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*"The pursuit of justice is a team effort."*

# *Newsletter*

***Legal News Briefs for Law Libraries & Defense Attorneys***

# U.S. SENTENCING COMMISSION VOTES TO APPLY CRACK GUIDELINE AMENDMENTS RETROACTIVELY

## Attorney General directs prosecutors to apply Fair Sentencing Act even in cases of mandatory minimum sentences

June 30, 2011 - Good news for defendants charged with crack-cocaine offenses came out of the hearing held by the United States Sentencing Commission on June 30, 2011. We all know that the Sentencing Commission has previously amended the sentencing guidelines to permanently put into effect the provisions of the Fair Sentencing Act which created substantial benefit for defendants convicted in crack-cocaine cases. However, the real question has been: *when will these new favorable developments be made retroactive?*

NLPA is pleased to announce that the U.S. Sentencing Commission voted early today to retroactively apply the amended guidelines to prisoners who were convicted and sentenced under the earlier, more harsh 100:1 crack guidelines. It is projected that the retroactivity of the crack guideline amendments will effect more than 12,000 federal defendants. However, as with the 2007 guideline amendments made retroactive, reductions in sentences are not automatically applied.

Also those who were sentenced to mandatory minimums may still be able to obtain relief in their sentences through the pursuit of a timely §2255 post-conviction motion requesting a re-sentencing. This conclusion is based on two recent appellate decisions from the First and Eleventh Circuits. See, United States v. Douglas, No. 10-2341, 2011 U.S. App. LEXIS 10922 (1st Cir. May 31, 2010), United States v. Rojas, No. 10-14662, 2011 U.S. App. LEXIS 12791 (11th Cir. June 24, 2011). Both of these decisions hold that the Fair Sentencing Act applies to defendants who were sentenced after August 3, 2010. Additionally this position was further strengthened by Attorney General Eric Holder's directive of July 15, 2011 directing them to apply the Fair Sentencing Act even in the case of mandatory minimum sentences (see enclosed). Should such a motion be pursued and should the motion be successful and the defendant be re-sentenced under the new guidelines and the Fair Sentencing Act, this could reduce his/her mandatory minimum from ten years to five years.
If you need assistance in the preparation of a direct appeal or §2255 motion, contact NLPA today!

### *WHAT CAN CRACK DEFENDANTS BE DOING NOW TO PURSUE A REDUCED SENTENCE?*

If you are interested in having NLPA assist your counsel in the preparation of a motion to reduce your sentence, please contact us immediately. The fee for NLPA to assist counsel in the preparation of a §3582 Motion to Apply Retroactive Guideline Amendments is $2,500.00. Also, if you do not have a lawyer to represent you in court to file your motion for a sentence reduction, NLPA can refer you to possible new counsel who could represent you as well.

WARNING: Unfortunately for thousands of defendants, in 2007 when the guidelines were amended and applied retroactively, a system was put in place which involved the Public Defender's Office filing a standard form that included no supporting arguments

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or case law on behalf of thousands of defendants - many of whom were not even aware of such action being taken. Many of these "forms" were simply denied. It is unclear if the courts will utilize a similar procedure for this new amendment so it is encouraged that action be taken immediately to have NLPA begin coordinating with counsel in preparing the motion for a sentence reduction.

NLPA can also provide assistance in the preparation of an evaluation which would focus solely on how the newly retroactive guidelines can impact your case. The fee for the evaluation is $1,000.00 and would be applied as a credit toward the cost of having NLPA prepare the motion seeking sentence reduction for counsel should you desire to have us assist with such upon completion of the case evaluation. NLPA also can offer assistance to counsel at virtually every stage of a criminal case - including supplements to direct appeals and/or post-conviction motions. Therefore, if you are in need of assistance, contact us today!

# CRACK COCAINE GUIDELINES OVERVIEW

On November 1, 2010, the Fair Sentencing Act (FSA) became effective. The Fair Sentencing Act replaced the 100-to-1 crack to powder cocaine sentencing ratio with an 18-to-1 ratio (28 grams will trigger a 5-year mandatory minimum and 280 grams will trigger a ten-year mandatory minimum) under 21 U.S.C. § 841. Unfortunately, Congress did not act to have this law applied retroactively, meaning that those convicted and sentenced prior to the enactment of the law have not received the benefit of the legislation.

According to the decision issued in United States v. Douglas, No. 09-202-P-H (D. Maine Oct. 27, 2010), Judge D. Brock Hornby stated that a defendant guilty of committing a crack offense before the Fair Sentencing Act was passed in August 2010, but "not yet sentenced on November 1, 2010, is to be sentenced under the amended Guidelines[] and the Fair Sentencing Act's altered mandatory minimums. . ." Those defendants currently on direct appeal, and that fall within Judge Brock's time line of being sentenced for involvement with crack cocaine between prior to November 1, 2010, now had a strong argument that they should have received the benefit of the amended Guidelines, thus partially ameliorating a portion of the retroactivity problem.

Fortunately, the recent decision of the United States Court of Appeals for the First Circuit upheld the Douglas decision. United States v. Douglas, 2011 U.S. App. LEXIS 10922 (1st Cir. May 31, 2011). Therein, the Court refuted the government's argument relying upon the deicsion issued in Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 659 n.10, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974). In Marrero, the Supreme Court stated that Congress' creation of parole eligibility for serious drug offenders, overturning a prior statutory bar, would not apply retroactively to those serving sentences for crimes committed prior to the new statute. Id. at 663-64. The Court in Douglas found that the conflict between an 18:1 guidelines sentence and a 100:1 mandatory minimum was more pronounced than making the availability of parole depend on whether the prisoner committed the crime before or after an amendment allowed parole.

Further, the imposition now of a minimum sentence that Congress has already condemned as too harsh makes this an unusual case. Douglas, *supra*. It seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums. The purity of the mandatory minimum regime has always been tempered by charging decisions, assistance departures and other interventions: here, at least, it is likely that Congress would wish to apply the new minimums to new sentences.

The United States Court of Appeals for the Eleventh Circuit has reached the same conclusion as the First Circuit regarding whether the FSA applies to defendants who committed crack cocaine offenses before August 3, 2010, the date of its enactment, but who are sentenced thereafter. United States v. Rojas, 2011 U.S. App. LEXIS 12791 (11th Cir. June 24, 2011).

In May 2010, Carmelina Vera Rojas pleaded guilty to one count of conspiring to possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and two counts of distributing 5 grams or more of cocaine base, in violation of § 841(a)(1). Her sentencing was scheduled for August 3, 2010, which as it so happened, was the date on which President Obama signed the FSA into law. The district court granted the parties a continuance to determine whether Vera Rojas should be sentenced under the FSA. After considering the parties' arguments, the district court concluded that the FSA should not apply to Vera Rojas's offenses. In September 2010, the court sentenced Vera Rojas to ten years' imprisonment.

On appeal, Vera Rojas argued that the district court erred in refusing to apply the FSA to her sentence. Because she had not yet been sentenced when the FSA was enacted, Vera Rojas believed that she should benefit from the FSA's provision raising the quantity of crack cocaine required to trigger a ten-year mandatory minimum sentence. Further, Vera Rojas contended that the FSA falls within recognized exceptions to the general savings statute, 1 U.S.C. § 109. The interest in honoring clear Congressional intent, as well as principles of fairness, uniformity, and administrability, necessitated a conclusion that Rojas receive the benefit of the FSA.

Aside from the obvious benefits that the above decisions represent for defendants involved with crack cocaine in the First and Eleventh Circuits, these new rulings create a circuit split regarding whether the FSA applies to defendants who committed crack cocaine offenses before August 3, 2010, the date of its enactment, but who are sentenced thereafter on how to handle cases wherein. See, e.g., United States v. Fisher, 635 F.3d 336, 340 (7th Cir. 2011)(the Fair Sentencing Act does not apply to individuals whose conduct preceded the act, but who were sentenced after its enactment date). Consequently, the oft-needed circuit split to foster review of this issue by the United States Supreme Court is now in place.

The Fair Sentencing Act is not the only avenue whereby strides are being made to insure fairness in crack cocaine sentencing. The United States Sentencing Commission, realizing the unfair nature of the United States Sentencing Guidelines, enacted amendments to the Guidelines dealing with crack cocaine offenses. Reflecting the changes made by the Fair Sentencing Act of 2010 regarding sentencing fairness for offenders involved with crack cocaine, the amended Guidelines have raised the amount of crack cocaine needed to issue certain offense levels. However, the amended Guidelines were not specifically stated to apply retroactively.

In hearings on June 2, 2011 before the United States Sentencing Commission on the applicability off retroactivity of the crack cocaine Guidelines, Attorney General Eric Holder testified and he indicated support for partial retroactivity of the new reduced crack guidelines. Holder, speaking for the Obama Administration, stated that "[w]e believe that the imprisonment terms of those sentenced pursuant to the old statutory disparity -- who are not considered dangerous drug offenders -- should be alleviated to the extent possible to reflect the new law," Holder said. Retroactive

reductions in sentences should not apply to those who possessed or used weapons in committing their crimes or offenders with "significant" criminal histories, Holder said.

Holder also stated:

> The Commission's Sentencing Guidelines already make clear that retroactivity of the guideline amendment is inappropriate when its application poses a significant risk to public safety -- and the Administration agrees. In fact, we believe certain dangerous offenders -- including those who have possessed or used weapons in committing their crimes and those who have significant criminal histories -- should be categorically prohibited from receiving the benefits of retroactivity, a step beyond current Commission policy.

The Administration's suggested approach to retroactivity of the amendment recognizes Congressional intent in the Fair Sentencing Act to differentiate dangerous and violent drug offenders and ensure that their sentences are no less than those originally set. However, we believe that the imprisonment terms of those sentenced pursuant to the old statutory disparity -- who are not considered dangerous drug offenders -- should be alleviated to the extent possible to reflect the new law.On June 30, 2011, the United States Sentencing Commission voted to make the new reduced crack offense sentencing guidelines applicable retroactively to previously sentenced defendants. Clearly, it is an exciting time in the federal justice system, as the federal government continues to rapidly erase years of unfair and unconscionable sentencing practices for those involved with crack cocaine. As with all issues involved in a criminal case, NLPA has been at the forefront by assisting counsel in protecting defendants' rights - from the time of indictment until all avenues of relief have been pursued. Due to its long tradition of criminal research, NLPA is in a position to assist with the preparation of the necessary motions to obtain a fair sentence. Should you have concerns that your client is entitled to a lesser sentence based upon involvement with crack cocaine, contact NLPA immediately, and we will help you in your fight for justice!

# FIRST CIRCUIT

## AFFIRMS *DOUGLAS*, HOLDING LOWER FSA CRACK MINIMUMS APPLY IN PIPELINE CASES

June 1, 2011 - A panel of the First Circuit has unanimously affirmed US District Judge D. Brock Hornby important ruling in *US v. Douglas*, No. 09-202-P-H (D. Maine Oct. 27, 2010), which had concluded that a defendant guilty of committing a crack offense back in 2009 but "not yet sentenced on November 1, 2010, is to be sentenced under the amended Guidelines, and the Fair Sentencing Act's altered mandatory minimums apply to such a defendant as well." Here are a few notable passages from today's big circuit ruling in US v. Douglas, No. 10-234 (1st Cir. May 31, 2011):

> None of the Supreme Court cases squarely governs this case. Two of those cases (invoked by Douglas), United States v. Chambers, 291 U.S. 217 (1934), and Hamm v. City of Rock Hill, 379 U.S. 306 (1964), overrode section 109 in problematic situations. While the analytical explanation given in each case has little bearing on this one, the cases do suggest that some sense of the "fair" result, arguably helpful to Douglas in light of the reformist purpose of the FSA, sometimes plays a role in applying section 109. See Goncalves, 2011 WL 1631649, at *6-7.
>
> Perhaps closer to this case from a factual standpoint is Marrero (relied on by the government); it held that Congress' creation of parole eligibility for serious drug offenders, overturning a prior statutory bar, would not apply retroactively to those serving sentences for crimes committed prior to the new statute. Marrero, 417 U.S. at 663-64. Still, the conflict between an 18:1 guidelines sentence and a 100:1 mandatory minimum may seem to some more pronounced than making the availability of parole depend on whether the prisoner committed the crime before or after an amendment allowed parole.
>
> Further, the imposition now of a minimum sentence that Congress has already condemned as too harsh makes this an unusual case. It seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums. The purity of the mandatory minimum regime has always been tempered by charging decisions, assistance departures and other interventions: here, at least, it is likely that Congress would wish to apply the new minimums to new sentences.
>
> Finally, while the rule of lenity does not apply where the statute is "clear," e.g., Boyle v. United States, 129 S. Ct. 2237, 2246 (2009), section 109 is less than clear in many of its interactions with other statutes, and that is arguably true in the present case as well. Our principal concern here is with the "fair" or "necessary" implication, Marrero, 417 U.S. at 659 n.10; Great N. Ny. Co., 208 U.S. at 465, derived from the mismatch between the old mandatory minimums and the new guidelines and to be drawn from the congressional purpose to ameliorate the cocaine base sentences. But the rule of lenity, applicable to penalties as well as the definition of crimes, adds a measure of further support to Douglas.

In addition to being very big news for many crack defendants in the First Circuit, this new *Douglas* ruling creates a crisp circuit split because the Seventh Circuit has come to a different view on this issue and has already rejected en banc review of its ruling that the new lower FSA minimums do not apply to not-yet-sentenced defendants. Consequently, the oft-needed circuit split to foster SCOTUS review is now in place (and we would not be too surprised if the SG's office seeks cert from this Douglas ruling in light of the Seventh Circuit's contrary opinion).

# SPOTLIGHT: CASES OF INTEREST

US v. Rojas, No. 10-14662 (11th Cir. June 24, 2011). The issue in this appeal is whether the

Fair Sentencing Act of 2010 ("FSA"), Pub. L. No. 111-220, 124 Stat. 2372 (2010), applies to defendants who committed crack cocaine offenses before August 3, 2010, the date of its enactment, but who are sentenced thereafter. We conclude that it does.

In May 2010, Carmelina Vera Rojas pleaded guilty to one count of conspiring to possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and two counts of distributing 5 grams or more of cocaine base, in violation of § 841(a)(1). Her sentencing was scheduled for August 3, 2010, which as it so happened, was the date on which President Obama signed the FSA into law. The district court granted the parties a continuance to determine whether Vera Rojas should be sentenced under the FSA. After considering the parties' arguments, the district court concluded that the FSA should not apply to Vera Rojas's offenses; in September 2010, the court sentenced Vera Rojas to ten years' imprisonment.

On appeal, Vera Rojas argues that the district court erred in refusing to apply the FSA to her sentence. Because she had not yet been sentenced when the FSA was enacted, Vera Rojas believes that she should benefit from the FSA's provision raising the quantity of crack cocaine required to trigger a ten-year mandatory minimum sentence. Further, Vera Rojas contends that the FSA falls within recognized exceptions to the general savings statute, 1 U.S.C. § 109. Relying in large part on the general savings statute, the government contends that Congress's omission of an express retroactivity provision requires that the FSA be applied only to criminal conduct occurring after its August 3, 2010, enactment. We conclude that the FSA applies to defendants like Vera Rojas who had not yet been sentenced by the date of the FSA's enactment. The interest in honoring clear Congressional intent, as well as principles of fairness, uniformity, and administrability, necessitate our conclusion. Accordingly, we reverse and remand to the district court for re-sentencing.

# OBTAINING A FAIR SENTENCE - HOW TO AVOID A STATUTORY MANDATORY LIFE SENTENCE.

Often, NLPA is contacted by attorneys who represent criminal defendants who are unsure as to whether to accept a plea offer. The case of *United States v. Defendant*, (E.D. Tenn. 2011) (case name and no. available to counsel on request), demonstrates how NLPA can assist counsel in the preparation of research regarding the potential benefits and drawbacks of a plea offer, thereby making the decision of whether to enter the plea much clearer and simpler. The Defendant was charged with: conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b), and 846; and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). The government also filed a notice of prior convictions pursuant to 21 U.S.C. § 851. As a result, The Defendant faced a mandatory sentence of life incarceration if convicted. With his client facing such a harsh sentence, yet lacking a viable defense to the charges, the Defendant's attorney, Matthew M. Robinson, contacted NLPA to conduct research upon possible means to avoid a life sentence.

NLPA therefore conducted research on the potential sentence faced by the Defendant, as well as the possibility of avoiding the harshest sentence. NLPA confirmed that the Defendant faced a statutory mandatory sentence of life incarceration. However, NLPA did note that a sentence below the statutory minimum could be obtained should The Defendant provide substantial assistance to the government. 18 U.S.C. § 3553(e)-(f) provided authority to a district court to sentence a defendant below an otherwise-applicable statutory minimum sentence.

The Defendant subsequently pleaded guilty pursuant to a plea agreement. Within the agreement, the government agreed to move for a lesser sentence should the Defendant provide substantial assistance in the investigation or prosecution of suspected criminals. The Defendant proceeded to provide substantial assistance to law enforcement officials.

Prior to sentencing, the Defendant had second thoughts about his guilty plea, and discussed with counsel the option of withdrawing his plea. Mr. Robinson then contacted NLPA, requesting research upon the possibility of withdrawing a plea, as well as the potential benefits and drawbacks of withdrawing the Defendant' plea. NLPA examined the factors that the court would review in determining whether to permit a withdrawal of the plea, such as: (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted. *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994). Applying these factors to the Defendant, NLPA noted that The Defendant had at least two prior felony drug convictions, meaning that in the Sixth Circuit, he would be deemed to have prior experience with the criminal justice system for purposes of refuting any claim that he was confused or did not understand the plea process. Further, the Defendant did not offer any protestations of innocence. As such, NLPA believed that the Defendant would not be permitted to withdraw his plea. Regarding the effects of withdrawing the plea, NLPA stated that the Defendant would again be facing a mandatory sentence of life incarceration should he successfully withdraw the plea.

Fortunately, the Defendant chose not to attempt to withdraw his plea. Instead, the Defendant continued to cooperate with law enforcement officials. At sentencing, the government moved for a reduction to the Defendant's sentence based upon the cooperation given. The Defendant received a sentence of 235 months incarceration, a far cry from the statutory mandatory penalty of life incarceration.

The bottom line is that just because an individual faces a statutorily mandated sentence does not mean that all attempts at securing a lesser sentence must be abandoned in pursuit of an "all or nothing" attempt that a criminal trial would represent. Instead, by being aware of all possible options, attorneys can counsel their clients into pursuing alternatives that can result in a sentence below that mandated by statute. From challenging the procedural mechanisms of imposing a statutory sentence to arguing the lack of factual support for sentencing enhancements to presenting mitigating arguments, NLPA has been at the forefront of attacking insidious and unfair sentences. Should your clients find themselves in similar situations to the Defendant, NLPA stands ready to assist you in the research and preparation of any motions and/or research necessary to assist you in the vigorous defense of your clients

# NLPA CONTINUES

# A TREND OF EXCELLENCE - A REFLECTION ON THE SUCCESSFUL OUTCOMES WE HELPED TO ACHIEVE DURING THE SECOND QUARTER OF 2011:

During 2011 NLPA continues obtaining successful outcomes for its clients. While obviously no one can guarantee the successful outcome of every case, we're very proud of our track record. Here is a spotlight of some of what we were able to accomplish during the second quarter of 2011!

**Ross, C** - NLPA assisted Mr. Ross' counsel with sentencing research for his case which was heard in the USDC ED TN (Knoxville) Case No.: 3:10-cr-00053-13. Mr. Ross was charged with Conspiracy to Possess with Intent to Distribute 5 Kilograms or More of Cocaine w/Criminal Forfeitures; Conspiracy to Commit Money Laundering. The PSI in the case called for a guideline range of 360 to LIFE in prison. However, at sentencing the court imposed 234 months - saving Mr. Ross more than **TEN YEARS TO LIFE IN PRISON!**

**Kennedy, A**- NLPA assisted counsel for Mr. Kennedy's case which was heard in the USDC SD OH (Columbus) Case No. 2:10-cr-00095-1. Mr. Kennedy was charged with Conspiracy to Distribute Narcotics; Conspiracy to Manufacture Marijuana; Sell, Distribute or Dispense Narcotics; Bank Larceny and Theft; Manufacture Marijuana; Violent Crime / Drugs / Machine Gun; Penalties for Firearms; Unlawful Transport of Firearms; Sell, Distribute or Dispense Marijuana; Possession of Marijuana; Money Laundering - Fraud or Other; Conspiracy to Commit Money Laundering. The PSI in his case called for a sentencing range of 360 to LIFE in prison. However, at sentencing the court imposed 180 months - Saving Mr. Kennedy **FIFTEEN YEARS TO LIFE IN PRISON!** Mr. Kennedy also received the judge's recommendation for designation at a Bureau of Prisons (BOP) facility near to his family as well as participation in the BOP's Residential Drug Abuse Program (RDAP) which will help him receive time off of his sentence as well.

**Davis, R** - NLPA assisted attorney Robert Ratliff in the preparation of research to help fight a 360 months to LIFE guideline range for Mr. Davis. His case was heard in USDC ED TN (Knoxville) (Case No.: 3:10-cr-00053-1) where Mr. Davis was charge with Conspiracy to Distribute 5 Kilograms or More of a Mixture or Substance Containing a Detectable Amount of Cocaine; Conspiracy to Distribute and Possess with Intent to Distribute 5 Kilograms or More of a Mixture or Substance Containing a Detectable Amount of Cocaine w/Criminal Forfeiture Allegation; Conspiracy to Commit Money Laundering with Forfeiture Allegations. At sentencing the court imposed 23 ½ years - saving Mr. Davis more than 6 years to life in prison!

**Manna, P** - NLPA assisted counsel for Mr. Manna in the preparation of sentencing research. Mr. Manna's case was heard in the USDC NJ - Newark (Case No. 2:10-cr-00126-1) with Conspiracy to Distribute Controlled Substance(Cocaine Base); Unlawful Transport of Firearms. The PSI report listed his guideline range to be at 262-327 months. However, at sentencing the court imposed 121 months - saving Mr. Manna more than **SEVENTEEN YEARS** in prison!

**Foy, S** - NLPA assisted counsel in the direct appeal of Mr. Foy which was heard in the 10th Circuit U.S. Court of Appeals (Case No. 09-3314). The case originated out of the USDC KS (Case No. 2:07-cr-20168-4) where Mr. Foy was charged with Conspiracy to Manufacture, Possess With Intent to Distribute, and Distribute More Than 50 Grams of Cocaine Base (Crack); Conspiracy to Manufacture, to Possess with Intent to Distribute, and to Distribute Cocaine base (crack) and, to Possess with Intent to Distribute and to Distribute Cocaine; Attempted to Possessed With Intent to Distribute 5 Kilograms or More of Cocaine. The Court of Appeals affirmed in part and vacated in part remanding the case back to the District Court for a re-sentencing based upon a Venue argument.

# INTERESTED IN HIRING NLPA?

Do you have pressing deadlines? - Give us a due date and you can relax. Have a brief due? - Call us for a free preliminary consultation so we can determine a cost estimate. NLPA can provide anything from a research memorandum to a file-ready brief - whichever you may need. If you're considering hiring someone to assist with your criminal proceedings, NLPA offers realistic fees that may suit you in your pursuit of finding top-notch yet affordable legal research & consulting assistance. We believe you will find our fees to be extremely competitive compared to other legal research firms in the country. We also have several alternative options for paying our fees.

NLPA can accept payment via cashier's check or money order through the mail.

We also can accept credit/debit card payments over the telephone as well as electronic check (check by phone) payments over the telephone.

For most services provided NLPA also offers payment plans as well. With a minimum down payment you could soon be financing your legal fees.

Therefore, if you are interested in discussing the financing options available to you for your specific matter, please contact us. NLPA assists in virtually every stage of criminal proceedings from pretrial to post-conviction and also assists in immigration matters. For additional information on the services offered by National Legal Professional Associates please contact our office.

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# Office of the Attorney General
Washington, D. C. 20530

July 15, 2011

**MEMORANDUM FOR ALL FEDERAL PROSECUTORS**

**FROM:** Eric H. Holder, Jr.
Attorney General

**SUBJECT:** Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus. Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States* v. *Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed*, *United States* v. *Douglas*, No.10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In light of the differing court decisions—and the serious impact on the criminal justice system of continuing to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to "restore fairness in federal cocaine sentencing policy" but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the Act's central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme—defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law. That is what I direct you to undertake today.

# *About NLPA*

NLPA is a research and consulting firm, owned and staffed by attorneys, and dedicated to the professional mission of providing counsel, research, and related work product to members of the Bar. Our ownership structure includes attorneys licensed to practice before many local, state, and federal courts; however, NLPA is not a law firm and provides no "front line" legal services. On the other hand, we are much more than your typical paralegal service as our work is prepared by attorneys. Our sole purpose is to provide research and consulting assistance by lawyers, for lawyers . . . and their clients. With cutting-edge computer research capabilities, an experienced and top quality staff, and more than the past two decades' experience, NLPA is well-positioned to provide the types of assistance members of the Bar need. You are important to us and we hope we can commence and maintain a long-term relationship with you. Please know that we are here to assist in all your needs. If you would like to know more about the services we offer, please contact us at:

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***NLPA: WE LISTEN, WE CARE, WE GET RESULTS !***

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