

The New Sentencing Policies, Part II

By Johanna S. Zapp, Esq.

I have received many emails with questions about the new Attorney General's memo regarding the New Sentencing Policies. Perhaps the way to be most clear is to give you a bullet pointed list about the new policies and the implementation of those policies in the SDNY and EDNY.

Criteria to Qualify (this is for anywhere in the United States):

A defendant will qualify for the new sentencing policies if he/she meets the criteria below:

- The defendant's relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person

- The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization.
- The defendant does not have sufficient ties to large scale drug trafficking organizations, gangs, or cartels; and
- The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

In the SDNY:

- If you meet the criteria as set forth above, and you have not yet pled guilty and you have not gone to trial, the government will either change your indictment or they will work out a plea agreement in which you are not subject to the mandatory minimum sentence.
- If you meet the criteria and you have already pled guilty but you have not been sentenced yet, you will be evaluated by the government on "a case by case" basis. This means your lawyer

will need to plead your case to the prosecutor and hope for the best. Things that are considered by the government are: what has happened to co-defendants already sentenced (the Courts need to make sure that people who committed the same kind of crimes in the same cases receive similar sentences- so if your co-defendant was already sentenced based on mandatory minimums, it's probably not likely you will get a reduced charge.) The government will also consider "offense characteristics."

- In the SDNY, if you've already been sentenced, the government will not consider anything regarding a reduced charge.
- If the prosecutor in your case says no to a legitimate request for a reduced charge, it is your attorney's duty to go up the chain of command to plead your case and try and get a reduced charge for you.

In the EDNY:

- If you have been indicted and you meet the criteria but you have not yet pled guilty or gone to trial, the government will either change your indictment or they will work out a plea agreement in which you are not subject to the mandatory minimum sentence.

- If you meet the criteria but you already pled guilty, the government will either change your indictment or they will work out a plea agreement in which you are not subject to the mandatory minimum sentence. If you qualify, your charge will be reduced. It is unclear exactly how they are going to do this, (after all, you've already pled guilty in this scenario). It seems like the only way this can be done is to set aside your previously entered guilty plea, you would then be re-charged by the government pursuant to the new policies and then you'd plead guilty again.

- If you were convicted at trial but not yet sentenced, you will be evaluated on a "case by case" basis. Meaning, your attorney will have to make a pretty compelling case as to why after trial you should get a reduced charge.
- If you have already been sentenced and you are currently on direct appeal, "there will be a strong presumption against agreeing to reduced charges" but the government will listen to your lawyer and at least consider their argument. Basically this means no, but anything is possible. And if you are not on direct appeal, then there is no chance at all for a reduced charge.

- In the EDNY on airport courier cases, the government will ask the court to reduce your guideline calculation by an ADDITIONAL FOUR POINTS under United States Sentencing Guideline 5k3.1.

These new policies are for narcotics cases only. This is true throughout the United States.

would help. Something from the commission itself would be great. Your lawyer should suggest that it's something the Court should consider when determining an appropriate sentence.

It is not known yet if this would be retroactive, but history suggests it would be. The adjustments to the crack sentencing guidelines were retroactive, so it is likely that this new change would also be retroactive, but no one can say for sure.

U.S. Sentencing Commission Update

By Johanna S. Zapp, Esq.

There is news that a two point reduction in all types of drug cases can be expected in November of 2014. In January of 2014 the commission will propose the change, and in April 2014 the Commission will hold public hearings on the issue. Any official change would not happen until November 2014. However, this is an issue that your lawyer should bring up at sentencing NOW. Meaning, attorneys should argue to judges that this two point reduction is coming and it's on the horizon. Submitting something showing evidence that this two point reduction is coming certainly

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