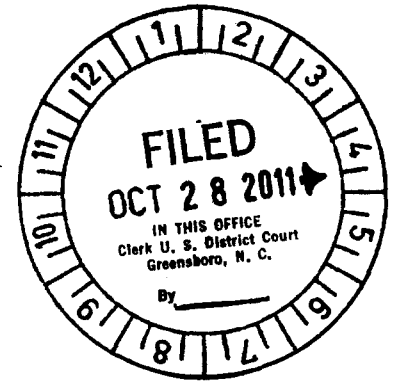


IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



In Re: Petitions for Retroactive Application)
of U.S. Sentencing Guideline Amendment 750)
Affecting Crack Cocaine Offense Level Guidelines)
Effective November 1, 2011)

**INTERNAL PROCEDURES FOR PROCESSING CASES INVOLVING RETROACTIVE
APPLICATION OF AMENDMENT 750 TO THE FEDERAL SENTENCING
GUIDELINES REGARDING COCAINE BASE (CRACK) OFFENSES**

This memorandum addresses the procedures in this District for implementing the United States Sentencing Commission’s Amendment to Guideline § 1B1.10, effective November 1, 2011, which authorizes retroactive application of the Parts A and C of Amendment 750 to the Cocaine Base (“Crack”) Offense Level Guidelines (the “2011 Retroactive Crack Amendment”). As a general matter, motions seeking a reduction of sentence pursuant to the retroactive Guideline are governed by 18 U.S.C. § 3582(c)(2). These proceedings are not full resentencings, and may be ruled on by the Court without a hearing. See United States v. Legree, 205 F.3d 724 (4th Cir. 2000); Fed. R. Cr. P. 43(b); see also United States v. Dunphy, 551 F.3d 247 (4th Cir. 2009); Dillon v. United States, 130 S. Ct. 2683 (2010). The determination of whether and to what extent to allow a reduction of sentence is within the discretion of the District Court under Sentencing Guideline § 1B1.10, based on the Guideline Range that would have applied if the amendment (in this case the 2011 Retroactive Crack Amendment) had been in effect at the time of the defendant’s sentencing, with all other Guideline calculations and applications remaining the same. Guideline § 1B1.10 provides that in determining whether to allow a reduction and the extent of the reduction within the newly calculated range, the Court should consider the sentencing factors in 18 U.S.C. § 3553(a) within the limitations set out in Guideline § 1B1.10, as well as any “public safety risk” including the nature and seriousness of the danger to any person or community posed by the reduction, and “post-sentencing conduct” of the defendant. Given the number of cases potentially impacted by the 2011 Retroactive Crack Amendment in this District, this memorandum provides an outline of an administrative process for prioritizing and handling these cases. When they are ready for a ruling, the cases will be submitted to the original Sentencing Judge. If the original Sentencing Judge is no longer active, the Court will determine internally how the cases should be distributed among the active Judges.

I. Initial Identification Process

- A. The U.S. Probation Office for this District has prepared and will continue to prepare a list of defendants who may be affected by the 2011 Retroactive Crack Amendment, based on information they have obtained from the Bureau of Prisons and the U.S. Sentencing Commission.
- B. The Federal Public Defender’s Office may also have identified defendants who may be affected by the retroactivity provision. The Federal Public Defender’s Office will coordinate providing general information regarding these procedures to defendants as necessary.

- C. Consideration for a reduced sentence will be limited initially to those defendants who have filed a Motion requesting a reduced sentence pursuant to the 2011 Retroactive Crack Amendment. As outlined below, the Motions will be prioritized for consideration based upon each defendant's projected release date, with initial priority given to those defendants with a projected release date of on or before November 1, 2014.

II. Review of Motions

- A. The Clerk's Office will docket and identify all Motions that have been filed requesting a reduction of sentence pursuant to the 2011 Retroactive Crack Amendment. The Clerk's Office will then transmit copies of the Motions directly to the Probation Office for further action consistent with the procedures outlined herein.
- B. The Probation Office will prioritize Motions into three "waves":
 - (1) First Wave: Defendants who have filed a Motion seeking relief and who have a current release date of on or before November 1, 2014.
 - (2) Second Wave: Defendants who have filed a Motion seeking relief and who have a current release date of between November 1, 2014 and November 1, 2017.
 - (3) Third Wave: Defendants who have filed a Motion seeking relief and who have a current release date of on or after November 1, 2017.
- C. The Federal Public Defender's Office will coordinate appointment of counsel for "First Wave" defendants who were previously represented by court-appointed counsel, with a presumption that previous counsel should be reappointed if possible. Although counsel is not required to be appointed, appointment of counsel will facilitate the process and should be allowed if the defendant qualifies. An Order will be issued authorizing the Federal Public Defender to make initial reviews of potential eligibility and coordinate representation issues in this regard. However, the actual appointments will be made by separate orders issued by the Court in each case. With respect to this process for appointment of counsel:
 - (1) The Court will presume that any incarcerated defendant who has filed a Motion pursuant to the 2011 Retroactive Crack Amendment and who previously qualified for appointment of counsel will continue to qualify for appointed counsel unless changed financial circumstances appear. In order to confirm each defendant's present financial circumstances, the Clerk's Office will forward to each defendant who files such a Motion a new CJA-23 Financial Affidavit to be completed and returned to the Clerk's Office.
 - (2) The Federal Public Defender's Office will identify previous counsel and will determine whether any conflicts or other issues would prevent reappointment of previous counsel. If the Federal Public Defender's Office was previously

appointed as counsel and no conflict exists, the Federal Public Defender's Office will notify the Clerk's Office, and the Clerk's Office will submit a proposed Order Reappointing Counsel to the Court. Likewise, if a panel attorney was previously appointed and the attorney is still on the panel and no conflicts exist, a CJA-20 will be submitted reappointing counsel for purposes of the § 3582(c)(2) proceeding. These appointments will initially be handled solely by the Chief Judge, until notice is otherwise provided. If prior counsel cannot be reappointed, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate a new appointment, with a presumption in favor of appointing the Federal Public Defender's Office. If the Federal Public Defender's Office cannot be appointed, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate appointment of another panel attorney, for referral to the Court.

- (3) For defendants who previously retained counsel, if the defendant files a Motion pursuant to the 2011 Retroactive Crack Amendment without the assistance of counsel, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate obtaining a CJA-23 Financial Affidavit and appointment of counsel for that defendant.
- (4) Defense attorneys who were previously appointed as counsel for a defendant and who wish to file a request for a sentence reduction on behalf of their former client must first contact the Federal Public Defender's Office and the Clerk's Office so that a CJA-20 can be submitted to the Court reappointing the attorney as counsel to handle the § 3582(c)(2) proceeding. Compensation for counsel will be based only on work performed after the attorney has been notified of the appointment by the Federal Public Defender's Office or the Clerk's Office.

D. The Probation Office will initially retrieve Presentence Reports, Worksheets, and Judgments for all First Wave defendants.

E. The Probation Office will then screen the First Wave defendants to determine which defendants could be potentially eligible for a Recalculated Guideline based upon the following criteria established by the U.S. Sentencing Commission.

- (1) Crack cocaine must have been involved in the offense such that the base offense level was determined based at least in part on the quantity of crack involved, although this may include cases where the offense of conviction was not specifically a crack cocaine offense.
- (2) The defendant's base offense level must be affected by the 2011 Retroactive Amendment based on the quantity of crack for which the defendant was held accountable, as set out in the chart below :

8.4 kg or more	Not eligible (still level 38)
4.5kg to < 8.4 kg	Eligible (reduce 2 levels from 38 to 36)

2.8 kg to < 4.5 kg	Not eligible (still level 36)
1.5 kg to < 2.8 kg	Eligible (reduce 2 levels from 36 to 34)
840 g to < 1.5 kg	Not eligible (still level 34)
500 g to < 840 g	Eligible (reduce 2 levels from 34 to 32)
280 g to < 500 g	Not eligible (still level 32)
196 g to < 280 g	Eligible (reduce 2 levels from 32 to 30)
150 g to < 196 g	Eligible (reduce 4 levels from 32 to 28)
112 g to < 150 g	Eligible (reduce 2 levels from 30 to 28)
50 g to < 112 g	Eligible (reduce 4 levels from 30 to 26)
35 g to < 50 g	Eligible (reduce 2 levels from 28 to 26)
28 g to < 35 g	Not eligible (still level 26)
22.4 g to < 28 g	Eligible (reduce 2 levels from 26 to 24)
20 g to < 22.4 g	Eligible (reduce 4 levels from 26 to 22)
16.8 g to < 20 g	Eligible (reduce 2 levels from 24 to 22)
11.2 g to < 16.8 g	Eligible (reduce 4 levels from 24 to 20)
5.6 g to < 11.2 g	Eligible (reduce 6 levels from 24 to 18)
5.0 g to < 5.6 g	Eligible (reduce 8 levels from 24 to 16)
4.0 g to < 5.0 g	Eligible (reduce 6 levels from 22 to 16)
3.0 g to < 4.0 g	Eligible (reduce 4 levels from 20 to 16)
2.8 g to < 3.0 g	Eligible (reduce 2 levels from 18 to 16)
2.0 g to < 2.8 g	Eligible (reduce 4 levels from 18 to 14)
1.4 g to < 2.0 g	Eligible (reduce 2 levels from 16 to 14)
1.0 g to < 1.4 g	Eligible (reduce 4 levels from 16 to 12)
500 mg to < 1.0 g	Eligible (reduce 2 levels from 14 to 12)
Less than 500 mg	Not eligible (still level 12)

*For cases involving a combination of controlled substances, eligibility must be determined on a case-by-case basis, using the new drug equivalency tables in which 1 gram of cocaine base (“crack”) converts to 3,571 grams of marijuana.

*For cases involving simple possession of cocaine base (“crack”) that previously involved a cross-reference to Guideline § 2D1.1, eligibility will now be determined using Amended Guideline § 2D2.1.

- (3) The final offense level must not have been derived from the career offender or armed career criminal Guideline, as the 2011 Retroactive Amendment would not affect the sentencing range of any offender whose final offense level was determined under these parts of the Guidelines. In this regard, the Court notes that because a § 3582(c)(2) proceeding is not a re-sentencing, and because all other Guideline calculations must remain the same, the Court will not, as part of a § 3582(c)(2) proceeding, reconsider a career offender designation or otherwise entertain a challenge based on United States v. Simmons (4th Cir. 2011).
- (4) The defendant’s prior sentence (as originally imposed or as previously reduced) must be greater than any applicable statutory mandatory minimum punishment,

unless the defendant received relief from the mandatory minimum punishment pursuant to the statutory safety valve under 18 U.S.C. § 3553(f) or through a departure for Substantial Assistance under Guideline § 5K1.1, 18 U.S.C. § 3553(e), or Rule 35(b). Because the Fair Sentencing Act does not apply retroactively, the applicable statutory mandatory minimums are those that were applied by the original Sentencing Judge at the time of the original Judgment.

- (5) The defendant's prior sentence (as originally imposed or as previously reduced) must be greater than the minimum of the Amended Guideline Range, as the Court may not depart or vary below the Amended Guideline Range unless the defendant received a previous departure for Substantial Assistance pursuant to Guideline § 5K1.1, 18 U.S.C. § 3553(e), or Rule 35(b). The Court notes that pursuant to the November 1, 2011 Amendment to Guideline § 1B1.10, previous departures, including departures for over-representation of criminal history, may not be taken into account in calculating the Amended Guideline Range, and the Court may only depart below the Amended Guideline Range based on previous departures for Substantial Assistance pursuant to Guideline § 5K1.1, 18 U.S.C. § 3553(e), or Rule 35(b).
 - (6) The defendant must currently be serving the original term of imprisonment, as the 2011 Retroactive Amendment does not apply to a defendant in custody on a revocation of supervised release.
- F. If a First Wave defendant will not be eligible using the criteria set forth above, the Probation Office will prepare a brief Memorandum stating why the defendant would not be eligible. Those cases, identified as "Ineligible First Wave Defendants" will ultimately be processed using the procedures set out below in Section V. However, priority will be given to First Wave defendants who are identified by the Probation Office as potentially eligible.
- G. For the potentially eligible First Wave defendants, the Probation Office will prepare a "Recalculated Guideline Worksheet." This Worksheet will be treated in the same manner as Presentence Reports, and will include:
- (1) Defendant's Name, Case Number, and BOP Register Number
 - (2) Date of Original Judgment and any Amended Judgment
 - (3) Name of Sentencing Judge and Offense of Conviction
 - (4) Previous Offense Level, Criminal History Category, and Previous Guideline Range
 - (5) The Quantity of Crack attributed to the Defendant, including the quantity attributed to the Defendant in the PSR, any objections to the quantity by the Defendant at the original sentencing, and any Court finding as to quantity
 - (6) Previous Sentence Imposed
 - (7) Any Departure at the original sentencing pursuant to Guideline § 5K1.1 and 18 U.S.C. § 3553(e)
 - (8) Any Departures or Variances at the original sentencing, other than pursuant to Guideline § 5K1.1 and 18 U.S.C. § 3553(e)

- (9) Any Rule 35(b) Motions
- (10) Any other Post-Judgment Proceedings, including any previous § 3582(c)(2) proceedings
- (11) Recalculated Guideline Range (taking into account statutory mandatory minimum as applied at the time of the original Judgment)
- (12) Summary of Post-Conviction Conduct, including summary of information from the BOP's Sentry system, status of Educational and Vocational Training, status of Substance Abuse Treatment, status of Physical or Mental Health Treatment, and any other public safety considerations
- (13) Release Planning
- (14) Projected release date, and whether the defendant would be subject to immediate release or a "time served" sentence under the recalculated Guideline Range

H. If any of the relevant information is missing, the Probation Office may ask Defense Counsel to provide any necessary information before the Worksheet is completed.

III. Circulation of Probation Assessment for Potentially Eligible Cases

- A. After preparing the Worksheet, the Probation Office will prepare a packet with the defendant's Motion (including any supporting material filed by the defendant or his counsel), the Recalculated Guideline Worksheet, the Presentence Report, the original Judgment, any Amended Judgment, any previous § 3582(c)(2) Motions and Orders, and copies of any Rule 35(b) Motions or § 5K1.1 Motions or other Motions granted by the Court that affected the sentence imposed. The Probation Office will send this packet to the Government and to Defense Counsel, or if no appointment of counsel has yet been made, to the Federal Public Defender's Office. The Federal Public Defender's Office will forward the packet to appointed counsel if the Federal Public Defender's Office is not providing representation.
- B. Counsel for the Government and the defendant will review the information and file a response either consenting or objecting within 14 days. The Consent or Objection should be returned to the Probation Office, with a copy to opposing counsel, and should also be filed with the Clerk's Office under seal. It is the Court's expectation that the Government will raise in its Objections any assertions that the defendant is a public safety risk, or that the defendant is not eligible for the reduction, or any other issues that should be brought to the Court's attention in considering the defendant's Motion. The reasons for the Objection should be stated specifically. In addition, if the defendant or the Government objects to a sentence within the newly calculated range that retains the previous determination of where within the range the sentence should be (i.e., low, middle, or high end of the range), that party may note the Objection and the basis therefore in his submission to the Probation Office.
- C. If either side files an Objection, any Response by the other side must be submitted to the Probation office, with a copy to opposing counsel, and filed under seal with the Clerk's Office within 7 days of the filing of the Objection. Any cases that include an

Objection by either side will be separated out for consideration after the consent cases have been processed.

IV. Submission to the Court of Potentially Eligible Cases

- A. For all those cases in which both sides consent to the revised range reflected in the Recalculated Guideline Worksheet and no type of Objection has been raised, the Probation Office will prepare an “Order Regarding Motion for Reduction of Sentence” for the Court’s consideration, using the form created by the Administrative Office of the Courts, and leaving blank the actual revised sentence to be imposed. If the defendant would be subject to immediate release, the proposed Order should be modified to reflect a sentence of “time served,” with the Order stayed for ten (10) days to allow the Bureau of Prisons time to process the defendant as necessary. In those cases without Objections, the “Additional Comments” section should note that the Recalculation is made with the consent of the Government and the defendant. The Proposed Order should be submitted to the Court electronically, followed by the full printed packet of information previously prepared, including the consents submitted by both sides.
- B. The submission will be evaluated by the Court pursuant to the provisions of Guideline § 1B1.10, as outlined above. Ordinarily, the Court would have previously considered the § 3553(a) factors at the time of the original sentencing in determining where within the original Guideline Range to sentence the defendant. In that regard, where no Objection has been raised, the Court may accept the parties’ Consent as an acknowledgment that the parties do not object to a recalculated sentence that retains the previous determination of where within the range to sentence the defendant (i.e., low, middle, or high end of the newly calculated range), although the Court retains discretion to consider all of the material submitted in determining whether and to what extent to allow a reduction in sentence within the limits set out in Guideline § 1B1.10.
- C. After submitting the initial group of First Wave cases without Objections, the Probation Office will then submit to the Court those First Wave cases involving potentially eligible defendants in which an Objection was raised. This submission should include the full packet of available information and the original position of the Probation Officer, along with the Objection, any Response, and an electronic version of an “Order Regarding Motion for Sentence Reduction,” using the form prepared by the Administrative Office of the Courts.

V. Processing of Cases Determined by the Probation Office to be Ineligible

- A. For those First Wave defendants who filed a Motion but were initially determined not to be eligible for a reduced sentence, the Probation Office will circulate to the Government and Defense Counsel the brief Memorandum setting forth the reasons why the individual was not eligible, with the Judgment and Presentence Report attached as needed. Any Objection to this determination must be submitted to the Probation Office, with a copy to opposing counsel, and filed with the Clerk’s Office under seal,

within 14 days after the Memorandum is circulated by the Probation Office. Any Response to the Objection must be submitted to the Probation Office, with a copy to opposing counsel, and filed under seal with the Clerk's office, within 7 days thereafter.

- B. If the Probation Office revises its conclusion as a result of any Objection or Response, the Probation Office may reprocess the case as potentially eligible using the procedures set forth above. If the Probation Office does not revise its initial ineligibility determination, the Probation Office will then submit the original Memorandum and any Objection and Response to the Court for consideration, along with the packet with the defendant's Motion (including any supporting material filed by the defendant or his counsel), Presentence Report, the original Judgment, any Amended Judgment, any previous § 3582(c)(2) Motions and Orders, and copies of any Rule 35(b) Motions or § 5K1.1 Motions or other Motions granted by the Court that affected the sentence imposed. The Probation Office will also submit an electronic version of an "Order Regarding Motion for Sentence Reduction," using the form prepared by the Administrative Office of the Courts.
- C. After reviewing the packet submitted by the Probation Office, if the Court nevertheless concludes that a case should be processed as "potentially eligible," the Court will refer the case back to the Probation Office to reprocess the case as potentially eligible using the procedures set forth above.

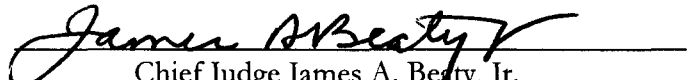
VI. Ongoing Processing

- A. The Probation Office will continue to process as first priority any Motions filed by defendants in the First Wave.
- B. The Probation Office will then begin processing Motions filed by defendants who fall in the "Second Wave" using the same process outlined above. The Public Defender may likewise continue to coordinate appointment of counsel as set out above. The processing procedures will generally be the same, but the time for filing Consents or Objections in Second Wave cases will be 21 days rather than 14 days.
- C. Any Motions submitted to the Court should be clearly identified as a "First Wave," "Second Wave" or "Third Wave" case, should be identified as "Not Eligible" (with a brief Memorandum) or "Potentially Eligible" (with a Recalculated Guideline Worksheet), and should be identified as "By Consent" or "With Objections." The Court will prioritize processing of the cases based on these categorizations, with First Wave defendants who are Potentially Eligible and By Consent being handled on a preliminary expedited basis. However, if any cases arise involving a Potentially Eligible Second or Third Wave Defendant By Consent, and it has been determined that the defendant would be eligible for a sentence of time served under the recalculated range, that case may be submitted for expedited consideration with the First Wave cases.
- D. After the initial processing is underway, the Probation Office and Federal Public Defender's Office will identify those defendants who have not filed a Motion but who

may be potentially eligible for a reduced sentence. The Federal Public Defender's Office will provide general information to those defendants so identified, in order to give the defendants notice of the need to file a Motion in order to be considered for a reduced sentence, again with information being provided initially to those defendants with release dates in the "First Wave." As additional Motions are filed, they will be prioritized and handled as set out above.

- E. If an attorney is appointed to represent a defendant pursuant to these procedures but fails to file a Consent or Objection within the allotted time set out herein, or an Extension of Time to file the same, a new attorney will be appointed.

This, the 27 day of October, 2011.


Chief Judge James A. Besty, Jr.