

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

In Re: Petitions for Retroactive Application)
of the November 1, 2007 Amendment to)
Crack Cocaine Offense Level Guidelines)

**INTERNAL PROCEDURES FOR PROCESSING CASES INVOLVING RETROACTIVE
APPLICATION OF THE AMENDMENT TO THE FEDERAL SENTENCING
GUIDELINES REGARDING COCAINE BASE (CRACK) OFFENSES**

This memorandum addresses the procedures in this District for implementing the United States Sentencing Commission's Amendments to Guideline 1B1.10, which authorize retroactive application of the Sentencing Commission's November 1, 2007 Amendment to Cocaine Base ("Crack") Offense Level Guidelines (the "Retroactive Crack Amendment"). As a general matter, motions seeking a reduction of sentence pursuant to the retroactive Guideline are governed by 18 U.S.C. § 3582(c)(2). These proceedings are not full resentencings, and may be ruled on by the Court without a hearing. See *U.S. v. Legree*, 205 F.3d 724 (4th Cir. 2000); Fed. R. Cr. P. 43(b). The determination of whether and to what extent to allow a reduction of sentence is within the discretion of the District Court under Sentencing Guideline 1B1.10, based on the Guideline Range that would have applied if the amendment (in this case the Retroactive Crack Amendment) had been in effect at the time of the defendant's sentencing, with all other Guideline calculations and applications remaining the same. Guideline 1B1.10 provides that in determining whether to allow a reduction and the extent of the reduction within the newly calculated range, the Court should consider the sentencing factors in 18 U.S.C. § 3553(a) within the limitations set out in Guideline 1B1.10, as well as any "public safety risk" including the nature and seriousness of the danger to any person or community posed by the reduction, and "post-sentencing conduct" of the defendant. Given the number of cases potentially impacted by the Retroactive Crack Amendment in this District, and as a result of discussions with the Clerk's Office, the U.S. Attorney's Office, the Federal Public Defender's Office, the CJA Panel Representative, and the U.S. Probation Office for this District, this memorandum provides an outline of an administrative process for prioritizing and handling these cases. When they are ready for a ruling, the cases will be submitted to the original Sentencing Judge, or to the Chief Judge if the original Sentencing Judge is no longer active. After we have some experience with these procedures, we will consider whether any modifications to these procedures are needed.

I. Initial Identification Process

- A. The U.S. Probation Office for this District has prepared and will continue to prepare a list of defendants who may be affected by the retroactivity provision, based on information they have obtained from the Bureau of Prisons and the U.S. Sentencing Commission.
- B. The Federal Public Defender's Office has similarly identified defendants who may be affected by the retroactivity provision. The Federal Public Defender's Office will coordinate providing general information regarding these procedures to defendants as necessary.
- C. Consideration for a reduced sentence will be limited initially to those defendants who have filed a Motion requesting a reduced sentence pursuant to the Retroactive Crack Amendment. As outlined below, the Motions will be prioritized for consideration based upon each defendant's projected release date, with initial priority given to those defendants with a projected release date of on or before March 3, 2011.

II. Review of Motions

- A. The Clerk's Office will docket and identify all Motions that have been filed requesting a reduction of sentence pursuant to the Retroactive Crack Amendment. The Clerk's Office will, for docketing purposes, refer the Motions to the original Sentencing Judge, or to the Chief Judge if the original Sentencing Judge is no longer active. The Clerk's Office will then transmit copies of the Motions directly to the Probation Office for further action consistent with the procedures outlined herein.
- B. The Probation Office will prioritize Motions into three "waves":
 - (1) First Wave: Defendants who have filed a Motion seeking relief and who have a current release date of on or before March 3, 2011.
 - (2) Second Wave: Defendants who have filed a Motion seeking relief and who have a current release date of between March 3, 2011 and March 3, 2014.
 - (3) Third Wave: Defendants who have filed a Motion seeking relief and who have a current release date of on or after March 3, 2014.

C. The Federal Public Defender's Office will coordinate appointment of counsel for "First Wave" defendants who were previously represented by court-appointed counsel, with a presumption that previous counsel should be reappointed if possible. Although counsel is not required to be appointed, appointment of counsel will facilitate the process and should be allowed if the defendant qualifies. An Order has been issued authorizing the Federal Public Defender to make initial reviews and coordinate representation issues in this regard. However, the actual appointments will be made by separate orders issued by the Court in each case. With respect to this process for appointment of counsel:

- (1) The Court will presume that any incarcerated defendant who has filed a § 3582 Motion pursuant to the Retroactive Crack Amendment and who previously qualified for appointment of counsel will continue to qualify for appointed counsel unless changed financial circumstances appear. In order to confirm each defendant's present financial circumstances, the Clerk's Office will forward to each defendant who files such a Motion a new CJA 23 Financial Affidavit to be completed and returned to the Clerk's Office.
- (2) The Federal Public Defender's Office will identify previous counsel and will determine whether any conflicts or other issues would prevent reappointment of previous counsel. If the Federal Public Defender's Office was previously appointed as counsel and no conflict exists, the Federal Public Defender's Office will notify the Clerk's Office, and the Clerk's Office will submit a proposed Order Reappointing Counsel to the Court. Likewise, if a panel attorney was previously appointed and the attorney is still on the panel and no conflicts exist, a CJA 20 will be submitted reappointing counsel to handle the § 3582 Motion. These appointments will initially be handled solely by the Chief Judge, until notice is otherwise provided. If prior counsel cannot be reappointed, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate a new appointment, either the Federal Public Defender's Office or another panel attorney, for referral to the Court.
- (3) For defendants who previously retained counsel, if the defendant files a § 3582 Motion without the assistance of counsel, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate obtaining a CJA 23 Financial Affidavit and appointment of counsel for that defendant.

- D. The Probation Office will retrieve Presentence Reports, Worksheets, and Judgments for all First Wave defendants.
- E. The Probation Office will then screen the First Wave defendants to determine which defendants could be potentially eligible for a Recalculated Guideline based upon the following criteria established by the U.S. Sentencing Commission.
- (1) Crack cocaine must have been involved in the offense such that the base offense level was determined based at least in part on the quantity of crack involved, although this may include cases where the offense of conviction was not specifically a crack cocaine offense.
 - (2) The original base offense level must have been greater than 12 and not level 43, as offenders sentenced at unincluded levels are unaffected by the Amendment.
 - (3) The quantity of crack involved must have been less than 4,500 grams, as cases involving 4,500 grams or more are not affected by the Amendment.
 - (4) The final offense level must not have been derived from the career offender or armed career criminal guideline, as the Amendment would not affect the sentencing range of any offender sentenced under these parts of the Guidelines.
 - (5) The original sentence must have been greater than any applicable statutory mandatory minimum punishment, unless the defendant received relief from the mandatory minimum punishment pursuant to the statutory safety valve under 18 U.S.C. § 3553(f) or through a departure for Substantial Assistance under Guideline 5K1.1 and 18 U.S.C. § 3553(e).
 - (6) The defendant must currently be serving the original term of imprisonment, as the Amendment does not apply to a defendant in custody on a revocation of supervised release.
- F. If a First Wave defendant will not be eligible using the criteria set forth above, the Probation Office will prepare a brief Memorandum stating why the defendant would not be eligible. Those cases, identified as “Ineligible First Wave Defendants” will then be set aside for later disposition, as further discussed below.

- G. For the potentially eligible First Wave defendants, the Probation Office will prepare a "Recalculated Guideline Worksheet." This Worksheet will be treated in the same manner as Presentence Reports, and will include:
- (1) Defendant's Name, Case Number, and BOP Register Number
 - (2) Date of Original Judgment and any Amended Judgment
 - (3) Name of Sentencing Judge and Offense of Conviction
 - (4) Previous Offense Level, Criminal History Category, and Previous Guideline Range
 - (5) Previous Sentence Imposed
 - (6) Any Departures, Variances, Rule 35 Motions, or Other Post-Judgment Proceedings
 - (7) Recalculated Guideline Range (taking into account statutory mandatory minimum)
 - (8) Summary of Post-Conviction Conduct, including summary of information from the BOP's Sentry system, status of Educational and Vocational Training, status of Substance Abuse Treatment, status of Physical or Mental Health Treatment, and any other public safety considerations
 - (9) Release Planning
 - (10) Projected release date, and whether the defendant would be subject to immediate release or a "time served" sentence under the recalculated Guideline range
- H. If any of the relevant information is missing, the Probation Office may ask Defense Counsel to provide any necessary information before the Worksheet is completed.

III. Circulation of Probation Assessment and Objection Period

- A. After preparing the Worksheet, the Probation Office will prepare a packet with the Defendant's Motion, the Recalculated Guideline Worksheet, the Presentence Report, the Judgment, and copies of any Rule 35 Motions or Section 5K1.1 Motions or other Motions granted by the Court that affected the sentence imposed. The Probation Office will send this packet to the Government and to Defense Counsel, or if no appointment of counsel as yet been made, to the Federal Public Defender's Office. The Federal Public Defender's Office will forward the packet to appointed counsel if the Federal Public Defender's Office is not providing representation.

- B. Counsel for the Government and the defendant will review the information and file a response either consenting or objecting within 20 days. The Consent or Objection should be returned to the Probation Office, with a copy to opposing counsel, and should also be filed with the Clerk's Office under seal. It is the Court's expectation that the Government will raise in its Objections any assertions that the defendant is a public safety risk, or that the defendant is not eligible for the reduction, or any other issues that should be brought to the Court's attention in considering the defendant's Motion. The reasons for the Objection should be stated specifically. In addition, if the defendant or the Government objects to a sentence within the newly calculated range that retains the previous determination of where within the range the sentence should be (i.e., low, middle or high end of the range), that party may note the Objection and the basis therefore in his submission to the Probation Office.
- C. If either side files an Objection, any Response by the other side must be submitted to the Probation office, with a copy to opposing counsel, and filed under seal with the Clerk's Office within 10 days of the filing of the Objection. Any cases that include an Objection by either side will be separated out for consideration after the consent cases have been processed.

IV. Submission to Court

- A. For all those cases in which both sides consent to the revised range reflected in the Recalculated Guideline Worksheet and no type of Objection has been raised, the Probation Office will prepare an "Order Regarding Motion for Reduction of Sentence" for the Court's consideration, using the form created by the Administrative Office of the Courts, and leaving blank the actual revised sentence to be imposed. If the defendant would be subject to immediate release, the proposed Order should be modified to reflect a sentence of "time served," with the Order stayed for ten (10) days to allow the Bureau of Prisons time to process the defendant as necessary. In those cases without Objections, the "Additional Comments" section should note that the Recalculation is made with the consent of the Government and the defendant. The Proposed Order should be submitted to the Court electronically, followed by the full printed packet of information previously prepared, including the consents submitted by both sides.
- B. The submission will be evaluated by the Court pursuant to the provisions of Guideline Section 1B1.10, as outlined above. Ordinarily, the Court would have previously considered the § 3553(a) factors at the time of the original sentencing

in determining where within the original Guideline range to sentence the defendant. In that regard, where no Objection has been raised, the Court may accept the parties' Consent as an acknowledgment that the parties do not object to a recalculated sentence that retains the previous determination of where within the range to sentence the defendant (i.e., low, middle or high end of the newly calculated range), although the Court retains discretion to consider all of the material submitted in determining whether and to what extent to allow a reduction in sentence within the limits set out in Guideline 1B1.10.

- C. After submitting the initial group of First Wave cases without Objections, the Probation Office will then submit to the Court those First Wave cases involving potentially eligible defendants in which an Objection was raised. This submission should include the full packet of available information and the original position of the Probation Officer, along with the Objection, any Response, and an electronic version of an "Order Regarding Motion for Sentence Reduction," using the form prepared by the Administrative Office of the Courts.
- D. For those First Wave defendants who filed a Motion but were initially determined not to be eligible for a reduced sentence, the Probation Office will circulate to the Government and Defense Counsel the brief Memorandum setting forth the reasons why the individual was not eligible, with the Judgment and Presentence Report attached as needed. Any Objection to this determination must be submitted to the Probation Office, with a copy to opposing counsel, and filed with the Clerk's Office under seal, within 20 days after the Memorandum is circulated by the Probation Office. Any Response to the Objection must be submitted to the Probation Office, with a copy to opposing counsel, and filed under seal with the Clerk's office, within 10 days thereafter. The Probation Office will then submit the original Memorandum and any Objection and Response to the Court for consideration, along with an electronic version of an "Order Regarding Motion for Sentence Reduction," using the form prepared by the Administrative Office of the Courts.

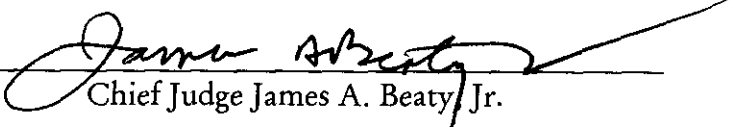
V. Ongoing Processing

- A. The Probation Office will continue to process as first priority any Motions filed by defendants in the First Wave.
- B. The Probation Office will then begin processing Motions filed by defendants who fall in the "Second Wave" using the same process outlined above. The Public

Defender may likewise continue to coordinate appointment of counsel as set out above. The processing procedures will generally be the same, but the time for filing Consents or Objections in Second Wave cases will be 30 days rather than 20 days.

- C. Any Motions submitted to the Court should be clearly identified as a "First Wave," "Second Wave" or "Third Wave" case, should be identified as "Not Eligible" (with a brief Memorandum) or "Potentially Eligible" (with a Recalculated Guideline Worksheet), and should be identified as "By Consent" or "With Objections." The Court will prioritize processing of the cases based on these categorizations, with First Wave defendants who are Potentially Eligible and By Consent being handled on a preliminary expedited basis. However, if any cases arise involving a Potentially Eligible Second Wave Defendant By Consent, and it has been determined that the defendant would be eligible for a sentence of time served under the recalculated range, that case may be submitted for expedited consideration with the First Wave cases.
- D. After the initial processing is underway, the Probation Office and Federal Public Defender's Office will identify those defendants who have not filed a Motion but who may be potentially eligible for a reduced sentence. The Federal Public Defender's Office will provide general information to those defendants so identified, in order to give the defendants notice of the need to file a § 3582 Motion in order to be considered for a reduced sentence, again with information being provided initially to those defendants with release dates in the "First Wave." As additional Motions are filed, they will be prioritized and handled as set out above.
- E. These procedures may be modified as this process continues.

This, the 7 day of March, 2007.


Chief Judge James A. Beaty, Jr.