CASE NO. 08-10691

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

NONE

_____
Adam Wolf
Attorney of record for Ronald Ross

REQUEST FOR ORAL ARGUMENT

Defendant Ronald Ross respectfully requests twenty minutes of oral argument for each party. Because this case has national significance and raises constitutional claims, oral argument would aid resolution of this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

SUMMARY OF THE CASE

Counsel must be appointed for an indigent criminal defendant who seeks resentencing following a retroactive sentencing-guideline change, where a federal statute now invites the defendant and the Government to introduce post-sentencing facts that bear on the defendant's period of incarceration. Fundamental fairness and the right to counsel under the Fifth and Sixth Amendments, respectively, demand that indigent defendant Ronald Ross, with an eighth-grade education, not act as his own counsel.

The district court denied Ross's resentencing motion—maintaining a sentence that is effectively an upward departure from what the Sentencing Commission believes is an appropriate punishment for his drug offense—based on new facts that had never previously been presented to the district court. In this appeal, Ross does not seek reversal of the order denying his motion with instructions that the district court grant the motion. Rather, he respectfully requests that this Court vacate the judgment below and remand the matter for appointed counsel to represent him for purposes of resentencing, which would allow counsel to marshal, identify, and present new mitigating facts, and to rebut the Government's new aggravating facts. With years of Ross's freedom at stake, the Constitution does not countenance forced *pro se* representation.

JURISDICTIONAL STATEMENT

Mr. Ross appeals from a final judgment entered by the United States District Court for the Northern District of Texas, the Honorable Sam. R. Cummings presiding, denying a motion and disposing of all claims for resentencing pursuant to 18 U.S.C. § 3582(c)(2). The district court denied the motion on July 2, 2008, RE 17-18,[1] and Ross, *pro se* at the time, filed a timely notice of appeal on July 14, 2008, RE 9. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in denying Mr. Ross's resentencing motion without appointing counsel, thereby contravening the Fifth and Sixth Amendments to the U.S. Constitution?

2. Whether the district court erred in denying Mr. Ross's resentencing motion based on extra-record evidence that was neither provided to Ross nor subject to judicial notice?

---

[1] Defendant cites the Record Excerpts and the non-reproduced pre-sentence report as "RE" and "PSR," respectively, followed by the corresponding page number.

STATEMENT OF THE CASE

This case arises from the U.S. Sentencing Commission's recognition that the pre-2008 sentencing guideline for crack-cocaine offenses called for overly severe periods of incarceration. Accordingly, the Commission adjusted the guideline to recommend much shorter sentences for crack-cocaine offenders. Acknowledging that most inmates currently serving sentences imposed under the old crack-cocaine guideline received unduly lengthy sentences, the Commission took the unusual step of making its guideline amendment retroactive.

After pleading guilty to a crack-cocaine offense in 2006, Defendant Ronald Ross was sentenced under the former guideline to 151 months imprisonment. Whereas Ross's original guideline range was 121-151 months incarceration, the new guideline range for his offense is 100-125 months.

Accordingly, on June 4, 2008, Ross filed a short questionnaire and motion for resentencing in light of the retroactive guideline amendment. On July 1, 2008, the Government opposed Ross's motion with a 22-page brief. The Government argued that Ross's post-sentencing conduct constituted new aggravating facts justifying the denial of his motion, and it urged the district court not to appoint counsel to assist Ross in the proceeding.

One day later, on July 2, 2008, the district court, per Judge Cummings, denied Ross's motion. The lower court grounded its denial in, among other factors, Ross's post-sentencing conduct. In its order denying Ross's motion, the district court explicitly relied on documents that were neither provided to Ross nor subject to judicial notice.

Ross appeals the denial of his resentencing motion. He seeks vacation of the judgment below on narrow grounds: that the district court erred when it (1) denied his motion without appointing counsel and (2) based its ruling on extra-record documents that were neither provided to Ross nor subject to judicial notice. Ross respectfully requests that this Court remand the case to the district court for the filing of a resentencing motion with the assistance of appointed counsel.

STATEMENT OF FACTS

Ronald Ross's non-prison education concluded when he was 13 years old. PSR 10. Having completed eighth grade, Ross never graduated from Alderson Junior High School. *Id.*

To support his family, Ross admitted to engaging in a small amount of drug distribution. In 2006 he was charged in a two-count indictment with distribution of and possession with intent to distribute crack cocaine, as well

as with aiding and abetting these offenses. RE 10-11. Ross pled guilty to one of the counts, and the court dismissed the remaining count. RE 13.

The district court calculated Ross's sentencing guideline range to be 121-151 months, PSR 11, and it imposed a sentence of 151 months, or nearly 13 years, RE 14. Counsel represented Ross during his criminal proceeding, including sentencing. RE 1, 13.

In 2007, following a 20-year dialogue between Congress and the U.S. Sentencing Commission, the crack-cocaine sentencing guideline was amended to significantly reduce prison sentences for such offenses. *See infra* pp. 20-23. Finding that sentences imposed under the original crack-cocaine sentencing guideline were unjust and fundamentally flawed, the Sentencing Commission voted to make the guideline change retroactive. *See id.* at 22.

Virtually at the same time, the Commission amended the procedures attendant to a resentencing motion based on a retroactive guideline amendment to specify that either the defendant or the Government could introduce post-sentencing conduct in support of or in opposition to the motion. *Id.* at 29; *see also United States v. Robinson*, 542 F.3d 1045, 1052 (5th Cir. 2008). Such post-sentenci

Ross subsequently received a two-page questionnaire that he filed as a motion for resentencing in light of the new, retroactive crack-cocaine guideline. RE 20-21. The questionnaire asks mostly yes/no questions, including whether Ross could identify new mitigating facts. RE 21.

Hampered by his confinement and education in identifying, marshaling and presenting new facts, Ross nonetheless answered "yes" to the new-facts question. *Id.* In the space provided in the questionnaire for elaboration, he directed the court to a short, attached resentencing motion

highlight his sobriety in prison, his post-release plans, his daily contact with his family, or his lack of any serious disciplinary violations while incarcerated.

The Government, opposing Mr. Ross's short, non-detailed motion, filed a 22-page brief. RE 35-56. Urging a complete denial of Ross's motion, the Government raised new aggravating facts, including that Mr. Ross had been "sanctioned on three occasions for prison rule violations." RE 36. The Government did not lodge documentation in the record to buttress these disciplinary violations, and instead described the violations in explosive, and misleading, language: "engaging in sexual acts on two occasions and being in an unauthorized area on one occasion." *Id.* Furthermore, and again without providing documentation, the Government implied that Mr. Ross had not taken seriously his prior drug use by noting that Mr. Ross had "not yet been through the 500-hour drug aftercare program." *Id.* The Government insisted that this prison conduct should lead to the district court's finding "that a longer sentence than is suggested by the

S. Ct. 558 (2007), and *United States v. Booker*, 543 U.S. 220 (2005) ("*Booker* issue"), to resentencing proceedings, a complicated constitutional issue of first impression within this circuit. RE 45-55.

The district court ruled on the resentencing motion only one day after the Government filed its opposition. RE 17. Thrice referring to Ross's post-sentencing conduct, among other factors, the court denied Ross's motion in its entirety. RE 17-18. In its order, the court did not recognize any new mitigating facts, but recited verbatim the Government's new aggravating facts. RE 17 (referring to Mr. Ross's "engaging in sexual acts and being in an unauthorized area").

The district court not only grounded its decision in Ross's alleged post-sentencing conduct, but consulted extra-record Bureau of Prison ("BOP") documents regarding the alleged new aggravating facts. RE 17. These BOP documents are not in the record, were not provided to Ross for his review, and are not subject to judicial notice. While the Government furnished the court with these documents, it failed to provide Mr. Ross with the new evidence offered against him.

SUMMARY OF ARGUMENT

Armed with a junior-high-school education, Ronald Ross has been tasked with the duties of a lawyer. Pursuant to a statutory directive, Ross

must identify, marshal, and present new facts to the sentencing court, as well as respond to new facts alleged by the Government. At stake for this uncounseled inmate is nothing less than his freedom.

The district court's denial of Ross's resentencing motion without appointing Ross an attorney violated his rights to counsel under the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to counsel. "Fundamental fairness," the touchstone of Due Process, demands the appointment of counsel to an indigent criminal defendant who is explicitly invited to provide new mitigating facts and to respond to new aggravating facts, when those facts bear on his period of incarceration. This is especially true where those new facts motivate a district court to deny a resentencing motion altogether—effectively approving an upward departure from the sentencing-guideline range that the U.S. Sentencing Commission now believes to be appropriate for the given offense.

The Sixth Amendment mandates counsel for Mr. Ross's resentencing for the same reason it required the appointment of counsel at his original sentencing: per the new resentencing statute, a defendant should identify, marshal, and present new facts to the sentencing court, as well as respond to the Government's new facts. A district court must appoint counsel to

perform these classic roles of defense counsel where new facts are in play and a defendant's freedom hangs in the balance.

While the district court erred by not appointing counsel to assist Ross, it also violated Ross's Due Process rights by basing its denial of Ross's motion on extra-record documents that were neither provided to Ross nor subject to judicial notice. The Due Process Clause requires, at a minimum, the right to be heard, including the right to review evidence being considered by the court.

Ross faced a stacked deck from start to finish: he was denied counsel, denied an opportunity to file a reply brief, and denied a more just sentence due to secret evidence. The Constitution proscribes such one-sided proceedings.

STANDARD OF REVIEW

This Court reviews *de novo* a decision regarding the appointment of counsel for an indigent defendant, *Childress v. Johnson*, 103 F.3d 1221, 1224 (5th Cir. 1997), and an alleged denial of due process, *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004) (stating that this Court applies *de novo* review to the legal question of whether an individual's constitutional rights have been violated).

ARGUMENT

I. DUE PROCESS REQUIRES THE APPOINTMENT OF COUNSEL TO A DEFENDANT WITH AN EIGHTH-GRADE EDUCATION WHO RISKS THE LOSS OF HIS FREEDOM DUE TO NEW EVIDENCE THAT THE GOVERNMENT PRESENTS FOR PURPOSES OF RESENTENCING.

The Sentencing Commission has offered possible years of liberty to inmates like Mr. Ross, but these inmates may first need to fend off factual allegations and legal arguments proffered by federal prosecutors who oppose the granting of earlier freedom. Fundamental fairness requires that indigent individuals have the assistance of counsel when facing the loss of their physical liberty. Where the Government is now encouraged at a resentencing proceeding to rely on evidence never previously reviewed by the sentencing court, it would violate Due Process to require Ross to respond to this evidence and to marshal new facts without the assistance of counsel.

The Due Process Clause requires the appointment of counsel to indigent litigants when the denial of counsel would be fundamentally unfair. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *see also United States v. Whitebird*, 55 F.3d 1007, 1011 n.3 (5th Cir. 1995). In assessing an indigent's Due Process right to the appointment of counsel, a court weighs the individual's private interests, the Government's interests, and the "risk that the procedures used will lead to erroneous decisions," which it considers

A. Private and Public Interests Weigh Strongly in Favor of Appointing Counsel for a Defendant With an Eighth-Grade Education Who Needs to Identify, Marshal, and Present New Facts To Secure His Freedom.

In *Lassiter*, the Supreme Court assessed parents' interest in retaining custody of their children, finding this interest to be "commanding." 452 U.S. at 27. That "commanding" interest, however, pales in comparison to one's interest in his own physical freedom. An individual has no greater interest than to be free from the shackles of the state's confinement. *Cf.*

2. The Government's interests also militate in favor of appointing counsel.

Like Mr. Ross, the Government has a significant interest in counsel being appointed here. The Government has twin concerns in whether counsel is appointed: (1) that the district court reach "an accurate and just decision," and (2) that the outcome is "as economical[] as possible." *Lassiter*, 452 U.S. at 27-28. When balanced, these interests militate in favor of appointing counsel for Ross.

As for the first interest—that the district court reach an accurate and just decision regarding Ross's incarceration—the Supreme Court recognized in *Lassiter* that the Government's interest in a correct decision tilts toward appointing counsel. *Id.* Indeed, the Government's interest in *Lassiter* for the court to render a correct decision regarding parental rights is amplified here: a resentencing determines an individual's freedom, and the Government needs to ensure that its citizens' sentences are fair and sound.

The Government's second interest—its economic interest—also pulls toward the appointment of counsel. On the one hand, the Government has an economic interest in the district court's rendering an accurate decision. Proper application of the sentencing factors, in light of new facts and the new sentencing guideline, may very well yield a shorter sentence for Ross, which would save taxpayer money on his confinement. The Government

has an interest in not devoting money to house and otherwise care for an individual who need not be in the Government's custody. This interest is particularly acute here, where the court's denial of Ross's resentencing motion effectively granted Ross an upward departure from the sentencing guideline that the U.S. Sentencing Commission believes is appropriate for his offense.

On the other hand, the Government has an economic interest in avoiding the expense of counsel and the cost of thorough proceedings. *Id.* However, the Supreme Court has deemed this economic interest to be "hardly significant" and, in fact, "*de minimis*." *Id.* at 28. There are relatively few crack-cocaine offenders who could benefit from a retroactive application of the new guideline—certainly a group smaller in number than parents in termination proceedings, where the Government's interest in avoiding the expense of counsel was found to be minor.

On balance, the Government, like Mr. Ross, has an interest in the court appointing counsel for Ross. The *de minimis* cost of appointing counsel for the relatively small number of people in Mr. Ross's position is negligible relative to the Government's need for the imposition of sound criminal sentences and interest in saving money otherwise sunk into incarcerating people who do not meet the statutory criteria for confinement.

resentencing proceeding was, at the time, not an opportunity for either party to raise new facts). If Ross's resentencing had not depended on new facts, the risk of an erroneous decision would have been insubstantial; but that risk is very real when, as here, both parties rely on new facts and need to identify, marshal, and present new evidence to respond to each others' arguments. *See infra* p. 29 (explaining how a recent statutory amendment now invites the parties to present new facts in a resentencing proceeding).

The risk of an erroneous decision is further exacerbated where the Government and a *pro se* inmate litigate a complicated legal argument. Opposing Mr. Ross's resentencing motion, the Government briefed the *Booker* issue, a claim of first impression in this Court that has produced a circuit split in authority. *Compare United States v. Hicks*, 472 F.3d 1167, 1169 (9th Cir. 2007) ("*Booker* applies to § 3582(c)(2) proceedings"), *with United States v. Hudson*, 242 Fed. App'x 16 (4th Cir. 2007), *cert denied* 128 S. Ct. 1282 (2008) (holding that *Booker* does not apply to such proceedings).

A trained advocate is needed to identify, marshal, and present new facts, let alone to litigate a difficult constitutional claim of first impression. By denying counsel, the court entrusted these matters to an inmate with a junior-high-school education, clearly increasing the possibility of an erroneous decision.

B. There Is a Presumption for Appointed Counsel Here Because Mr. Ross Risks the Loss of His Freedom When the Government Relies On New Evidence To Rebut the Default of a Significant Sentencing Reduction.

The Government's introduction of new facts not only implicates the *Eldridge* factors, but also, since these facts risked Mr. Ross's freedom,

his own liberty. Specifically, its new facts served to deny Mr. Ross the significantly earlier release that the Commission intended for most crack-cocaine defendants. *Cf. Zadvydas v. Davis*

drug, type of drug, and mandatory-minimum sentence prescribed by Congress. *Kimbrough*, 128 S. Ct. at 567.

The crack-cocaine guideline was necessarily based on even less information than the guidelines for other drug offenses, since crack cocaine was a relatively new drug at the time the Commission devised the sentencing guidelines. *See, e.g.*, U.S. Dep't of Justice, Identifying and Responding to New Forms of Drug Abuse: Lessons Learned From "Crack" and "Ice" 33 (1994) (noting that the first major news stories about crack cocaine appeared in 1985). Accordingly, the Commission crafted a crack-cocaine guideline based on a number of mere assumptions regarding the harmfulness of crack cocaine, the mine-run crack-cocaine offense, and the mine-run crack-cocaine offender. *See, e.g.*, U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 122 (1995). The Commission placed substantial weight on its assumptions that there was a significant relationship between crack-cocaine trafficking and violent crime and that mine-run crack-cocaine offenders would be "kingpin" traffickers. *Id.* at 9-10, 118.

Twenty years later, it is universally recognized that these assumptions were false. *Kimbrough*, 128 S. Ct. at 568. With the benefit of further research, expert testimony, and more experience with crack-cocaine offenses

in the criminal-justice system, the Sentencing Commission concluded that the original crack-cocaine guideline was fundamentally flawed, such that the "crack/powder sentencing disparity is . . . unwarranted" and, most importantly, "fails to meet the sentencing objectives set forth by Congress." *Id.*

Starting in 1995, the Sentencing Commission, recognizing that its crack-cocaine guideline led to unjust sentences, unanimously started recommending to Congress guideline

on crack-cocaine offenders were unwarranted and unjust, *see id.* ("The Sentencing Commission then voted to make the amendment retroactive . . . to remedy some of the past injustice the 100:1 ratio had wrought."), and (2) the guideline amendment was intended to decrease crack-cocaine sentences substantially, S. Rep. 225, 98th Cong., 1st Sess. 180 (1983) (providing that that Commission not make guideline amendments retroactive when the amendment is only a "minor" adjustment). The inexorable conclusion is that the vast majority of crack-cocaine offenders sentenced under the old guideline should receive their freedom far sooner if they are eligible for a sentencing reduction.

In practice, too, district courts are taking to heart the significance of the retroactive crack-cocaine guideline amendment. They are routinely granting motions for eligible defendants and markedly reducing their original sentences, affording them much earlier freedom.

denials are almost always based on their clear statutory ineligibility, such as their already having completed their crack-cocaine sentence or their not even having been convicted of a crack-cocaine offense. *Id.* at 14 (table 9) (finding that these reasons account for 76% of the denials). In fact, only 2.1% of the denials have been due to new facts. *Id.* So long as crack-cocaine defendants meet the objective criteria for the granting of a resentencing motion, courts are almost automatically granting their motions.

Once district courts grant crack-cocaine offenders' motions, they almost always allow the movants *significantly* earlier release. Courts have imposed new sentences at the extreme lowest end of the new guideline range for 67% of the successful crack-cocaine movants. *Id.* at 10 (table 7). Moreover, district courts have imposed new sentences at the midpoint or lower of the new guideline range for almost ninety percent of such defendants. *Id.* Far lower sentences are not technically automatic, but they are expected and nearly certain.

Mr. Ross's case is the exception, where the Government's introduction of new facts effectively stood between Ross and the freedom that other crack-cocaine defendants have realized. Not only did Ross fail to receive a significantly different sentence, but the denial of his motion means

that he will not see his freedom any earlier at all.[3] The court's denial of Ross's motion is effectively an upward departure from the guideline that the U.S. Sentencing Commission believes is appropriate for people who have committed Ross's offense: the new guideline range is 100-125 months and Ross's sentence (151 months) is more than two years greater than the top of that range.

The Government's new facts and unchallenged legal argument cost Mr. Ross his freedom. When defendants meet the criteria for the granting of their motions but the Government introduces new facts to prevent far earlier release dates, these defendants face a loss of liberty that the Commission intended. This potential for the loss of liberty creates a presumption that crack-cocaine defendants should be appointed counsel in order to respond to the Government's new facts.

C. Denying Counsel To Mr. Ross Was Fundamentally Unfair.

The established Due Process test militates in favor of appointing counsel to Ross. Private and public interests weigh strongly in favor of

---

[3] Had Mr. Ross's motion been granted and had he, like two-thirds of successful crack-cocaine movants, received a Guideline-minimum sentence, his new sentence would have been 100 months (regaining his freedom more than 33% earlier than under his original sentence). Even if he had been one of the unlucky 5.1% of the successful crack-cocaine movants who were sentenced at only the midpoint of the new guideline range, his new sentence would have been 112 months (realizi

appointing counsel, and this is buttressed by the presumption of counsel where the Government seeks to introduce new facts for the purpose of denying the norm of significantly earlier release envisioned by the Sentencing Commission. Ultimately, not appointing counsel to Ross—forcing him to identify new facts, marshal new facts, present new facts, respond to new facts, and litigate vexing constitutional issues briefed on the other side by skilled and experienced federal prosecutors, all from his prison cell—is simply unfair.

Interest balancing and presumptions aside, it does not take a constitutional scholar to recognize that denying counsel to Ross flies in the face of fundamental fairness. Mr. Ross's freedom is at stake, and yet he alone, without an attorney's assistance, has been charged with performing traditional counsel functions. He has an eighth-grade education, no assets, and little contact with the outside world; he is ill-equipped to litigate against career prosecutors in federal court regarding a detailed factual record and complex legal arguments.

The Government believed the issues at bar are complicated enough to warrant a 22-page brief in opposition to Ross's questionnaire and motion. Armed with nothing more than an eighth-grade education and with his

freedom at stake, Mr. Ross should be appointed counsel as a matter of fundamental fairness.

II. THE SIXTH AMENDMENT REQUIRES THE APPOINTMENT OF COUNSEL WHERE CONGRESS HAS EXPLICITLY INVITED THE GOVERNMENT AND MR. ROSS TO IDENTIFY, MARSHAL, AND PRESENT NEW FACTS THAT BEAR ON THE DETERMINATION OF A PROPER PERIOD OF CONFINEMENT.

The Sixth Amendment requires the appointment of counsel for resentencing, as it does for one's original sentencing, where the defendant or the Government accepts the express statutory invitation to identify, marshal, and present new facts that bear on the defendant's period of confinement. The new procedures for resentencing, which explicitly allow for new facts to play a role in the sentence imposed, create a functional need for a lawyer to represent the defendant. Mr. Ross's case is exemplary, where the defendant, hamstrung by his confinement and his junior-high education, was in no position to adequately identify, marshal, and present new mitigating facts to the court, or to perform these functions in response to the Government's new aggravating facts. Mr. Ross needed counsel, and his sentence depended on it.

A. The Sixth Amendment Requires the Appointment of Counsel For Resentencing Proceedings When the Operative Statute Contemplates the Presentation of New Facts and Requires the Sentencing Court to Evaluate Those Facts.

The Sixth Amendment's right to appointed counsel at sentencing, where counsel marshals and presents new mitigating facts, as well as responds to the new aggravating facts that the Government introduces, applies equally to Mr. Ross's resentencing. In light of a recent statutory amendment, the Government and Mr. Ross relied on new facts in advocating for different sentences. Appointing counsel for Mr. Ross's sentencing, but not for his resentencing, is indefensible.

It is well established that the Sixth Amendment demands the appointment of counsel for indigent defendants during sentencing proceedings. *See, e.g.*, *Mempa*, 389 U.S. 128. The U.S. Supreme Court has held that counsel is required at sentencing for "marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence." *Id.* at 135. Counsel is required especially in the sentencing context, the *Mempa* Court noted, because a sentencing court considers new facts—facts not in the trial record—such as "the alleged commission of offenses for which the accused [has] never [been] tried." *Id.* at 136-37.

Mempa tracks the functions typically performed by criminal-defense attorneys. For fact-based proceedings, such as sentencings, counsel consider what type of facts could benefit their clients, how to marshal those facts, in what form to present such facts to the court, and how to respond to facts upon which the Government relies.

It is no wonder, then, that this Court held that the Sixth Amendment did not require the appointment of counsel for resentencing proceedings when the former governing statute did not provide defendant-movants an "opportunity to present mitigating factors." *Whitebird*, 55 F.3d at 1011. However, as this Court recognized in its order appointing appellate counsel in *Robinson*, the 2008 amendment to Sentencing Guideline 1B1.10 altered resentencings in a meaningful way: "the new process . . . allows district courts to consider 'post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment.'" 542 F.3d at 1052 (noting that such consideration of post-sentencing facts for resentencing "is different than the sentencing procedure for § 3582(c)(2) motions when *Whitebird* was decided") (quoting U.S. Sentencing Guidelines Manual § 1B1.10(b) n.1(B)). This is dispositive to the Sixth Amendment inquiry because resentencings now mimic in relevant part the original sentencing

process that motivated the *Mempa* Court to hold that the Sixth Amendment requires the appointment of counsel at sentencing.

Like Mr. Mempa, Mr. Ross deserves counsel who will identify, marshal, and present new mitigating facts and respond to the Government's allegations of new aggravating facts. These are classic duties that counsel performs during sentencing, and, unlike when this Court ruled in *Whitebird*, these duties are now crucial to resentencing proceedings.

Ross presumes the Government will respond, as it did in unsuccessfully opposing the appointment of appellate counsel in the related *Robinson* case, with an inflexible, mechanistic, and erroneous temporal argument that would overlook the foundation of the Sixth Amendment right to counsel. The Government wishes to insert new language into the Sixth Amendment that would promote form over function: counsel is never constitutionally required once the defendant's direct appeal has concluded, even where a rather unusual statute directs a defendant to file a motion in his criminal case for a resentencing based on new, post-sentencing conduct. However, an inflexible temporal limitation is not supported by case law and belies the Sixth Amendment's purposes.

The Government will attempt to ground its temporal argument in the unexceptional Sixth Amendment principle that counsel need not be

appointed for an indigent individual beyond his first appeal when pursuing a collateral attack on a conviction, *Coleman v. Thompson*, 501 U.S. 722, 756 (1991);

"assure[s] the indigent defendant an adequate opportunity to present his claims fairly").

The Supreme Court has provided that an indigent criminal defendant must be afforded counsel under the Sixth Amendment to "marshal[] the facts, introduce[] evidence of mitigating circumstances and in general aid[] and assist[] the defendant to present his case as to sentence." *Mempa*, 389 U.S. at 135. A crack-cocaine offender with an eighth-grade education who has been directed to identify, marshal, and present new facts and to respond to the Government's new facts—where these new facts are material to the defendant's period of confinement—must be provided an attorney to perform these traditional roles of counsel.

B. Counsel Was Necessary for Mr. Ross to Identify, Marshal, and Present New Mitigating Facts, As Well as to Respond to the Government's New Aggravating Facts.

Mr. Ross made his best effort to identify, marshal, and present new facts in support of his motion, and, if he had been provided the opportunity—i.e., if the court did not deny his motion one day after receiving the Government's opposition—he would have attempted to respond to the Government's new facts. However, he failed to raise and discuss relevant new mitigating facts and was ill-positioned to rebut the

Government's new aggravating facts. Mr. Ross's case illustrates the need for counsel to conduct this work.

Aptly styled as a "Motion and Questionnaire," Mr. Ross's pleadings presented the bare minimum information to inform the court he was entitled to a resentencing, but contained scant factual information and, critically, no discussion of how these new facts appropriately bear on his period of incarceration. RE 20-21, 23-28. As for new facts that should be considered with such a motion, Ross attached only a barebones "inmate education data transcript," along with a completion certificate for one prison education class and an unexplained photograph of himself.

The Government responded with a

Had Ross been provided counsel and opportunity to respond to the Government's new facts, his counsel would have explained that the Government's discussion of the 500-hour drug program was wholly irrelevant because this program is available only to inmates within 36 months of release. Counsel also would have provided necessary context to respond to the significance of the alleged disciplinary infractions. While the Government writes about these infractions in a manner that invites speculation that Ross committed rape—"engaging in sexual acts"—and perhaps tried to escape—"being in an unauthorized area"—counsel's providing context with supporting documents would have demonstrated that these infractions have no bearing on Ross's dangerousness or ability to live a law-abiding lifestyle. As it turns out, Ross was in an unauthorized area one time only because he barely missed the line for a robe to mark his graduation from a prison educational class, and he was merely waiting for the next graduation-robe line to form. Moreover, his "sexual acts" were nothing more than two occasions of alleged masturbation, the proof for which was only a prison official believing on each occasion that Ross may have been moving his hand in a manner that would support such an act.

An appointed attorney could have gathered declarations to respond to the Government's new facts and to support new mitigating facts. Mr. Ross,

like other federal inmates, is prohibited from corresponding through the mail with other federal inmates—even if he wanted to secure a declaration from an inmate at another facility to support a new mitigating fact or to dispute or provide context for one of the Government's new aggravating facts. Similarly, counsel can subpoena notes in the BOP's files, which are off-limits to Mr. Ross. Ross does not have access to the computer databases and online sources available to counsel. In short, inmates like Ross actually or effectively lack access to important information that counsel could employ in mitigation or as rebuttal to the Government's new facts.

Counsel also would have understood what mitigating new facts to identify, marshal, and present to the court in support of Ross's motion. Without counsel, Ross did not describe any factors supporting a new sentence or explain how the exhibits he attached to his motion warranted a significantly reduced sentence. The motion did not explain that Ross has been sober for the entirety of his federal incarceration; that he voluntarily signed up for and completed five drug classes—not "*a* drug education program," as the Government maintained, RE 30 (emphasis added)— because he is committed to living a drug-free life upon release; that he completed every drug-education class that the prison offers inmates in his position; how he would apply the lessons he learned from these

classes, as well as his completed vocational and language courses; or that he has post-release employment plans. Moreover, counsel would have documented how three disciplinary write-ups for minor infractions, none of which was itself a criminal offense, should have been viewed as evidence of his rehabilitation, not as a factor in aggravation. Furthermore, counsel would have presented evidence about how Mr. Ross's age upon an earlier release—36 years old, for example, if Ross were to receive the highest sentence under the new guideline—correlates to a sharp decline in recidivism for his class of offenders. These are just a few examples, and the pleadings as a whole reveal that Mr. Ross needed counsel to identify, marshal, and present mitigating new facts, as well as to perform these functions in response to the Government's new facts.

Mr. Ross's missteps, therefore, resulted from a trio of factors: a lack of legal training, an eighth-grade education, and a dearth of information available to him. While the retroactive guideline amendment presented Ross a chance to secure his freedom significantly earlier than originally planned, the failure to appoint counsel rendered this opportunity an exercise in futility. Identifying, marshaling, and presenting new facts, as well as performing those functions in response to the Government's new facts, are

tasks simply beyond the skill level of an inmate with an eighth-grade education.

III. ROSS'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE DISTRICT COURT CONSIDERED EXTRA-RECORD EVIDENCE THAT WAS NEVER DISCLOSED TO HIM.

Adding insult to the injury of denying Ross's motion without appointing counsel, the district court admittedly relied on documents that were never disclosed to Ross. Due Process demands more and requires vacating the judgment below.

"The fundamental requisite of due process," the Supreme Court has stated repeatedly, "is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). An opportunity for a party to be heard in a court of law necessitates, at the very least, the party's ability to see the evidence offered against him or her. *See, e.g.*, *Gardner v. Florida*, 430 U.S. 349 (1977); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). At its core, due process requires that legal proceedings and evidence not be secretive, so that parties may at least make informed decisions about whether, and how, to contest the relevant facts. *Gardner*, 430 U.S. at 362; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("This right to be heard has little reality or worth unless one . . . can choose for himself whether to . . . acquiesce or contest.").

The district court’s reliance on extr

CONCLUSION

For the foregoing reasons, Defendant Ronald Ross respectfully urges this Court to vacate the judgment of the district court and remand the matter for appointed counsel to present his case adequately and fully to the sentencing court.

Dated: November 20, 2008

Respectfully submitted,

Adam B. Wolf
Jay Rorty
ACLU FOUNDATION

_____
Adam B. Wolf
Attorneys for Appellant Ronald Ross

CERTIFICATE OF SERVICE

I, LORENA FERNANDEZ, declare:

I am a resident of the County of Santa Cruz, California; that I am over eighteen (18) years of age and not a party to the within-entitled cause of action; that I am employed in the County of Santa Cruz, California; and that my business address is 1101 Pacific Ave., Suite 333, Santa Cruz, CA 95060.

On November 20, 2008, I served a copy of the attached document, entitled **OPENING BRIEF OF DEFENDANT-APPELLANT** on counsel below by placing true and correct copies thereof enclosed in sealed envelopes addressed as follows:

Denise Williams, Esq.
Amanda R. Burch, Esq.
US Attorney's Office
Northern District of Texas
1205 Texas Avenue
Lubbock, TX 79401

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Appellant, by his counsel, hereby certifies that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 7,855 words.

Dated: November 20, 2008

_____
Attorney for Appellant Ronald Ross