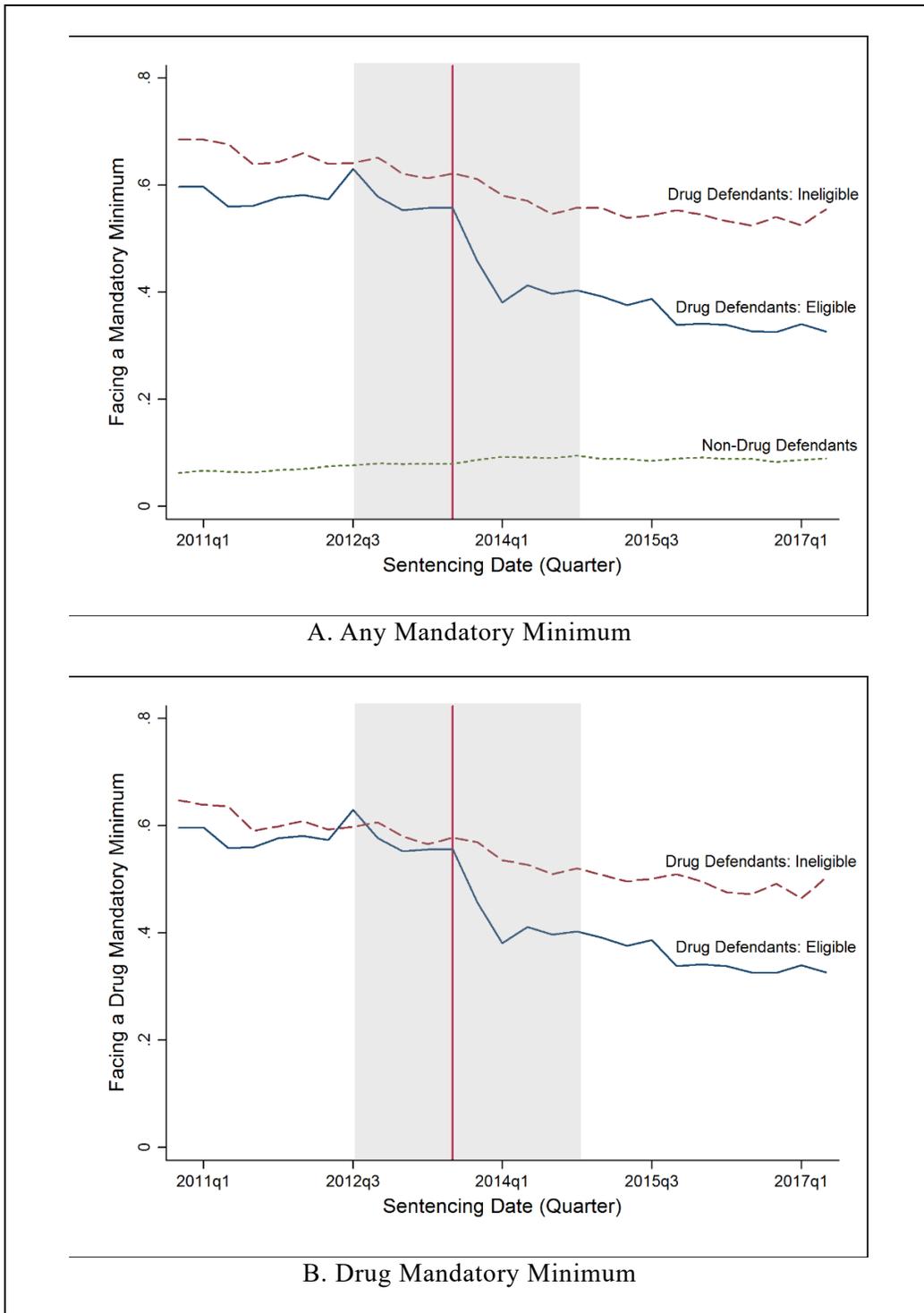


Figure 2. Mandatory Minimum Charging Before and After the Holder Memo

Figure 3 restricts attention to drug defendants and shows how average statutory minimums and sentences changed in the eligible and ineligible groups after the policy

change. As in Figure 2, Panel A uses the defendant's overall statutory minimum and Panel B uses the defendant's statutory minimum based on drug charges only.

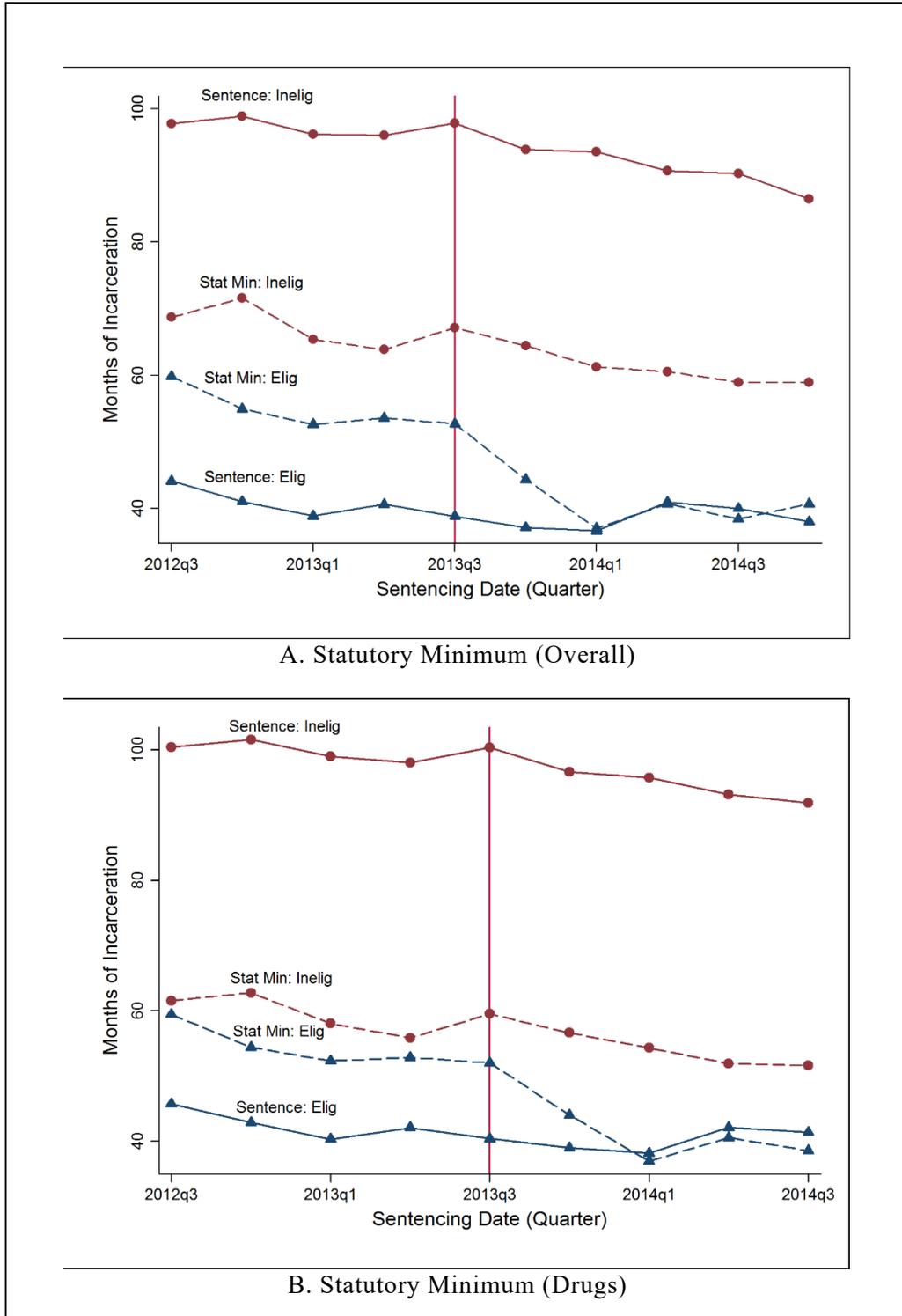


Figure 3. Sentences and Statutory Mins Before/After the Holder Memo

For ineligible defendants, sentences (solid red line) are, on average, significantly larger than the overall and drug-specific statutory minima (dashed red lines). In both panels, the sentencing and statutory minima trends are parallel for ineligible defendants and indicate that, on average, defendants in the ineligible group receive sentences that are roughly 30 months above the statutory minimum and 40 months above the drug minimum. Sentences and statutory minimums appear to slightly decrease after the Holder Memo is distributed.

Among eligible defendants, the relationship between the average statutory minimum and average sentence length is more complicated. In the pre-period, as in the ineligible group, the two trends move in tandem. Unlike ineligible defendants, however, eligible defendants in the pre-period were routinely sentenced roughly 12 months *below* their statutory minimum or drug minimum. After the Holder Memo, sentences in the eligible group remained largely unchanged, suggesting that the Memo did not significantly reduce sentences in this group. Appendix Figure A.1 presents an analogous figure over a longer time period.

III. Research Design

A. Empirical Strategy

The Holder Memo was promulgated on August 12, 2013, and took immediate effect. The main analyses in this paper use a difference-in-differences design to estimate the effects of the Memo on charging decisions and sentencing outcomes. This research design compares how defendants eligible for treatment by the Holder Memo fared relative to ineligible defendants before and after the Memo was distributed in August 2013. The main empirical specification is:

$$Y_{idy} = \beta_0 + \beta_1 \text{Eligible}_i \times \text{Memo}_y + \beta_2 \text{Eligible}_i + \beta_3 \text{Memo}_y + \beta_4 \mathbf{X}_i + \text{Offtype}_i \quad (1) \\ + \delta_d + \eta_y + \gamma \times \delta_d + \varepsilon_{idy}$$

where Y_{idy} is an outcome variable for defendant i sentenced in district d in month m and year y . The variable Eligible_i is an indicator variable that equals one if defendant i is eligible for treatment by the Holder Memo. The variable Memo_y is an indicator variable that equals one for defendants sentenced in September 2013 and later.⁴⁰

⁴⁰ Unfortunately, the Commission data does not report the precise day of sentencing so this variable is defined at the month level, beginning in the first full month after the Memo took effect.

The key coefficient of interest, β_1 , captures the differential effect of the Memo on eligible compared to ineligible defendants. Regressions also include control variables relating to defendants and their cases in X_i , which include the defendant’s race and ethnicity (Black, Hispanic, other race and ethnicity, and White), sex, U.S. citizenship, age, age-squared, level of education attained (less than high school, high school degree, some college, or college degree), and criminal history points. The term $Offtype_i$ controls for three offense types (drug possession or trafficking, firearms, and other). Sentencing fiscal year and federal district court fixed effects are included as η_y and δ_d , respectively, and $y \times \delta_d$ are district-specific linear trends.

β_2 and β_3 are conditional, rather than average effects due to the inclusion of an interaction term in equation (1). That is, β_2 reflects the change in Y for eligible defendants relative to ineligible defendants *in the pre period*. The coefficient β_3 represents the change in Y in the post period relative to the pre period *for ineligible defendants*.

The main empirical analysis includes defendants who were sentenced between July 2012 and October 2014—fourteen months pre- and post-Memo. The sample stops in October 2014 to avoid picking up effects of the 2014 Drug Guidelines Amendment, which reduced the Guidelines ranges for drug trafficking defendants and took effect on November 1, 2014.⁴¹

I restrict the sample to drug defendants given evidence in Figure 2 that non-drug defendants do not appear to follow parallel trends in the pre-period. As described above, I define drug defendants broadly—a defendant is a “drug defendant” if their case involves drugs that are reported in the Commission data. While the vast majority of these defendants are convicted of drug trafficking offenses, the sample also includes defendants convicted of other federal crimes, such as simple drug possession, firearms offenses, and others.

I also examine whether the Memo affected disparity on the basis of race and ethnicity using a triple-difference design:

$$Y_{idmy} = \beta_0 + \beta_1 Eligible_i \times Memo_{my} \times Race_i + \beta_2 Eligible_i \times Memo_{my} + \beta_3 Eligible_i \times Race_i + \beta_4 Memo_{my} \times Race_i + \beta_5 Eligible_i + \beta_6 Memo + \beta_7 Race_i + B_8 X_i + Offtype_i + \gamma_m + \delta_d + \eta_y + y \times \delta_d + \varepsilon_{idmy} \quad (2)$$

⁴¹ Section IV.D examines alternative time windows.

where $Race_i$ is an indicator variable for the defendant's racial group (Black, Hispanic, and White). The coefficient of interest, β_1 , captures the extent to which the effects of the Holder Memo differ based on the defendant's racial groups.⁴²

B. Identification

Identification is premised on the assumption that any change in the difference in outcomes for eligible versus ineligible defendants after the Holder Memo was promulgated were due to the Holder Memo itself. There are, in general, three threats to identification.

First, any changes to federal criminal practice that occurred contemporaneously with the Holder Memo and differentially affected eligible and ineligible defendants threatens identification. Such events would create a coefficient estimate of β_1 that incorporates the effect of those contemporaneous events as well as the effects of the Memo. I am not aware, however, of any other changes to federal criminal practice that happened in or around the Memo's distribution in August 2013. As previously described, I end the sample after October 2014 to avoid picking up any effects of the 2014 Drug Guidelines Amendment, which took effect in November 2014. Among the Amendments to the Guidelines that occurred during the sample period, none seem likely to generate the results presented in Section V.

The second threat to identification will arise if the Holder Memo coincided with—or itself generated—a change in the composition of the eligible and ineligible defendant populations. The Memo itself instructed prosecutors to continue to follow former guidance in determining charges, which suggests that—in theory—the charging policy change should not have altered the composition of federal prosecutions.⁴³ Federal prosecutors, however, might not have complied with this instruction.

Changes in decisions to prosecute could bias the results in either direction. On the one hand, after the policy change, prosecutors might have preferred not to prosecute low-level defendants who—without a mandatory minimum—are likely to receive very low sentences or might be unwilling to cooperate with the government. On the other hand,

⁴² Section IV.A.3 uses a similar triple-difference design to test whether the Memo's effects varied by the prevailing political preferences in the state (operationalized by whether Barack Obama or Mitt Romney won the state in the 2012 presidential election).

⁴³ Memo at 2.

prosecutors might have been more willing to prosecute low-level defendants after the policy change if they know these defendants will not face mandatory minimums.⁴⁴

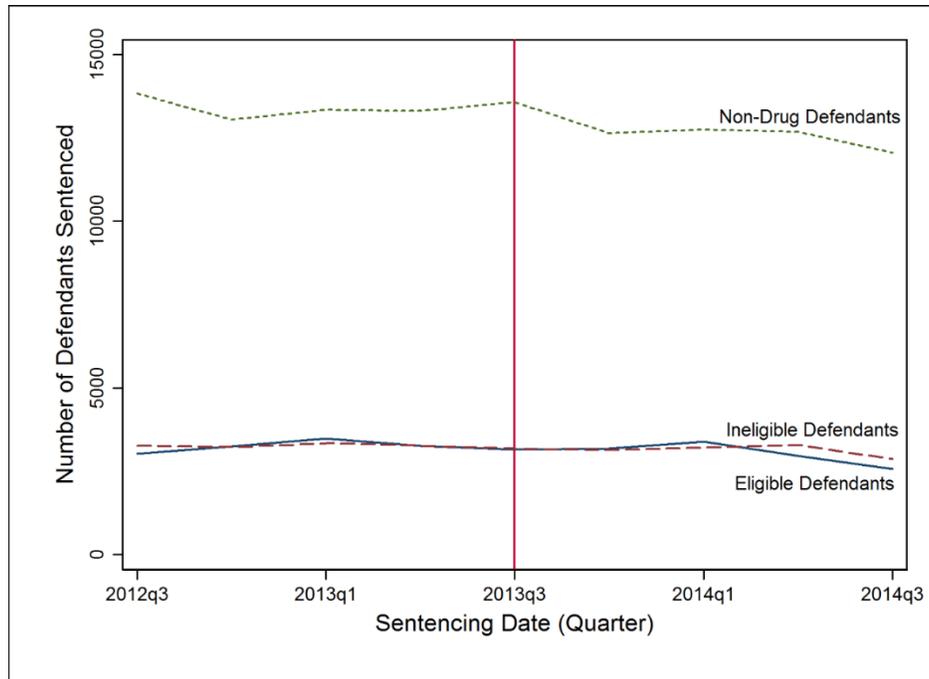


Figure 4. Defendants Sentenced Before/After the Holder Memo

The third threat to identification is the possibility of indirect effects (or, spillovers) in the control group. Spillovers will exist if the Memo affected outcomes in the ineligible group, in which case the ineligible group would not be a valid counterfactual for the eligible group. Such indirect effects could occur, for example, if the Holder Memo induced prosecutors to stop charging mandatory minimums for some ineligible defendants. Similarly, sentencing judges might create spillovers if the Memo causes them to reduce the sentences of ineligible defendants. Spillover effects at sentencing seem plausible in this setting because federal sentencing law and formal prosecutorial guidance make clear that prosecutors and judges should strive to avoid creating unwarranted disparities that result when similarly-situated defendants (especially co-defendants) are sentenced differently. Behaviorally, sentencing judges might subconsciously anchor sentences of ineligible defendants to those of eligible co-defendants. I investigate the possibility of spillovers in section V.C and find evidence of

⁴⁴ Bjerk (2005) finds, for example, that after California passed a three-strikes law, California prosecutors often used their discretion to avoid charging felonies if the felony would result in a three-strikes sentence.

indirect effects among ineligible defendants with at least one eligible co-defendant, but not among other ineligible defendants. As part of this inquiry, Table 10 presents interrupted time series estimates of the effects of the Holder Memo in the eligible and ineligible groups only.

IV. Effects of the Holder Memo

This section presents estimates of how the Holder Memo affected three dimensions of federal criminal practice. First, subsection V.A investigates **compliance**: whether the Holder Memo reduced mandatory-minimum charging for eligible defendants and whether compliance varied by race and ethnicity, or regionally across the United States. Second, subsection V.B tests for **efficacy**: whether the Holder Memo accomplished its stated goal of reducing sentences for eligible defendants. Third, subsection V.C examines whether the Holder Memo affected race-based sentencing **disparity**.

A. Holder Memo Compliance

Before examining how the Holder Memo affected case outcomes, a threshold question asks to what extent (if at all) federal prosecutors complied with the Memo. Figure 2 suggests significant but imperfect compliance. This subsection estimates overall compliance and compliance by race and Hispanic ethnicity.

1. Overall Compliance. To quantify compliance, I estimate equation (1) where Y_{idy} is the defendant's statutory minimum in years of incarceration, transformed by its inverse hyperbolic sine.⁴⁵ OLS regression results are reported in Table 2. I transform the statutory minimum by its inverse hyperbolic sine to estimate percentage changes.⁴⁶ The key coefficient of interest is the estimate for the (*Eligible* × *Memo*) term reported in the top row of Table 2. These numbers estimate the relative change in mandatory minimum charging among eligible defendants relative to ineligible defendants in the period after the Holder Memo was promulgated compared to the period before the Memo was promulgated.

Because the regressions include an interaction term, the coefficient estimates for *Eligible* estimate the relationship between being an eligible defendant and being charged

⁴⁵ A recent article shows that estimates using the inverse hyperbolic sine transformation are sensitive to the units of measurement of the transformed variable (Aihounton & Henningsen 2021). Aihounton & Henningsen (2021) suggest measuring a variable in units that produce the largest R^2 and predicted R^2 values. Measuring statutory minima and sentence length in years performed better than measuring in days, months, decades, or centuries.

⁴⁶ Following Burbidge, Magee, and Robb (1988), I use the inverse hyperbolic sine (IHS) transformation rather than the log transformation for the sentence length variable because the log-likelihood function for IHS is well-defined when sentence length equals zero (as it does for many defendants). The coefficient estimates are interpreted the same way that coefficients are interpreted when the dependent variable is logged.

with a mandatory minimum in the pre-period. Similarly, the coefficient estimates for the *Memo* variable indicate the effect of the Holder Memo on mandatory-minimum charging for ineligible defendants. Thus, in columns (4) and (5), which include sentencing year fixed effects, the coefficient on *Memo* is only identified using variation within fiscal year 2013—the year the Memo was promulgated.

The results in column (5) include the full set of controls, including district and sentencing year fixed effects, as well as district-specific linear trends. The coefficient estimate of the interaction term (*Eligible* × *Memo*) in column (5) of Panel A is -0.270, suggesting a roughly 24 percent reduction in mandatory minimum charging for eligible defendants relative to ineligible defendants after the Memo was promulgated.⁴⁷ In all specifications, the coefficient estimate for the (*Eligible* × *Memo*) interaction term is negative, highly statistically significant, and economically meaningful, indicating compliance with the Memo, as depicted in Figure 2.

The coefficient estimates for the *Eligible* × *Memo* term do not vary much from regressions with no controls (column (1)) to regressions with the full set of controls (column (5)). The inclusion of full controls reduces the compliance estimate from around 27 percent in column (1) to 24 percent in column (5). In all specifications, the coefficient estimates on the eligibility variable are small and statistically insignificant suggesting that in the pre-Memo period, eligible and ineligible defendants were not charged significantly differently.

2. Compliance by Defendant Race and Ethnicity. It is possible that the Memo’s policy change was implemented unequally, especially because prior work has shown that prosecutors are more likely to charge mandatory minimums against Black defendants and because Table 2 suggests incomplete compliance. To test for unequal compliance by race and Hispanic ethnicity, Table 3 reports compliance estimates by racial group.⁴⁸ The dependent variable is the inverse hyperbolic sine of the defendant’s statutory minimum in years.

Column (1) estimates changes in Black-white and Black-Hispanic disparity after the Memo, without differencing by whether the defendant was eligible. In other words, column

⁴⁷ This coefficient is interpreted the same way as an OLS regression with a logged dependent variable: the average statutory minimum in the eligible group thus fell by $(1 - \exp(-0.270)) * 100\% = -23.7$ percent in the post period relative to the ineligible group.

⁴⁸ The results are similar when the data is analyzed by race-sex group. Only 15 percent of defendants in the sample are female

(1) estimates how racial disparity in mandatory minimum charging changed overall after the policy change. The coefficients of interest for the *Memo* × *Hispanic* and *Memo* × *White* variables are both statistically insignificant, but the point estimates suggest that, if anything, both Black-Hispanic and Black-White disparity reduced after the policy change.

The coefficients of interest in column (2) are the triple interactions between race, eligibility, and the Memo. These coefficients represent the effect of the Holder Memo on compliance for Hispanic and White defendants relative to Black defendants, who make up the omitted group. The coefficient estimate for Hispanic ethnicity defendants is negative and marginally significant ($p=0.09$), suggesting stronger compliance for Hispanic defendants than to Black defendants. The coefficient estimate for White defendants is not statistically significant and smaller in magnitude—indicating no statistically significant compliance differences for Black relative to White defendants. The f-statistic for the three-way interaction is not statistically significant, however, so I cannot reject the hypothesis of equal compliance across racial groups.

Columns (2) through (4) estimate equation (1) separately for each racial group. The coefficients on the *Eligible* × *Memo* term are negative and statistically significant at the one-percent level in all groups. As in the triple difference regression, the estimates in columns (2) through (4) suggest that compliance was, if anything, strongest for Hispanic defendants, although differences in the estimates across racial groups in columns (2)-(4) are not statistically significant.

3. Compliance by Geography. Compliance with Holder’s policy change was imperfect: after the Memo was distributed, around one-third of seemingly eligible defendants were charged with a mandatory minimum, raising the possibility that some AUSAs did not fully comply with the Memo’s instruction. This subsection explores whether compliance varied by the prevailing politics of the state. One might expect less compliance in federal districts located in states that voted against Barack Obama in the 2012 presidential election.

Because “blue” and “red” states systematically differ in terms of their populations and case compositions, Table 4 reports results from a triple-difference regression that interacts the *Eligible* and *Memo* variables with an indicator variable that equals one if the case was prosecuted in a state won by Barack Obama in 2012. The results suggest no differential compliance between red and blue states once relevant control variables are

included. The coefficient estimate on the three-way interaction term (*Eligible* × *Memo* × *Blue State*) is -0.073 and statistically insignificant. When equation (1) is estimated for blue and red states separately, compliance estimates are virtually indistinguishable: -0.292 in the “blue” states and -0.291 in the “red” states.

B. Holder Memo Efficacy

The Holder Memo expressly stated one goal: to reduce the sentences imposed upon the eligible defendant population. This section examines whether the Memo accomplished this goal. Table 5 presents results of regressing equation (1) using sentence length as the outcome variable, Y_{idy} . The sentence length variable is measured in years and transformed by its inverse hyperbolic sine to estimate percentage changes.

The coefficient estimate on the interaction term in column (5)—the specification with the full set of controls—is -0.015 and is not statistically significant, suggesting that the Memo did not influence sentences. Given evidence in Table 2 that the Memo led to a more than twenty percent decrease in mandatory minimum *charging*, these findings suggest that the Memo was not very effective at translating charging leniency into sentencing reductions. Section V explores potential explanations for this finding.

C. Holder Memo and Racial Disparity

The Holder Memo might have affected racial disparities in sentencing. Myriad scholarship documents unequal treatment of defendants on the basis of race in criminal cases, and many scholars have found that racial disparities in mandatory minimum charging significantly contribute to racial disparities in sentencing. If the policy were applied disparately it could exacerbate racial inequality in sentencing. On the other hand, if prosecutors applied the policy equally to defendants of all races and ethnicities, it could reduce racial disparities in sentencing.

In this section, I test whether the Holder Memo affected racial disparity in sentencing. Table 6 reports sentencing disparity by racial group. The dependent variable is the inverse hyperbolic sine of the defendant’s sentence in years.

Column (1) estimates changes in Black-white and Black-Hispanic sentencing disparity after the Memo, without differencing by whether the defendant was eligible. In other words, column (1) estimates how racial disparity in sentencing changed overall after the Holder Memo. The coefficients of interest for the *Memo* × *Hispanic* and *Memo* × *White*

variables are both statistically insignificant, but the point estimates suggest that, if anything, both Black-Hispanic and Black-White disparity increased after the policy change.

The coefficients of interest in column (2) are the triple interactions between race, eligibility, and the Memo. These coefficients represent the effect of the Holder Memo on sentence length for Hispanic and White defendants relative to Black defendants, the omitted group. Neither is statistically significant—suggesting that the Holder Memo did not meaningfully affect racial disparities in sentencing. Thus, suggestive evidence of stronger compliance for Hispanic ethnicity defendants at charging (documented in Table 3) does not appear to have translated into reduced sentences.

Columns (2) through (4) estimate equation (1) separately for each racial group. The coefficients on the *Eligible* \times *Memo* term are negative for all groups but none are statistically significant. The point estimate on the *Eligible* \times *Memo* term is larger for Black defendants (-0.040) than for Hispanic and White defendants (-0.025 and -0.008, respectively), suggesting that, if anything, the Memo was most successful at reducing sentences for Black defendants. However, these coefficient estimates are not statistically different.

D. Robustness of the Results

1. Additional Controls for Offense Conduct. Figure 4 suggested that the number of eligible and ineligible defendants prosecuted over time remained stable. However, Figure 4 might obscure underlying differences in the charges brought or on-the-ground offense conduct among defendants in these groups. Table A.1 presents results when controls are included for the severity of the charged offense. The first measure of offense severity is the defendant's base offense level. The second is the minimum of the defendant's untrumped Guidelines range, transformed by its inverse hyperbolic since. Including these controls produces coefficient estimates that are similar in magnitude and statistical significance to the main results reported in Tables 2 and 5.

2. Alternative Definitions of “Eligible”. Table A.2 presents regression results when the eligible group excludes defendants who received an aggravated role adjustment or an adjustment for the use of a minor. Either of these factors will exclude a defendant from eligibility per the Holder Memo. As Figure 1 demonstrates, however, the prevalence of these adjustments for defendants near the margin of eligibility shifted between the pre- and post-periods, suggesting the application of these adjustments could be endogenous. For this

reason, these criteria were not used to categorize defendants as eligible or ineligible in the main analysis.

When these variables are used to define eligibility, the number of eligible defendants falls by around six percent: from 26,034 defendants to 24,514 defendants. Redefining eligibility to account for whether the defendant received an aggravated role adjustment or a use-of-a-minor adjustment produces regressions results that are nearly identical to those in the main analysis.

As described above, the Commission data does not include a variable to indicate whether the defendant was part of a drug trafficking organization, gang, or cartel (which would render them ineligible). In the third and sixth columns of Table A.2, I roughly proxy for such membership by excluding defendants in multi-defendant cases from eligibility.

Because the Commission data does not identify when two defendants are part of the same case, I used the matched LIONS sample for this analysis, which reduces the size of the sample from around 55,000 to around 40,000 defendants. When further restricting the definition of *eligible*, the regressions produce estimates that are consistent with the main results of the paper, finding highly significant compliance paired with statistically insignificant sentencing effects.

3. Analysis at the Courthouse Level. So far, the analysis has used the federal district court as the relevant unit of geography. Most federal judicial districts, however, include multiple courthouses to which defendants, judges, prosecutors, defense counsel, and court personnel are not randomly assigned. Unlike the Commission data, the LIONS data includes a variable that indicates the courthouse in which each case was prosecuted. This subsection shows that the main results are robust to including courthouse fixed effects and courthouse-specific linear trends (as opposed to district fixed effects and district-specific linear trends). I carry out this analysis with the matched sample described in section II.A. As described in the previous subsection, using the LIONS data restricts the sample from around 55,000 defendants in the main analysis to around 40,000 defendants in the matched sample.

Table A.3 allows readers to compare the main compliance and efficacy results to analogous results when the analysis treats the courthouse as the relevant unit of geography rather than the federal district court. With this narrower geographic tailoring, the compliance estimates are nearly identical to those in the main analysis (a 24 percent charging reduction

in the main results compared to a 26 percent charging reduction when courthouse controls are used). The sentencing estimates are more attenuated in the regression that uses courthouse controls. The point estimate suggests a statistically and economically insignificant decrease in sentence length resulting from the policy change. The compliance and efficacy results by race and Hispanic ethnicity with courthouse controls are also similar to those in the main analysis and do not produce any evidence of differential compliance or efficacy between defendants of different racial groups.⁴⁹

V. Explaining the Results

The Holder Memo was a major charging directive. It had the potential to reach tens of thousands of federal defendants. Its explicit goal was to reduce sentences for low-level, nonviolent drug defendants with little criminal history, but it appears to have failed to do so despite significant compliance. Why didn't Holder's policy change translate into more sizable sentencing reductions? This section explores three possible explanations, which I call the *entrenchment* explanation, the *redundant leniency* explanation, and the *spillovers* explanation.

A. The Entrenchment Explanation

Mandatory minimums do not operate in a vacuum. Instead they are both formally and behaviorally entrenched in many other aspects of federal drug law, policy, and practice. (Didwania, 2020). For example, the U.S. Sentencing Guidelines are calibrated to the mandatory minimums for drug offenses. A defendant with no criminal history who is convicted of a drug offense involving a given quantity of drugs will be subject to a Guidelines range that is very near or encompasses the statutory minimum associated with that quantity of drugs. Judges and prosecutors are also anchored to the Guidelines, both behaviorally and formally. For example, federal prosecutors must get approval from a supervisor to recommend to the court a sentence outside the Guidelines range to the court.⁵⁰ Federal district judges are required to start each sentencing by calculating the defendant's advisory Guidelines range, and federal courts of appeals can apply a presumption of reasonableness for in-range sentences. Prior work also suggests that judges are affected by subconscious

⁴⁹ Results on file with the author.

⁵⁰ The Justice Manual instructs prosecutors: "Before recommending a sentence that reflects a departure or variance from the advisory guideline range, the attorney for the government must obtain supervisory approval." Justice Manual 9-27.730.

anchoring bias when sentencing defendants (Bennett, 2014; Rachlinski, Wistrich, & Guthrie, 2015; Tversky & Kahneman, 1974), although anchoring bias appears to be weaker for judges appointed after the Guidelines became advisory (Yang, 2014).

The entrenchment explanation for the findings suggests that because mandatory minimums are reinforced by other aspects of federal drug law, policy, and practice, a policy change like Holder's—focused solely on charging decisions—is unlikely to affect sentences. This is so because the Holder Memo excised mandatory minimum charges without upsetting any other aspect of federal drug prosecutions. The Holder Memo instructed prosecutors to continue to charge cases, to report drug quantities to the court, and to compute defendants' Guidelines ranges just as they did before the Memo.

The results in Table 7 demonstrate that other than reductions in mandatory minimum charging, drug prosecutions continued business-as-usual after the Holder Memo took effect, just as the Memo instructed. Table 7 presents regression results of equation (1) where Y measures eight additional outcome variables: (1) the drug minimum (inverse hyperbolic sine); (2) an indicator variable for whether the defendant faced a statutory minimum; (3) the defendant's base offense level; (4) the low end of the defendant's Guidelines range at sentencing before the application of any statutory minimum (inverse hyperbolic sine); (5) whether the defendant received a substantial assistance reduction; (6) whether the defendant received a safety-valve reduction; (7) whether the defendant received a sentence below the (untrumped by any mandatory minimum) Guidelines range; and (8) whether the defendant received a sentence below the (trumped) Guidelines range.⁵¹

Columns (1) and (2), alternative measures of the statutory minimum, re-test the compliance hypothesis and find that statutory minimums fell significantly more in the eligible group than the ineligible group, as in the main results and depicted in Figure 3.

Columns (3) and (4) investigate the relationship between the Holder Memo and variables relating to the defendant's Guidelines range. The Memo does not appear to have affected defendants' base offense levels, which suggests prosecutors complied with the portion of the Memo that instructed them to “be candid with the court . . . 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

⁵¹ The untrumped Guidelines range is the Guidelines range before application of any mandatory minimum.

lacks such specificity.” Along the same lines, Column (4) similarly suggests that the Memo did not affect the ultimate untrumped Guidelines ranges into which defendants landed, suggesting that prosecutors followed the Memo’s instruction to “accurately calculate the sentencing range under the United States Sentencing Guidelines.”

Columns (5) through (8) examine sentencing-related outcomes. It is plausible that substantial assistance and safety-valve reductions could have decreased for eligible defendants relative to ineligible defendants after the policy change if eligible defendants were less motivated to cooperate with the government when no longer facing mandatory minimums. The regression results in columns (5) and (6), however, do not support this hypothesis—the policy change was not associated with changes in substantial assistance or safety-valve application in the eligible group. Nor do they suggest a meaningful change in the frequency of below-Guidelines sentencing, as shown in columns (7) and (8).

Overall, the results in Table 7 support the entrenchment explanation. Although mandatory minimum charging significantly responded to the policy change, the policy change does not appear to have affected defendants’ Guidelines calculations, nor did the change appear to have significantly affected sentencing decisions.

B. The Redundant Leniency Explanation

Criminal reforms intended to reduce mass incarceration traditionally target people whom the criminal legal system already treats the most leniently, rather than those it treats the most harshly (O’Hear, 2017; Pfaff, 2017). I call this phenomenon *redundant leniency* and it could explain why Holder’s policy change did not meaningfully translate charging reductions into sentencing reductions. In the years prior to the Memo’s issuance, defendants convicted of drug offenses were often successful at earning sentences below the mandatory minimum—potentially leaving little room for the Memo to reduce sentences (Bjerk, 2017). The summary statistics in Table 1 also suggest redundant leniency could explain the results: among eligible defendants, 70 percent earned a safety-valve reduction and 23 percent received a substantial assistance reduction. These summary statistics demonstrate that the majority of eligible defendants were not bound by their statutory minimum before the Holder Memo was issued.

An early analysis by Paul Hofer of the Federal Public and Community Defenders identified this concern almost immediately after the policy change took effect (Hofer, 2013).

In his calculation, Hofer estimated that 6,780 defendants sentenced in fiscal year 2012 would have been eligible for Holder Memo treatment, but that only 530 defendants would have likely received a lower sentence if the Memo had been in effect. The reason for the disconnect between eligibility and outcomes, Hofer explained, was that many of the defendants he identified as eligible for Memo treatment earned substantial assistance or safety valve reductions. As a result, many of these defendants were not subject to controlling drug minimums at sentencing in the pre-period.

To test whether redundant leniency is the controlling explanation for the results I restrict attention to defendants with exactly two criminal history points. During the Memo period, defendants with two criminal history points were ineligible for safety valve relief. Until 2018, safety valve relief was reserved for defendants with one or zero criminal history points. Defendants with two criminal history points thus had the most to gain from the Holder Memo because they were likely to be eligible for Holder Memo leniency but ineligible for safety-valve relief—the most common way that defendants convicted of drug offenses avoid a mandatory minimum.

Table 8 presents regression results in which the sample is restricted to defendants with two or more criminal history points. With this restriction, the eligible group only includes defendants with precisely two criminal history points whose offense did not involve a weapon. Defendants with three or more criminal history points and those whose offenses involved a weapon make up the ineligible group. It is important to note that this restriction removes almost half of the observations.

If redundant leniency is responsible for the results, one would expect the eligible group in this analysis to achieve larger sentencing reductions than in the main analysis because this group did not experience redundant leniency. This is not what I find. The results when defendants with zero or one criminal history points are excluded are nearly identical to those in the full results—Memo eligibility is associated with a roughly 22 percent decrease in the average statutory minimum, but not associated with any significant change in average sentence length. These findings suggest that *redundant leniency* is likely not the sole explanation for the results.

C. *The Spillovers Explanation*

In the difference-in-differences design, ineligible defendants serve as the control group. If their charges and sentences were indirectly affected by the Memo, their trajectories in the post-Memo period will not provide valid counterfactual information for the treated group. For example, if the Holder Memo led to reductions in mandatory minimum charging and sentencing in the ineligible group, the regressions will understate the effects of the Memo for eligible defendants. As described in subsection III.B, it is possible that the charging policy indirectly affected outcomes in the ineligible group. Spillover effects could occur at charging—for example, if the Holder Memo induced prosecutors to stop charging mandatory minimums for some ineligible defendants. Spillover effects could also occur at sentencing, particularly because the U.S. Attorney’s Manual and federal sentencing law make clear that prosecutors and judges should strive to avoid creating the unwarranted disparity that results when similarly-situated defendants (especially co-defendants) are sentenced differently.

To investigate the possibility of spillovers, I divide defendants into five categories: (1) solo eligible defendants, (2) solo ineligible defendants, (3) eligible defendants with at least one co-defendant, (4) ineligible defendants with at least one eligible co-defendant, and (5) ineligible defendants with no eligible co-defendants. My hypothesis is that ineligible defendants are more likely to experience spillover effects of the Memo if they are prosecuted in a case with an eligible co-defendant because lenient Memo treatment toward the eligible co-defendant could “spill over” onto the ineligible co-defendant.

In order to carry out this division, I merge the Commission data with the LIONS data described in section II.A. The regressions presented in Table 9 are not difference-in-differences. Instead, they are simple interrupted time series regressions that take the form:

$$Y_{idy} = \beta_0 + \beta_1 Memo_y + \beta_2 X_i + Offtype_i + \delta_d + \eta_y + y \times \delta_d + \varepsilon_{idy} \quad (3)$$

The coefficient estimates on the *Memo* variable represent the changes in the outcome variable, Y_{idy} , in the post-Memo period relative to the pre-Memo period.

The results provide some evidence of spillovers. First, when it comes to mandatory minimum charging, only the eligible defendants experience statistically significant reductions after the Memo took effect, as reported in columns (1) and (3) of Table 9. Eligible solo defendants experience 30 percent reductions in mandatory minimum charging, while

eligible defendants prosecuted in multi-defendant cases experience 16 percent reductions in mandatory minimum charging. Ineligible defendants—whether prosecuted alone or with co-defendants—do not experience statistically significant reductions in mandatory minimum charging and the point estimates suggest, if anything, small effects of the Holder Memo among the ineligible defendants, as shown in columns (2), (4), and (5).

The Memo appears to affect sentence length for one class of defendants: ineligible defendants prosecuted in multi-defendant cases involving at least one eligible co-defendant, as reported in column (4). These defendants experienced sentencing reductions of around eleven percent after the Memo took effect, while eligible defendants and ineligible defendants without an eligible co-defendant did not experience statistically or economically significant sentencing reductions. Table 9 thus suggests a small class of sentencing spillovers.

Table 10 reports interrupted time series estimates of equation (3) in the eligible and ineligible groups. These regressions estimate charging and sentencing changes in each group after the policy change without any control group. Columns (1) and (2) find that mandatory minimum charging decreased much more for eligible than ineligible defendants after the policy change. For eligible defendants, mandatory minimum charging declined by 26 percent, while for ineligible defendants the point estimate (seven percent) is not statistically significant. Unlike in the difference-in-differences estimates, the interrupted time series regressions suggest sentencing effects of the policy change in the eligible group of roughly seven percent. For ineligible defendants as a whole, the policy change did not meaningfully or statistically significantly reduce sentences. Table 10 constitutes suggestive evidence that the policy change *did* reduce sentences for the eligible group, although less forcefully than it reduced mandatory minimum charging.

VI. Discussion

The preceding empirical analysis found that Holder’s policy change did not work as intended. There are three main findings. First, prosecutors appear to have complied with the Memo’s instruction to stop charging mandatory minimums for eligible defendants: mandatory minimums sharply fell in this group relative to the ineligible group in the period after the policy change took effect. In the eligible group, the average statutory minimum fell by around forty percent relative to the ineligible group. Second, these reductions in

mandatory minimum charging did not translate into meaningful reductions in sentences for eligible defendants. Among eligible defendants, sentences fell by around six percent relative to ineligible defendants, a decline that is not statistically significant at conventional levels. These estimates suggest at best a modest effect of the policy change on sentencing. Third, the policy does not appear to have affected racial disparity in sentencing.

These findings create implications for those hoping to reform both federal and state criminal systems. For federal reformers, legislation eliminating or reducing mandatory minimums is likely to be more consequential than charging policies like Holder's. For one thing, eliminating or reducing mandatory minimums is likely to be more effective for serious offenders than for the low-level, nonviolent defendants targeted by this policy. For another thing, eliminating or reducing mandatory minimums could remove a significant bargaining chip from the prosecutorial arsenal, which would likely reduce sentences for drug trafficking defendants who plead guilty simply because they fear a mandatory minimum charge.

If Congress reduces the mandatory minimums for drug trafficking offenses, it is likely that the Sentencing Guidelines for drug trafficking offenses will move in lockstep, as when Congress has amended these mandatory minimums in the past. If Congress eliminates mandatory minimums for drug trafficking offenses, the Commission could easily create new Drug Guidelines. The Commission has consistently criticized the Drug Guidelines for being too harsh and for exacerbating racial inequality. To date, however, the Commission has created Drug Guidelines that align with the mandatory minimums and has stated that it does so in deference to Congress. Thus, if Congress acts first to eliminate or reduce mandatory minimums, the interconnected institutional environment in which mandatory minimums are entrenched will destabilize.

The findings also offer lessons for state and local reformers. Over the last several years, criminal law reform advocates, scholars, and the general public have paid increased attention to the potential of elected prosecutors to fix the massive and unequal harms our criminal systems impose on defendants, their families, and their communities. Some U.S. jurisdictions have elected *progressive prosecutors* who seek to use their prosecutorial power to reduce incarceration and racial inequality in their jurisdiction. Many have enacted sweeping reforms.

Yet, progressive prosecutors are likely to face many hurdles in implementing reform agendas. For example, progressive prosecutors could face conflict with other actors in the criminal system, including legislators and law enforcement (Davis, 2019). Progressive prosecutors might meet resistance from rank-and-file prosecutors steeped in an office culture contrary to the progressive prosecutor's vision (Ouziel, 2020; Sklansky, 2017). Others point out that policy changes implemented by county-level prosecutors are constrained in their breadth by the fact that these reforms only apply within the local jurisdiction, and by the fact that reform-minded prosecutors nearly always must be elected—suggesting that many local jurisdictions will not be reached by progressive policies (Hessick & Morse, 2020; Bellin, 2020).

This paper, however, suggests that other concerns, like redundant leniency and entrenchment, should not be overlooked. Many of the concerns stated above were unlikely to plague Holder's reform. Take the criticism that many of the proposed reforms do not reach enough defendants. The Holder policy focused on federal drug trafficking cases—the most commonly-prosecuted federal offense. And the charging policy applied across the United States. Together, these facts suggest that many defendants could have potentially benefitted.

Or, take the concern that progressive prosecutors' reforms are likely to be sabotaged by other actors within the system. No other actors within the executive, legislative, or judicial branches appear to have sabotaged the Holder reform efforts. Reduction or elimination of mandatory minimums for low-level drug offenders was widely supported. When surveyed, federal district judges report that they consider mandatory minimums too high, especially for crack-cocaine and marijuana trafficking offenses (U.S. Sentencing Commission, 2010), suggesting that removing mandatory minimums would lead to lower sentences.

Moreover, prosecutors around the U.S. appear to have complied with the policy—at least on paper. Progressive prosecutors likely have even more control over their subordinates than the Attorney General of the United States. Because they are concentrated in one locale, more of the subordinates likely agree substantively with the progressive prosecutor's directives. Progressive prosecutors also typically have more control over firing recalcitrant subordinates than the Attorney General. And, given their smaller numbers and closer quarters, local prosecutors are more likely to discover recalcitrance.

What lessons, then, does the federal experience offer local progressive prosecutors? First, the results suggest that policy changes that do not account for the interconnected nature

of criminal systems—the ways different elements and actors self-reinforce—are likely to be ineffective. These findings provide a compelling example for policymakers skeptical of the need for such systemic reform.

Second, the findings suggest that policy changes should not be targeted at only the lowest-level defendants. It is, of course, important to address the massive scale of the misdemeanor justice system (Kohler-Hausman, 2018; Mayson & Stevenson, 2020), and the harshness with which our criminal systems treat defendants accused of low-level crimes. But reforms that are redundant of preexisting opportunities for leniency offer limited room for improvement.

Third, the findings suggest that progressive prosecutors should not focus on implementing policies that simply allow judges to be more lenient. The combination of redundant leniency and entrenchment makes it unlikely that this approach will yield salient results. Although shifting leniency decisions to other actors may be politically more palatable, progressive prosecutors might have more success acting more directly. For example, Holder’s policy change might have been effective if it had tried to more directly address sentences, either by instructing line prosecutors not to bring cases against eligible defendants, or to expressly recommend below-Guidelines sentences to the court.

Finally, progressive prosecutors should develop monitoring mechanisms to ensure compliance with reforms. For example, it is possible—but not observable in this dataset—that prosecutors complied with Holder’s reform “on paper,” while still using the threat of violating the policy and charging a mandatory minimum as a bargaining tool. Monitoring mechanisms might include more robust data collection at each stage of prosecutorial decision-making.

Appendix A: Holder Memos



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 policy²:

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.

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.



Office of the Attorney General

Washington, D.C. 20530

August 29, 2013

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

FROM:

THE ATTORNEY GENERAL

SUBJECT:

Retroactive Application of Department Policy on Charging Mandatory
Minimum Sentences and Recidivist Enhancements in Certain Drug Cases

This memorandum provides additional guidance to federal prosecutors for cases that were charged before I issued the August 12, 2013, memorandum setting forth Department policy on charging mandatory minimum sentences and recidivist enhancements in certain drug cases (hereinafter referred to as the “Attorney General’s policy memorandum”). In brief, the policy applies as follows:

- For cases charged and awaiting adjudication of guilt: the policy is applicable to all such cases.
- For cases in which guilt has been adjudicated and sentence has not yet been imposed: the policy may be applied in the discretion of the prosecutor, and prosecutors are encouraged to apply the policy in guilty-plea cases where legally and practically feasible.
- For cases in which sentence has been imposed: the policy is not retroactively applicable.

DISCUSSION

The applicability of the Department’s policy depends on the stage of the proceeding.

Defendants Charged But Not Yet Convicted. In the case of a defendant who was charged before the policy’s issuance, but who has not pleaded guilty or been convicted, prosecutors should apply the new policy and pursue an appropriate disposition consistent with the policy’s section, “Timing and Plea Agreements.” Application of the policy also may require a motion to withdraw an information previously filed under 21 U.S.C. § 851.

In applying the policy, prosecutors should consider all of the facts and circumstances of a case. In particular, in determining whether a defendant has a “significant” criminal history, prosecutors should evaluate the facts beyond the number of criminal history points. While a significant criminal history is normally evidenced by three or more criminal history points, that is not a mechanical test. A criminal history involving three or more points may not be significant for purposes of the policy if, for example, a conviction is remote in time, aberrational, or for conduct that itself represents non-violent, low-level drug activity.

Defendants Who Have Pleaded Guilty But Have Not Been Sentenced. In cases in which a defendant would not have been charged with the mandatory minimum under the new policy but previously entered a guilty plea and admitted to facts triggering a mandatory minimum, prosecutors are encouraged to seek relief from the mandatory minimum sentence. In determining whether relief is warranted, prosecutors should consider all pertinent facts, including the criteria stated in the Attorney General's memorandum, the need to equitably treat co-defendants charged in the same case, and any other pertinent circumstances regarding the offender and the prosecution.

In many cases, relief from the plea is unnecessary because the defendant qualifies for relief from the mandatory minimum through the safety valve, 18 U.S.C. § 3553(f). It may also be unnecessary if the government files a motion under 18 U.S.C. § 3553(e) to depart from the mandatory minimum based on cooperation. In other cases, prosecutors can seek relief from the prior guilty plea by negotiating a plea agreement in which the defendant agrees to plead guilty to a superseding information charging the drug offense without the pertinent quantity, and the government agrees to move to dismiss original indictment under Federal Rule of Criminal Procedure 48(a).

Alternatively, if permitted by the court, prosecutors may move to dismiss the charged allegation of the enhancement fact. Such a motion is functionally equivalent to dismissing a greater offense, leaving the conviction for a lesser-included offense intact. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013) (describing the allegation of an enhancement fact as that of a greater offense: "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

With respect to defendants who previously pled guilty following the filing of an information under 21 U.S.C. § 851, and have not been sentenced, prosecutors are also encouraged to consider the guidelines stated in the Attorney General's memorandum and, where appropriate, move to withdraw a Section 851 information before sentencing.

Defendants Convicted At Trial. As a general matter, prosecutors should not seek relief for a defendant who was previously convicted at trial where the jury found a drug quantity that requires a mandatory minimum sentence (beyond any relief that a defendant is entitled to under application of the safety valve or based on cooperation with the government). Nevertheless, prosecutors have discretion to seek relief in an unusual case upon determining that the interests of justice so require. Such unusual circumstances may arise, for example, where the defendant persuasively explains that he proceeded to trial only to contest a mandatory minimum provision that would not be charged under the new policy, or where action is required to assure consistent treatment of co-defendants in the same case or closely related cases.

If a decision is made to seek relief, the government may proceed in accordance with the Rule 48(a) procedure stated earlier, that is, by moving to dismiss the count of conviction and replacing it with a plea to a superseding information or by simply moving with the court's permission to strike the conviction for the greater included offense and retain a conviction for the drug offense without the mandatory minimum.

Separately, with respect to defendants who were convicted at trial following the filing of an information under 21 U.S.C. § 851, and have not been sentenced, prosecutors are encouraged to consider the guidelines stated in the Attorney General's memorandum and, where appropriate, move to withdraw an 851 information before sentencing.

Defendants Who Have Been Sentenced. Prosecutors should not disturb the sentence in a case in which the sentence has been imposed, whether or not the case is on direct appeal or in some other stage of post-conviction litigation. See *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012) (stating with respect to a statutory change that “in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.”).

Prosecutorial Discretion. Application of the policy—and any decision to afford relief to those already convicted but not yet sentenced—is an exercise of prosecutorial discretion over charging decisions. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Rinaldi v. United States*, 434 U.S. 22 (1977) (per curiam); see also *United States v. Labonte*, 520 U.S. 751, 762 (1997) (similar as to discretionary decision whether to file an enhancement notice under Section 851). Prosecutors should oppose any motion initiated by a defendant, under Rule 11, Rule 33, or any other provision, without the government’s consent, to seek relief from a mandatory minimum sentence based on the government’s new charging policy.¹

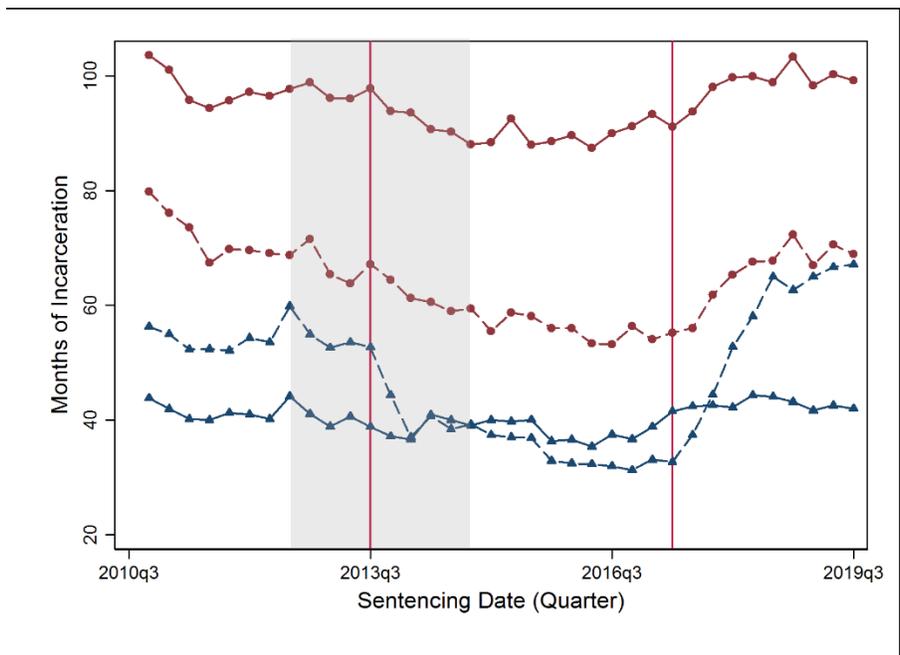
¹ As stated in the Attorney General’s memorandum, the policies set forth in these memoranda are not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding. See *United States v. Caceres*, 440 U.S. 741 (1979).

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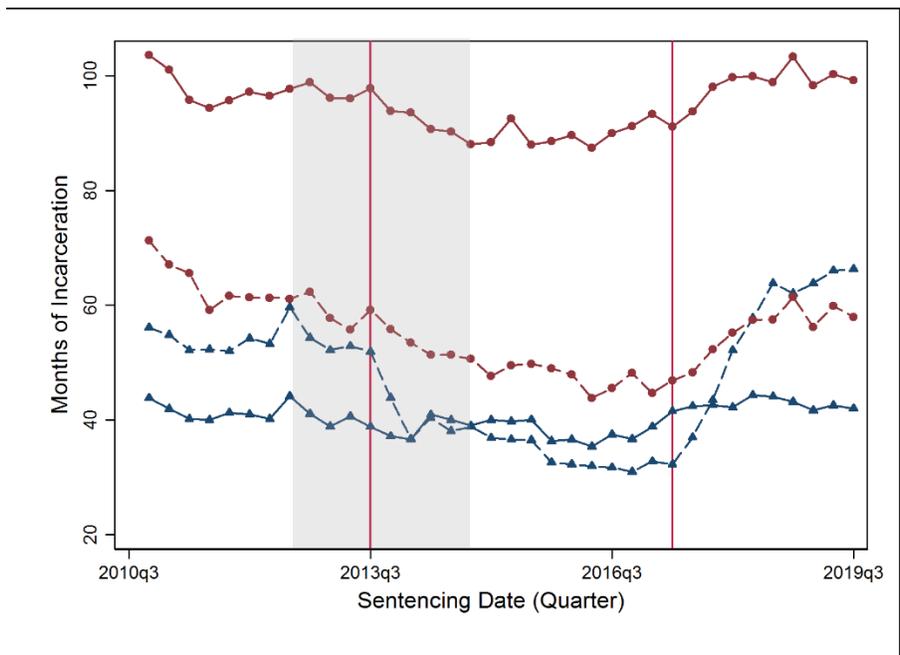
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A. Any Mandatory Minimum



B. Drug Mandatory Minimum

Figure A.1. Mandatory Minimums and Sentences Before/After the Holder Memo—Extended Time

Table 1. Summary Statistics

| | Drug Defendants (1) | Eligible Drug Defendants (2) | Ineligible Drug Defendants (3) | Non-Drug Defendants (4) |
|---|---------------------------|------------------------------------|--------------------------------------|-------------------------------|
| <i>Defendant Characteristics</i> | | | | |
| Black | 0.269 | 0.137 | 0.385 | 0.186 |
| Hispanic | 0.454 | 0.597 | 0.328 | 0.511 |
| Non-Hispanic White | 0.246 | 0.228 | 0.262 | 0.256 |
| Another Race | 0.032 | 0.038 | 0.026 | 0.047 |
| Male | 0.848 | 0.786 | 0.903 | 0.870 |
| U.S. Citizen | 0.750 | 0.609 | 0.874 | 0.541 |
| Age (years) | 35.2 | 34.9 | 35.5 | 37.5 |
| Criminal History Points | 3.87 | 0.349 | 6.98 | 4.20 |
| Less than HS | 0.426 | 0.458 | 0.397 | 0.488 |
| HS Only | 0.368 | 0.297 | 0.431 | 0.275 |
| Some College | 0.175 | 0.195 | 0.157 | 0.161 |
| College Grad | 0.031 | 0.050 | 0.015 | 0.076 |
| <i>Case Characteristics</i> | | | | |
| Base Offense Level | 27.2 | 27.5 | 27.0 | 11.8 |
| Final Offense Level | 24.7 | 23.1 | 26.2 | 16.2 |
| <i>Intermediate Outcomes</i> | | | | |
| Safety Valve ⁵² | 0.333 | 0.695 | 0.012 | - |
| Substantial Assistance | 0.255 | 0.230 | 0.276 | 0.079 |
| Mean Guidelines Range ⁵³ | 103.6 | 70.4 | 132.9 | 49.1 |
| <i>Case Outcomes</i> | | | | |
| Any Incarceration | 0.932 | 0.891 | 0.969 | 0.875 |
| Sentence | 70.7 | 43.3 | 94.9 | 36.7 |
| Sentence / Mean GL Range | 0.725 | 0.594 | 0.839 | 0.676 |
| Below-Guidelines (0/1) | 0.636 | 0.683 | 0.595 | 0.480 |
| Above-Guidelines (0/1) | 0.055 | 0.022 | 0.085 | 0.029 |
| In-Range (0/1) | 0.309 | 0.295 | 0.321 | 0.491 |
| <i>Observations</i> | | | | |
| | 54,798 | 25,662 | 29,136 | 103,906 |

Notes: Summary statistics for federal defendants sentenced between July 2012 and October 2014 reported in the U.S. Sentencing Commission individual datafiles.

⁵² Includes defendants who satisfied the requirements of the safety-valve under Guideline 2D1.1(b)(18).

⁵³ All sentence length variables are in months, are capped at 470 months, and do not include alternative confinement, such as house arrest. All Guidelines range variables refer to the Guidelines calculations before the application of a statutory minimum or maximum.

Table 2. Holder Memo and Mandatory Minimum Charging

| | (1) | (2) | (3) | (4) | (5) |
|---------------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| Eligible × Memo | -0.315*** (0.080) | -0.309*** (0.082) | -0.306*** (0.084) | -0.306*** (0.083) | -0.270*** (0.047) |
| Eligible | 0.005 (0.086) | -0.005 (0.099) | -0.002 (0.086) | -0.002 (0.086) | -0.022 (0.073) |
| Memo | -0.153*** (0.038) | -0.157*** (0.039) | -0.149*** (0.037) | 0.122** (0.052) | 0.110*** (0.041) |
| R ² | 0.018 | 0.098 | 0.203 | 0.205 | 0.220 |
| Demographic/Case Controls | N | Y | Y | Y | Y |
| District FEs | N | N | Y | Y | Y |
| Sentencing Year FEs | N | N | N | Y | Y |
| District Trends | N | N | N | N | Y |
| Observations | 54,665 | 54,665 | 54,665 | 54,665 | 54,665 |

Notes: OLS regressions of the defendant's statutory minimum (inverse hyperbolic sine). ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the district level and reported in parentheses. Demographic and case controls include race, Hispanic ethnicity, sex, U.S. citizenship, age and age-squared at sentencing, criminal history points, level of educational attainment (four categories), and offense type (three categories).

Table 3. Holder Memo Compliance by Race and Hispanic Ethnicity

| | All Defs (1) | All Defs (2) | Black Defs (3) | Hispanic Def (4) | White Defs (5) |
|--------------------------------|---------------------|----------------------|----------------------|------------------------|----------------------|
| Eligible × Memo × Hispanic | - | -0.161* (0.087) | - | - | - |
| Eligible × Memo × White | - | -0.071 (0.082) | - | - | - |
| Eligible × Memo | - | -0.158*** (0.052) | -0.176*** (0.053) | -0.306*** (0.071) | -0.225*** (0.059) |
| Eligible × Hispanic | - | 0.260** (0.120) | - | - | - |
| Eligible × White | - | -0.083 (0.076) | - | - | - |
| Memo × Hispanic | -0.085 (0.056) | 0.073 (0.053) | - | - | - |
| Memo × White | 0.030 (0.052) | 0.087 (0.053) | - | - | - |
| Eligible | - | -0.136** (0.056) | -0.182*** (0.057) | 0.076 (0.102) | -0.083 (0.058) |
| Memo | 0.021 (0.050) | 0.056 (0.052) | 0.059 (0.081) | 0.154** (0.073) | 0.062 (0.085) |
| Hispanic | 0.391*** (0.042) | 0.239*** (0.069) | - | - | - |
| White | -0.118* (0.062) | -0.079 (0.059) | - | - | - |
| F-Stat (Three-Way Interaction) | - | 1.70 (p=0.19) | - | - | - |
| R ² | 0.216 | 0.221 | 0.184 | 0.268 | 0.251 |
| Observations | 52,934 | 52,934 | 14,726 | 24,733 | 13,475 |

Notes: OLS regressions of the defendant's statutory minimum in years (inverse hyperbolic sine). ***: p<0.01; **: p<0.05; *: p<0.10. Standard errors are clustered at the district level and reported in parentheses. Demographic and case controls listed in Table 2 and fixed effects for sentencing fiscal year and federal district, and district-specific linear trends.

Table 4. Holder Memo Compliance by State Politics

| | All Defs (1) | “Blue” States (2) | “Red” States (3) |
|------------------------------|----------------------|----------------------|----------------------|
| Eligible × Memo × Blue State | -0.073 (0.157) | - | - |
| Eligible × Memo | -0.302*** (0.084) | -0.292*** (0.070) | -0.291*** (0.065) |
| Eligible × Blue State | -0.017 (0.176) | - | - |
| Memo × Blue State | -0.114 (0.075) | - | - |
| Eligible | 0.013 (0.141) | 0.141** (0.065) | 0.036 (0.124) |
| Memo | -0.078* (0.040) | -0.035 (0.093) | 0.107* (0.053) |
| Blue State | 0.222* (0.132) | - | - |
| R ² | 0.097 | 0.217 | 0.224 |
| Observations | 49,586 | 25,584 | 24,002 |

Notes: OLS regressions of inverse hyperbolic sine of statutory minimum. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the district level and reported in parentheses. Demographic and case controls listed in Table 2 and fixed effects for sentencing fiscal year. Columns (2) and (3) also include district-specific linear trends.

Table 5. Holder Memo and Sentence Length

| | (1) | (2) | (3) | (4) | (5) |
|---------------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| Eligible × Memo | -0.029 (0.025) | -0.023 (0.023) | -0.016 (0.019) | -0.016 (0.019) | -0.015 (0.021) |
| Eligible | -0.808*** (0.044) | -0.510*** (0.051) | -0.481*** (0.040) | -0.481*** (0.040) | -0.482*** (0.021) |
| Memo | -0.064*** (0.020) | -0.065*** (0.019) | -0.072*** (0.016) | -0.033 (0.025) | -0.032 (0.026) |
| R ² | 0.166 | 0.258 | 0.354 | 0.354 | 0.357 |
| Demographic/Case Controls | N | Y | Y | Y | Y |
| District FEs | N | N | Y | Y | Y |
| Sentencing Year FEs | N | N | N | Y | Y |
| District Trends | N | N | N | N | Y |
| Observations | 54,798 | 54,798 | 54,798 | 54,798 | 54,798 |

Notes: OLS regressions of sentence length in years (inverse hyperbolic sine). ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the district level and reported in parentheses. Demographic and case controls listed in Table 2, as well as sentencing fiscal year and district fixed effects, and district-specific linear trends.

Table 6. Holder Memo Sentencing by Race and Hispanic Ethnicity

| | All Defs (1) | All Defs (2) | Black Defs (3) | Hispanic Def (4) | White Defs (5) |
|-----------------------------------|----------------------|----------------------|----------------------|------------------------|----------------------|
| Eligible × Memo × Hispanic | - | 0.018 (0.046) | - | - | - |
| Eligible × Memo × White | - | 0.018 (0.046) | - | - | - |
| Eligible × Memo | - | -0.037 (0.036) | -0.040 (0.035) | -0.025 (0.030) | 0.008 (0.036) |
| Eligible × Hispanic | - | 0.234*** (0.029) | - | - | - |
| Eligible × White | - | 0.0008 (0.043) | - | - | - |
| Memo × Hispanic | 0.030 (0.034) | 0.040 (0.029) | - | - | - |
| Memo × White | -0.017 (0.040) | -0.024 (0.037) | - | - | - |
| Eligible | - | -0.602*** (0.027) | -0.570*** (0.028) | -0.395*** (0.048) | -0.569*** (0.035) |
| Memo | -0.046 (0.031) | -0.043 (0.029) | -0.028 (0.049) | -0.017 (0.028) | -0.064 (0.057) |
| Hispanic | 0.146*** (0.033) | 0.074* (0.044) | - | - | - |
| White | -0.166*** (0.040) | -0.120*** (0.036) | - | - | - |
| F-Stat (Three-Way Interaction) | - | 0.09 (p=0.91) | - | - | - |
| R ² | 0.325 | 0.359 | 0.373 | 0.342 | 0.403 |
| Observations | 53,064 | 53,064 | 14,757 | 24,806 | 13,501 |

Notes: OLS regressions of the defendant's sentence in years (inverse hyperbolic sine). ***: p<0.01; **: p<0.05; *: p<0.10. Standard errors are clustered at the district level and reported in parentheses. Demographic and case controls listed in Table 2 and fixed effects for sentencing fiscal year and federal district, and district-specific linear trends.

Table 7. The Holder Memo and Other Outcomes

| <u>Panel A. Early Outcomes</u> | | | | |
|--|---------------------------|-----------------------------|-------------------------|----------------------------|
| | Drug Min (IHS) | Stat Min (0/1) | Base Offense Level | GL Min: Untrumped (IHS) |
| | (1) | (2) | (3) | (4) |
| Eligible × Memo | -0.267*** (0.047) | -0.106*** (0.015) | -0.152 (0.149) | -0.019 (0.019) |
| Eligible | 0.002 (0.072) | 0.003 (0.023) | -0.671** (0.330) | -0.355*** (0.039) |
| Memo | 0.106*** (0.039) | 0.041** (0.014) | 0.177 (0.207) | 0.006 (0.022) |
| R ² | 0.222 | 0.218 | 0.183 | 0.281 |
| Observations | 54,798 | 54,665 | 54,771 | 54,790 |
| <u>Panel B. Intermediate and Case Outcomes</u> | | | | |
| | Substantial Assistance | Safety Valve (Elig Only) | Below-GL (Untrumped) | Below-GL (Trumped) |
| | (5) | (6) | (7) | (8) |
| Eligible × Memo | -0.006 (0.012) | - | 0.000009 (0.013) | 0.003 (0.013) |
| Eligible | -0.046*** (0.013) | - | 0.061*** (0.013) | 0.034*** (0.014) |
| Memo | 0.007 (0.015) | -0.001 (0.009) | 0.025* (0.014) | 0.020 (0.013) |
| R ² | 0.113 | 0.257 | 0.179 | 0.161 |
| Observations | 54,798 | 25,254 | 54,790 | 54,790 |

Notes: OLS regressions. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the district level. Demographic and case controls listed in Table 2 and fixed effects sentencing fiscal year, federal district, and district-specific linear trends. Column (7) does not include fixed effects for sentencing fiscal year.

Table 8. Results for Defendants with Two or More Criminal History Points

| | <u>Stat Min (IHS)</u> | | | <u>Sentence Length (IHS)</u> | | |
|-----------------|-----------------------|----------------------|-----------------------------|------------------------------|----------------------|-----------------------------|
| | Main Results | >1 CH Point | >1 CH Point & No Sub Assist | Main Results | >1 CH Point | >1 CH Point & No Sub Assist |
| Eligible × Memo | -0.270*** (0.047) | -0.253*** (0.058) | -0.268*** (0.077) | -0.015 (0.021) | -0.020 (0.039) | -0.013 (0.045) |
| Eligible | -0.022 (0.073) | -0.094* (0.050) | -0.086 (0.057) | -0.482*** (0.021) | -0.227*** (0.036) | -0.249*** (0.045) |
| Memo | 0.110*** (0.041) | -0.019 (0.049) | -0.003 (0.055) | -0.032 (0.026) | -0.020 (0.030) | -0.003 (0.034) |
| R ² | 0.221 | 0.202 | 0.221 | 0.357 | 0.270 | 0.296 |
| Observations | 54,665 | 27,952 | 20,292 | 54,798 | 28,040 | 20,379 |

Notes: OLS regressions. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the district level. Additional controls include those listed in Table 2, fixed effects for sentencing fiscal year and federal district, and district-specific linear trends.

Table 9. Spillover Effects of Holder Memo

| | Solo Defendant Cases | | Multi-Defendant Cases | | |
|--|----------------------|-------------------|---------------------------------------|-----------------------------------|--------------------------------------|
| | Eligible (1) | Ineligible (2) | Eligible w/ Ineligible Co-D (3) | Ineligible w/ Elig Co-D (4) | Ineligible w/out Elig Co-D (5) |
| <u>Panel A. Dependent Variable: Stat Min (IHS)</u> | | | | | |
| Memo | -0.352*** (0.086) | -0.013 (0.063) | -0.172*** (0.052) | -0.086 (0.057) | -0.009 (0.108) |
| <u>Panel B. Dependent Variable: Sentence (IHS)</u> | | | | | |
| Memo | -0.029*** (0.038) | 0.008 (0.028) | -0.009 (0.038) | -0.112*** (0.038) | 0.003 (0.051) |
| Observations | 9,343 | 10,315 | 8,694 | 7,288 | 3,747 |

Notes: OLS regressions. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the district level. Additional controls include those listed in Table 2, fixed effects for federal district and district-specific linear trends.

Table 10. Interrupted Time Series

| | <u>Stat Min (IHS)</u> | | <u>Sentence (IHS)</u> | |
|----------------|--------------------------|-------------------|--------------------------|-------------------|
| | Eligible (1) | Ineligible (2) | Eligible (3) | Ineligible (4) |
| Memo | -0.302*** (0.057) | -0.066 (0.041) | -0.072*** (0.022) | -0.019 (0.019) |
| R ² | 0.273 | 0.204 | 0.264 | 0.237 |
| | <u>Stat Min (months)</u> | | <u>Sentence (months)</u> | |
| Memo | -10.232*** (0.241) | -1.110 (2.074) | -2.546*** (0.890) | -1.420 (1.740) |
| R ² | 0.245 | 0.167 | 0.191 | 0.183 |
| Observations | 25,612 | 29,053 | 25,662 | 29,136 |

Notes: OLS regressions. ***: p<0.01; **: p<0.05; *: p<0.10. Standard errors are clustered at the district level. Additional controls include those listed in Table 2, fixed effects for federal district, and district-specific linear trends.

Table A.1 Additional Controls for Offense Severity

| | <u>Stat Min (IHS)</u> | | | <u>Sentence Length (IHS)</u> | | |
|--------------------|-----------------------|----------------------|----------------------|------------------------------|----------------------|----------------------|
| | (1) | (2) | (3) | (4) | (5) | (6) |
| Eligible × Memo | -0.270*** (0.047) | -0.255*** (0.049) | -0.252*** (0.049) | -0.015 (0.021) | -0.003 (0.015) | 0.002 (0.015) |
| Eligible | -0.022 (0.073) | 0.048 (0.046) | 0.088** (0.044) | -0.482*** (0.040) | -0.426*** (0.020) | -0.333*** (0.015) |
| Memo | 0.110*** (0.041) | 0.092** (0.038) | 0.088** (0.038) | -0.032 (0.026) | -0.047** (0.018) | -0.054*** (0.016) |
| Base Offense Level | N | Y | Y | N | Y | Y |
| GL Min | N | N | Y | N | N | Y |
| R ² | 0.221 | 0.463 | 0.467 | 0.357 | 0.652 | 0.697 |
| Observations | 54,665 | 54,638 | 54,638 | 54,798 | 54,771 | 54,771 |

Notes: OLS regressions. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the district level. Additional controls include those listed in Table 2, fixed effects for sentencing fiscal year and federal district, and district-specific linear trends.

Table A,2 Alternative Definition of “Eligible”

| | <u>Stat Min (IHS)</u> | | | <u>Sentence (IHS)</u> | | |
|-----------------|-----------------------|-----------------------------|----------------------------------|-----------------------|-----------------------------|----------------------------------|
| | Main Results | Elig. Incl. Enhancements | Elig. Excl. Defs with Co-Defs | Main Results | Elig. Incl. Enhancements | Elig. Excl. Defs with Co-Defs |
| Eligible × Memo | -0.270*** (0.047) | -0.280*** (0.049) | -0.349*** (0.085) | -0.015 (0.021) | -0.014 (0.020) | -0.025 (0.021) |
| Eligible | -0.022 (0.073) | -0.083 (0.069) | -0.029 (0.089) | -0.482*** (0.040) | -0.586*** (0.039) | -0.326*** (0.045) |
| Memo | 0.110*** (0.041) | 0.107** (0.041) | 0.083* (0.046) | -0.032 (0.026) | -0.032 (0.026) | -0.039 (0.030) |
| R ² | 0.221 | 0.222 | 0.209 | 0.357 | 0.375 | 0.336 |
| Observations | 54,665 | 54,665 | 39,285 | 54,798 | 54,798 | 39,387 |

Notes: OLS regressions. ***: p<0.01; **: p<0.05; *: p<0.10. Standard errors are clustered at the district level. Additional controls include those listed in Table 2, fixed effects for sentencing fiscal year and federal district, and district-specific linear trends.

Table A.3 Main Results at the Courthouse Level

| | Stat Min (IHS) | | Sentence (IHS) | |
|-----------------|----------------------------------|----------------------|----------------------------------|----------------------|
| | District Level (Main Results) | Courthouse Level | District Level (Main Results) | Courthouse Level |
| Eligible × Memo | -0.270*** (0.047) | -0.296*** (0.049) | -0.015 (0.021) | 0.002 (0.017) |
| Eligible | -0.022 (0.073) | 0.039 (0.057) | -0.482*** (0.040) | -0.460*** (0.030) |
| Memo | 0.110*** (0.041) | 0.150*** (0.047) | -0.032 (0.026) | -0.036 (0.028) |
| Mean of DV | 1.572 | 1.546 | 2.047 | 2.050 |
| R ² | 0.221 | 0.244 | 0.357 | 0.380 |
| Observations | 54,665 | 39,285 | 54,798 | 39,387 |

Notes: OLS regressions. ***: p<0.01; **: p<0.05; *: p<0.10. Standard errors are clustered at the district level. Additional controls include those listed in Table 2, fixed effects for sentencing fiscal year and courthouse, and courthouse-specific linear trends.