How a Sentence for a Drug Offender May Be Lower if Imposed Today

I. Statutes and Guidelines

The elements and statutory penalties for the drug offenses you are likely to encounter are found at 21 U.S.C. §§ 841(a) & (b) (drug trafficking), 846 (attempt and conspiracy), 856 (maintaining drug-involved premises), 860 (distribution or manufacturing in or near protected locations), 952-960 (importation and exportation), and 46 U.S.C. §§ 70503, 70506, 70508 (maritime drug offenses). These offenses carry statutory mandatory minimums, and are subject to guideline ranges set forth at §§ 2D1.1-2D1.11 and §§ 4B1.1-4B1.2 of the Guidelines Manual.

II. What You Will Need

To determine whether the sentence the client is currently serving would be lower if imposed today, and how much lower, you will need the following legal references:

- Current Federal Criminal Code and Rules of Criminal Procedure, and those in effect on the date the offense was committed -- West's hard copy, Westlaw or Lexis
- Current Guidelines Manual and the Manual under which the client was sentenced. A new Guidelines Manual is issued on November 1 of each year reflecting changes since the previous version, although amendments are occasionally issued on interim dates when Congress directs an emergency amendment. The client should have been originally sentenced under the version in effect on the date of sentencing unless the version in effect on the date the offense was committed resulted in a lower guideline range, in which case that version should have been used.[1] Current and previous versions of the Guidelines Manual are available at http://www.ussc.gov/guidelines-manual/guidelines-manual. Use the pdf version rather than the html version (if you are given a choice for the particular year) because it shows the tables more clearly.
    - Fed. Sent. L. & Prac. (2014 ed.), database FSLP on Westlaw, contains a chapter on each guideline with interpretive caselaw, not the only caselaw, but a good start.
- Attorney General Holder's Memoranda setting forth current charging policies dated May 19, 2010, August 12, 2013, and August 29, 2013 (summarized in Appendix 2 and posted in the Training Manual)
- Sections of the Training Manual on specific issues noted below

You will need the following case documents:

- Docket Sheet
- Charging Document – original and any superseding complaint, indictment, information
- Plea Agreement, if any
- Presentence Report, and any Objections and Addenda
- Sentencing Motions and Memoranda
- Sentencing Transcript and any Re-sentencing Transcript

[1] *See* USSG § 1B1.11 (b)(1); *Miller v. Florida*, 482 U.S. 423 (1987).

- Judgment and any Corrected or Amended Judgment
- Statement of Reasons
- Order Releasing client and Pretrial Services Report if s/he was released on bond
- Notice/Information filed by the government under 21 U.S.C. § 851, if any
- Records of prior conviction(s)[2] if 1 or more prior conviction(s): (a) were used to increase a mandatory minimum under 21 U.S.C. §§ 841, 851; (b) subjected client to the career offender guideline under USSG §§4B1.1, 4B1.2; or (c) may have been used to improperly increase the criminal history score
- Motion for Downward Departure under USSG § 5K1.1 or 18 U.S.C. § 3553(e) if client cooperated before sentencing
- Motion for Downward Departure under Fed. R. Crim. P. 35(b) if client cooperated after sentencing
- Motion or other request for sentence reduction under 18 U.S.C. § 3582(c)(2), order granting or denying the motion/request
- Appellate Briefs and Opinions, if there was a direct appeal, including an appeal of an order granting or denying a § 3582(c)(2) motion/request
- Motions, Memoranda, Orders, Decisions, if habeas review was sought under 28 U.S.C. §§ 2241, 2255

To determine how much time the client has served, you will need the PSCD and the PD15 from the Bureau of Prisons (BOP).

For instructions on where and how to obtain these documents and forms you can use to do so, *see* Necessary Documents and How to Obtain Them.

III. Analysis

Follow these steps in order. Examples are provided in Part IV. If you need help:

- If you are a pro bono lawyer, refer to the reference material on the subject posted at https://clemencyproject2014.org/reference, and if your question is not answered in the reference material, please contact appropriate resource counsel through the applicant tracking system.
- If you are a Federal Defender, contact abaronevans@gmail.com.

A. Determine the components of the current sentence.

Determine (1) the original statutory range and the factual and legal bases for it, and (2) the guideline range applicable at the original sentencing, including the career offender range if it was

[2] Records of prior conviction include: (1) charging document and any amended charging document; (2) plea colloquy transcript; (3) judgment and commitment order or abstract of judgment; (4) docket entries; (5) any available NCIC report or other document noting the conviction (if government provided document to former counsel in discovery); (6) if applicable, jury instructions; and (7) if applicable, a written document reflecting the court's findings.

applicable, and the facts and guideline provisions upon which it was based, even if the guideline range was trumped by a mandatory minimum pursuant to USSG § 5G1.1(b), (c)(2).

Was the sentence later revised as the result of an appeal (by the client or the government), grant of a writ of habeas corpus, sentence reduction under 18 U.S.C. § 3582(c)(2), or Rule 35 motion? If so, determine the statutory range and the guideline range for the sentence the client is currently serving.

B. Determine whether the sentence would be lower if imposed today, and how much lower.

Though not absolutely necessary, it will be most persuasive if you can show that the sentence that would be imposed today is less than or equal to the time the client has already served or will serve (as discussed in Overall Instructions, Part III.1), or up to a few years more.[3] All the better if the client has served years more than the sentence he would receive today. Thus, it is not enough to identify one way in which the sentence would be lower and stop. Follow the analysis from beginning to end.

1. Is the sentence the client is currently serving dictated by a mandatory minimum? If so:

    a. If the client was convicted of an offense involving crack, would the mandatory minimum be lower under the Fair Sentencing Act of 2010 (FSA)? *See* Appendix 1.

    b. Is the mandatory minimum based on one or more § 851 enhancements for a prior conviction for a "felony drug offense"? If so, is the prior offense not "felony" or not a "drug offense" under current law? *See* How a Person Whose Sentence Was Previously Enhanced Based on a "Felony Drug Offense" under 21 U.S.C. § 851 Would Receive a Lower Sentence Today.

    c. Did the client receive a higher mandatory minimum (and guidelines base offense level) for death or serious bodily injury resulting from the use of the substance? If so, would that enhancement not apply under current law? *See* Would an Enhancement for Accidental Death or Serious Bodily Injury Resulting from the Use of a Drug No Longer Apply Under the Supreme Court's Decision in *Burrage v. United States*, 134 S. Ct. 881 (2014) and *Alleyne v. United* States, 133 S. Ct. 2151 (2013)?

    d. Would quantity, § 851 enhancement(s), or both, not be charged under Attorney General Holder's current charging policy? If not, the mandatory minimum will be reduced or eliminated, and the statutory maximum may be lowered. *See* Appendices 2 and 3.

[3] The President can commute a sentence to any length. He could commute a sentence of 30 years, 10 of which have already been served, to 10 more years. However, it seems most persuasive to say that the client would already or very soon be out if he were sentenced under today's laws, guidelines, and charging policies. And if that is so, the client should be released as soon as possible.

e. Was the quantity upon which the mandatory minimum was based found by a judge by a preponderance of the evidence at sentencing? If so, *see* Would the Supreme Court's Decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013) Lead to a Lower Sentence Today?

f. What would the statutory range be if the client were sentenced today? *See* Appendix 3.

2. If no mandatory minimum applied at the original sentencing, or the guideline range was higher than an applicable mandatory minimum, or the mandatory minimum would be eliminated or reduced under the analysis in Step B.1, what would the guideline range be today?

a. If the client was convicted of an offense involving crack:
   i. What is the guideline range after the FSA amendments effective November 1, 2010 for the quantity determined at sentencing? *See* USSG 2D1.1(c) (Nov. 1, 2010).
   ii. What is the statutory maximum under the FSA for the quantity charged in the indictment? Would it cap the guideline range pursuant to USSG § 5G1.1(a), (c)(1)?
   iii. If the career offender guideline applies, is the guideline range lower because of a lower statutory maximum under the FSA? *See* Appendix 1; USSG § 4B1.1(b).

b. Regardless of drug type, what is the guideline range after the "drugs minus 2" amendments effective November 1, 2014? *See* Amendment 3, Reader Friendly Amendments to the Sentencing Guidelines (eff. Nov. 1, 2014).[4] The Sentencing Commission voted on July 18, 2014 to make this amendment retroactive. For how to deal with this development in the clemency context, *see* How to Deal With the Retroactive Drugs Minus Two Amendment.

c. Would the statutory maximum be lower because quantity, § 851 enhancement(s), or both, would not be charged under Attorney General Holder's current charging policy? *See* Appendices 2 and 3. If so, would the new statutory maximum cap the guideline range pursuant to USSG § 5G1.1(a), (c)(1)?

d. If the client was a "career offender" under the guidelines in effect at the time of sentencing, is he no longer a "career offender" because a necessary predicate is not a "crime of violence," is not a "controlled substance offense," or is not a "felony" under current decisional law or the current guidelines? *See* How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today; Ameliorating Amendments to U.S. Sentencing Guidelines.

[4] Available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf.

e. If the career offender guideline still applies, is it lower because there is now a lower statutory maximum because the prosecutor would not charge quantity or § 851 enhancement(s) under the Holder charging policy? *See* Appendix 3; USSG § 4B1.1(b).

f. Have there been any reductions in the applicable guideline range (other than those accounted for above) since the defendant was sentenced that were not already given full effect through a sentence reduction under 18 U.S.C. § 3582(c)(2) because the amendment was not made retroactive, or no one moved for a reduction, or a mandatory minimum or the career offender guideline stood in the way? *See* Ameliorating Amendments to U.S. Sentencing Guidelines.

g. What would the guideline range be if the inmate were sentenced today?

3. Would the sentence be lower under the Supreme Court's decisions rendering the guidelines advisory if imposed today?

a. If the client was sentenced before *Booker* (Jan. 12, 2005), or after *Booker* but before *Kimbrough* (Dec. 10, 2007) or *Spears* (Jan. 21, 2009) or *Gall* (Dec. 10, 2007), or before the circuit accepted these decisions, or at any time but the guideline range was trumped by a higher mandatory minimum that would be eliminated or reduced under the analysis in Step B.1, the sentencing judge may impose a sentence below the guideline range today under the statutory command to impose a sentence that is "sufficient, but not greater than necessary," to satisfy the purposes of sentencing in light of all relevant factors. *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

4. Would the sentence be lower today but for some mistake or oversight that was not caught at the time and was never corrected? In the course of the analysis above, be alert for mistakes in the sentence that went unnoticed by the court, the probation officer, and the parties at the time of sentencing. *See* Mistakes and Oversights Not Caught at the Time and Never Corrected.

5. If the client was also convicted of a firearms offense, *see* How a Person Convicted of a Firearms Offense or Who Was Convicted of a Drug Offense and Received a Guideline Increase Because a Firearm "Was Possessed" May Qualify for Commutation.

6. Regardless of whether the sentence was driven by a mandatory minimum or a mandatory guideline range, it will be significant if the sentencing judge, court of appeals on direct appeal, or a judge or court of appeals in a habeas case stated contemporaneously that the sentence required by the statute or guidelines was too harsh. Courts did not always voice these views, given the futility. Whether or not the sentencing judge made such a statement at the time she imposed the sentence, consider asking her for a letter stating that she would impose a lower sentence today.

Whether and if so how to contact the judge should be handled with caution. *See* Overall Instructions, Part IV.D.2.

You may discover that a reason the sentence would be lower today -- particularly the reasons noted in Step B.1.b, B.1.c, B.1.e, B.2.d, or B.4 -- has already been raised, or could be raised, in a habeas petition. For how to deal with this complicating factor, *see* Pending or Possible Court Challenges: Appeals, Habeas Petitions, § 3582(c)(2) Motions.

IV. Examples

At the end of each example is a "calculation of how the imposed sentence would change if inmate were sentenced today," which the OPA requires. We recommend that you include it in the Executive Summary of the criteria in the clemency submission.

SAM JONES - CRACK

The following facts and procedural history come from the docket sheet, the indictment, an information filed by the prosecutor under 21 U.S.C. § 851, the presentence report (PSR), the sentencing memorandum, the sentencing transcript, the judgment, the statement of reasons, the decision on direct appeal, a motion for writ of habeas corpus and order denying the motion, and orders denying § 3582(c)(2) motions in Mr. Jones' case; the docket sheet and judgment in his brother's case; and discussions with the client and the attorney who represented Mr. Jones at trial and sentencing.

On January 3, 2006, Sam Jones, a 28-year-old addict who sold small quantities of crack cocaine for his older brother in exchange for crack and small amounts of money, was arrested selling 5 grams of crack to an informant outside the apartment where he and his brother lived. According to the informant, Jones had sold him 5 grams of crack on nine previous occasions. A search of the apartment turned up 150 grams of crack in a drawer in the kitchen, and a single shot .22 caliber handgun on the top shelf of a closet in the brother's bedroom.

Mr. Jones and his brother were charged with conspiracy to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 846 & § 841(b)(1)(A), and with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). Mr. Jones was also charged with 10 counts of distributing 5 grams of crack in violation of 21 U.S.C. § 841(b)(1)(B).

Mr. Jones had three prior state court convictions: (1) carrying a concealed weapon on June 1, 1996, for which he was sentenced to 30 days in jail; (2) possession with intent to sell cocaine on April 1, 1997, for which he was sentenced to time served of 18 months in jail; and (3) simple possession of crack on February 1, 2004, for which he was sentenced to 36 months' probation.

The prosecutor attempted to induce Mr. Jones to cooperate against his brother by threatening to file notice of two prior convictions for a "felony drug offense" under 21 U.S.C. § 851, one for the 1997 possession with intent to sell offense, and one for the 2004 simple possession offense.

Mr. Jones declined to cooperate, and the prosecutor filed notice of the two prior convictions, thus subjecting Mr. Jones to mandatory life under 21 U.S.C. § 841(b)(1)(A) if convicted.

Mr. Jones went to trial. He was convicted of conspiracy to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A), and of the ten counts of distribution of 5 grams of crack in violation of 21 U.S.C. § 841(b)(1)(B). The jury acquitted him of possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c).

Mr. Jones' brother pled guilty to the conspiracy count. In exchange for his guilty plea and his cooperation against three street level dealers who sold crack for him, the prosecutor dismissed the § 924(c) charge, agreed that the quantity of crack involved in the conspiracy was at least 50 but less than 150 grams, and agreed to overlook the gun for purposes of calculating the guideline range. As a result, the mandatory minimum was 10 years, and the guideline range was 151-188 months (he had no criminal history). The prosecutor also filed a motion for downward departure based on substantial assistance against others under USSG § 5K1.1, asking for a sentence at the mandatory minimum of 10 years. On June 6, 2007, the judge sentenced Mr. Jones' brother to ten years.

Mr. Jones' lawyer filed a sentencing memorandum arguing that the life sentence for this non-violent, addicted, small-time drug dealer violated the Eighth Amendment ban against cruel and unusual punishment, and the Due Process Clause because the prosecutor vindictively filed the § 851 enhancements against Mr. Jones for exercising his rights not to cooperate and to go to trial.

On June 15, 2007, the judge reluctantly rejected these arguments in light of Supreme Court precedent,[5] and sentenced Mr. Jones to mandatory life in prison, stating that the sentence was "not fair or appropriate," that it was "in fact a gross miscarriage of justice," but that "my hands are tied."

Components of the Current Sentence

Statutory range

The statutory range for conspiracy to distribute 50 grams or more of crack under the 2006 edition of the U.S. Code was 10 years to life. *See* 21 U.S.C. § 841(b)(1)(A)(iii) & § 846. However, because the prosecutor filed notice of two prior convictions for a "felony drug offense," the statutory sentence was mandatory life. *See* 21 U.S.C. § 841(b)(1)(A), § 851.

Jones was also convicted of ten counts of distribution of 5 grams of crack, each with a statutory range of 5 to 40 years, *see* 21 U.S.C. § 841(b)(1)(B)(iii), but multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that they run consecutively. *See* 18 U.S.C. § 3584(a).

[5] *See Harmelin v. Michigan*, 501 U.S. 957 (1991); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

The statutory range was therefore **life**.

Guideline range

The guideline range was irrelevant at the original sentencing because it was trumped by the statutory life sentence, which became "the guideline sentence," USSG § 5G1.1(b), but you will need the otherwise applicable "guideline range" later in the analysis.

Even when the guideline range is trumped, it is almost always calculated in the PSR. Work with the PSR and the Nov. 1, 2005 Guidelines Manual to determine the applicable guideline range.

The PSR asserted that the quantity of crack for which Mr. Jones is accountable under the guidelines was 200 grams (the 10 sales of 5 grams each to the informant and the 150 grams found in a drawer), subject to a base offense level of 34 under § 2D1.1(c)(3) (2005).

The PSR also asserted that although the jury acquitted Mr. Jones of the firearms offense based on the beyond a reasonable doubt standard, he should receive a 2-level increase under § 2D1.1(b)(1), which merely requires proof by a preponderance that a firearm "was possessed," and applies as long as the firearm "was present, unless it is clearly improbable that the weapon was connected with the offense." *Id*., cmt. (n.3). The PSR asserted that while there was no information indicating that Mr. Jones possessed the gun, it "was present" in his brother's closet, and it was not clearly improbable that it was "connected with" the conspiracy offense. Mr. Jones objected, arguing that there was no proof whatsoever that the gun on a shelf in a closet in his brother's bedroom, far from the kitchen where 150 grams of crack was found, had any connection to the conspiracy offense. The judge declined to rule on the objection because it could make no difference to the ultimate sentence, given the mandatory life sentence. *See* Fed. R. Crim. P. 32(i)(3)(B).

The PSR assigned Mr. Jones to Criminal History Category IV based on 7 criminal history points:

- 1 point for the 1996 conviction at age 18 for carrying a concealed weapon, for which he was sentenced to 30 days in jail, *see* § 4A1.1(c);
- 3 points for the 1997 conviction at age 19 for possession with intent to sell cocaine, for which he was sentenced to time served of 18 months in jail, *see* § 4A1.1(a);
- 1 point for the 2004 conviction at age 26 for simple possession of crack, for which he was sentenced to 36 months' probation, *see* § 4A1.1(c); and
- 2 points for committing the instant offense while on probation for the simple possession offense, *id*., § 4A1.1(d).

With an offense level of 36 and a Criminal History Category of IV, the guideline range was **262-327 months**. *See* Sentencing Table, USSG, ch. 5, pt. A.

But, as the PSR notes, but for the life sentence, the career offender guideline would apply. The 1996 concealed weapon offense was a "crime of violence" under circuit at the time of sentencing, and the 1997 possession with intent to sell offense was a "controlled substance

offense" as defined in § 4B1.2(b). These offenses, not quite 10 and 9 years old at the time of the instant offense respectively, were within the applicable time period to count. *See* § 4A1.2(e)(1)-(2); § 4B1.2, cmt. (n.4). (The simple possession offense would not count as a career offender predicate, *see* § 4B1.2(b), but only two predicates are needed, *see* § 4B1.1(a).)

Under the career offender guideline, the automatic offense level is 37 for an offense with a statutory maximum of life, and the automatic Criminal History Category is VI, and the guideline range was **360 months to life**. *See* § 4B1.1; Sentencing Table, USSG, ch. 5, pt. A.

Was the Sentence Later Revised? No. Checking the docket sheet and relevant documents, you see that:

(1) The sentence was affirmed on appeal.
(2) Mr. Jones filed two habeas petitions. In 2009, he filed a habeas petition claiming that his lawyer was ineffective by failing to fully advise him of the consequences of going to trial in the face of the prosecutor's threat to file the § 851 enhancements. The petition was denied. In 2010, he filed a second habeas petition based on *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), holding that carrying a concealed weapon was not a "crime of violence" under the career offender guideline. The petition was denied because the claim failed to meet the requirements for a second or successive petition under 28 U.S.C. § 2255(h), and because there could be no prejudice even if the claim were viable because Jones was serving a statutorily mandated life sentence, not a career offender sentence.
(3) No Rule 35(b) motion was filed.
(4) Mr. Jones moved for a sentence reduction after the 2008 and 2010 amendments to the crack guidelines. Both motions were denied because the mandatory life sentence precluded any reduction. *See* § 1B1.10, cmt. (n.1(A)) (effective Mar. 3, 2008).

Would the Sentence Be Lower Today, and How Much Lower?

Based on the PSR and BOP records, Mr. Jones has been incarcerated since his arrest on January 3, 2006. By January 3, 2016, he will have served ten actual years. By January 3, 2015, he will have served nine actual years (108 months); he has earned all of his good time credit thus far, and assuming he does not lose any good time credit, he will have served 124 months including good time by January 3, 2015. *See* Good Time Chart.

Statutory range

The jury found Mr. Jones guilty of conspiracy to distribute 50 grams or more of crack, and of ten counts of distribution of 5 grams of crack, for a total of at least 100 grams of crack. Under the Fair Sentencing Act, his statutory range would drop from life under 21 U.S.C. § 841(b)(1)(A), to **10 years to life** under § 841(b)(1)(B) if the two § 851 enhancements would be charged today. *See* Appendix 1.

The two § 851 enhancements are based on predicates that qualify as "felony drug offenses" under current law, but they most likely would not be charged under the Attorney General's charging policy because all six factors militate against it: (1) Jones was not an organizer, leader, manager or supervisor of others within a criminal organization; (2) he was not involved in the use or threat of violence in connection with the offense; (3) two of his three prior convictions are remote, none are serious, and, as explained below, the concealed weapon offense is not a "crime of violence" under current law; (4) he had no ties to large-scale drug trafficking organizations, gangs, or cartels; (5) the filing of the § 851 enhancements resulting in a life sentence created a gross disparity with the 10-year sentence his more culpable brother received; and (6) he was an addict who sold drugs to support his habit. *See* Appendix 2. If the § 851s were not charged, the statutory range would drop to **5-40 years** under § 841(b)(1)(B). *See* Appendix 1.

Quantity would likely not be charged under the Attorney General's charging policy either. Again, Jones was not an organizer, leader, manager or supervisor of others within a criminal organization, and he had no ties large-scale drug trafficking organizations, gangs, or cartels. While he had 7 criminal history points, only 5 of those points were based on prior convictions, and those three convictions were remote in time and/or for conduct that itself represents non-violent low-level drug activity. Jones did receive a 2-level enhancement under the guidelines for his brother's gun, which was "relevant conduct" involving "possession of a weapon" as broadly defined by the guidelines, but the jury acquitted Mr. Jones of the weapons charge and there was no proof even by a preponderance of the evidence that the gun was connected to the conspiracy offense. *See* Appendix 2. If neither the § 851s nor quantity was charged, the statutory range would drop to **0-20 years**. *See* Appendix 1.

In any event, Mr. Jones has already served more time than any statutory minimum that could possibly apply today.

Guideline range

As noted above, but for the mandatory life sentence (which you have now determined would be reduced to at most 10 years), Mr. Jones would have been subject to a guideline range of 360 months to life under the career offender guideline when he was originally sentenced. But Mr. Jones would not be sentenced under the career offender guideline range today because his prior conviction for carrying a concealed weapon is no longer a "crime of violence." *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). You should note in your submission that he raised this claim in a habeas petition, but it was denied, not on the merits but because it did not meet the standard for a second or successive petition under 28 U.S.C. § 2255(h), and because there could be no prejudice because he is serving a statutorily mandated life sentence. *See* Pending and Possible Court Challenges: Appeals, Habeas Petitions, § 3582(c)(2) Motions at 1.

Mr. Jones would therefore be subject to the ordinary guideline range. Under the FSA amendments, the base offense level for 200 grams of crack would be 30. *See* USSG 2D1.1(c)(5)

(Nov. 1, 2010). Assuming that the judge would apply the 2-level increase for the presence of his brother's gun under the forgiving standard of § 2D1.1(b)(1), the offense level would be 32. In Criminal History Category IV, the range would be 168-210 months. You should note in your submission that Mr. Jones was unable to obtain relief under § 3582(c)(2) for the retroactive amendments to the crack guidelines because of the statutory life sentence. *See* USSG § 1B1.10, cmt. (n.1(A)).

Under the drugs minus two amendment effective November 1, 2014, the guideline range would be **135-168 months**. *See* Amendment 3, Reader Friendly Amendments to the Sentencing Guidelines (eff. Nov. 1, 2014). Mr. Jones would be ineligible for retroactive relief under this amendment because of the statutory life sentence. For how to deal with this situation, *see* How to Deal With the Retroactive Drugs Minus Two Amendment.

Variance from the Guideline Range

Mr. Jones was sentenced on June 15, 2007, after *Booker* was decided on January 12, 2005. But both the guideline range and *Booker* were rendered irrelevant by the mandatory life sentence. If Mr. Jones were sentenced today, his guideline range of 135-168 months would be the starting point, and the sentencing judge would have discretion to vary below it pursuant to *Booker* and its progeny. *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

There would be grounds for a variance. For example, he sold only small amounts of crack and engaged in no violence. He sold drugs only to support his habit and was not motivated by greed. He sold drugs for his older brother, his only family since his mother died when he was fifteen years old. He was fairly young, only 28 years old, at the time of his offense. Even under the guidelines incorporating the FSA's 18:1 powder-to-crack ratio, judges sentence below the guideline range in 40% of all cases in which the government does not seek a substantial assistance or fast-track departure.[6] How much of a variance? Based on the average reduction from the bottom of the guideline range of 34.2% in crack cases,[7] the sentence would be about **88 months**. It may be even lower. Some judges vary to a range reflecting a 1:1 ratio to reach a fair sentence,[8] and the Department of Justice urged Congress to adopt a 1:1 ratio.[9] If the judge varied

[6] U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. 45 (2013) (876 out of 2,195 cases).

[7] U.S. Sent'g Commission, *Quick Facts* (2013), available at http://www.ussc.gov/research-and-publications/quick-facts.

[8] *See, e.g., United States v. Williams*, 788 F. Supp. 2d 847 (N.D. Iowa 2011); *United States v. Shull*, 793 F. Supp. 2d 1048, 1064 (S.D. Ohio 2011); *United States v. Trammell*, 2012 U.S. Dist. LEXIS 5615 (S.D. Ohio Jan. 18, 2012); *United States v. Cousin*, 2012 WL 6015817 (W.D. Pa. Nov. 30, 2012); *United States v. Whigham*, 754 F. Supp. 2d 239, 247 (D. Mass. 2010).

to a range reflecting a 1:1 ratio, the range would be **63-78 months**. *See* USSG 2D1.1(c)(10), (b)(1) (Nov. 1, 2010).

The judge stated at sentencing that the life sentence was "not fair or appropriate" and was "in fact a gross miscarriage of justice," but that his "hands [were] tied." He reluctantly denied Mr. Jones's Eighth Amendment challenge based on the Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), but as noted in that decision, one reason that a life sentence for a nonviolent drug offense does not violate the Eighth Amendment is the possibility of executive clemency. *Id.* at 996. That the judge sentenced Mr. Jones' more culpable brother to ten years indicates that he would impose a sentence below the guideline range of 135-168 months that would apply to Mr. Jones today. Consider asking the judge for a letter stating that he would impose a sentence of 10 years if he had had the discretion to do so. *See* Overall Instructions, Part IV.D.2.

Components	**Current Sentence**	**Likely Sentence Today**
Statutory Range	Life	0-20 years, or 5-40 years
Career Offender Range	360 months - Life	N/A
Ordinary Guideline Range	262-327 months	135-168 months
With Booker Variance	N/A	Estimated 88 months
Sentence Imposed/ Likely Would Be Imposed	Life	88 months

JOHN HARRIS – POWDER COCAINE

On January 1, 1998, Mr. Harris, then 30 years old, was arrested and charged along with nine others with conspiracy to distribute powder cocaine in violation of 21 U.S.C. § 846. One of them entered into a cooperation agreement with the government. Mr. Harris and eight others went to trial and were convicted. No quantity was specified in the indictment, submitted to the jury, or found by the jury.

Based on law enforcement reports of statements of the cooperating witness and various confidential informants, the PSR asserted that the entire conspiracy involved at least 150 kilograms of cocaine, the amount necessary to reach the highest base offense level under the mandatory guidelines, and also, according to the PSR, subjecting all of the defendants to a mandatory minimum under 21 U.S.C. § 841(b)(1)(A) because the quantity was at least 5,000 grams.

As to Mr. Harris's statutory range, the prosecutor had filed a § 851 enhancement based on his one prior conviction for simple possession of 5 grams of Ecstasy, an offense punishable by more

[9] Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary, 111th Cong. 101 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen.).

than one year under state law, for which he received probation. Thus, according to the PSR, Mr. Harris's statutory range was 20 years to life.

As to Mr. Harris's guideline range, the PSR noted that Mr. Big, the leader of the conspiracy, had recruited Mr. Harris to deliver 500 grams of cocaine on one occasion, but that Mr. Harris's "relevant conduct" under USSG § 1B1.3 included (1) the 150 kilograms or more involved in the entire conspiracy, thus subjecting him to a base offense level 38 under the November 1, 1997 Guidelines Manual, *see* USSG § 2D1.1(c)(1), and (2) five guns found in Mr. Big's headquarters, thus subjecting Mr. Harris to a 2-level enhancement under § 2D1.1(b)(1) because a weapon "was possessed" by Mr. Big in connection with the conspiracy. With a total offense level of 40 and a Criminal History Category of I based on one prior conviction for possession of 5 grams of Ecstasy, *see* § 4A1.1(c), the PSR calculated a guideline range of 292-365 months.

Mr. Harris objected to application of a mandatory minimum under 21 U.S.C. § 841(b)(1)(A) based on the quantity stated in the PSR, arguing that the government had not charged or proved to the jury that he had conspired to traffic in any quantity, and thus his statutory range was that under § 841(b)(1)(C) with no mandatory minimum. The government argued that he had been convicted of the conspiracy, which required only that he willfully joined it knowing that its object was to distribute cocaine, and that quantity was not an element and need only be proved to the judge by a preponderance of the evidence. The judge agreed with the government's legal argument, and found by a preponderance of the hearsay information contained in the PSR that the quantity involved in the conspiracy was at least 150 kg., more than the 5,000 grams required for the mandatory minimum under § 841(b)(1)(A) to apply. *See* Appendix 3.

Mr. Harris also objected to the base offense level 38 and the 2-level gun enhancement used to calculate his guideline range, arguing that he had delivered 500 grams of cocaine on one occasion and that he did not know about or reasonably foresee any amounts distributed by others, nor did he know about or foresee Mr. Big's guns. The judge denied these objections, accepting the government's argument that Mr. Harris must have known that Mr. Big was in the business of distributing much larger quantities of cocaine, that everyone knows that guns go with large quantities of drugs, and that, according to the Sentencing Commission, the preponderance of the evidence standard provides sufficient due process for calculating the guideline range, *see* USSG § 6A1.3, cmt.

Mr. Harris asked for a mitigating role adjustment because he was plainly among the least culpable of those involved in the conspiracy. *See* USSG § 3B1.2, cmt. (n.1). The judge rejected this request, accepting the government's argument that Mr. Harris was as culpable as anyone else except Mr. Big.

Mr. Harris asked for a downward departure. After being convicted of possessing 5 grams of Ecstasy at the age of 21, he had gone to college and lived a law-abiding life until he lost his job and made the poor decision, when asked by his childhood friend Mr. Big, to deliver 500 grams of cocaine. The judge said he was "sympathetic" to Mr. Harris's request, "particularly in light of your limited participation in this crime," but that the Commission's policy statements deemed personal characteristics of the defendant, such as education and employment record, to be "not

ordinarily relevant," and accordingly, the circuit had disapproved of departures based on such mitigating factors.

On May 1, 1999, the judge sentenced Mr. Harris to 292 months, the bottom of the mandatory guideline range. The co-conspirators all received the same sentence, except Mr. Big who received 365 months at the top of the guideline range, and the cooperator who received 5 years.

Analysis

Mr. Harris has been incarcerated since his arrest on January 1, 1998 and has earned all of his good time credit (47 days per year). By January 1, 2015, he will have served 17 actual years (204 months), and assuming he does not lose any good time credit, he will have served about 235 months including good time. *See* Good Time Chart.

Components of the Current Sentence

As noted above, the statutory range was **20 years to life**, and the guideline range was **292-365 months**. The sentence has not changed; it was affirmed on appeal, and no habeas petition, Rule 35(b) motion, or § 3582(c)(2) motion has been filed.

Would the Sentence Be Lower Today, and How Much Lower?

Statutory Range

If Mr. Harris were sentenced today, the statutory range would drop from 20 years-life to 0-20 years for two reasons. First, the prosecutor would most likely not charge the § 851 enhancement or quantity under the Attorney General's current charging policy. *See* Appendix 2. The § 851 enhancement is based on a simple possession offense that nonetheless qualifies as a "felony drug offense," but it most likely would not be charged because: (1) Harris played no leadership role; (2) he was not involved in the use or threat of violence in connection with the offense; (3) his criminal history was minor and nonviolent; (4) he had no ties to large-scale drug trafficking organizations, gangs, or cartels (a group of people who conspire to sell cocaine locally is not akin to a "large-scale" gang or cartel, and Harris's ties to the group were not "significant" in any event); and (6) Harris's involvement was limited to one delivery and was motivated by the loss of his job. The prosecutor also would likely not charge quantity. The only issue here is the judge's acceptance of the PSR's finding that Mr. Harris's "relevant conduct" involved possession of a weapon, but as explained below, that finding was mistaken even under the 1997 guidelines under which Mr. Harris was sentenced.

Second, the quantity that was used to increase the statutory range under 21 U.S.C. § 841(b)(1)(C) that would have applied based on the indictment and the jury verdict, to the statutory range under § 841(b)(1)(A) was not charged or proved to the jury beyond a reasonable doubt, but found by the judge by a mere preponderance of the hearsay information over Harris's objection. The statutory range could not be increased based on such a finding under the Supreme Court's

subsequent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 133 S. Ct. 2151 (2013). *See* Would the Supreme Court's Decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013) Lead to a Lower Sentence Today?

For either or both reasons, the statutory range would be 0-20 years today. *See* Appendix 3.

Guideline range

The guideline range would be 41-51 months if properly calculated today.

First, in reviewing the section entitled Ameliorating Amendments to U.S. Sentencing Guidelines, you notice that in 1992, the Commission amended the "relevant conduct" guideline at § 1B1.3 to narrow the scope of relevant conduct in cases involving "jointly undertaken criminal activity," and included new illustrations in the application notes. *See* USSG, App. C, amend. 439 (Nov. 1, 1992). You see that there is an illustration that precisely fits Mr. Harris's case. Note 2(c)(7) says that R recruits S to distribute 500 grams of cocaine, and that although S knows that R is the prime figure in a conspiracy to import much larger quantities, as long as S's agreement and conduct is limited to distributing the 500 grams, S's "relevant conduct" is limited to 500 grams. *See* USSG § 1B1.3, cmt. (n.2(c)(7)). The same reasoning would apply to the two-level increase for Mr. Big's possession of guns – Harris's agreement and conduct did not include guns. No one noticed this application note at sentencing in 1998, and the amendment was not made retroactive. *See* USSG § 1B1.10(c).

Second, you notice that the commentary to the mitigating role guideline, USSG § 3B1.2, as amended in 2001, USSG, App. C, amend. 635 (Nov. 1, 2001), provides that a defendant "who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which [he] personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline." USSG § 3B1.2, cmt. (n.3(A)). This amendment was not made retroactive. *See* USSG § 1B1.10(c).

Third, the Drugs Minus Two amendment effective November 1, 2014 would apply. *See* Amendment 3, Reader Friendly Amendments to the Sentencing Guidelines (eff. Nov. 1, 2014).

As of November 1, 2014, the base offense level for 500 grams of cocaine would be 24, USSG § 2D1.1(c)(8), Harris would receive a two-level reduction for his at most minor role, *id*., § 3B1.2(a), and his total offense level would be 22. As at the original sentencing, Mr. Harris would receive one criminal history point for his one prior conviction for which he received probation, *id.*, § 4A1.1(c), placing him in Criminal History Category I. His guideline range would be 41-51 months. *See* Sentencing Table, USSG, ch. 5, pt. A.

Since he has already served four times the bottom of the guideline range that would apply today, you need not analyze whether the sentence would be affected by *Booker* and progeny.

Note that because the drugs minus two amendment has been made retroactive, Harris should also move for a sentence reduction under 18 U.S.C. § 3582(c)(2). If you are not a Federal Public Defender, check with the Federal Public Defender office in the district to determine the status and coordinate on timing and other issues. If such a motion were granted, the guideline range would be reduced to 235-293 months, but the 240-month mandatory minimum would stand in the way of a full reduction to the bottom of the amended guideline range. For how to deal with the situation, *see* How to Deal With the Retroactive Drugs Minus Two Amendment.

Components	**Current Sentence**	**Likely Sentence Today**
Statutory Range	20 years-Life	0-20 years
Career Offender Range	N/A	N/A
Ordinary Guideline Range	292-365 months	41-51 months
With Booker Variance	N/A	Not estimated
Sentence Imposed/ Likely Would Be Imposed	292 months	41 months

BETTY JOHNSON – PERCOCET/OXYCODONE

On December 31, 2001, Betty Johnson went to a party with her friend Melissa Curry. Ms. Johnson drove Ms. Curry home from the party at 2:00 A.M. Curry's mother could not wake her the next morning. When the paramedics arrived, they pronounced her dead. The medical examiner found heroin, benzodiazepines, cannaboids, and oxycodone (the narcotic ingredient in Percocet) in her system. Curry's mother told police that her daughter had gone to a party at Sally M.'s house with Ms. Johnson. Sally M. told them that she had seen Ms. Johnson give Ms. Curry Percocet tablets at the party, and that Curry had given Sally 7 of the tablets, keeping 12 for herself. Police confirmed that Ms. Johnson, who had severe back pain resulting from an accident, had gotten a prescription for Percocet filled the day of the party. Ms. Johnson declined to speak to the police.

On February 1, 2002, Ms. Johnson was indicted for distributing oxycodone in violation of 21 U.S.C. § 21 U.S.C. 841(a)(1) and § 841(b)(1)(C), subject to a statutory range of 0-20 years. When she declined to plead guilty (because she was the single mother of a 4-year-old), the prosecutor threatened to file a § 851 enhancement based on her 1995 Kansas conviction for possessing marijuana without affixing a drug stamp (a common way of prosecuting drug possession in Kansas). The prosecutor warned that if she was found guilty, this would raise her statutory range to 0-30 years and that he would seek a severe sentence based on Curry's death.

Ms. Johnson went to trial and was convicted based on Sally M.'s testimony that she had distributed Percocet to Curry. No evidence of Curry's death was introduced at trial.

The PSR noted that the statutory range was 0-30 years under 21 U.S.C. § 841(b)(1)(C) because the prosecutor had filed an enhancement based on a prior conviction for a "felony drug offense."

Using the 2001 Guidelines Manual, the PSR calculated a guideline range of 15-21 months based on the 19 Percocet tablets that Johnson gave Curry, as follows:

Each Percocet tablet contained 5 mg. of oxycodone, 325 mg. of Acetaminophen, and 220 mg. of inactive ingredients for a total of 550 mg. Under Application Note A to the Drug Quantity Table at USSG § 2D1.1(c), "[t]he weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." USSG § 2D1.1(c), Note A (2001). At 550 mg. each, the 19 Percocet tablets weighed a total of 10,450 mg., or 10.45 grams, of a mixture or substance containing oxycodone. Oxycodone is not specifically listed in the Drug Quantity Table. Under Application Note 10 in the commentary to USSG § 2D1.1, the 10.45 grams of the mixture or substance containing oxycodone was converted under the Drug Equivalency Tables to an "equivalent" quantity of marijuana. USSG § 2D1.1 cmt. (n.10) (2001). Under that table, 1 gram of a mixture or substance containing oxycodone was equivalent to 500 grams of marijuana. Thus, the 10.45 grams of the mixture or substance containing oxycodone was equivalent to 5.2 kilograms of marijuana, which corresponded to a base offense level 14. USSG § 2D1.1. Her Kansas drug tax stamp conviction resulted in 1 criminal history point, placing her in Criminal History Category I. Under the Sentencing Table in Chapter 5, Part A, the guideline range was 15-21 months.

The government objected, arguing that the court should find that Johnson's distribution of Percocet to Curry caused her death, thus triggering a sentence of mandatory life under 21 U.S.C. § 841(b)(1)(C).

The sentencing judge held a hearing at which the medical examiner and another expert testified that the Percocet was a contributing cause of Melissa's death, and a defense expert testified that the Percocet played little if any role in causing the death and that Melissa would not have died but for the heroin.

Ms. Johnson argued that the enhancement could not be imposed because the evidence failed to establish that the oxycodone she distributed was the "but for" cause of death, and in any event, the statutory range could not be increased based on "death results" because it was not charged in the indictment or proved to the jury beyond a reasonable doubt.

The judge noted that the government could not have proved beyond a reasonable doubt that the Percocet caused the death, or even by a preponderance that it was the "but for" cause of death, but that it had proved that it was more likely than not that Johnson's distribution of the Percocet to Curry was a contributing cause of her death, which was all that was required under circuit law.[10]

Once the judge made that finding by a preponderance of the evidence, he concluded that he was "compelled" to sentence Ms. Johnson, not to mandatory life as the government contended, but to a mandatory term of exactly 30 years. The judge agreed with Johnson that the statutory range

[10] *United States v. McIntosh*, 236 F.3d 968, 972-73 (8th Cir. 2001) (holding that drug need not be proved to be the proximate cause of death).

based on the jury's verdict and the § 851 enhancement was 0-30 years, and that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he could not impose a sentence above 30 years based on a fact that was not charged in the indictment or proved to the jury beyond a reasonable doubt. However, the judge agreed with the government that under *Harris v. United States*, 536 U.S. 545 (2002), a fact that sets or raises a mandatory minimum sentence is not an element and thus may be found by a judge by a preponderance of the evidence. The government was correct that the "death results" finding called for a mandatory minimum of life, but the sentence must be capped at 30 years under *Apprendi*. Indeed, the judge explained, the circuit had approved this approach with respect to drug quantity, holding that there is no *Apprendi* violation in imposing a sentence based on a quantity found by the judge by a preponderance as long as the sentence imposed does not exceed the statutory maximum based on the quantity charged in the indictment and found by the jury.[11]

Based on the judge's finding, the probation officer amended the calculation of the guideline range in the PSR from 1521 months to a base offense level 43 under USSG § 2D1.1(a)(1). The guideline range in Criminal History Category I was therefore life, *see* Sentencing Table, USSG, ch. 5, pt. A, but was capped at the statutory maximum of 30 years under USSG § 5G1.1(a).

On January 1, 2003, the judge sentenced Johnson to a mandatory term of 30 years.

Analysis

Ms. Johnson has been incarcerated since she was sentenced on January 1, 2003. By January 1, 2015, she will have served 12 actual years (144 months); she has earned all of her good time credit (47 days per year) and assuming she does not lose any good time credit, she will have served about 165 months including good time. *See* Good Time Chart.

Components of the Current Sentence

As noted above, the mandatory statutory sentence was 30 years, and the guideline range would have been 15-21 months absent the judge's finding that "death resulted," which increased the range to life, capped at 30 years under § 5G1.1(a).

The sentence has not changed. The court of appeals rejected Johnson's arguments that she should not have been subjected to the "death results" enhancement because it is an element that must be charged in an indictment and proved to a jury beyond a reasonable doubt, and because the government failed to prove that the Percocet she distributed was the "but for" cause of death. She filed a habeas petition raising the same issues, but it was denied. No Rule 35(b) or § 3582(c)(2) motion has been filed.

Would the Sentence Be Lower Today, and How Much Lower?

Statutory Range

[11] *United States v. Titlbach*, 300 F.3d 919, 921-22 (8th Cir.2002).

If the sentence were imposed today, the statutory range would be **0-20 years** for multiple reasons.

The "death results" enhancement would not apply for two reasons under the Supreme Court's recent decision in *Burrage v. United States*, 134 S. Ct. 881 (2014). *Burrage* requires "but for" causation, which the judge stated the government had failed to prove under any standard. And under *Burrage* and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), because the fact of "death results" results in a mandatory minimum, it must be proved to a jury beyond a reasonable doubt, which the government did not attempt to do and the judge said it could not do. *See* Would an Enhancement for Accidental Death or Serious Bodily Injury Resulting from the Use of a Drug No Longer Apply Under the Supreme Court's Decision in *Burrage v. United States*, 134 S. Ct. 881 (2014) and *Alleyne v. United* States, 133 S. Ct. 2151 (2013)?

Thus, assuming the § 851 enhancement would apply today, the statutory range would be 0-30 years. *See* Appendix 3.

But the § 851 enhancement would not apply today for two reasons. First, the prior Kansas conviction for possession of marijuana without affixing a tax stamp would not be a "felony" under current law because, under the Kansas sentencing scheme and based on Ms. Johnson's particular prior record, she could not have actually been sentenced to more than 7 months in prison. *See United States v. Brooks*, __ F.3d __, 2014 WL 2443032 (10th Cir. June 2, 2014); *United States v. Haltiwanger*, 637 F.3d 1213 (8th Cir. 2011). *See* How a Person Whose Sentence Was Previously Enhanced Based on a "Felony Drug Offense" under 21 U.S.C. § 851 Would Receive a Lower Sentence Today (Part II.A.2).

Moreover, you discover in reviewing the docket and the § 851 information that the prosecutor did not file the information until the afternoon of the first day of trial. The information must be filed *before* trial. *See* 21 U.S.C. § 851(a)(1). If the probation officer, defense counsel, or the judge had noticed the untimely filing before sentencing, the § 851 enhancement could not have been applied. *See* Mistakes and Oversights Not Caught at the Time and Never Corrected.

Guideline range

If Ms. Johnson were sentenced today, her guideline range would be **0-6 months**.

Her base offense level would not be 43 because "the offense of conviction" did not "establish[] that death … resulted from the use of the substance." USSG § 2D1.1(a)(1).

In reviewing the section entitled Ameliorating Amendments to U.S. Sentencing Guidelines, you notice that effective Nov. 1, 2003, the Commission changed the methodology for determining quantity under the Drug Equivalency Table for oxycodone offenses from using the weight of the pills to using the weight of actual oxycodone, regardless of pill type, and that this reduced penalties for offenses involving Percocet. USSG app. C, amend. 657 (Nov. 1, 2003). The

amendment was made retroactive, *see* USSG § 1B1.10(c), but Ms. Johnson did not file a motion under 18 U.S.C. § 3582(c)(2) because the 30-year mandatory minimum made her ineligible for a reduction. *See* § 1B1.10, cmt. (n.1(A)).

Under the amendment, 1 gram of actual oxycodone is equivalent to 6,700 grams of marijuana. USSG § 2D1.1 cmt.(n.8(D)) (2013). The 95 mg. of actual oxycodone (0.095 gram) contained in the 19 Percocet tablets is equivalent to 636.5 grams of marijuana, which corresponds to a base offense level 8. In Criminal History Category I, the guideline range would be **0-6 months**. *See* Sentencing Table, USSG, ch. 5, pt. A (2013).

Under the Drugs Minus Two amendment effective November 1, 2014, the base offense level would decrease to 6, *see* Amendment 3, Reader Friendly Amendments to the Sentencing Guidelines (eff. Nov. 1, 2014), but it would make no difference because the guideline range would remain 0-6 months. *See* Sentencing Table, USSG, ch. 5, pt. A.

Since Ms. Johnson has already served 162 months longer than the bottom of the guideline range that would apply today, which is zero months, you need not analyze whether the sentence would be affected by *Booker* and progeny.

Note that Johnson has not yet filed a second habeas petition raising a claim under the Supreme Court's January 26, 2014 decision in *Burrage*, or the Tenth Circuit's June 2, 2014 decision in *Brooks*, or seeking relief from the prosecutor's misconduct in seeking a sentence enhancement based on a § 851 information that he failed to file before trial or her counsel's ineffectiveness in failing to notice. For how to proceed under these complicating circumstances, *see* Pending and Possible Court Challenges: Appeals, Habeas Petitions, § 3582(c)(2) Motions.

Components	**Current Sentence**	**Likely Sentence Today**
Statutory Range	30 years	0-20 years
Career Offender Range	N/A	N/A
Ordinary Guideline Range	30 years	0-6 months
With Booker Variance	N/A	Not estimated
Sentence Imposed/ Likely Would Be Imposed	30 years	0-6 months

JOSEPH DODD - HEROIN

On January 1, 2007, Mr. Dodd was arrested after he sold 100 grams of heroin to a confidential informant. Mr. Dodd was a small time street dealer who usually sold dime bags, but the CI insisted on 100 grams (the amount necessary for a 5-year mandatory minimum). Mr. Dodd was charged with distribution of 100 grams of heroin in violation of 21 U.S.C. § 841(b)(1)(B).

After unsuccessfully moving to dismiss the indictment under an entrapment theory, Mr. Dodd pled guilty as charged.

According to the PSR, based on the November 1, 2006 Guidelines Manual, the base offense level for 100 grams of heroin was 26, *see* USSG § 2D1.1(c)(7), and Mr. Dodd was in Criminal History Category II based on 3 criminal history points: 2 for maintaining a premises for selling, giving away, or using a controlled substance, for which he was sentenced to 60 days in jail, *id.* § 4A1.1(b); and 1 for sale of less than 2.23 grams of heroin, for which he received probation, *id.* § 4A1.1(b). His guideline range was 70-87 months. *See* Sentencing Table, USSG, ch. 5, pt. A.

However, the PSR found Mr. Dodd to be a career offender based on his two prior convictions. With a statutory range of 5-40 years, *see* Appendix 3, the offense level was 34, the Criminal History Category was VI, and the guideline range 262-327 months. *See* USSG § 4B1.1(b); Sentencing Table, USSG, ch. 5, pt. A.

Mr. Dodd received a 2-level reduction under § 3E1.1 for pleading guilty. The prosecutor refused to move for a further 1-point reduction because Mr. Dodd had moved to dismiss the indictment. Mr. Dodd objected to the prosecutor's refusal, to no avail. The guideline range was 210-262 months.

On June 1, 2007, the judge sentenced Mr. Dodd to 210 months.

In doing so, the judge stated that he disagreed with the guideline's "quantum leap" from 70-87 months to 262-327 months as applied to Dodd. Dodd, like "the vast majority of these people, is not violent. He's not engaged in high level drug trafficking. He has an addiction problem." The judge said that 210 months "is way in excess of what is necessary to deter this type of criminal conduct," and that it "is subject to question that any sentencing scheme is going to really deter the drug business." The judge said that he would impose a lower sentence if he could, but that a variance from the career offender guideline was not permissible under circuit law.

Analysis

Mr. Dodd has been incarcerated since his arrest on January 1, 2007. By January 1, 2016, he will have served nine actual years (108 months); he has earned all of his good time credit (47 days per year), and assuming he does not lose any good time credit, he will have served about 124 months including good time. *See* Good Time Chart.

Components of the Current Sentence

The statutory range was 5-40 years, and the guideline range was 210-262 months. The sentence has not changed. The court of appeals affirmed the conviction and sentence (agreeing with the judge that a variance from the career offender guideline was impermissible), and no habeas petition, Rule 35(b) motion, or § 3582(c)(2) motion has been filed.

Would the Sentence Be Lower Today, and How Much Lower?

If Mr. Dodd were sentenced today, his statutory range would remain **5-40 years**, but his guideline range would be **41-51 months**.

Guideline Range

First, Mr. Dodd was not a career offender under the 2006 Guidelines Manual under which he was sentenced, and would not be a career offender today.

One of the two "controlled substance offenses" upon which the PSR relied to find Mr. Dodd to be a career offender, and without which he could not be a career offender, was for violating California Health and Safety Code 11366, which made it unlawful (and still makes it unlawful) to "open[] or maintain[] any place for the purpose of unlawfully selling, giving away, *or using*" a controlled substance. (emphasis added).

In reviewing the PSR's account of this prior offense, it looks like the place Mr. Dodd "maintained" was nothing but a room where he and a few friends used heroin. Based on your review of the section entitled How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today, and the guideline itself, you know that the term "controlled substance offense" under § 4B1.2(b) does include "using" drugs but only trafficking in drugs. You investigate further.

Under the 1988 guidelines, "controlled substance offense" was defined to include 21 U.S.C. § 856, a federal offense defined as maintaining a premises "for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance," or any "state offense that is substantially similar." USSG § 4B1.2(2) & cmt. (n.2) (Jan. 1, 1988). In 1989, however, the Commission deleted the reference to 21 U.S.C. § 856, and defined "controlled substance offense" as "an offense under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute." *See* App. C, Amend. 268 (Nov. 1, 1989); USSG § 4B1.2(2) (Nov. 1, 1989). This definition did not include using a controlled substance.

Applying this definition, the Eighth Circuit Court of Appeals held that a jury verdict convicting a defendant of violating 21 U.S.C. § 856 by managing a residence "for the purpose of *distributing or using* a controlled substance" was not a career offender predicate because it did "not clarify whether [he] was convicted of a possession § 856 offense or a distribution § 856 offense." *United States v. Baker*, 16 F.3d 854, 857-58 (8th Cir. 1994). In 1997, the Commission added commentary to the career offender guideline stating that the federal offense of violating 21 U.S.C. § 856 "is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense,'" citing the Eighth Circuit's decision in *Baker*. *See* U.S.S.G., App. C, Amend. 568 (Nov. 1, 1997) (Reason for Amendment); USSG § 4B1.2, cmt. (n.1) (Nov. 1, 1997). This provision remains in the guideline today.

You obtain the state court records. The charging document, court minutes, and transcript of Mr. Dodd's guilty plea to violating California Health and Safety Code 11366 show that he pled guilty to "maintaining a place for the purposes of selling, giving away *or using* a controlled substance." (emphasis added). This conviction was not, and is not, a career offender predicate because it did not specify whether he pled guilty to facilitating the offense of selling or the offense of merely using.[12] USSG § 4B1.2, cmt. (n.1).

Second, in reviewing the section entitled Ameliorating Amendments to U.S. Sentencing Guidelines, you notice that effective November 1, 2013, the Commission added language to Application Note 6 of § 3E1.1 (Acceptance of Responsibility) to state that the government "should not withhold such a motion [for the third point] based on interests not identified in § 3E1.1," USSG, App. C, amend. 775 (Nov. 1, 2013), that is, for reasons other than "permitting the government to avoid preparing for trial," *see* § 3E1.1(b). Filing a pre-trial motion to dismiss the indictment does not require the government to prepare for trial. Thus, the prosecutor would move for the third point for acceptance of responsibility if Mr. Dodd were sentenced today.

If Mr. Dodd were sentenced today, his base offense level would be 26 for 100 grams of heroin, USSG § 2D1.1(c)(7), less 3 points for acceptance of responsibility, *id*. § 3E1.1, his Criminal History Category would be II, and his guideline range would be 51-63 months. *See* Sentencing Table, USSG, ch. 5, pt. A. Under the drugs minus two amendments, the range would be **41-51 months**, less than half the time he was already served.

Note that Mr. Dodd has not filed a habeas petition to seek correction of the mistake that was made in classifying him as a career offender under the guidelines then in effect. He might do so based on an ineffective assistance of counsel theory, but he would face various procedural hurdles. For what to say in the petition and how to otherwise address this situation, *see* Pending or Possible Court Challenges: Appeals, Habeas Petitions, § 3582(c)(2) Motions.

For how to deal with the fact that the Sentencing Commission has voted to make the drugs minus two amendment retroactive, *see* How to Deal With the Retroactive Drugs Minus Two Amendment.

Variance from the Career Offender Guideline Range

You should also establish that even if Mr. Dodd had not been erroneously classified as a career offender, the judge would vary from the career offender range, and the circuit would uphold the

[12] For statutes that set forth elements in the alternative, some of which are qualifying offenses and some of which are not, courts may look to a limited set of documents to determine of which set of elements the defendant was convicted: the charging document and jury instructions if the defendant was convicted at trial, *Taylor v. United States*, 495 U. S. 575, 602 (1990), and the plea agreement and plea colloquy if the defendant pled guilty, *Shepard v. United States*, 544 U. S. 13, 25-26 (2005). This methodology, which avoids the Sixth Amendment violation that would occur if a federal court found the facts of an offense of which the defendant was previously convicted in state court, is known as the "modified categorical approach." *See Descamps v. United States*, 133 S. Ct. 2276, 2283-84 (2013).

sentence. Mr. Dodd was sentenced in June 2007, after *Booker* but before *Kimbrough* was decided in December of 2007, and as the judge noted, before most circuits accepted that judges were free to vary based on a policy disagreement with the career offender guideline. *See* How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today; How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

How much of a variance? The average reduction in career offender cases is 32.7% from the bottom of the range,[13] which in this case would result in a sentence of 141 months. However, this is an average and many judges vary further. Given the judge's strong comments at sentencing, consider asking the judge for a letter stating what sentence he would have imposed if he had full discretion to vary from the career offender guideline, and perhaps informing him of the mistake that was made (by the probation officer and the parties) in classifying Mr. Dodd as a career offender. Check with the Federal Defender in the district regarding how best to approach the judge. *See* Overall Instructions, Part IV.D.2.

Components	**Current Sentence**	**Likely Sentence Today**
Statutory Range	5-40 years	5-40 years
Career Offender Range	210-262 months	N/A
Ordinary Guideline Range	70-87 months	41-51 months
With Booker Variance	N/A	Not estimated
Sentence Imposed/ Likely Would Be Imposed	210 months	41 months

METHAMPHETAMINE

For examples of how sentences for methamphetamine offenses would be lower today, *see* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today; Federal Sentencing for Non-Experts.

[13] U.S. Sent'g Commission, *Quick Facts* (2013), available at http://www.ussc.gov/research-and-publications/quick-facts.

APPENDIX 1
Statutory Penalties for Crack Offenses Before and After the Fair Sentencing Act of 2010

Statutory Range	Pre-FSA	Post-FSA
21 USC 841(b)(1)(A)		
10-life	50 grams or more	280 grams or more
20-life	50 grams or more + one 851	280 grams or more + one 851
	50 grams or more + the drug was the but for cause of death or serious bodily injury	280 grams or more + the drug was the but for cause of death or serious bodily injury
Life	50 grams or more + two 851s	280 grams or more + two 851s
21 USC 841(b)(1)(B)		
5-40 years	5 grams or more but less than 50 grams	28 grams or more but less than 280 grams
10-life	5 grams or more but less than 50 grams + any number of 851s	28 grams or more but less than 280 grams + any number of 851s
20-life	5 grams or more but less than 50 grams + the drug was the but for cause of death or serious bodily injury	28 grams or more but less than 280 grams + the drug was the but for cause of death or serious bodily injury
life	5 grams or more but less than 50 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury	28 grams or more but less than 280 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury
21 USC 841(b)(1)(C)		
0-20 years	Less than 5 grams	Less than 28 grams
0-30 years	Less than 5 grams + any number of 851s	Less than 28 grams + any number of 851s
20-life	Less than 5 grams + the drug was the but for cause of death or serious bodily injury	Less than 28 grams + the drug was the but for cause of death or serious bodily injury
life	Less than 5 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury	Less than 28 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury

APPENDIX 2
Attorney General Holder's Charging Policies

Prosecutors "should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets *each*" of four criteria:

- "relevant conduct" does not involve violence, credible threat of violence, possession of a weapon, trafficking drugs to or with minors, death or serious bodily injury
- not an organizer, leader, manager, or supervisor of others within a criminal organization
- does not have "*significant* ties" to "*large-scale* drug trafficking organizations, gangs, or cartels"
- does not have a "significant criminal history," "normally evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions."[14] Three or more points "may not be significant if, for example, a conviction is remote in time, aberrational, or for conduct that itself represents non-violent low-level drug activity."[15]

Prosecutors "should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions[,] . . . consider[ing]" six factors [need not meet *each* of these criteria – it's a totality of the circumstances test]:

- Whether D "was an organizer, leader, manager or supervisor of others within a criminal organization"
- Whether "the *defendant* was involved in the use or threat of violence in connection with the offense" [*not* relevant conduct]
- "The nature of the defendant's criminal history, including any prior history of *violent* conduct or *recent* prior convictions for *serious* offenses"
- "Whether the defendant has *significant* ties to *large-scale* drug trafficking organizations, gangs, or cartels"
- "Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants"
- "Other case-specific aggravating or mitigating factors."[16]

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[14] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 2 (Aug. 12, 2013) [Holder Memo, Aug. 12, 2013].

[15] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 1 (Aug. 29, 2013) [Holder Memo, Aug. 29, 2013].

[16] Holder Memo, Aug. 12, 2013, at 3.

The defendant is not required to plead guilty or cooperate in order to be charged fairly. Rather, the defendant need only "meet[] the above criteria."[17] For defendants "charged but not yet convicted," "prosecutors should apply the new policy and pursue an appropriate disposition consistent with the policy's section, 'Timing and Plea Agreements.'" For defendants who already pled guilty or were convicted by a jury but have not yet been sentenced, prosecutors are "encouraged" to "consider" withdrawing § 851s.[18]

"Charges should not be filed simply to exert leverage to induce a plea."[19] "Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea)."[20]

[17] *Id*. at 2 ("Timing and Plea Agreements").

[18] Holder Memo, Aug. 29, 2013, at 1-2.

[19] Memorandum to all Federal Prosecutors from Eric H. Holder, Jr., Attorney General, Department Policy on Charging and Sentencing at 2 (May 19, 2010); U.S. Attorneys Manual, § 9-27.300.

[20] U.S. Attorneys Manual, § 9-27.320.

APPENDIX 3
Current Statutory Penalties

21 USC 841(b)(1)(A)				
Mandatory 10 Years-Maximum Life weight of "mixture or substance containing a detectable amount of" the drug		**Mandatory 20 Years-Maximum Life**	**Mandatory Life**	
Heroin	1,000 grams or more	• prosecutor files one § 851 enhancement for prior "felony drug offense" • death or serious bodily injury results	• prosecutor files two § 851 enhancements for prior "felony drug offenses" • prosecutor files one § 851 enhancement for prior "felony drug offense" and death or serious bodily injury results	
Powder cocaine	5,000 grams or more			
Crack cocaine	280 grams or more			
PCP	1 kg. or more, or 100 grams or more pure			
LSD	10 grams or more			
N-phenyl-N-propanamide	400 grams or more, or 100 grams or more analogue			
Marijuana	1,000 kg. or more, or 1,000 or more plants			
Methamphetamine	500 grams or more, or 50 grams or more pure			

21 USC 841(b)(1)(B)				
Mandatory 5 Years-Maximum 40 Years weight of "mixture or substance containing a detectable amount of" the drug		**Mandatory 10 Years-Maximum Life**	**Mandatory 20 Years-Maximum Life**	**Mandatory Life**
Heroin	100 grams or more	prosecutor files any number of § 851 enhancements	death or serious bodily injury results	prosecutor files any number of § 851 enhancements for prior "felony drug offense"
Powder cocaine	500 grams or more			

Crack cocaine	28 grams or more	for prior "felony drug offense"		and death or serious bodily injury results
PCP	100 grams or more, or 10 grams or more pure			
LSD	1 gram or more			
N-phenyl-N-propanamide	40 grams or more, or 10 grams or more analogue			
Marijuana	100 kg. or more, or 100 or more plants			
Methamphetamine	50 grams or more, or 5 grams or more pure			

21 USC 841(b)(1)(C)			
0-20 Years	**0-30 Years**	**Mandatory 20 Years -Maximum Life**	**Mandatory Life**
Weight less than above or unspecified for any controlled substance in Schedule I or II except less than 50 kg. or an unspecified weight of marijuana (see below, 841(b)(1)(D)) 50 or more marijuana plants regardless of weight; 10 kg. hashish; 1 kg. hashish oil; any amount of gamma hydroxybutric acid; 1 gram flunitrazepam	prosecutor files any number of § 851 enhancements for prior "felony drug offense"	death or serious bodily injury results	prosecutor files any number of § 851 enhancements for prior "felony drug offense" and death or serious bodily injury results

21 USC 841(b)(1)(D)	
0-5 Years	**0-10 Years**
Less than 50 kg. marijuana or unspecified	prosecutor files any number of § 851

But "distributing a small amount of marihuana for no remuneration" is punishable as simple possession by not more than 1 year, or by 15 days-2 years if committed after a prior conviction for any drug offense, or by 90 days-3 years if committed after 2 or more prior convictions for any drug offense. 21 USC 841(b)(4), 844.	enhancements for prior "felony drug offense"