PENDING AND POSSIBLE COURT CHALLENGES:
APPEALS, HABEAS PETITIONS, § 3582(c)(2) MOTIONS

I. Introduction

Question 4 of the OPA's form petition for sentence commutation asks if the applicant appealed, sought Supreme Court review, and/or filed a habeas challenge to his conviction or sentence, and if those matters are concluded.

If all court challenges that were filed have concluded, it tends to support commutation as there is no other pending means to obtain relief from an unfair sentence that would not be imposed today. In some cases, you will affirmatively use the litigation history to demonstrate that the client raised the issue that would make his sentence lower today but is unable to get relief from the courts. For example, Applicant A was classified as a "career offender" at his original sentencing based on a prior conviction later held by the Supreme Court or court of appeals not to be a "crime of violence." He raised this claim in a habeas petition, but it was denied, not on the merits but because it did not meet the standard for a second or successive petition under 28 U.S.C. § 2255(h). *See Gilbert v. United States,* 640 F.3d 1293 (11th Cir. 2011) (en banc). As another example, Applicant B, who was sentenced before the Fair Sentencing Act of 2010 (FSA) became law on August 3, 2010, would receive a lower mandatory minimum and a lower guideline range if he were sentenced today. He filed a motion for reduction in sentence under 18 U.S.C. § 3582(c)(2), but the district court denied any reduction because Congress did not expressly make the lower FSA statutory limits retroactive and the pre-FSA mandatory minimum stood in the way of a reduction in the retroactive guideline range. When Applicant B appealed that ruling, the court of appeals affirmed. *See United States v. Blewett,* 746 F.3d 647 (6th Cir. 2013) (en banc).

If a court challenge is pending, you face a different situation because there is at least a theoretical possibility that a court could grant relief. An OPA rule advises that a petition "should" not be filed if other forms of relief "are available," except in "exceptional circumstances,"[1] and the Notice BOP sent to inmates on May 5 states that "[p]etitions for commutation are not generally accepted from inmates who are presently challenging their convictions or sentences." Petitions from inmates with pending habeas challenges may be submitted and will be considered. How to deal with a pending habeas challenge, and with cases in which a pending appeal or a § 3582(c)(2) motion is pending, is explained in Part II.

In a third set of cases, you will find that there are grounds for a court challenge, the very grounds that show that the sentence would be lower if imposed today, but the client has not filed any petition or motion in court. How to deal with these cases is explained in Part III.

II. Pending Court Proceedings

A. Habeas Challenges

[1] Rule 1.3 states: "No petition for commutation of sentence…should be filed if other forms of judicial or administrative relief are available, except upon a showing of exceptional circumstances," http://www.justice.gov/pardon/clemency.htm#commutation.

Procedural barriers to substantively meritorious habeas claims, such as the one-year statute of limitations, the requirement of retroactivity, the narrow circumstances in which second or successive petitions are allowed, and procedural default, are insurmountable in most cases. Even if a particular claim is likely to eventually surmount all procedural barriers, a ruling on the merits is unlikely to occur in sufficient time to file a clemency submission because these cases take a long time to litigate and they tend to be given a low priority by the courts. If you had to wait for a ruling before filing a commutation petition, it may well be too late. If you had to explain in a commutation petition that the habeas petition is likely to fail because of procedural barriers, or substantive law for that matter, the government would be able to use that concession against the client in the habeas litigation should the commutation petition be denied.[2] Given the uncertainty that any commutation petition will be granted, such an explanation may destroy the client's ability ever to get relief, and will make your relationship with the client difficult at best.

Not to worry. Petitions for sentence commutation may be submitted and will be considered in cases in which a habeas petition is pending. The following explanation will suffice:

> A habeas petition has been filed. [Briefly state the current status, e.g., pending in the district court, pending in the court of appeals.] Given the many hurdles to habeas relief and the length of time it takes for these cases to reach resolution, we ask that you consider this petition.

You should include this statement in answering Question 4 on OPA's form petition, and you can include it, as relevant, in the Memorandum in Support of Petition for Sentence Commutation, perhaps in a footnote.

Given the uncertainty that any commutation petition will be granted (no matter how strong), it may be wise to attempt to negotiate a settlement of the pending habeas matter with the government that would result in the client's release in the very near future. This may be possible if a habeas claim is substantively meritorious (even if there are procedural barriers[3]), or if the government supports commutation regardless of whether it is meritorious. See, for example, the motion and orders cited in the footnote,[4] and *United States v. Holloway* and the examples cited

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[2] The client signs the commutation petition. The petition and documents submitted in support of it "may be made available for inspection, in whole or in part, when in the judgment of the Attorney General their disclosure is required by law or the ends of justice." 28 C.F.R. §1.5.

[3] The prosecutor may waive the one-year statute of limitations. *See Wood v. Milyard*, 132 S. Ct. 1826 (2012).

[4] *See* Joint Motion to Reduce Sentence and Dismiss § 2255 Motion, Order Dismissing Defendant's Motion to Vacate and Set Aside Sentence, and Order Amending the Judgment, *United States v. Martinez-Blanco*, No. 1:06-cr-00396, available on PACER.

therein.[5] **You must coordinate with habeas counsel, if any. If the client is not represented by counsel in the habeas matter**, and you are not in a position to negotiate on his behalf (*e.g*, you have no experience in habeas law,[6] you do not know the prosecutor, or you are experienced and know the prosecutor but do not wish to represent the client in any matter other than commutation), **contact abaronevans@gmail.com or jennifer_coffin@fd.org**. They may be able to find experienced counsel in the district where the habeas matter is pending to negotiate on the client's behalf.

You may well encounter pending habeas petitions relying on *Descamps v. United States*, 133 S. Ct. 2276 (2013), a decision that favorably changed the law regarding what constitutes an enhancing prior conviction through application of the categorical/modified categorical approach. *DesCamps* was decided on June 20, 2013, so many claims were filed on or before June 19, 2014 (the date the one-year statute of limitations ran). **These claims have real merit, and many were filed by Federal Public Defenders and other lawyers**. If you are not that lawyer, **you *must* contact and coordinate with that lawyer. If the client filed a habeas petition *pro se*, contact Paresh Patel (paresh_patel@fd.org), the national coordinator for *Descamps* claims**.

B. Direct Appeals

Because inmates must have served at least 10 years in order to be considered for commutation, it is unlikely that anyone will have an initial direct appeal pending. Some clients, however, may have direct appeals of denials of motions for reduced sentence under 18 U.S.C. § 3582(c)(2) or related petitions for certiorari pending, claiming, for example:

- The district court wrongly denied a sentence reduction because the Fair Sentencing Act's reduced mandatory minimums should be read as retroactive. In *United States v. Dorsey*, 133 S. Ct. 2321 (2012), the Supreme Court held that the lower statutory ranges of the Fair Sentencing Act of 2010 apply to offenses that preceded August 3, 2010, the effective date of the Act, but who were originally sentenced on or after that date. You are unlikely to encounter appeals based on *Dorsey* because of the 10-years-served requirement. However, many defendants whose original sentences were imposed before August 3, 2010 were denied relief, and claimed on appeal that the Fair Sentencing Act should be read as retroactive in that situation as well. Thus far, such appeals have all been denied.[7]

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[5] Memorandum Regarding the Vacatur of Two Convictions Under 18 U.S.C. § 924(c), No. 1:95-cr-00078 (E.D.N.Y. July 28, 2014).

[6] *See* ABA Model Rule of Professional Responsibility 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[7] *See United States v. Santos-Rivera*, 726 F.3d 17 (1st Cir. 2013); *United States v. Humphries*, 502 F. App'x. 46, 47-48 (2d Cir. 2012); *United States v. Coplin*, ___ F. App'x. ___, 2013 WL 4852255, *1 (3d Cir. 2013); *United States v. Black*, 737 F.3d 280, 287 (4th Cir. 2013); *United States v. Kelly*, 716 F.3d 180, 181-82 (5th Cir. 2013); *United States v. Blewett*, 746 F.3d 647 (6th Cir. 2013) (en banc); *United States v. Robinson*, 697 F.3d 443, 444-45 (7th Cir. 2012); *United States v. Reeves*, 717 F.3d 647, 650–51

- The Commission's policy statement prohibiting the district court from reiterating in a § 3582(c)(2) proceeding a variance or a departure (for reasons other than cooperation) granted at the original sentencing is invalid. These appeals, too, have thus far been denied.[8]

- The Commission's policy statement preventing sentence reductions for career offenders whose sentences were "based on" the crack guideline range is invalid. Those appeals have also been denied.[9]

- The district court wrongly denied a sentence reduction because, although the defendant entered into a Rule 11(c)(1)(C) agreement specifying a particular sentence, the sentence was "based on" the guideline range as defined in *Freeman v. United States*, 131 S. Ct. 2685 (2011). Some of these appeals have been successful.[10]

Appeals are usually resolved much more quickly than habeas claims, so you may be able to wait for a ruling. But the current administration ends on January 20, 2017. If you cannot wait for a ruling, you cannot state that the appeal is likely to fail. You can state that the district court denied a reduction in sentence, cite the decision(s) upon which the denial was based, and state that an appeal is pending. As soon as there is a ruling, inform the OPA.

Again, **if you are not the lawyer who filed a pending appeal, you *must* contact and coordinate with that lawyer. If there is no appellate counsel because the client appealed *pro se* (which is much less likely than in habeas matters), or if you need advice about a pending appeal, contact abaronevans@gmail.com or jennifer_coffin@fd.org**.

C. Motions for Reduction in Sentence Under 18 U.S.C. § 3582(c)(2)

(8th Cir. 2013); *United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013); *United States v. Murphy*, 501 F. App'x. 740, 744 (10th Cir. 2013); *United States v. Berry*, 701 F.3d 374, 377 (11th Cir. 2012); *United States v. Swangin*, 726 F.3d 205, 208 (D.C. Cir. 2013).

[8] *See United States v. Taylor*, 743 F.3d 876 (D.C. Cir. 2014); *United States v. Davis*, 739 F.3d 1222 (9th Cir. 2014); *United States v. Colon*, 707 F.3d 1255 (11th Cir. 2013); *United States v. Erskine*, 717 F.3d 131 (2d Cir. 2013); *United States v. Anderson*, 686 F.3d 585 (8th Cir. 2012); *United States v. Berberena*, 694 F.3d 514 (3d Cir. 2012).

[9] *United States v. Pleasant*, 704 F.3d 808 (9th Cir. 2012); *Ware v. United States*, 694 F.3d 527 (3d Cir. 2012); *see also United States v. Rivera*, 662 F.3d 166, 177-83 (2d Cir. 2011) (applying previous circuit law permitting reduction where a career offender's sentence was "based on" the crack guidelines, but acknowledging that the policy statement abrogated that law).

[10] *See, e.g.*, *United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013); *United States v. Smith*, 658 F.3d 608 (6th Cir. 2011).

Section 3582(c)(2) of Title 18 provides that when a defendant was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," "the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The "applicable policy statement" is USSG § 1B1.10.

There are two situations in which you may encounter a pending or soon to be pending motion under 18 U.S.C. § 3582(c)(2).

1. Favorable New Amendment to USSG § 1B1.10

In 2011, the Commission amended § 1B1.10 to prohibit district courts from reiterating a variance or departure granted at the original sentencing, except if the departure was based on a government motion to reward substantial assistance in the investigation or prosecution of another. In such a case, the court could impose a reduction "comparably less than the amended guideline range." USSG § 1B1.10(b)(2)(B).

The government can move for a substantial assistance departure from the guideline range under USSG §5K1.1, or from a mandatory minimum under 18 U.S.C. § 3553(e), which can otherwise stand in the way of any departure at all or a departure that fairly reflects the cooperation.

After the 2011 amendment, courts of appeals split in various ways over whether and when the "amended guideline range" referenced in § 1B1.10(b)(2)(B) was trumped by a higher mandatory minimum by operation of § 5G1.1(b), which makes the mandatory minimum the guideline sentence when the mandatory minimum is greater than the top of the guideline range. In many cases in which retroactive relief under the amendments to the crack guidelines was sought, circuit law resulted in the denial of any reduction or a fully comparable reduction. For a full explanation of the various circuit splits and their effects, *see* Amendments to the Sentencing Guidelines Effective Nov. 1, 2014 at pp. 3-4,[11] and Public Comment from the Federal Public and Community Defenders at 1-5 (Mar. 18, 2014).[12]

Effective November 1, 2014, the policy statement will be amended to provide:

> If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline

[11] http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20140430_Amendments.pdf.

[12] http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-FPD.pdf.

> range shall be determined without regard to the operation of §5G1.1 … and §5G1.2.

USSG § 1B1.10(c) (eff. Nov. 1, 2014).

If your client was originally sentenced under the crack guidelines and received a substantial assistance departure, he may have had a motion for sentence reduction denied or received only a partial reduction under circuit precedent. Or he may not have filed a motion because it was clear that it would be denied under circuit precedent. Or no one filed a motion.

Beginning November 1, 2014, if not before, many clients in crack cases will file, or should file, a § 3582(c)(2) motion to take advantage of this change.

Unless you are a Federal Public Defender or Criminal Justice Act attorney in the district where the client was sentenced, you will not be appointed to file a § 3582(c)(2) motion taking advantage of this amendment, and should not attempt to do so if you are inexperienced in this area of sentencing law.[13] **You must seek out and coordinate with the lawyer who has filed, will file, or should file the motion**. In most districts, the Federal Public Defender or Criminal Justice Act attorneys represented all inmates in seeking retroactive relief under the crack amendments, but in a few districts, judges required inmates to proceed *pro se*. To be on the safe side, in any crack case in which the client received a substantial assistance departure at the original sentencing, contact the Federal Defender office in the district to determine who, if anyone, represented or represents the client in § 3582(c)(2) proceedings, and how best to proceed with the commutation petition. If the district is the Southern District of Georgia or the Eastern District of Kentucky, where there is no Defender office, contact abaronevans@gmail.com or jennifer_coffin@fd.org.

If a § 3582(c)(2) motion is filed on the client's behalf, it should be resolved fairly quickly. If for whatever reason it is taking too long and you feel you cannot delay the commutation petition, tell the OPA that a motion has been filed, that it still has not been ruled upon, what the reduction will be if it is granted, and that you will advise if and when the court acts.

If you have any question about what to do, contact abaronevans@gmail.com or jennifer_coffin@fd.org.

2. Retroactive Drugs Minus 2 Amendment

The Sentencing Commission voted on July 18, 2014 to make retroactive the recent "drugs minus two" amendment to the drug guidelines. Thus, many clients sentenced for a drug offense should be filing a § 3582(c)(2) motion. For how to deal with this situation in the clemency context, *see* How to Deal With the Retroactive Drugs Minus Two Amendment.

[13] *See* ABA Model Rule of Professional Responsibility 1.1.

III. Challenges that Could Be Filed But Have Not Been Filed

As noted in other sections explaining how the sentence would be lower if imposed today, you will find that the law has changed in material respects. For example, a prior conviction for a "felony drug offense" used to enhance your client's drug sentence under 21 U.S.C. § 841 & 851 may no longer be a "felony" or may no longer be a "drug offense." Or, your client received an enhanced mandatory minimum and guideline range because an accidental "death or serious bodily injury result[ed]," but the enhancement was imposed in violation of *Burrage v. United States*, 134 S. Ct. 881 (2014) because the drug your client distributed was not proved to be the but for cause. Or any mandatory minimum was imposed in violation of *Alleyne v. United States*, 133 S. Ct. 2151 (2013). Or your client received a mandatory minimum under an aiding and abetting theory in violation of *Rosemond v. United States*, 134 S. Ct. 1240 (2014) because he did not have advance knowledge that a confederate would do the act upon which the mandatory minimum was based, *e.g.*, use or carry a gun. Or the client was convicted of "using" a firearm during a drug trafficking crime subject to a mandatory minimum based on having traded drugs for a gun in violation of *Watson v. United States*, 552 U.S. 74 (2007). Or the client was convicted of possessing a gun and received a mandatory minimum under the ACCA based on a prior conviction that is not a "violent felony" or not a "serious drug offense" under current law. Or the client was sentenced as a "career offender" under the guidelines based on a prior conviction that is not a "crime of violence," not a "controlled substance offense," or not a "felony" under current law. Or, the client was sentenced based on a mistake or oversight that was not noticed at the time and was never corrected.

In any of these situations, it would be possible to raise a claim in a habeas petition, but for whatever reason, that has not been done. It may be that a habeas petition has not been filed because the one-year statute of limitations has not yet run (as for errors under *Burrage* or *Rosemond*, for example), or because it would be futile to file a petition because of the various procedural barriers noted in Part II.A (*e.g.*, *Alleyne* may not be retroactive, but *Burrage* probably is, though a second or subsequent petition raising a *Burrage* claim may face other hurdles), or because the inmate or his former lawyer simply did not notice the change in law or did not take action.

A habeas petition could be filed, and in many cases should be filed. But this situation presents the same problems noted in Part II.A. If a habeas petition is filed and you have to wait for a ruling to file a commutation petition, President Obama would almost surely no longer be in office. If you have to explain in a commutation petition that procedural barriers will likely prevent relief, the prosecutor could use that concession against the client in the habeas litigation should the commutation petition be denied. In this situation, you can say the following in your Memorandum in Support of Petition for Sentence Commutation, perhaps in a footnote, depending on the situation:

> A habeas petition has not been filed but [may be][could be] filed. We ask that you consider this petition in light of the many hurdles to habeas relief and the length of time it takes for these cases to reach resolution.

If you have an ongoing relationship with the client, decide whether a habeas petition should be filed. But many lawyers representing clients for purposes of sentence commutation will not be representing the client in any other matter. Moreover, a lawyer with little or no experience with habeas law generally should not represent the client in a habeas matter. If you do not have an ongoing relationship with the client, contact and coordinate with any lawyer who is likely to represent the client in determining whether to file a habeas petition, filing one if so, and/or negotiating a resolution with the government.[14] It may be that the client has a lawyer who is planning to file a habeas petition. Or the lawyer who last represented or is currently representing the client in a court proceeding did not know about a meritorious habeas claim that you have discovered, and can handle it going forward. **You should contact and coordinate with that lawyer. If it is not obvious that there is any lawyer to coordinate with, or the last lawyer to represent the client is unhelpful, contact abaronevans@gmail.com or jennifer_coffin@fd.org**.

[14] The prosecutor may waive the one-year statute of limitations. *See Wood v. Milyard*, 132 S. Ct. 1826 (2012).