

**APPLICATION AND IMPACT OF
21 U.S.C. § 851:**

**ENHANCED PENALTIES FOR
FEDERAL DRUG TRAFFICKING OFFENDERS**

UNITED STATES SENTENCING COMMISSION
JULY 2018



APPLICATION AND IMPACT OF 21 U.S.C § 851:
ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS



WILLIAM H. PRYOR JR.
Acting Chair

RACHEL E. BARKOW
Commissioner

CHARLES R. BREYER
Commissioner

DANNY C. REEVES
Commissioner

J. PATRICIA WILSON SMOOT
Ex Officio

ZACHARY C. BOLITHO
Ex Officio

KENNETH P. COHEN
Staff Director

July 2018



TABLE OF CONTENTS

1	SECTION ONE: INTRODUCTION
5	SECTION TWO: KEY FINDINGS
9	SECTION THREE: SECTION 851 ENHANCEMENTS
10	Enhanced Penalties Pursuant to Section 851
11	Relief Provisions
12	Recent Changes
15	SECTION FOUR: DATA ANALYSIS
16	The Commission's Updated Study of Mandatory Minimum Penalties
16	Methodology
18	Prevalence and Application of 851 Enhancements
18	<i>Eligibility and Filed 851 Information</i>
19	<i>Withdrawal/Invalidation of Filed 851 Information</i>
20	<i>Statutory Relief from an Enhanced Penalty</i>
20	Geographic Distribution
24	Drug Type
25	Criminal History
27	Plea and Trial Rates
28	Substantial Assistance
30	Average Sentence
32	Offender Demographics—Race
35	SECTION FIVE: CONCLUSION
37	ENDNOTES
47	APPENDIX



United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)



1 Introduction



Introduction

In October 2017, the Commission published *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System (2017 Drug Publication)*,¹ which is the second in a series of publications on mandatory minimum penalties in the federal criminal system.² This publication, the fourth in the Commission’s series, further analyzes drug penalties by focusing on the application of the recidivist enhancements for drug offenses commonly referred to as “851 enhancements.”³

As discussed in the *2017 Drug Publication*, mandatory minimum and statutory maximum penalties in drug trafficking offenses apply based on the quantity of drugs involved in the offense, the defendant’s prior felony drug trafficking offenses, if any, or both. As an initial matter, a drug offender may be subject to a mandatory minimum penalty if the offense involved a threshold quantity of a controlled substance.⁴ These mandatory minimum penalties for drug offenses may be enhanced further if a drug offender has a prior conviction for a “felony drug offense.”⁵ To trigger these enhanced penalties, prosecutors must follow the procedural requirements set forth in 21 U.S.C. § 851. Primarily, a prosecutor must file an information providing notice of which prior convictions support the enhanced penalties.

In its 2011 *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011 Mandatory Minimum Report)*,⁶ the Commission recommended that Congress reassess the severity and scope of the 851 enhancements. That report concluded that 851 enhancements were both more severe than the more graduated increases provided for in the guidelines and inconsistently applied across judicial districts. During visits to judicial districts across the country, prosecutors also reported wide variations in the practices surrounding the filing of an 851 information seeking enhanced mandatory minimum penalties.

Using fiscal year 2016 data, this publication provides comparisons between all offenders who appeared eligible for an 851 enhancement, offenders for whom an information was filed, offenders for whom an information was filed and later withdrawn, and offenders who remained subject to the enhancement at sentencing. These and other key terms used throughout this publication are defined on the next page.

Key Terms

851 enhancement: the increased penalty imposed when (1) a drug offender was previously convicted of a “felony drug offense”; and (2) the government filed a requisite information pursuant to 21 U.S.C. § 851.

Eligible offender: a federal drug offender who had one or more prior convictions for a “felony drug offense” sufficient to trigger enhanced statutory penalties. For purposes of this publication, the term includes only those drug offenders who were (1) sentenced under §§2D1.1 or 2D1.2 of the federal *Guidelines Manual*; and (2) previously convicted of any drug trafficking offense, drug possession or other drug-related offenses for which the documentation clearly indicated that an 851 information had been filed, or any other drug possession or drug-related offense that received three criminal history points (*i.e.*, those offenses that received sentences exceeding 13 months) under the guidelines.

Filed: the government filed an 851 information pursuant to 21 U.S.C. § 851 seeking an enhanced penalty for a drug offender previously convicted of a “felony drug offense.”

851 information: the filing required for an 851 enhancement. It is a document, similar to an indictment, alleging that the defendant has certain qualifying prior convictions. The prosecutor must prepare and sign the information but is not required to present it to a grand jury.

Withdrawn: the government filed an 851 information and later withdrew it, indicating it was no longer seeking the enhanced penalty. This category also includes a small number of cases in which the court found the enhancement inapplicable.

Not withdrawn prior to sentencing: the government filed an 851 information and did not withdraw it prior to sentencing. These offenders may or may not have received relief from the enhancement (through substantial assistance or the safety valve) at sentencing.

Subject to: the offender did not receive relief from an enhanced statutory minimum penalty (through substantial assistance or the safety valve), and, therefore, remained subject to the enhanced statutory mandatory minimum penalty at sentencing.

Enhanced statutory minimum penalty: an increase to an applicable statutory minimum penalty for a drug offender previously convicted of a “felony drug offense.”

Enhanced statutory maximum penalty: an increase to the statutory maximum penalty for a drug offender previously convicted of a “felony drug offense” where the instant offense did not involve an enhanced mandatory minimum penalty.





United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)



2 Key Findings



Key Findings

1. Cases in which an 851 enhancement applied are rare.

- The government filed an 851 information against 757 drug trafficking offenders, which represents just 12.3 percent of 6,153 offenders eligible for an 851 enhancement in fiscal year 2016.
- The number of offenders is even smaller after considering cases in which the government withdrew the 851 information or made a motion for substantial assistance relief. There were only 583 cases in which the 851 information was not withdrawn by the time of sentencing, and only 243 offenders (3.9% of eligible offenders) who ultimately remained subject to an enhanced mandatory minimum penalty.

2. The 851 enhancements were applied inconsistently, with wide geographic variations in the filing, withdrawal, and ultimate application of the 851 enhancements for eligible drug trafficking offenders.

- In the majority of districts in fiscal year 2016, at least one-quarter of all drug trafficking offenders were eligible for an 851 enhancement.
- There was, however, significant variation in the extent to which the enhanced penalties were sought against eligible offenders, ranging from five districts in which an 851 enhancement was sought against more than 50 percent of eligible drug trafficking offenders to 19 districts in which the enhancement was not sought against any of the eligible offenders.
- Districts also varied significantly in the rate at which an 851 information was filed and later withdrawn. Several of the districts with the highest rates of filing an 851 information also 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.

Key Findings

3. The 851 enhancements resulted in longer sentences for the relatively few drug offenders to which they apply.

- In fiscal year 2016, offenders against whom an 851 information was filed received an average sentence that was over five years longer (61 months) than eligible offenders against whom the information was not filed (147 months compared to 86 months).
- Offenders who remained subject to an enhanced mandatory minimum penalty at sentencing had average sentences of nearly 19 years (225 months), approximately ten years longer than the average sentence for offenders who received relief from an enhanced mandatory minimum penalty (107 months) and nearly 12 years longer than the average sentence for eligible offenders against whom the information was not filed (86 months).

4. While 851 enhancements had a significant impact on all racial groups, Black offenders were impacted most significantly.

- Black offenders comprised the largest proportion of drug trafficking offenders (42.2%) eligible for an 851 enhancement in fiscal year 2016.
- Black offenders constituted the majority (51.2%) of offenders against whom the government filed an information seeking an 851 enhancement, followed by White offenders (24.3%), Hispanic offenders (22.5%), and Other Race offenders (2.0%).
- Such an information was filed against nearly 15 percent (14.9%) of Black offenders who were eligible to receive an 851 enhancement. This rate was higher than the rates for White offenders (11.4%), Other Race offenders (11.7%), and Hispanic offenders (9.4%).
- The prevalence of Black offenders was even more pronounced for offenders who remained subject to an enhanced mandatory minimum penalty at sentencing, with Black offenders representing 57.9 percent of such offenders.





United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)



3 Section 851
Enhancements



Enhanced Penalties Pursuant to Section 851

Drug offenses continue to be the most common offenses carrying mandatory minimum penalties in the federal system.⁷ Federal drug trafficking offenders are primarily convicted of offenses under title 21 of the United States Code. These statutes prohibit the distribution, manufacture, or importation of controlled substances, and possession with intent to distribute controlled substances.⁸ They also prohibit certain specific acts like distributing drugs to persons who are under the age of 21 or who are pregnant, using persons under the age of 18 in drug operations, and distributing drugs in or near schools and colleges.⁹ The most commonly prosecuted drug offenses that carry mandatory minimum penalties are 21 U.S.C. §§ 841 and 960.¹⁰ Under both provisions, mandatory minimum penalties are tied to the quantity and type of controlled substance involved in the offense.¹¹ When certain quantity thresholds are met, a five-year mandatory minimum penalty and a maximum term of 40 years applies, while larger amounts

increase the mandatory minimum penalty to ten years, with a maximum of life imprisonment.¹² Higher penalty ranges apply if death or serious bodily injury results from use of the controlled substance.¹³

These mandatory minimum penalties may be enhanced further if a drug offender has a prior conviction for a “felony drug offense.”¹⁴ As demonstrated in the table below, offenders who otherwise qualify for the five-year mandatory minimum penalty may be subject to an increased statutory range of ten years to life if they have a prior conviction for a felony drug offense.¹⁵ Similarly, a qualifying prior conviction increases a ten-year mandatory minimum to a 20-year mandatory minimum (the maximum remains life), while offenders previously convicted of two or more prior drug felonies are subject to a mandatory term of life.¹⁶ For sentences otherwise increased due to a death or serious bodily injury, a prior felony drug offense further increases the mandatory minimum sentence.¹⁷ Finally, even for provisions that do not include a statutory mandatory minimum penalty, such as

Common 851 Enhancements		
Statutory Provision	Statutory Penalty	Enhanced Penalty Under 21 U.S.C. § 851
21 U.S.C. § 841 (b)(1)(A)	10-year statutory minimum →	20-year statutory minimum <i>(after one prior conviction for a felony drug offense)</i>
	→	Life statutory minimum <i>(after two or more prior convictions for a felony drug offense)</i>
21 U.S.C. § 841 (b)(1)(B)	5-year statutory minimum →	10-year statutory minimum <i>(after one prior conviction for a felony drug offense)</i>
21 U.S.C. § 841 (b)(1)(C)	20-year statutory maximum →	30-year statutory maximum <i>(after one prior conviction for a felony drug offense)</i>

21 U.S.C. § 841(b)(1)(C), a prior conviction for a “felony drug offense” can result in an increased statutory maximum penalty.¹⁸

In addition to increasing the minimum and maximum term of imprisonment, the required term of supervised release is also typically doubled.¹⁹ For example, the court must impose a term of supervised release of at least five years for any offender convicted pursuant to 21 U.S.C. § 841(b)(1)(A) or § 960(b)(1). Similarly, offenders convicted under 21 U.S.C. §§ 841(b)(1)(B) and 960(b)(2) must receive a term of supervised release of at least four years. However, the mandatory term of supervised release is generally doubled when the offender had a prior conviction for a felony drug offense.

These increased penalties are not, however, automatically triggered upon conviction. Prosecutors must take affirmative steps prior to the offender’s conviction for these higher penalties to apply. These additional procedural requirements are set forth in 21 U.S.C. § 851 (Proceedings to establish prior convictions), which 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.”²⁰

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.²¹ In particular, the court must inquire of the defendant whether the prior conviction is accurate and inform the defendant that any challenge to a prior conviction not raised before sentencing will be waived.²² The defendant is entitled to a hearing before a judge,²³ in which the government bears the burden of proving facts in the information beyond a reasonable doubt.²⁴ If the defendant does not raise a challenge, or the court finds that the prior conviction qualifies under section 851 at a hearing, the court must impose an enhanced sentence.²⁵

Although the recidivist drug enhancements are found in the penalty provisions of various drug statutes, they are commonly referred to as “851 enhancements.” Consistent with common usage, this publication thus uses the term “851 enhancement” to refer to the increased penalty applicable to offenders who have been convicted of a prior felony drug offense.

Relief Provisions

Offenders may receive relief from a drug mandatory minimum penalty, including a recidivist enhancement, in two ways. First, if the prosecution files a motion based on the defendant’s “substantial assistance” to authorities in the investigation or prosecution of another person, a sentencing court may impose a sentence below the statutory minimum pursuant to 18 U.S.C. § 3553(e).²⁶ Second, if the defendant meets the “safety valve” criteria





provided in 18 U.S.C. § 3553(f), the statute provides that the court shall impose a sentence pursuant to the sentencing guidelines without regard to the otherwise applicable statutory minimum. Unlike a substantial assistance departure—which applies to all federal offenses carrying a mandatory minimum penalty—the safety valve statute applies only in cases in which a defendant faces a mandatory minimum penalty after being convicted of a drug trafficking offense listed in the statute.²⁷ These relief mechanisms are described in greater detail in the 2017 *Overview Publication*.²⁸

The guidelines incorporate both statutory mechanisms for relief from mandatory minimum penalties. Section 5K1.1 in the *Guidelines Manual* authorizes a departure from the guideline range if the offender provided substantial assistance to law enforcement and the government files a motion to that effect. However, because §5K1.1 cannot authorize courts to impose a sentence below a mandatory minimum penalty, the sentencing court may not do so unless the government files a motion pursuant to 18 U.S.C. § 3553(e). For defendants who qualify for relief from the mandatory minimum penalty pursuant to the statutory safety valve, the guideline at §5C1.2 directs the court to “impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence.”²⁹ The drug trafficking guideline at §2D1.1 also provides for a 2-level decrease if the defendant meets the safety valve subdivision criteria listed at §5C1.2.³⁰ This decrease applies regardless of whether the defendant was convicted of an offense carrying a mandatory minimum penalty.

Recent Changes

Beginning in 2010, the Department of Justice amended its guidance to federal prosecutors regarding which offenses to charge, including by requiring more targeted charging of offenses carrying a mandatory minimum penalty. Before 2010, Department of Justice policy had directed prosecutors to charge the most serious, readily provable offenses supported by the facts and that would result in the longest sentence.³¹ In 2010, then-Attorney General Eric Holder issued a memorandum instructing that while a prosecutor “should ordinarily charge” the most serious offense, the charging decision requires an individual assessment of the facts of the case, considering the purpose of federal criminal laws and the best use of federal resources. The “Holder Memorandum,” as it has come to be called, required the same individualized assessment in plea bargaining and sentencing.³²

After the Supreme Court’s 2013 decision in *Alleyne v. United States*,³³ which held that facts that trigger a mandatory minimum penalty are elements that must be submitted to the jury and proven beyond a reasonable doubt,³⁴ the Department of Justice further modified its charging policies as part of its Smart on Crime Initiative. Noting that “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,” the Department of Justice issued a new policy refining its charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders.³⁵ The

Smart on Crime Initiative instructed that “prosecutors should decline to charge the quantity necessary to trigger the mandatory minimum sentence if the defendant meets” certain criteria. The memorandum further provided that “[p]rosecutors 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,” instructing prosecutors to consider the following factors:

- Whether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization;
- Whether the defendant was involved in the use or threat of violence in connection with the offense;
- The nature of the defendant’s criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses;
- Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels;
- Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants; and
- Other case-specific aggravating or mitigating factors.³⁶

The following year, the Department of Justice issued additional guidance regarding the role of plea negotiations in filing recidivist

enhancements.³⁷ Referencing the previously provided list of factors, the guidance explicitly stated that “[w]hether a defendant is pleading guilty is not one of the factors enumerated in the charging policy.”³⁸ It further provided that the “enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty.”³⁹ Acknowledging that there may be certain circumstances (for example, new information, recognition of cooperation, or a reassessment of the strength of the case) that may warrant forgoing or dismissing a previously filed information in connection with a guilty plea, it concluded that “[a] practice of routinely premising the decision to file an § 851 enhancement solely on whether a defendant is entering a guilty plea, however, is inappropriate and inconsistent with the spirit of the policy.”⁴⁰

The Department guidance, which was in effect during the period the Commission analyzed for this publication, likely impacted the rate at which an 851 information was filed. Different trends, however, may emerge because of changed policies with respect to the recidivist enhancements. Attorney General Jefferson Sessions rescinded both policies regarding section 851 and issued guidance reverting to the previous policy that “prosecutors should charge and pursue the most serious, readily provable offense” and stating that “the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.”⁴¹





United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)



4 Data Analysis



The Commission's Updated Study of Mandatory Minimum Penalties

In its 2011 *Mandatory Minimum Report*, the Commission recommended that Congress reassess the severity and scope of the recidivist enhancements for drug offenses at 21 U.S.C. §§ 841 and 960. The Commission noted that, in certain cases, the doubling of mandatory minimum penalties, and the mandatory term of life imprisonment could be viewed as disproportionate and excessively severe, as these enhancements far exceed the more graduated proportional increases provided by the guidelines. The Commission also concluded that section 851 enhancements were inconsistently applied across judicial districts and recommended that Congress consider amending the definition of “felony drug offense” to reduce inconsistent application of the enhancement.⁴²

The Commission continues to receive inquiries regarding the application of section 851 from Congress, the Department of Justice, and judges. Given the findings in the 2011 *Mandatory Minimum Report*, as well as ongoing interest in this subject, the Commission provides this publication to update the information and analyses and to further inform discussion of the Commission’s recommendations regarding the use of mandatory minimum penalties.

For this publication, the Commission analyzed data for all offenders sentenced in fiscal year 2016 who appeared eligible for an 851 enhancement, including offenders for whom the government never filed an information or filed and later withdrew. This publication provides

data regarding relevant offender and offense characteristics, including demographic data and basic criminal history information⁴³ and provides comparisons between all offenders who appeared eligible for an 851 enhancement, offenders for whom an information was filed, offenders for whom an information was filed and later withdrawn, and offenders who remained subject to the enhancement at sentencing.

2011 RECOMMENDATIONS

In its 2011 *Mandatory Minimum Report*, the Commission found significant variation in the application of the recidivist enhancements for drug offenses, and recommended that Congress more finely tailor their scope and severity to reduce inconsistency.

Methodology

In order to further explore the application of mandatory minimum penalties, specifically the enhanced statutory penalties for drug offenses, the Commission conducted a 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 States Code; and (2) prior qualifying drug convictions.

In considering the first factor, the Commission limited its analysis to offenders sentenced under §§2D1.1 and 2D1.2 for purposes of this publication. Though a small minority of offenders against whom an 851 information was filed were sentenced under other guidelines,⁴⁴ the majority of offenders (93.7%; n=757) against whom an 851 information was filed were sentenced under one of those two guidelines. Limiting the analyses to these two guidelines focuses this updated analysis on the statutory penalty provisions that are generally at the heart of policy discussions involving drug mandatory minimum penalties, including the recidivist enhancements for drug offenses at 21 U.S.C. §§ 841 and 960.⁴⁵

The Commission next analyzed the offenders sentenced under §§2D1.1 and 2D1.2 to determine whether an 851 enhancement could have applied based on the offender's prior criminal history. As noted earlier, offenders are eligible if they have a prior conviction for a "felony drug offense," which includes any "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."⁴⁶

Recent technological advances have expanded the Commission's ability to collect complete information on the number of convictions and the types of offenses in the criminal histories of federal offenders. As part of this process, the Commission classified prior drug offenses as either Drug Trafficking, Drug Possession, or an Unspecified Drug

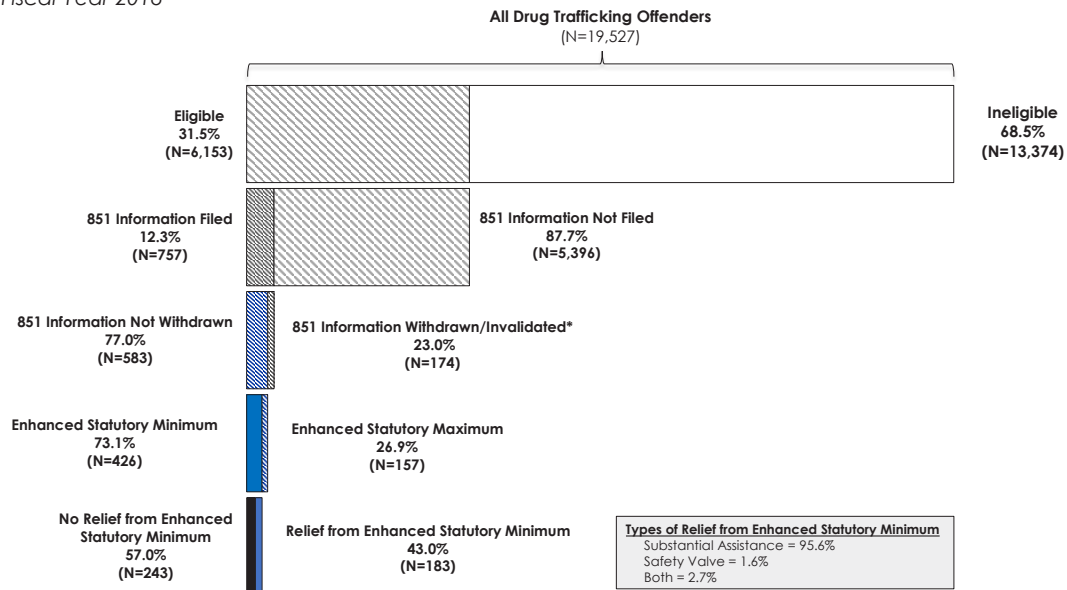
Offense (which generally includes convictions for offenses "related to" drugs, such as use of a telephone to facilitate drug trafficking).⁴⁷ For purposes of this analysis, the Commission considered an offender "eligible" for an 851 enhancement if the offender had previously been convicted of any drug trafficking offense. The Commission also included prior convictions for drug possession or other drug-related offenses for which the documentation clearly indicated that an 851 information had been filed, as well as any other such prior drug conviction that received three criminal history points (*i.e.*, those offenses that received sentences exceeding 13 months of imprisonment). The Commission thus assumed that, in addition to any drug trafficking offense, any prior drug offense for which the offender received three criminal history points qualified as a felony drug offense in that it was punishable by more than one year in prison.⁴⁸

Finally, the Commission identified all cases in its fiscal year 2016 datafile in which the Department of Justice filed an 851 information seeking enhanced penalties,⁴⁹ and collected the following data points: (1) the statutory minimum and maximum penalties; (2) the date on which the defendant was indicted; (3) the date on which the 851 information was filed; (4) the defendant's prior drug offenses, including the date of sentence and penalty imposed; (5) whether the prior drug offense received criminal history points in the guideline calculation; (6) offense type and whether it was a felony; (7) whether an 851 information was withdrawn or found to be inapplicable by the court; and (8) whether an offender received statutory relief from mandatory minimum penalties.





Figure 1. Eligibility And Application Of 851 Enhancements
 Fiscal Year 2016



* Four offenders received court relief from the 21 U.S.C. § 851 statutory enhancement due to a finding regarding a previous offense.
 SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Prevalence and Application of 851 Enhancements

Eligibility and Filed 851 Information

As reflected in Figure 1 above, just under one-third (31.5%; n=6,153) of the 19,527 drug trafficking offenders sentenced in fiscal year 2016 appeared to be eligible for an enhanced statutory penalty.⁵⁰ As noted above, however, the enhanced penalties are not automatically triggered upon conviction. Rather, prosecutors must take the affirmative step of filing an information pursuant to the procedural requirements set forth in 21 U.S.C. § 851. It is only if such information is filed and the court finds that the prior conviction qualifies under section 851 at a hearing that the court must impose a sentence consistent with the enhanced statutory penalties.

In fact, an information was filed in only a small percentage of the cases in which the offender appeared to be eligible for the recidivist enhancement. As set forth in Figure 1, of the 6,153 offenders eligible for the enhanced penalties, the government sought the enhancement in 757 cases (12.3%). In an additional 889 cases (14.4%), the government specifically stated in a plea agreement or other court document that it was not going to file an 851 information where, presumably, it could have done so.

Withdrawal/Invalidation of Filed 851 Information

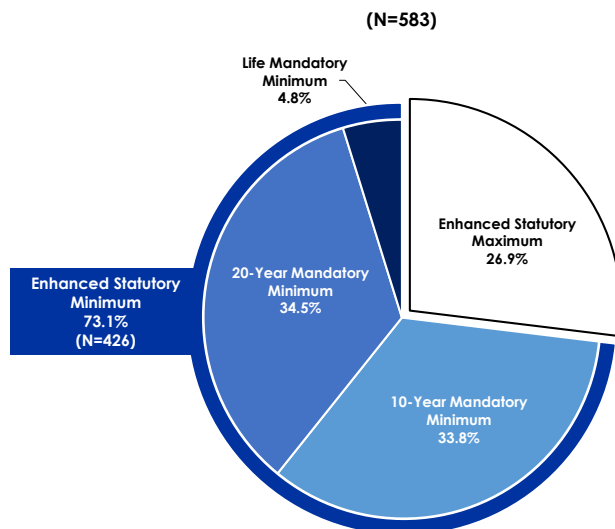
Even when an 851 information was filed, there were a notable number of cases in which the government ultimately withdrew the 851 information or in which the court found the recidivist enhancement inapplicable because the offender’s prior criminal conviction was insufficient to satisfy the requirements for the enhanced penalties.

As shown in Figure 1, the government ultimately withdrew the 851 information in over one-fifth (22.5%; n=170) of the 757 cases in which an 851 information was filed. The court made a finding in four additional cases that the recidivist penalty did not apply and therefore that the 851 information was not valid. As a result, there were 583 cases in which an 851 information was not withdrawn or found invalid before sentencing, representing 9.5 percent of those offenders who were eligible for the enhancement in fiscal year 2016.

The filing of an 851 information has one of two principle effects, depending on the statute of conviction. In most instances, the 851 information triggers an increase in 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 triggers an increased statutory maximum penalty.⁵¹ For example, an offender convicted of trafficking a quantity of drugs that does not meet the quantity threshold necessary to trigger a mandatory minimum penalty would face a 20-year statutory maximum penalty under 21 U.S.C. § 841(b)(1)(C). However, if such offender has a prior felony drug offense and an 851 information is filed, the applicable statutory maximum increases to 30 years.

As shown in Figure 2, nearly three-quarters (73.1%; n=426) of the 583 offenders who did not have the 851 withdrawn were convicted of an offense carrying an enhanced

Figure 2. Length Of Increased Statutory Mandatory Minimum Penalty When 851 Information Was Not Withdrawn Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.



statutory minimum penalty. Offenders who did not have the 851 information withdrawn were most frequently convicted of violating a statute carrying an enhanced mandatory minimum penalty of 20 years of imprisonment (34.5%), followed closely by offenders facing an enhanced mandatory minimum penalty of ten years (33.8%). Just under five percent (4.8%) were convicted of an offense carrying an enhanced mandatory minimum penalty of life imprisonment.

Statutory Relief from an Enhanced Penalty

Over one-third (35.2%) of the 583 cases in which an 851 information had not been withdrawn by the time of sentencing were relieved of the enhanced penalty because they received a substantial assistance reduction or qualified under the statutory safety valve. The overwhelming majority of such offenders received a reduction for providing substantial assistance (98.5%),⁵² while only a very small percentage (1.5%) received safety valve relief only.⁵³

Of course, the effect of receiving statutory relief varies depending on whether the offender faced an enhanced statutory maximum or an enhanced statutory minimum. For offenders who face an enhanced statutory minimum, the impact of the statutory relief is the same as that for any other mandatory minimum—that is, the court may impose a sentence without regard to the otherwise applicable minimum. In the case of an enhanced statutory maximum, statutory relief has no impact on the term of imprisonment.⁵⁴

Given this distinction, the following discussion of offenders who remained subject to an enhanced penalty pursuant to an 851 information focuses only on those offenders who faced an enhanced statutory minimum term of imprisonment. It is these offenders who receive the greatest benefit from statutory relief and therefore those for whom the lack of relief has the greatest impact on the court's authority and the ultimate sentence imposed.

As noted above, 426 of the 583 offenders who did not have the 851 information withdrawn were convicted of an offense carrying an enhanced statutory minimum penalty.⁵⁵ Of those 426 offenders, 183 received some form of statutory relief from the otherwise applicable mandatory minimum penalty—175 (41.1%) received a substantial assistance departure, three (0.7%) only received relief through safety valve and five (1.2%) received relief via substantial assistance and safety valve.⁵⁶ Thus, as shown on Figure 1, over half (57.0%) of the 426 offenders facing an enhanced statutory minimum penalty remained subject to that penalty at sentencing.

Geographic Distribution

As detailed in the Commission's 2011 *Mandatory Minimum Report*, prosecutors reported wide variations in the practices surrounding the filing of an 851 information seeking enhanced mandatory minimum penalties during the course of Commission staff visits to 13 judicial districts over the period of June through August 2011.⁵⁷ In nine districts,

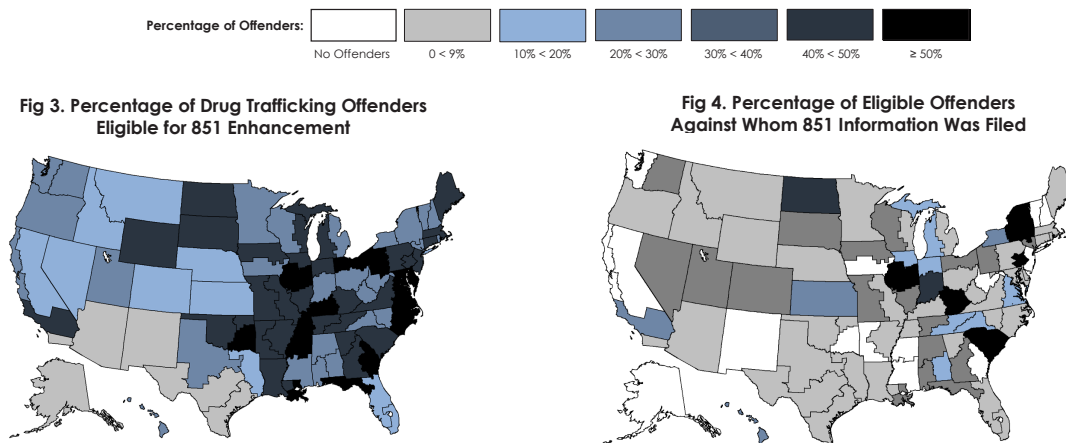
prosecutors related that they did not file the information automatically in every applicable case, but instead advised that they delayed filing the information while engaging in plea negotiations.⁵⁸ In two districts, prosecutors advised that they filed the information triggering the enhanced penalties in every applicable case and did not withdraw the information under any circumstances. In another district, prosecutors suggested that office policy required that an 851 information be filed in every applicable case, absent supervisory approval. These prosecutors noted, however, that the timing of the filing was left to the discretion of the individual prosecutor handling the case. In contrast to those districts in which an 851 information was always filed, in one district, the prosecutors advised that they rarely filed the information. The prosecutors in this district described the enhanced penalties as a “hammer for the worst offenders,” but otherwise too harsh for low-

level drug offenders. Prosecutors did advise, however, that an 851 information would be filed in any case where the offender insisted on going to trial.⁵⁹

In fiscal year 2016, geographic differences in the filing, withdrawal, and application of 851 enhancements for eligible drug trafficking offenders persisted.⁶⁰ For example, as discussed in more detail below, districts varied significantly with regard to the frequency with which an 851 information was filed against eligible offenders. Similarly, several of the districts in which an 851 information was most frequently filed were also among those least likely to withdraw an information.

In the majority of districts, at least one-quarter of all drug trafficking offenders were eligible for an 851 enhancement. Specifically,

Figures 3 and 4. Percentage Of Drug Trafficking Offenders Eligible For 851 Enhancement And Against Whom 851 Information Was Filed By District Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Criminal History Datafile, USSCFY16.





in 73 of 94 districts, the eligibility rates were greater than 30.0 percent, with most (59) having between 30.0 and 49.0 percent of drug trafficking offenders eligible for the enhanced penalties. Fourteen districts had rates that were greater than 49.0 percent, while there were only eight districts in which less than 20.0 percent of offenders were eligible for the enhancement.⁶¹ The distribution among districts is depicted in Figure 3 on the previous page.

The Commission’s analysis, however, revealed significant variation in the extent to which the enhanced penalties were sought against eligible offenders. As set forth in Table 1, the Central District of Illinois had the highest percentage of eligible drug trafficking offenders against whom the government filed an information seeking the enhancement (74.6%). This was considerably higher than the next highest district, the Northern District

of New York (56.1%). On the opposite end of the spectrum, 19 districts, represented in white in Figure 4, had no cases in which an 851 information was filed in fiscal year 2016.⁶²

Districts also varied significantly in the rate at which an 851 information was filed and later withdrawn. As reflected in Tables 2 and 3, the rates at which a filed 851 information was withdrawn ranged from zero to 86.4 percent of those filed in the district. Even among the districts with the ten highest withdrawal rates, the rate ranged from a high of 86.4 percent in the Western District of North Carolina to less than a quarter (23.1%) in the Western District of Pennsylvania.

Table 1. Districts With The Highest Percentage Of Eligible Drug Trafficking Offenders Against Whom 851 Information Was Filed Fiscal Year 2016

District	Percent Filed
Central District of Illinois	74.6%
Northern District of New York	56.1%
Eastern District of Pennsylvania	55.9%
Eastern District of Kentucky	51.9%
District of South Carolina	50.6%
District of North Dakota	48.4%
Southern District of Indiana	40.5%
District of Hawaii	34.8%
Central District of California	31.3%
District of Kansas	31.3%

SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

When analyzing these withdrawal rates, other interesting, but seemingly conflicting relationships emerge. Several of the districts with the highest rates of filing an 851 information also had among the lowest rates of withdrawal. For example, an 851 information was filed in 44 cases (74.6% of eligible offenders) in the Central District of Illinois, with only three (6.8%) withdrawn. A similar trend was seen in several of the other districts with high filing rates. In the Northern District of New York (an information was filed against 56.1% of eligible offenders), the 851 information was not withdrawn in any of the 23 cases in which it was filed. Similar rates existed in the Eastern District of Kentucky (51.9% filing rate), where an 851 was filed in 54 cases (51.9% of those eligible) and only one (1.9%) was withdrawn, and the District of North Dakota where an information was filed in 30 cases (48.4% filing rate) and only three (10.0%) were withdrawn.

Conversely, the data suggests that some districts have higher rates of withdrawal even where they appear to be more selective in filing an 851 information. For example, an 851 information was filed against just over one-quarter of eligible offenders (27.2%) in the Western District of North Carolina. Even with the relatively low rate of filing, the district tops the list of withdrawal rates, with the 851 information being withdrawn in 19 of the 22 (86.4%) cases in which it was filed. A similar pattern is seen within the other two districts with the highest rates of withdrawal. An 851 information was filed against 31.3 and 23.4 percent of eligible offenders, respectively, in the Central District of California and the Northern District of Illinois. Both subsequently had the information withdrawn in at least half (78.1% and 50.0%) of these cases by the time of sentencing.



Tables 2 and 3. Districts¹ With Highest And Lowest Percentages Of Offenders For Whom 851 Information Was Withdrawn²
Fiscal Year 2016

Table 2. Highest Percentage

District	Percent Withdrawn
Western District of North Carolina (19 of 22)	86.4%
Central District of California (32 of 41)	78.1%
Northern District of Illinois (9 of 18)	50.0%
District of Kansas (5 of 15)	33.3%
Southern District of Texas (4 of 12)	33.3%
Northern District of Iowa (3 of 10)	30.0%
District of South Carolina (12 of 42)	28.6%
Western District of Texas (7 of 25)	28.0%
Southern District of Indiana (4 of 15)	26.7%
Western District of Pennsylvania (3 of 13)	23.1%

Table 3. Lowest Percentage

District	Percent Withdrawn
Northern District of New York (0 of 23)	0.0%
Southern District of New York (0 of 20)	0.0%
Eastern District of Kentucky (1 of 54)	1.9%
Eastern District of Virginia (1 of 29)	3.4%
Western District of New York (1 of 17)	5.9%
Central District of Illinois (3 of 44)	6.8%
Eastern District of Tennessee (3 of 43)	7.0%
Northern District of Ohio (1 of 12)	8.3%
District of North Dakota (3 of 30)	10.0%
Western District of Missouri (3 of 25)	12.0%

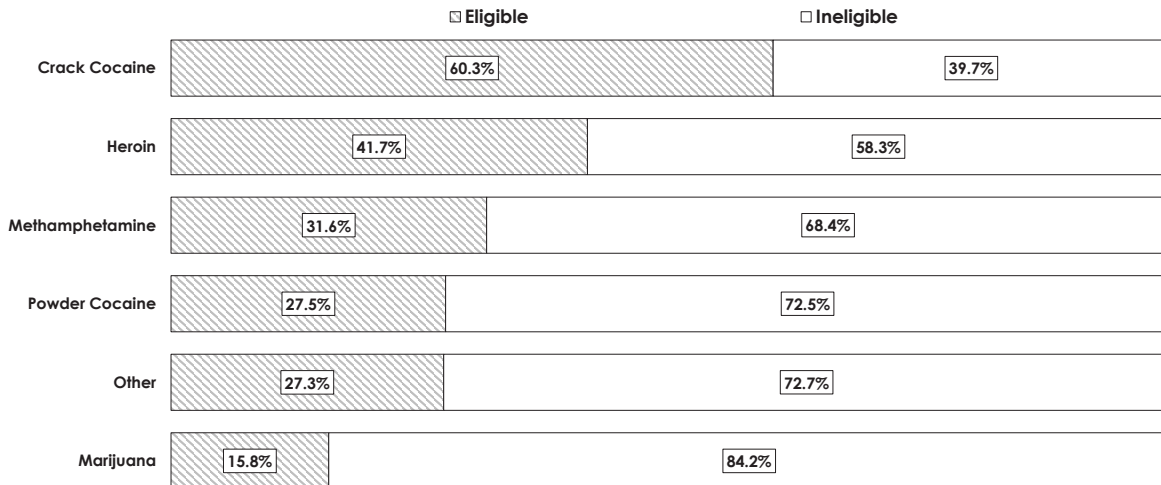
¹ Districts with 10 or more filings.

² Four offenders received Court relief from the 21 U.S.C. § 851 statutory enhancement as the Court found the offender's prior criminal convictions insufficient to satisfy the requirements described in 21 U.S.C. § 851.

SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.



Figure 5. Eligibility Of 851 Enhancement By Drug Type
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Criminal History Datafile, USSCCHFY16.

Drug Type

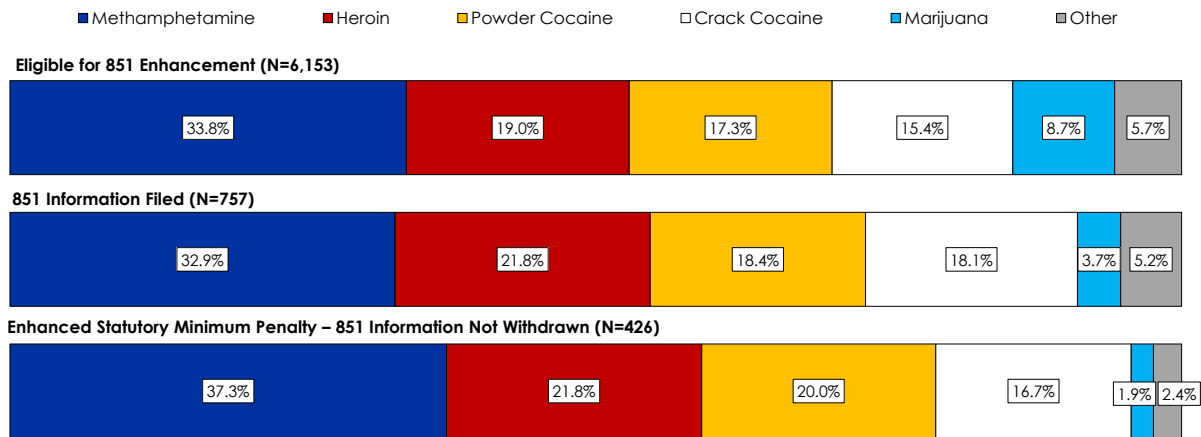
There were notable differences in eligibility rates by drug type as depicted in Figure 5. For example, the majority (60.3%) of crack cocaine offenders were eligible for an enhanced statutory penalty. Conversely, marijuana offenders were least likely to be eligible for the enhanced penalties, with only 15.8 percent meeting the eligibility requirements. The percentage of eligible offenders for each of the other drug types was below 50.0 percent, but also varied: 41.7 percent of heroin offenders, 31.6 percent of methamphetamine offenders, 27.5 percent of powder cocaine offenders, and 27.3 percent of other drug offenders were eligible.

As reflected in Figure 6, methamphetamine offenders comprised the largest group (33.8%) among drug trafficking offenders eligible for an 851 enhancement. Heroin offenders

(19.0%), powder cocaine offenders (17.3%), crack cocaine offenders (15.4%), and marijuana offenders (8.7%) followed.

Despite the variations in eligibility among the various drug types, there was generally consistency between eligibility and the filing of an 851 information when considering drug type. As demonstrated in Figure 6, the rate of filing an 851 enhancement by drug type was relatively consistent with the percentage of eligible offenders by drug type, with one notable exception. While marijuana offenders comprised 8.7 percent of drug trafficking offenders eligible for the enhanced penalties, such offenders were only 3.7 percent of those against whom the government filed an 851 information. The proportions for the other drug types were relatively similar, with the government seemingly seeking the enhancement slightly more often for crack

Figure 6. Eligibility And Application Of 851 Enhancement By Drug Type
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Criminal History Datafile, USSCCHFY16; 2016 851 Datafile, USSC851FY16.

cocaine offenders (18.1% of cases in which an information was filed, compared to 15.4% of eligible offenders) and heroin offenders (21.8% of cases in which an information was filed, compared to 19.0% of all eligible offenders).⁶³

The mix of drug types does change slightly further when considering only those cases involving an enhanced mandatory minimum penalty. As reflected in Figure 6, of the 426 cases involving an 851 information that was not withdrawn by the time of sentencing, the proportion of methamphetamine cases increased to 37.3 percent of the cases. In addition, the proportion of marijuana offenders further decreased to 1.9 percent, indicating that the 851 enhancement is rarely used to enhance an applicable statutory minimum for such offenders.

Criminal History

Nearly half (49.4%) of all drug offenders were in Criminal History Category (CHC) I, with the remainder distributed throughout Criminal History Categories (CHC II – 12.5%; CHC III – 14.1%; CHC IV – 7.5%; CHC V – 4.3%; and CHC VI – 12.3%).

Not surprisingly, offenders who were eligible for an 851 enhancement were in higher Criminal History Categories than all drug offenders. This is because the prior drug offenses that trigger an 851 enhancement have generally already been accounted for through application of the sentencing guidelines' criminal history rules and therefore incorporated into the otherwise applicable guideline range.⁶⁴ One-third (33.0%) of offenders eligible for an 851 enhancement were in Criminal History Category VI. The next largest portion of





Table 4. Eligibility And Application Of 851 Enhancement By Criminal History Category
 Fiscal Year 2016

	All Drug Offenders	Eligible for 851	851 Filed	851 Withdrawn	851 Not Withdrawn	Subject to 851 at Sentencing
Total (# of offenders)	19,527	6,153	757	174	583	243
Criminal History Category						
I	49.4%	8.4%	4.2%	6.9%	3.4%	1.2%
II	12.5%	14.0%	11.2%	12.6%	10.8%	10.7%
III	14.1%	21.3%	20.1%	20.7%	19.9%	16.5%
IV	7.5%	14.3%	13.0%	13.8%	12.7%	15.6%
V	4.3%	8.9%	8.2%	7.5%	8.4%	8.2%
VI	12.3%	33.0%	43.3%	38.5%	44.8%	47.7%

SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16 and 2016 Datafile, USSCFY16.

offenders were in Criminal History Category III (21.3%). The portion of offenders eligible for the enhancement in Criminal History Category I was much smaller than for all drug offenders (8.4%). This also is to be expected, as all offenders included in the group eligible for the enhancement must have a conviction for a prior felony drug offense. To be both eligible for the enhancement and in Criminal History Category I, an offender must have been convicted of a prior felony drug offense for which the offender was sentenced to a term of probation or less than 60 days of imprisonment,⁶⁵ or that was outside the applicable time period for purposes of computing criminal history under §4A1.2(d) and (e).⁶⁶ Unlike the rules for calculating criminal history, the 851 enhancement has no limitation on the timeframe in which a qualifying conviction must have occurred.

Of those eligible offenders, 46.3 percent had only one qualifying prior drug conviction,⁶⁷ while 53.7 percent had two or more such qualifying convictions.⁶⁸ A small percentage (0.3%) were also convicted under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), and more than one-fifth (21.2%) qualified as a career offender under §4B1.1.⁶⁹

Offenders for whom the government filed for the enhancement tended to be in higher Criminal History Categories than eligible offenders overall. For those filed, 43.3 percent were in Criminal History Category VI. Although a smaller percentage than of those eligible for the enhanced penalties, of those that the government sought the enhancement, 4.2 percent were in Criminal History Category I.

Of those offenders for whom the government filed an information, 39.5 percent had one qualifying prior drug conviction,⁷⁰ while 60.5 percent had two or more such prior qualifying convictions.⁷¹ Compared to eligible offenders, a larger percentage (1.2%) qualified as an armed career criminal under ACCA or as a career offender (30.8%).

In the cases in which the government withdrew the 851 information, offenders tended to have slightly less severe criminal histories compared to all offenders for whom the information was filed. For those offenders whose information was withdrawn, 38.5 percent were in Criminal History Category VI. Conversely, a slightly higher percentage of such

offenders were in Criminal History Categories I and II (6.9% and 12.6%, respectively).

Of those offenders whose information was withdrawn, 48.9 percent had one qualifying prior drug conviction,⁷² while 51.1 percent had two or more such prior qualifying convictions.⁷³ Similar to offenders eligible for the enhancement, a small percentage (0.6%) qualified as an armed career criminal under ACCA, and slightly more than a quarter (26.4%) qualified as a career offender.

Offenders who remained subject to an enhanced mandatory minimum penalty at the time of sentencing were in even higher Criminal History Categories. Nearly half (47.7%) were in Criminal History Category VI, while only 1.2 percent were in Criminal History Category I. Among this group of offenders, nearly all of the relevant prior drug offenses were felonies

(86.8%), and the average sentence imposed for the prior drug offenses was 48 months. Consistent with this finding, only a very small percentage of offenders remained subject to an enhanced statutory minimum penalty based upon predicate drug offenses for which they received only probationary sentences (4.1%; n=10).

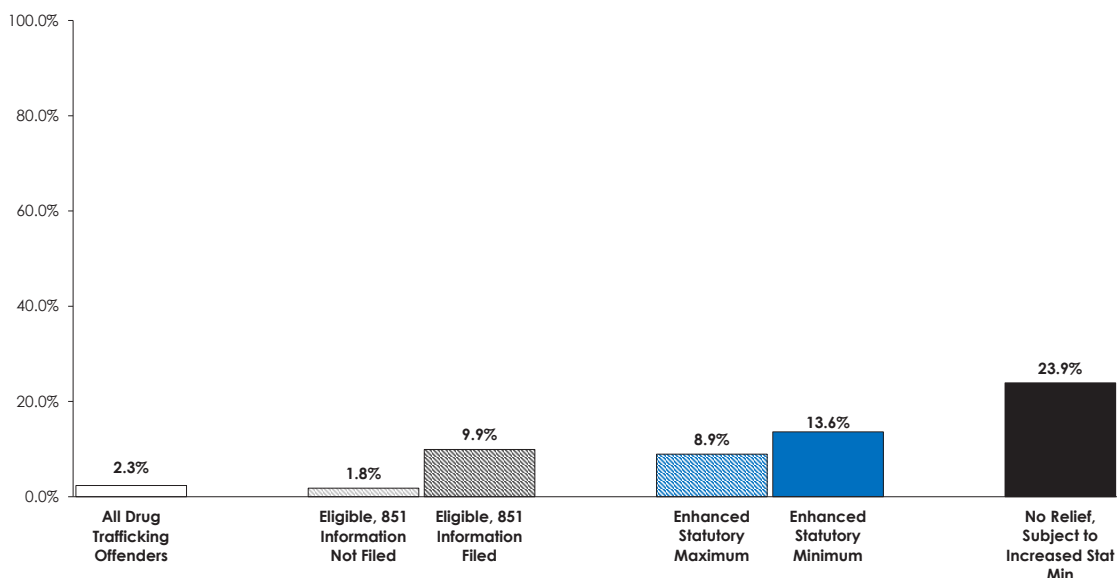
Plea and Trial Rates

As set forth in Figure 7 below, offenders against whom the government filed an 851 enhancement were over five times as likely to proceed to trial than eligible offenders for whom the enhanced penalty was not sought.

In fiscal year 2016, 9.9 percent of offenders against whom the government filed an 851 information proceeded to trial, compared to only 2.3 percent of all drug offenders and 1.8



Figure 7. Eligibility And Application Of 851 Enhancement By Percentage Of Offenders Going To Trial Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.



percent of those offenders who were eligible, but against whom the 851 information was not filed. Among those against whom an 851 information was filed, offenders who faced an enhanced statutory minimum penalty were more likely to proceed to trial than offenders who faced an enhanced statutory maximum (13.6% compared to 8.9%).

Unsurprisingly, those offenders who remained subject to an enhanced statutory minimum penalty had the highest trial rate, with nearly one-quarter (23.9%) proceeding to trial. By contrast, only 2.7 percent of all federal offenders proceeded to trial in fiscal year 2016. Such offenders also tended to receive the downward adjustment under the guidelines for acceptance of responsibility⁷⁴ at a decreased rate (74.9% compared to 95.8% for all federal offenders in fiscal year 2016).

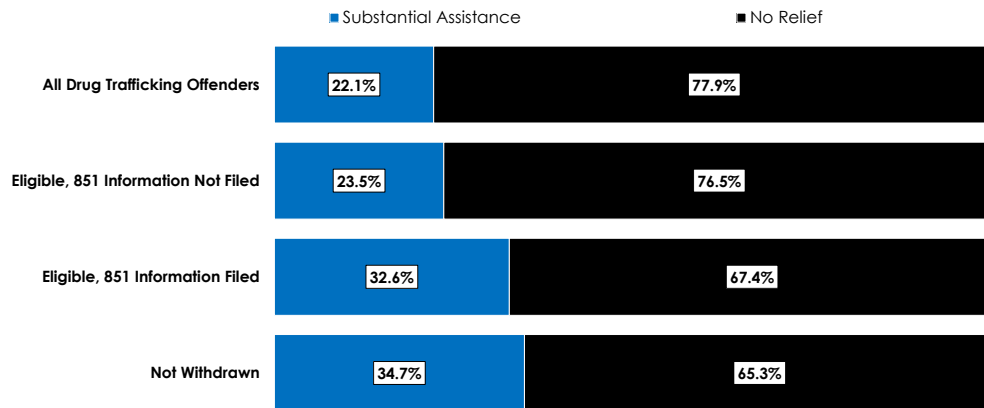
Substantial Assistance

The Commission also analyzed the relationship between the rates of substantial assistance relief under §5K1.1 and application of an 851 enhancement. Offenders convicted of an offense carrying a drug mandatory minimum penalty, including the enhanced penalties discussed in this publication, are provided an incentive to plead guilty and cooperate with law enforcement officials. Namely, when the government files a motion indicating that the defendant has substantially cooperated, 18 U.S.C. § 3553(e) grants the court authority to impose a sentence below a mandatory minimum penalty. Because the Commission has also incorporated this incentive into the guidelines

at §5K1.1, offenders not facing a mandatory minimum penalty are also eligible to receive a departure from the applicable guideline range by providing substantial assistance to the government. As was the case when the Commission analyzed all drug mandatory minimum penalties,⁷⁵ there is some correlation between the enhanced penalties provided for through the filing of an 851 information and the likelihood that an offender received a reduced sentence for providing substantial assistance.⁷⁶ The impact of the 851 information is clearly seen when comparing substantial assistance rates for those eligible offenders against whom an information was not filed to those eligible offenders against whom an information was filed. As demonstrated in Figure 8 on the next page, nearly one-third (32.6%) of offenders against whom the government sought the enhancement received a reduction for substantial assistance, while less than one-quarter (23.5%) of eligible offenders against whom the government did not pursue the enhanced penalties received the reduction. The rate of substantial assistance was even higher where the 851 information had not been withdrawn by the time of sentence and, therefore, the offender continued to face the increased penalties (34.7%).

This trend is also generally borne out at the district level among those districts that have a high rate of filing an 851 information, coupled with a low rate of withdrawal. As noted above,⁷⁷ several of the districts that had the highest rates of filing an 851 information—including the Central District of Illinois, the Northern District of New York, the Eastern District of Kentucky, and the District of North Dakota—

Figure 8. Eligibility And Application Of 851 Enhancement By Percentage Of Offenders Receiving Substantial Assistance Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

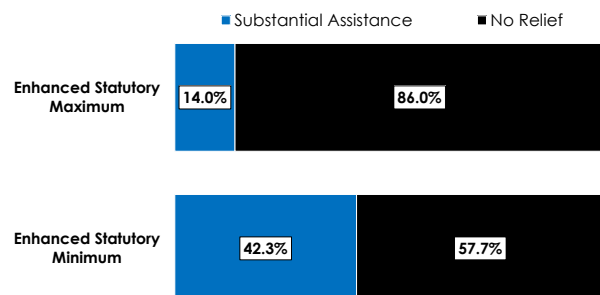
also had among the lowest rates of withdrawal. The offenders in these districts who faced an enhanced mandatory minimum penalty provided substantial assistance at rates (38.5%, 53.3%, 27.8%, and 85.2%, respectively) that were consistently higher than the substantial assistance rate among all drug offenders (22.1%).

The rate of substantial assistance in cases in which the government withdrew the 851 information, however, is arguably contrary to the above trend. One might expect a high rate of cooperation among such offenders, and that such cooperation in turn resulted in the withdrawal. In fact, during the Commission’s site visits in 2011, some prosecutors noted that “they might withdraw the Section 851 information if the offender agreed to provide substantial assistance.”⁷⁸ While confirming this might be the practice in some districts, the data did not demonstrate a clear correlation between cooperation and having an information

withdrawn. In fiscal year 2016, the rate of substantial assistance for those offenders for whom the government withdrew the 851 information (25.9%) was only slightly higher than that for all eligible offenders (24.5%).

The incentive to provide substantial assistance is even more stark when comparing those offenders who faced an enhanced statutory minimum penalty to those offenders who faced an enhanced statutory maximum. As reflected

Figure 9. Percentage Of Offenders Eligible For 851 Enhancement Receiving Substantial Assistance Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.





in Figure 9, offenders facing an enhanced statutory minimum were more than three times as likely to have provided substantial assistance to the government (42.3%) as compared to 14.0 percent of offenders who faced an enhanced statutory maximum penalty.

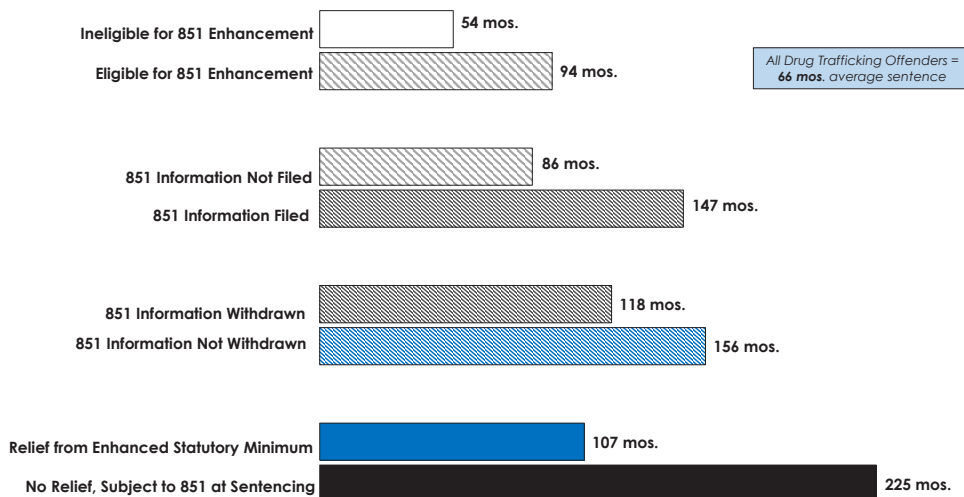
Average Sentence

As demonstrated in Figure 10, the impact of a filed 851 information on the average sentenced imposed is substantial. This impact is particularly noticeable when comparing the average sentences for eligible offenders against whom an information was not filed to the sentences for eligible offenders against whom

an information was filed. When the government filed an 851 information, offenders received on average a sentence that was over five years longer (61 months) than for offenders who were eligible but against whom the information had not been filed (147 months compared to 86 months).

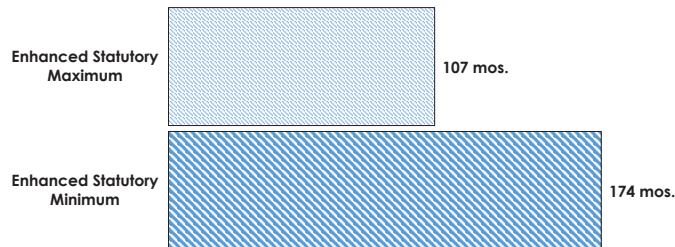
Once an 851 information was filed, the government’s subsequent determinations also had a significant impact on the ultimate sentence. Though still considerably longer than when the information was not filed in the first place (118 months compared to 86 months), a government decision to withdraw an 851 information generally resulted in a significantly reduced

Figure 10. Average Sentence Length By Eligibility And Application Of 851 Enhancement
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Figure 11. Average Sentence Length For Offenders Against Whom 851 Information Was Filed And Not Withdrawn Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

sentence. As shown in Figure 10, offenders in such a scenario had an average sentence of 118 months, which is over three years shorter than when the 851 information was not withdrawn (156 months).

A government motion for a substantial assistance departure reduction is also a key factor on sentence length. Offenders who remained subject to an enhanced statutory minimum penalty at sentencing had average sentences of nearly 19 years (225 months), approximately ten years longer than the average sentence for offenders who received relief from an enhanced statutory minimum penalty (107 months).

When an 851 information was not withdrawn, average sentences also varied significantly based on whether the enhancement increased the statutory minimum or increased the statutory maximum only. While the average sentence was 156 months in cases where an 851 information had not been withdrawn by the

time of sentencing, it was over one and half times longer for cases involving an increased statutory minimum (174 months) as it was for cases involving an increased statutory maximum only (107 months).⁷⁹ See Figure 11 above.

Among those who remained subject to the enhanced mandatory minimum penalty, the most common sentence imposed was ten years of imprisonment (28.4%). Twenty offenders (8.2%) received a life sentence.





Offender Demographics—Race

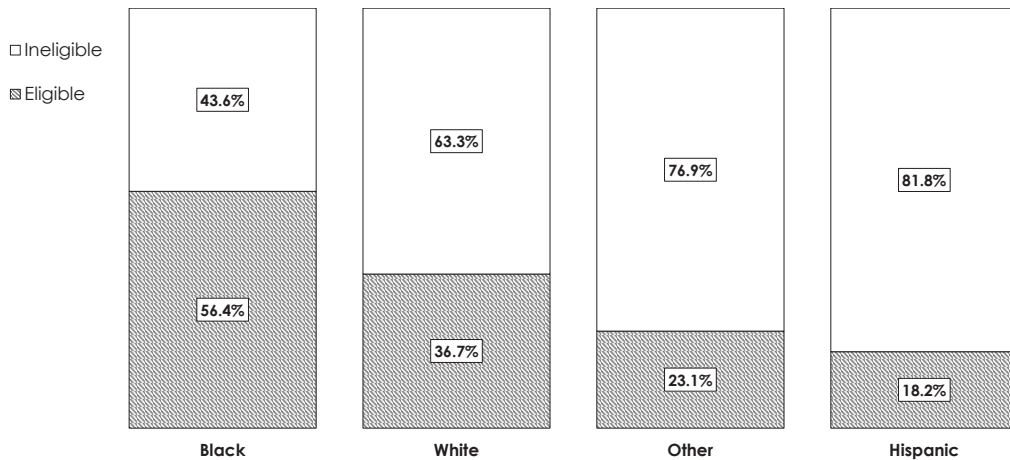
The Commission also considered the application and impact of the enhanced penalties on various racial groups. As discussed below, 851 enhancements have a significant impact on all racial groups. However, the data demonstrates that the provisions applied most frequently to Black offenders and that such offenders therefore were most significantly impacted.

This finding is consistent with the fact that Black offenders as a group are more likely to have the requisite prior convictions to qualify for the enhancement. As set forth in Figure 12, more than half (56.4%) of Black drug trafficking offenders were eligible for the enhancement, while just over one-third (36.7%) of White drug trafficking offenders were eligible. By contrast, only 18.2 percent of Hispanic drug trafficking

offenders were eligible in fiscal year 2016. Black drug trafficking offenders were eligible for an 851 enhancement most often because, on average, they had higher criminal history scores than other drug offenders. Black offenders were least likely of any racial group to be in Criminal History Category I (25.6% of Black offenders), the lowest criminal history category, and most likely to be in Criminal History Category VI (24.5% of Black offenders), the highest criminal history category. In contrast, the majority of Hispanic offenders (66.3%) had criminal history scores in Criminal History Category I.

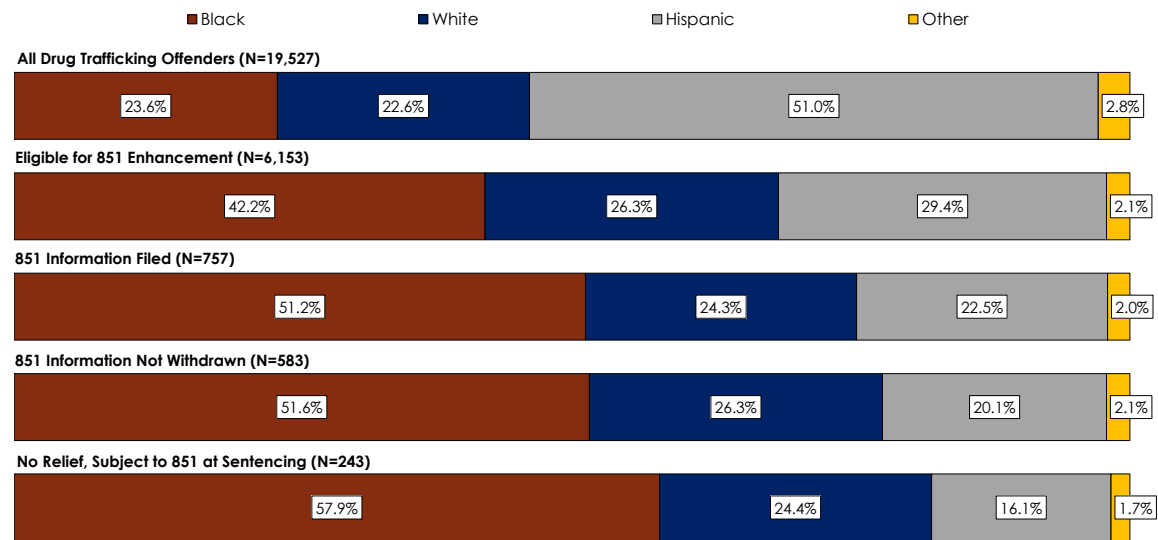
As a result, Black offenders comprised the largest proportion of drug trafficking offenders eligible for the 851 enhancements. In this regard, Black offenders made up a notably larger portion (42.2%) of offenders eligible for an 851 enhancement than they did of drug offenders overall (23.6%), while the opposite was true for Hispanic offenders (29.4% compared to 51.0%).

Figure 12. Percentage Of Drug Trafficking Offenders Eligible For 851 Enhancement By Race
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Figure 13. Eligibility And Application Of 851 Enhancement By Race
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Consistent with their representation of drug offenders generally, White offenders comprised slightly more than one-quarter of offenders eligible for the enhancement (26.3%), followed by Other Race⁸⁰ offenders (2.1%).

The impact of the 851 enhancements on Black offenders is more clearly seen when comparing the racial groups at each of the key stages of the 851 process—whether the offender is eligible, if so, whether the 851 information was filed, and lastly, whether the offender remained subject to an enhanced statutory minimum penalty. As reflected in Figure 13, Black offenders comprised an increasingly larger proportion of offenders as they progressed through each of these stages. Black offenders were the majority (51.2%) of offenders for whom the government actually filed an information seeking the enhancement,

followed by White offenders (24.3%), Hispanic offenders (22.5%) and Other Race offenders (2.0%). The prevalence of Black offenders was even more pronounced for offenders who remained subject to an enhanced mandatory minimum penalty at sentencing (57.9%), while the opposite was true for Hispanic offenders (16.1%). The portion of White offenders (24.4%) and Other Race offenders who remained subject to the enhanced penalty (1.7%) was relatively consistent with their respective representation among offenders for whom an information was filed.





United States Sentencing Commission
 APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

Table 5. Eligibility And Application Of 851 Enhancement By Race
 Fiscal Year 2016

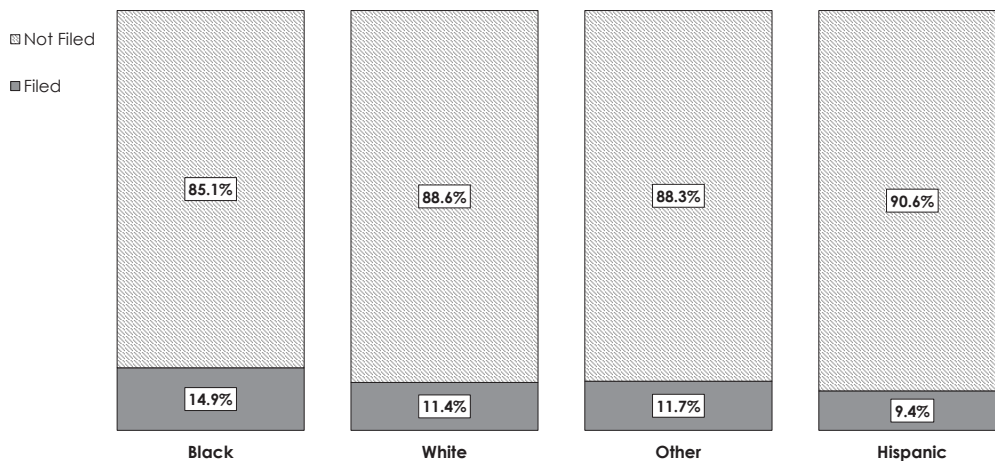
	All Drug Offenders	Eligible for 851	851 Filed	851 Withdrawn	851 Not Withdrawn	Subject to 851 at Sentencing
Total (# of offenders)	19,527	6,153	757	174	583	243
Race						
White	22.6%	26.3%	24.3%	17.8%	26.3%	24.4%
Black	23.6%	42.2%	51.2%	50.0%	51.6%	57.9%
Hispanic	51.0%	29.4%	22.5%	30.5%	20.1%	16.1%
Other	2.8%	2.1%	2.0%	1.7%	2.1%	1.7%

SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16 and 2016 Datafile, USSCFY16.

Another way to analyze the application of the enhancement among racial groups is to examine the percentage of offenders in each racial group who were eligible to receive the enhancement compared to the percentage of those offenders who did receive it. Using this approach, an information was, in fact, filed

against nearly 15 percent (14.9%) of Black offenders who were eligible to receive the enhanced penalty. This rate was higher than the rates for White offenders (11.4%) and Other Race offenders (11.7%). The information was filed against eligible Hispanic offenders at the lowest rate of any racial group (9.4%).

Figure 14. Percentage Of Eligible Offenders Against Whom 851 Information Was Filed By Race
 Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.



5 Conclusion



Conclusion

Although sought in a relatively small percentage of cases (only 12.3% of offenders who were eligible for the enhancement), 851 enhancements had a significant impact on the sentencing of drug offenders, resulting in penalties that were more severe than the more graduated increases in punishment provided for in the guidelines.

The impact of a filed 851 information was particularly noticeable when comparing the average sentences for eligible offenders against whom an information was not filed to the sentences for eligible offenders against whom an information was filed. When the government filed an 851 information, offenders received on average a sentence that was over five years longer (147 months compared to 86 months). Once an 851 information was filed, the government's subsequent determinations regarding withdrawal and other relief from the mandatory minimum penalty also had a significant impact on the ultimate sentences. Where an 851 information was withdrawn, offenders had an average sentence of 118 months, which is over three years shorter than when an 851 information was not withdrawn (156 months). Similarly, offenders who received relief from an enhanced statutory minimum penalty had average sentences nearly ten years shorter than the average sentence for those who remained subject to an enhanced statutory minimum penalty (107 months compared to 225 months).

In addition to resulting in longer sentences, the 851 enhancements were also inconsistently applied across judicial districts. Districts varied significantly in the frequency with which an 851 information was filed against eligible offenders. Several of the districts in which an 851 information was most frequently filed were also among those least likely to have such an information withdrawn, while some districts in which an 851 information was least likely to be filed were among those most likely to have it withdrawn.

With differing rates of filing, withdrawal, relief, and ultimate application, the data also demonstrates that the statutory scheme had the most significant impact on Black offenders. Because Black offenders as a group are more likely to have the requisite prior convictions to qualify for the enhancement, they comprised the largest proportion of drug trafficking offenders eligible for the 851 enhancements. 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—whether the offender is eligible, if so, whether the 851 information was filed, and lastly, whether the offender remained subject to an enhanced mandatory minimum penalty. As a result, when considering each racial group separately, eligible Black offenders received the enhancement more frequently than any other racial group.



Endnotes



United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

1 U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL
JUSTICE SYSTEM (2017) [hereinafter 2017 DRUG PUBLICATION], *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf. As with other publications
in this series, the 2017 *Drug Publication* built on the Commission’s 2011 *Report to the Congress: Mandatory Minimum
Penalties in the Federal Criminal Justice System* (2011 *Mandatory Minimum Report*). U.S. SENTENCING COMM’N,
2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM
(2011) [hereinafter 2011 MANDATORY MINIMUM REPORT], *available at* [https://www.ussc.gov/research/congressional-
reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system](https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system).

2 The term “mandatory minimum penalty” refers to a federal criminal statute requiring, upon conviction
of a federal criminal offense and the satisfaction of criteria set forth in that statute, the imposition of a specified
minimum term of imprisonment. A provision that requires a mandatory minimum fine, mandatory minimum term of
probation, mandatory minimum term of supervised release, or any other mandatory component of a sentence other than
imprisonment is not considered a mandatory minimum penalty for purposes of this publication.

3 The 2011 *Mandatory Minimum Report* provided detailed historical analyses of the evolution of federal
mandatory minimum penalties, scientific literature on the topic, and extensive analysis of the Commission’s own data,
public comment, and expert testimony. In the chapter devoted to drug offenses, it provided information about drug
mandatory minimum penalties overall and separately by drug type. In addition to analyzing the use of drug mandatory
minimum penalties generally, it also specifically focused on the application of the recidivist enhancements for drug
offenses commonly referred to as “851 enhancements.”

4 2017 DRUG PUBLICATION, *supra* note 1, at 10.

5 *See* 21 U.S.C. §§ 841(b)(1)(A)&(B); 960(b)(1)&(2).

6 2011 MANDATORY MINIMUM REPORT, *supra* note 1.

7 *See* U.S. SENTENCING COMM’N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL
CRIMINAL JUSTICE SYSTEM (2017) [hereinafter 2017 OVERVIEW PUBLICATION], at 34-35, *available at* [https://www.
ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf);
2017 DRUG PUBLICATION, *supra* note 1, at 2, 16.

8 21 U.S.C. §§ 841, 960.

9 *See* 21 U.S.C. §§ 859, 860, and 861. A person who commits one of those offenses is subject to a mandatory
minimum penalty of at least one year of imprisonment, unless a greater mandatory minimum penalty otherwise applies.

10 Section 841 prohibits the knowing or intentional manufacture, distribution, dispensation, or possession with
intent to manufacture, distribute or dispense a controlled substance. Section 960 prohibits the knowing and intentional
importation or exportation of a controlled substance. 21 U.S.C. §§ 841, 960. Controlled substance is defined as “a drug
or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter,” and
includes powder cocaine, crack cocaine, marijuana, methamphetamine, and heroin, among others. 21 U.S.C. § 802(6).

11 The penalties for committing other drug offenses under Title 21 are also tied to the same penalty structure. For example, attempts or conspiracies to commit any drug offense are subject to the same penalty structure as the substantive offense. *See* 21 U.S.C. §§ 846, 963.

12 These mandatory minimum penalties became effective on November 1, 1987, for all drug types, except methamphetamine. *See* Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 (1986) (amending 21 U.S.C. § 841(b)(1)). The mandatory minimum penalties for methamphetamine became effective on November 18, 1988. *See* Pub. L. No. 100-690, § 6470(g)(3), 102 Stat. 4181, 4378 (1988) (amending 21 U.S.C. § 841(b)(1)). Congress also added a mandatory minimum penalty for simple possession of crack cocaine in 1988. *See* Pub. L. No. 100-690, § 6371, 102 Stat. 4181, 4370 (1988) (amending 21 U.S.C. § 844(a)). The Fair Sentencing Act of 2010 (FSA) altered the mandatory minimum penalties established by the 1986 and 1988 Acts by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844).

13 *See* 21 U.S.C. §§ 841(b) and 960(b).

14 The term “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). Certain state drug offenses that are classified as misdemeanors by the state but are punishable by imprisonment for more than one year qualify as a felony drug offense for purposes of the enhanced penalties. *See Burgess v. United States*, 553 U.S. 124, 126 (2008).

15 *See* 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2)(A)–(H).

16 *See* 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A)–(H).

17 21 U.S.C. §§ 841(b)(1)(A)&(B), 960(b)(1)&(2).

18 *See, e.g.*, 21 U.S.C. §§ 841(b)(1)(C) (20-year statutory maximum increased to 30-year statutory maximum); *id.* § 960(b)(3) (same). Cases involving an enhanced statutory maximum penalty could nevertheless involve an offense carrying an otherwise applicable mandatory minimum penalty that was not increased through the filing of an 851 information. For example, some offenders were also convicted of a firearms offense carrying a mandatory minimum penalty pursuant to 18 U.S.C. § 924(c). Additionally, some drug statutes carry a short mandatory minimum penalty that is not increased as a result of the filing of an 851 information. For example, while a prior conviction would trigger an increased statutory maximum for an offender convicted under 21 U.S.C. § 859 (Distribution to persons under age 21), the one-year mandatory minimum term of imprisonment would remain unaffected.

19 *See* 21 U.S.C. §§ 841(b)(1), 960(b).

20 *See* 21 U.S.C. § 851(a).

21 *Id.* § 851(b)–(c).





United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

22 *Id.* § 851(b). Courts require strict compliance with the procedures provided in section 851(b). *See, e.g.,* *United States v. Ocampo-Estrada*, 873 F.3d 661, 667 (9th Cir. 2017) (“We require strict compliance with the procedural aspects of section 851(b). The § 851(b) colloquy is not merely a procedural requirement. It serves a functional purpose to place the procedural onus on the district court to ensure defendants are fully aware of their rights.”) (internal quotations and citation omitted).

23 *Id.* § 851(c)(1). Ordinarily, any fact that results in a statutory minimum or increase in a statutory maximum must be charged in an indictment and found by a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 114–15 (2013). The existence of a prior conviction is an exception to that general rule. A prior conviction need not be included in a charging document and may be found by a judge by a preponderance of the evidence. *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998).

24 *Id.* § 851(c)(1). If the denial stems from a challenge to the existence of the conviction or from any claim other than validity of the prior conviction, the prosecutor is required to prove the conviction’s existence to the judge beyond a reasonable doubt. *Id.* In contrast, if the denial concerns a challenge to the validity of the prior conviction, the offender bears the burden of persuading the court by a preponderance of the evidence that any facts supporting the claimed invalidity are true. *Id.* § 851(c)(2). Validity-related challenges are not permitted for convictions that occurred five or more years prior to the date of the information. *Id.* § 851(e).

25 *Id.* § 851(d)(1). If the court finds the defendant is not subject to the enhanced penalty, the court must, at the government’s request, postpone sentencing to allow for appeal of that finding. *Id.* § 851(d)(2).

26 *See* 18 U.S.C. § 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

27 The safety valve provisions apply to offenses under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. §§ 841, 844, 846) and section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 960, 963).

28 *See* 2017 OVERVIEW PUBLICATION, *supra* note 7, at 18–19 (explaining the statutory and guideline “substantial assistance” and “safety valve” provisions).

29 *See* U.S. SENTENCING COMM’N, *Guidelines Manual*, §5C1.2(a) (Nov. 2016). As required by Congressional directive, the new offense level cannot be lower than 17 for offenders whose mandatory minimums were at least five years in length. *See* USSG §5C1.2(b).

30 *See* USSG §2D1.1(b)(17).

31 *See* Memorandum from Attorney General John Ashcroft on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (September 22, 2003).

32 *See* Memorandum from Attorney General Eric Holder on Department Policy on Charging and Sentencing (May 19, 2010), *available at* <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

33 570 U.S. 99 (2013).

34 *Id.* at 115.

35 See Memorandum from Attorney General Eric Holder on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

36 *Id.*

37 See Memorandum from Attorney General Eric Holder on Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014), available at https://www.justice.gov/oip/foia-library/ag_guidance_on_section_851_enhancements_in_plea_negotiations/download.

38 *Id.*

39 *Id.*

40 *Id.*

41 See Memorandum from Attorney General Jefferson Sessions on Department Charging and Sentencing Policy (May 10, 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.

42 2011 MANDATORY MINIMUM REPORT, *supra* note 1, at 356. In particular, the Commission suggested that Congress consider incorporating a state’s classification of an offense as either a felony or misdemeanor, to reflect the state’s judgment of the seriousness of the offense, or exclude simple possession offenses from the definition of “prior drug offense.”

43 In fiscal year 2016, the Commission’s datafile included 67,742 cases and, of those cases, the Commission received complete guideline application information and sufficient documentation for analysis in the 62,251 cases considered for this publication. See 2017 OVERVIEW PUBLICATION, *supra* note 7, at 28. The methodology used in this series of publications, with respect to records collection and data analysis, is described in detail in the 2017 OVERVIEW PUBLICATION, *supra* note 7, at 28.

44 In total, the government filed an 851 information against 808 offenders in fiscal year 2016. Of these 808 offenders, 757 offenders were sentenced under §§2D1.1 and 2D1.2. As noted, the analysis in this publication focuses on those 757 offenders. The additional 51 offenders were sentenced under §2K2.1 (n=17), §2S1.1 (n=17), §2A1.1 (n=9), §2A2.1 (n=2), §2A1.5 (n=1), §2A2.2 (n=1), §2B1.1 (n=1), §2B3.1 (n=1), §2D1.11 (n=1), and §2D1.5 (n=1). Of these offenders, the government later withdrew the information for 14 offenders. Of the remaining 37 offenders, 12 received some form of relief from the enhancement and 25 remained subject to the enhancement at sentencing. Fourteen were subject to an increase to a statutory minimum penalty, and 11 were subject to an increased statutory maximum penalty.

45 The limitation is also consistent with the methodology used to analyze the application of section 851 in the Commission’s 2011 *Mandatory Minimum Report*.





United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

46 See 21 U.S.C. § 802(44).

47 See U.S. SENTENCING COMM’N, TRACEY KYCKELHAHN, PH.D. AND EMILY HERBST, M.A., *THE CRIMINAL HISTORY OF FEDERAL OFFENDERS*, Appendix (2018), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf.

48 The use of three criminal history points as a proxy for the length of the prior sentence is necessary because of data limitations. As noted earlier, 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 can include cases in which an offender was sentenced to a year or less in prison or sentenced to probation. Nevertheless, it is often difficult to ascertain whether prior convictions receiving sentences of one year or less were punishable in excess of one year under state law. For that reason, the Commission included convictions for drug offenses that were not trafficking offenses only if the offense received three criminal history points (for those offenses that received sentences in excess of 13 months) to ensure the convictions were in fact felonies. This approach was likely under-inclusive insofar as it did not include certain prior convictions that were eligible for the enhancement under section 851.

49 In order to identify such offenders, the Commission utilized the same optical recognition software used to extract criminal history information from the Juvenile Adjudication and Adult Conviction sections of an offender’s Presentence Report. Using this software, the Commission identified all drug trafficking cases in fiscal year 2016 with a specific reference to 21 U.S.C. § 851 or selected key words that indicated that use of the enhancement (*e.g.*, “enhanced penalties” or “prior conviction for a felony drug offense”). In addition to the cases identified through this automated search, the Commission also included all drug trafficking cases in which a 20-year drug mandatory minimum applied as offenders are only subject to a 20-year drug mandatory minimum in cases in which an 851 enhancement was sought, cases involving a continuing criminal enterprise under 21 U.S.C. § 848, and certain cases where death results. The Commission then reviewed each of these cases to confirm it involved an 851 enhancement.

50 As noted above, this analysis is limited to the 19,527 offenders who were sentenced under §§2D1.1 and 2D1.2.

51 Even in these enhanced statutory maximum cases, the 851 information already generally increases the minimum term of supervised release.

52 Some offenders who received a reduction for substantial assistance also qualified for the statutory safety valve (3.4% of the 205 offenders).

53 The requirement that an offender have a prior felony drug conviction in order for the enhanced penalties to apply, combined with the safety valve’s requirement that the defendant “not have more than 1 criminal history point,” makes application of the safety valve rare.

54 For such cases, the primary impact is found in the court’s ability to impose a term of supervised release below the otherwise applicable statutory minimum term of supervision. See 18 U.S.C. § 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level *established by statute as a minimum sentence* so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”) (emphasis added); 18 U.S.C. § 3553(f) (“Notwithstanding any other provision of law . . .

the court shall impose a sentence pursuant to the guidelines promulgated by the United States Sentencing Commission . . . *without regard to any statutory minimum sentence*, if the court finds at sentencing . . . that” certain criteria exist) (emphasis added); United States v. Hendricks, 171 F.3d 1184, 1186 (8th Cir. 1999) (“A defendant who meets the criteria under this section is *exempt from any* otherwise applicable statutory minimum sentence of imprisonment and *statutory minimum term of supervised release.*”)(emphasis in original).

55 See *supra* Figure 1.

56 Of the 157 offenders who faced an enhanced statutory maximum, 22 received a substantial assistance departure or qualified for the safety valve at sentencing, 20 (12.7%) received a substantial assistance departure and two (1.3%) qualified for both substantial assistance and the safety valve.

57 See 2011 MANDATORY MINIMUM REPORT, *supra* note 1, at 105.

58 Prosecutors in the districts where an 851 information was not automatically filed also mentioned other reasons that might cause them to refrain from filing the information. Some prosecutors noted that the nature of the prior criminal history might impact the decision whether to seek enhanced penalties. For example, if the offender’s prior conviction was very old or if there was only one qualifying prior conviction, prosecutors might refrain from seeking enhanced penalties. Some prosecutors mentioned the nature of the prior conviction, suggesting that even though the prior conviction may qualify as a felony drug conviction under the applicable statute, prosecutors do not view all qualifying priors as equally serious. Likewise, prosecutors might decide not to seek a life sentence for having two or more qualifying priors, but rather file an 851 information using only one qualifying prior conviction. Some prosecutors noted that the information might not be filed if they encountered difficulties in securing documentation to prove the prior conviction. The timing of a plea was also noted as a factor. The longer an offender waited to enter a guilty plea, the more likely the prosecutors were to file the information. Others suggested that the information might not be filed if the offender had agreed to cooperate.

59 See 2011 MANDATORY MINIMUM REPORT, *supra* note 1, at 112–13.

60 A complete distribution of drug trafficking offenders eligible for the enhanced, recidivist penalties, as well as those against whom an 851 information was filed or withdrawn and those who remained subject to an enhanced mandatory minimum penalty at sentencing, is provided for each circuit and district in the Appendix, at Figure A-1.

61 The geographic distribution of eligible offenders is also depicted in the Appendix, at Figure A-2, Table A-2.

62 These districts included the District of New Hampshire, the District of Vermont, the Eastern District of New York, the District of New Jersey, the District of the Virgin Islands, the Northern District of West Virginia, the Northern District of Mississippi, the Southern District of Mississippi, the Western District of Arkansas, the Southern District of Iowa, the District of Alaska, the Eastern District of California, the Northern District of California, the District of Guam, the Western District of Washington, the District of New Mexico, the Eastern District of Oklahoma, the Southern District of Georgia, and the District of the Northern Mariana Islands. The geographic distribution of offenders for whom an 851 information was filed is depicted in the Appendix, at Figures A-4, A-5, A-6.

63 Reflected in the Appendix, at Figure A-7, the breakdown by drug type for those cases in which the government filed an information and later withdrew is consistent with the portions of cases filed by drug type. The government





United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

withdrew filings slightly more often in the cases involving methamphetamine (36.8% of cases withdrawn, compared to 32.9% of cases filed), powder cocaine (19.5% of cases withdrawn, compared to 18.4% of cases filed), and crack cocaine (19.0% of cases withdrawn, compared to 18.1% of cases filed). The government withdrew the information slightly less often in cases involving heroin (17.2% of cases withdrawn, compared to 21.8% of cases filed) and marijuana (2.9% of cases withdrawn, compared to 3.7% of cases filed).

64 *See* USSG Ch.4.

65 USSG §4A1.1(c).

66 USSG §4A1.2(d)&(e).

67 As noted above, for purposes of this publication, the term includes only those drug offenders who were (1) sentenced under §§2D1.1 or 2D1.2; and (2) previously convicted of any drug trafficking offense, drug possession or other drug-related offenses for which the documentation clearly indicated that an 851 information had been filed, or any other drug possession or drug-related offense that received three criminal history points (*i.e.*, those offenses that received sentences exceeding 13 months).

68 The maximum number of prior qualifying convictions was 29.

69 USSG §4B1.1(a) (“A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.”).

70 For a description of the offenders included as “eligible offenders” *see supra* n.67.

71 The maximum number of prior qualifying convictions was 19.

72 For a description of the offenders included as “eligible offenders” *see supra* n.67.

73 The maximum number of prior qualifying convictions was 19.

74 USSG §3E1.1.

75 *See* 2017 DRUG PUBLICATION, *supra* note 1, at 35–36.

76 As discussed in the Commission publication on drug mandatory minimums, the length of mandatory minimum penalties is just one factor that affects whether an offender receives substantial assistance. The availability of substantial assistance relief is also often dependent on the offender’s function in the offense. *See id.*

77 *See infra* at 20–21.

78 *See* 2011 MANDATORY MINIMUM REPORT, *supra* note 1, at 113.

79 Of the 157 cases involving an enhanced statutory maximum only, the Commission identified four cases (2.5%) in which the applicable guideline range would have otherwise been capped absent the enhanced statutory maximum penalty.

80 The “Other Race” category includes offenders of Native American, Alaskan Native, and Asian or Pacific Islander origin. For offenders sentenced under §§2D1.1 or 2D1.2, there were 554 offenders identified as “Other Race” offenders: 291 (52.5%) were of Asian/Pacific Islander origin, 218 (39.4%) were Native-American/Alaskan Native, and 45 (8.1%) were of other origin. For eligible offenders in fiscal year 2016, the “Other Race” category consists of 48.4% Asian/Pacific Islander (n=62), 42.2% Native-American/Alaskan Native (n=54); and 9.4% of other origin (n=12).





United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)



Appendix



United States Sentencing Commission
 APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

Table A-1. Drug Trafficking Offenders and 21 U.S.C. § 851 Filings By Circuit and District
 Fiscal Year 2016

CIRCUIT District	All Drug Trafficking Offenders Eligible for 21 U.S.C. § 851 Enhancement		21 U.S.C. § 851 Filings		21 U.S.C. § 851 Filings Withdrawn ³	21 U.S.C. § 851 Not Withdrawn	Subject To 21 U.S.C. § 851 Enhanced Statutory Minimum Penalty ⁴	
	Number	Percent ¹	Number	Percent ²	Number	Number	Number	Percent ⁴
TOTAL	6,153	31.5	757	12.3	174 (4)	583	243	57.0
D.C. CIRCUIT	42	35.6	8	19.0	6	2	2	100.0
District of Columbia	42	35.6	8	19.0	6	2	2	100.0
FIRST CIRCUIT	237	28.2	10	4.2	2	8	3	75.0
Maine	44	43.6	4	9.1	0	4	1	50.0
Massachusetts	70	45.2	4	5.7	2	2	1	100.0
New Hampshire	14	31.8	0	0.0	0	0	0	0.0
Puerto Rico	98	19.3	1	1.0	0	1	0	0.0
Rhode Island	11	34.4	1	9.1	0	1	1	100.0
SECOND CIRCUIT	423	32.5	62	14.7	2	60	13	29.5
Connecticut	66	44.3	2	3.0	1	1	0	0.0
New York								
Eastern	58	21.1	0	0.0	0	0	0	0.0
Northern	41	39.0	23	56.1	0	23	7	46.7
Southern	162	33.8	20	12.3	0	20	2	10.5
Western	56	33.7	17	30.4	1	16	4	44.4
Vermont	40	31.7	0	0.0	0	0	0	0.0
THIRD CIRCUIT	314	45.6	53	16.9	10	43	12	31.6
Delaware	13	52.0	1	7.7	1	0	0	0.0
New Jersey	75	42.4	0	0.0	0	0	0	0.0
Pennsylvania								
Eastern	68	44.7	38	55.9	6	32	7	24.1
Middle	55	43.3	1	1.8	0	1	1	100.0
Western	99	52.4	13	13.1	3	10	4	50.0
Virgin Islands	4	22.2	0	0.0	0	0	0	0.0
FOURTH CIRCUIT	775	46.5	115	14.8	39	76	47	82.5
Maryland	127	54.7	7	5.5	2	5	5	100.0
North Carolina								
Eastern	126	64.9	9	7.1	0	9	2	40.0
Middle	46	37.7	1	2.2	0	1	1	100.0
Western	81	37.2	22	27.2	19	3	1	100.0
South Carolina	83	48.3	42	50.6	12	30	17	77.3
Virginia								
Eastern	125	50.0	29	23.2	1	28	21	91.3
Western	82	45.6	4	4.9	4	0	0	0.0
West Virginia								
Northern	58	33.7	0	0.0	0	0	0	0.0
Southern	47	36.7	1	2.1	1	0	0	0.0

Table A-1 Continued. Drug Trafficking Offenders and 21 U.S.C. § 851 Filings By Circuit and District
Fiscal Year 2016

CIRCUIT District	All Drug Trafficking Offenders Eligible for 21 U.S.C. § 851 Enhancement		21 U.S.C. § 851 Filings		21 U.S.C. § 851 Filings Withdrawn ³	21 U.S.C. § 851 Not Withdrawn	Subject To 21 U.S.C. § 851 Enhanced Statutory Minimum Penalty	
	Number	Percent ¹	Number	Percent ²	Number	Number	Number	Percent ⁴
FIFTH CIRCUIT	906	21.8	58	6.4	15 (2)	43	24	75.0
Louisiana								
Eastern	61	53.0	8	13.1	2	6	4	66.7
Middle	24	48.0	1	4.2	1	0	0	0.0
Western	37	46.8	3	8.1	0 (1)	2	0	0.0
Mississippi								
Northern	14	51.9	0	0.0	0	0	0	0.0
Southern	24	30.4	0	0.0	0	0	0	0.0
Texas								
Eastern	114	29.5	1	0.9	0	1	1	100.0
Northern	190	32.7	8	4.2	0	8	6	100.0
Southern	140	12.0	12	8.6	4	8	7	100.0
Western	302	18.2	25	8.3	6 (1)	18	6	60.0
SIXTH CIRCUIT	727	45.8	134	18.4	13 (1)	121	29	46.8
Kentucky								
Eastern	104	45.2	54	51.9	1	53	13	72.2
Western	63	52.9	3	4.8	2	1	1	100.0
Michigan								
Eastern	79	38.7	5	6.3	0 (1)	4	0	0.0
Western	32	41.6	8	25.0	3	5	2	66.7
Ohio								
Northern	96	55.8	12	12.5	1	11	2	22.2
Southern	63	33.7	3	4.8	0	3	1	50.0
Tennessee								
Eastern	170	47.1	43	25.3	3	40	9	39.1
Middle	24	44.4	3	12.5	1	2	0	0.0
Western	96	52.2	3	3.1	1	2	1	50.0
SEVENTH CIRCUIT	315	42.5	94	29.8	18 (1)	76	39	72.2
Illinois								
Central	59	58.4	44	74.6	2 (1)	41	15	57.7
Northern	77	42.3	18	23.4	9	9	7	100.0
Southern	60	43.8	6	10.0	1	5	5	100.0
Indiana								
Northern	27	45.0	8	29.6	1	7	0	0.0
Southern	37	31.9	15	40.5	4	11	9	81.8
Wisconsin								
Eastern	42	40.0	1	2.4	0	1	1	100.0
Western	13	31.7	2	15.4	0	2	2	100.0
EIGHTH CIRCUIT	687	40.6	81	11.8	9	72	29	46.8
Arkansas								
Eastern	84	44.0	1	1.2	0	1	1	100.0
Western	43	40.6	0	0.0	0	0	0	0.0
Iowa								
Northern	56	43.8	10	17.9	3	7	5	71.4
Southern	44	31.7	0	0.0	0	0	0	0.0
Minnesota	49	32.2	4	8.2	0	4	2	66.7
Missouri								
Eastern	92	46.2	3	3.3	0	3	1	100.0
Western	151	48.6	25	16.6	3	22	10	62.5
Nebraska	69	28.6	3	4.3	0	3	1	50.0
North Dakota	62	43.1	30	48.4	3	27	4	14.8
South Dakota	37	45.1	5	13.5	0	5	5	100.0





United States Sentencing Commission
 APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

Table A-1 Continued. Drug Trafficking Offenders and 21 U.S.C. § 851 Filings By Circuit and District
 Fiscal Year 2016

CIRCUIT District	All Drug Trafficking Offenders Eligible for 21 U.S.C. § 851 Enhancement		21 U.S.C. § 851 Filings		21 U.S.C. § 851 Filings Withdrawn ³	21 U.S.C. § 851 Not Withdrawn	Subject To 21 U.S.C. § 851 Enhanced Statutory Minimum Penalty	
	Number	Percent ¹	Number	Percent ²	Number	Number	Number	Percent ⁴
NINTH CIRCUIT	857	23.1	67	7.8	41	26	12	50.0
Alaska	11	19.3	0	0.0	0	0	0	0.0
Arizona	208	18.9	2	1.0	2	0	0	0.0
California								
Central	131	47.0	41	31.3	32	9	4	50.0
Eastern	72	29.5	0	0.0	0	0	0	0.0
Northern	38	36.2	0	0.0	0	0	0	0.0
Southern	171	14.8	5	2.9	0	5	3	60.0
Guam	1	5.9	0	0.0	0	0	0	0.0
Hawaii	23	31.9	8	34.8	0	8	2	28.6
Idaho	23	23.7	2	8.7	1	1	1	100.0
Montana	36	29.8	1	2.8	0	1	1	100.0
Nevada	20	21.5	2	10.0	2	0	0	0.0
Northern Mariana Islands	0	0.0	0	0.0	0	0	0	0.0
Oregon	36	31.9	1	2.8	1	0	0	0.0
Washington								
Eastern	31	31.0	5	16.1	3	2	1	50.0
Western	56	37.1	0	0.0	0	0	0	0.0
TENTH CIRCUIT	339	26.3	33	9.7	13	20	12	75.0
Colorado	30	27.8	4	13.3	1	3	2	66.7
Kansas	48	28.4	15	31.3	5	10	5	71.4
New Mexico	102	16.2	0	0.0	0	0	0	0.0
Oklahoma								
Eastern	19	52.8	0	0.0	0	0	0	0.0
Northern	34	45.9	2	5.9	0	2	1	100.0
Western	35	42.2	2	5.7	0	2	2	100.0
Utah	36	35.0	7	19.4	6	1	0	0.0
Wyoming	35	41.2	3	8.6	1	2	2	100.0
ELEVENTH CIRCUIT	531	30.3	42	7.9	6	36	21	67.7
Alabama								
Middle	9	32.1	2	22.2	0	2	1	50.0
Northern	31	35.6	6	19.4	1	5	2	40.0
Southern	31	34.1	4	12.9	0	4	3	75.0
Florida								
Middle	118	21.2	6	5.1	1	5	0	0.0
Northern	38	60.3	7	18.4	0	7	4	66.7
Southern	136	23.3	7	5.1	1	6	6	100.0
Georgia								
Middle	51	48.6	8	15.7	3	5	3	100.0
Northern	50	42.4	2	4.0	0	2	2	100.0
Southern	67	56.8	0	0.0	0	0	0	0.0

¹ The percent of drug trafficking offenders eligible for the 21 U.S.C. § 851 enhancement is presented as a share of all drug trafficking offenders sentenced under §2D1.1 and §2D1.2.

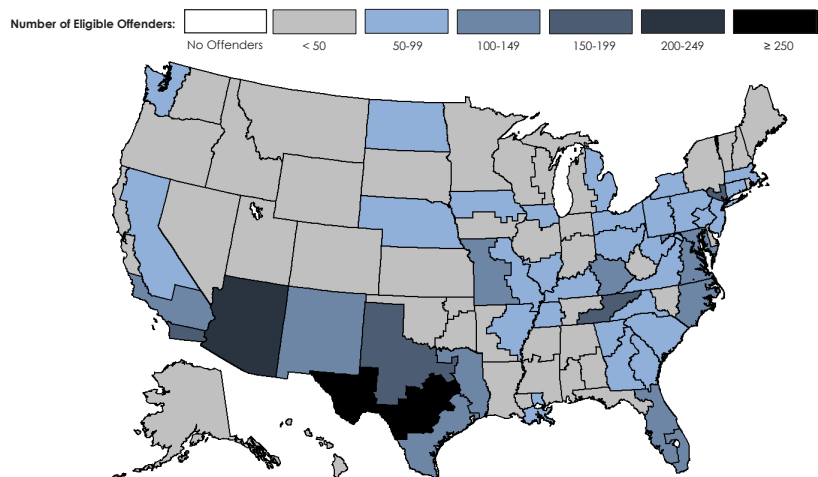
² The percent of 21 U.S.C. 851 filings is presented as a share of total eligible offenders.

³ An offender can receive court relief from the 21 U.S.C. § 851 statutory enhancement if the court finds the offender's prior criminal convictions insufficient to satisfy the requirements described in 21 U.S.C. § 851. These cases are represented in parentheses.

⁴ The percent of offenders subject to the 21 U.S.C. 851 statutory minimum penalty is presented as a share of all cases where the 21 U.S.C. 851 was not withdrawn and where the section 851 filing resulted in an enhanced mandatory minimum penalty. As discussed in the publication, 73.1% (n=426) of the 583 cases in which the section 851 information was filed and not withdrawn involved an increased statutory minimum penalty. The remaining 157 cases (26.9%) involved an increased statutory maximum penalty.

SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Figure A-1. Number Of Drug Trafficking Offenders Eligible For 851 Enhancement By District
Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 Criminal History Datafile, USSCCHFY16.

Table A-2. Districts With The Highest Percentage Of
Drug Trafficking Offenders Eligible For 851 Enhancement
Fiscal Year 2016

District	Percent Eligible
Eastern District of North Carolina	64.9%
Northern District of Florida	60.3%
Central District of Illinois	58.4%
Southern District of Georgia	56.8%
Northern District of Ohio	55.8%
District of Maryland	54.7%
Eastern District of Louisiana	53.0%
Western District of Kentucky	52.9%
Eastern District of Oklahoma	52.8%
Western District of Pennsylvania	52.4%

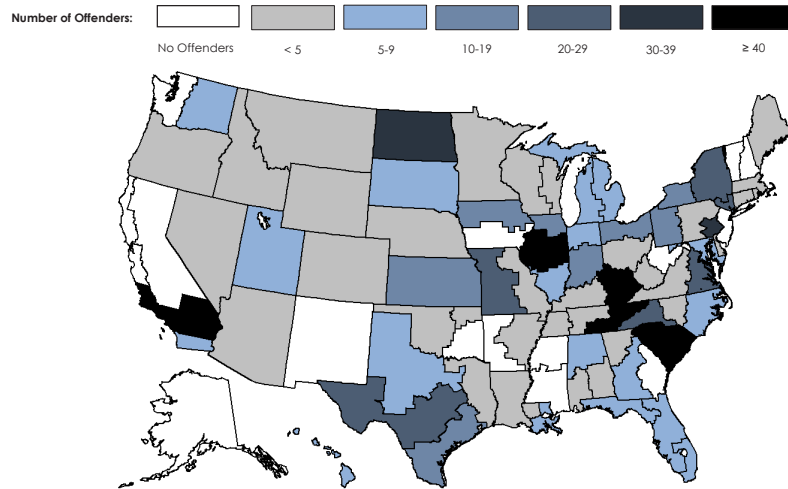
SOURCE: U.S. Sentencing Commission, 2016 Criminal History Datafile, USSCCHFY16.





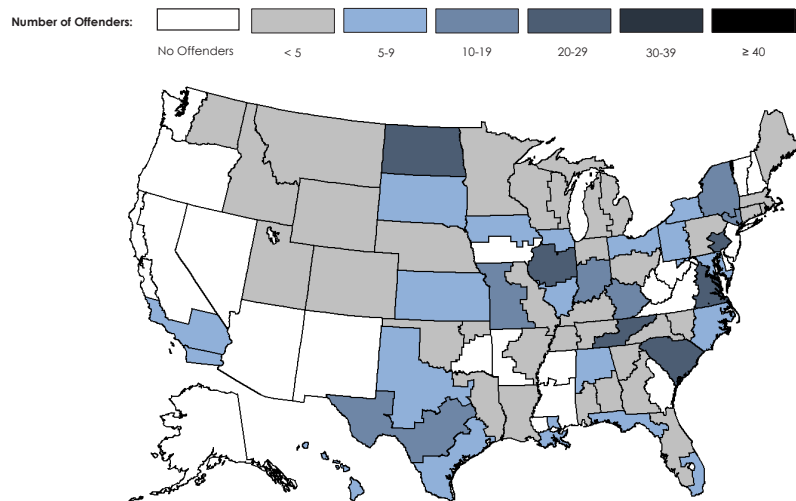
United States Sentencing Commission
APPLICATION AND IMPACT OF 21 U.S.C. § 851 (2018)

Figure A-2. Number Of Offenders Against Whom An 851 Information Was Filed By District
Fiscal Year 2016



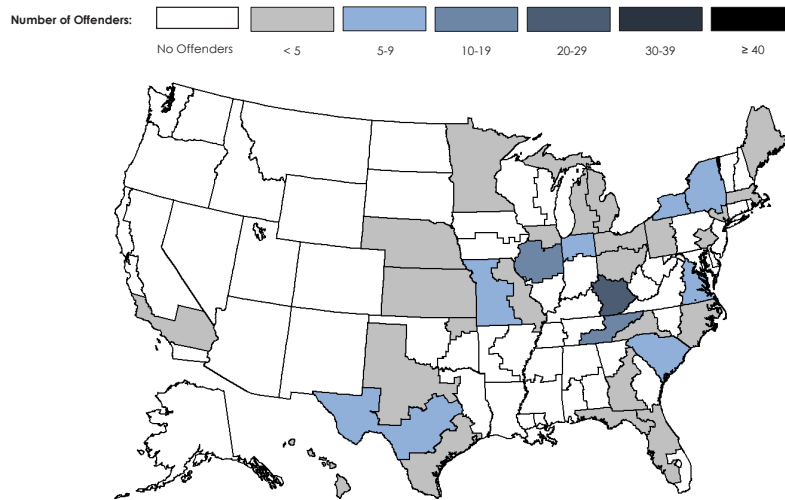
SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Figure A-3. Number Of Offenders With Enhanced Statutory Mandatory Minimum Penalty 851 Information
Fiscal Year 2016



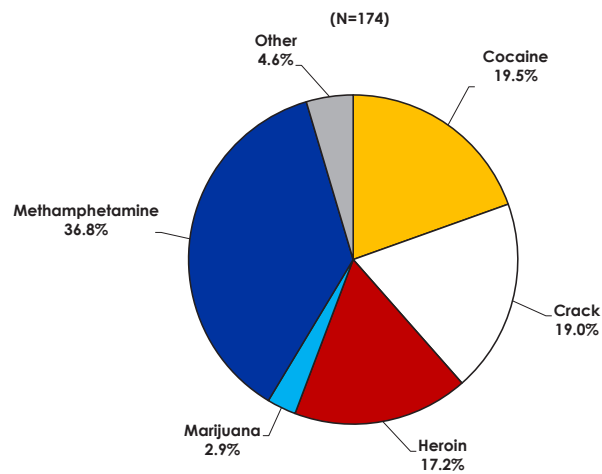
SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Figure A-4. Number Of Offenders With Enhanced Statutory Maximum Penalty 851 Information Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

Figure A-5. Percentage Of Eligible Offenders For Whom 851 Information Was Withdrawn By Drug Type Fiscal Year 2016



SOURCE: U.S. Sentencing Commission, 2016 851 Datafile, USSC851FY16.

