The Holder Memo

Author:
Robert M. Sanger
July, 2010
Criminal Justice

By Robert Sanger

*Robert Sanger is a Certified Criminal Law Specialist and has been a criminal defense lawyer in Santa Barbara for over 36 years. He is a partner in the firm of **Sanger & Swysen**. Mr. Sanger is an Officer of California Attorneys for Criminal Justice (CACJ) and is the Co-Chair of the CACJ Death Penalty Committee as well as a Director of Death Penalty Focus and a Member of the ABA Criminal Justice Sentencing Committee.*

The Holder Memo

Introduction

The Attorney General of the United States, Eric Holder, has not been effecting sea changes in the criminal justice system of the United States. But he has been making some common sense observations regarding some basic distortions that have come to be accepted in this country.

Last year, Attorney General Holder spoke of “getting smart on crime” as a rational substitute or supplement for the campaign slogan, “get tough on crime.” The latter plays into the politics of fear and hatred and simply helps politicians get re-elected. However, it also leads this country into the position of incarcerating more people per capita than any other country in the world. Attorney General Holder has also requested that the disgraceful disparity in sentencing between crack cocaine and powder cocaine be eliminated on the grounds that it basically discriminated along economic and racial lines. And he has been a proponent of effective defense services to ensure that justice is done. These are fairly modest efforts but they do suggest a more enlightened attitude toward the justice system than prevailed over the last few decades..

The Holder Memo of May 19, 2010

On May 19, 2010, the Attorney General of the United States issued a memorandum setting forth the policy of "Main Justice" regarding filing and prosecution of federal criminal cases as well as sentencing in such cases.[1] The memo is just over two pages long. It supersedes memoranda of prior United States Attorneys and their assistants on the subject.

The first thing to note is that the memo sets forth a general theme – these memos are intended to do just that. There is an extensive United States Attorneys Manual, Title Nine of which relates to criminal law. That Title, alone, is several hundred pages long.[2] So memos of this sort are written to set the tone of the Office rather than make specific detailed changes. But this one does change the tone.

The memo is directed: "MEMORANDUM TO ALL FEDERAL PROSECUTORS." It is entitled, "Department Policy on Charging and Sentencing." And its tone is, in fact, different than the prior memo of former Attorney General Ashcroft from 2003 and from the Assistant Attorneys General which were also superseded.

Attorney General Holder makes a commitment to equality and fairness in the charging and prosecution of federal criminal cases. Specifically, the Attorney General makes it clear that he will not tolerate "unwarranted consideration of such factors as race, gender, ethnicity, or sexual orientation." He also advises against charges being "filed simply to exert leverage to induce a plea..."

These changes in tone are significant. It is not likely that the memo itself will end prosecutorial misconduct. It is inherent in the exercise of power that there will be abuses. The Attorney General already has cracked down on federal prosecutors who have withheld evidence and committed misconduct as he did in the prosecution of Senator Stevens of Alaska.[3] The current memo is a reaffirmation that this Attorney General will continue to expect fairness.

The Attorney General's memo also has a clear message to the federal prosecutors around the country that his policy of moving from being mindlessly "tough on crime" to "smart on crime" should be implemented both federally and locally. At a speech before the American Bar Association Convention in Chicago, Illinois, August 3, 2009, he set forth this position in detail.[4] Since then, it has been a theme in his public addresses to urge action to prevent crime, including, preventing crime by making societal improvements, particularly among the marginalized of society. He spoke as recently as May 10, 2010 in Sacramento on gang violence urging this approach.[5]

Smart on Crime and Sentencing

This concept of being smart on crime also has application in sentencing reform. In this respect the Attorney General's May 19, 2010 memo is even more significant than it may seem on its face. The Attorney General talks about "individualized assessment" and "individualized justice" in the context of sentencing. Consistent with his concern for equality, he shows deference to the United States Sentencing Guidelines but clearly acknowledges that sentencing should be an individualized matter. He says that "equal justice depends on individualized justice, and smart law enforcement demands it."

The memo acknowledges the goals of punishment under 18 U.S.C.§3553(a), requiring a balancing of punishment, rehabilitation, deterrence, restitution, and public safety. The Attorney General notes that the Guidelines are now advisory.[6] This is a major acknowledgement as a matter of policy. While criminal defense practitioners and federal prosecutors are certainly aware of this, federal prosecutors have continued to take the position in actual practice that the Guidelines should be followed in most cases. This does not only affect "lower" sentences – and there have been some judges sentencing below the Guidelines especially where the Guidelines are artificially harsh -- but it affects the ability to suggest creative alternative sentences.

Prior to the advent of the Guidelines in 1987 and their original eventual approval by decision of the United States Supreme Court,[7] it was fairly common for a defense counsel to propose a sentence that involved a split sentence or a term of imprisonment followed by some sort of community service. Courts sometimes approved these kinds of sentences with the thought that simply locking people up at government expense was a waste of resources and that allowing them to be punished while conducting a community service resulted in a greater benefit to the public. Unfortunately, the Sentencing Guidelines curtailed the ability of the judges to impose this kind of sentence.

But with the *Booker* case in January of 2005,[8] there was some modest hope that alternative sentences could return. The United States Probation Office and the Administrative Office of the Courts issued a memorandum early in 2005.[9] The document urged Probation Officers, Judges and Prosecutors to take advantage of the opportunity to impose alternative sentences involving community service instead of straight incarceration. It saw this opportunity as something that made sense for the criminal justice system, the defendant and the community. It described to opportunity to impose an alternative sentence in the proper case a as a "win-win" situation.

Nevertheless, federal prosecutors throughout the country were reluctant to allow the courts or United States Probation to embrace this approach. They continued to rely on the Guidelines. Defendants continued to just be locked up in the ever burgeoning and outrageously expensive Bureau of Prisons facilities. The result is where we are today, incarcerating more people per capita in this country than any other country in

the world.[10] We incarcerate over 770 people per 100,000 population while most European nations are around the 150 per 100,000 rate. The waste of resources, both to house so many people and to deprive the community of their services, is incredible.

Conclusion

Attorney General Holder's memorandum of May 19, 2010, holds out hope that the prosecutors and courts will return to "individualized justice" and "individualized assessment" in the prosecution and sentencing of people in this country. What we are doing now is not working and is hopelessly expensive. There is no doubt a brutalizing effect of this policy of incarceration. Imprisonment is becoming a way of life for communities and, intergenerationally, for families. We have to break the cycle and stop giving into the politics of fear and hatred. We have to break the paradigm of imprisoning people who can serve their communities.

The Attorney General's memo, of course, is directed to federal law enforcement. The federal system prosecutes a lot of white collar cases. Among those prosecuted are many people who have the skills and can lead the way to show this society the value of alternative sentences. But, alternative sentences must also be expanded from white collar cases in the federal system to other kinds of federal cases and then to the state systems. This country must be better than it appears to be – we cannot be so self righteous about our virtue as a nation and yet concede that our people are the worst in the world and the most in need of being locked up.

---

[1] Available at: http://sentencing.typepad.com/files/holder-charging-memo.pdf

[2] While the Manual is published in printed form, it is also available by the Government on line as a result of the Freedom of Information Act at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

[3] See one of many contemporaneous reports: *Anchorage Daily News*, April 1, 2009

[4] The text of the speech is posted on the Department of Justice website: http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html

[5] Speech before the California Cities Gang Prevention Network, Sacramento, California, Monday, May 10, 2010 at: http://www.justice.gov/ag/speeches/2010/ag-speech-100510.html

[6] In 2005, the United States Sentencing Guidelines were held by the United States Supreme Court to be advisory only in *United States v. Booker*, 543 U.S. 220 (2005).

[7] In *Mistretta v. United States* 488 U.S. 361 (1989) the United States Supreme Court originally held that the United States Sentencing Guidelines, created under the Sentencing Reform Act of 1984, were constitutionally valid and did not involve a violation of the separation of powers or an improper intrusion into the judicial role of determining a fair sentence.

[8] *United States v. Booker*, 543 U.S. 220 (2005).

[9] Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services, Court & Community Informational Series: Community Service (2005), previously available at: http://www.uscourts.gov/misc/revision-community.pdf As of this writing, the publication appears to be removed from the website.

[10] This is documented in various sources. A reliable list is complied at the King's College, London.