UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In Re:

Petitions for sentencing reduction based on the amendments to the guidelines for cocaine base offenses made retroactive by the United States Sentencing Commission to take effect on November 1, 2011.

Misc. No. 11-437 (ADC)

ADMINISTRATIVE DIRECTIVE

I. Introduction

The Fair Sentencing Act of 2010 (hereinafter "FSA") was enacted by Congress in order to "restore fairness to Federal cocaine sentencing." *See* Pub. L. No. 111-220, 124 Stat. 2372 (Preamble). The bill was signed into law by President Barack Obama on August 3, 2010. In essence, the FSA amended the Anti-Drug Abuse Act of 1986 by increasing the threshold quantities that were previously in place to trigger statutory mandatory minimum penalties for offenses involving cocaine base (crack) under 21 U.S.C. § 841(b). The new quantity thresholds under the FSA had the effect of reducing the statutory powder-to-crack cocaine ratio from 100-to-1 to approximately 18-to-1.

With the enactment of the FSA, Congress also provided the United States Sentencing Commission (hereinafter "USSC") with emergency authority and directed it to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." Pub. L. No. 111-220, §8(2). Congress gave the USSC ninety (90) days to follow the directive. The USSC complied, and on October 27, 2010, it promulgated amendments to the Drug Quantity Table at

USSG § 2D1.1 to reflect the 18-to-1 ratio. *See* USSG, 2010 Supp. to App. C, Amendment 748 (effective Nov. 1, 2010). As a matter of example, under the amended guidelines, an offense level of 26 is assigned to offenses involving at least 500 grams of powder cocaine or at least 28 grams of crack, which corresponds to a guideline range of 63 to 78 months with a Criminal History Category of I.[1] USSG § 2D1.1 (Nov. 1, 2010, Supp.) Similarly, offenses involving at least 5 kilograms of cocaine or at least 280 grams of crack, are assigned an offense level of 32, which corresponds to a guideline range of 121 to 151 months of imprisonment if the defendant has a Criminal History Category of I.[2] *Id.* The USSC then adjusted upward and downward the offense levels in the Drug Quantity Table to likewise reflect the new 18-to-1 ratio. The USSC expressly noted that the amendments were intended to account for the FSA new mandatory minimum sentences and to "ensure[] that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionately reflected throughout the Drug Quantity Table." Notice of temporary emergency amendments to sentencing guidelines and commentary, 75 Fed. Reg. 66,188, 66, 191 (Oct. 27, 2010).

Subsequently, on April 6, 2011, and pursuant to the authority conferred to the USSC by 28 U.S.C. § 994(u) regarding guideline amendments that may be considered for retroactive application, the Commission voted to make Amendment 750 (Parts A and C) retroactive effective November 1, 2011. Amendment 750, with an exception not applicable here, re-promulgated and made permanent the temporary emergency amendments promulgated by the USSC effective on November 1, 2010 in following Congress' directive under the FSA to amend the Drug Quantity Table. On June 30,

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[1]Under the previous Drug Quantity Table, a base offense level of 26 was triggered if the offense involved at least 20 grams of crack.

[2]It used to be that a base offense level of 32 was triggered if the offense involved at least 150 grams of crack.

2011, the USSC officially amended policy statement § 1B1.10 (Reduction in Term of Imprisonment ans a Result of Amended Guideline Range). In other words, the USSC voted to make the reduced offense levels under the Drug Quantity Table of USSG § 2D1.1 applicable in a retroactive fashion to individuals serving an imprisonment term and whose sentences were computed under the sentencing guidelines for offenses involving crack.

The present directive is intended to set forth a plan under which the District of Puerto Rico will handle the hundreds of petitions that are expected to be filed by defendants pursuant to the retroactive amendment. While this directive intends to be as inclusive as possible, the Court also understands that the process of applying retroactive amendments to the sentencing guidelines is a fluid one that needs to be grounded on principles of flexibility and cooperation among the parties involved. Accordingly, this directive is intended as an outline of the guiding principles that will be followed in processing the reduction of sentence petitions. Nothing set forth in this directive is intended to confer individual rights to litigants, nor limit the discretion of individual judicial officers.

II. Relevant Statutory Provisions and Eligibility

It must be first noted that the fact that the USSC has made the amendments to the crack sentencing guidelines retroactive does not make a sentencing reduction automatic. There are eligibility requirements that are discussed below. Moreover, even if a particular defendant is eligible, it still remains a decision committed to the sound discretion of the judicial officers whether to grant the requested reduction of sentence under the facts and circumstances of the individual cases and after taking into consideration the safety of the community and other relevant factors. With that clarification, the Court discusses the relevant statutory provisions involved in the process.

Sentencing reductions are authorized by statute pursuant to 18 U.S.C. § 3582

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.

18 U.S.C. § 3582(c)(2). This is so because in accordance with Congress' directive, the USSC shall periodically review and revise the guidelines after consulting with all Court dependencies, the Federal Public Defenders, the Department of Justice, among others, and suggest to Congress any changes to the guidelines that appear warranted. *See* 28 U.S.C. § 994(o).

On the other hand, Section 994(u) of Title 28, United States Code, specifically provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). To implement the directive found in section 994(u) once a guideline range has been lowered, the USSC amends the policy statement found at USSG § 1B1.10. Said policy statement outlines the circumstances under which a person may be eligible for a sentencing reduction. In pertinent part, the policy statement, as amended, states:

> (a) Authority.—
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> (1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

USSG § 1B1.10(a)(1). In turn, any reduction that is not consistent with the policy statement is not authorized if "(A) none of the amendments listed in subsection (c) is applicable to the defendant; or (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2)(A) and (B). It must be noted, and the Court cannot stress this enough, that the proceedings for sentencing reduction under § 3582(c)(2) and the USSC's policy statement "do not constitute a full re-sentencing of the defendant." USSG § 1B1.10(a)(3).

With respect to eligibility of a particular defendant to a sentencing reduction, and the extent of any such reduction, the Court

> shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

USSG § 1B1.10(b)(1). There are limitations to the Court's authority to reduce a term of imprisonment. A Court cannot reduce a term of imprisonment to a term that is less than the minimum of the amended guideline range. USSG § 1B1.10(b)(2)(A).[3] Moreover, in no event can the reduced term of imprisonment be less than the term of imprisonment already served by the defendant. USSG § 1B1.10(b)(2)(C). With respect to defendants who received a sentence below the applicable guideline range after the government certified to the Court through motion his or her

[3]For example, if the previous offense level was a level 30 (at least 50 but less than 150 grams of crack) with an imprisonment range of 97 to 121 months and the defendant was sentenced to 84 months, under the amended range, he or she would qualify for an offense level of 26 and an imprisonment range of 63 to 78 months. The Court will be prohibited under the policy statement from reducing the term of imprisonment of that defendant to less than 63 months.

substantial assistance, "a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate." USSG § 1B1.10(b)(2)(B).[4]

It is necessary to note the following. The policy statement found at USSG § 1B1.10 is binding on the Court; therefore, proceedings under 18 U.S.C. § 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005). *See Dillon v. United States*, 130 S. Ct. 2683 (2010). Judicial officers are thus precluded from entertaining arguments for a below-the-amended-guideline-range sentence in the context of § 3582(c)(2). That does not mean that the factors found in 18 U.S.C. § 3553(a) cannot be considered. The application notes to USSG § 1B1.10 in fact direct the Court to take the 3553(a) factors into consideration in determining whether a reduction is warranted and the extent of such reduction. USSG § 1B1.10, note (1)(B)(I). What is prohibited is using the factors to justify a sentence below the new amended guideline range. Similarly, in determining whether a reduction is warranted, and if so, how much, the Court may consider the nature and seriousness of the danger to any person or the community if the term of imprisonment is reduced. USSG § 1B1.10, note (1)(B)(ii). The Court may also take into account the defendant's post-sentencing conduct. USSG § 1B1.10, note (1)(B)(iii).

Finally, as stated above, a defendant is not eligible for a sentencing reduction if such reduction is inconsistent with the policy statement found in USSG § 1B1.10. A reduction is inconsistent if, for instance, none of the amendments listed in the new Drug Quantity Table (subsection (c) of USSG § 2D1.1) is applicable to the defendant. The simplest example of this is when the guideline range of a defendant was originally determined by making him responsible for a controlled substance that is not cocaine base. In other words, if the defendant was found guilty at

[4]In this District, under the 2007 retroactive guidelines, the practice was to reduce the term of imprisonment based on the same percentage of reduction the defendant received for substantial assistance.

trial or accepted responsibility for an offense involving a controlled substance other than crack, he or she is not eligible for a reduction. A reduction is also inconsistent with the policy statement if the amended guideline applies to the defendant but the same has no effect in lowering the defendant's applicable guideline range. Examples of this situation are that the defendant was sentenced to the statutory mandatory minimum term of imprisonment or that the defendant was sentenced under the career offender guideline. *See* USSG § 1B1.10, note (1)(A).

III. Standard Procedure

The Court expects a flood of *pro se* petitions to be filed by November 1, 2011 and thereafter. Even as this directive is drafted, many defendants have already started to file *pro se* petitions for reduction of sentence. The procedure for handling any such petitions will be as follows:

A. *Pro se* petitions will be received by the Clerk of Court and will be filed under the previously created "Subsequent Motion re: Crack Cocaine" category

B. All pleadings related to the issue of a sentencing reduction should also be filed selecting the "Subsequent Motion re: Crack Cocaine" category. The filing will be made restricted to "Selected Parties" (counsel, the court and U.S. Probation Office).

C. The "Subsequent Motion re: Crack Cocaine" category must already be linked to the designated parties at the United States Attorney's Office (USAO), the United States Probation Office (USPO), and the Federal Public Defender's Office (FPDO) for purposes of notice. The filing will be made restrictive to the "Selected Parties" (Counsel, USPO and the Court).

D. The Court hereby appoints the Federal Public Defender as default counsel to represent all defendants seeking a sentencing reduction under the USSC's amendments to the guidelines that were made retroactive effective November 1, 2011. This appointment is, of course, without prejudice to a defendant seeking to prosecute his reduction of sentence petition through retained counsel. Even

if counsel is retained, counsel shall abide by the guidelines and the plan set forth in this directive.

E. Upon receiving notice of a motion for reduction of sentence, *pro se* or otherwise, the USPO shall file with the Court and provide both counsel for the government and counsel for the defendant a "retroactivity package" which shall consists of the following documents:

1. Presentence Investigation Report;

2. Judgment and Commitment Order;

3. Plea Agreement;

4. Indictment; and

5. Transcript of sentencing hearing, if available.

F. The USPO shall also make a short submission with the background of the case and a recommendation to the Court regarding the defendant's eligibility for sentencing reduction. To the extent possible, the "retroactivity package" shall be compiled and provided to counsel within 30 days of the filling of the petition.

G. If a "retroactivity package" was already compiled and filed for a particular defendant, the USPO then only needs to submit its recommendation regarding eligibility.

H. If the defendant is determined to be eligible according to the USPO submission, the designated counsel from the USAO and the FPDO shall meet and file a stipulation recommending to the Court the disposition of the reduction of sentence petition. This stipulation shall be filed no later than 20 days after receipt by the parties of the retroactivity package and the USPO's assessment as to eligibility.

I. Should either party (USAO or defense counsel) disagree with the assessment made by the USPO as to eligibility, and in the absence of a stipulated disposition, a memorandum of law, not to exceed four (4) pages; shall be filed within those same 20 days expounding the reasons why counsel

understands that the defendant is, or is not, eligible for a sentencing reduction.

J. The Court understands that the process of handling sentencing reductions petitions will dramatically increase the already significant workload that the USPO currently has. For that reason, the Court is giving the USPO 30 days to produce a "retroactivity package" whereas in the previous round of crack retroactivity, the USPO had only 10 days to disclose the "retroactivity package." Nothing in this directive precludes the parties to act more expeditiously in the cases that the parties have identified that a defendant may qualify for immediate release if the reduction were to be granted by the Court.

K. The form orders previously used by the Court for the 2007 retroactive guideline amendments shall be adapted to apply to this directive. The Court will continue to use form AO 247 (02/08) "Order Regarding Motion for Sentence Reduction" unless the same is superseded by the Administrative Office of the United States Court. In such a case, the Court will use the form so amended and/or superseded.

L. Individual judicial officers are at liberty to consider other circumstances that may require the extension or modification of the terms of this Administrative Directive.

IV. Effective Date

This Administrative Directive shall enter into effect immediately. While no ruling on any petition for sentencing reduction shall be made prior to November 1, 2011, the Court, USAO, FPDO and USPO may begin to process the petitions that have already been filed guided by the principles and implementation plan set forth herein.

In San Juan, Puerto Rico, this 21st day of September, 2011.

S/AIDA M. DELGADO-COLON
Chief United States District Judge