Memorandum

To: Participants, National Sentencing Policy Institute
From: Training Branch of the Office of Defender Services
Date: June 25, 2008
Re: Appointment of Counsel in Crack Retroactivity Cases

"These are grossly unfair sentences, especially for non-violent crack offenders, and the retroactivity amendment is only a small step toward addressing the unfairness. This is a class of offenders who got a raw deal . . . . The question ought to be, 'Why shouldn't they get a lawyer?'"

The Honorable John Gleeson
Chair, Defender Services Committee
United States District Judge for the Eastern District of New York[1]

With the cooperation of key players in the federal judiciary, the retroactive crack amendment has resulted in the release of hundreds of federal prisoners, without the administrative burden that some predicted would flow from a retroactive amendment. Despite these successes, however, some defendants remain in prison, even though they may be eligible for immediate release.[2] In some cases they stay in prison out of mere oversight—neither the defendant nor the court realizes the defendant is eligible for release, so he remains in custody. In other cases, however, defendants remain in prison while their pro se motions pend indefinitely and inexplicably. For other defendants whose motions are reviewed, some are denied on legal grounds for which there was no briefing, and still others are denied or are granted only partially based on the facts of the original crime or the defendant's post-sentencing conduct.

This is not to say that every defendant who wants a reduction is automatically entitled to one. Unfortunately, in too many cases that do not receive a full reduction, the common denominator is the lack of appointed counsel. Although many defendants around the country have benefitted from the appointment of counsel, an informal survey of federal defenders around the country suggests that some judges, and in some cases entire districts, are not appointing counsel as a matter of course, even in contested matters.[3] Given the magnitude of the stakes (liberty and justice), the novelty of the issues, and the historic cooperation between all parties, Judge Gleeson's comment resonates in our ears: "*Why shouldn't they get a lawyer?*"

Realizing that some judges around the country choose not to appoint counsel, the Training Branch of Defender Services offers ten reasons why counsel should be appointed to handle § 3582(c)(2) motions.

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[1] *National Summits Help Federal Courts Prepare for Sentence Reduction Requests*, THE THIRD BRANCH, Feb. 2008, *available at* http://www.uscourts.gov/ttb/2008-02/national_summit.cfm.
[2] See Table 1 below.
[3] See Table 2 below.

1. A reduction under § 3582(c)(2) is a limited resentencing.

The amendment to USSG §1B1.10 codifies what some courts previously held: a § 3582(c)(2) reduction is "not a full resentencing."[4] However, as the Ninth Circuit observed, "While § 3582(c)(2) proceedings do not constitute full resentencings, their purpose *is* to give defendants a new sentence."[5] Thus, to say that counsel is not required because a § 3582(c)(2) reduction is not a full resentencing begs the question. The pertinent question for courts is this: What type of proceeding is contemplated by 18 U.S.C. § 3582(c)(2) and USSG §1B1.10?

A § 3582(c)(2) motion cannot constitute a *full* resentencing because the scope of the hearing is narrower than in the first instance. At the high end, § 3582(c)(2) authorizes only a *reduction*, so the maximum penalty after a § 3582(c)(2) motion is the length of the original sentence. At the low end, the amended text of §1B1.10 is aimed to limit the extent of any reduction to the low end of the amended guideline range, minus a proportionate reduction for any deviation from the guidelines that was already awarded.[6] Whatever this lower limit may be, the judge does not have the broad discretion to impose a sentence anywhere within the statutory range that he would enjoy on a full resentencing.

However, within this new range, the judge's authority and judicial task is the same as it was at sentencing: "consider[] the factors set forth in § 3553(a)" to decide what sentence is appropriate.[7] Indeed, courts have repeatedly described proceedings under § 3582(c)(2) as "resentencings," albeit limited ones.[8] Thus, it would seem that counsel is required on a § 3582(c)(2) motion for the same reasons it is required at an original sentencing, most importantly to delineate the scope of the proceeding and to argue the merits of the case under § 3553(a).

2. Counsel is required to define the scope of a § 3582(c)(2) resentencing.

A central task for judges is to delineate the scope of a § 3582(c)(2) resentencing, and this task requires the advice of counsel. As courts consider whether and to what extent a reduction is available, they must confront novel legal issues, for example:

a. Under what circumstances and how far may a district court go below the amended

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[4] USSG §1B1.10(a)(3); *see, e.g., United States v. McBride*, 283 F.3d 612, 615 (3d Cir. 2002); *see also*, *United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007).

[5] *Hicks*, 472 F.3d at 1171.

[6] USSG §1B1.10(b)(2). The Ninth Circuit has suggested such a limit may be unconstitutional. *See Hicks*, 472 F.3d at 1173.

[7] 18 U.S.C. § 3582(c)(2); *see also* USSG §1B1.10, comment. n.1(b)(i) ("Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).").

[8] *See, e.g., Restrepo-Contreras v. United States*, 99 F.3d 1128 (1st Cir. 1996) (unpublished); *United States v. Forde*, 165 F.3d 912 (4th Cir. 1998) (unpublished); *United States v. Townsend*, 55 F.3d 168, 171 (5th Cir. 1995); *United States v. Hasan*, 245 F.3d 682, 684 (8th Cir. 2001); *United States v. Cothran*, 106 F.3d 1560, 1562 (11th Cir. 1997).

guideline range?

b. Does USSG §1B1.10(b)(2), which limits resentencing to the amended guideline range, violate the Sixth Amendment?[9]

c. May a defendant be resentenced if his original sentence reflected a departure below the mandatory minimum pursuant to § 3553(e)?

d. May a defendant who was a career offender benefit from the retroactive crack amendment?

This memo does not attempt to answer these or other questions about the scope of a § 3582(c)(2) resentencing.[10] However, until such questions are resolved by appellate courts, a district court should appoint counsel to brief their merits and ensure they are preserved for appeal.

3. Counsel is required to make a factual record of post-sentencing conduct and argue the merits of the case.

Within the legal limits of a § 3582(c)(2), the substantive question of what sentence to impose requires the assistance of counsel. The contrary view may go as follows. In some cases where a defendant is clearly eligible for a reduction, a judge may be inclined to handle the case without the benefit of counsel out of the belief that the relevant record and pertinent factual arguments have already been made. A judge might reason: "I remember this case. I considered the § 3553(a) factors in the first instance, and a sentence of __ is appropriate."

Under the old version of §1B1.10, this approach might have made some sense. The old rule stated that a judge facing a § 3582(c)(2) motion had to "consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines . . . been in effect at the time the defendant was sentenced."[11] Thus, courts held there was no automatic right to counsel because there was no need or opportunity for either party to marshal any facts or arguments in addition to those presented at the original sentencing.[12]

This reasoning is inadequate in light of changes to §1B1.10, which added new considerations that were not at issue at the original sentence. First, the new version of §1B1.10 specifically instructs judges to "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."[13]

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[9] *See Hicks*, 472 F.3d at 1173 ("[T]o the extent that the policy statements are inconsistent with *Booker* by requiring that the Guidelines be treated as mandatory, the policy statements must give way.").

[10] Some of these issues are addressed in a memo entitled *Crack Retroactivity Questions, Answers, Caselaw, Argument Outlines* (Feb. 18, 2008), *available at* http://www.fd.org/pdf_lib/Defender.Authority.Combined.FINAL.2.18.0819.pdf.

[11] USSG §1B1.10(b) (2007).

[12] *See, e.g., United States v. Reddick*, 53 F.3d 462 (2d Cir. 1995); *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995); *United States v. Tidwell*, 178 F.3d 946 (7th Cir. 1999); *United States v. Townsend*, 98 F.3d 510, 513 (9th Cir. 1996). One case held that a court could deny outright a reduction based on post-sentencing conduct, but "[f]or purposes of considering where in the new Guidelines range the court would have sentenced Wyatt, the subsequent [conduct] is not a relevant factor." *United States v. Wyatt*, 115 F.3d 606, 610 (8th Cir. 1997).

[13] USSG §1B1.10, comment. n.1(B)(ii).

The government regularly cites this provision as a reason for denying a reduction, reminding the court of a defendant's violence or use of a weapon in connection with the original offense. Some judges grant a 2-level reduction over such objections on the ground that offense conduct is already taken into account by the amended guideline range.[14] Other judges, however, have denied even pro se motions based only on the facts that were before the court at the original sentencing.[15] This is not to say that a reduction should have been granted in any particular case—this is only to say that an attorney should have been appointed to argue the significance of offense conduct under the new language of §1B1.10.

In addition to requiring courts to reconsider the significance of offense conduct, the new language of §1B1.10 authorizes courts to consider facts that were not before the court in the first instance. "The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment."[16] This consideration raises the same concerns as the previous consideration in that it requires courts to weigh the implications of a defendant's conduct in ways that it has not previously done. It also raises another concern. Unlike the record of offense conduct, which has already been established at sentencing, the record of defendant's post-sentence conduct must be made for the first time at a § 3582(c)(2) resentencing. In some cases (but apparently not all cases), a probation officer can access BOP's records to inform the court about a defendant's disciplinary record. No one, however, will be marshaling the facts about a defendant's rehabilitative efforts, his strong performance in prison programs, or his changed family circumstances in support of a reduction. In at least one case, the court declined to award a full reduction based on a pro se defendant's disciplinary record.[17]

In short, the fact that a defendant was represented at sentencing does not diminish the need to have counsel appointed on a § 3582(c)(2) motion. Amended §1B1.10 changes the analysis such that attorneys are now needed to argue the merits of the case, both as to offense conduct and post-sentencing conduct.

4. Counsel may be constitutionally required.

Of course, however a court views the relative merits of appointing counsel, these views may be trumped by the claim that counsel is constitutionally required on such motions. Admittedly, the Supreme Court has never directly addressed this question, and circuits have generally held that counsel was not required (though counsel could always be appointed as a matter of discretion).[18] However, the Supreme Court addressed the scope of the Sixth Amendment right to counsel in post-sentencing proceedings in *Mempa v. Rhay*,[19] and the analysis

[14] *See, e.g., United States v. Smith*, 2008 WL 2148075 (E.D. Wis. 2008) (noting that aggravating offense conduct was "still" accounted for in the amended guideline range).

[15] *See, e.g., United States v. Smith*, 4:99-cr-00044 (S.D. Ga. 2008) (denying unopposed pro se motion based on "the factors identified in 18 U.S.C. § 3553(a), namely the history and characteristics of the defendant and the need to protect the public from further crimes of the defendant"); *United States v. Harrell*, 3:04-cr-00019 (S.D. Ga. 2008).

[16] USSG §1B1.10, comment. n.1(B)(iii).

[17] *United States v. Davis*, 4:01-cr-00188 (S.D. Ga.) (reducing sentence by less than two levels where pro se defendant had two disciplinary violations while in prison).

[18] See note 12 above.

[19] 389 U.S. 128 (1967).

there seems to require the appointment of counsel under § 3582(c)(2).

In *Mempa* the Supreme Court considered whether the Constitution required the appointment of counsel at a probation revocation hearing. The state argued it did not because the possibility of a prison sentence had already been imposed at sentencing and imprisonment following a revocation was "a mere formality." The court rejected this argument, holding 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 such a critical stage.[20]

Looking at *Mempa*, a court might reason that eligibility for a reduction does not constitute a "right" to a reduction, and because the defendant is already in custody, a § 3582(c)(2) resentencing is not a stage where "substantial rights" are affected. Thus, it may conclude counsel is not required. This analysis goes too far because it would eliminate the right to counsel at sentencing. By virtue of a conviction, a defendant has no right to any particular sentence within the statutory range. Thus, the right to counsel cannot depend on the right to seek a particular sentence.

To the contrary, *Mempa* suggests that the right to counsel is implicated because the question of the person's liberty is at issue. Even though the sentence imposed in *Mempa* was mandated by statute, the length of time actually served would depend on recommendations from the judge and prosecutor. The Court reasoned, "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."[21] More recently, the Court has suggested that where a statute provides some avenue of relief, the government may not then "'bolt the door to equal justice' to indigent defendants" by denying counsel.[22]

5. Too many uncounseled inmates have been forgotten.

In addition to these legal reasons for appointing counsel on a § 3582(c)(2) resentencing, one practical reason for appointing counsel is that too many uncounseled inmates have been forgotten. In most districts the federal defenders have been appointed by standing order to review the cases that may be eligible for relief and file motions on behalf of those defendants. Three districts with high numbers of crack cases do not have a federal defender: Southern District of Georgia, Northern District of Alabama, and Eastern District of Kentucky. A review of cases that may be eligible for a reduction in those districts shows that for a number of defendants who may be eligible for immediate release, no action has been taken.

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[20] *Id.* at 134.
[21] *Id.* at 135.
[22] *Halbert v. Michigan*, 545 U.S. 605, 610 (2005).

Table 1: PENDING "CRITICAL CASES" FROM DISTRICTS WITH NO FEDERAL DEFENDER			
	Cases with release dates w/in 3 years	Cases with motions filed	Cases with counsel appointed
S.D. Ga.	14	6	1
E.D. Ky.	39	6	5
N.D. Ala.	55	27	2

Although these defendants will not all receive a sentence of "time served," some of them will. These defendants need the help of an attorney to raise the issues and move the case along.

6. Docket management is easier with attorneys on the case.

Contrary to the perception that appointing lawyers will slow things down, appointing attorneys is actually more efficient. Defense counsel can screen out cases in which prisoners are clearly not eligible, prosecutors cannot negotiate with potentially eligible prisoners for agreed upon orders, attorneys can sensibly litigate issues that need to be litigated, and later appeals and habeas petitions can be avoided through sound advice at the outset.

7. Defendants are losing their right to appeal because they do not have attorneys.

In addition to missing opportunities for relief in the district court, many pro se defendants lose the opportunity to vindicate their rights in the circuit court because they do not have counsel. Courts have consistently held that appeals from a denied § 3582(c)(2) motion must be filed within 10 days of the denial.[23] Unfortunately, an inmate whose pro se motion is denied without ever seeing a judge may not be aware of either his right to appeal or the 10-day filing rule unless he is advised by an attorney. Without the assistance of counsel, defendants who have a meritorious claim on appeal will be denied the right to review.[24]

8. Federal Defenders *want* to handle these cases and CJA funds are available to pay appointed lawyers.

Perhaps courts are concerned that a broad appointment to review cases in the district or a specific appointment to represent defendants on a reduction motion would overwhelm already burdened federal public defender offices. To the contrary, federal defenders want all eligible defendants to receive the benefit of the recent Guideline reduction. To facilitate this process, the Administrative Office of the U.S. Courts has authorized the appointment of federal public defenders to handle these cases, so there is no reason for judges to feel any apprehension about appointing federal defenders to handle crack reductions.

In other cases, where circumstances favor the appointment of a CJA panel attorney, it

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[23] *See United States v. Byfield*, 522 F.3d 400, 402 (D.C. Cir. 2008) (citing cases from nine other circuits for the same proposition).

[24] Some judges try to ameliorate this problem by including with the order a notice to the defendant of his right to file an appeal within 10 days. *See, e.g., United States v. Moore*, 5:03-cr-00304 (N.D. Ala.) (docket #85, 86).

may be that courts are concerned that appointment to handle a § 3582(c)(2) reduction may fall outside the authorization of the CJA. To the contrary, because the judiciary as a whole is committed to the just and effective resolution of these motions, the Administrative Office of the U.S. Courts has authorized the use of CJA funds for § 3582(c)(2) resentencings.[25]

9. Failure to appoint counsel contributes to unwarranted disparity.

Recent efforts to assess the appointment of counsel around the country suggest that courts are following disparate practices, which may lead to disparate results. At one extreme, it appears that the Northern District of Alabama, which has no federal defender, has appointed counsel in only 13 of the 132 cases where a motion has been filed. In other districts that have a federal defender, it appears that even within a single district, judges are taking different approaches. The following table summarizes the anecdotal reports of some federal defenders around the country regarding the disparate approaches that judges are taking.

Table 2: EXAMPLES OF SOME DISTRICTS WHERE JUDGES ARE NOT APPOINTING COUNSEL IN CRACK RETROACTIVITY CASES	
N.D. Alabama	Counsel generally not appointed
S.D. Alabama	Counsel generally not appointed
W.D. Arkansas	One judge does not appoint counsel if defendant appears to be barred from relief (e.g. career offender)
N.D. Florida	One judge routinely appoints FD; others appoint only when there is a legal issue
N.D. Georgia	Many judges not appointing counsel
S.D. Georgia	No attorney screening of eligible cases
D. Hawaii	Counsel appointed only if and when defendant files pro se motion
N.D. Illinois	One judge appoints counsel only if relief denied to defendant then appoints counsel to contact client and file motion to reconsider
S.D. Iowa	Two judges not appointing counsel
E.D. Kentucky	No attorney screening of eligible cases
D. Massachusetts	One judge not appointing counsel where defendant was sentenced to mandatory minimum
D. New Hampshire D. Rhode Island	Counsel not appointed in cases in which probation determined that defendant was ineligible (includes career offenders and mandatory minimum cases)
N.D. Texas	Only two judges are appointing counsel outright; three judges appoint only if govt opposes reduction; eight judges are not appointing counsel at all
W. D. Texas	One judge is not appointing counsel; other judges either appoint counsel or grant relief sua sponte
E.D. Virginia	Some judges appointing counsel only for legal issues

[25] *See Retroactivity of Crack Cocaine Amendments: Guidance to CJA Panel Attorneys*, *available at* http://www.fd.org/odstb_CrackRetroactivity.htm (stating that CJA appointments for § 3582(c)(2) motions are proper under 18 U.S.C. § 3006A(d)).

Ultimately, the appointment of counsel may not make a difference in the sentence a defendant ultimately receives. But that does not matter. In one case where a defendant's sentence was imposed based on misinformation in the absence of an attorney, the Supreme Court stated: "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."[26] Even if the end results are not disparate, counsel should be appointed to ensure that the proper procedures are followed and that the factual record is accurate.

10. The sound exercise of judicial discretion in an adversary system requires appointment of counsel.

In addition to disparity among defendants, the most noticeable imbalance where defendants are unrepresented is between the defendant and the prosecutor. The government is *always* represented by counsel—the defendant should be too. In the Northern District of Alabama, it is not uncommon to find a pro se motion filed with the district court, followed a few days later with an appearance of, not one, but three Assistant United States Attorneys,[27] a reminder that the government is fully represented by counsel. In other cases, a pro se motion may prompt a sophisticated legal objection from the government to which the untrained defendant cannot respond.

It is inconceivable that our country would sit idly by while defendants seek and win sentence reductions. We expect that an Assistant United States Attorney will review every motion that is filed. In contrast, no one reviews the cases of defendants in some districts to identify easy rejections, stipulate to easy reductions, and focus the cases on tough issues. In other districts where there is such review, some courts are declining to appoint attorneys to represent them once the motion is filed.

The U.S. Sentencing Commission has taken a bold first step in reducing penalties for crack cocaine. It has further demonstrated its courage in this area by making that reduction available to thousands of prisoners around the country. As Judge Gleeson observed, "These are grossly unfair sentences, especially for non-violent crack offenders, and the retroactivity amendment is only a small step toward addressing the unfairness. This is a class of offenders who got a raw deal." Still, there is no right to a reduction, and in the end the decision to grant relief remains in the discretion of the district court. As with all decisions, including the decision to impose a particular sentence in the first instance, the decision to reduce a person's sentence has strong arguments on both sides. In an adversary system like ours, the judge cannot exercise that discretion fairly when only one side has an advocate. The courts cannot rely on indigent pro se defendants to adequately represent themselves. To be fair, counsel must be appointed.

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[26] *Townsend v. Burke*, 334 U.S. 736 (1948).

[27] *See, e.g., United States v. Andrew Henley*, 7:06-CR-00530 (N.D. Al.) (docket #657).