Providing Counsel To All Potentially Eligible Beneficiaries Of The Retroactive Crack Guideline Amendment Makes Sense And Is Constitutionally Required.

The Criminal Justice Act requires counsel for any financially eligible person who is entitled to appointment of counsel under the Sixth Amendment. 18 U.S.C. § 3006A(a)(1)(H). Some CJA Plans require that services rendered under the plan 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.

Most judges recognize that all potentially eligible prisoners, including those filing *pro se* motions and those who come to their attention with no motion having been filed at all, should be represented by either the Defender or CJA counsel, for reasons of efficiency, accuracy, and simple fairness. The government, which has an interest in efficiency, should also be in favor of counsel for all. Defense counsel can screen out cases in which prisoners are clearly not eligible, prosecutors cannot negotiate with potentially eligible prisoners for agreed upon orders,[1] defense counsel can sensibly litigate issues that need to be litigated, and later appeals and habeas petitions can be avoided through the sound advice of counsel. Moreover, prosecutors have "specific obligations to see that the defendant is accorded procedural justice,"[2] including to "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."[3]

At a Crack Retroactivity Summit attended by judges, probation officers, prosecutors and defense counsel on January 17, 2008, the Department of Justice conceded that judges have discretion to appoint counsel but contended that there is no constitutional right to counsel. Since the Department does not seem to be arguing that a lawyer who files a Section 3582(c)(2) motion on a prisoner's behalf should be removed from the case, its argument would disadvantage prisoners who file *pro se* motions for relief, prisoners who file motions for appointment of counsel without filing a motion for

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[1] *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).

[2] ABA Model Rule of Professional Conduct 3.8, comment 1.

[3] ABA Model Rule of Professional Conduct 3.8(b).

relief, and prisoners who slip through the cracks and file no motion at all.[4] The Sentencing Commission disappointingly seemed to throw its weight behind the Department, announcing that there is no constitutional right to counsel and circulating a list of cases supposedly supporting that position. Given that the Commission amended the crack guideline and properly voted to make the amendment retroactive, its "fear of counsel" is puzzling.[5] Given the complexity of the issues, the new factfinding invited by revised U.S.S.G. § 1B1.10, p.s., and the need for individualized sentencing determinations, defense counsel will further the statutory sentencing goals embodied in the crack guideline amendment. Indeed, it is the Department that seems intent on thwarting the retroactive implementation of the amendment. The Commission should avoid articulating minimum constitutional standards, consistent with its role as an independent policymaking body and not a court. *Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989).

Turning to the cases disseminated, it is critical to recognize that they were decided before U.S.S.G. § 1B1.10, p.s., was revised to invite the presentation of new facts and arguments to increase the sentence above the bottom of the amended guideline range or to deny relief altogether. Previously, 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." USSG § 1B1.10(b), p.s. (Nov. 1, 2007 ed.). In determining the new guideline range, the court could consider only the amendment and no other guideline provision. *Id*., comment. (n.2). The only other matter the court could consider in determining the new term of imprisonment was a comparable departure if a guideline-sanctioned departure was given at the original sentencing. *Id*., comment. (n.3). Thus, counsel's only role was to ensure an accurate calculation of the new guideline range and a comparable departure if a departure was given at the original sentencing, but otherwise the resentencing was relatively mechanical. Courts held that there was no automatic right to counsel in a Section 3582(c)(2) proceeding,[6] because there was no need or opportunity for either party to marshal any facts or arguments in addition to those presented at the initial sentencing.[7] It is quite a different story when the

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[4] In one case of which we are aware, the government filed a twenty-three page brief making intricate statutory and constitutional arguments against relief for the *pro se* prisoner, and arguing against appointment of counsel.

[5] Perhaps the Commission and the Department fear that lawyers will competently raise and litigate the issue that *Booker* applies on a Section 3582(c)(2) motion, and thus the limitations of U.S.S.G. § 1B1.10, p.s., cannot be binding. If *pro se* litigants clumsily raise the issue, the government can more easily win and the circuits will fall in line. The efficiency of defense counsel screening out meritless cases, negotiating agreed orders, and sensibly litigating any issues would be sacrificed to obtain rulings that the policy statement is "binding."

[6] *United States v. Tidwell*, 178 F.3d 946 (7th Cir. 1999); *United States v. Reddick*, 53 F.3d 462 (2d Cir. 1995).

[7] *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *United States v. Townsend*, 98 F.3d 510, 513 (9th Cir. 1996); *United States v. Whitebird*, 55 F.3 1007, 1011 (5th Cir. 1995).

prosecution is invited to urge, and the court to impose, a sentence higher than the bottom of the amended guideline range or to deny relief altogether based on facts and arguments never before considered. *See United States v. DeMott*, __ F.3d __, 2008 WL 124188 (2d Cir. Jan. 15, 2008) ("[D]istrict court violated Day's right to be present at resentencing, his right to counsel at resentencing, and his right to notice that the court intended to impose an adverse non-Guidelines sentence.").

The revised policy statement sets up a structure in which the bottom of the amended guideline range is a floor, the original sentence is a ceiling, and courts are advised (or as the Commission and the Department would have it, commanded) to consider new facts and arguments in support of a sentence higher than the bottom of the amended range all the way up to the original sentence. Application note 1(B) of revised USSG § 1B1.10, p.s. (Mar. 3, 2008 ed.) 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 . . . but only within the limits described in subsection (b)." Subsection (b), in turn, states that the court "shall not" impose a term of imprisonment "that is less than the minimum of the amended guideline range," except that if the original sentence was below the guideline range, "a reduction comparably less may be appropriate." To assist the government and/or probation officers in arguing for higher sentences, the Bureau of Prisons has made available to them (but not defense counsel) on a website the inmates' institutional records, including incident reports based on rank hearsay and disciplinary proceedings conducted without counsel.

Under this new structure, counsel is required by the Sixth Amendment and the Due Process Clause. 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 such 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 at the resentencing, 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." And, in *Glover v. United* States, 531 U.S. 198 (2001), the Court held that "any amount of actual jail time has Sixth Amendment significance." Thus, the Sixth Amendment requires defense counsel on a Section 3582(c) motion -- to aid in calculating the revised guideline

range, to marshal the facts and evidence against any allegation that public safety, post-sentence conduct, or any § 3553(a) factor should result in a sentence higher than the bottom of the amended guideline range, and to marshal the facts and evidence of mitigating circumstances under § 3553(a) in support of a sentence no greater than at the bottom of the amended guideline range.

In *Halbert v. Michigan*, 545 U.S. 605 (2005), the Supreme Court held that the Due Process and Equal Protection Clauses require that if an avenue of relief is provided by statute, the government may not then "bolt the door to equal justice to indigent defendants" by denying counsel. In *Halbert*, the state refused to appoint counsel on a discretionary first appeal from a guilty plea, including for 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. The same rationale applies to Section 3582(c)(2) 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 rationale applies to Section 3582(c)(2) motions, where defense counsel is needed to correct errors in calculating the amended guideline range and in any information offered by the government or the probation officer in support of a higher sentence.