

MEMORANDUM

To: Participants in the Crack Amendment Retroactivity Summit
From: Federal Defender Sentencing Guidelines Committee
Subject: Effective, Efficient and Fair Implementation of the Retroactive Amendment
Date: January 14, 2008

The Sentencing Commission lowered guideline ranges for crack offenses by two levels for those sentenced on or after November 1, 2007 in order to partially alleviate the urgent and compelling problems of over-incarceration and unwarranted disparity resulting from the 100-to-1 powder/crack ratio. *See* USSG, App C, Amend. 706 (Nov. 1, 2007); USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* at 10 (May 2007). On December 11, 2007, the Commission voted that the amendment should apply to persons sentenced before November 1, 2007 because “the statutory purposes of sentencing are best served by retroactive application of the amendment.”¹

The Defenders greatly appreciate the Office of Probation and Pretrial Services and the Chief Probation Officers for their commitment to an effective, efficient and fair process in implementing the retroactive amendment by organizing these summits, by stepping in to provide Defenders with a list of potentially eligible prisoners, and by encouraging cooperation with defense counsel in each district.

While the precise procedural details will vary among districts, and individual judges will necessarily vary in their resolution of substantive legal issues and individual cases, the Defenders believe, and hope that all can agree, that two basic procedures are necessary if the retroactive amendment is to be implemented effectively, efficiently and fairly:

- Prisoners who are potentially eligible must be represented by counsel.
- Lists of potentially eligible prisoners should be shared with Defender Offices without delay.

This model was successfully used to implement the 1995 retroactive marijuana amendment in the District of Oregon and other districts. *See* Letter from Stephen R. Sady to U.S. Sentencing Commission, Nov. 20, 2007 (in the materials). Because of changes to the Guidelines, statutes and constitutional law, it is even more critical today that persons who stand to benefit from the retroactive crack amendment are represented by counsel and that the Defenders have equal access to all lists of potential beneficiaries. The United States is represented by counsel and has received all relevant lists. There is no conceivable justification for denying the same essential tools to those intended to benefit from the amendment.

¹ *See* U.S.S.C. Press Release, *U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses* (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/re1121107.htm>.

I. Defense Counsel Is Necessary.

We have surveyed the Federal Public and Community Defenders, and they are uniformly committed to continue to represent their clients after sentencing as long as the client remains indigent and so desires. They are attorney of record and there is no order terminating the representation. They have always represented clients in a variety of matters after sentencing, including Section 3582(c)(2) proceedings.² Virtually no prisoner can competently litigate the issues without the assistance of counsel, and the government cannot negotiate with any prisoner, whether represented by counsel or not. Defense counsel ensures that the process is accurate and efficient, and the courts thereby avoid dealing with *pro se* motions.

Based on our survey, the majority of District Courts and Probation Offices agree, and most District Courts have asked the Defender to represent as many people as possible, absent a conflict. *See* Point I(F), *infra*. We have been informed, however, that a subcommittee within the Department of Justice has advised United States Attorneys to oppose representation by counsel and also to oppose providing Defenders with the Commission's list. In the only six districts in which we have been informed of the United States Attorney's position, three are not opposing representation by defense counsel; one takes the position that no counsel is necessary but will not oppose a two-point reduction in any case; one takes the position that prisoners are not entitled to counsel unless there is an issue to litigate which will be decided solely by the government; and another takes the position that the court has discretion to appoint counsel but counsel is unnecessary even while litigating against the defendant.³

A. Numerous Institutional Efficiencies Are Furthered By Defense Counsel.

In addition to those just mentioned, under the protocol described in Mr. Sady's letter to the Commission, the lion's share of retroactive marijuana cases in the District of Oregon was resolved with agreed dispositions negotiated between prosecutor and defender – 121 orders were signed on one day. As the Supreme Court observed in a decision holding that there is a right to counsel in a discretionary first appeal, “No one questions . . . that the appointment of appellate counsel at state expense would be more efficient and helpful not only to defendants, but also to the appellate courts.” *Halbert v. Michigan*, 545 U.S. 605, 623 n.6 (2005).

² Defenders sought relief for clients under *Bailey v. United States*, 516 U.S. 137 (1995), routinely represent clients on probation and supervised release revocations, and regularly deal with the BOP on a variety of matters, such as credit for time served, programs such as RDAP, medical treatment, and other prison conditions.

³ *See* Government's Response, December 26, 2007, and Defendant's Reply, January 2, 2008, *United States v. Omar*, Case 2:05-cr-20044-DML-CEB (E.D. Mich.), available on PACER.

B. New Factual and Legal Issues Embedded in Revised USSG §§ 1B1.10 and 2D1.1 Invite Prosecutors To Litigate Against Prisoners And Otherwise Encourage Adversarial Proceedings.

Before the recent overhaul of USSG § 1B1.10, there were few opportunities for the government or defense counsel to litigate when a Section 3582(c) motion was filed.⁴ Nonetheless, most prisoners were represented, even if such representation was not required.

Revised USSG § 1B1.10 invites the government to litigate against the defendant to preclude or reduce relief. Application note 1(B) provides that, in determining whether a reduction is warranted at all, and the extent of such reduction, the court (i) “shall consider the factors set forth in 18 U.S.C. § 3553(a),” (ii) “shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment,” and (iii) “may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment.” Defense counsel is obviously needed to defend against aggravating allegations, to present mitigating evidence, and for simple accuracy.

We are aware of only one District Court that has at least preliminarily expressed the view that counsel is unnecessary. This was based on an assumption that all of the judges would reduce every person’s guideline range by precisely two levels and would not entertain arguments by the government to the contrary. This, however, would not obviate the need for defense counsel. Who is eligible and for what relief is not as straightforward as the District Court may have thought.

For example, if the initial sentence was in the middle of the range, should the new sentence be at the middle of the range or the bottom of the range, particularly in light of the need to consider the § 3553(a) factors to the extent they are applicable and *Kimbrough v. United States*, 128 S. Ct. 558 (2007)?

Further, if the defendant received a below-guideline sentence at the initial sentencing, how far below the guideline range should the new sentence be? To complicate matters, USSG § 1B1.10(b)(2)(B) has proved to be confusing.⁵ Some have

⁴ In determining whether and to what extent the court should reduce the sentence, the court was to “consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.” U.S.S.G. § 1B1.10(b). Thus, counsel was useful to help determine whether an inmate was eligible for a reduction under § 1B1.10(a) and, if so, to marshal the same facts and arguments that had been argued at the initial sentencing, but otherwise the reduction was mechanical and automatic.

⁵ It states:

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under

read the last sentence as advising against *any* reduction if the initial sentence was imposed on the basis of § 3553(a) as *Booker* requires. Others have read it to clarify that, in the Commission’s view, *Booker* sentences should not get any *more* of a reduction than the comparable reduction approved in the first sentence for all below-guideline sentences. The latter view appears to be correct based on application note 3, which draws no distinction between non-guideline sentences based on a guideline-approved departure and those based on § 3553(a), and the unlikelihood that the Commission would promulgate a policy statement at odds with Supreme Court law.⁶ Nonetheless, if the government urges the former interpretation, defense counsel is necessary.

Another issue is that, as a result of changes in the way crack is converted to an equivalent quantity of marijuana in cases involving crack and other controlled substances in revised USSG § 2D1.1, comment. (n.10(D)), the new guideline range is the same as the old guideline range in some cases. While such a case falls within the literal language of § 1B1.10(c), as it “does not have the effect of lowering the defendant’s applicable guideline range,” it also falls within the literal language of 18 U.S.C. § 3582(c)(2), as the defendant “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.”⁷ Since there is no discernible pattern in which quantities of which drugs produce this anomalous result, and the Commission did not state that it was intended, we must assume that it was unintended. Such cases require negotiation or litigation, which requires counsel.

Further, many defendants are due for release before March 3, 2008 based on application of USSG § 2D1.1, and some judges are willing to release them when due, or already have, though the Commission has advised delay until March 3, 2008. There is no practical or legal impediment to ordering release before March 3 if the judge wishes to do so. The purpose of the delay was “to give the courts sufficient time to prepare for and process these cases.”⁸ There is no need to wait for Congress because policy statements are not subject to congressional review or acquiescence. *See* 28 U.S.C. § 994(p); *Stinson*

subdivision (1) may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, a further reduction would not be appropriate.

⁶ *Neal v. United States*, 516 U.S. 284, 290, 295 (1996) (Commission “does not have the authority to [effectively] amend [a] statute” by “interpreting” it in ways contrary to the construction given it by the Supreme Court and the Court will “reject [the Commission’s] alleged contrary interpretation”); *Stinson v. United States*, 508 U.S. 36, 38 (1993) (“commentary in the Guidelines Manual that interprets or explains a Guideline is authoritative unless it violates the Constitution”).

⁷ For example, in a case involving 94 grams of crack and 77 grams of powder, the base offense level under the old guideline and the new guideline is 32, but the base offense level for 94 grams of crack has been lowered from 32 to 30.

⁸ *See* U.S.S.C. Press Release, *U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses* (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/re1121107.htm>.

v. United States, 508 U.S. 36, 40-46 (1993). The courts are required to treat the guidelines as advisory, and to consider all statutory criteria in existence when a motion under Section 3582(c)(2) is filed,⁹ including § 3553(a). Defense counsel is necessary to bring these cases to the courts' attention.

C. Under These Circumstances, The Constitution Requires Counsel.

1. Sixth Amendment

In *Mempa v. Rhay*, 389 U.S. 128 (1967), the Supreme Court held that *Gideon* and its progeny “clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected,” and that sentencing, including a subsequent change in sentence, is a critical stage. The Court rejected the state’s argument that the proceeding was not a critical stage because “petitioners were sentenced at the time they were originally placed on probation and that the imposition of sentence following probation revocation is . . . a mere formality.” While the judge was required to impose the maximum sentence for the offense of conviction, the judge and the prosecutor were also required to recommend to the Parole Board the length of the sentence to be served, along with information about the circumstances of the offense and the character of the defendant. “Obviously to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.”¹⁰ Likewise, defense counsel is necessary on a Section 3582(c) motion to aid in calculating the revised guideline range, to marshal the facts and evidence that pertain to the applicable § 3553(a) factors, and to defend against any allegation that public safety or post-sentence conduct should result in a denial of the reduction or a lesser reduction.

2. Due Process and Equal Protection Clauses

In *Halbert v. Michigan*, 545 U.S. 605 (2005), the Supreme Court held that the Due Process and Equal Protection Clauses require that, even if there is no constitutional right to an avenue of relief (there, appellate review), if such relief is provided by statute, the government may not then “bolt the door to equal justice to indigent defendants.” In *Halbert*, the state refused to appoint counsel on a discretionary first appeal from a guilty

⁹ See *United States v. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998); *United States v. Reynolds*, 111 F.3d 132 (Table) (6th Cir. 1997); *United States v. Williams*, 103 F.3d 57, 58-59 (8th Cir.1996); *Settembrino v. United States*, 125 F.Supp.2d 511, 517 (S.D. Fla. 2000).

¹⁰ Courts that previously held that there was no automatic right to counsel in a § 3582(c)(2) proceeding were careful to limit the holding to situations where there was no need to marshal any facts or arguments in addition to those presented at the initial sentencing. See *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *United States v. Whitebird*, 55 F.3 1007, 1011 (5th Cir. 1995).

plea, including Mr. Halbert, who claimed that “his sentence had been misscored” and that he needed counsel to correct the error. The Court held that basic fairness required appointed counsel based on the complexities of the law, the difficulties of litigating from prison, and the practical consideration that many prisoners are poorly educated, mentally ill, and otherwise ill-equipped to represent themselves. These same factors apply to Section 3582(c) motions.

In *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948), the Court found pre-*Gideon* that even though due process did not generally require the state to provide counsel when accepting a guilty plea and imposing sentence in a non-capital case, the absence of counsel violated due process when the defendant was sentenced on the basis of assumptions concerning his criminal record that were materially untrue. The Court said: “In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.” The same concerns are present on Section 3582(c) motions, where defense counsel will raise and correct errors in reading the record, applying the guideline, or other errors that may otherwise go unnoticed.¹¹

D. Under These Circumstances, The Criminal Justice Act Requires Counsel.

Representation by counsel is required for any financially eligible person who is entitled to appointment of counsel under the Sixth Amendment. 18 U.S.C. § 3006A(a)(1)(H). Further, a Section 3582(c) motion arguably is an “ancillary matter” for which counsel is required under 18 U.S.C. § 3006A(c). Some CJA Plans require that services rendered under the plan must be commensurate with those rendered if counsel were privately retained. *See, e.g.*, N.M. CJA Plan § 7(a). In any event, the case law makes clear that the District Courts have abundant discretion to appoint counsel under the Criminal Justice Act.

E. Ethical Rules and Standards Indicate That Defense Counsel Has An Obligation To Clients Who Are Potentially Eligible For Section 3582(c)(2) Relief, And Prohibit The Government From Interfering With The Opportunity To Obtain Counsel And From Negotiating With Defendants.

Defense counsel has a duty to identify, inform, and represent clients they represented at sentencing in connection with Section 3582(c)(2) proceedings. “Many

¹¹ We are aware of one case in which this has already occurred. The Defender received from Probation a supplementary PSR calculating the new guideline range with a criminal history score of VI. The Defender checked the original PSR and discovered that the criminal history score was II. If the Defender had not been involved, the error would not likely have been corrected. Relief would have been denied without counsel or any opportunity to be heard, in violation of the Due Process Clause.

important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights.”¹² See ABA Standards, The Defense Function, Std. 4-3.6. The ABA’s Providing Defense Services Standard 5-5.2 (Collateral proceedings) states:

Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

A prosecutor “has the responsibility of a minister of justice and not simply that of an advocate,” and “[t]his responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . .” ABA Model Rule of Professional Conduct 3.8, comment 1. Thus, the prosecutor “shall . . . make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.” ABA Model Rule of Professional Conduct 3.8(b). Taking the position that defendants are not entitled to counsel in connection with Section 3582(c)(2) proceedings is inconsistent with that responsibility.

Further, prosecutors may not negotiate directly with a defendant whether he is represented by counsel or not. See ABA Model Rule of Professional Conduct 4.2 (a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter); ABA Model Rule of Professional Conduct 4.3 (a lawyer shall not give advice, other than the advice to secure counsel, to an unrepresented person whose interests are adverse); ABA Standards, The Prosecution Function, Std. 3-4.1(b) (prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel’s approval). The retroactive marijuana amendment was efficiently and quickly accomplished in part because agreements were negotiated, and joint motions and orders forwarded to the court. That would not be possible without counsel.

F. The District Courts And Probation Offices In Most Districts Recognize That Defense Counsel Is Both Helpful And Necessary.

Based on our survey, some District Courts have not yet addressed the question of counsel. In those where the District court has expressed its intentions, only one has at least preliminarily indicated the view that defense counsel is unnecessary. See Point I(A), *supra*. In all other districts for which we have information, the judges intend that

¹² See also *Hunnecutt v. State Bar*, 44 Cal. 3d 362, 371 (1988) (“if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists . . . even if the representation has otherwise ended.”).

potential beneficiaries of the amendment will be represented by the Federal Defender Office or CJA counsel.

In the vast majority of these districts, the Defender Office has been asked to represent as many people as possible, and to identify ongoing prohibitive conflicts, in which case CJA counsel will be appointed. In only two districts, the court wishes to appoint CJA counsel to represent the clients they represented at sentencing even without a Defender conflict.

Defenders are working tirelessly with whatever preliminary lists they have been given. They are correcting and supplementing those lists by reviewing their own files, calling upon CJA counsel to review theirs, performing further investigation and analysis, and working cooperatively with Probation and in some instances with the clerk and the U.S. Attorneys Office.

After identifying all prisoners sentenced in the district who can potentially benefit, Defenders can write to their clients, asking them to confirm that they wish to be represented and if so, to fill out a financial affidavit. As to those who were represented by CJA or retained counsel (if the person has become indigent) and those who have filed *pro se* motions who have been brought to the Defender's attention by the court, several options are open, depending on the District Court's preference, if any. One is to advise former counsel to seek appointment even if there is no conflict. Another is to identify any ongoing prohibitive conflict, and if so, seek appointment of CJA counsel. Another is to send a letter to all potential beneficiaries whom the Defender did not represent at sentencing, asking if they wish to be represented by the Defender and if so, to sign a waiver of any potential conflict. Some cases are many years old, and in districts with a large number of cases, it may be impossible to locate and contact each original lawyer.

Where Defenders will be appointed to represent people they did not represent at sentencing, they will need the pre-sentence reports of those individuals. This is obviously necessary in order to definitively determine that the person is eligible, to calculate the new guideline range, to identify any issues, to consult with the client, to negotiate any agreement, and to identify which cases need attention first. In several districts, the Probation Office has provided the Defender with reports they do not already have.

II. Equal Access To Information Is Necessary.

The Commission recently provided its list to the Department of Justice, as required upon request pursuant to 28 U.S.C. § 994(w)(4), which was added by the PROTECT Act. The Commission has also provided lists by district to any Chief Judge who asks. Most Chief Judges have provided that list to their Defender Office, but unfortunately, a few have not.¹³ Some Defenders have been informed that the U.S.

¹³ Of fifty-seven (57) Defender Offices that have responded to our survey to date, forty-six (46) have received the Commission's list; seven (7) have contacted their Chief Judges for the list but have received no response; three (3) Chief Judges have said they will delay decision until after

Attorney or the Department Of Justice opposes their receiving the list. A few Defenders have requested the list from the U.S. Attorneys Office, but have been turned down.

The Office of Probation and Pretrial Services of the Administrative Office of the U.S. Courts has now stepped in to prepare and provide its own list to the Office of Defender Services, which has provided each Defender with the list for his or her district.

Neither list subsumes the other, though there is overlap. While both lists are under-inclusive and may be over-inclusive, they are a useful cross reference for all who are attempting to ensure that those entitled to relief receive it.¹⁴

We urge all Chief Judges to request the list for their districts from the Sentencing Commission, and to provide it to the Defender Office without delay. Denying Defender Offices the list, when the Department has it, is not only unfair but is unhelpful to the preparation of a reliable and complete final list.

Defender Offices have been making heroic efforts to identify all prisoners eligible for relief in their districts. The process is arduous and time consuming, and requires intuition and careful attention to detail. Some Defenders are sending a letter to every person charged with a controlled substance offense because not every case was coded for crack or even cocaine. They have found many eligible persons not on the Commission list by looking at the cases of co-defendants of persons who are on the Commission list. Through careful attention, they have discovered persons, who, while sentenced to a number of months at the mandatory minimum level, were not in fact subject to a mandatory minimum by virtue of §§ 3553(e) or (f), but nonetheless do not appear on a list. They have found that a number of people on the list have been released after serving their entire sentences. They have corrected transposed BOP and docket numbers, and have ordered their lists by release date.

This cannot be done as a practical matter by the Probation Office, judicial law clerks, court clerks, or the government without the Defenders. Calculating a new guideline range even in a straightforward case by someone very familiar with the guidelines takes 30-45 minutes. Defenders report that they have spent days and weeks in identifying potentially eligible prisoners. Defenders, who have a duty to individual

this meeting; and one (1) Chief Judge has refused to provide the list apparently on the mistaken belief that he is prohibited from doing so.

¹⁴ According to the Commission, its list does not include persons sentenced before FY 1992 or persons sentenced after June 30, 2007. U.S.S.C., Analysis Of The Crack Cocaine Amendment If Made Retroactive 4 (Oct. 3, 2007). The list also does not include persons for whom documentation was not forwarded to the Commission, cases that for a variety of reasons were not coded by the district court or the Commission as crack cases, persons who received a Rule 35 reduction after sentencing, or firearms cases sentenced under a cross-reference to the crack guideline.

clients, are motivated to devote the necessary time and effort to the process. Recognizing this, most Probation Offices have welcomed Defenders' participation.

The identification and review process cannot wait until March 3. Many prisoners are due for release before March 3, and there is no legal impediment to their being released on time. Where the court nonetheless intends to wait until March 3, orders should be signed and entered now so that BOP has sufficient advance notice to release them immediately on March 3.

For these reasons, we urge the Chief Judge of each district to request the Commission's list and provide it to the Defender without delay, so that reliable and complete lists can be finalized, and negotiation or litigation can begin.