Ingram v. United States

United States Court of Appeals for the Eighth Circuit

January 14, 2019, Submitted; August 2, 2019, Filed

No. 17-3409

Reporter
932 F.3d 1084 *; 2019 U.S. App. LEXIS 23225 **

Michael Ingram, Petitioner - Appellant v. United States of America, Respondent - Appellee

Prior History: [**1] Appeal from United States District Court for the Northern District of Iowa - Sioux City.

Ingram v. United States, 296 F. Supp. 3d 1076, 2017 U.S. Dist. LEXIS 180114 (N.D. Iowa, Oct. 31, 2017)

Counsel: For Michael Ingram, Petitioner - Appellant: Shelley A. Goff, Ruston, LA.

Michael Ingram, Petitioner - Appellant, Pro se, Ruston, LA.

For United States of America, Respondent - Appellee: Shawn Wehde, U.S. Attorney's Office, Northern District of Iowa, Sioux City, IA.

Judges: Before SMITH, Chief Judge, COLLOTON and ERICKSON, Circuit Judges.

Opinion by: SMITH

Opinion

[*1085] SMITH, Chief Judge.

Michael Ingram appeals the district court's[1] denial of his *28 U.S.C. § 2255* motion, which seeks relief from the mandatory [*1086] minimum sentence imposed for his 2008 conviction for conspiracy to distribute and possess with intent to distribute crack cocaine. Ingram's mandatory minimum sentence was doubled from 10 years to 20 years, pursuant to *21 U.S.C. § 851*, based on a prior felony drug conviction. The district court granted a certificate of appealability on whether imposition of the *§ 851* enhancement in Ingram's case violated his *Fifth Amendment* rights to equal protection and due process ("equal protection/selective prosecution claim"). Ingram bases that claim on the geographical disparity in the application of *§ 851* enhancements between the Northern District of Iowa and other districts. Because we

[1] The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, now retired.

hold that Ingram's [**2] § 2255 motion was untimely, we affirm the district court's denial of habeas relief.

I. *Background* [2]

In October 2007, the government charged Ingram with conspiracy to distribute and possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine that contained a cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. In February 2008, the government filed a notice that it would seek an enhanced sentence under 21 U.S.C. § 851 based on Ingram's prior felony drug conviction in Illinois. The notice identified Ingram's prior conviction as one for "[m]anufacture/delivery of controlled substance, in Circuit Court of Cook County, Illinois, on or about October 24, 2001, in case number 01CR2195101."

The jury found Ingram guilty of the charged offense. The district court scheduled Ingram's sentencing for June 16, 2008. Before sentencing, the probation officer provided the parties with a presentence investigation report (PSR). The PSR scored Ingram's sentence on the basis of a prior felony conviction, computed Ingram's guideline range to be 168 to 210 months (14 to 17.5 years), but noted Ingram's mandatory minimum sentence with the prior conviction enhancement was 240 months (20 years). [**3]

At the sentencing hearing, the court denied the government's request for a sentencing enhancement. The court concluded that the government's evidence inconsistently identified the purported statute of conviction. The government put some documents into the record that identified the offense as a violation of 720 Ill. Comp. Stat. 570/401(d). But, the government asserted Ingram violated a different statute—720 Ill. Comp. Stat. 570/401(d). The court postponed sentencing to allow a government appeal.

On appeal, the government argued the district court erred in determining the government had not proven Ingram's prior penalty-enhancing felony drug conviction. This court remanded on the sentencing enhancement. *United States v. Ingram, 309 F. App'x 66, 68 (8th Cir. 2009)*.

On remand, the district court held an evidentiary hearing. Following the hearing, the court found the government had proven beyond a reasonable doubt that Ingram had previously been convicted of a felony drug offense and imposed a sentence of 240 months (20 years). Ingram appealed. On February 10, 2010, this court affirmed Ingram's conviction and sentence. *Ingram, 594 F.3d at 981*.

Thereafter, on June 15, 2010, Ingram filed a petition for writ of certiorari. On October 4, 2010, the Supreme Court denied [*1087] that petition. *Ingram v. United States, 562 U.S. 888, 131 S. Ct. 222, 178 L. Ed. 2d 134 (2010)*.

On August 27, 2014, Ingram filed his § 2255 motion asserting, [**4] among other things, his equal protection/selective prosecution claim. The government moved to dismiss the § 2255 motion as untimely. Ingram did not dispute that his § 2255 motion was filed more than one year after the denial of his petition for writ of certiorari. *See* 28 U.S.C. § 2255(f)(1). However, he argued that his § 2255 motion was timely pursuant to a different "triggering" provision, 28 U.S.C. § 2255(f)(4). That section provides that the one-year period runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." *Id.* Ingram asserted that it was not until the

[2] Portions of this background section are taken from *United States v. Ingram, 594 F.3d 972 (8th Cir. 2010)*, without further attribution.

publication of *United States v. Young, 960 F. Supp. 2d 881 (N.D. Iowa 2013)*, that he learned of the substantial disparity in the imposition of *§ 851* enhancements between the Northern District of Iowa and other federal districts. According to Ingram, because he was an incarcerated person, he could not have discovered the information on which *Young* was based. He argued that a reasonable period of time had to elapse between the filing of *Young*, its appearance in the prison library system, and his discovery of *Young*. In summary, he maintained that his *§ 2255* motion incorporated claims based on new facts concerning the disparity disclosed in *Young* and that those claims were [**5] timely filed just over a year after the filing of *Young*.

The district court held that Ingram's claims concerning the constitutionality of *§ 851* were timely under *§ 2255(f)(4)*. First, the district court concluded that Ingram proved the existence of new facts based on *Young*. In that decision, the district court "point[ed] out that the Sentencing Commission's 'first and only, additional targeted coding and analysis project on nationwide application of *21 U.S.C. § 851* recidivist enhancements [was] as part of the Report To The Congress: Mandatory Minimum Penalties In The Federal Criminal Justice System (Commission's 2011 Report).'" *Ingram v. United States, No. C 14-4071-MWB, 2016 U.S. Dist. LEXIS 15361, 2016 WL 538468, at *7 (N.D. Iowa Feb. 9, 2016)* (second alteration in original) (quoting *Young, 960 F. Supp. 2d at 892*). The court noted that the Sentencing "Commission's 2011 Report was not published until about or *after* the one-year statute of limitations for Ingram's *§ 2255* Motion had run." *Id.* As a result, the court concluded that *Young* set forth

> an analysis of the "new" data about the application of *§ 851* revealed by the Commission's 2011 Report, *960 F. Supp. 2d at 892-902*, which, to the best of my knowledge and belief, was a publication of "new" facts, or at least "new" factual comparisons that might be specifically relevant to Ingram's [**6] case, almost two more years after the Commission's 2011 Report.

Id.

Second, the district court determined that Ingram acted diligently to discover the new facts set forth in *Young*. According to the court, "some reasonable period of time had to elapse between the filing of the *Young* decision, its appearance in the prison library system, and [Ingram's] discovery of it." *Id.* The court found that Ingram satisfied the diligence "requirement by filing his *§ 2255* Motion, asserting claims based on 'new facts' about the disparate application of *§ 851*, only a few days past one year from the publication of *Young*, and less than one year after he was reasonably likely to have actually discovered that decision." *Id.*

[*1088] The court also rejected the government's argument that Ingram's equal protection/selective prosecution claim was procedurally defaulted for failure to raise the claim on direct appeal. The court held that Ingram had overcome procedural default by establishing cause for the procedural default and actual prejudice. Though the court acknowledged the "anecdotal observation" it made "at Ingram's sentencing that there appeared to be unfair geographic disparities in the application of *§ 851* enhancements," it [**7] concluded that this observation did not provide "an adequate basis for Ingram's claim." *Ingram v. United States, 296 F. Supp. 3d 1076, 1081 (N.D. Iowa 2017)*. The court noted that the Sentencing Commission was "the only body that had the pertinent information," and it "did not publish the relevant statistics that could establish an adequate factual basis for such a claim until 2011." *Id.* The court concluded that its publication of the "analysis of the disparity, specifically comparing the Northern District of Iowa to other districts" in *Young*, was when "an adequate basis for Ingram's claim became apparent." *Id.* As a result, the court found that Ingram demonstrated "cause for his failure to raise on his direct appeal the geographic

disparity in application of § 851 enhancements, because the factual basis for such a claim was not reasonably available to him or his counsel before Ingram's appeal." *Id.*

The court next determined that Ingram satisfied the prejudice prong because "[r]emoving improper selective application of the § 851 enhancement in Ingram's case would have resulted in a halving of his mandatory minimum sentence and a significant reduction of his sentence to one within his advisory Sentencing Guidelines range." *Id.*

As to the merits of Ingram's equal protection/selective [**8] prosecution claim, the district court held that Ingram failed to establish the lack of a rational basis for any differential treatment of similarly situated persons in the application of § 851 enhancements.

The district court granted a certificate of appealability as to Ingram's equal protection/selective prosecution claim.

II. *Discussion*

Ingram argues that the district court erred in denying his § 2255 motion. According to Ingram, he proved that application of § 851 enhancements "is applied arbitrarily across the federal districts, resulting in [his] selective prosecution . . . and a violation of his [Fifth] Amendment right to equal protection." Appellant's Br. at 17. In response, in addition to defending the merits of the district court's decision, the government also argues that Ingram's § 2255 motion was time-barred and was procedurally defaulted. We now address the government's timeliness argument.

We review de novo the denial of a § 2255 motion. *Deroo v. United States, 709 F.3d 1242, 1245 (8th Cir. 2013)*.

Ingram concedes that his § 2255 motion "was not timely filed within the limitations period of 28 U.S.C. § 2255(f)(1)." Appellant's Br. at 1; *see also* 28 U.S.C. § 2255(f)(1) ("A 1-year period of limitation shall . . . . run from . . . the date on which the judgment of conviction becomes final . . . ."). Nevertheless, [**9] he argues that his § 2255 "motion is not untimely based on 28 U.S.C. § 2255(f)(4)." Reply Br. at 1. Under § 2255(f)(4), the one-year statute of limitations begins to run from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

"To be entitled to invoke the statute of limitations contained in *section 2255(f)(4)*, we have said that a petitioner must show [*1089] the existence of a new fact, while also demonstrating that he acted with diligence to discover the new fact." *Deroo, 709 F.3d at 1245* (quoting *Anjulo-Lopez v. United States, 541 F.3d 814, 817 (8th Cir. 2008)*).

The first question, therefore, is whether Ingram has shown the existence of a new fact. *See id.* For example, the Supreme Court has held that an order vacating a prior state-court conviction, which had been used to enhance the petitioner's federal sentence, constituted a new fact because it was "subject to proof or disproof like any other factual issue." *Johnson v. United States, 544 U.S. 295, 307, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005)*. By contrast, a judicial decision interpreting the law does not constitute a "new fact" for purposes of § 2255(f)(4). *See E.J.R.E. v. United States, 453 F.3d 1094, 1098 (8th Cir. 2006)* (holding intervening change in law is insufficient to reset the statute of limitations period under the Antiterrorism and Effective Death Penalty Act and declining to equitably toll the statute of limitations). A judicial decision, [**10] "unlike a predicate conviction, is a ruling exclusively within the domain of the courts

and is incapable of being proved or disproved." *Id.* (citing *Shannon v. Newland, 410 F.3d 1083, 1089 (9th Cir. 2005)* ("We would never, for example, ask a jury to decide whether a judicial decision had indeed changed a state's law in the relevant way, nor would the parties introduce evidence on the question.")); *see also Whiteside v. United States, 775 F.3d 180, 183-84 (4th Cir. 2014)* (holding an intervening change of law is not a fact supporting a claim); *Phillips v. United States, 734 F.3d 573, 580 (6th Cir. 2013)* (holding an intervening federal court of appeals decision was newly-discovered law, not a newly-discovered fact); *Lo v. Endicott, 506 F.3d 572, 575-76 (7th Cir. 2007)* (holding that while a state court's decision modifying substantive law could arguably help the petitioner's claim, the decision did not constitute a factual predicate for the petitioner's habeas claims).

Here, the "new facts" on which Ingram relies are those set forth in *Young* concerning the disparate application of *§ 851* among the various federal districts. In *Young*, the district court provided an "[o]verview [o]f [t]he [u]nderlying [d]ata [o]n *§ 851* [e]nhancements." *960 F. Supp. 2d at 892* (bold and italics omitted). The court based its overview on the Sentencing Commission's 2011 Report, stating:

> The grim state of affairs for *§ 851* enhancements . . . is starkly revealed by an examination [**11] of the Commission's *§ 851* data on the one occasion that it collected such information. Every year, pursuant to its statutory mandate, the Commission publishes national data collected from federal sentencings spanning all ninety-four districts. In 2011, the Commission conducted the first and only, additional targeted coding and analysis project on nationwide application of *21 U.S.C. § 851* recidivist enhancements as part of the REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Commission's 2011 REPORT). Ninety-three of the ninety-four districts reported data, and the Commission described in detail its methodology for its targeted *§ 851* study. The Commission's 2011 REPORT itself notes, "[This] study of drug offenses and mandatory minimum penalties demonstrates a lack of uniformity in application of the enhanced mandatory minimum penalties." Commission's 2011 REPORT at 253.

Id. (alteration in original) (footnotes omitted).

[*1090] The 2011 Report, however, did "not contain the raw data used for the *§ 851* analysis"; therefore, the district court "requested it directly from the Commission, and the Commission quickly responded by sending [the district court] the '851 datafile.'" *Id. at 893*. The district court "then [**12] re-analyzed and reformatted the raw data in several significant ways that go far beyond the Commission's analysis." *Id.* In particular, the district court "compare[d] the application of *§ 851* enhancements in the N.D. of Iowa to national statistics and the Eighth Circuit respectively." *Id.* Analyzing the *§ 851* data file, the court determined that "[t]he N.D. of Iowa ranks fourth in the nation in its use of *§ 851* enhancements (79% of eligible defendants received a *§ 851* enhancement)." *Id. at 894*. According to the court:

> Prosecutors in the N.D. of Iowa applied this enhancement at a rate more than six times the national median application rate (13%) and more than three times the national average application rate (26%). Compared to the national median application, eligible offenders in the N.D. of Iowa are 626% more likely to be subject to a *§ 851* enhancement and, compared to the national application average, eligible offenders are 311% more likely to receive a *§ 851* enhancement.

Id. (footnotes omitted).

The government argues that *Young* is newly-discovered law, not newly-discovered facts. We agree with the district court, however, that "Ingram [is] rel[ying on] the *facts* presented in *Young* about the disparate application of *§ 851* among [**13] the various federal districts, not the *Young* decision itself." *Ingram, 2016 U.S. Dist. LEXIS 15361, 2016 WL 538468, at *7* (emphasis added). The facts set forth in *Young* relied on the Commission's 2011 Report, which "was not published until about or *after* the one-year statute of limitations for Ingram's *§ 2255* Motion had run." *Id.* Therefore, the Commission's 2011 Report on which the court relied in *Young* can constitute "new facts" for purposes of *§ 2255(f)(4)*.

But Ingram must also prove "that he acted with diligence to discover the new fact." *Deroo, 709 F.3d at 1245* (quoting *Anjulo-Lopez, 541 F.3d at 817*). "Due diligence does not require repeated exercises in futility or exhaustion of every imaginable option, but it does require '*reasonable* efforts.'" *Id.* (quoting *Anjulo-Lopez, 541 F.3d at 818*).

Here, the one-year statute of limitations for Ingram to file his *§ 2255* motion under *§ 2255(f)(1)* expired in October 2011, the same month that the Commission released the 2011 Report.[3] The district court issued its opinion in *Young* setting forth an overview of the Commission's 2011 Report and the raw data underlying that report on August 16, 2013. Ingram filed his *§ 2255* motion on August 27, 2014, almost three years after the issuance of the Commission's 2011 Report and slightly over one year after the release of *Young*.

We conclude that the issuance of the Commission's [**14] 2011 Report—not *Young*—is what triggered Ingram's duty to act with due diligence. As the district court explained, the Commission's 2011 Report revealed facts about "the disparate application of *§ 851* among the various federal districts." *Ingram, 2016 U.S. Dist. LEXIS 15361, 2016 WL 538468, at *7*. The 2011 Report prompted the district court to request the raw data underlying that report. While the Commission's 2011 [*1091] Report may not have set forth the raw data underlying its conclusions, it certainly provided notice to Ingram that a disparity existed in the application of *§ 851*. Ingram, however, did not file his *§ 2255* motion until almost three years after the issuance of the Commission's 2011 Report. Ingram has not explained why he could not have acted sooner to bring his equal protection/selective enforcement claim based on facts revealed in the 2011 Report. Legal challenges to *§ 851* enhancements based on disparity or disproportionality "are not novel." *United States v. Collins, No. 10-CR-322 JNE, 2015 U.S. Dist. LEXIS 48101, 2015 WL 1634764, at *3 (D. Minn. Apr. 13, 2015)* (citing *United States v. LaBonte, 520 U.S. 751, 761-62, 117 S. Ct. 1673, 137 L. Ed. 2d 1001 (1997)* (rejecting argument "that if the Government provides notice under *§ 851(a)(1)* to one defendant, but not to another, the resulting difference in the maximum possible term is an 'unwarranted disparity'"); *United States v. Gordon, 953 F.2d 1106, 1107 (8th Cir. 1992)* (rejecting *Eighth Amendment* disproportionality argument as meritless in light of Supreme Court's [**15] approval of a "life sentence for a first offense of cocaine possession" in *Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)*, where defendant's career offender "guideline sentence range beg[an] at 262 months")). Therefore, we conclude that Ingram did not exercise due diligence in discovering the facts set forth in the Commission's 2011 Report.

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[3] *See* United States Sentencing Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Oct. 2011), *available at* https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

Because Ingram has failed to prove his *§ 2255* motion is timely under *§ 2255(f)(4)* and concedes that it is untimely under *§ 2255(f)(1)*, we hold that Ingram's *§ 2255* motion is time-barred.[4]

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

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[4] Because we hold that Ingram's *§ 2255* motion is time-barred, we need not reach whether Ingram's equal protection/selective enforcement claim is procedurally defaulted or analyze the claim on its merits.

Ingram v. United States

United States District Court for the Northern District of Iowa, Western Division

October 31, 2017, Decided; October 31, 2017, Filed

No. C 14-4071-MWB

Reporter
296 F. Supp. 3d 1076 *; 2017 U.S. Dist. LEXIS 180114 **; 2017 WL 4932918

MICHAEL INGRAM, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.

Subsequent History: Affirmed by *Ingram v. United States, 2019 U.S. App. LEXIS 23225 (8th Cir. Iowa, Aug. 2, 2019)*

Prior History: *Ingram v. United States, 2016 U.S. Dist. LEXIS 15361 (N.D. Iowa, Feb. 9, 2016)*

Counsel: [**1] For Michael Ingram, Petitioner: Shelley A Goff, LEAD ATTORNEY, Goff & Goff, Ruston, LA USA.

For United States of America, Respondent: Shawn Stephen Wehde, LEAD ATTORNEY, US Attorney's Office, Sioux City, IA USA.

Judges: MARK W. BENNETT, UNITED STATES DISTRICT JUDGE.

Opinion by: MARK W. BENNETT

Opinion

[*1079] **OPINION AND ORDER REGARDING PETITIONER'S AMENDED MOTION PURSUANT TO *28 U.S.C. § 2255* TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

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I. INTRODUCTION

On March 17, 2016, with the assistance of counsel, petitioner Michael Ingram filed [*1080] his Amended Motion Pursuant To *28 U.S.C. § 2255* To Vacate, Set Aside, Or Correct Sentence (*§ 2255* Motion), seeking relief from his mandatory minimum sentence on his 2008 conviction for conspiracy to distribute and to possess with intent to distribute crack cocaine. Ingram's mandatory minimum sentence was doubled from 10 years to 20 years, pursuant to *21 U.S.C. § 851*, based on a prior felony drug conviction. Ingram's Amended *§ 2255* Motion seeks relief [**2] on two of his original claims: (1) a claim that the imposition of a *§ 851* enhancement in his case violated his *Eighth Amendment* rights; and (2) a claim that the imposition of a *§ 851* enhancement in his case violated his *Fifth Amendment* rights to Equal Protection and Due Process (his equal protection/selective prosecution claim).[1] Both claims are based on the geographical disparity in the application of *§ 851* enhancements between this and other districts.

On February 8, 2017, after reviewing the parties' briefs, I entered an Order for further briefing on specific issues. The parties filed their Supplemental Briefs on March 17, 2017, and Supplemental Replies on March 31, 2017. In addition, on March 17, 2017, Ingram filed a Motion To Expand The Record Pursuant To *Rule 7 Of The Rules Governing Section 2254 Cases*, to which the respondent consented, and on March 18, 2017, Ingram filed an Amended Motion To Expand The Record, involving one additional exhibit, to which the respondent also consented. Ingram's Motions To Expand The Record identify *Rule 7 of the Rules Governing Section 2254 Cases* as the authority on which they are based. That rule, while inapplicable to this *§ 2255* case, is identical to *Rule 7 of the Rules Governing Section 2255 Cases.* Because I find good cause supports Ingram's Motions To Expand The Record, and the respondent has consented, those motions are **granted**.

After [**3] reviewing the parties' first round of supplemental briefs, I entered an Order on May 26, 2017, requiring the parties to make a proffer of evidence on Ingram's "equal protection/selective prosecution" claim and requiring supplemental briefing of the question of whether there is a rational basis for the geographic disparity between the imposition of a *§ 851* enhancement on Ingram in this district and lack of such an enhancement for similarly-situated persons in other districts. The parties filed their Proffers Of Evidence on August 10 and 11, 2017, and their Second Supplemental Briefs on September 15, 2017. Ingram filed a Second Supplemental Reply on September 29, 2017.

I conclude that Ingram's *§ 2255* Motion is now ripe for disposition.

II. LEGAL ANALYSIS

A. Procedural Default

[1] I will refer to Ingram's second claim as "equal protection/selective prosecution," recognizing that "[t]he requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" *United States v. Armstrong, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)* (quoting *Wayte v. United States, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)*).

Before considering any other questions in this case, I find it appropriate to address the respondent's contention, in its original briefing, that Ingram's claims are procedurally defaulted. The respondent is correct that, where a claim was not raised on direct appeal, it generally may not be raised in a § 2255 motion. *Walking Eagle v. United States, 742 F.3d 1079, 1082 (8th Cir. 2014)*. A petitioner may overcome "procedural default" from failure to raise a claim on direct appeal, however, if the petitioner [**4] establishes both "'cause for the procedural default and actual prejudice [*1081] resulting from the error.'" *Id.* (quoting *United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996)*, in turn citing *United States v. Frady, 456 U.S. 152, 167-68, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)*). The Supreme Court has recognized that a showing that the factual or legal basis for a claim was not reasonably available to counsel (or the defendant) would constitute cause under this standard. *See, e.g.,* *Strickler v. Greene, 527 U.S. 263, 284, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*; *Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*; *and compare* *Murphy v. King, 652 F.3d 845, 850 (8th Cir. 2011)* (where the factual basis for a claim was available to counsel, but counsel failed to recognize it, there is no adequate "cause" for the default).

Although I made an anecdotal observation at Ingram's sentencing that there appeared to be unfair geographic disparities in the application of § 851 enhancements, contrary to the respondent's present contentions, that is a long way from an adequate factual basis for Ingram's § 2255 claims. Indeed, the only body that had the pertinent information, the United States Sentencing Commission, did not publish the relevant statistics that could establish an adequate factual basis for such a claim until 2011. *See* *Strickler, 527 U.S. at 284* (noting that a cause external to the defense, such as the information being solely in the hands of the government, was required). It was not until I published my analysis of the disparity, specifically [**5] comparing the Northern District of Iowa to other districts, in *United States v. Young, 960 F. Supp. 2d 881 (N.D. Iowa 2013)*, that an adequate basis for Ingram's claim became apparent. Thus, I find that Ingram has shown cause for his failure to raise on his direct appeal the geographic disparity in application of § 851 enhancements, because the factual basis for such a claim was not reasonably available to him or his counsel before Ingram's appeal. *Strickler, 527 U.S. at 284*.

The prejudice prong requires a showing that there is a reasonable probability that, but for the cause in question, the result of the proceeding would have been different. *See* *Kennedy v. Kemna, 666 F.3d 472, 477 (8th Cir. 2012)*. Removing improper selective application of the § 851 enhancement in Ingram's case would have resulted in a halving of his mandatory minimum sentence and a significant reduction of his sentence to one within his advisory Sentencing Guidelines range. I find that difference sufficient "prejudice" to overcome procedural default.

Thus, procedural default does not bar relief on Ingram's claims.

B. The Eighth Amendment Claim

Ingram's first claim is that imposition of a § 851 enhancement in his case, on the basis of geographical location, violates the *Eighth Amendment*. Ingram relies on Justice Douglas's statement in his concurrence in *Furman v. Georgia, 408 U.S. at 238, 256 (1972)*, that a "capriciously selected random handful [**6] upon whom the sentence of death is imposed is unconstitutional cruel and unusual punishment under the *Eighth Amendment* requiring penal laws to be evenhanded, non-selective, and non-arbitrary." The respondent argues that a § 851 enhancement, even one doubling the mandatory minimum sentence from ten years to twenty years, is not closely comparable to a death penalty. Indeed, the respondent argues that

the *Eighth Amendment* forbids only "grossly disproportionate" sentences, but the Eighth Circuit Court of Appeals has concluded that mandatory minimum penalties do not violate the *Eighth Amendment*. The respondent also argues that Ingram's *§ 851* enhanced [*1082] mandatory minimum sentence of twenty years is not grossly disproportionate to his advisory Sentencing Guidelines range of 168 to 210 months, nor does it exceed the sentence permitted by statute.

As the Eighth Circuit Court of Appeals has explained,

> "'[A] sentence within statutory limits is generally not subject to review under the *Eighth Amendment*.'" *United States v. Rodriguez-Ramos, 663 F.3d 356, 366 (8th Cir.2011)* (quoting *United States v. Murphy, 899 F.2d 714, 719 (8th Cir.1990)*); *see also United States v. Collins, 340 F.3d 672, 679 (8th Cir.2003)* ("It is well settled that a sentence within the range provided by statute is generally not reviewable by an appellate court." (citation omitted)). In fact, we have "never held a sentence within the statutory range to violate [**7] the *Eighth Amendment*." *United States v. Vanhorn, 740 F.3d 1166, 1170 (8th Cir.2014)* (citing *United States v. Neadeau, 639 F.3d 453, 456 (8th Cir.2011)*).

United States v. Contreras, 816 F.3d 502, 514 (8th Cir. 2016). Not only was Ingram's sentence within the statutory range, the statutorily-mandated sentence imposed on Ingram is not comparable to the "extreme case[s]" involving "grossly disproportionate penalties for the underlying crime." *See, e.g.*, *United States v. Meeks, 756 F.3d 1115, 1120-21 (8th Cir. 2014)* (citing cases rejecting *Eighth Amendment* challenges to sentences, including drug cases).

Even accepting Ingram's allegations as true, he is not entitled to relief on his *Eighth Amendment* claim, and denial of this claim without a hearing is appropriate. *United States v. Sellner, 773 F.3d 927, 929-30 (8th Cir. 2014)* ("Evidentiary hearings on *28 U.S.C. § 2255* motions [are only] necessary prior to the motion's disposition if a factual dispute exists."). This claim is denied.

C. The Equal Protection/Selective Prosecution Claim

1. Preliminary matters

In the first round of supplemental briefing, Ingram contended, and the respondent conceded, that a prosecutor, a specific United States Attorney's Office (USAO), or the Department of Justice (DOJ) can be a proper respondent on an equal protection/selective prosecution claim. Thus, I may pass on to some contested preliminary issues.

Specifically, the parties dispute whether geographic location is a difference on which an equal protection/selective prosecution claim can be based. The respondent argues that [**8] geographic location is not a proper basis for such a claim, because it is not an impermissible motive such as race, religion, or the exercise of constitutional rights. I conclude that the respondent has mistaken *illustrations* of violations of equal protection for the *standard* for violations of equal protection. The *standard* is stated, variously, as whether the decision was based on an "unjustifiable standard," "arbitrary classification," or "impermissible motive," followed by illustrations—usually prefaced by "such as," indicating the list is not exclusive—including "race," "religion," or "exercise of constitutional rights." *See, e.g.*, *Texas v. Lesage, 145 L. Ed. 2d 347, 528 U.S. 18, 21, 120 S. Ct. 467 (1999)* (explaining that a school could defeat an equal

protection claim based on racially-based admissions "by proving that it would have made the same decision without the impermissible motive"); *United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)* (explaining equal protection requires that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification'" (quoting *Oyler v. Boles, 368 U.S. 448, 456, [*1083] 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962)*); *Wayte v. United States, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)* ("In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," which [**9] the court held included the exercise of protected statutory and constitutional rights (internal quotation marks and citations omitted)); *United States v. Jeanpierre, 636 F.3d 416, 424-25 (8th Cir. 2011)* (recognizing that a prosecutor's discretion in imposing *§ 851* enhancements is subject to "constitutional constraints," including that the decision "may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification" (internal quotation marks and citations omitted)); *United States v. Leathers, 354 F.3d 955, 962 (8th Cir. 2004)* (stating that an equal protection claim requires proof, inter alia, "that the government's action in thus singling [the defendant] out was based on an impermissible motive such as race, religion, or the exercise of constitutional rights" (quoting *United States v. Parham, 16 F.3d 844, 846 (8th Cir. 1994)*).

Thus, the question is whether "geographic location" is or can be an "unjustifiable standard" or an "impermissible motive," because, for example, it is an "arbitrary classification." *See generally Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)* (holding that claimants need not allege that they were part of a suspect class to state an equal protection claim). I conclude that it can be. *See United States v. Sebastian, 436 F.3d 913, 916 (8th Cir. 2002)* ("[I]t is difficult to imagine a sentencing disparity less warranted than one which depends on the accident of the judicial district in which the defendant happens to be [**10] arrested" (citations omitted)), *abrogated on other grounds by United States v. Jimenez-Perez, 659 F.3d 704 (8th Cir. 2011)*.

The respondent is not entirely wrong, however, that there is a difference between an equal protection/selective prosecution claim based on an arbitrary classification like race or religion, on the one hand, and such a claim based on an arbitrary classification like geographic location, on the other. The Eighth Circuit Court of Appeals has explained, "When no fundamental right or suspect class is at issue, a challenged law [or action] must pass the rational basis test." *Hughes v. City of Cedar Rapids, 840 F.3d 987, 996 (8th Cir. 2016)* (citing *Reno v. Flores, 507 U.S. 292, 301, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)*; *see also Hassan v. City of New York, 804 F.3d 277, 298-99 (3d Cir. 2015)* (explaining, in a *§ 1983* case alleging selective enforcement based on "religious affiliation," that "at a minimum," equal protection requires "rational-basis review," "intermediate scrutiny" where a "quasi-suspect" class, like gender, is at issue, and "strict scrutiny" only where a suspect class, like race and nationality, is at issue); *United States v. Hughes, 632 F.3d 956, 960 (6th Cir. 2011)* (case involving an equal protection/selective prosecution challenge to prosecution under *18 U.S.C. § 2423(b)*, recognizing that, because the petitioner was not part of a suspect class, he had to show that the government's classification lacked a rational basis); *Gary v. City of Warner Robins, Ga., 311 F.3d 1334, 1337 (11th Cir. 2002)* (case involving equal protection challenge to selective prohibition [**11] of the purchase of alcohol by persons under a certain age, explaining that age is not a "suspect class," so that the prohibition would be scrutinized only under the "rational basis" test). "Geographic location" plainly is not a "suspect" or "quasi-suspect" class, so that Ingram's equal protection/selective [*1084] prosecution claim is only subject to "rational basis" review.

2. Elements of the claim

As the Supreme Court has explained, "The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" *Armstrong, 517 U.S. at 465* (quoting *Wayte, 470 U.S. at 608*). Thus, in the case of a suspect classification, such as race, requiring strict scrutiny, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Id.* (quoting *Wayte, 470 U.S. at 608*); *Gilani v. Matthews, 843 F.3d 342, 348 (8th Cir. 2016)* ("To succeed, [a claimant] 'must show both that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose.'" (quoting *United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996)*. More specifically, "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* (adding, "This requirement has been established [**12] in our case law since *Ah Sin v. Wittman, 198 U.S. 500, 25 S. Ct. 756, 49 L.Ed. 1142 (1905)*."). Consequently, the Eighth Circuit Court of Appeals has stated, where the claim is based on a suspect classification, "[a] selective prosecution claim requires a defendant to show that: '(1) people similarly situated to [him] were not prosecuted; and (2) the decision to prosecute was motivated by a discriminatory purpose.'" *United States v. Peterson, 652 F.3d 979, 981 (8th Cir. 2011)* (quoting *United States v. Hirsch, 360 F.3d 860, 864 (8th Cir. 2004)*.

As noted above, however, geographic location is not a suspect classification; thus, an equal protection claim based on geographic location is subject only to rational basis scrutiny. "Under rational basis [scrutiny], the [claimants] 'must prove [that they] w[ere] treated differently by the [respondent] than similarly situated persons and the different treatment was not rationally related to a legitimate government objective.'" *Stevenson v. Blytheville Sch. Dist. #5, 800 F.3d 955, 972 (8th Cir. 2015)* (quoting *Koscielski v. City of Minneapolis, 435 F.3d 898, 901 (8th Cir. 2006)*, and explaining that, where the claimants had failed to establish that strict scrutiny applied, their equal protection claim was subject only to rational basis scrutiny); *accord Hassan, 804 F.3d at 298-99* (selective enforcement based on religious affiliation); *Hughes, 632 F.3d at 960* (case involving an equal protection/selective prosecution challenge to prosecution under *18 U.S.C. § 2423(b)*, recognizing that, because the [**13] petitioner was not part of a suspect class, he had to show that the government's classification lacked a rational basis); *Gary, 311 F.3d at 1337* (case involving equal protection challenge to selective prohibition of the purchase of alcohol by persons under a certain age, explaining that age is not a "suspect class," so that the prohibition would be scrutinized only under the "rational basis" test).

a. Discriminatory effect/similarly situated

One of the questions on which I required supplemental briefing was, what degree of similarity between defendants with a qualifying prior conviction is necessary to establish that they are "similarly situated" for purposes of an equal protection/selective prosecution claim based on application of *§ 851* sentencing enhancements? In *United States v. Smith, 231 F.3d 800 (11th Cir. 2000)*, cited by Ingram, the Eleventh Circuit Court of Appeals noted, "Neither this Court nor the Supreme Court has definitively explained what constitutes a [*1085] 'similarly situated' individual in th[e] context [of selective prosecution]." *Smith, 231 F.3d at 810*. One of the frustrations that prompted me to ask the parties for supplemental briefing of this specific question is that the Supreme Court and the Eighth Circuit Court of Appeals still have not had the opportunity to provide [**14] such an explanation. For example, the formulation of the

standard as "similarly situated 'in all relevant respects,'" *see* Gilani, 843 F.3d at 348 (quoting Flowers v. City of Minneapolis, 558 F.3d at 794, 798 (9th Cir. 2009)), does not clarify at all what those "relevant respects" might be.

In *Smith*, the Eleventh Circuit Court of Appeals suggested the following answer:

> [T]he definition is informed by the Supreme Court's recognition of legitimate factors that may motivate a prosecutor's decision to bring a case against a particular defendant. Those factors include "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." Armstrong, 517 U.S. at 465, 116 S.Ct. at 1486.
>
> In light of those legitimate factors, we define a "similarly situated" person for selective prosecution purposes as one [1] who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant—so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and [2] against whom the evidence was as strong or stronger than that against [**15] the defendant.

Smith, 231 F.3d at 810 (numbers added).

I note that the Fourth Circuit Court of Appeals has identified similar factors. That court fleshed out a list of factors that would demonstrate that defendants are similarly situated because "their circumstances present non distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." United States v. Venable, 666 F.3d 893, 900-901 (4th Cir. 2012) (citing United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996)). The court explained,

> Of particular significance here, the district court cannot only consider the other persons' "relative culpability," but must "take into account several factors that play important and legitimate roles in prosecutorial decisions." [Olvis, 97 F.3d at 744]. Examples of such factors include: (1) a prosecutor's decision to offer immunity to an equally culpable defendant because that defendant may choose to cooperate and expose more criminal activity; (2) the strength of the evidence against a particular defendant; (3) the defendant's role in the crime; (4) whether the defendant is being prosecuted by state authorities; (5) the defendant's candor and willingness to plead guilty; (6) the amount of resources required to convict a defendant; (7) the extent of prosecutorial resources; (8) the potential [**16] impact of a prosecution on related investigations and prosecutions; and (9) prosecutorial priorities for addressing specific types of illegal conduct. *Id.*

Venable, 666 F.3d at 901. The court cautioned, however, that analysis of the factors should not be conducted "in a mechanistic fashion." *Id.* Thus, I conclude that not every factor identified by the Fourth Circuit Court of Appeals is necessarily relevant to every kind of equal protection/selective prosecution claim.

[*1086] I find that some of these factors are also consistent with explanations of "similarly-situated persons," for purposes of other kinds of equal protection claims, by the Eighth Circuit Court of Appeals and the Supreme Court. The Supreme Court and the Eighth Circuit Court of Appeals have explained that, for purposes of an equal protection claim based on Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), "[t]he characteristics of similarly situated jurors need not match perfectly with the

excluded jurors, for 'potential jurors are not products of a set of cookie cutters.'" *United States v. Young, 753 F.3d 757, 780 (8th Cir. 2014)* (quoting *Miller-El v. Dretke, 545 U.S. 231, 247 n.6, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005))*. Neither are criminal defendants subject to *§ 851* enhancements "products of a set of cookie cutters." Yet, the claimant and the comparators must both be subject to a *§ 851* enhancement, or any comparison would be meaningless.

Going [**17] further, the Eighth Circuit Court of Appeals has repeatedly identified "similarly situated" persons as those engaged in "similar misconduct." *See, e.g., Johnson v. Ready Mixed Concrete Co., 424 F.3d 806, 811 (8th Cir. 2005)*. Other aspects of the "similar misconduct" requirement include that the comparator was subject to the "same standards" and engaged in "the same conduct without any mitigating or distinguishing circumstances." *See, e.g., Fatemi v. White, 775 F.3d 1022, 1042 (8th Cir. 2015)* (equal protection employment discrimination case); *Burton v. Martin, 737 F.3d 1219, 1231 (8th Cir. 2013)* (equal protection employment discrimination case describing the required similarity as "comparable seriousness" of the misconduct, but expressly permitting consideration of comparators with more serious misconduct). As to differences in mitigating circumstances, in the case of criminal defendants, the Eighth Circuit Court of Appeals has explained that a defendant who pleaded guilty and cooperated with the government is not similarly situated to a defendant who did not. *See, e.g., United States v. Bowie, 618 F.3d 802, 819 (8th Cir. 2010)*. These factors are consistent with the statement by the Eleventh Circuit Court of Appeals that a similarly-situated person is "one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant." [**18] *Smith, 231 F.3d at 810*.

In this case, in my view, this "similar misconduct" requirement is of considerable importance. In cases involving equal protection claims based on charging of substantive offenses, this factor might well require closer similarity than the same general kind of offense, such as drug trafficking, and instead require that the offenses be charged under the same statute, such as drug conspiracy crimes pursuant to *21 U.S.C. § 846*, and likely similar or close base offense levels of the same controlled substance. Where, as here, the charging decision at issue does not involve a substantive offense, but a penalty enhancement, however, I believe that a "relevant respect," *see Gilani, 843 F.3d at 348*, is the potential penalty. Thus, here, a similarly-situated person would be someone charged with a drug-trafficking crime that subjected the comparator to the same mandatory minimum sentence pursuant to *21 U.S.C. § 841*, in the absence of a *§ 851* enhancement, that Ingram faced. *Cf. Smith, 231 F.3d at 810*. I think another relevant component of the "similar misconduct" requirement is a similar criminal history, including, for example, whether a defendant was prosecuted in state or federal court, because recidivism, deterrence, and enforcement priorities are plainly relevant factors [**19] in the determination of charging decisions, as the Eleventh and Fourth [*1087] Circuit Courts of Appeals recognized. *See Venable, 666 F.3d at 901*; *Smith, 231 F.3d at 810*. Indeed, the penalty enhancement under *§ 851* is directed at recidivism, because it is triggered by prior drug felonies.

I also conclude that, in the context of a *§ 851* enhancement, this "comparable seriousness" factor extends to the underlying drug offense on which the enhancement is predicated. To me, this is the most important factor. I often see state court aggravated misdemeanors that are very old used as the predicate prior drug felonies for *§ 851* enhancements. Often, the offender received probation for that predicate offense and never served even a few days of county jail time. If one defendant has an old state court misdemeanor conviction where he never served a day in jail, but another defendant had a prior federal drug conspiracy conviction with a lengthy prison sentence, this difference would be exceptionally important in

determining whether or not they were "similarly situated." In other words, these are "legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to [different defendants]." *Venable, 666 F.3d at 900-901*. Thus, in the context of a *§ 851* enhancement, [**20] the nature and punishment of the predicate offense are crucial factors in the "similarly situated" analysis.

I believe that other "relevant respects" in this case are whether the comparators are alike in the disposition of their criminal cases, *e.g.*, by plea or trial, and whether the comparators cooperated, because these are relevant "mitigation" factors in punishment, as well. *See Fatemi, 775 F.3d at 1042* (noting the relevance of "mitigation"); *Bowie, 618 F.3d at 819* (noting that defendants who pleaded guilty and cooperated are not similarly situated to defendants who did not).

In short, while I do not find it necessary to attempt a comprehensive list of pertinent factors, nor do I find it necessary to determine that certain factors are irrelevant, it seems to me that the following factors are the *minimum* points of similarity that must be shown to establish that a comparator is similarly situated to Ingram for purposes of a *§ 851* enhancement: (1) The comparator must have been potentially subject to a *§ 851* enhancement; (2) the comparator's predicate offense must have been similar in nature, seriousness, recentness or remoteness in time, and punishment; (3) the comparator's federal drug-trafficking crime must have carried the same mandatory [**21] minimum sentence pursuant to *§ 841*, in the absence of a *§ 851* enhancement; and (4) the comparator must have gone to trial on the federal charge.

The comparators that Ingram has identified as "similarly situated" in his Proffer Of Evidence satisfy the first and third of the minimum points of similarity identified above, but none satisfy the fourth, and it is, at best, uncertain whether they satisfy the second. As the starting point for the necessary comparisons, Ingram went to trial on and was convicted by a jury of a charge of conspiracy to distribute and to possess with intent to distribute 50 grams or more of crack cocaine. His prior conviction for purposes of a *§ 851* enhancement, as identified in the Superseding Indictment and the Notice Of Intent To Seek Enhanced Penalties Pursuant To *21 U.S.C. § 851*, was for manufacture/delivery of a controlled substance, on or about October 24, 2001, in Cook County Circuit Court, Illinois. Ingram's Presentence Investigation Report shows that he received 18 months of probation on this prior conviction.

Dewight Brewer, Ingram's first purportedly similarly-situated comparator, was [*1088] convicted in 2011 in the Eastern District of Michigan of distribution of at least one kilogram of [**22] heroin and five kilograms of cocaine, on a guilty plea in exchange for the prosecution's recommendation of a sentence of 188 months and agreement not to file a *§ 851* enhancement. Ingram Proffer Of Evidence, Ex. 8, p.3, and Ex. 9, pp. 2-4. Thus, unlike Ingram, Brewer was convicted pursuant to a plea agreement, so he is distinguishable, not similarly situated. This is so, even though his prior convictions include one that might be considered more serious than Ingram's, because Brewer had a 2001 conviction for conspiracy to distribute crack and heroine, for which his prison term ended in 2008, a few years prior to his 2011 federal offense, Ingram Proffer Of Evidence, Ex. 9, pp. 2-3, where Ingram's prior conviction was several years earlier and incurred only probation.

Otis Booth, offered as another comparator, was convicted in 2014 in the Western District of Tennessee of trafficking between five and fifteen kilograms of cocaine, while he was on supervised release for another offense, but the prosecution agreed not to file the *§ 851* enhancement as part of his plea agreement. Ingram Proffer Of Evidence, Ex. 2, p. 2. Thus, Booth also pleaded guilty, where Ingram went to trial. Furthermore, Ingram's [**23] Proffer Of Evidence provides no indication of the nature, date, or

punishment of Booth's predicate offense for § 851 purposes, so the extent of similarity on that point cannot be determined.

Stevon Ray Alexander pleaded guilty in 2009 in the Western District of Louisiana to possession with intent to distribute more than 50 grams of crack cocaine, and the prosecution filed no § 851 enhancement. Ingram Proffer Of Evidence, Ex. 1, p.2. Thus, also unlike Ingram, Alexander's federal charge was resolved by a plea, rather than a trial. Alexander's plea agreement gives no indication of the nature, recentness, or punishment of his predicate offense. *Id.* His brief on appeal indicates two prior convictions for "drug possession" in 2001, and a third conviction for "drug possession" in March 2008, just prior to his conviction on his federal offense, but does not indicate the punishment of any of his prior convictions. Thus, Alexander appears to be distinguishable on the second minimum point of similarity, as well as the fourth.

In short, while the statistical comparison of various districts set out in *United States v. Young, 960 F. Supp. 2d 881 (N.D. Iowa 2013)*, shows substantial disparities in the application of § 851 enhancements among federal districts, those statistics [**24] do not demonstrate the required different treatment of persons *similarly situated in relevant respects* to establish the "discriminatory effect" element of an equal protection/selective prosecution claim. Ingram has failed to identify any persons similarly situated in the *minmum* ways required for his equal protection/similarly situated challenge to his § 851 enhancement. Ingram's equal protection/selective prosecution claim fails on the "similarly situated" element.

b. Lack of a rational basis

Even assuming that Ingram could marshal evidence of persons in other districts who were sufficiently similarly situated, but were not subjected to § 851 enhancements, to establish a discriminatory effect, he would still have to prove the lack of a rational basis for that different treatment. *Stevenson, 800 F.3d at 972*; *accord Hassan, 804 F.3d at 298-99*; *Hughes, 632 F.3d at 960*; *Gary, 311 F.3d at 1337*.

Ingram seems to suggest that evidence of dissimilar treatment of similarly-situated persons in different geographical locations also suffices to make the required [*1089] showing of lack of a rational basis. Even if that were true, Ingram has failed to make the required showing of dissimilar treatment of similarly-situated persons in different geographical locations from which he contends lack of a rational basis [**25] could be inferred.

Ingram's principal difficulty with showing lack of a rational basis is that, while there is a "clear pattern" of disparate application of § 851 enhancements in various districts, even though § 851 appears neutral on its face as to geographic locations, that disparity may be rationally related to legitimate government interests. As the respondent repeatedly asserts, the difference is readily explainable on the basis of, and rationally related to, the factors that prosecutors are allowed to consider in exercising their prosecutorial discretion about what charges (and enhancements) to bring. *Wayte, 470 U.S. at 607* (reiterating that USAOs retain "broad discretion" as to whom to prosecute and what charges to bring). As the respondent argues, different federal districts have different needs, resources, personnel, and priorities, and they are entitled to pursue policies that reasonably address those differences. There is no doubt that the USAO for the Northern District of Iowa could produce a rational basis for imposing the § 851 enhancement on Ingram, because he has a prior drug conviction, and imposing such an enhancement serves the legitimate

governmental purpose of punishing recidivism, which is clearly [**26] a policy of the USAO in this district, as the statistics discussed in *Young* quite clearly show.

Thus, Ingram also has not proffered any evidentiary basis on which he can demonstrate lack of a rational basis in support of his equal protection/selective prosecution claim, and that claim is denied as a matter of law.

D. Certificate Of Appealability

Denial of all of Ingram's claims for *§ 2255* relief, including those abandoned in briefing, raises the question of whether or not he is entitled to a certificate of appealability on those claims. In order to obtain a certificate of appealability on those claims, Ingram must make a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*; *Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000)*; *Mills v. Norris, 187 F.3d 881, 882 n.1 (8th Cir. 1999)*; *Carter v. Hopkins, 151 F.3d 872, 873-74 (8th Cir. 1998)*; *Ramsey v. Bowersox, 149 F.3d 749 (8th Cir. 1998)*; *Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997)*. "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox, 133 F.3d at 569*. Moreover, the United States Supreme Court reiterated in *Miller—El v. Cockrell* that, "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy *§ 2253(c)* is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment [**27] of the constitutional claims debatable or wrong.'" *537 U.S. at 338* (quoting *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*).

I conclude that Ingram has failed to make a substantial showing that denial of his *Eighth Amendment* claim is debatable among reasonable jurists, that a court could resolve any of the issues raised in that claim differently, or that any question raised in that claim deserves further proceedings. Consequently, a certificate of appealability is denied as to Ingram's *Eighth Amendment* claim. *See 28 U.S.C. § 2253(c)(1)(B)*; *Miller-El, 537 U.S. at [*1090] 335-36*; *Cox, 133 F.3d at 569*. On the other hand, because Ingram's equal protection/selective prosecution claim involves several unsettled questions of law and my resolution of those issues and attendant factual issues could be debatable among reasonable jurists, and other courts could resolve some or all of those issues differently, or conclude that the claim deserves further proceedings, I will grant a certificate of appealability as to Ingram's equal protection/selective prosecution claim. *Id.*

III. CONCLUSION

Upon the foregoing,

1. Petitioner Michael Ingram's March 17, 2017, Motion To Expand The Record Pursuant To *Rule 7 Of The Rules Governing Section 2254 Cases* (docket no. 25) and his March 18, 2017, Amended Motion To Expand The Record (docket no. 28), to which the respondent has consented, are **granted**;

2. Petitioner Michael [**28] Ingram's August 27, 2014, *Pro* Se Motion Pursuant To *28 U.S.C. § 2255* To Vacate, Set Aside, Or Correct Sentence (docket no. 1), as amended, with the aid of counsel, by his March

17, 2016, Amended Motion Pursuant To *28 U.S.C. § 2255* To Vacate, Set Aside, Or Correct Sentence (docket no. 10), is **denied in its entirety**;

3. No certificate of appealability will issue as to Ingram's *Eighth Amendment* claim or any contention in that claim;

4. A certificate of appealability shall issue as to Ingram's equal protection/selective prosecution claim and the contentions in that claim.

IT IS SO ORDERED.

DATED this 31st day of October, 2017.

/s/ Mark W. Bennett

MARK W. BENNETT

U.S. DISTRICT COURT JUDGE

NORTHERN DISTRICT OF IOWA

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Sentencing

- In fiscal year 2010, 43.7 percent of heroin offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing.

- In fiscal year 2010, the rate at which heroin offenders convicted of an offense carrying a mandatory minimum penalty were subject to the mandatory minimum penalty at sentencing varied by race, gender and citizenship.

    - Black offenders were subject to the mandatory minimum penalty at sentencing most often, in 66.8 percent of their offenses carrying such a penalty, followed by White (37.4%) and Hispanic (36.8%) offenders. Other Race offenders were subject to the mandatory minimum penalty at sentencing the least often, in 15.4 percent of their cases.

    - Male offenders were subject to the mandatory minimum penalty at sentencing more often than female offenders (44.8% of their cases, compared to 35.6% of cases involving female offenders).

    - United States citizens were subject to the mandatory minimum penalty at sentencing more often than non-citizen offenders (57.0% of their cases, compared to 24.1% of cases involving non-citizen offenders).

- The average sentence for heroin offenders who remained subject to a mandatory minimum penalty at the time of sentencing (*i.e.*, who did not receive any form of statutory relief) was 119 months. The average sentence for heroin offenders who obtained from a mandatory minimum penalty was 51 months.

Prison Impact

- At the end of fiscal year 2010, 3.0 percent of the offenders in the custody of the Bureau of Prisons were heroin offenders.

I. SECTION 851 ANALYSIS

1. *Introduction*

As discussed earlier in this chapter, the penalty structure for drug statutes increases an applicable mandatory minimum penalty when a drug offender is convicted of a second or subsequent felony drug offense.[691] For example, 21 U.S.C. § 841 criminalizes possession of

[691] The term "felony drug offense" is defined in 21 U.S.C. § 802(44) as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances."

controlled substances with the intent to distribute and sets penalties based upon the quantities of the particular controlled substance involved in the offense. Section 841(b)(1)(A) sets a ten-year mandatory minimum penalty for specified quantities of enumerated controlled substances and increases that mandatory minimum penalty to 20 years of imprisonment if "any person commits such a violation after a prior conviction for a felony drug offense has become final."[692] Section 841(b)(1)(A) increases the mandatory minimum penalty to life imprisonment for any person who commits such a violation "after two or more prior convictions for a felony drug offense have become final."[693] Section 841(b)(1)(B) involves lesser quantities of the controlled substances covered by subsection (b)(1)(A) and doubles the mandatory minimum from five to 10 years of imprisonment. [694]

These increased penalties are not, however, automatically triggered upon conviction. Rather, prosecutors must take affirmative steps prior to the offender's conviction for these higher penalties to apply. The mechanism by which prosecutors can seek enhanced penalties for drug offenders who have prior convictions for felony drug offenses is set forth in 21 U.S.C. § 851 (Proceedings to establish prior convictions). Section 851 provides, in pertinent part, that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." Once the information is filed, section 851 sets forth additional procedural requirements that must be met before the court can impose the enhanced penalty upon the offender.[695]

2. *Methodology*

The Commission's study of drug offenses and mandatory minimum penalties demonstrates a lack of uniformity in application of the enhanced mandatory minimum penalties. To better assess the application of these penalties, the Commission conducted a more targeted analysis of the nation-wide application of 21 U.S.C. § 851 by conducting a specialized coding and analysis project. Assessing whether an offender qualifies for an enhancement under section 851 requires analysis of two factors: 1) the instant offense of conviction under title 21, United

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[692] *See* 21 U.S.C. § 841(b)(1)(A).

[693] *See id.*

[694] As noted earlier in this chapter, section 846, which criminalizes attempts and conspiracies, adopts the penalty structure for the underlying offense. These three statutes, as noted in Table 4-1, were the three most frequently charged in 2010.

[695] *See generally* 21 U.S.C. § 851 (b)-(d). The offender can challenge the prior conviction, which requires a hearing at which the United States Attorney has the burden of proof beyond a reasonable doubt on any issue of fact. *See* 21 U.S.C. § 851(c)(1). The offender can also challenge the constitutionality of the prior conviction, but must set forth the challenge with particularity. For such challenges, the offender bears the burden of proof by a preponderance on any issue of fact raised by this response. *See* 21 U.S.C. § 851(c)(2). These challenges must be resolved at a hearing, at which either party may introduce evidence. Either side has the right to appeal the court's determination. *See* 21 U.S.C. § 851(d)(2).

States Code; and 2) prior qualifying drug convictions. Information about both factors can be determined objectively from the sentencing documents submitted to the Commission. Thus, evaluating whether section 851 enhancements are uniformly applied lends itself to quantitative analysis.

The Commission used sample groups from three fiscal years (2006,[696] 2008, and 2009[697]) for the analysis. In all, 3,050 cases from fiscal year 2006, 5,434 cases from fiscal year 2008, and 5,451 cases from fiscal year 2009 were included in this analysis.

Using these groups of cases, the Commission examined all the documents submitted for each case to ascertain whether the enhancement could have applied based on the offender's prior criminal history. To make this determination, the Commission examined each offender's criminal history for any prior conviction involving the distribution, manufacture, sale, possession with the intent to distribute, intent to manufacture, trafficking or importation or exportation of any controlled substances.[698] The Commission also noted whether any such offenses were specifically identified as a felony and if so, included those cases in the analysis. For any drug offense not specifically identified as a felony, the Commission examined the sentence for the drug conviction to determine whether it exceeded 12 months.[699] If so, the case was included in the analysis. Juvenile drug convictions were excluded from the analysis.

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[696] The fiscal year 2006 sample was randomly selected from the Commission's fiscal year 2006 datafile and comprises cases that were sentenced after June 6, 2006. The Commission selected offenders in cases where the enhancement was documented as part of the conviction or in cases sentenced under USSG §§2D1.1 or 2D1.2 and where the offender's previous criminal history included a drug offense.

[697] The fiscal year 2008 and 2009 samples were randomly selected from cases with complete guideline application information sentenced in the third and fourth quarters of those fiscal years. From this sample group, the Commission selected cases with the enhancement documented as a statute of conviction, or with offenders with previous criminal history and sentenced under USSG §§2D1.1 or 2D1.2.

[698] Although some federal circuit courts have held that juvenile felony drug convictions qualify for enhancement under section 841(b), the Commission excluded juvenile predicate convictions from the analysis of offenses eligible for enhancement because presentence reports sometimes fail to specify whether a defendant was certified as an adult notwithstanding the fact he or she was under the age of majority under state law. Moreover, although some federal courts have broadly interpreted section 802(44) to include convictions for offenses "related to" drugs, such as use of a telephone to facilitate drug trafficking, the Commission only included felony convictions for drug distribution, manufacture, possession, and similar drug offenses.

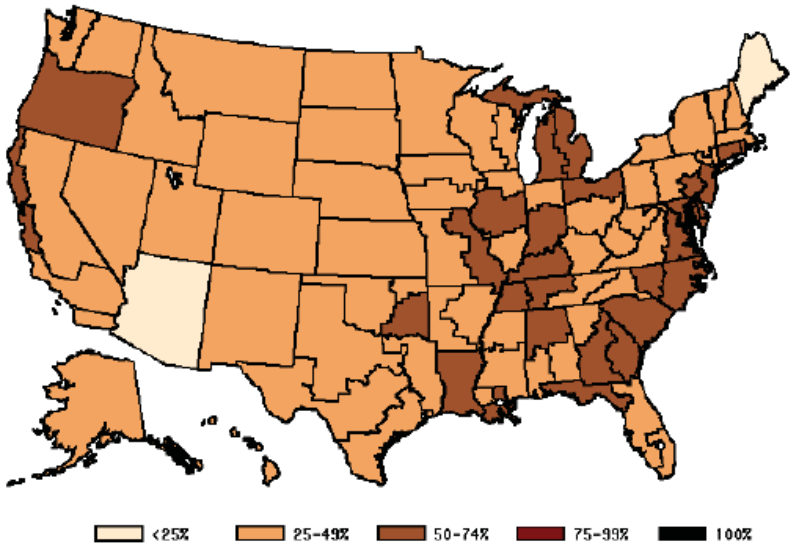
[699] An important limitation on the Commission's coding project concerning enhancements for prior convictions for felony drug offenses under section 841(b) should be noted. Under 18 U.S.C. § 802(44), a "felony drug offense" includes simple possession of a controlled substance that is punishable in excess of one year in prison even if such an offense is not labeled as a "felony" offense under the relevant state law. Such predicate convictions for simple possession thus can include cases in which an offender was sentenced to a year or less in prison or sentenced to probation. In reviewing the criminal history sections of presentence reports in order to determine whether an offender was eligible for enhancement under section 851 based on a prior conviction for simple possession of a controlled substance, the Commission often could not ascertain whether prior convictions receiving sentences of one year or less (including probationary sentences) were "punishable" in excess of one year in prison under state law. For that reason, the Commission only included convictions for simple possession that received prison sentences of more than one year in order to ensure that such convictions were in fact felonies. This approach likely was under-inclusive insofar as it did not include certain prior convictions that were eligible for enhancement under section 851.

Once the Commission concluded than an offender qualified for the enhancement, the Commission examined the documentation to ascertain whether the court had made any findings of fact relating to the enhancement. The Commission also attempted to determine whether the government had affirmatively agreed not to file the enhancement as part of plea negotiations.

3. *Geographic Variations*

From the sample, the Commission identified, district by district, the percentage of drug offenders who, based on their offense conduct and criminal history, appeared to be eligible for enhancement under 21 U.S.C. § 851 in fiscal years 2006, 2008, and 2009. *See* Figure 8-49. In the majority of the districts, at least one-quarter of all drug offenders were eligible for enhancement under section 851. Specifically, in 62 of 94 judicial districts (66.0%), the rates of drug offenders eligible for enhancement under section 851 were between 25 and 49 percent. In addition, in 29 districts (30.8%), the rates of eligible drug offenders were between 50 and 74 percent. There were only three districts (3.2%) in which less than 25 percent of drug offenders were eligible for enhancement.

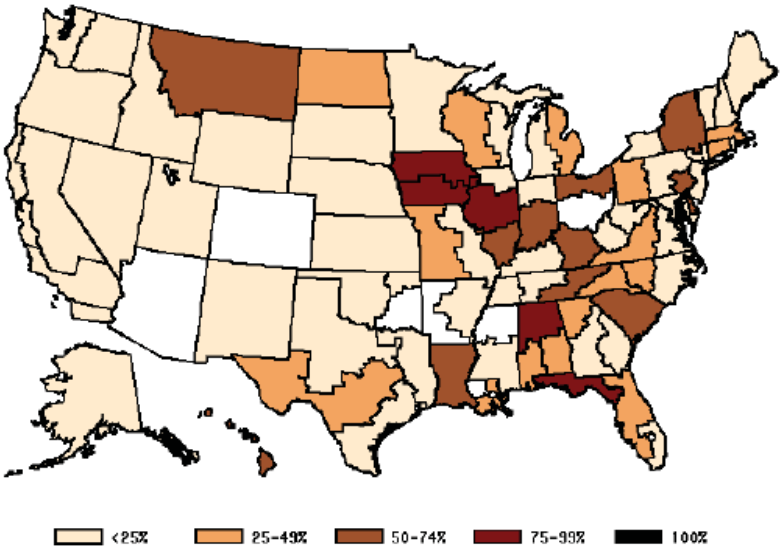
Figure 8-49
Drug Offender Eligibility for 21 U.S.C. § 851 Penalty Enhancement
by District
Fiscal Year 2006, 2008 and 2009 Sample Groups



SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

The Commission's analysis revealed significant variation in the manner in which the enhancement provision was applied. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty as an enhancement. In contrast, in eight districts, none of the eligible drug offenders received the enhanced penalty. *See* Figure 8-50.

Figure 8-50
Application of 21 U.S.C. § 851 Penalty Enhancement for Eligible Drug Offenders
By District
Fiscal Year 2006, 2008 and 2009 Sample Groups



SOURCE: U.S. Sentencing Commission, 2006, 2008 and 2009 "851" Datafile.

4. *Demographic Characteristics of Offenders Eligible for Section 851 Enhancement*

The Commission also examined demographic data about the offenders eligible for the enhancement. Within each racial demographic group there were offenders who were eligible for the enhancement but did not receive it. *See* Figure 8-51. Black offenders qualified for the enhancement at higher rates than any other racial group. More than half (58.0%) of Black offenders were eligible for the enhancement, but only 17.3 percent received it. More than one-third (36.5%) of White offenders were eligible for the enhancement while 9.1 percent received it. Hispanic offenders were eligible in 30.5 percent of their cases, but 6.0 percent received the enhancement. Finally, 24.1 percent of Other Race offenders were eligible for the enhancement, while 6.0 percent received it.

United States v. Young

United States District Court for the Northern District of Iowa, Western Division

August 16, 2013, Decided

No. CR 12-4107-MWB

Reporter
960 F. Supp. 2d 881 *; 2013 U.S. Dist. LEXIS 116042 **; 2013 WL 4399232

UNITED STATES OF AMERICA, Plaintiff, vs. DOUGLAS YOUNG, Defendant.

Prior History: *United States v. Grant, 2013 U.S. Dist. LEXIS 68096 (N.D. Iowa, May 13, 2013)*

Counsel: [**1] For US Probation, Interested Party: uspNotify, LEAD ATTORNEY.

For Douglas Young, also known as Big Doug, Defendant: Michael L Smart, LEAD ATTORNEY, Federal Public Defender's Office, Sioux City, IA.

For USA, Plaintiff: Shawn Stephen Wehde, LEAD ATTORNEY, US Attorney's Office, Sioux City, IA.

Judges: MARK W. BENNETT, U.S. DISTRICT COURT JUDGE.

Opinion by: MARK W. BENNETT

Opinion

[*881] **SENTENCING OPINION AND STATEMENT OF REASONS PURSUANT TO *18 U.S.C. § 3553(c)* DISCUSSING THE DRAMATIC NATIONAL DISPARITY IN THE DEPARTMENT OF JUSTICE'S APPLICATION OF *21 U.S.C. § 851* ENHANCEMENTS**

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This [**2] case presents a deeply disturbing, yet often replayed, shocking, dirty little secret of federal sentencing: the stunningly arbitrary application by the Department of Justice (DOJ) of *§ 851* drug sentencing enhancements.[1] These enhancements, at a minimum, double a drug defendant's mandatory minimum sentence and may also raise the maximum possible sentence, for example, from forty years to life.[2] They are possible any time a drug defendant, facing a mandatory minimum sentence in federal court, has a prior qualifying drug conviction in state or federal court (even some state court misdemeanor convictions count), no matter how old that conviction is.

Recent statistics obtained from the U.S. Sentencing Commission (Commission)—the only known data that exists on the eligibility and applications of the DOJ's *§ 851* decision making—reveal jaw-dropping, shocking disparity. For example, a defendant in the Northern District of Iowa (N.D. of Iowa) who is eligible for a *§ 851* enhancement is 2,532% more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska. [*883] Equally problematic is that, at least prior to August 12, 2013, decisions to apply or waive *§ 851* enhancements were made in the absence of any national policy, and they are still solely within the unreviewed discretion of the DOJ without any requirement that the basis for the decisions be disclosed or stated on the record. This is true even for non-violent, low-level [**4] drug addicts. These decisions are shrouded in such complete secrecy that they make the proceedings of the

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[1] *21 U.S.C. § 851 (2012)*. On August 12, 2013, while I was completing the drafting of this ruling, Attorney General Holder disseminated his Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (August 12, 2013) (Holder 2013 Memo), which belatedly established a national policy on *§ 851* enhancements. I am cautiously encouraged to see the changes, which could lead to much less arbitrary, less racially [**3] discriminatory, and fairer and more just application of the *§ 851* enhancements. These benefits could come to pass, however, only if this new policy—and from experience the "if" needs to be strongly emphasized—is actually uniformly implemented and followed in the 94 districts, admittedly a daunting task for an Attorney General and the Criminal Division.

[2] *21 U.S.C. § 841(b)(1)(B)(viii) (2012)*.

former English Court of Star Chamber appear to be a model of criminal justice transparency. *See In re Oliver, 333 U.S. 257, 266-271, 68 S. Ct. 499, 92 L. Ed. 682 (1948)* ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by . . . the English Court of Star Chamber."). Attorney General Holder's August 12, 2013, Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Holder 2013 Memo), while establishing a national policy for § 841 enhancements, does nothing to pull aside the cloak of secrecy shrouding the nationwide disparities in the application of *§ 851* enhancements.

I. INTRODUCTION – DEFENDANT DOUGLAS YOUNG

Defendant Douglas Young, whose situation brings the issue of the *§ 851* enhancement before me now, pleaded guilty to conspiracy to distribute 28 grams or more of cocaine base following a prior conviction for a felony drug offense (count 1) and possession with intent to distribute 28 [**5] grams or more of cocaine base (count 2) in violation of *21 U.S.C. §§ 846*, *841(b)(1)(B)*, and *851*. His preliminary Presentence Investigation Report revealed, *inter alia*, that he is a 37-year-old African-American male with a Total Offense Level of 29, and 3 criminal history points, putting him in Criminal History Category II. Mr. Young's advisory U.S. Guideline range was 93 to 121 months. His entire criminal history scoring consisted of one offense—a conviction in Cook County, Illinois, in 1996, at age 20, for the manufacture/delivery of a controlled substance—cocaine base. He received probation, which he successfully completed without notation of any probation violations. His mandatory minimum sentence of 60 months is doubled to 120 months as a result of a *§ 851* enhancement for this 17-year-old conviction, and his maximum sentence of 40 years is increased to life, as well. However, after objections were filed by defense counsel, Mr. Young argued that his one prior conviction should receive no criminal history points, and the AUSA, the U.S. probation officer, and I agreed. Thus, Mr. Young is in Criminal History Category I and is now safety-valve eligible.

Both pre-[3] and post-[4] Fair Sentencing [**6] Act,[5] I have used a 1:1 crack-to-powder ratio, rather than the historical 100:1 ratio prior to the FSA and the current 18:1 ratio post-FSA. If I use this 1:1 ratio, Mr. Young would have a base offense level of 26, minus 3 levels for acceptance of responsibility, for a Total Offense level of 23. Combined with his Criminal History Category II, this results in an advisory Guideline range of 51 to 63 months. However, in the final PSR, Mr. Young dropped to a Criminal History Category I, and is now safety-valve eligible with a Guideline range [*884] of 70 to 87 months, which lowers to 37 to 46 months using the 1:1 ratio. Because Mr. Young is safety-valve eligible, he no longer has the 5-year mandatory minimum, and the *§ 851* enhancement no longer doubles that mandatory minimum, but it still raises his maximum statutory sentence to life

Nevertheless, in a somewhat bizarre "O. Henry" ending, the AUSA did make a substantial assistance motion, but also made a Motion For Upward Departure For Under-Representation Of Criminal History (docket [**7] no. 88), because Mr. Young's Criminal History Category is I, despite his previous

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[3] *United States v. Gully, 619 F. Supp. 2d 633 (N.D. Iowa 2009)*.

[4] *United States v. Williams, 788 F. Supp. 2d 847 (N.D. Iowa 2011)*.

[5] ***Pub. L. No. 111-220, 124 Stat. 2372***.

conviction for a felony drug-trafficking offense in 1996. I say "bizarre," because a strong argument can be made that Mr. Young is in the class of 74% of defendants nationally who are eligible for a *§ 851* enhancement, yet have it waived. It seems that a defendant, like Mr. Young, who pleads guilty, signs a cooperation plea agreement, actually cooperates to the degree to earn a prosecution recommendation for a substantial assistance reduction (which, in this district, is a very high bar), and who has a 17-year-old predicate state court drug conviction, where he received probation and successfully completed it, so that he received no criminal history points, is likely the kind of defendant who should receive a waiver of his *§ 851* enhancement. I denied the AUSA's Motion For Upward Departure. Thus, owing to the convoluted workings of Mr. Young's criminal history scoring, making him safety-valve eligible, and my rejection of the AUSA's attempt to reimpose sentencing consequences for Mr. Young's prior conviction, the harsh effect of a *§ 851* enhancement here was minimized for Mr. Young—but that is a very rare [**8] occurrence in this district.

Addressing the individual 3553(a) factors, I find that the 1:1 ratio issue is the only mitigating factor, which is why I am not varying any lower than the revised 1:1 ratio range of 37 to 46 months. Mr. Young asserted that the following aspects of his history and characteristics warranted a lower sentence:

- He was born in Chicago and had an unstable childhood;
- His mother was a drug addict, who was eventually murdered in 2008;
- His father was often absent from the family home as he traveled in the United States Army;
- At one point in his childhood, the State of Illinois Department of Children and Family Services conducted a home study and found that his mother was neglectful of him and his sister. Although no removal proceedings were conducted, he and his sister eventually moved in with their maternal grandmother;
- He has a history of marijuana use and completed a drug treatment program while on supervised release; and
- He was compliant while on pretrial release and, while he should not get kudos for doing what he is supposed to be doing, his being compliant on pretrial release indicates that he is amenable to supervision.

Defendant's Brief In Support Of [**9] Motion For Downward Variance (docket no. 87-1), 3-4. I have balanced against these mitigating factors the following aggravating factors:

- The length of the charged drug conspiracy and the frequency of purchases for distribution;
- The lack of any reportable Social Security Administration (SSA) income for years 2008 through 2012 and very minimal reportable income for years 2003 to 2007;

[*885] • His claims of self-employment income from cutting hair of $500 per month from 2010 to the present, with no record of SSA earnings for those years; and

- His child-support obligation of $200 per month, but in arrears by over $10,000

Balancing all relevant factors, Mr. Young's August 12, 2013, Motion For Downward Variance (docket no. 87) is granted only to the extent that I have applied a 1:1 ratio. Ultimately, after evaluating the U.S.S.G. § 5K1.1 factors, I did reduce Mr. Young's sentence, based solely on application of a 1:1 ratio and Mr. Young's substantial assistance, to 24 months of incarceration followed by 4 years of supervised release on each count, to run concurrently, with certain other conditions as stated on the record.

II. THE OVERVIEW

A. How The § 851 Enhancement Works

I turn now to the *§ 851* [**10] enhancement issue in this and other cases. Pursuant to the penalty provisions set forth in *21 U.S.C. § 841(b)(1)*, enhanced penalties, including increased mandatory minimum and maximum terms of imprisonment, apply if the defendant has a prior conviction for a "felony drug offense." "Felony drug offense" is defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." *21 U.S.C. § 802(44)*. This sweeping definition includes many state drug convictions that the various states define under state law as misdemeanors. Unlike criminal history scoring under the Federal Sentencing Guidelines, no conviction is too old to be used as an enhancement. These enhancements are usually referred to as "*§ 851* enhancements" because *21 U.S.C. § 851* establishes and prescribes certain notice and other procedural requirements that trigger them.[6]

In my experience, many *§ 851* enhancements involve only relatively minor state drug offenses classified as some variation of a misdemeanor under state law. Many predicate prior offenses are also decades old, where the defendant never served so much as one day in jail, and often paid only a small fine.

The highest penalties in federal drug cases are for convictions under *21 U.S.C. § 841(b)(1)(A)*. This subsection applies when the offense of conviction involves specifically identified drugs coupled with specific quantities of those drugs. A first-time drug offender convicted under *§ 841(b)(1)(A)* faces a statutory mandatory minimum [**12] sentencing range of ten years and a maximum sentence of life. With a prior "felony drug conviction," the mandatory minimum doubles to twenty years. With two prior "felony drug convictions," a mandatory life sentence must be given. *21 U.S.C. § 841(b)(1)(A)*. On the other hand, *§ 841(b)(1)(B)* applies to offenses involving lower quantities of drugs. A five-year [*886] mandatory minimum applies with no "prior felony drug" convictions, while a prior "felony drug" conviction, doubles the mandatory minimum to ten years.[7]

B. A Brief History Of Recidivist Enhancements And § 851

The modern history of experimentation with enhancements for prior drug convictions can be traced back to the 1964 amendments to the Narcotic Drug Import and Export Act of 1958.[8] This statutory scheme

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[6] The procedural requirements include notice by way of information prior to trial or plea filed by the U.S. Attorney "stating in writing the previous [**11] convictions to be relied upon." *21 U.S.C. § 851(a)(1)*. *Section 851(b)* provides the defendant and the defense attorney an opportunity to affirm or deny the predicate convictions. If the defendant denies the prior convictions or claims they are invalid, the court shall hold a hearing and at the request of either party "shall enter finding[s] of fact and conclusions of law." *21 U.S.C. § 851(c)(1)*. Also, a person alleging the prior conviction was obtained in violation of the U.S. Constitution is required to set forth the basis with "particularity." *21 U.S.C. § 851(c)(2)*.

[7] As used in this opinion, the phrase "at least doubles" the sentence or similar phrases refers to the above description of how *§ 851* enhancements works. Unfortunately, the Commission's data does not reveal when more than one *§ 851* enhancement was actually applied to the same defendant.

[8] Title 21 U.S.C. § 174 (1964), provided, as follows:

automatically required the mandatory minimum sentence to be doubled when the offender had a qualifying prior drug conviction. Title II of the Comprehensive [**13] Drug Abuse Prevention and Control Act of 1970, better known as the Controlled Substances Act (CSA), repealed and replaced the Narcotic Drug Import and Export Act. Pub. L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1970), codified at *21 U.S.C. §§ 801-904*. The CSA afforded judges and prosecutors some leeway for the application of the prior drug conviction enhancement. The CSA also replaced mandatory minimum sentences with maximum sentences for what has become *21 U.S.C. § 841*.

The House Committee, in reporting on the House bill, explained the reasons for revising the penalty structure:

> The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many [**15] instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible [*887] can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.

H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News, pp. 4566, 4576.

In *United States v. Noland, 495 F.2d 529 (5th Cir. 1974)*, the first appellate case to be decided under the enhancement section of the 1970 CSA, the court understood this flexibility to be used in situations where neither the prosecutor, nor the court thought the enhancement desirable or necessary. *Id. at 532*. The court in *Noland* determined that it was up to the U.S. Attorney to seek enhancement if the sentence was to be doubled. [**16] Judge Sidney Thomas noted, in discussing *Noland*, that "the statutory scheme was completely everted: rather than requiring courts to impose mandatory minimums regardless of prosecutorial desire, courts were prohibited from enhancing sentences unless the government had timely filed an information stating that it intended to seek an enhanced sentence based on specific prior convictions." *United States v. Severino, 268 F.3d 850, 863 (9th Cir. 2001)*. So, the Congressional motivation for the injection of prosecutorial discretion for the sentencing enhancement was to overcome

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> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under [**14] *section 7237(c) of the Internal Revenue Code of 1954*), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Title *26 U.S.C. § 7237(c)(1) (1964)*, provided, as follows:

> (c) Conviction of second or subsequent offense. -
>
> (1) Prior offenses counted. - For purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C. sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section. . . .

the temptation for prosecutors *not* to charge offenders in situations where the court was likely to impose an unduly harsh sentence because of a qualifying prior drug offense. This is the opposite of the application of *§ 851* enhancements as currently applied in the N.D. of Iowa, where it is applied in four out of five eligible cases.

C. Lack Of A National DOJ § 851 Policy

Until earlier this week, the DOJ did not appear to have a national policy[9] for the 94 districts as to when or why to seek a *§ 851* enhancement and, in the N.D. of Iowa, there was no discernible local policy or even a whiff of an identifiable pattern. I [**17] have never been able to discern a pattern or policy of when or why a defendant receives a *§ 851* enhancement in my nearly 20 years as a U.S. district court judge who has sentenced over 3,500 defendants, mostly on drug charges. I asked one of our district's most respected supervisors of probation officers to inquire among all of this district's probation officers who write pre-sentence reports if any could discern a pattern. I received the following response: "I had a chance to talk with each of the writers and the consensus is that there really is no rhyme or reason to when [*888] the *§ 851* [enhancement] is filed and when it is not." I have also repeatedly asked defense counsel, on the record, if they are able to discern a pattern as to when their clients, who are eligible for a *§ 851* enhancement, receive it and when it is waived. Not a single defense lawyer has ever been able to articulate a pattern—other than the criminal defense lawyers from Omaha, Nebraska, who routinely indicate that, had the case been in the District of Nebraska, the *§ 851* notice would have been waived. These on-the-record statements by the Omaha criminal defense lawyers are validated by the data from the Commission. [**18] These data establish that, for the three-year sampling period, an eligible defendant in the N.D. of Iowa had a whopping 2,532% greater likelihood of receiving a *§ 851* enhancement than the same defendant in the District of Nebraska. *See* App. C, Figure 2C.

In eight of the Nation's ninety-four federal districts, *§ 851* enhancements have been waived in every case, regardless of whether the defendant pleads, goes to trial, or cooperates, with or without receiving a substantial assistance motion. In many other districts, the *§ 851* enhancements were used as a plea hammer to induce a defendant to plead—then withdrawn when the defendant did plead. In the N.D. of Iowa, already this year, I have sentenced numerous defendants with *§ 851* enhancements, regardless of whether they pled, or pled and cooperated, and did or did not receive a substantial assistance motion. Indeed, in one case, the *§ 851* notice was not waived where a defendant pled, cooperated, was given a *U.S.S.G. § 5K1.1* [**20] motion, but not an *18 U.S.C. § 3553(e)* motion, so that the defendant received the full brunt of the doubling of her mandatory minimum sentence, even though she was the least culpable defendant in a small methamphetamine conspiracy. She received the second longest sentence of any of her

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[9] The "Ashcroft Memo," dated Sept. 22, 2003, does mention briefly a superficial "policy" on *§ 851* enhancements in that they should be sought in "all appropriate cases," but they could be waived "only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity." John Ashcroft, Attorney General, Memo Regarding Policy On Charging Of Criminal Defendants (U.S. Department of Justice, Sept. 22, 2003) (Ashcroft Memo), available at *www.justice.gov/opa/pr/2003/September/03_ag_516.htm* (last visited Aug. 13, 2013); *see* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, *43 U.C. Davis L. Rev. 1135, 1164, (2010)* [hereinafter *Rethinking Recidivist Enhancements*]. The Ashcroft Memo was superseded by the "Holder 2010 Memo" on Department Policy on Charging and Sentencing, dated May [**19] 19, 2010, which makes no specific reference to *§ 851* enhancements. Eric J. Holder Jr., Attorney General, Memorandum to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010) (Holder 2010 Memo), available at *www.justice.gov/oip/holder-memo-charging-sentencing.pdf* (last visited Aug. 13, 2013). It was not until the Holder 2013 Memo, dated August 12, 2013, replaced the Holder 2010 Memo that the DOJ established a national policy for *§ 851* enhancements.

co-defendants. *United States v. Newhouse, 919 F. Supp. 2d 955, 2013 WL 346432, *26, *30 (N.D. Iowa 2013)*.

At long last, on August 12, 2013, Attorney General Holder issued his 2013 Memo establishing a national policy on charging mandatory minimum sentences and recidivist enhancements in drug cases. In pertinent part, the Holder 2013 Memo addressed *§ 851* enhancements, as follows:

> **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 [**21] 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 [*889] guidance provided by my May 19, 2010 memorandum, and the policy outlined in this memorandum.

Holder 2013 Memo at 3.

D. The Wheel of Misfortune

The lack of any national or local policy, at least until August 12, 2013, rendered application of *§ 851* enhancements both whimsical and arbitrary—something akin to the spin of a "Wheel of Misfortune"—where similarly-situated defendants in the same district, before the same sentencing judge, sometimes received a doubling of their mandatory minimum sentences and sometimes did not.[10] The same was true for similarly-situated defendants in the same district, [**22] before different judges, and similarly-situated defendants spanning the ninety-four districts. Also, the opposite problem of unwarranted uniformity existed, where, owing to the absence of a national policy, the most objectively deserving defendants were never subject to an enhancement in the eight districts that never apply *§ 851* enhancements. Given the arbitrary nature of *§ 851* enhancements, there were no assurances that the most objectively deserving defendants, nationwide, were actually the defendants receiving enhancements. Likewise, there were no assurances that the least deserving defendants, nationwide, were the ones that actually received a waiver.

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[10] The role of Pat Sajak, from the classic television game show "Wheel of Fortune," is played, in this instance, by the DOJ Assistant Attorney General for the Criminal Division, and the wheel is spun not by contestants, but by the more than 4,500 Assistant U.S. Attorneys nationwide.

The purpose of the Sentencing Reform Act of 1984 (SRA) was to

> [P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility [**23] to permit individualized sentences, where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." *28 U. S. C. § 991(b)(1)*, Congress further specified four "purposes" of sentencing that the Commission must pursue in carrying out its mandate: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed . . . correctional treatment." *18 U. S. C. § 3553(a)(2)*.

Mistretta v. United States, 488 U.S. 361, 374, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). The lack of a national, regional, intra-state, or local policy on *§ 851* enhancements rendered that stated purpose as illusory as David Copperfield's Vanishing Statue of Liberty.[11]

If humans continue to be involved in federal sentencing, there will always be some disparity. There was before the passage of the SRA, and there has been in each phase of the unfolding [**24] saga of federal Guideline sentencing.[12] The current most [*890] popular gripe is that post *Booker* and *Gall*, federal judges create too much sentencing disparity in applying the *18 U.S.C. § 3553(a)* factors.[13] Indeed, there is

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[11] Kenneth R. Clark, *Magic on TV: Miss Liberty Vanishes Before Your Eyes*, PHIL. DAILY NEWS, Apr. 7, 1983, at 45.

[12] The Commission often refers to four time periods under the Guidelines:

> [T]he *Koon* period (June 13, 1996 through April 30, 2003), the PROTECT Act period (May 1, 2003 through June 24, 2004), the *Booker* period (January 12, 2005 through December 10, 2007), and the *Gall* period (December 11, 2007 through September 30, 2011). The Commission selected these periods based on Supreme Court decisions and legislation that influenced federal sentencing in fundamental ways. Specifically, in *United States v. Koon*, the Supreme Court defined the level of deference due to district courts' decisions to sentence outside the guideline range and determined that such decisions should be reviewed for abuse of discretion. In passing the PROTECT Act nearly seven years later, Congress restricted district courts' discretion to impose sentences outside the guideline range, and required that courts of appeals review such decisions de novo, [**26] or without any deference to the district court's decision. In Booker, the Supreme Court struck down two statutory provisions in the SRA that made the guidelines mandatory, and also defined the standard of review for sentences on appeal. In *Gall v. United States*, the Court further defined the appellate standard of review.

United States Sentencing Commission, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, Pt. A, pp.2-3 (Dec. 2012) (2012 *BOOKER* REPORT) (footnotes omitted).

[13] In a letter from the DOJ to the Commission, the DOJ voices concern for sentencing disparity, at least when created by others: "[T]hey involve the continuing erosion of the guidelines and increasing unwarranted disparities in sentencing within courthouses and across the country." The DOJ grudgingly recognized that sentencing disparities are driven by more than just judicial decision making, and they have often "written and spoken extensively about [their] concerns with reduced certainty and increased unwarranted disparities in sentencing." Jonathan J. Wroblewski, Director, Office of Policy and Legislation U.S. Department of Justice, *Letter from the DOJ to The Honorable Patti B. Saris, Chair*, at p.8 (July 11, 2013).

In [**27] the 2012 *BOOKER* REPORT, the Commission notes,

> The Commission's review of sentencing decisions suggests that judges view similar circumstances and weigh the *section 3553(a)* factors differently, in particular individual offender characteristics, much as they did during the years leading up to the SRA. In the wake of these changes, the Commission has observed both increasing inconsistencies in sentencing practices . . . and widening demographic differences in sentencing.

2012 *BOOKER* REPORT, 113.

some disparity because no two federal district court judges, over numerous cases, are likely to apply the Guidelines and the *§ 3553(a)* factors in precisely the same way. Nevertheless, there is no unwarranted disparity because judges are applying congressionally-mandated factors and their decisions are subject to appellate review. Where there is now a national policy by the DOJ, with defined factors for the 94 U.S. Attorneys and the thousands of Assistant U.S. Attorneys to apply, I can accept that different federal prosecutors, like different federal judges, could, in the utmost good faith, apply the same factors differently and reach different results—that's what happens when individuals exercise judgment. What should be totally unacceptable and shocking to federal judges of all stripes, the DOJ, Congress, and the American public were the effects of a total lack of a national policy prior to August 12, 2013. What we had until then was a standardless Wheel of Misfortune [**25] regime.[14] The Commission's data and my experience illustrated the dangers of such a regime: Individual prosecutor's wholly-insulated *§ 851* charging decisions resulted in both unwarranted sentencing disparity and unwarranted sentencing uniformity—the worst case scenario imaginable.

[*891] ***E. Other Problems With The Arbitrary Workings Of § 851 Enhancements***

Wholly apart from these critical considerations of arbitrary application and lack of transparency by the DOJ, the serious [**28] and pervasive structural deficiencies in *§ 851* enhancements that existed prior to August 12, 2013, often led to bizarre and incomprehensibly unfair results.[15] For example, take two low-level drug addict co-defendants who, prior to August 12, 2013, pled guilty to and were sentenced for the same conspiracy to manufacture a small amount (as little as five grams) of homemade methamphetamine, made from cough medication purchased at a local drug store. One was non-violent; the other had a long history of violence. They were both fifty years old and lived next to each other, and both worked the night shift at a local manufacturing plant. Bob had a thirty-year-old prior aggravated misdemeanor conviction in Iowa for possession of a small amount of marijuana. In 1993, he paid a $100 fine, was given probation, never served a day in jail, and successfully completed his short term of probation. He had no other prior convictions. His co-defendant, John, had one prior armed robbery conviction in 2000, served an eight-year prison sentence, and violated his parole on several occasions before he was discharged in 2011. John also had four assault convictions before his armed robbery conviction. John [**29] would likely have received a mandatory minimum five-year sentence, but because Bob's prior misdemeanor drug conviction is a

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[14] I had personally complained in writing to the highest levels of the DOJ about these concerns and was blown off with a perfunctory, brief letter, many months later, that read like a form letter in response to a consumer complaining that the sauce was too sour in a frozen entrée purchased at the local grocery store. It appeared to me that the DOJ had zero concerns about even examining this serious problem. The Holder 2013 Memo has restored my faith in the DOJ's recognition of and interest in resolving this problem.

[15] Scholars have criticized the effectiveness of recidivist enhancements like the *§ 851* enhancement. Professor Russell notes,

> Empirical studies cast serious doubt on whether the rationales of sentencing—deterrence, incapacitation, retribution, and rehabilitation—support the magnitude of these federal enhancements. These studies suggest that longer prison terms do not significantly reduce recidivism and may even be counterproductive. Indeed, some studies suggest that alternatives to incarceration, such as drug treatment for repeat drug offenders, [**30] can be more effective than long prison terms at reducing recidivism and promoting public safety. . . . Perhaps most significantly, there is clear evidence that enhancements based on prior drug convictions exacerbate racial disparities in the criminal justice system.

Rethinking Recidivist Enhancements, supra, n.9, at 1139 (footnotes omitted). I have no position, and take no position, on these questions because these policy considerations about the general wisdom of recidivist enhancements like *§ 851* reside exclusively in the other two branches of government.

predicate to a § 851 enhancement, and John's prior robbery and assault convictions are not, Bob would likely have received, at a minimum, the mandatory minimum sentence of ten years in a district where § 851 enhancements were routine. This was justice?[16] [*892] Indeed, a major drug trafficker in federal court would not receive a recidivist enhancement with a prior state court murder conviction, but a low-level drug addict would receive such an enhancement with a prior qualifying state court misdemeanor drug conviction. This was justice?

I am optimistic that fair application of the Holder 2013 Memo will rectify this problem going forward.

III. ANALYSIS OF THE COMMISSION'S § 851 DATA

A. Overview Of The Underlying Data On § 851 Enhancements

The grim state of affairs for § 851 enhancements prior to the national policy established by the Holder 2013 Memo is starkly revealed by an examination of the Commission's § 851 data on the one occasion that it collected such information. Every year, pursuant to its statutory mandate, the Commission publishes national [**32] data collected from federal sentencings spanning all ninety-four districts.[17] In 2011, the Commission conducted the first and only, additional targeted coding and analysis project on nationwide application of 21 U.S.C. § 851 recidivist enhancements as part of the REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Commission's 2011 REPORT). Ninety-three of the ninety-four districts reported data, and the Commission described in detail its methodology for its targeted § 851 study.[18] The Commission's 2011 REPORT itself

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[16] In the parlance of Guideline calculations, both Bob and John would have had a base offense level of 26, based on the 5 grams of pure methamphetamine. They would each have received a 3-point reduction for acceptance of responsibility, have had no other guideline enhancements, and have had a total offense level of 23. Bob's prior state conviction would have been too old to count toward his criminal history, so Bob would have been a Criminal History I. His advisory Guideline range would have been 46 to 57 months, but his mandatory minimum, doubled from 60 months by a § 851 enhancement, would have been 120 months, 74 months above the [**31] low end of his Guideline range, because his prior state court aggravated misdemeanor drug conviction is treated as a felony for purposes of the § 851 enhancement. On the other hand, John would have been in Criminal History Category II, based on his armed robbery conviction, which scores 3 points, and no points for his 4 prior assault convictions, because they are more than 10 years old. None of John's prior 5 convictions count under § 851, so John would have received no enhancement. His final offense level would have been the same as Bob's and his advisory Guideline range would have been 51 to 63 months, but his mandatory minimum sentence would have been only 60 months.

[17] 28 U.S.C. § 995(a)(13)-(16) (2012).

[18] The Sentencing Commission explains the methodology of the study, as follows:

> To better assess the application of these penalties, the Commission conducted a more targeted analysis of the nation-wide application of 21 U.S.C. § 851 by conducting a specialized coding and analysis project. Assessing whether an offender qualifies for an enhancement under § 851 requires analysis of two factors: 1) the instant [**33] offense of conviction under title 21, United States Code; and 2) prior qualifying drug convictions. Information about both factors can be determined objectively from the sentencing documents submitted to the Commission. Thus, evaluating whether § 851 enhancements are uniformly applied lends itself to quantitative analysis.
>
> The Commission used sample groups from three fiscal years (2006, 2008, and 2009) for the analysis. In all, 3,050 cases from fiscal year 2006, 5,434 cases from fiscal year 2008, and 5,451 cases from fiscal year 2009 were included in this analysis.
>
> Using these groups of cases, the Commission examined all the documents submitted for each case to ascertain whether the enhancement could have applied based on the offender's prior criminal history. To make this determination, the Commission examined each offender's criminal history for any prior conviction involving the distribution, manufacture, sale, possession with the intent to distribute,

notes, "[This] study of drug offenses and mandatory minimum penalties demonstrates a lack of uniformity in application of the enhanced mandatory minimum penalties." Commission's 2011 REPORT at 253.

[*893] Because the Commission's 2011 REPORT does not contain the raw data used for the *§ 851* analysis, I requested it directly from the Commission, and the Commission quickly responded by sending me the "851 datafile," which is contained in Appendix F. I then re-analyzed and reformatted the raw data in several significant ways that go far beyond the Commission's analysis. These data are presented in a variety of charts and graphs included in the text and appendices of this opinion.[19] All of the statistics used in the [**35] empirical analysis sections of this opinion (B-E) and in the appendices are drawn exclusively from the Commission's "851 datafile."[20] Sections B and C compare the application of *§ 851* enhancements in the N.D. of Iowa to national statistics and the Eighth Circuit respectively. Section D examines disparity that can be found within circuits, and Section E shows a lack of uniformity even in [*894] multi-district states. All statistics in the text of the opinion are rounded to whole numbers, and figures in the footnotes and appendices are calculated to two decimal places.

B. Northern District Of Iowa - § 851 Application Disparity

The N.D. of Iowa ranks fourth in the nation in its use of *§ 851* enhancements (79% of eligible defendants received a *§ 851* enhancement), trailing only the S.D. of Iowa (84%), N.D. of Florida (87%), and Guam (100%, but only three eligible defendants). App. A. Prosecutors in the N.D. of Iowa applied this enhancement at a rate more than six times the national median application rate (13%) and more than three times the national average application rate (26%).[21] Compared to the national median application, eligible

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> intent to manufacture, trafficking or importation or exportation of any controlled substances. The Commission also noted whether any such offenses were specifically identified as a felony and if so, included those cases in the analysis. [**34] For any drug offense not specifically identified as a felony, the Commission examined the sentence for the drug conviction to determine whether it exceeded 12 months. If so, the case was included in the analysis. Juvenile drug convictions were excluded from the analysis.
>
> Once the Commission concluded than an offender qualified for the enhancement, the Commission examined the documentation to ascertain whether the court had made any findings of fact relating to the enhancement. The Commission also attempted to determine whether the government had affirmatively agreed not to file the enhancement as part of plea negotiations.

Commission's 2011 REPORT at 253 – 255 (footnotes omitted).

[19] *See* App. A for districts ranked by the rate at which *§ 851* enhancements are applied to eligible offenders; App. B for the disparity in intra-state application; App. C for a comparison of districts in the Eighth Circuit; App. D for intra-circuit disparity and averages; and App. E for all information on districts listed alphabetically.

[20] Notes on the Commission's data are as follows:

> The fiscal year 2006 sample was randomly selected from the Commission's fiscal year 2006 datafile and comprises cases that were sentenced after June 6, 2006. The Commission selected offenders in cases where the enhancement was documented as part of [**36] the conviction or in cases sentenced under *USSG §§ 2D1.1* or *2D1.2* and where the offenders previous criminal history included a drug offense.
>
> Mandatory Minimum Penalties in the fiscal year 2008 and 2009 samples were randomly selected from cases with complete guideline application information sentenced in the third and fourth quarters of those fiscal years. From this sample group, the Commission selected cases with the enhancement documented as a states of conviction, or with offenders with previous criminal history and sentenced under *U.S.S.G. §§ 2D1.1* or *2D.1.2*.
>
> Although some federal circuit courts have held that juvenile felony drug convictions qualify for enhancement under *section 841(b)*, the Commission excluded juvenile predicate convictions from the analysis of offenses eligible for enhancement because presentence reports

offenders in the N.D. of Iowa are 626%[22] more likely to be subject to a § 851 enhancement and, compared to the national application average, eligible offenders are 311% more likely to receive a § 851 enhancement. The mode, or most common application rate, nationally, [**39] was 0%. Apps. A, E. The application rate for the N.D. of Iowa in the national context is shown, just below, in Figure 2E.

N.D. of Iowa Compared to National § 851 Enhancement Statistics

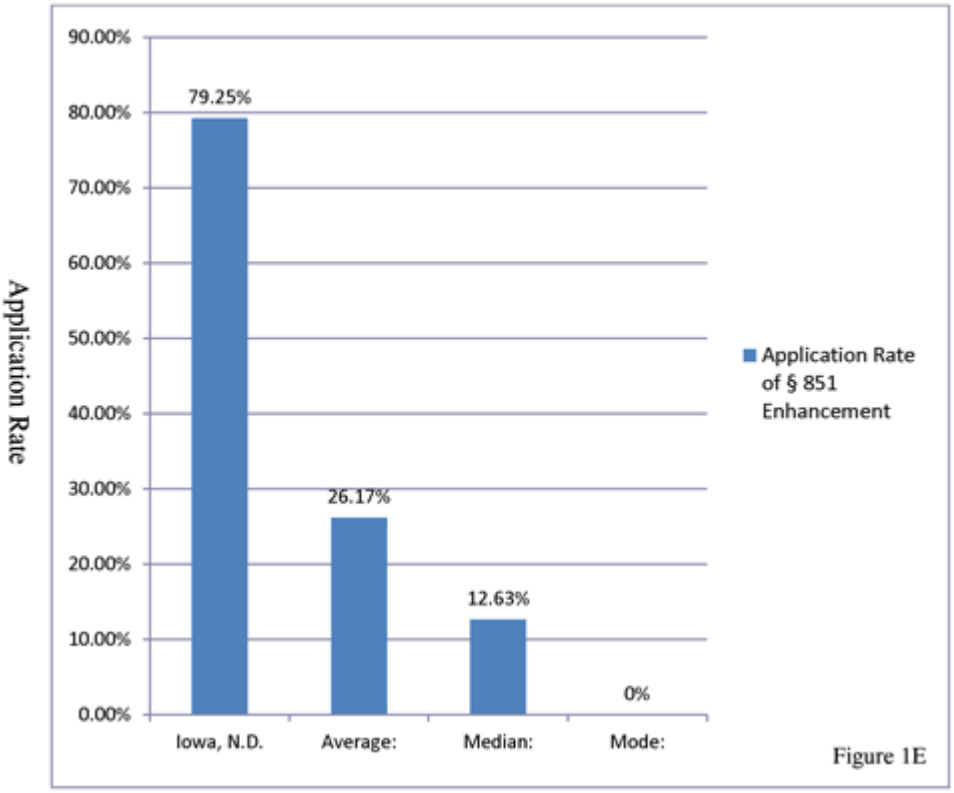

Figure 1E

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sometimes fail to specify whether a defendant was certified as an adult notwithstanding the fact that he or she was under the age of majority under state law. Moreover, although some federal courts have broadly interpreted section 802(44) to include convictions for offenses "related to" drugs, such as use of a telephone to facilitate drug trafficking, the Commission [**37] only included felony convictions for drug distribution manufacture, possession, and similar drug offenses.

An important limitation on the Commission's coding project concerning enhancements for prior convictions for felony drug offenses under § 841(b) should be noted. Under 21 U.S.C. § 802(44), a "felony drug offense" includes simple possession of a controlled substance that is punishable in excess of one year in prison even if such an offense is not labeled as a "felony" offense under other relevant state law. Such predicate convictions for simple possession thus can include cases in which an offender was sentenced to a year or less in prison or sentenced to probation. In reviewing the criminal history sections of presentence reports in order to determine whether an offender was eligible for enhancement under § 851 based on a prior conviction for simple possession of a controlled substance, the Commission often could not ascertain whether prior conditions receiving sentences of one year or less (including probationary sentences) were "punishable" in excess of one year in prison under state law. For that reason, the Commission only included convictions for simple possession that received [**38] prison sentences for more than one year in order to ensure that such convictions were in fact felonies. This approach likely was under-inclusive insofar as it did not include certain prior convictions that were eligible for enhancement under § 851.

Commission's 2011 REPORT at 254 nn.696-699. Data was unavailable for the district of the Northern Mariana Islands.

[21] App. E (national median of application rate is 12.63%).

[22] N.D. of Iowa's 79.25% application rate divided by the national average application rate of 26.17%. App. E.

Of the ninety-three reporting districts, sixty have an application rate of 25% or less. [*895] This data is presented in Figure 2A, just below. *See* App. A.

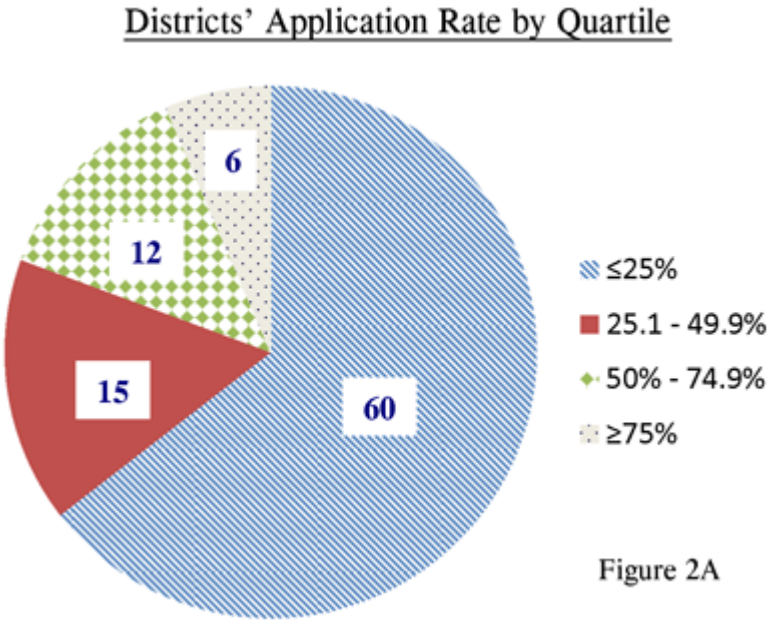

Figure 2A

Only seven districts applied the enhancement in over two-thirds of eligible cases. *Id.* Nationally, eight districts (Arizona, W.D. of Arkansas, Colorado, Louisiana, N.D. of Mississippi, S.D. of Ohio, E.D. of Oklahoma, and the Virgin Islands) never enhanced a single eligible defendant.[23] The N.D. of Iowa's 79% rate is greater than all of the following twenty-nine districts COMBINED: Maryland, N.D. West Virginia, E.D. Texas, N.D. California, New Jersey, E.D. Arkansas, S.D. West Virginia, S.D. Mississippi, South Dakota, New Mexico, W.D. Missouri, Nebraska, M.D. Pennsylvania, W.D. Washington, Oregon, M.D. Georgia, W.D. Tennessee, Puerto Rico, S.D. California, N.D. Texas, Arizona, W.D. Arkansas, Colorado, M.D. Louisiana, N.D. Mississippi, S.D. Ohio, E.D. Oklahoma, [**40] and the Virgin Islands. App. A. Eligible offenders in the N.D. of Iowa face a 271% increased likelihood of receiving a *§ 851* enhancement compared to the average application rate in the Eighth Circuit. The Eighth Circuit disparity is discussed in the next sub-section.[24]

C. The Eighth Circuit – § 851 Application Disparity

The average application rate of *§ 851* enhancements for districts in the Eighth Circuit is 28%. App. D. The application rates in the Eighth Circuit range from 84% in the S.D. of Iowa, to 0% in the W.D. of Arkansas. *Id.* Of the ten districts in the Eighth Circuit, Iowa's two districts are responsible for enhancing the sentences of 63% of the eligible offenders. Table 1C, below, shows the total number of defendants sentenced for [**41] drug offenses in each district, the number and percentage of those defendants who were eligible for a § 841 enhancement, the number and percentage of eligible defendants who actually

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[23] App. E. (84 eligible defendants in Arizona, 18 in W.D. of Arkansas, 26 in Colorado, 15 in Louisiana, 17 in N.D. of Mississippi, 62 in S.D. of Ohio, 6 in E.D. of Oklahoma, and 4 in the Virgin Islands were not charged with *§ 851* enhancements in the Commission's sample analysis).

[24] App. D. (N.D. of Iowa had a 79.25% application rate divided by the national average application rate of 26.17% and the Eighth Circuit average application rate of 28.27%).

received a § 841 enhancement, the number [*896] of eligible defendants for whom a § 851 enhancement was waived, and the intra-state discrepancy in application of § 851 enhancements among districts. Figure 1C, also below, then shows, in a bar graph for easy comparison, the number of defendants in each district who were eligible for but *did not* receive § 851 enhancements compared to those who were both eligible for and *did* receive § 851 enhancements.

District	Total	Eligible / Total	Eligible	Enhanced / Eligible	Enhanced Enhanced	Eligible - discrepancy	Intra-state
Iowa, S	149	73	48.99%	61	83.56%	12	4.32%
Iowa, N	107	53	49.53%	42	79.25%	11	
Missouri, E	286	147	51.40%	15	10.20%	132	35.37%
Missouri, W	191	79	41.36%	36	45.57%	43	
Minnesota	211	80	37.91%	6	7.50%	74	
Nebraska	219	64	29.22%	2	3.13%	62	
Arkansas, E	86	40	46.51%	2	5.00%	38	5.00%
Arkansas, W	43	18	41.86%	0	0.00%	18	
N. Dakota	57	27	47.37%	12	44.44%	15	
S. Dakota	75	25	33.33%	1	4.00%	24	

§ 851 Enhancement Application or Waiver in the Eighth Circuit's Districts

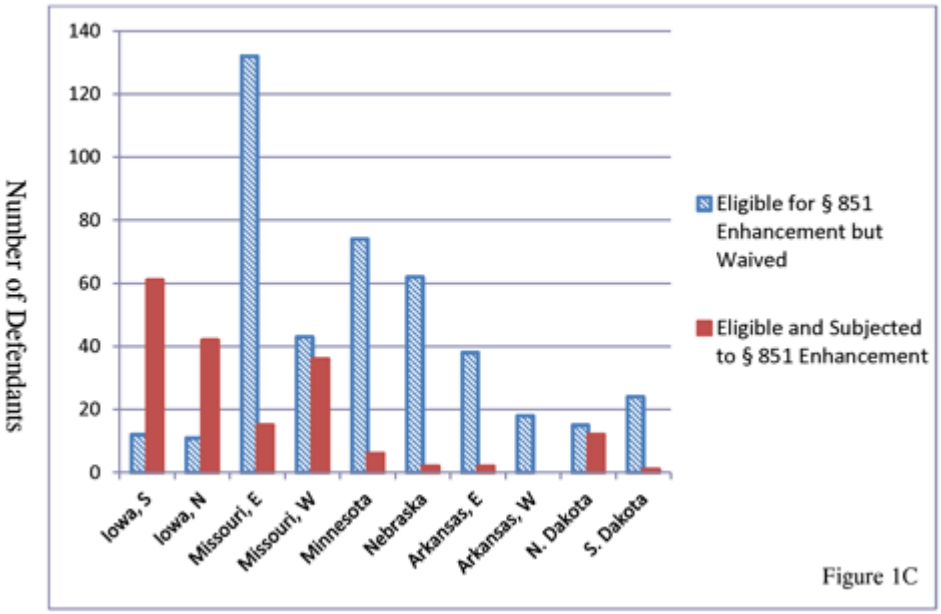


Figure 1C

Prosecutors in the N.D. of Iowa applied this enhancement at a higher rate than all other districts in the Eighth Circuit except the S.D. of Iowa. Iowa's two federal [**42] district applied the § 851 enhancement to more defendants than the rest of the districts in the Eighth Circuit combined. App. D. The N.D. of Iowa alone, applied the § 851 enhancement at a rate more than twice the amount of six other districts in the Eighth Circuit combined.[25] Eligible [*897] defendants in the N.D. of Iowa were 1,183% more likely to receive at least a § 851 enhancement than the average of other districts in the Eighth Circuit excluding the S.D. of Iowa. App C.

[25] The six districts are Minnesota, E.D and W. D. of Arkansas, Nebraska, South Dakota, and the W.D. of Missouri.

Although the N.D. and S.D. of Iowa differ in application by only five percentage points, the difference that geography can make in sentencing becomes apparent when the N.D. of Iowa is compared to the three federal districts, other than the S.D. of Iowa, that border the N.D. of Iowa. Apps. C, D. Nebraska is only one mile south of the federal courthouse in Sioux City, Iowa, where I preside, yet defendants are 2,532% more likely to face a *§ 851* enhancement in the N.D. of Iowa than in the D. of Nebraska. Ironically, a very significant percentage of my drug cases, including those where a *§ 851* enhancement is applied, [**43] could have been venued and prosecuted in Nebraska.[26] The South Dakota border is four miles to the west, but federal prosecutors in the D. of South Dakota apply the enhancement at one-twentieth the rate federal prosecutors apply it in the N.D. of Iowa. App. C. Defendants in Minnesota, an hour-and-a-half drive to the north, were less than one-tenth as likely to be subjected to a *§ 851* enhancement as defendants in the N.D. of Iowa. Figure 5C, below, illustrates the rate of application of *§ 851* enhancements in the N.D. of Iowa compared to its neighbors, and Figure 2C, below, shows the percentage of increased likelihood of application of *§ 851* enhancements in the N.D. of Iowa compared to selected Eighth Circuit districts. App. C.

Frequency Of § 851 Enhancement Application In Selected Adjacent Districts

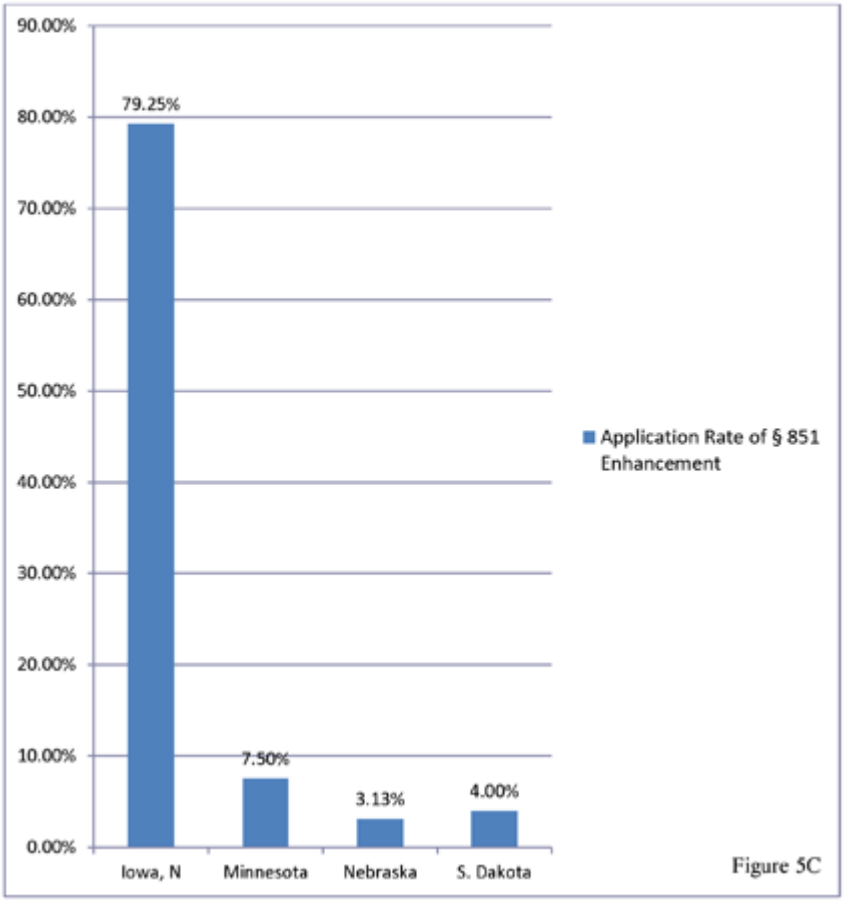
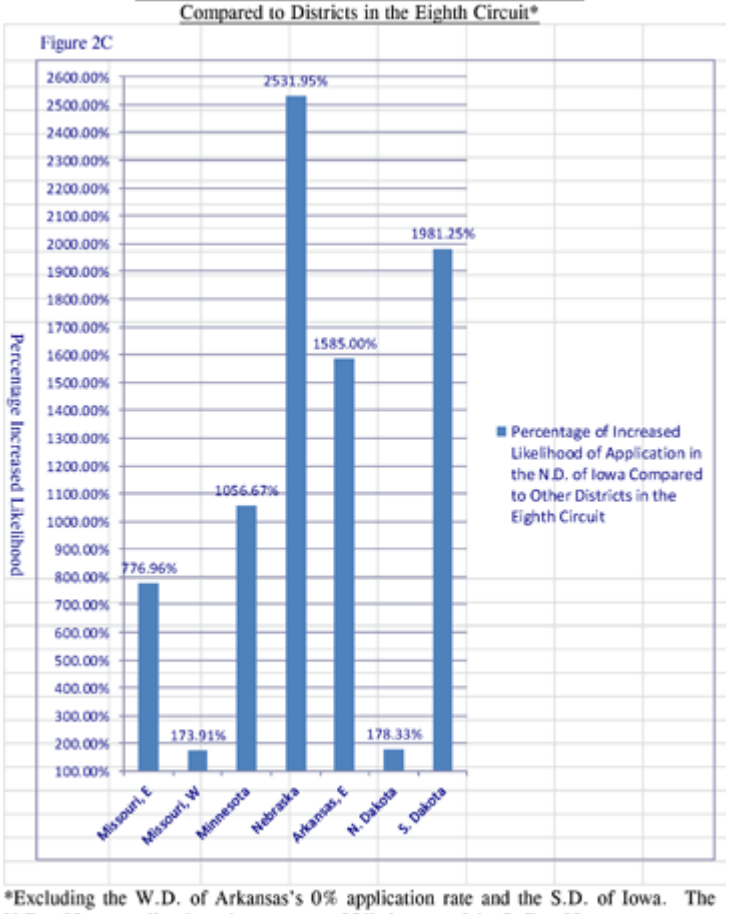


Figure 5C

[*898]

[26] Virtually all of my drug cases are conspiracy cases and most have several overt acts, if not the locus of the conspiracy, in South Sioux City, Nebraska. Because the Tri-State Drug Task Force, made up of law enforcement personnel from Nebraska, South Dakota, and Iowa is located in Sioux City, Iowa, the agents prefer filing the cases here to avoid the 200 mile round-trip to the federal courthouse in Omaha, Nebraska.

Increased Likelihood of Enhancement in the N.D. Iowa Compared to Districts in the Eighth Circuit*



*Excluding the W.D. of Arkansas's 0% application rate and the S.D. of Iowa. The N.D. of Iowa applies the enhancement at 95% the rate of the S. D. of Iowa

[*899]

D. Intra-circuit – § 851 Application Disparity

In [**44] each circuit, I took the district with the highest *§ 851* application rate (strictest) minus the district with the lowest application rate (most lenient) to determine the circuit range. The average intra-circuit range for all circuits is 59 percentage points. App. D. This average indicates that, out of every five defendants to whom an *§ 851* enhancement was applied in the strictest district in that circuit, three of those defendants in the most lenient district in that circuit did not receive the enhancement.[27] Not surprisingly, the average application rate for each circuit is [*900] largely in line with the national average.[28] Notable deviations from this standard, however, can be found in the circuits that sandwich my own: The prosecutors in districts in the Tenth Circuit stingily file the information required for the enhancement in only 9% of eligible cases, but the prosecutors in districts in the Seventh Circuit average application rate of 40% provides a spectrum ending with leniency to the west.

The Eleventh Circuit's districts have an average enhancement application rate of 38%, while the adjacent Fifth Circuit averages only 17%. *Id.* The Eleventh Circuit has the largest intra-circuit disparity of 85%; curiously, two adjacent districts provide this extreme range. Prosecutors in the N.D. of Florida opted to at

[27] This statistic was calculated by averaging the ranges of each of the eleven districts, excluding Guam as an outlier, where the *§ 851* enhancement was applied in all three eligible cases over the [**45] sampled period for the Commission's "851 datafile." App. D.

[28] *Id.* (Eighth Circuit average application is 28.27%) and App. E (national average application is 26.17%).

least double the sentences of 60 of 69 eligible offenders over the sample period, yielding an 87% application rate. Just across the border in the M.D. of Georgia, in contrast, there were 52 eligible offenders, but prosecutors deemed only 1 warranted such a severe enhancement, resulting in just a 2% application rate. This means that offenders charged in the N.D. of Florida are 4,529% more likely to receive at least double the time that a similarly-situated defendant just to the north, in the M.D. of Georgia, would receive.[29] The S.D. of Florida (including Miami) applied this enhancement only 14% of the time, less than one-sixth the rate of the N.D. of Florida. *Id.* The N.D. of Florida applied the *§ 851* enhancement [**46] at a rate equivalent to that of thirty other districts combined. App. A. Defendants in the N.D. of Georgia faced enhanced sentences at a rate almost twenty-five times greater than defendants in the M.D. of Georgia.[30] The Eleventh Circuit's extreme 85% variance in range is not the result of a single outlying district, but more often two districts in the same state will have widely different application rates. Examples are the following: Alabama—with the N.D.'s application rate of 75% compared to the M.D.'s application rate of 44%; Florida—with the N.D.'s application rate of 87% compared to the S.D.'s application rate of 14%; Georgia—with the N.D.'s application rate of 48% compared to the M.D.'s application rate of 2%. *Id.* Figure 1D, below, illustrates the ranges and averages of each circuit. The impact of the figure may be lost, because almost every circuit achieves an almost 50% range in applications between its extreme districts.[31]

[29] *Id.* (N.D. of Florida application rate is 86.96% divided by the M.D. of Georgia's application rate of 1.92%).

[30] *Id.* (M.D. of Georgia has a 1.92% application rate and the N.D. of Georgia has a 47.50% application rate, 24.7 times as high.)

[31] *Id.* [**47] at Figure 1D.

Range and Average of § 851 Enhancement Application to Eligible Offenders by Circuit*

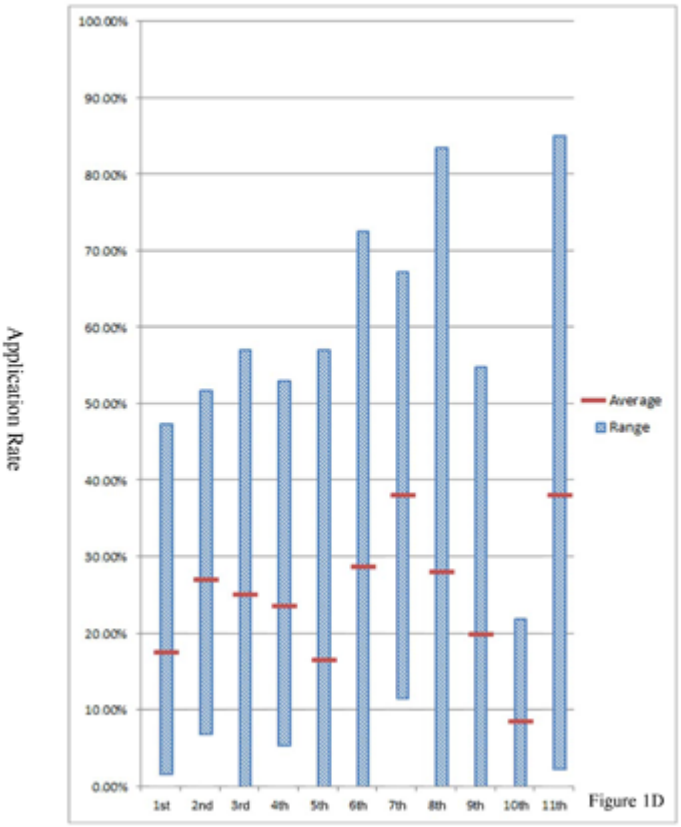


Figure 1D

[*901] *The D.C. Circuit's average application rate is 18%

E. Intra-state And National – § 851 Application Disparity

Five states (Arkansas, Louisiana, Mississippi, Ohio, and Oklahoma) have one district that never enhanced sentences using § 851, but has another district that did apply the enhancement. That is hardly the most striking intra-state disparity, in terms of a particular defendant's likelihood of a § 851 enhancement in one district in a state, as compared to other districts in that state, however, because Arkansas, [*902] Mississippi, and Oklahoma have such low percentages of enhanced defendants versus eligible defendants. More striking is Louisiana's intra-state disparity of 57% and Ohio's intra-state disparity of 58%. The average disparity among these five states is 28%. App. B.

Aside from the five states with a district with no § 851 enhancements, Tennessee offers the largest intra-state disparity in application. In the E.D. of Tennessee, offenders are 3,994% more likely to receive a § 851 enhancement than in the W.D. of Tennessee.[32] Offenders with a qualifying prior drug conviction in the W.D. of Texas were 2,585% more likely to have the Wheel of Misfortune land on a § 851 enhancement than their counterparts in the N.D. of [**48] Texas.[33] Georgia offenders unfortunate enough to be charged in the N.D. faced a 2,470% greater likelihood of a § 851 enhancement than their brothers or

[32] App. D. (E.D. of Tennessee's 72.62% application rate divided by the W.D. of Tennessee's 1.82%).

[33] *Id.* (W.D. of Texas's 38.02% application rate divided by the N.D. of Texas's 1.47%).

sisters in the M.D. and 680% worse odds of a prosecutor not waiving the § 851 enhancement than eligible defendants in the S.D.[34] Apparently, Assistant U.S. Attorneys in the N.D. of Georgia are less persuaded by the state motto: Wisdom, Justice, and Moderation. Flying back to the East Coast, the birthplace and signing place of the Declaration of Independence, Pennsylvanians have not seemed to benefit in equality from their noble heritage. The 2,257% increased opportunity for defendants in the E.D. of Pennsylvania to enjoy at least twice the amount of time in a federal penitentiary, compared to the unfortunately shortchanged offenders in the M.D. of Pennsylvania, where eligible defendants are stingily bequeathed § 851 enhancements only 2.5% of the time, is another prime example of gross disparity.[35]

Nationally, the districts at the extremes of the application rate show incredible disparity. While it may be unfair to compare Guam's 100% application rate to the 0% application rate in the Virgin Islands, because neither district has many eligible defendants,[36] the N.D. of Florida's 87% application rate provides a telling comparison to the 1% rate in the N.D. of Texas. The average application rate for the top ten districts is 76%,[37] but the average for the ten districts with the lowest application rate is less than 1%.[38] The average for the half of all districts with the strictest application rate is 44%, which is eight times higher than the 5% average application rate for the most lenient half of all districts. *Id.*

F. Summary

While the Commission's 2011 REPORT, itself, observed "a lack of uniformity in the application of the enhanced mandatory [*903] minimum penalties,"[39] my more probing analysis of the Commission's data establishes that this is a gross understatement. For unknown and unknowable reasons, federal prosecutors have been applying massive numbers of § 851 enhancements in many districts and not in others. For presumably other reasons, prosecutors in eight districts let their § 851 enhancement hammers gather dust over the three-year sampled period, never raising it against a single eligible defendant. No matter how this information is examined, inequity and the seemingly arbitrary practice of prosecutors prior to establishment of a national policy in the Holder 2013 Memo represented a Wheel of Misfortune approach to § 851 [**51] enhancements, resulting in shocking disparity among the nation's ninety-four districts. Whether the national policy in the Holder 2013 Memo will change this shocking disparity remains to be seen.

IV. THE ROLE OF THE JUDICIARY IN ATTEMPTING TO CORRECT THE PROBLEM

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[34] *Id.* (N.D. of Georgia's 47.50% application rate divided by [**49] M.D. of Georgia's 1.92%).

[35] *Id.* (E.D. of Pennsylvania's 57.14% application rate divided by M.D. of Pennsylvania's 2.53%).

[36] Guam and the Virgin Islands are the only two districts with ten or fewer total (eligible and ineligible drug defendants), and only three and four eligible defendants respectively. Given this small sample size, the comparison may be unfair.

[37] App. A (Guam at 100%, N.D. of Florida at 86.96%, S.D. of Iowa at 83.56%, N.D. of Iowa at 79.25%, C.D. of Illinois at 78.95%, [**50] N.D. of Alabama at 75.00%, E.D. of Tennessee at 72.62%, E.D. of Kentucky at 63.86%, S.D. of Illinois at 61.82%, N.D. of New York at 59.46%).

[38] *Id.* (S.D. of California at 1.53%, N.D. of Texas at 1.47%, Arizona at 0%, W.D. of Arkansas at 0%, Colorado at 0%, M.D. of Louisiana at 0%, N.D. of Mississippi at 0%, S.D. of Ohio at 0%, E.D. of Oklahoma at 0%, and the Virgin Islands at 0%).

[39] Commission's 2011 REPORT at 253.

Congress has delegated *§ 851* enhancement decisions exclusively to federal prosecutors. Thus, the Commission, defendants, their counsel, and federal district and appellate court judges are powerless to do anything but complain about arbitrary application of *§ 851* enhancements. Neverthelesss, as Judge Calabresi recently penned,

> And yet, we judges have a right—a duty even—to express criticism of legislative judgments that require us to uphold results we think are wrong. We may alert Congress to mistakes or gaps in its legislation. We may tell the legislature that we think a judgment it has made is mistaken, even absurd, and urge Congress to reconsider its judgment. We may even go further and suggest that a judgment made by the legislature is headed towards unconstitutionality. To do these things is not to "call the law into disrepute," but rather to work with coordinate branches of government to [**52] prevent disreputable laws from enduring.

*United States v. Ingram, 721 F.3d 35, 43, 2013 U.S. App. LEXIS 12011, 2013 WL 2666281, *14 n.9 (2nd Cir. 2013)* (Calabresi, J. concurring) (footnotes and citations omitted). I believe we have an equal right—even duty—to call out the DOJ on its application of the new national policy, its secrecy in applying *§ 851* enhancements, and the completely arbitrary way in which it could continue to apply these devastating enhancements, which add to the burdens of our Nation's mass incarceration problems,[40] in the absence of

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[40] The DOJ recently observed that in the last 20 years "the U.S. prison population exploded and overall criminal justice spending with it. For most of the country's history, imprisonment rates were stable at less than 150 persons per 100,000 in population. In the last several decades, though, the rate has more than quadrupled to over 700 per 100,000. Many have documented the impact that such imprisonment rates have had on individuals and communities, including the erosion of trust and confidence in criminal justice among many citizens, particularly in disadvantaged communities and communities of color." Jonathan J. Wroblewski, Director, Office of Policy and Legislation, *Letter from the Department of Justice to The Honorable Patti B. Saris, Chair, United States Sentencing Commission,* at 2-3 (July 11, 2013). Professor Sarah French Russell, in the context of a scholarly article on recidivist sentencing enhancements has observed:

> Eliminating federal enhancements based on prior drug convictions, or at least decreasing the magnitude of these enhancements, would also go a long way towards reducing the federal prison population. During the past twenty-five years, [**54] the federal prison population has grown by more than 500%. Indeed, although the growth of the prison population has slowed in some states and even declined in a few, the federal prison population continues to expand rapidly. The majority of federal prisoners are serving sentences for drug offenses. The large size of the federal prison population is due in substantial part to the impact that prior drug convictions have on federal sentences.

Rethinking Recidivist Enhancements, supra, n.9, at 1232 (footnotes omitted).

On August 1st of this year, in a joint press release announcing the introduction of their bipartisan Smarter Sentencing Act, Senators Durbin and Lee stated:

> With federal prison populations skyrocketing and nearly half of the nation's federal inmates serving sentences for drug offenses, Assistant Majority Leader Dick Durbin (D-IL), Senator Mike Lee (R-UT) have introduced the Smarter Sentencing Act, to modernize our drug sentencing polices by giving federal judges more discretion in sentencing those convicted of non-violent offenses. Making these incremental and targeted changes could save taxpayers billions in the first years of enactment.
>
> "Mandatory minimum sentences for non-violent [**55] drug offenses have played a huge role in the explosion of the U.S. prison population," Durbin said. "Once seen as a strong deterrent, these mandatory sentences have too often been unfair, fiscally irresponsible and a threat to public safety. Given tight budgets and overcrowded prison cells, judges should be given the authority to conduct an individualized review in sentencing certain drug offenders and not be bound to outdated laws that have proven not to work and cost taxpayers billions."
>
> "Our current scheme of mandatory minimum sentences is irrational and wasteful," Lee said. "By targeting particularly egregious mandatory minimums and returning discretion to federal judges in an incremental manner, the Smarter Sentencing Act takes an important step forward in reducing the financial and human cost of outdated and imprudent sentencing polices."

new transparency [*904] accompanying the new policy. I believe that the judiciary has a continuing obligation to pressure the DOJ to make public the basis for specific *§ 851* enhancement decisions. For example, AUSAs could state on the record how the decision to impose a *§ 851* enhancement in a particular case complies with the Holder 2013 Memo. To the extent that AUSAs might invoke a deliberative process privilege for such decisions, I urge them to waive it, in the greater interest of transparency and fairness, so that presiding judges can tell if they are complying with the Holder 2013 Memo, even if judges ultimately can do nothing more than complain about arbitrary [**53] or noncompliant application.

The DOJ could easily do these things, if it wanted, to become less arbitrary, more transparent, or both, to demonstrate its compliance with the [**57] new national policy for *§ 851* enhancements. I respectfully request that the DOJ consider doing so.

[*905] ***V. THE DOJ, THE AUDACITY OF HYPOCRISY, AND THE OPPORTUNITY FOR ATONEMENT***

The SRA requires the Criminal Division of the DOJ to submit to the Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes to the guidelines that appear to be warranted, and otherwise assessing the Commission's work. *28 U.S.C. § 994(o) (2006)*. On July 11, 2013, the DOJ did just that, writing: "We are pleased to submit this report pursuant to the Act. The report also responds to the Commission's request for public comment on its proposed priorities for the guideline amendment year ending May 1, 2014. *Notice of Proposed Priorities and Request for Public Comment, 78 Fed. Reg. 32,533 (May 30, 2013)*." Jonathan J. Wroblewski, Director, Office of Policy and Legislation U.S. Department of Justice, *Letter from the DOJ to The Honorable Patti B. Saris, Chair*, at p.1 (July 11, 2013).

The Report is replete with references to the DOJ's deep concern for sentencing disparity, at least when created by others, and for greater justice for all:

- "Together, we must reform federal [**58] sentencing policy in the months ahead so that federal criminal justice . . . can contribute to greater justice for all." *Id.* at 1.
- "It was thought that certainty in sentencing . . . also increase[s] fairness in sentencing by reducing unwarranted sentencing disparities." *Id.* at 2.

The United States has seen a 500 percent increase in the number of inmates in federal custody over the last 30 years, in large part due to the increasing number and length of certain federal mandatory sentences. Mandatory sentences, particularly drug sentences, can force a judge to impose a one-size-fits-all sentence without taking into account [**56] the details of an individual case. Many of these sentences have disproportionately affected minority populations and helped foster deep distrust of the criminal justice system.

This large increase in prison populations has also put a strain on our prison infrastructure and federal budgets. The Bureau of Prisons is nearly 40 percent over capacity and this severe overcrowding puts inmates and guards at risk. There is more than 50 percent overcrowding at high-security facilities. This focus on incarceration is also diverting increasingly limited funds from law enforcement and crime prevention to housing inmates. It currently costs nearly $30,000 to house just one federal inmate for a year. There are currently more than 219,000 inmates in federal custody, nearly half of them serving sentences for drug offenses.

Durbin and Lee Introduce Smarter Sentencing Act, WEBSITE OF DICK DURBIN, US SENATOR FOR ILLINOIS, ASSISTANT MAJORITY LEADER (August 1, 2013), *http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-486-853f-f8ef7b99e736*.

• "[T]here is much more that can and must be done to ensure Equal Justice Under Law for all." *Id.* at 3.

• "While we are concerned about increased sentencing disparities. . . ." *Id.* at 8.

• "And we further believe that much can be learned from the states, including how to . . . reduce unwarranted sentencing disparities, and better allocate sentencing decisions among the stakeholders in the criminal justice system." *Id.* at 9.

• "Given new and emerging crime challenges . . . and the growing disparities of the *post-Booker* sentencing system, we think it is time for reform." *Id.* at 9-10.

In contrast to these stated concerns about sentencing disparities, the statistical information presented in this opinion, drawn directly from the Commission's data, conclusively establishes that, at least prior to the statement of a national policy in the Holder 2013 Memo, there was a breathtaking disparity in the DOJ's own application [**59] of *§ 851* enhancements. This dramatic sentencing disparity created, implemented, and ignored by the DOJ, did as much or more to create unwarranted and arbitrary sentencing disparities as any other source I am aware of. It has added thousands of years of arbitrarily inflicted incarceration on drug defendants, most of whom are non-violent drug addicts, based on the absence of a DOJ national policy informed by reasonable factors. The DOJ either had the data about application of *§ 851* enhancements and not only ignored it, but hid it from the public, or never bothered to gather such data, which was grossly negligent. Either way, allowing this disparity to persist for so long was a terrible abuse of the public trust.

There is much that the DOJ could do to atone for its creation of such arbitrary disparities. First, while the DOJ criticizes others for creating unwarranted sentencing disparity, it ought to give serious consideration to ending or at least narrowing its self-generated *§ 851* disparity—and it has taken a dramatic first step to do so with the Holder 2013 Memo. Second, now that the DOJ has a national policy for *§ 851* enhancements, in the interest of [*906] transparency, it should examine [**60] the pros and cons of adding to the policy requirements that AUSAs state on the sentencing record why a *§ 851* notice is applied or waived in particular cases. Finally, publishing prosecutorial policies on *§ 851* enhancements by individual districts and nationally, with an explanation of how those policies interpret and apply the policy stated in the Holder 2013 Memo, with the relevant statistical data about eligibility and application by the DOJ, would enable the best practices to surface in sunlight rather than secrecy. Transparent policies and data would be reviewable by defendants, government lawyers, defense lawyers, the Commission, and the courts. Such transparency would enable the Commission to develop statistics on the following: (1) data determining whether *§ 851* was being applied without the current arbitrariness, and (2) recidivist rates of those receiving *§ 851* enhancements. This would lead to a greater understanding of the efficacy of recidivist sentencing enhancements and facilitate the evolution of sensible, evidence-based policies by Congress, the Commission, and the DOJ.[41]

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[41] It would also allow the Commission and the DOJ to analyze whether current claims that the DOJ's [**61] *§ 851* application has or continues to discriminate against racial minorities are true. *See, e.g.*, *Rethinking Recidivist Enhancements, supra, at n.9, at 1169*. "[T]he *§ 851* enhancement furthers racial disparities." Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration, 18 Mich. J. Race & L. 295 (2013)*. Although the Commission's 2011 REPORT did little to highlight the disparities that have been my focus, it did observe that "[b]lack offenders qualified for the *[§ 851]* enhancement at higher rates than any other racial group." Commission's 2011 REPORT, 256; *see also id.* at 257, 261.

One hopeful sign that the DOJ is willing to address the problem openly came from the August 12, 2013, remarks of Attorney General Eric Holder to the American Bar Association. In those remarks, Attorney General Holder observed, *inter alia*, that the DOJ, attorneys, and judges must "fundamentally rethink[ ] the notion of mandatory minimum sentences for drug-related crimes," although there was no specific mention of *§ 851* enhancements in that address, even though such enhancements have had such a dramatic effect on mandatory minimum sentences.[42] The Holder 2013 Memo, disseminated [**62] the same day, indicates that the DOJ has moved beyond "fundamental rethinking" to promulgation of a new policy on mandatory minimum sentences, specifically addressing *§ 851* enhancements.

Much will turn, however, on how the rather vague guiding factors in the Holder 2013 Memo are interpreted and applied by the DOJ generally and by individual United States Attorneys and whether additional guidance from the DOJ is provided. For example, the factor requiring consideration of "[t]he nature of the defendant's criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses" is quite broad.[43] In my district, most of the *§ 851* enhancements have been based on state offenses designated aggravated misdemeanors, but treated as felonies under federal law. Many of those state offenses are also very old, quite minor, and actually resulted in very light penalties, such as fines or probation, with no jail time, notwithstanding [**63] the potential for a sentence exceeding a year of imprisonment. I question [*907] the wisdom of using such prior drug offenses as a basis for *§ 851* enhancements. I believe that any consideration of "[t]he nature of the defendant's criminal history" should flag such prior drug offenses for special scrutiny, to ensure that application of a *§ 851* enhancement is appropriate on the basis of the specific prior drug offense, as well as in light of other factors identified in the Holder 2013 Memo.

Finally, when I showed the AUSA in this case some of the evidence of disparities in the application of *§ 851* enhancements in this district compared to neighboring districts—presented above—during Young's sentencing hearing, the AUSA admitted that he had not seen such information. He also stated that he had only known, from contact with individual AUSAs in neighboring districts that, for example, the D. of Nebraska rarely imposed *§ 851* enhancements unless a defendant actually went to trial. He stated that he was "a little bit shocked that [neighboring districts] don't hardly ever apply *[§ 851* enhancements] based on [**64] what they—what I've heard in talking to them. But again, I didn't pull the statistics. They are new to me." Sentencing Hearing, Real Time Transcript. On the other hand, he was only "surprised" at the extent of the disparities. Specifically, he said, "I don't know if shock's the right word because—but yes, it surprises me to see that kind of difference in how they are applying *[§ 851*] and how we are applying it." *Id.* He also stated that he could not comment on the reasons for such disparities without reviewing more information about the disparities and the policies in the various districts, but he did admit that the existence of such disparities "certainly raises some questions." *Id.*

The comments of this AUSA, who is a very experienced prosecutor in this district and one whom I believe operates in absolute good faith, demonstrate that the DOJ never provided the information about the disparities in *§ 851* enhancements to prosecutors in the field nor provided any direction to them on how to apply such enhancements, which might have helped remedy the disparities. I do not blame this

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[42] Attorney General Holder, *Remarks At American Bar Association As Prepared For Delivery*, ABA (August 12, 2013), available at *http://livewire.talkingpointsmemo.com/entry/read-ag-eric-holders-remarks-at* american-bar (last visited Aug. 13, 2013).

[43] *See, supra*, p. 15 (quoting the "Recidivist Enhancements" section of the Holder 2013 Memo).

AUSA for either the disparities or his lack of knowledge about them; rather, it is clear that there has been [**65] a failure at the higher levels of the DOJ to make even its own prosecutors aware of the problem or to address it. The DOJ has had the pertinent information since the Commission's 2011 REPORT, but apparently did nothing with it until just this week, when it disseminated the Holder 2013 Memo. This secrecy and inaction is extremely disappointing and raises serious concerns about how the DOJ and prosecutors in individual districts will handle *§ 851* enhancements going forward, even with the Holder 2013 Memo in place.

Again, I am optimistic that fair application of the Holder 2013 Memo will rectify this problem going forward. Of course, if all *§ 851* enhancement decisions are still made in secret, no reasons for such decisions in particular cases are ever announced, tracked, or published by the DOJ, and no nationwide statistics are kept and made public by the DOJ or the Commission on circumstances in which *§ 851* enhancements are imposed, we will never know if the Holder 2013 Memo has effectively eliminated intra-state, intra-Circuit, or other regional or national disparities in the application of *§ 851*. Instead, we will still have only anecdotal experiences with the application—or lack of [**66] application—of *§ 851* enhancements. In the absence of such efforts at tracking, analyzing, and disseminating information about *§ 851* enhancements, I have little faith that the Holder 2013 Memo will actually remedy the gross disparities apparent in past applications of such enhancements.

[*908] *VI. CONCLUSION*

The massive disparity in eligibility and application of *§ 851* notices prior to the promulgation of a national policy in the Holder 2013 Memo is deeply disturbing, as is the incredible cloak of secrecy in which these decisions were made. Unfortunately, judges have done very little, if anything, to call this to the attention of the DOJ. That failing is due, in large part, to the lack of dissemination to judges of statistics about this problem. Enhancements for recidivism have been part of the statutory sentencing arsenal for drug crimes at least since the 1964 amendments to the Narcotic Drug Import and Export Act of 1958, and the Federal Sentencing Guidelines and the Commission have been in place since 1987, yet until the Commission's study and 2011 REPORT, there was simply no way to determine what disparities application of *§ 851* was creating—and the data from the Commission's 2011 REPORT, [**67] using sample groups from three fiscal years (2006, 2008, and 2009), is now aging. The lack of information about the problem is why I have undertaken to obtain and analyze the only known data on the subject.[44] I call on my colleagues on the federal bench to express their continuing concerns to the DOJ about application of *§ 851* enhancements and implementation of the national policy in the Holder 2013 Memo.

Admittedly, the DOJ has a very full plate. The Office of Inspector General of the DOJ recently submitted a statutorily-required list of top management and performance challenges facing the DOJ dated November 7, 2012.[45] It listed and discussed ten extremely important matters: (1) Safeguarding National Security, (2) Enhancing Cyber Security, (3) Managing the Federal Prison System, (4) Leading the Department in an Era of Budget Constraints, (5) Protecting Civil Rights and Civil Liberties, (6) Restoring Confidence, (7) Coordinating Among Law Enforcement Agencies, (8) Enforcing Against Fraud and Financial Offenses,

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[44] I commend the Commission for its willingness to respond fully and promptly to my various requests for data.

[45] Michael E. Horowitz, Inspector General, *Top Management and Performance Challenges in the Department of Justice–2012*, at 1 (Nov. 7, 2012) available at *http://www.justice.gov/oig/challenges/2012.htm* (last viewed Aug. 13, 2013).

(9) Administering Grants and Contracts, and (10) Ensuring Effective [**68] International Law Enforcement. These are all extremely important matters. But so too are the thousands of extra months inmates are serving solely as a result of the DOJ's continued lack of transparency, prior lack of a coherent policy, and prior and potentially continuing arbitrary application of *§ 851* enhancements. I congratulate Attorney General Holder and the DOJ for making *§ 851* enhancements a priority in the policy changes established in the Holder 2013 Memo.

In testimony before the U.S. Senate Committee on the Judiciary Subcommittee on Crime and Drugs, then Assistant Attorney General Lanny A. Breuer of the Criminal Division of the DOJ testified:

> Ensuring fairness in the criminal justice system is also critically important. Public trust and confidence are essential elements of an effective criminal justice system – our laws and their enforcement must not only be fair, but they must also be perceived as fair. The perception of unfairness undermines governmental [**69] authority in the criminal justice process. It leads victims and witnesses of crime to think twice before cooperating with law enforcement, tempts jurors to ignore the law and facts when judging a criminal case, and draws the public into [*909] questioning the motives of governmental officials.[46]

The Holder 2013 Memo holds out hope that the DOJ will follow its own Congressional testimony by trying to eliminate the hidden yet massive injustice created by prior application of *§ 851* enhancements. The dramatic failure of the DOJ, prior to the Holder 2013 Memo, to publicly acknowledge and take steps to reduce the national disparity in the application of *§ 851* enhancements diminished judicial and public trust and confidence in both the DOJ and the federal criminal justice system. It not only created a perception of injustice, it actually perpetuated a gross injustice and "dr[ew] the public into questioning the motives of governmental officials." *Id.* Let us hope that the new national policy on *§ 851* enhancements will undo some of that damage.

We as judges can and should do more. While we still cannot require AUSAs to state on the record how they have applied the *§ 851* policy, we can certainly request that they do so. The same is true with asking, on the record, what factors an AUSA considered in deciding to apply or waive the *§ 851* enhancement. We can also ask if the AUSAs are aware of and have studied the Commission's data on *§ 851* enhancements. We can further probe if the DOJ has any plans to make public the impact of the new national policy on reducing the massive and unwarranted sentencing disparities former application of *§ 851* enhancements had created.

Finally, it is vitally important to remember that defendants subject to the *§ 851* enhancements are real people and members of our communities, not contestants on a game show. While they may cross their fingers and hope the winds of change that have blown a new, national *§ 851* policy onto our shores will blow in their favor, the most important factor for the length of their sentences should not be which prosecutor the tic, tic, tic, tic of the Wheel of [**71] Misfortune chooses for them.

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[46] *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity, before the U.S. Sen. Comm. on the Judiciary, Subcomm. on Crime and Drugs,* 111th [**70] Cong. 101 p.1 (Apr. 29, 2009) (Statement of Lanny A. Breuer, Assistant Att'y Gen., Crim. Div., U.S. Dep't of Justice).

THEREFORE, upon consideration of all relevant factors, defendant Douglas Young was sentenced to 24 months of incarceration followed by 4 years of supervised release on each count, to run concurrently, with certain other conditions as stated on the record.

IT IS SO ORDERED.

DATED this 16th day of August, 2013.

/s/ Mark W. Bennett

MARK W. BENNETT

U.S. DISTRICT COURT JUDGE

NORTHERN DISTRICT OF IOWA

Appendix A

[*910] ***21 U.S.C. § 851*** **Enhancement Ranked By District Application Fiscal Year 2006, 2008, and 2009 Sample Groups**

Table 1A

	Rank	District	Enhanced /Eligible
	1	Guam	100.00%
	2	Florida, N	86.96%
	3	Iowa, S	83.56%
	4	Iowa, N	79.25%
	5	Illinois, C	78.95%
	6	Alabama, N	75.00%
	7	Tennessee, E	72.62%
	8	Kentucky, E	63.86%
Top 10%	9	Illinois, S	61.82%
	10	NY, N	59.46%
	11	SC	57.97%
	12	Ohio, N	57.83%
	13	Louisiana, W	57.14%
	14	PA, E	57.14%
	15	Montana	54.84%
	16	Hawaii	52.38%
	17	Indiana, S	52.00%
	18	Delaware	50.00%
	19	Massachusetts	49.09%
	20	NC, W	47.83%
	21	Georgia, N	47.50%
	22	Missouri, E	45.57%