



Federal Drug Recidivism Enhancements

*Application and Impact of 21 U.S.C. § 851:
Enhanced Penalties for Federal Drug Trafficking Offenders*

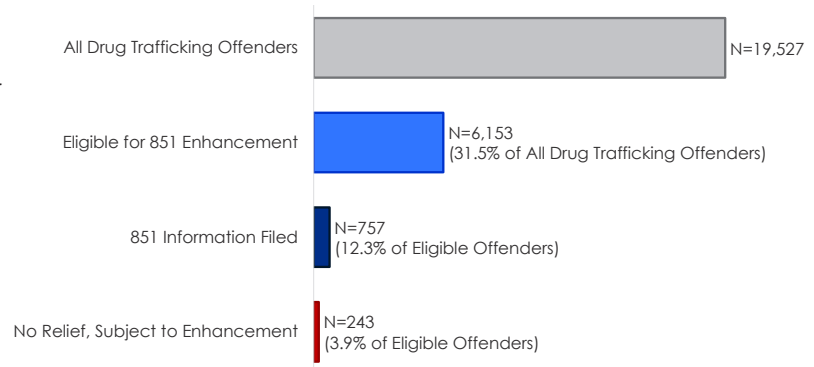
Overview

In July 2018, the United States Sentencing Commission issued a report, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders*, which examines the use and impact of increased penalties (851 enhancements¹) for drug offenders who have a prior felony drug conviction. To trigger the increased penalty, prosecutors must take affirmative action to file an 851 information. Prosecutors also have the discretion to withdraw the information prior to sentencing. This publication is the fourth in a recent series of reports on mandatory minimum penalties, which build on the Commission's 2011 report to the Congress.² Below are some key findings of the report.

Highlights

- In fiscal year 2016, the government filed an 851 information against just 12.3% (N=757) of offenders eligible for an increased penalty under 21 U.S.C. § 851 (see figure on the right).
- The government withdrew the 851 information in over one-fifth (22.5%) of cases in which the information was filed.
- In light of the low filing rate and subsequent withdrawal rate, a small number of eligible offenders (N=243 or 3.9%) remained subject to the increased penalty at sentencing.

Eligibility and Application of 851 Enhancements Fiscal Year 2016



Highest and Lowest Percentages of Withdrawn 851 Information Filings By District Fiscal Year 2016

Districts with Highest Percentage of Withdrawn Filings

Western District of North Carolina	86.4% (19 of 22)
Central District of California	78.1% (32 of 41)
Northern District of Illinois	50.0% (9 of 18)
District of Kansas	33.3% (5 of 15)
Southern District of Texas	33.3% (4 of 12)

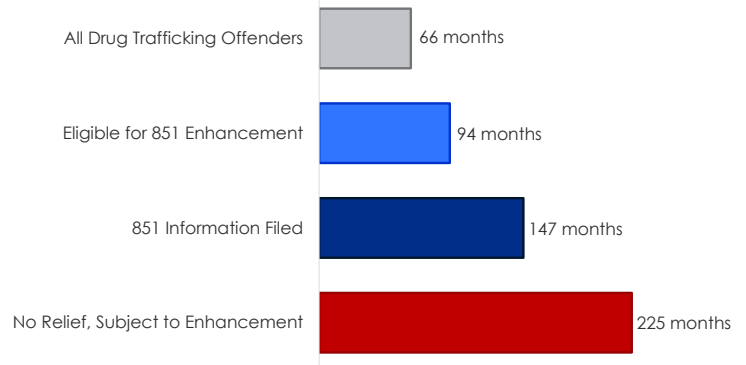
Districts with Lowest Percentage of Withdrawn Filings

Northern District of New York	0.0% (0 of 23)
Southern District of New York	0.0% (0 of 20)
Eastern District of Kentucky	1.9% (1 of 54)
Eastern District of Virginia	3.4% (1 of 29)
Western District of New York	5.9% (1 of 17)

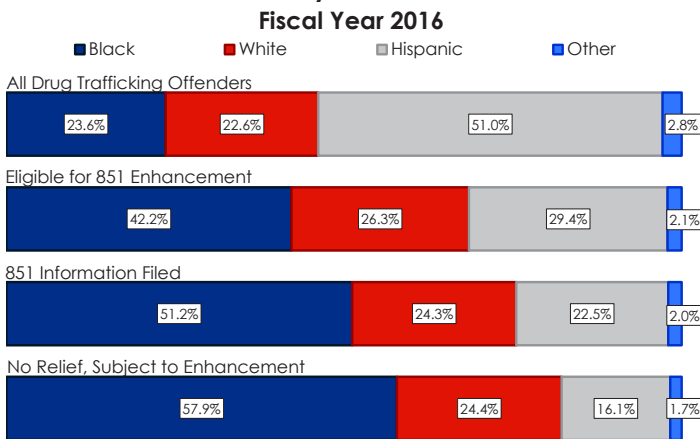
- 851 enhancements were applied inconsistently, with wide geographic variations in eligibility, filing, withdrawal, and ultimate application of the enhancement among federal drug trafficking offenders.
- For example, five districts sought 851 enhancements against more than 50% of eligible drug trafficking offenders while 19 districts sought no 851 enhancements against any eligible offenders.
- The government also withdrew the filed 851 information at varying rates across districts (see figure on the left). Several of the districts with the highest rates of filing an 851 information had among the lowest rates of withdrawal. Conversely, some districts have higher rates of withdrawal even where they appear to be more selective in filing an 851 information.

- The decision to file, withdraw, or hold an offender subject to an 851 enhancement significantly impacts an offender's average sentence length. For example, when the government filed an 851 information, offenders received an average sentence of over five years longer (61 months) than when an 851 information was not filed against an eligible offender.
- Offenders who remained subject to the increased minimum at sentencing (no relief) received an average sentence of nearly a decade longer (107 months) than the average sentence for offenders who received relief from the filed 851 information.

Average Sentence Length By Eligibility and Application of 851 Enhancements Fiscal Year 2016



Eligibility and Application of 851 Enhancements By Race



- While 851 enhancements had a significant impact on all racial groups, Black offenders were impacted most significantly.
- Black offenders as a group were more likely to have the requisite prior convictions to qualify for the enhancement. However, even after accounting for eligibility, Black offenders comprised an increasingly larger proportion of offenders as they progressed through each of the key stages of the 851 process.

U.S. Sentencing Commission's 2011 Recommendations

The Commission's recent reports build on the Commission's previous reports and publications—particularly, its 2011 report. In the 2011 report, the Commission explained that it "stands ready to work with Congress on measures that can be taken to enhance the strength and effectiveness of the current guidelines system and address the problems with certain mandatory minimum penalties." The Commission also made the following recommendations:

- A strong and effective federal sentencing guidelines system best serves the purposes of the Sentencing Reform Act.³
- If Congress decides to exercise its power to direct federal sentencing policy by enacting mandatory minimum penalties, such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.
- Congress should request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or amending mandatory minimum penalties.

Endnotes

1. In most instances, the 851 enhancement increases an already applicable mandatory minimum penalty. In other cases where the statute of conviction does not provide for a mandatory minimum penalty, the 851 information increases the statutory maximum penalty.
 2. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS : MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, (OCT. 2011).
 3. Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984).
- SOURCE: U.S. Sentencing Commission, 2016 851 Datafile and 2016 Criminal History Datafile, USSC851FY16 - USSCCHFY16.

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