Retroactive Crack Amendment
Practice Tips and Other Lessons Learned in Charlotte
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I. The Poison Pill in USSG 1B1.10 Should Apply to No Cases.

As some have noticed, the second sentence of revised USSG 1B1.10(b)(2)(B), p.s., can be read to deprive individuals of any relief if they were sentenced initially under the constitutionally required *Booker* remedy, which requires consideration of all of the purposes and factors listed in Section 3553(a), not just the guideline range.[1] The Commission offered no explanation for this cryptic sentence when it promulgated the policy statement. However, as explained elsewhere, the corresponding application note 3 draws no distinction between non-guideline sentences based on a guideline-approved departure and those based on § 3553(a), and the Commission could not have promulgated a policy statement in conflict with the Supreme Court's interpretation of a statute or with the Constitution.[2] *See* Sentence Reductions Under the Retroactive Crack Amendment 11 n.29, 1/2/08; Crack Summit Memo from Defender Guideline Committee 3-4, 1/14/08, both posted on the Crack Cocaine Guideline Amendments page of www.fd.org.

[1] The first sentence states that "[i]f 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 . . . may be appropriate," but the second sentence states: "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."

[2] *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").

USSC in its presentation to the conference in Charlotte explained that what USSC had in mind was 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.[3] 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). It's too bad the Commission did not explain this in writing.

II. The March 3 Date Is A Matter Of Judicial Discretion.

Many defendants are due for release before March 3, 2008 based on application of USSG § 2D1.1, effective November 1, 2007. Though the Commission has advised delay until March 3, 2008 even for these prisoners, some judges are willing to release prisoners now, or already have. At the Charlotte meeting, a few judges said publicly that they would entertain a motion for immediate release, giving the government an opportunity to respond. USSC tried very hard to maintain that the date was the law, but this was met with considerable skepticism. The purpose of the delayed release date was "to give the courts sufficient time to prepare for and process these cases,"[4] and USSC reaffirmed in Charlotte that the purpose was that the amendment affects many people and judges need to get ready. If a judge is ready now, this rationale does not apply. It also makes sense to release people when due, to avoid a bottleneck on March 3.

The government has claimed in some cases that judges have to wait until March 3 because USSG 1B1.10 requires congressional review and acquiescence by silence. This is not correct because USSG 1B1.10 is a policy statement and policy statements are not subject to congressional review and acquiescence. *See* 28 U.S.C. § 994(p); *Stinson v. United States*, 508 U.S. 36, 40-46 (1993).

As the Criminal Law Committee of the Judicial Conference said in its letter to the Commission on November 2, 2007, "the main point remains that judicial flexibility is consistent with the long-articulated view of the Judicial Conference that sentencing guidelines should not deprive a judge of the discretion to reach an appropriate sentence." *See* Letter from Criminal Law Committee at 5-6 (Nov. 2, 2007), http://www.ussc.gov/pubcom_Retro/PC200711_004.pdf. Indeed, the courts are required to treat the guidelines and policy statements as advisory after *Booker*, *Rita*, *Kimbrough* and *Gall*.

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[3] The USSC's presentation was conducted by the Chair, the Staff Director, General Counsel, and a Senior Training Specialist.

[4] *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/rel121107.htm.

Further, the district court must consider all relevant statutory criteria in existence when a motion under Section 3582(c)(2) is filed, whether or not in existence at the time of the original sentencing. *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). While Section 3553(b) essentially rendered Section 3553(a) a nullity at any pre-*Booker* sentencing, Section 3553(a) is now the sentencing law, as interpreted by the Supreme Court. Consideration of Section 3553(a) includes the amended guideline, the reasons for the amendment, *i.e.*, as a partial remedy to address the fact that crack guideline sentences are greater than necessary to satisfy sentencing purposes and create unwarranted disparity, USSG, App C, Amend. 706 (Nov. 1, 2007); USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* at 10 (May 2007), and the fact that it was made retroactive to best serve the statutory purposes of sentencing.[5]

As the Commission has acknowledged, it originally set the guideline above the mandatory minimum level, thus "contribut[ing] to the problems associated with the 100-to-1 drug quantity ratio," USSG, App. C, Amend. 706 (Nov. 1, 2007), and then extended this approach across 17 levels below, between and above the two statutory levels for reasons it did not explain.[6] Holding a prisoner longer than the amendment itself requires directly conflicts with these considerations and thus with Section 3553(a).[7]

Further, USSC's advice to deny relief until March 3 lacks the procedural legitimacy of the amendment itself. While USSC announced in Charlotte that it solicited public comment on revised USSG 1B1.10, this is only a partial account. USSC requested comment regarding whether the amendment should be included in §1B1.10(c) and "whether, if it amends §1B1.10(c) to include [the] amendment, it also should amend §1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively under 18 U.S.C. § 3582(c)(2)."[8] However, neither the text of

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[5] 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/rel121107.htm.

[6] "This is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 49 (2004).

[7] The Commission cannot effectively amend a statute by interpreting it in a way that is contrary to the construction given it by the Supreme Court. *Neal v. United States*, 516 U.S. 284, 290, 295 (1996).

[8] *See* http://www.ussc.gov/FEDREG/fedr0707_1.htm.

the substantial revisions to USSG 1B1.10 nor the March 3 date was ever published for comment. This was not improper, as only "guidelines" must be published for comment, 28 U.S.C. § 994(x), but it produced a purportedly binding policy statement based on a questionable legal theory. It was drafted in reliance on a theory advanced by a law professor and former prosecutor and presumably supported by DOJ, while ignoring advice from the Criminal Law Committee of the Judicial Conference and Defenders to take a more moderate approach.[9]

If the judge nonetheless believes he has no discretion to release the person when due under the amended crack guideline, he can use his equity jurisdiction to grant interim relief, *i.e*., bail. *See* Sentence Reductions Under the Retroactive Crack Amendment at 8, http://www.fd.org/pdf_lib/retroactivity%20memo.pdf. Or, you can file a petition under 28 U.S.C. § 2255 or the All Writs Act, 28 U.S.C. § 1651(a). *Id*. at 9-10.

III. USSC Insists That Unsound Math In Multi-Drug Cases Precludes Relief.

In its presentation to the conference, USSC listed "certain cases involving multiple drug types" as an example of "when crack cocaine amendment would not result in a lowering of the guideline range," such that relief is precluded under USSG 1B1.10(c).

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. James Egan, a Research and Writing Specialist in Alex Bunin's office, has prepared a thorough analysis of the equivalency table problems with examples, entitled Faulty Math In New Cocaine Base Equivalency Table, soon to be posted at http://www.fd.org/odstb_CrackCocaine.htm.

First, as he points out, a mechanical application of these formulae will often arbitrarily punish defendants for some quantities of drugs, even when more culpable

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[9] The Criminal Law Committee suggested a general and non-binding policy statement, in recognition that "in the wake of *Booker*, all resentencings now have to be done under an advisory system." *See* Letter from Criminal Law Committee at 5-6 (Nov. 2, 2007), http://www.ussc.gov/pubcom_Retro/PC200711_004.pdf. Professor Chanenson's theory was that USSC could promulgate a detailed and binding policy statement to mandatorily restrict judicial discretion. *See* Testimony of Steven L. Chanenson, http://www.ussc.gov/hearings/11_13_07/Chanenson_testimony.pdf. Defenders noted that it was unnecessary to give any guidance to judges beyond that contained in the existing USSG 1B1.10, and that the "Commission should not explicitly declare any policy statement to be binding. As Professor Chanenson acknowledged, no court has adopted the position that a policy statement in this area is 'absolute' and the courts may not agree with such a theory. For the Commission to adopt this position would entail novel statutory and constitutional interpretation, which is not its proper role." *See* Letter from Defenders to USSC, November 21, 2007, available at http://www.fd.org/odstb_CrackCocaine.htm.

offenders benefit. Second, and more systemically, the underlying premise of the Guidelines is mathematical. If the math is wrong, the rational basis for the system is undermined. That becomes even more evident when USSC declines to fix the problem then announces that these irrational disparities must be applied to deny relief under Section 3582(c)(2). It is hard to think of a better argument for why the limitations in USSG 1B1.10 cannot be "binding." If they are binding, judges must strictly apply this bad math, knowing it is bad. Third, this is not just a retroactivity problem. Every case under the amendments in which the tables are used is suspect if the parties and the court did not know of these inherent disparities and adjust for them.

IV. BOP Procedures That Could Contribute to Longer Incarceration And Other News From BOP

1. BOP announced that it will be seeking a stay of ten days of any release order to collect DNA, give victims notice, perform Adam Walsh Act civil commitment reviews, and do release planning.[10] Thus, they said, judges should order "time served plus ten days." If an extra ten days would result in the client being held longer than the amendment requires, you should urge the judge to deny any stay or grant a shorter one. Some judges said that they want motions filed now for prisoners due for release before, on or shortly after March 3, so that they can issue the government notice to show cause, schedule a hearing if necessary, and release the person as soon as possible.

2. BOP has a Sentry database, accessible to prosecutors and Probation Officers, but not defense counsel, which contains "every incident report." This includes rank hearsay and disciplinary proceedings conducted without counsel, and could be used to establish the public safety or post-sentencing conduct aggravators under USSG 1B1.10, comment. (n.1(B)). This may be enough due process in the prison setting, but it is not enough upon which to base a sentencing decision. *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)."); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (pre-*Gideon*, defendant has a due process right to counsel at sentencing to ensure that he is sentenced on the basis of accurate information). One Probation Officer said that his office will run the Sentry report on everybody, and will provide it to defense counsel. Certainly, the defendant has a right to the report if it is being used to argue for denial of relief altogether or for a new sentence higher than the bottom of the new guideline range. *Ibid*.

3. Since most crack offenses are non-violent, any evidence of the public safety aggravator will come from BOP. One judge asked that all agreed orders state that the public safety factor has been considered.

[10] Don't forget to warn clients to remain silent in response to any questions about sexual activity, or they will lose much more than two levels. *See* Civil Commitment material on Adam Wash page, http://www.fd.org/odstb_AdamWalsh.htm.

4. BOP said that transporting prisoners raises safety concerns. It also said that pulling an inmate out of prison to attend a hearing for two weeks or more would require him to restart RDAP. If a judge orders a hearing by videoconference, BOP will accommodate it. Another idea was to hold hearings in a central place within the region (a BOP facility?) rather than in courtrooms around the country. But it is unclear how this would work, since many prisoners are housed in a region far from the district where they were sentenced. There seemed to be some recognition that if facts that could be dispositive needed to be contested, such as information from BOP regarding public safety, a hearing may be required. *See, e.g.*, *United States v. Mueller*, 168 F.3d 186, 189-90 (5th Cir. 1999); *United States v. Byfield*, 391 F.3d 277, 280-81 (D.C. Cir. 2004).

5. Probation Officers can get release plans by writing to BOP to request it. There was discussion about release plans being used to address concerns about public safety. If BOP's release plan would make the conditions more onerous, the prisoner gets a hearing unless he waives it. *See* Fed. R. Crim. P. 32.1(c). To knowingly and intelligently waive a hearing, the defendant needs counsel.

6. BOP claims that it has informed the entire inmate population of the retroactive crack amendment, told them they can get their PSRs, and that contact information for Defender offices is in the library. According to a prosecutor from the Eastern District of Pennsylvania who spoke on the practitioners' panel, this means that "due process has been served." Putting aside that due process has yet to be served through appointment of counsel and litigation of a motion, BOP's notice system obviously is not being implemented in all facilities, or is just not working for whatever reason. Some Defender Offices are getting almost no calls. Inmates are calling judges' chambers, court clerks, and even prosecutors. Many prisoners are filing *pro se* motions.

7. To alleviate a crush on halfway house space, BOP will put as many people on home detention as possible. If we heard correctly, this might mean moving people that are not subject to the retroactive crack amendment who are currently in halfway houses to home detention.

8. The estimated release date on inmate locator includes good time.

V. Counsel 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.[11] The government, which also claims to have an interest in efficiency, should also be in favor of counsel for all. Defense counsel can screen out cases in which prisoners who are clearly not eligible, prosecutors cannot negotiate with potentially eligible prisoners for agreed upon orders,[12] defense counsel can sensibly litigate issues that need to be litigated, and appeals and habeas petitions can be avoided through the sound advice of defense counsel. Moreover, prosecutors have "specific obligations to see that the defendant is accorded procedural justice,"[13] 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."[14]

At the meeting in Charlotte, 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 relief, and prisoners who

[11] According to our survey of Defenders, the vast majority of districts have already decided that the Defender will represent as many as possible, CJA counsel will be appointed if there is a conflict, and this includes *pro se* litigants, but few judges at the Charlotte meeting announced the plan for counsel in their districts when given the opportunity. However, Judge Gleeson (EDNY) reminded judges that considering how we got here, they should not be asking why appoint counsel, but why shouldn't these people who have a shot at a small bit of relief from the raw deal they received get a lawyer? He urged judges to use the Defender as the clearinghouse, and to provide either Defender or CJA counsel in all cases; if there is no disagreement and there is nothing for the lawyer to do, don't pay him. Judge Keeley (ND WVa) said her district is relying on the Defender to screen cases and is providing counsel to all. Judge Borman (ED Mich) said that the Defender or CJA counsel will be appointed for all, including *pro se* litigants; this will save a lot of work and avoid problems; the Defender will screen out ineligible folks, negotiate many others; the best way to identify eligible persons is to have Probation work with the Defender. Judge Carnes (ND GA) advised to appoint the Defender first, absent a conflict, to save money. Judge Africk (ED LA) and Judge Conrad (WD NC) said they did not have a plan yet. Defender Lee Lawless announced that the ED MO is appointing the Defender to all cases.

[12] *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).

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

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

slip through the cracks and file no motion at all.[15] 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.[16] 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,[17] 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.[18] It is quite a different story when the prosecution is invited to urge, and the court to impose, a sentence higher than the

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[15] 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.

[16] 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."

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

[18] *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).

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.

VI. USSC/DOJ Pushing Their Theory That The Limitations In USSG 1B1.10 Are Binding, And That *Booker* Does Not Apply

While most Section 3582(c)(2) motions will be resolved by agreement, particularly for those due for release in the near future, there will undoubtedly be cases where defense counsel will need to argue that USSG 1B1.10 is not binding and that a lower sentence is required to comply with *Booker* and Section 3553(a). For example, USSG 1B1.10's preclusion of relief in cases where the amendment does not change the guideline range is patently absurd where USSC's bad math results in no change in multi-drug cases, creating sentences that are greater than necessary by USSC's own account. And there will be cases where the client was sentenced before *Booker* was decided without consideration of any Section 3553(a) factor other than the unconstitutional mandatory guideline range.[19]

[19] As the Criminal Law Committee of the Judicial Conference said:

> Many of the offenders who could take advantage of the two-level reduction were sentenced before . . . *Booker*. The issue then arises as to whether they can argue

As Judge Lynch recently said in *United States v. Polanco*, 2008 WL 144825, *2 (S.D. N.Y. Jan. 15, 2008):

> The Sentencing Commission has purported to limit the sentencing court's authority to reduce a sentence, emphasizing that, in its view, the reduction authorized by § 3582(c)(2) and the Commission's policy statement "do not constitute a full resentencing of the defendant," and prohibiting a reduction to a sentence "that is less than the minimum of the amended guideline range." The effectiveness of these limitations is yet to be tested; it would be, to say no more, ironic if the relief available to a defendant who received a sentence that is now recognized to have been unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guideline under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline.[20]

You may have thought that this issue could wait until prisoners due for release on or before March 3 are released, but DOJ and USSC are pushing it hard right now. USSC devoted much of its presentation to why the limitations in revised USSG 1B1.10 are binding and do not violate the Constitution. An AUSA essentially gave an oral argument on the subject, and handed out a response to a motion for reduction of sentence, arguing at length that *Booker* does not apply and that USSG 1B1.10 is mandatory. This 23-page brief was against a *pro se* prisoner who seemed to be arguing for what he understood was the effect of the amended guideline alone. In addition to complex statutory and constitutional arguments against the application of *Booker* which the prisoner did not seem to be requesting, the government argued that no counsel should be appointed. And

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> at the "resentencing" that they should receive not only the two-level adjustment but an even lower sentence – a variance – because the § 3553(a) factors that are now in play were not in play when they were originally sentenced. The only decisions that speak to this issue have held that a defendant *can* raise new *Booker* issues at resentencing proceedings for modification of a sentence based on the lowering of a guideline range by the Commission. Thus, it is possible that defense attorneys may be required to consider whether to file *Booker* motions for their clients in these cases . . .

Letter from Criminal Law Committee at 5 (Nov. 2, 2007) (emphasis in original), http://www.ussc.gov/pubcom_Retro/PC200711_004.pdf. The Criminal Law Committee cited only *Hicks*, *Forty Estrema*, and *Jones*. There are other cases now being cited by USSC and DOJ, but they are irrelevant for the reasons stated in Sentence Reductions Under the Retroactive Crack Amendment at 5-7, http://www.fd.org/pdf_lib/retroactivity%20memo.pdf.

[20] It was unnecessary to decide whether USSC's limitations were effective in this case because the amendment alone resulted in a March 17 release date.

we have a letter brief making similar arguments from the government in another case in a case where the movant did not argue that *Booker* should apply.[21]

In short, it looks like DOJ will be pushing for swift rulings from the courts of appeals that USSG 1B1.10 is binding, and that its ideal case is one in which the issue has not been argued at all or has not been competently argued. We are preparing a model brief or reply to these arguments, which will be available upon request.

VII. USSC and USPO Lists

As of now, all Defender Offices should have the USPO list. Of 64 Defenders who responded to our survey, 53 have received the USSC list from their Chief Judges. Only one district court (S.D. Texas) has redacted the USSC list to exclude persons not previously represented by the Defender.

Neither list is complete, and neither subsumes the other. (According to reports from Defenders, the USSC list may be a third or more short.) Here are some of the types of cases that are definitely missing from the USSC list, and may also be missing from the USPO list:

- persons sentenced before 1992
- persons sentenced after June 30, 2007 and perhaps before if they were not coded by USSC by August 2007
- persons for whom documentation was not forwarded to USSC by the district court
- cases that were not coded as crack cases by USSC or the district court – as to USSC coding, the earlier the case, the less reliable the coding
- persons who received a Rule 35 reduction after sentencing
- persons who received a guideline sentence with a number of months that look like a mandatory minimum (*e.g.*, 120 months) but were not in fact subject to a mandatory minimum because of safety valve or substantial assistance
- persons charged with firearms offenses who were cross referenced to the drug guideline and sentenced based on the crack guideline
- cases that show up in CMS as gun cases even though they had crack charges, b/c the case had to be opened under one charge

[21] These materials are available upon request.