

The Doing Time Times

Federal Defender Services
Of Wisconsin, Inc.



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Maybe Doing A Little Less Time

December 18, 2007

It has been a good and historic week for federal criminal defendants and for those who fight and labor for fairer federal sentencing laws and practices. On December 10, 2007, the Supreme Court in two decisions, *Gall v. United States*, 552 U.S. ___ (2007) and *Kimbrough v. United States*, 552 U.S. ___ (2007) (See *Doing Time Times* Issue 8), affirmed that federal judges indeed have discretion to impose reasonable sentences, even where federal guidelines call for different sentences. In *Gall*, the Court held that “while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, Courts of Appeals must review all sentences—whether inside, just outside or significantly outside the Guidelines range—under a deferential abuse of discretion standard.” In *Kimbrough* the Court ruled that the crack guidelines are advisory, like all the other federal sentencing guidelines, and rejected a lower court ruling that they are effectively mandatory. The Court ruled that judges must consider the crack guidelines but may conclude that they are too harsh when considering the disparity between punishment for crack cocaine and powder cocaine. *Kimbrough*, however, does not change the mandatory minimums for crack offenses. The mandatory minimums are set by statutes which only Congress can change.

Also, and possibly more important to many defendants serving federal sentences, on December 11, 2007 the United States Sentencing Commission unanimously voted to give retroactive effect to its recent amendment to the Federal Sentencing Guidelines that reduces penalties for crack cocaine offenses. This change will be effective on March 3, 2008. This long awaited decision has been met with great excitement by the countless men and women across the country doing federal time for crack offenses. Inside this special issue dubbed “*Maybe Doing A Little Less Time*,” we will answer some common questions on the amendment. The article does not set out to delve into all the nuances and subtleties of the

amendment. Rather, it is a basic open letter to quickly get reliable information to those who may be affected by this change.

For those doing time on crack offenses who were sentenced in a federal court outside of Wisconsin, please know that federal public defender offices around the country are working hard to identify eligible individuals in their districts and are devising plans to contact those individuals or to get information to them. For those sentenced on crack offenses in federal courts in Wisconsin, we want you and your families to know that Federal Defender Services of Wisconsin is working diligently to identify and contact all inmates sentenced on crack offenses in the Eastern District of Wisconsin (Milwaukee and Green Bay) and the Western District of Wisconsin (Madison) who may potentially benefit from this law. Once we have generated a list of potentially affected persons sentenced in Wisconsin federal courts, we will contact them directly by letter.

It is our hope that inmates potentially eligible for the sentence reduction will be patient, using the time between now and March to contact lawyers to work on their behalf, rather than rushing to file their own motions. Because the reduction is not automatic, but instead subject to the judge's discretion, assistance of a lawyer may increase the chances of the court granting relief. For our part, we will do our best to both identify and work toward any available relief for all inmates serving federal sentences imposed in the Eastern and Western Districts of Wisconsin.

What can you do if you are serving crack time and are not contacted by your federal defender office or just want to make sure that your case is reviewed? Simply write a letter to the federal defender office in the district where you were sentenced. (See page 6 for a list of addresses). Your letter should include the following information which you can get from your PSR and Judgment of Conviction, available to you through your counselor/caseworker:

- Your name and case number (if you know it);
- Offense/crime of conviction;
- Date of your sentence;
- Sentence imposed;
- Name of Judge;
- Name of your lawyer at the time of sentence; and
- Your projected release date.

Finally, we would be remiss if we did not applaud the Sentencing Commission. Though modest, the crack amendment is a welcome step toward mitigating the unwarranted sentencing disparity that exists between federal powder and crack cocaine defendants. We urge the Commission, as it has done since 1995, to continue to call on Congress to address the fundamental unfairness that exists in federal sentencing policies on the 100-to-1 statutory ratio on powder/crack offenses. In the meantime, we will endeavor to do everything we can to ensure that persons doing federal time for crack offenses in Wisconsin receive whatever relief may be available under this new amendment.

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BY THE NUMBERS

- 19,500 offenders nationally appear to be eligible to seek a reduced sentence under the new crack amendment;
- Of that number, 85.9% percent are Black, 7.6 % are Hispanic, and 5.8%, are White;
- 94.2% are male and 5.8% are female; and
- the average age at sentencing was 30.

From the U.S. Sentencing Commission’s “Analysis of the Crack Cocaine Amendment If Made Retroactive” available at www.ussc.gov.

CRACK GUIDELINE AMENDMENT BASICS

What is the crack guideline amendment?

Starting November 1, 2007, the Guidelines’ offense levels for crack offenses were reduced generally by two levels. The resulting average reduction of guideline range is approximately two years.

Do these new guidelines apply to those sentenced prior to November 1, 2007, and/or already doing time?

On December 11, 2007, the Sentencing Commission voted unanimously to make the crack cocaine guideline amendment retroactive. "Retroactive" means that the courts have the authority to apply the new amendments to people sentenced *prior* to the date (November 1, 2007) that the amendments went into effect.

When can the courts start applying the new crack guideline amendment to people already sentenced and serving time?

The effective date is March 3, 2008, which means that (1) motions can be brought on and after that date and (2) courts are authorized to start granting motions for reductions of sentences on that date.

Will the crack guideline amendment automatically apply to all crack offenders sentenced before November 1, 2007?

No. The decision to apply the amendment is discretionary. The sentencing judge will decide whether an individual is eligible for a lower sentence and how much, if at all, that sentence should be lowered. The sentencing judge will consider many factors in deciding whether to reduce

a sentence, including whether lowering the sentence would pose a danger to the community. The Court may also consider factors such as post-offense conduct.

Additionally, those sentenced to the mandatory minimum cannot benefit from this amendment. Career Offenders may also have problems benefitting from this amendment because a career offender's offense levels are based on statutory penalties, not the drug quantities that were the subject of the crack amendment.

Again, as noted earlier, issues like these and other nuances make the assistance of a lawyer -- rather than self-help or reliance on "form motions"-- important and useful.

How much of a reduction can a qualifying person expect?

There is no quick answer. Each case will have to be individually reviewed (preferably, with the assistance of an attorney). It will depend on the original sentence and how much the sentencing judge decides to reduce the individual's sentence.

How do I apply for this reduction?

Under 18 U.S. § 3582(c)(2), the statute that authorizes reductions based on amendment to the sentencing

guidelines, the prisoner, the Director of the Bureau of Prisons or the Court on its own motion may move for a reduction based on the new crack guideline amendments.

Though an individual may file *pro se* or on his own, we again stress that assistance of an attorney should be sought to maximize the chances of success. We recommend writing the federal defender office in your sentencing district to see if you can get the assistance of counsel. Help will be found for those seeking it.

What if a person has already served time on a crack offense and is currently on supervised release?

If the person would have benefitted from this amendment but is already on supervised release, on a petition for early termination of supervised release under 18 U.S.C. § 3583(e)(1), the Court may consider the fact that the person has served a longer term of imprisonment than would have been appropriate under this new amendment. There is no automatic termination of supervised release because the person served a longer prison term. The decision to terminate supervised release early, like the decision to grant relief under this amendment, is discretionary.

Does the crack amendment change the mandatory minimum sentences for crack crimes?

No. The mandatory minimum sentence for a crime involving at least five grams of crack remains five years. The mandatory minimum sentence for a crime involving at least 50 grams of crack remains 10 years. Only Congress (not the Sentencing Commission) can change these mandatory minimums.

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CONTACT US

If you wish to submit an article or suggestions for future newsletter, please write to us at:

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