

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 IN RE:

4 PETITIONS FOR RETROACTIVE
5 APPLICATION OF THE NOVEMBER 1,
6 2007 AMENDMENT TO THE CRACK
7 COCAINE OFFENSE LEVEL
8 GUIDELINES.
9

Misc. No. 08-31 (JAF)

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SAN JUAN, P.R.

10 **ADMINISTRATIVE DIRECTIVE**

11 **I.**

12 Effective on November 1, 2007, the U.S. Sentencing Commission
13 implemented amendment #706, as amended by #711, lowering the Base
14 Offense Level for crack cocaine by two levels. The 2007 crack
15 amendment will be applied retroactively effective March 3, 2008. See
16 Application Note 10(D), entitled "Instructions for Combining Crack
17 Cocaine with Other Drugs;" USSG § 1B1.10, as amended, and 18 U.S.C.
18 § 3582(c)(2). See also The Federal Cocaine Sentencing Report
19 submitted to Congress by the Sentencing Commission on May 15, 2007.

20 Without prejudging any issues related to the implementation of
21 the amendment, we deem it convenient to share with the bar some
22 principles and legal understandings that reasonable minds find
23 appropriate for consideration in the process of applying the
24 amendment retroactively. The listing that follows does not prejudice
25 any issue related to the approved retroactivity.

26 1. The 2007 Crack Amendment, #706 (as amended by #711), was
27 made retroactive effective March 3, 2008. Retroactivity allows the

1

1 sentencing court to consider a possible reduction of imprisonment for
2 inmates meeting certain criteria set by statute and the guidelines.
3 The relevant statutes and Guideline Policy Statement are the
4 following:

- 5 A. Direction from Congress - 28 U.S.C. § 944(u)
- 6 B. Authority of the Court - 18 U.S.C. § 3582(c)(2)
- 7 C. Implementation Guideline - USSG § 1B1.10 as amended on
8 November 1, 2007, effective on March 3, 2008.

9 2. 28 U.S.C. § 944(u) provides, in pertinent part, as follows:

10 If the Commission reduces the term of
11 imprisonment recommended in the Guidelines
12 applicable to a particular offense or category
13 of offenses, it shall specify in what
14 circumstances and by what amount the sentences
15 of prisoners serving terms of imprisonment for
16 the offense may be reduced.

17 In turn, 18 U.S.C. § 3582(c)(2) provides, in pertinent part, as
18 follows:

19 In the case of a defendant who has been
20 sentenced to a term of imprisonment based on a
21 sentencing range that has been subsequently
22 lowered by the Sentencing Commission pursuant to
23 28 U.S.C. § 994(o), upon motion of the
24 defendant, or the Director of the Bureau of
25 Prisons, or on its own motion, the court may
26 reduce the term of imprisonment, after
27 considering the factors set forth in § 3553(a),
28 to the extent that they are applicable, if such
29 reduction is consistent with applicable policy
30 statements issued by the Sentencing Commission.

31 Lastly, the policy statement itself, USSG § 1B1.10, must be
32 considered. See USSG § 1B1.10, as amended effective March 3, 2008.

1 The amendment is available in a Supplement to the Guidelines Manual,
2 www.ussc.gov. The amendment is not contained in the 2007 Guidelines
3 Manual. Section § 1B1.10 implements 28 U.S.C. § 994(u) and provides
4 guidance and limitations regarding motions under 18 U.S.C.
5 § 3582(c)(2).

6 3. The retroactivity implementation process has three steps:

7 A. One must look at the Criminal Judgment; the
8 Presentence Investigation Report, and any plea agreement to
9 determine if the defendant is eligible for a reduction;

10 B. the next step requires a determination of the extent
11 of any reduction allowed;

12 C. followed by a consideration of factors to determine
13 if, and to what extent, a reduction is warranted.

14 4. The General Eligibility Requirements under 18 U.S.C. § 3582
15 (c)(2) must be considered.

16 A. The defendant is serving a term of imprisonment;

17 B. the amendment is listed in USSG § 1B1.10(c), and

18 C. the Guideline Range applicable to the defendant has
19 subsequently been lowered as a result of a listed amendment. It must
20 be noted, however, that an amendment listed in § 1B1.10(c) may not
21 always lower the defendant's applicable guideline range. Examples of
22 this are the operation of another guideline, e.g., an "override" by
23 the Chapter Four Career Offender Guideline, or a statutory provision,

1 such as a mandatory minimum sentence which "trumps" the otherwise
2 applicable range.

3 5. Some examples of when the Crack Cocaine Amendment would not
4 result in a lowering of the guideline range are the following:

- 5 A. Base Offense Level is 12.
6 B. Quantity of crack cocaine exceeds 4,500 gms.
7 C. The defendant is a career offender (§ 4B1.1) or an
8 armed career criminal (§ 4B1.4).
9 D. The defendant is subject to a mandatory minimum in
10 excess of the guideline range (§ 5G1.1(b)).
11 E. Certain cases involving multiple drug types.

12 This listing is not *numerus clausus*. Other cases will have to be
13 considered by judicial officers, in order to determine if they are
14 foreclosed from the lowering effect of the amendment. Some of these
15 cases may include individuals who have received the benefit of a
16 sentence reduction under Fed.R.Crim.P. 35(b) or defendants whose
17 binding plea agreements, Fed.R.Crim.P. 11(e)(1)(C), may exclude
18 further reductions.

19 Pursuant to USSG § 1B1.10(b)(1) and App. Note 2, the amended
20 guideline range is determined by substituting only the amendment
21 listed at USSG § 1B1.10(c) into the guidelines as applied at the
22 original sentencing. All other guideline application decisions for
23 the original sentencing remain unaffected.

1 The court shall not reduce defendant's term of imprisonment
2 to a term less than 33 months.

3 Other limitations must be considered, as well as exceptions to
4 the rule. If the original sentence was less than the minimum of the
5 original guideline range, *i.e.*, a departure or variance, a reduction
6 comparably less than the amended guideline range is permissible.
7 However, when the original sentence was a variance pursuant to United
8 States v. Booker, 543 U.S. 220 (2005), a reduction from the sentence
9 originally imposed generally would not be appropriate.

10 Booker-related issues must be addressed by the district court.
11 However, Booker may not apply because the amendment is directed at
12 reducing, not increasing, the defendant's sentence. Also, the
13 distinction between departures and variances must be clearly
14 understood. One thing is a traditional departure. However, if we are
15 to consider a post-Booker variance, where the sentencing judge had
16 more liberty to sentence a particular defendant, then there may not
17 be basis for further reductions based on the amendment. Another
18 example is of help.

19 Example: Original sentence below range, USSG § 1B1.10(b)
20 (2) (B) & App. Note 3.

21 Original Guideline Range - 70-87 months

22 Original Term Imposed - 56 months

23 (Court imposed a downward departure of 20% below the
24 minimum of the guideline range)

1 Amended Guideline Range - 57-71 months

2 A reduction of 20% from the amended guideline range minimum
3 of 57 months would result in a comparable reduction, *i.e.*,
4 46 months.

5 8. USSG § 1B1.10 and App. Note 1(B) make reference to another
6 factor to consider in determining if and to what extent a reduction
7 is warranted. Within the limits established by § 1B1.10(b) as to the
8 possible extent of a reduction, the following shall be considered:

9 § 3553(a) factors, as consistent with § 3582(c) (2):

- 10 - Public safety: The seriousness of the danger to any
11 person or the community.
12 - The court may also consider post-sentencing conduct of
13 the defendant while in prison.

14 9. Lastly, supervised release revocations are not affected by
15 the amendment. pursuant to § 1B1.10, App. Note 4, only a term of
16 imprisonment imposed as part of the original sentence can be reduced
17 under § 1B1.10. No other component of the sentence, such as fines or
18 restitutions, can be reduced under this provision. A reduction in
19 the term of imprisonment imposed upon revocation of supervised
20 release is not authorized.

21 **II.**

22 As part of the implementation of the 2007 crack amendments, the
23 U.S. Sentencing Commission held a sentencing summit in St. Louis,
24 Missouri, on January 23-25, 2008. During said meeting, the various

1 attending districts were represented by prosecutors, Federal Public
2 Defenders, Probation Department personnel, and the court itself. Our
3 District representatives worked intensively and were able to foster
4 cooperation and flexibility, in order to implement the retroactivity
5 of the crack amendment.

6 The following is a general outline of this District's
7 implementation plan.

8 1. The District of Puerto Rico will entertain motions, pro se
9 or otherwise, seeking relief under the retroactive crack amendment
10 effective March 3, 2008. Any motion filed before the effective date
11 of the amendment will not be decided until at least March 3, 2008.

12 2. The filing of any such motion will be notified to the U.S.
13 Attorney's Office, Attn: Supervisory Asst. U.S. Attorney Jeannette
14 Mercado and Asst. U.S. Attorney José Ruiz, Chief, Criminal Division,
15 Torre Chardón, 350 Carlos Chardón St., San Juan, PR 00918; Tels.
16 (787) 282-1884 and (787) 282-1809, e-mail: jeannette.mercado@usdoj.gov
17 and jose.ruiz3@usdoj.gov, respectively; and to the U.S. Probation
18 Office, Attn: Assistant Deputy Chief U.S. Probation Officer Zulma
19 Basora, 400 Federico Degetau Federal Building, 150 Carlos Chardón
20 Avenue, San Juan, PR 00918-1703; Tel. (787) 766-5814; e-mail:
21 zulma_basora@prp.uscourts.gov and belinda_zayas@prp.uscourts.gov. If
22 the filing is made pro se, the Court Services Manager and Courtroom
23 Deputy Clerk to the Chief Judge, Rebecca Agostini-Viana, U.S.
24 District Court Clerk's Office, 150 Carlos Chardón St., San Juan, PR

1 00918, Tel. (787) 772-3053, e-mail: becky_agostini@prd.uscourts.gov,
2 will enter a docket order notifying the parties concerned of said
3 filing.

4 3. The court appoints the Federal Public Defender's Office,
5 Attn: AFPD Héctor L. Ramos-Vega, 241 Franklin D. Roosevelt Ave., San
6 Juan, PR 00918-2441; Tel. (787)-281-4922, e-mail: hector_ramos@fd.org
7 and ruth_sein@fd.org, as the default defense counsel for all pro-se
8 filings. This default appointment is without prejudice of retained
9 representations or CJA appointments if ordered by the court.

10 4. Upon receipt of notice of the filing of any such motions
11 seeking reduction of sentence, the Probation Office will prepare and
12 electronically file, **within ten (10) days**, a "retroactivity package"
13 consisting of the following documents:

- 14 A. Presentence Investigation Report
- 15 B. Judgment and Commitment Order
- 16 C. Plea Agreement
- 17 D. Indictment
- 18 E. Sentencing transcript if available.

19 The filing will be made restricted to "Selected Parties"
20 (counsel and court), and will include a short recommendation as to
21 eligibility for the benefits of the retroactive amendment.

22 5. The designated Assistant Federal Public Defender, retained
23 or otherwise appointed counsel, and the Assistant U.S. Attorney will
24 meet to consider and announce any stipulated disposition. Such

1 recommendation to the court must be filed **not later than ten (10)**
2 **days** after the filing of the retroactivity package and Probation
3 Office recommendation contemplated in paragraph 4, ante. If the
4 stipulated disposition is accepted by the court, an AO Form 245, Form
5 Order Regarding Motion for Sentence Reduction, will be entered
6 forthwith.

7 The Clerk will mark the ten-day periods contemplated herein for
8 automatic follow-up and notice of electronic notification to counsel.

9 6. In the absence of stipulation for disposition as
10 contemplated in paragraph 5 above, the Probation Office will make a
11 final recommendation as to disposition **within five (5) days** of the
12 entry of the electronic notification to counsel contemplated in
13 paragraph 5 ante. Thereafter, the parties will have **five (5) days** to
14 file simultaneous memoranda not exceeding four pages, proposing a
15 final disposition. Upon the expiration of such term, the final
16 disposition will be announced by the court, without the need of a
17 hearing and without a mandatory request of the defendant's presence.
18 The court will then enter an expedited disposition order in AO Form
19 245 and the same will be filed forthwith.

20 The short terms provided in paragraphs 5 and 6 are intended to
21 mainly accommodate those cases where an inmate is a candidate for
22 immediate release.

