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# *NATIONAL LEGAL PROFESSIONAL ASSOCIATES*

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

***Newsletter***

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


# NLPA LAUNCHES CRIMINAL DEFENSE SUBSCRIPTION PLAN

## NLPA'S CRIMINAL DEFENSE SUBSCRIPTION PLAN

*Information you can use to help your loved one in their fight for justice.*

Do you often times wish that you could obtain information that could assist you in knowing what needs to be done to help your loved one to fight for justice, but cannot afford to hire a high priced attorney to give you the information or the help you need?

The NLPA Criminal Defense Subscription Plan services is the answer. By subscribing to the NLPA Information Subscription Service you can obtain information about all types of topics that can be provided to you in order to obtain information in an affordable way that will help you deal with issues being faced by your loved one.

In putting this information together, NLPA has relied upon some of the best legal minds in the business. Our mission is to set a new standard for convenience and service in a field not typically known for great customer care. We believe it should be easy for anyone to obtain information necessary to help a loved one who is facing criminal charges or serving his sentence. Our goal is to help everyone get the legal information that they need and are entitled to so that they will have a better understanding of how to deal with their attorney or the Department of Corrections on these matters.

Putting these critical aspects of the law and incarceration issues within the reach of millions of people is one of our founding principles and we urge you to contact us to sign up for your subscription to receive information about areas that can help you and your loved one. Topics which are currently available and the cost to obtain such is set forth below.

- **Pretrial Information**
- **Plea Negotiations**
- **Preliminary Sentencing**
- **Appeals**
- **Post-Conviction Relief**
- **Halfway House**
- **Work Release**
- **Parole**
- **Institutional Transfer**
- **How to survive Jail**
- **Medical Issues**
- **Deportation/Immigration**
- **Getting Married/Funeral**
- **§1983 Lawsuit**
- **Expungement of Priors**
- **Clemency/Pardon**

If you are interested in subscribing to any of the topics on the list above, call NLPA at 513-247-0082 or e-mail us at contactus@nlpa.com

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## NEW DEVELOPMENTS IN CRACK COCAINE SENTENCING

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 did not and have not received the benefit of the legislation.

However, a recent decision from the United States Court of Appeals for the Sixth Circuit has opened the door to retroactive application of the Fair Sentencing Act. In United States v. Blewett, 2013 U.S. App. LEXIS 9889 (6th Cir. May 17, 2003), the Sixth Circuit reversed prior decisions and ruled that the Fair Sentencing Act "should apply to all defendants, including those sentenced prior to its passage." Therein, two defendants sentenced in 2005 received mandatory minimum sentences based upon then existing laws regarding crack cocaine sentencing. In 2013, the defendants filed a motion under 18 U.S.C. §3582, arguing that there sentences should be reduced due to the Fair Sentencing Act, a position with which the Sixth Circuit agreed.

In reaching its decision, the Sixth Circuit loosed itself from the mores of traditional Eighth amendment jurisprudence on the issue of retroactivity of the FSA. Instead, in stirring language, the Court found that failure to apply the FSA retroactively would represent a violation of the Equal Protection Clause of the Fifth Amendment to the United States Constitution. While such is a novel manner to insure retroactive application of the Fair Sentencing Act, the dissent in Blewett notes that such a theory is not without problems. No parties to Blewett actually raised an Equal Protection argument, and no challenge has been raised that the failure to make the FSA retroactively applicable represents a constitutional violation. Further, no other circuit has grounded its FSA jurisprudence in the Fifth Amendment. As such, the reasoning underlying the Blewett decision is likely to be reviewed by the United States Supreme Court.

Clearly, it is an exciting time in the federal justice system, as the various branches of the federal government continue to rapidly erase years of unfair and unconscionable sentencing practices for those involved with crack cocaine. Given the Blewett decision, and its uncertain future, NLPA suggests that individuals languishing with unjust sentences based upon pre-FSA crack cocaine sentences should immediately pursue relief via 18 U.S.C. §3582. It is

NLPA's hope, and strong belief, that both the Fair Sentencing Act will be made permanently retroactive. NLPA will continue to monitor relevant law, as well as participate in presenting arguments for retroactivity to federal courts throughout the country. As with all issues involved in a criminal case, NLPA has been at the fore 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 you are entitled to a lesser sentence based upon involvement with crack cocaine, contact NLPA immediately, and we will help you in your fight for justice!

## NEW DEVELOPMENTS IN FEDERAL SENTENCING

The United States Supreme Court has recently issued several rulings that are favorable to federal criminal defendants. One such decision was issued in Alleyne v. United States, 2013 U.S. LEXIS 4543 (June 17, 2013). Therein, a defendant was convicted of using a firearm during and in relation to a crime of violence. The jury verdict form did not state that the firearm was brandished. The district and circuit courts relied on the decision issued in Harris v. United States, 536 U.S. 545 (2002), wherein it was stated that judicial fact finding that increased the mandatory minimum sentence for a crime was permissible under the Sixth Amendment. Because the finding of brandishing increased the penalty to which the defendant was subjected, the Supreme Court held that it was an element of the offense, which had to be found by the jury beyond a reasonable doubt. As the judge, rather than the jury, found brandishing, the Court held that the sentence violated the defendant's Sixth Amendment rights. The Supreme Court determined that the essential Sixth Amendment inquiry was whether a fact was an element of the crime. Because there was no logical basis to distinguish facts that raised the maximum sentence from those that increased the minimum sentence, the Court overruled Harris. The Court found that "[a] fact that increases a sentencing floor, thus, forms an essential ingredient of the offense" and must be submitted to the jury.

The Alleyne decision has the potential to open the door for re-sentencing for many federal defendants who had their statutory minimum sentences increased via judicial fact finding. However, the decision did not specifically state that it applied retroactively. As such, any federal defendants who feel that the Alleyne decision applies to their case should contact NLPA for assistance, as retroactivity arguments are difficult to make without proper legal assistance.

The Supreme Court also issued its decision in Peugh v. United States, 186 L. Ed. 2d 84 (2013). Therein, the Court found that Ex Post Facto Clause of the United States Constitution was violated when a defendant who committed a crime in 2000 but was sentenced in 2009 was sentenced under the 2009 Guidelines, as the more recent Guidelines called for a greater punishment than the 2000 Guidelines in effect when defendant completed his crimes. A retrospective increase created a sufficient risk of a higher sentence to constitute an ex post facto violation. When the defendant committed his crime, the recommended Guideline sentence was between 30 and 37 months incarceration. When the defendant was sentenced, the recommended Guideline sentence was between 70 and 87 months incarceration. Such a retrospective increase in the measure of punishment raised clear ex post facto concerns. The amended Guidelines' enhancement of the measure of punishment by altering the substantive "formula" used to calculate the defendant's sentencing range created a "significant risk" of a higher sentence, and offended fundamental justice, one of the principal interests the Ex Post Facto Clause was designed to serve.

As with the Alleyne decision, the Peugh decision has the potential to open the door for re-sentencing for many federal defendants. Also like the Alleyne decision, the Peugh decision did not specifically state that it applied retroactively. As such, any federal defendants who feel that the Peugh decision applies to their case should contact NLPA for assistance, as NLPA has been at the forefront for over two decades in efforts to have favorable law apply retroactively.

The United States Court of Appeals for the Sixth Circuit has also recently issued favorable new law. In United States v. Washington, 714 F.3d 962 (6th Cir. 2013),the Sixth Circuit found that 18 U.S.C. §924(c)(1)(C) was ambiguous as to how convictions should be ordered for sentencing when a defendant was convicted on multiple counts of car jacking that arose from the same indictment and proceedings. Accordingly, the rule of lenity applied.

Under 18 U.S.C. §924(c)(1)(A), a defendant's first conviction receives a mandatory consecutive sentence of five, seven, or ten years, depending on whether the defendant used, brandished, or discharged a firearm during the crime. Thereafter, 18 U.S.C. §924(c)(1)(C)(I) prescribes that "[i]n the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years." The particular issue in Washington revolved around the interpretation of the phrase "second or subsequent conviction." 18 U.S.C. §924(c)(1)(C). The defendant in Washington was convicted on multiple carjacking counts in the same proceeding, some of which involve brandishing a firearm and others discharging a firearm. Accordingly, whichever conviction the district court treats as the first conviction during sentencing would determine whether the defendant begins with a five, seven, or ten-year mandatory minimum term of imprisonment. 18 U.S.C. §924(c)(1)(A)(i)—(iii). Afterwards, all other car jacking convictions under §924(c)(1)(C)(i) will receive a twenty-five year term of imprisonment, regardless of whether a firearm was used, brandished, or discharged during those particular crimes. 18 U.S.C. §924(c)(1)(C)(I). Thus, the district court's ordering of the offenses could make up to a five-year difference in a defendant's mandatory minimum sentence.

Given the lack of guidance from the statute as to how to order the convictions, the Sixth Circuit found that the rule of lenity would apply, stating that the "rule of lenity cautions that such doubt be resolved in a defendant's favor." Pursuant to the rule of lenity, "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Therefore, multiple convictions under 18 U.S.C. §924 are to be ordered in the manner most favorable to the defendant.

Given the rash of newly issued sentencing law by the federal judiciary, the time to seek justice for criminal defendants has never been more favorable. Throughout its history, NLPA has been at the fore of fighting for justice at sentencing Due to its long tradition of criminal research, NLPA is in a position to assist with the preparation of the necessary motions and research to assist defendants in obtaining a fair sentence. Should you have concerns that you are entitled to a lesser sentence based upon newly issued law, contact NLPA immediately, and we will help you in your fight for justice!

## JUSTICE SAFETY VALVE ACT

The Violent Crime Control and Law Enforcement Act of 1994, codified at 18 U.S.C. §3553(f), added the so-called safety valve to mandatory minimum sentences. The safety-valve provision "contemplates shorter

sentences for first time offenders who might otherwise be subject to mandatory minimum sentences," United States v. Clark, 110 F.3d 15, 17 (6th Cir.1997). It allows a district judge, under certain circumstances, to sentence the defendant on the basis of only what the United States Sentencing Guidelines would otherwise require. One of the circumstances that must exist for application of the safety valve provision is that the offense is a controlled substance offense having a mandatory minimum under 21 U.S.C. §§841, 844, 846, 960, and 963.

Fortunately, recognizing the unfair nature of applying the safety valve provision only to controlled substance offenders, the United States Senate has started discussion toward removing limiting circumstances on the safety valve provision, thereby allowing the safety valve to apply to all criminal offenses under federal law that have a mandatory minimum sentence. On March 20, 2013, Senators Patrick Leahy (D-Vt) and Rand Paul (R-Ky) introduced the Justice Safety Valve Act of 2103 (Senate Bill 619). On April 24, 2013, Representatives Bobby Scott (D-Va) and Thomas Massie (R-Ky) introduced the Justice Safety Valve Act of 2013, H.R. 1695, in the United States House of Representatives. If passed, the bill would apply in the same manner that the currently existing safety valve provision applies.

18 U.S.C. §3553(f) provides that the court may depart below the statutory minimum if five requirements are met:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
(3) the offense did not result in death or serious bodily injury to any person;
4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. §3553(f). The Sentencing Guidelines establish similar limitations on the applicability of statutory minimum sentences. *See* U.S.S.G. §5C1.2

NLPA cautions, however, that the Justice Safety Valve Act is not yet law. Only after the bill is passed in both houses of Congress, and signed by the President, will the bill become law. NLPA also notes that the bill does not have retroactive effect. As such, anyone currently serving a mandatory sentence for a non-controlled substance offense will not benefit by enactment of the new law. As with many laws that are not given retroactive effect at their passage, NLPA will work to have the law applied retroactively.

The proposed legislation, if enacted, will greatly expand the ability of federal

defendants to receive fair and just sentences. As predicted by NLPA, shrinking government budgets, along with fundamental principles of decency and common sense, have caused long hoped for sentencing breakthroughs to occur. NLPA will continue to monitor Congressional action regarding federal sentencing, and will be ready to act once Congress enacts favorable law!

## New Marijuana Laws and Prohibition

The 2012 elections witnessed voters in Colorado and Washington pass legislation legalizing personal marijuana possession and use.[1] However, changes in the law at the state level have not been matched by changes in marijuana laws at the federal level. Marijuana possession and use are still crimes under federal law. As a result, the new state marijuana laws and the federal marijuana laws are incompatible.

[1]Colorado's Amendment 64 passed with just over 54 percent of the vote. The new law allows that "the use of marijuana should be legal for persons twenty-one years of age or older." The measure allows adults to buy and possess up to one ounce of the drug, and to grow up to six marijuana plants in an "enclosed, locked space." In Washington, a similar law was passed under Initiative 502.

Such a situation is comparable to the state of law when the Eighteenth Amendment to the United States Constitution was enacted prohibiting the manufacture and sale of alcohol. Not surprisingly, the Eighteenth Amendment contrasted with the desires some states, and even the legislation of certain states, most notably the laws of New York. At the time that Prohibition was enacted, Alfred "Red" Smith, of Irish descent, was the Governor of New York. Governor Smith was a strong advocate of states''rights and individual freedoms. Gov. Smith pressed the passage of the Walker-Gillette Bill in 1920 (the first year of National Prohibition) to legalize 2.75% beer by weight and 3.5% by volume in clubs, restaurants, hotels with fifty or more rooms (only with meals), and in grocery stores for home consumption. However, two weeks later the United States Supreme Court effectively nullified the law.

Given the intransigence of several states, including New York, in enforcement of Prohibition, the federal government enacted the Culliver law. This law permitted the federal Prohibition Director in New York City to call upon the superintendent of state troopers, the sheriff of each county, and every chief of police to assist in arresting violators of Prohibition. Nevertheless, state officials became increasingly less responsive in enforcing Prohibition, causing enforcement to rest largely with federal officers.

Declining support for Prohibition, due to the desire to consume alcohol along with the increasingly intrusive conduct of the federal government, made obtaining convictions for violation of Prohibition law increasingly difficult. Passage of the federal Jones Act of 1929 made violations of Prohibition laws a felony rather than a misdemeanor and increased maximum penalties. Nevertheless, the penalties actually imposed in both New York State and the rest of the nation remained low. Eventually, realizing the futility of Prohibition, the Twenty-first Amendment was passed overturning the Eighteenth Amendment.

In studying interactions between the state and federal governments during Prohibition, light can be shed on the likely pattern of interaction between the respective governments regarding the aforementioned marijuana laws. Should the federal government insist on enforcing marijuana related laws in Washington and Colorado, court battles are likely to surface. Given the primacy of the federal government's laws over those of the individual states, such battles would likely not be in the states' favor.

However, several recent developments are favorable to the recently passed marijuana

laws. President Obama has stated that recreational users of marijuana in states that have legalized the substance should not be a "top priority" of federal law enforcement officials prosecuting the war on drugs. "We've got bigger fish to fry," the President stated. Further, since 1998, eighteen states have enacted legislation allowing for some form of legal marijuana use.[2] Seven more states have recently attempted to pass legislation regarding some form of legal marijuana use.[3]

Clearly, like in the case of Prohibition, popular support for state laws allowing for the conduct in question is likely to lead to increased intrusion by the federal government to insure enforcement of marijuana related laws. At some point, this cost will be deemed too high, allowing for state laws to control.

At present, it is unknown exactly how the marijuana laws at issue will interact. However, NLPA will remain at the forefront of research and development of arguments assisting those who merely wish to exercise their rights and who have been unjustly prosecuted and persecuted by the federal government.

[2]The states permitting some form of legal marijuana are: Alaska; Arizona; California; Colorado; Connecticut; Delaware; Hawaii; Maine; Massachusetts; Michigan; Montana; Nevada; New Jersey; New Mexico; Oregon; Rhode Island; Vermont; and Washington, as well as Washington, D.C.

[3]The states attempting to allow for legal marijuana use are: Idaho; Illinois; Maryland; Mississippi; New Hampshire; New York; and Oklahoma

## INTERESTED IN HIRING NLPA?

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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