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Newsletter

Legal News Briefs for Law Libraries & Defense Attorneys

2010 FEDERAL SENTENCING GUIDELINES ISSUED - FEDERAL COURT HOLDS THAT NEW CRACK GUIDELINES APPLY TO DEFENDANTS CONVICTED BEFORE FAIR SENTENCING ACT

The United States Sentencing Commission, realizing the unfair nature of the United States Sentencing Guidelines, has recently issued 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. Under U.S.S.G. § 2D1.1(c)(7), the pre-amendment Guidelines called for a base offense level of 26 for those involved with at least 20 grams of crack cocaine. Thanks to the amended Guidelines, it now takes 28 grams of crack cocaine to receive a base offense level of 26. Similarly, the pre-amendment Guidelines called for a base offense level of 32 for those involved with 150 grams or more of crack cocaine. U.S.S.G. § 2D1.1(c)(4). Under the amended Guidelines, it now takes involvement with 280 grams of crack cocaine to obtain a base offense level of 32. Other offense levels are established by extrapolating upward and downward. NLPA notes, however, that in passing the amended Guidelines, the Sentencing Commission overturned the previously amended crack cocaine Guidelines enacted in 2007. Further, the Commission stressed that this amendment is temporary and will have to be re-promulgated by May 1, 2011.

WHAT DOES THIS CHANGE MEAN FOR CRIMINAL DEFENDANTS?

One would think that those awaiting sentencing will receive the benefit of

the newly amended Guidelines. However, guess again. In an effort to minimize the benefit that defendants can receive from the new law - both with regard to mandatory minimum sentences and the 100:1 crack-cocaine ratio - the government is now attempting to argue that courts must apply the pre-existing, and harsher sentencing guidelines for defendants whose crime was committed prior to the Fair Sentencing Act. Fortunately arguments may exist to prevent the government from doing so.

In the recent case of *US v. Douglas*, (No. 09-202-P-H)(D. Maine) decided on October 27, 2010, Judge Brock Hornby ruled that a pre-August 3, 2010 defendant who committed his crime before the effective date of the new law but has not yet been sentenced is

entitled to be sentenced under the amended guidelines and the Fair Sentencing Acts altered mandatory minimum provisions. He made it very clear that for a defendant not to receive the benefit of this new law even though he may have committed his crime before the law went into effect is a violation of the defendant's due process rights and the intent of Congress.

A more difficult course exists for those already sentenced under the pre-amendment Guidelines. However, there is good news here as well. Although, the amended Guidelines have not been given retroactive effect, meaning that the amended Guidelines do not apply to those who have already been sentenced, NLPA notes, that such should not prevent defendants pursuing a direct appeal and sentenced under the pre-amendment Guidelines from raising a claim that they should be entitled to the benefit of the amended Guidelines, as their convictions have not yet technically become final.

The *Douglas* case can also be of assistance to defendants in their direct appeals. For 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 have a strong argument that they should have received the benefit of the amended Guidelines.

For those who are out of time or who have completed the direct appeal process, attempts can be made to receive the benefit of the amended Guidelines via a motion for reduced sentence under 18 U.S.C. § 3582 or a motion for post-conviction relief under 28 U.S.C. § 2255. NLPA submits that, as the amended Guidelines have not been declared retroactively applicable, any avenue of relief pursued by a defendant will have to focus on the elements of fairness in sentencing as called for by 18 U.S.C. § 3553. As the amended Guidelines are based upon years of testimony and research regarding the insidious nature of overly harsh crack cocaine sentences, defendants will have to argue that their sentences should be reduced based upon the unfairness of such sentencing practices.

Of course this is not to say that the amendment will not be applied retroactively at some time in the future. As we saw with the 2007 amendments, they were applied retroactively. Nonetheless, even if this new amendment is not applied retroactively, there are still ways in which NLPA can help.

We are at a time where the government realizes the backlashes of the harsh sentences that have been imposed over the past several decades and the prison population matters are a clear result of this approach. Certainly we appreciate that the government appears to be attempting to take corrective steps to this. However, clearly, not accounting for the thousands of inmates in the BOP who are already serving time may not be the best approach to correcting this problem quickly. Obviously NLPA strongly disagrees with this approach as we firmly believe that in fairness, an amendment such as this should be available to the thousands of inmates already serving their sentences in the federal prison system. Fortunately you may not be without options.

The key to keep in mind about this amendment not having been applied retroactively at this time is that this means that a defendant cannot simply file a motion solely requesting a reduction in sentence based upon this amendment. It does not, however, mean that a defendant who receives a remand in his/her case for a new sentencing cannot receive the consideration of this amendment at that resentencing.

NLPA has been providing research and assistance to attorneys in matters such as these for more than the past two decades. We have enjoyed a great number of phenomenal victories as the result of our assistance as well. Therefore, it is very important that, even if a defendant cannot proceed with a motion requesting a reduction in sentence based upon the amendment alone, that he/she not give up and continue to look into all other areas that may merit a remand for a new sentencing so that they can not only receive the benefit of the amendment at that time, but also consideration for many of the other issues in their case.

Either way, 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. It is NLPA's hope, and strong belief, that the amended Guidelines concerning crack cocaine will be made retroactive by May 1, 2011. However, NLPA urges defendants not to wait on a retroactivity decision that is not guaranteed to be issued. It is imperative that defendants seek the relief that they are entitled to as soon as possible. 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!

If you are interested in viewing the new 2010 Federal Sentencing Guidelines, you can obtain your electronic copy - including the Emergency Amendment for the Fair Sentencing Act by visiting the website of the United States Sentencing Commission at: www.ussc.gov , where you can also view a full analysis of the retroactive application of the crack cocaine amendment and the emergency press release issued on October 15, 2010.

THE RECENCY AMENDMENT: SENTENCING COMMISSION SENDS CONGRESS AMENDMENT TO REDUCE CRIMINAL HISTORY SCORE GUIDELINES!

In a move that potentially could assist thousands of defendants receive lower sentences, the Sentencing Commission has sent Congress a set of proposed amendments to the federal sentencing guidelines that will go into effect on November 1, 2010. Proposed Amendment No. 5 will change the way criminal history is calculated and would eliminate the rule that adds two criminal history points if a crime for which the person is being sentenced is committed less than two years after release from prison. This is also known as the Recency Amendment.

HOW CAN THIS CHANGE HELP DEFENDANTS WHO ARE WAITING TO BE SENTENCED?

This amendment which became effective November 1, 2010 enables defendants who have not yet been sentenced but who have prior criminal convictions to raise the amendment as an issue in their sentencing memoranda to help reduce their criminal history points and, their sentencing guideline range. Should you have a client that is waiting to be sentenced, NLPA can assist in the preparation of a sentencing memorandum that would address all appropriate downward departure issues as well as this important change in the calculation of criminal history to help the defendant receive a much lower sentence.

CAN THIS AMENDMENT HELP PEOPLE WHO HAVE ALREADY BEEN SENTENCED?

Unfortunately the Commission has not yet agreed to make this new amendment retroactive to apply to cases for individuals who have already been sentenced. NLPA strongly objects to this position as we believe it adversely impacts upon the due process rights of defendants who only, due to the time at which they were convicted and sentenced, are being discriminated against by this new favorable change to the guidelines. If you have a client who has already been sentenced and could benefit from the Recency Amendment, NLPA is happy to assist in the preparation of a timely appeal or §2255 motion to address this issue including all of the reasons why the amendment should be applied retroactively to your client.

If you are unsure what avenues may exist at this time, NLPA can also prepare a detailed case analysis to look into this as well as many other possible issues and avenues of relief. The key to keep in mind about this amendment not having been applied retroactively at this time is that it means that a defendant cannot simply file a motion solely requesting a reduction in sentence based upon this amendment. It does not, however, mean that a defendant who receives a remand in his/her case for a new sentencing cannot receive the consideration of this amendment at that resentencing. If you are interested in having NLPA prepare a case evaluation to look into ways of getting the case back into court, please contact us today!

Also, keep in mind that in the past the guideline amendments have been given retroactive effect. A good example is the recent crack-cocaine amendment (Amendment 706) which reduced the base offense level for crack cocaine by two levels. This amendment was approved in 2007. In 2008, in a subsequent amendment (Amendment 713), the Commission added Amendment 706 to the list of amendments which may be applied retroactively. NLPA believes the criminal history amendment should be applied retroactively as well.

Based upon the foregoing, when the proposed amendment becomes effective, it should result in lower criminal history categories for many defendants who have not yet been sentenced and, thus, lower sentencing guideline ranges.

However, for the time being it appears that such benefit will only extend to those sentenced after the amendment goes into effect. NLPA is proud of its winning track record. We have enjoyed success in helping defendants and their counsel obtain substantially reduced sentences as the result of the research our team of lawyers have prepared. If you or your client are in need of assistance in this matter contact NLPA today. After all, the pursuit of justice is a team approach!

CASES OF INTEREST

NLPA has recently tracked the case of **United States v. Dillon**, 130 S. Ct. 2683, 177 L. Ed. 2d 271 (2010). In Dillon, the defendant was sentenced to a 322 month term of incarceration in 1993, based largely upon involvement with crack cocaine. In 2007, the United States Sentencing Commission amended the sentencing Guidelines regarding crack cocaine, making said amendment retroactive. Accordingly, the defendant filed a motion for a sentence reduction under 18 U.S.C. § 3582(c)(2), and asked the court to grant not just the two-level reduction authorized by the amendment but a further reduction consistent with the sentencing factors found in 18 U.S.C. § 3553(a). However, the district court found that it was constrained by U.S.S.G.§ 1B1.10 from imposing a sentence outside the Guidelines range, and it re-sentenced defendant to 270 months imprisonment based solely upon the amended crack cocaine Guideline. On June 17, 2010, the United States Supreme Court upheld the district court's interpretation of the law. Section 3582(c)(2) authorized only a limited adjustment to an otherwise final sentence and required the sentencing court, pursuant to U.S.S.G. § 1B1.10(b)(2), to impose a term of imprisonment that was within the amended Guidelines range unless it originally imposed a below-Guidelines sentence. The Court also found that its decision in United States v. Booker did not require the district court to treat § 1B1.10(b) as non-binding.

While NLPA had hoped that the Dillon decision would result in defendants being able to receive below Guidelines sentences based upon the principles of fairness as put forth in 18 U.S.C. § 3553, NLPA submits that defendants are still in a position to receive the benefit of recent favorable trends in the law regarding crack cocaine. The first such favorable act is the Fair Sentencing Act of 2010. The Fair Sentencing Act serves to: (1) replace the 100-to-1 crack to powder cocaine statutory 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); and (2) eliminate the five-year mandatory minimum for simple possession of crack cocaine. The law is not retroactive, meaning that it will not apply to anyone who committed their crack offense before the law was signed.

However, NLPA expects that the United States Sentencing Guidelines will soon be amended to more accurately reflect the similar dangers involved with crack and powder cocaine, bringing the sentencing ratios closer to 1-to-1. NLPA believes that any amendment to the Guidelines regarding crack cocaine will most likely be retroactive, meaning that those sentenced before any new amendment can still receive the benefit of said amendment.

A further positive trend has come from the federal district courts. The district courts have continued to grant remarkable relief in many cases involving sentences based upon crack cocaine involvement, despite the limitations put forth by the Dillon decision. In United States v. Miller, 2010 U.S. Dist. LEXIS 79763 (D. Minn. August 5, 2010), the United States District Court for the District of Minnesota determined that a defendant sentenced as career offenders could be eligible for re-sentencing under 18 U.S.C. § 3582, despite the fact that the defendants sentence range was not specifically determined by his involvement with crack cocaine. The district court found that even though the defendant's guideline sentence range was determined by his career offender status, the underlying crack cocaine Guideline calculation was reviewed by the sentencing court in determining whether a life sentence under the career offender guideline was appropriate.

The defendant in Miller was re-sentenced to time served of 262 months, as the top end of the recalculated crack cocaine guideline was less than time served. The court found that, in issuing a new sentence pursuant to the principles of 18 U.S.C. § 3553, factors such as "simple justice and common decency" should dictate that the defendant be given a chance to contribute to society. Clearly, any defendant who's sentence involves crack cocaine, no matter how tangentially, should attempt to seek relief based upon favorable new crack cocaine sentencing law.

NLPA stresses that arguments regarding a challenge to a crack cocaine based sentence are technical and require an experienced advocate. With a real chance to have a sentence reduced,

NLPA urges that defendants take the time and care to properly raise issues involving crack cocaine. As with all sentencing issues in the federal justice system, NLPA has been at the fore in protecting the rights of American citizens. Should you have concerns that your sentence was inappropriate or issued in violation of your rights, contact NLPA immediately, and we will help you in your fight for justice!

US v. SEANZ, No. 09-3647 (7th Cir. Oct. 23, 2010) - Cruz Saenz received a significant 293-month sentence for transporting drug money on one single occasion. The District court seemed to think that Saenz was involved in the conspiracy beyond this single incident and denied Saenz's request for a minor role reduction as a result. Finding no evidence in the record of any involvement beyond the single transport of money, the 7th Circuit remanded "for the District Court to reconsider whether Saenz should receive the minor role adjustment.

It may be that when the district court said that Saenz was more than a courier, it meant he was not simply a totally unknowing mule.... The fact remains, however, that the only evidence in the record regarding Saenz's participation in this conspiracy is that he did so on only one occasion. The district court's reasoning suggests that it concluded otherwise, and that this conclusion was the premise for its denial of the minor participant adjustment.... Because the denial was apparently premised on information not supported by the record, we remand for reconsideration....

In doing so, we note again the length of the sentence Saenz received for transporting drug money on one occasion. That sentence, again, was 293 months in prison. And, to repeat, the government sought a higher sentence. If the government's position is that 293 months is barely good enough for a one-time courier, we wonder what it thinks the appropriate sentence would be for someone who is a large-scale supplier of drugs . And with sentences like this one for single-time couriers, why not be a major supplier? If caught, the sentence is not likely to be much more, and one can certainly make a whole lot more money in the meantime."

NLPA CONTINUES A TREND OF EXCELLENCE -A RECAP ON OUR SUCCESSFUL CASES DURING THE THIRD QUARTER OF 2010

During 2010 NLPA continues obtaining successful outcomes for its clients. While obviously no one can guarantee the successful outcome of every case, here is a spotlight of what we were able to accomplish through to our third quarter of this year!

Ellison, V - NLPA assisted counsel for Mr. Ellison in the preparation of sentencing research in the case of Mr. Ellison which involved a crack-cocaine conspiracy charge. His case was heard in the USDC ED TX (Case No. 4:09-cr-00107-3). The PSI in the case listed a guideline range of 108-135 months. However, at sentencing the court imposed only 54 months - saving Mr. Ellison more than six years in prison!

Carson, L - NLPA assisted Attorney Robert Ratliff in the preparation of sentencing research in the case of Mr. Carson who was charged in a multi-drug conspiracy indictment in the USDC SD of AL (Case No. 1:09-cr-00066-1). The PSI originally listed a guideline range of 324-405 months. However, the court instead imposed a sentence of 121 months - saving Mr. Carson more than **23 YEARS IN PRISON!**

Peele, L- NLPA assisted Attorney George Sallaway in the preparation of sentencing research in the case of Mr. Peele who was charged in crack conspiracy and firearm case in the USDC WD NY (Case No. 6:07-cr-06173-11). The PSI Report listed a sentence of 292-365 months. However, at sentencing, Mr. Peele received 288 months - saving him more than six years in prison!

Irving, L - NLPA assisted counsel in the case of Mr. Irving with the preparation of sentencing research. The case was heard in the USDC CT, New Haven Division (Case No. 3:09-cr-00117-17) where Mr. Irving was involved in cocaine and crack-cocaine conspiracy charges. The PSI in this case listed a guideline range of sixth (60) months or, if the court applied a safety valve - a range of 37-46 months. However, at the sentencing the defendant received a sentence of only 24 months - Saving Mr. Irving three years in prison!

Harrell, R - NLPA assisted counsel for Mr. Harrell in the preparation of sentencing research in his case. The case was heard in the USDC CD IL, Urbana Division (Case No. 2:08-cr-20039-1) where the defendant was charged with cocaine and crack cocaine conspiracy. The PSI listed a sentencing guideline range of 360 to **Life**. However, at sentencing the court instead imposed a sentence of 180 months! - Saving Mr. Harrell more than **FIFTEEN YEARS TO**

LIFE in prison!

Calvin, E - NLPA assisted Mr. Calvin's attorney in the preparation of research for his sentencing. The case was heard in the USDC ED LA, New Orleans Division (Case No. 2:09-cr-00175-2) where Mr. Calvin was charged with possession and intent to distribute cocaine. The PSI Report listed a guideline range of 135-168 months. However, at the sentencing the court instead imposed a sentence of 120 months - saving Mr. Calvin four years in prison!

Clark, D - NLPA assisted counsel for Mr. Clark in the preparation of sentencing research to help fight his guideline level of 292 to 365 months. His case was heard in the USDC ED VA (Case No. 3:03-cr-00079-7). At the sentencing hearing the court imposed 240 months saving Mr. Clark more than 10 years in prison!

Redding, E - NLPA assisted counsel for Mr. Redding in the preparation of sentencing research. His case was heard in the USDC ND WV (Case No. 3:09-cr-00067-1) and his guideline level was 135-168 months. However, at the sentencing the court imposed 110 months - saving Mr. Redding almost five years in prison!

Epps, N - NLPA assisted counsel in the case of Mr. Epps in the preparation of research for the sentencing. The case was heard in the USDC ND NY (Case No. 3:09-cr-00581-1). Mr. Epps' guideline level was 188-235. However, at the sentencing the court imposed 110 months - saving Mr. Epps more than ten years in prison!

CASE SPOTLIGHT:

U.S. vs hulett

NLPA HELPS DEFENDANT SAVE 11 YEARS AT SENTENCING

Often, NLPA is contacted by attorneys who represent defendants who are facing unduly harsh sentences under the federal sentencing Guidelines. The case of *United States v. Drew Hulett*, case no. 2:08-cr-20079-6 (D. Kansas 2010) demonstrates how NLPA can assist counsel in the preparation of sentencing arguments designed to obtain the lowest possible sentence for defendants. In this case, Mr. Hulett was thinking about entering a guilty plea in a methamphetamine conspiracy case. Mr. Hulett contacted NLPA, who then contacted his appointed attorney David A. Kelley, Esq. Mr. Hulett ultimately decided to enter that guilty plea, but when the presentence report was finished, he was facing an advisory guidelines sentence of 188-235 months incarceration. With NLPA's assistance, Mr. Kelley fought the unjustified guideline sentence and was able to secure a sentence of 135 months, saving his client a minimum of 53 months incarceration. Thanks to Attorney Kelley and NLPA, an additional sentencing reduction motion is also expected from the government that will likely result in a total sentence of approximately 54 months. For those of you keeping score, **that is more than 11 years shorter than the sentence Mr. Hulett was facing based on the original presentence report** calculations! The lesson to be learned here is that it is never too early to get NLPA involved in the case.

With NLPA's assistance, Mr. Hulett and Attorney Kelley filed objections to the pre-sentence investigation report. NLPA argued that a two-point weapons enhancement was improper, and that Mr. Hulett's criminal history score was erroneously calculated. It was also argued that the Guideline recommended sentence was greater than necessary to achieve the goals of sentencing pursuant to 18 U.S.C. § 3553(a). NLPA noted that, in light of the decisions issued in cases such as *United States v. Booker*, 125 S.Ct. 738 (2005) and *Kimbrough v. United States*, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), the district court was free to deviate from strict adherence to the Guidelines, and could issue a sentence that was fair based upon the specific facts of Mr. Hulett's case. The district court agreed with the arguments presented by NLPA and Attorney Kelley, resulting in a sentence well below the applicable advisory guideline range calculated in the presentence report. Attorney Kelley was also able to secure an agreement from the government to file a motion for an additional sentencing reduction at a later date.

Mr. Hulett was not a hardened life-long criminal, and with NLPA's assistance, the District Court and the government eventually realized it. The presentence report writer needed additional convincing, but in the end, the District Court obtained an accurate picture of the defendant and made the appropriate decision to disregard several spurious allegations contained in the presentence report. Just because the pre-sentence investigation report puts forth a certain sentencing range does not mean that the defendant has to lay down and take it. Challenges can always be made to the report in an effort to obtain a lower sentence. The purpose of a presentence report is to put forth the factors justifying a certain sentence, to give the court an accurate portrait of the defendant, including mitigating factors. Unfortunately, presentence

report writers often neglect their duties in this regard, instead focusing only on aggravating factors and the government's allegations as to the defendant's guilt and criminal conduct. While it is true that these are important factors for the court to consider in sentencing a defendant, they are not the only factors or the most important factors. The most important purpose of sentencing litigation is to give the court the proper tools to work with for imposing a fair sentence. These include mitigating factors, justifications for downward departures and anything else that will convince the court to impose a lower sentence than it would have without the information. After all, it is the purpose of every sentencing court to impose a sentence that is sufficient, but not greater than necessary. NLPA has been at the forefront of attacking insidious and unfair sentences. Should your clients find themselves in similar situations to Mr. Hulett, 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.

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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