MEMORANDUM

To: All Defenders, CJA Panelists

From: Sentencing Resource Counsel

Re: Crack Summit II: Practice Tips and Lessons Learned in St. Louis

Date: January 28, 2008

I. People Who Received *Booker* Variances Originally Are Eligible for a Reduction under Revised § 1B1.10(b)(2)(B).

The Commission clarified again in St. Louis that if a defendant originally received a sentence that was lower than the guideline range – regardless of whether the lower sentence was based on a guideline-based departure or a *Booker*-based variance – a comparable reduction from the amended guideline range is permissible under revised § 1B1.10(b)(2)(B). The Commission explained that the second sentence of revised § 1B1.10(b)(2)(B) means only that if the judge did not consider the Guidelines *at all* in the original sentencing, the prisoner would not be entitled to relief, because the original sentence would not then have been based on a guideline range that was subsequently lowered.[1] This is good news, because it should apply to no cases. The judge must consider the Guidelines, even if she then rejects them as unsound policy, and to do otherwise is reversible error. *Gall v. United States*, 128 S. Ct. 586, 596 (2007); *Kimbrough v. United States*, 128 S. Ct. 558, 564, 570 (2007); *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007); *Booker v. United States*, 543 U.S. 220, 245-46 (2005).

When asked why the Commission did not make this clear in the Application Notes, one of the Commissioners responded that the Commissioners could not agree on clarifying language. What is clear, however, is that unless the sentence was procedurally unreasonable to begin with, people who received *Booker* variances are eligible for a sentence reduction under § 1B1.10(b)(2)(B).

II. Some Judges Are Willing to Reduce Sentences for Eligible Defendants Now.

Many defendants are due for release before March 3, 2008 based on application of USSG § 2D1.1, effective November 1, 2007. In St. Louis, the Commission continued to stress that judges should delay reducing sentences until March 3, 2008, which is the date that the Commission picked to make revised § 1B1.10 effective. Some judges, however, are willing to release prisoners now, or already have. In the Practitioners' Breakout, two Defenders reported that they have already had clients released – one of whom had his client's crack sentence reduced by 100 months to time served. Other offices have reported to Sentencing Resource Counsel that they also have had clients released. When

[1] The Commission's presentation was conducted by two Commissioners and a Senior Training Specialist.

an AFPD informed the judges' panel that Defenders were filing motions now seeking the immediate release of eligible inmates on the ground that March 3 was an arbitrary date, not one judge questioned the propriety of such motions, and one commented that the government was unlikely to appeal such an order anyway.

In informal discussions, probation officers and court clerks were also willing to consider recommending that eligible inmates be released before March 3, so long as defense attorneys could demonstrate that such release was authorized. The arguments and authority for releasing eligible inmates now can be found in the following materials:

- Selected Retroactivity Caselaw, Federal Public and Community Defenders (Jan. 24-25, 2008), pp. 1-2;
- Practice Tips and Lessons Learned in Charlotte, Amy Baron-Evans and Anne Blanchard (Jan. 20, 2008), pp. 2-4;
- Memorandum re: Sentence Reductions for Crack Defendants, Sentencing Resource Counsel (Jan. 2, 2008), pp. 2-10.

III. Policy Statements Do Not Trump Statutes, No Matter What the Commission (or the Government) May Think.

Once again, the Commission devoted much of its presentation to why the limitations in revised § 1B1.10 are binding and do not violate the Constitution. In addition, an AUSA essentially gave an oral argument on the subject during the Practitioners' Panel, reading from a response to a motion for reduction of sentence that had argued at length that *Booker* does not apply and that USSG 1B1.10 is mandatory.[2]

We can expect the Commission to encourage courts – and particularly the courts of appeals where it has had success in the past – to issue swift rulings holding that § 1B1.10 is binding. The DOJ will no doubt be pushing for such rulings in cases in which the issue has not been argued at all or has not been competently argued. A team is preparing a model brief or reply to these arguments, which will be available upon request. In the meantime, you can find arguments and authority for treating § 1B1.10 as advisory in the following materials:

- Selected Retroactivity Caselaw, Federal Public and Community Defenders (Jan. 24-25, 2008), pp. 11-12
- Practice Tips and Lessons Learned in Charlotte, Amy Baron-Evans and Anne Blanchard (Jan. 20, 2008), pp. 10-12
- Memorandum re: Sentence Reductions for Crack Defendants, Sentencing Resource Counsel (Jan. 2, 2008), pp. 10-16.

[2] We have a copy of that brief, as well as a letter brief making similar arguments from the government in another case in a case where the movant did not even argue that *Booker* should apply; these materials are available upon request.

IV. DOJ Concedes that Counsel Is Required Whenever the Court May Impose Less than the Full Two-Level Reduction and Pledges Not to Oppose the Appointment of Counsel in Any Case.

DOJ backed off considerably from its earlier position that counsel is not necessary in a § 3582(c)(2) proceeding. In St. Louis, it began by taking a modified position that counsel was necessary in any case in which the government was arguing for less than the two-level reduction, but asserted that the government would not oppose such a reduction in "99% of these cases."[3] Every judge who spoke in St. Louis agreed that counsel was required anytime the court considered imposing less than the two-level reduction, and most planned to appoint defense counsel to represent all inmates who are even potentially eligible for a reduction. As Judge John Tunheim pointed out, courts have taken restrictive stances since *Booker*, and the Supreme Court has corrected them at every turn. His view is that given the very difficult issues at stake, courts "need to be careful and get it right," which means that every defendant needs counsel.

One judge directly questioned why DOJ had any business weighing in on the question of whether counsel should be appointed. The AUSA representing DOJ furiously backpedaled and stated that DOJ would not be filing briefs on whether counsel ought to be appointed, objecting to counsel's appointment or otherwise litigating the issue. This represents a 180-degree policy shift.

It is worth noting that in St. Louis, the Commission did not take a position on whether counsel is necessary or required. In Charlotte, it was part of the Commission's presentation and list of "selected" case law that counsel was not constitutionally required. Criticism followed, and it has backed off.

V. DOJ's Position that the Bottom of the Amended Guideline Range Will Operate as a Mandatory "Floor," Subject to Aggravators Found By the Judge, Opens Itself to Challenge.

DOJ also stated that in 99% of the cases, the Department will not be presenting information regarding public safety or post-conviction conduct, and that in those cases the Department will agree to a sentence at the *bottom* of the new guideline range. It also described the bottom of the guideline range after the two-level reduction as a "floor," much like the mandatory minimum floor in *Harris* and stated that *Booker*'s "one way ratchet" language doesn't apply here because § 3582(c)(2) was clearly intended to be a "one way ratchet downward." This position begs the question whether increasing the floor (or the sentence that the Commission and the Supreme Court in *Kimbrough* have said is *still* greater than necessary) based on judicial findings of dangerousness or post-

[3] DOJ repeatedly referred to the two-level reduction as if it were the maximum reduction allowed. In so doing, DOJ is attempting to avoid having courts decide whether they can reduce a sentence more than the two levels. Of course, we argue that courts must have discretion to go beyond the guidelines and policy statements in every instance. *See* Part III, *supra*.

conviction conduct implicates the Sixth Amendment. This will be addressed in the model brief.

The judges who spoke on the panel seemed to agree that even if the defendant was sentenced at the top or middle of the original guideline range, the sentencing judge has the discretion under § 3553(a) to go down to the bottom of the new range.

VI. Probation Cannot Determine Whether an Inmate Is Eligible for a Reduction and No Orders Can Be Entered Without Notice to the Defendant and an Opportunity to Be Heard.

In many districts, Defenders are being appointed as an initial matter to represent all inmates in cases identified by the Commission or Probation or defense counsel, and all those who self-identify through *pro se* motions or letters to the court, to analyze whether the inmates are even arguably eligible for a sentence reduction. In a few districts, Probation has been tasked with screening identified inmates to determine whether they are even arguably eligible for a sentence reduction, an approach DOJ is pushing nationally even though some USAOs in St. Louis informally recognized that this approach raises numerous problems. One judge stated that she will likely be adopting a procedure whereby Probation alone will determine whether or not an inmate is eligible for a sentence reduction, and that she intends to enter orders in cases in which Probation determines the inmate is ineligible without appointing defense counsel. This judge also suggested that, for those cases deemed potentially eligible for a sentence reduction, she will designate a "blue ribbon criminal panel" consisting of one representative each from the CJA panel, the Defenders, and the USAO to conduct a "blind review" of the potentially eligible cases and identify those on which there can be agreement and those on which there cannot and will thereafter make a recommendation to the court on each case.

Plans such as these, which are designed to limit defense counsel's review of potentially eligible cases, are ill-conceived and unconstitutional. Probation is institutionally and legally unqualified to screen cases for eligibility. Probation officers are not attorneys and are not authorized to render legal opinions, and courts have long held that deciding the sentence to be imposed is an inherently judicial function that cannot be delegated to a probation officer.[4] The same is true for "blue ribbon panels" or any other non-party who attempts to provide the court with a recommendation on the proper sentence in any given case.

[4] *See, e.g., Ex parte United States*, 242 U.S. 27, 41-42 (1916) ("the right to try offenses against the criminal laws and, upon conviction, to impose the punishment provided by law, is judicial"); *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) ("a probation officer may not decide the nature or extent of the punishment imposed upon a probationer"); *United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995) (court cannot delegate to probation the authority to set a restitution payment schedule); *United States v. Mohammad*, 53 F.3d 1426, 1439 (7th Cir. 1995) (delegating a "serious sentencing decision from a judicial officer to another deprives the defendant of a substantial right," constitutes a "serious structural defect in the criminal proceedings," and "seriously affects the integrity of those proceedings").

In *United States v. Spudic*, 795 F.2d 1334 (7th Cir. 1986), the Seventh Circuit disapproved of the judge's practice of meeting with a group of probation officers to determine "appropriate and fair sentences not disproportionate from other sentences in like cases." This practice was inconsistent with "rudimentary notions of fairness" because, among other things, it "may have an unrecognized influence on the sentencing judge causing the judge to abide by council consensus," and "the further concern that the impact of what is subsequently presented in open court at sentencing will be minimized, that the sentence will be foreordained, and that the judge therefore enters the actual sentencing hearing without an open mind." *Id.* at 1343.

Similarly, in *United States v. Brigham*, 447 F.3d 665 (9th Cir. 2006), two judges in the majority of a panel of the Ninth Circuit held that it was not plain error for the judge to participate in a "sentencing council" of judges in that district, the purpose of which was to reduce disparity. After meeting with the sentencing council, the judge imposed a 37-month sentence where the plea agreement called for 24 months. The majority made clear that it was not holding that this was or was not error, only that it was not plain error. The third judge concurred in the judgment (an *Ameline* remand), but wrote separately to disagree with the holding that use of a sentencing council in determining the defendant's sentence was not plain error: "In addition to constituting a troubling ex parte communication, the use of a sentencing council erodes the well-established principle that federal judges should be independent and insulated from group pressures. Article III provides life tenure and undiminished due compensation to federal judges to preserve their autonomy." *Id.* at 672 (Ferguson, J., concurring in the judgment). Further, "early constitutional debates in this country underscore the importance of judicial independence and insulation:

> [The] independence of . . . judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which . . . the influence of particular conjunctures . . . sometimes disseminate among the people themselves, and . . . have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id., quoting The Federalist No. 78 (Alexander Hamilton).

Determining eligibility for a sentence reduction is a difficult and subtle business, and many issues pertaining to eligibility remain open. The following are just some examples of defendants that may be eligible for a reduction despite the Commission's (and DOJ's) opinion that they are not:

- Career offenders / ACC defendants. *See* Selected Retroactivity Caselaw at 9-11; Memorandum re: Sentence Reductions for Crack Defendants at 16-17.
- Defendants whose sentence appears to be limited by a mandatory minimum. *See* Selected Retroactivity Caselaw at 8-9; Memorandum re: Sentence Reductions for Crack Defendants at 18.

- Defendants whose career offender, ACCA, or mandatory minimum sentence was based on law that has since changed and is no longer good law.
- Defendants who were sentenced for a continuing criminal enterprise or based on the "schoolyard" statute, 21 U.S.C. § 860.
- Defendants whose guideline range ends up not being reduced by a quirk of the guidelines (e.g., cases where the base offense level was 12 or less or the drug quantity was 4500 gm or more or certain cases involving multiple drug types). *See* Part VII, *infra*, Practice Tips and Lessons Learned in Charlotte at 4-5; Memorandum re: Sentence Reductions for Crack Defendants at 17-18; Good Math to Fight the Bad Math: Applying the Commission's Lowest Accepted Ratios to All Offense Levels, James Egan & Molly Roth (Jan. 25, 2008); Faulty Math In New Cocaine Base Equivalency Table, James Egan (Jan. 18, 2008); Applying the Crack Amendments 101 (Nov. 1, 2007).[5]
- Defendants sentenced pursuant to binding plea agreements. *See* Selected Retroactivity Caselaw at 9.
- Defendants incarcerated on a supervised release revocation. *See* Memorandum re: Sentence Reductions for Crack Defendants at 18-19.

As districts develop their own procedures for identifying eligible defendants, it is important to remind courts of the complex nature of these and other issues that potentially bear on eligibility. Defense counsel is uniquely capable of analyzing such issues and should have primary responsibility for doing so. Neither defense counsel nor the courts can or should rely on Probation's eligibility assessments, and no orders can be issued without notice to the defendant and an opportunity to respond.

VII. The Commission Suggests that Fairness Arguments May Be Appropriate in Cases Involving Unsound Math In Multi-Drug Cases.

As in Charlotte, the Commission listed in its presentation "certain cases involving multiple drug types" as ineligible for relief under § 1B1.10. The Commission has previously described this result as an "anomaly," and repeated that description in St. Louis. This "anomaly" is analyzed at length in James Egan's paper, "Faulty Math In New Cocaine Base Equivalency Table" (Jan. 18, 2008), which is now posted on fd.org. Essentially, if § 1B1.10 is viewed as "binding," strict application of the new marijuana equivalency table for crack offenses involving multiple drugs will often result in arbitrary ineligibility for a reduction. Upon questioning in St. Louis, the Commission suggested that a person who would be technically ineligible due to the mathematical anomaly promulgated by the Commission may be able to raise a "fairness argument."

We should argue that the Commission's decision to alter the mathematical formula to arbitrarily deny relief to some crack defendant's reflects "unsound judgment" and should not be followed. *See Rita v. United States*, 127 S. Ct. 2465, 2468 (2007) (district court may conclude that the guideline sentence fails to reflect § 3553(a)

[5] The latter three reports are available at http://www.fd.org/odstb_CrackCocaine.htm.

considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate "regardless.").

More support for this point may be found in James Egan and Molly Roth's more recent analysis entitled "Good Math to Fight the Bad Math: Applying the Commission's Lowest Accepted Ratios to All Offense Levels" (Jan. 25, 2008), also posted on fd.org.

VIII. BOP Maintains that Defense Counsel Is Not Permitted To See Sentry Database Information, Even When It Will Be Used To Deny Relief.

BOP made clear that defense counsel will not be able to see information from the Sentry database, which is accessible to prosecutors and Probation Officers. In St. Louis, it was suggested that the Probation Officer will summarize what she determines is relevant information for presentation to the court. Because this information could be used to establish the public safety or post-sentencing conduct aggravators under § 1B1.10, comment. (n.1(B)), even in those cases in which the government does not intend to raise such a challenge, defense counsel should always insist on notice and an opportunity to respond to the information itself, not just a Probation Officer's summary of its view of the relevant information.

It bears repeating that to withhold the information undermines the fundamental due process right to be sentenced based on accurate information subject to thorough adversarial testing. *See Rita v. United* States, 127 S. Ct. 2456, 2465 (2007) ("the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. *See* Rules 32(f), (h), (i)(C) and (i)(D); *see also Burns v. United States*, 501 U.S. 129, 136 (1991) (recognizing importance of notice and meaningful opportunity to be heard at sentencing)."). In addition, in cases applying § 3582(c)(2), courts have recognized that a district court "certainly has the discretion" to consider new information from the Probation Office in resolving a § 3582(c)(2) motion, but that it abuses its discretion by failing to disclose the contents of that information to the defendant before denying the motion. *United States v. Mueller*, 168 F.3d 186, 189 (5th Cir. 1999) (defendant must have notice of the contents of any addendum to the PSR); *see also United States v. Byfield*, 391 F.3d 277, 280-81 (D.C. Cir. 2004).

IX. The Policy Statement in § 1B1.10 Cannot Be Half-Binding, Half-Advisory.

One of the judges posed a question about a potential issue that may arise regarding acceptance of responsibility, asking about a person who originally received a three-level reduction in offense level for acceptance of responsibility but who now, at the amended guideline range, would only be eligible for a two-level reduction. In an interesting twist, Judge Castillo took the position that the person would only be eligible for a one-level reduction under § 1B1.10. Yet, § 1B1.10(b)(1) specifically directs judges to substitute only the amendments listed in subsection (c) and to leave all other guideline application decisions unaffected. The Commission and the government cannot have it both ways, insisting on the one hand that § 1B1.10 binds judges, but ignoring on the other those portions that would prevent it from justifying a higher sentence.

X. The Operation of the Safety-Valve Statute post-*Booker* Supports the Advisory Nature of § 1B1.10, Contrary to the Commission's View.

The Commission explained in St. Louis that it took *Booker* into account when it determined that it could limit district judges to the two levels by way of § 1B1.10. The Commission noted the limiting language of § 3582(c)(2), analogizing it to the mandatory language contained in the safety-valve statute, 18 U.S.C. § 3553(f). The Commission reported that courts have uniformly held that the safety-valve statute is still mandatory after *Booker*. The Commission failed to note, however, that the safety-valve statute remains mandatory only with respect to the five *statutory* factors that, if found by the court, allow for relief from a mandatory minimum. Once the court finds each factor, *Booker* now requires that the ultimate guideline range is advisory only. This is despite the other mandatory language of the statute referring to the guidelines and stating that "the court *shall* impose a sentence pursuant to the guidelines . . . without regard to the any statutory minimum sentence." 18 U.S.C. § 3553(f).

Despite the Commission's effort to downplay or outright ignore it, the portion of the safety-valve statute that *depends* on the guidelines is now advisory. Like § 3553(f), § 3582(c)(2) refers to the guidelines as providing the defining source of its limitations, which if the analogy to § 3553(f) is to be complete, means that those limitations must be advisory after *Booker*.

- *See* Selected Retroactivity Caselaw at 8-9.