

The Controlled Substances Act at 50 Years

February 20-22, 2020

Phoenix, Arizona

ASU Sandra Day O'Connor
College of Law
Arizona State University
Academy for Justice

O THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW

DRUG ENFORCEMENT AND POLICY CENTER

Panel 2A: Marijuana Reform

#CSAat50

Presenter: **Oliver Kim** • Adjunct Professor, School of Law - University of Pittsburgh

Reviewer: **Daniel Rodriguez** • Harold Washington Professor, Pritzker School of Law - Northwestern University

Presenter: **Paul Larkin, Jr.** • Rumpel Senior Legal Research Fellow - The Heritage Foundation

Reviewer: **Patricia J. Zettler** • Assistant Professor, Moritz College of Law - The Ohio State University

Presenter: **Melanie Reid** • Associate Dean of Faculty, Duncan School of Law - Lincoln Memorial University

Reviewer: **Alex Kreit** • Professor of Law - Thomas Jefferson School of Law

Additional Reviewer: **David Kramer** • Senior Associate Attorney - Vincente Sederberg LLP

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Panel 2B: Drug Policy Empirical Research and Sentencing Reform

#CSAat50

Presenter: **Stephanie Holmes Didwania** • Assistant Professor, Beasley
School of Law - Temple University

Reviewer: **Jelani Jefferson Exum** • Professor of Law - University of Detroit
Mercy

Presenter: **Erica Zunkel** • Associate Director, Federal Criminal Justice Clinic
- University of Chicago

Reviewer: **Jonathan Wroblewski** • Director, Office of Policy and Legislation,
Criminal Division - U.S. DOJ

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Mandatory Minimum Entrenchment and the Controlled Substances Act



Stephanie Holmes Didwania (Temple Law)

The Controlled Substances Act at 50 Years

Arizona State University Sandra Day O'Connor College of Law

February 22, 2020

Outline

Mandatory Minimums in the Act

Mandatory Minimum Entrenchment

Case Study: Eric Holder Memo

Next Steps

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Mandatory Minimums in the Act

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Controlled Substances Act

In the Act, mandatory minimums are primarily based on **drug type** and **drug quantity**.

MMs added as part of the Anti-Drug Abuse Act of 1986.

- MMs range from five years to life.
- Crack-powder disparity (originally 100:1)

Controlled Substances Act

Example: First time offender distributing **heroin** and no death or serious bodily injury. If **quantity** is:

1 kg or more → 10 year MM

[100g to 1 kg) → 5 year MM

Less than 100 g → no MM

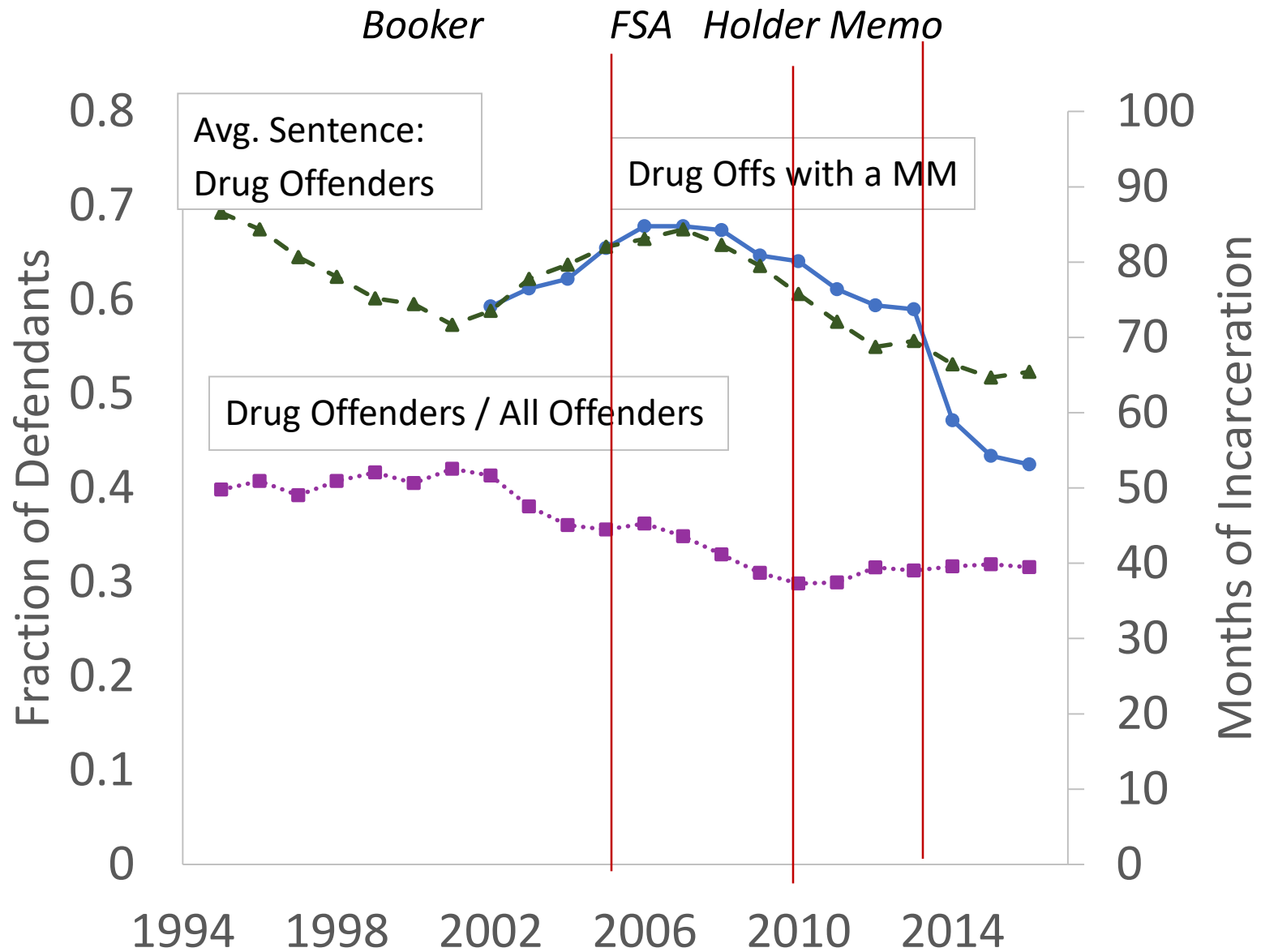
“Mandatory” Minimums: Exceptions

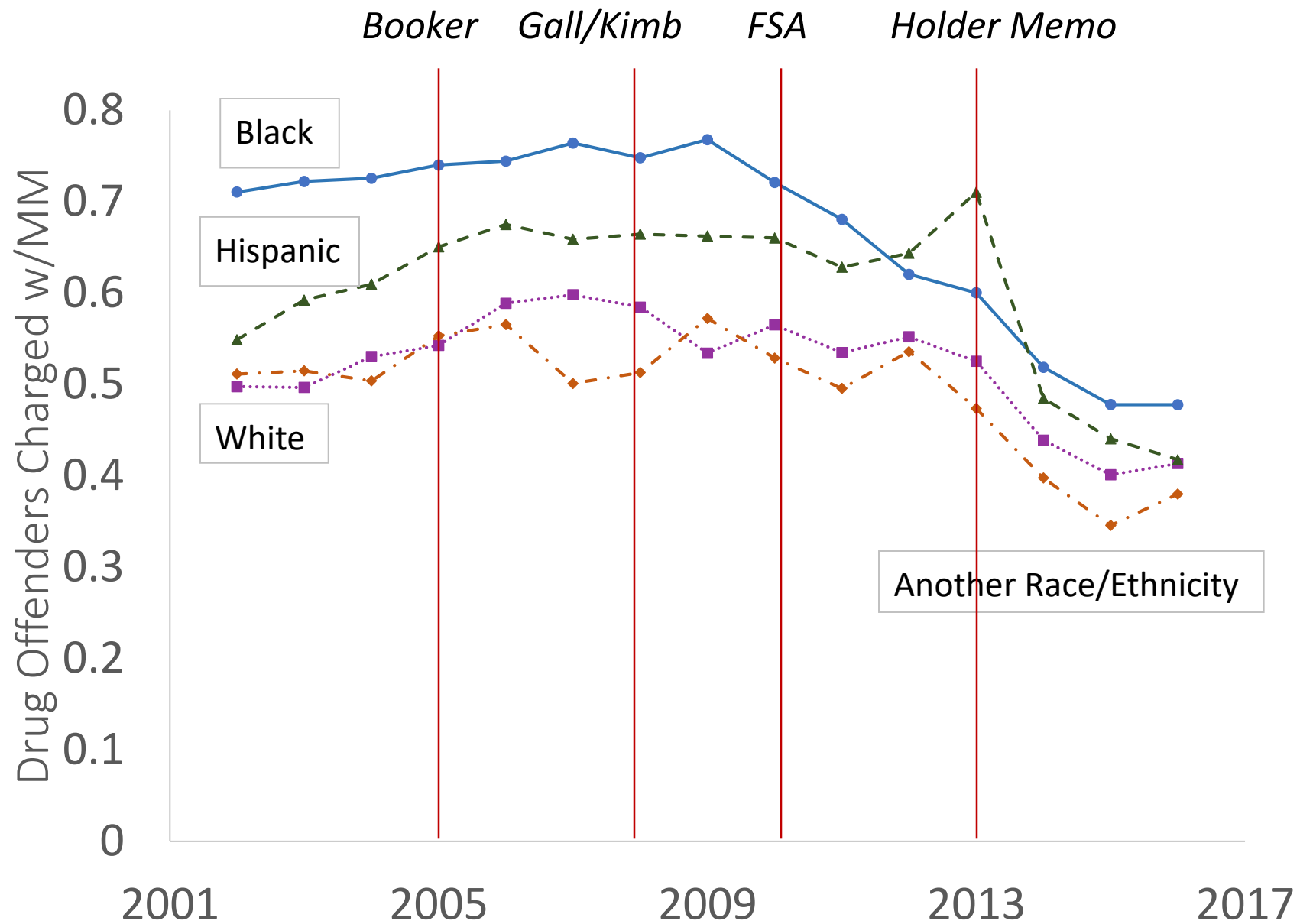
Two ways to get a sentence < MM in a federal drug case:

1. Safety Valve: for certain low-level drug offenders (32% of all drug offenders, FY16)
2. Substantial Assistance: available for all defendants (24% of drug offenders, FY16)

Critiques

- (1) Impose unduly harsh sentences for many defendants;
- (2) Perpetuate race disparity; and
- (3) Imbalance dynamics in plea bargaining.





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Mandatory Minimum Entrenchment

Three ways that mandatory minimums are entrenched:

(1) Tied to the Sentencing Guidelines

(2) Judges anchored

(3) Co-defendants and similarly-situated defendants

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALLEYNE *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 11–9335. Argued January 14, 2013—Decided June 17, 2013

Petitioner Alleyne was charged, as relevant here, with using or carrying a firearm in relation to a crime of violence, 18 U. S. C. §924(c)(1)(A), which carries a 5-year mandatory minimum sentence, §924(c)(1)(A)(i), that increases to a 7-year minimum “if the firearm is brandished,” §924(c)(1)(A)(ii), and to a 10-year minimum “if the firearm is discharged,” §924(c)(1)(A)(iii). In convicting Alleyne, the jury form indicated that he had “[u]sed or carried a firearm during and in relation to a crime of violence,” but not that the firearm was “[b]randished.” When the presentence report recommended a 7-year sentence on the §924(c) count, Alleyne objected, arguing that the verdict form clearly indicated that the jury did not find brandishing beyond a reasonable doubt and that raising his mandatory minimum sentence based on a sentencing judge’s finding of brandishing would violate his Sixth Amendment right to a jury trial. The District Court overruled his objection, relying on this Court’s holding in *Harris v. United States*, 536 U. S. 545, that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. The Fourth Circuit affirmed, agreeing that Alleyne’s objection was foreclosed by *Harris*.

Held: The judgment is vacated, and the case is remanded. Pp. 10–17.

457 Fed. Appx. 348, vacated and remanded.

JUSTICE THOMAS delivered the opinion of the Court with respect to Parts I, III–B, III–C, and IV, concluding:

1. Because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury. Accordingly, *Harris* is overruled. Pp. 10–16.

Holding: Any fact that increases the mandatory minimum of a crime is an “element” of the crime that must be submitted to the jury (or pled to).

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




ATTORNEY
GENERAL
ERIC H.
HOLDER, JR.



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

August 12, 2013

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

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

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

The Supreme Court's decision in *Alleyne* heightens the role a prosecutor plays in determining whether a defendant is subject to a mandatory minimum sentence. To be sure, the exercise of discretion over charging decisions has always been an "integral feature of the criminal justice

We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation....

deterrence, and rehabilitation. Moreover, rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs. These reductions in public safety spending require us to make our public safety expenditures smarter and more productive.

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

Justice Dept. Seeks to Curtail Stiff Drug Sentences



Attorney General Eric H. Holder Jr. discussed n
taxpayer spending on prisons and address unfa
Jason Henry for The New York Times

CNN politics 45 Congress SCOTUS Facts First 2020 2019 Elections

• LIVE TV Edition

Eric Holder seeks to cut mandatory minimum drug sentences

By Dan Merica and Evan Perez, CNN

Updated 7:03 PM ET, Mon August 12, 2013

Holder Tossing Mandatory Minimum Sentences Out the Window

Tough punishments 'breed disrespect for the system,' attorney general will say.

For all these reasons, I am issuing the following policy²:

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

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

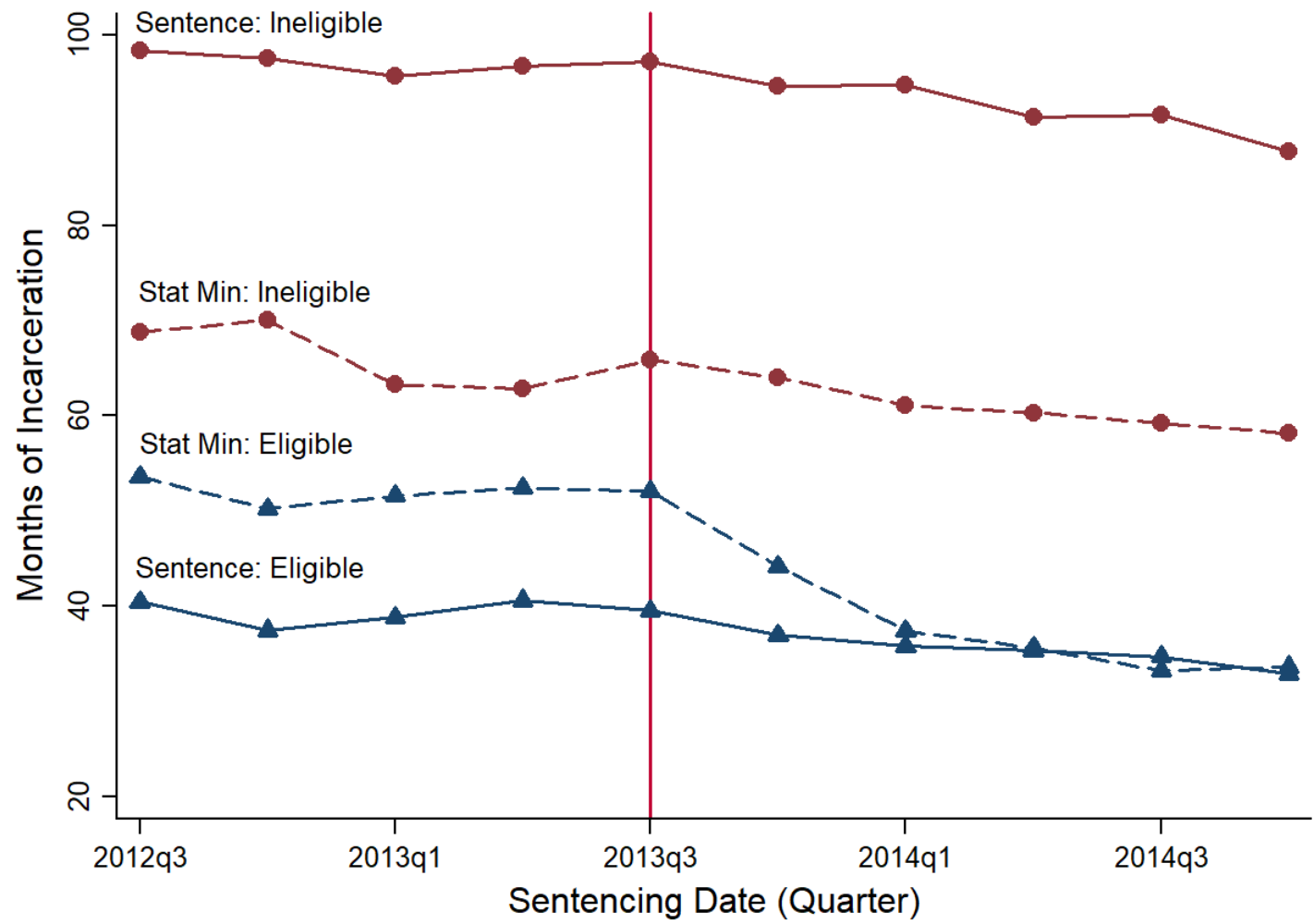
- The defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;
- The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization;
- The defendant does not have significant ties to large-scale drug trafficking organizations.

Prosecutors must be candid with the court, probation, and the public as to the full extent of the defendant’s culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant’s role in the offense, even if the charging document lacks such specificity. Prosecutors also should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines....

giving to a lesser included offense, or waive indictment and plead guilty to a superseding information that does not charge the quantity necessary to trigger the mandatory minimum.

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

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



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Proposals

Amend/reduce mandatory minimums:

- Many valid critiques: unduly harsh for many defendants and racially disparate
- Mostly (but not entirely) unique to drug offenders.

Untether Guidelines from MMs:

- Within Sentencing Commission's statutory mandate
- Unlikely to generate massive disparity