

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

GENERAL ORDER 2019-03

**IN RE: APPOINTMENT OF COUNSEL AND MOTIONS FOR RELIEF UNDER
THE FIRST STEP ACT OF 2018**

The Court has established procedures to, *sua sponte*, review the sentences of currently incarcerated individuals that the United States Sentencing Commission (USSC) has identified as potentially eligible for a modification in their term of imprisonment in accordance with Section 404 of the First Step Act. The Court has additionally established procedures for reviewing motions filed by currently incarcerated individuals requesting a modification in their imposed term of imprisonment pursuant to Section 404 of the First Step Act. These procedures are more particularly described in Addendum A to this Order.

**I. Defendants Identified By The USSC As Potentially Eligible For A Modification
Of An Imposed Term of Imprisonment**

The Court will, pursuant to 18 U.S.C. § 3582(c)(1)(B), review the list of cases of potentially eligible, and currently incarcerated, defendants provided to it by the USSC beginning with those defendants closest to release or eligibility for release, assuming they otherwise meet the consideration criteria. Any motion filed by any defendant who is on the USSC's list that seeks a modification in their sentence shall be denied without prejudice as the Court will, on its own initiative, consider whether such defendant is eligible for a modified sentence, and appoint counsel, in accordance with the procedure set forth in this General Order.

The U.S. Probation Office shall prepare an analysis of the First Step Act's impact and shall recommend a modified sentence, if appropriate. After reviewing Probation's recommendation, the Court will thereupon enter an order that appoints the defendant counsel, directs Probation to electronically file its analysis and release it to both defense counsel and to the USA, directs the USA to file its response to Probation's recommendation with twenty (20) days from the date the recommendation is filed and directs defense counsel to file its reply to the USA's response within thirty (30) days following service of the USA's response.

II. Motions for Relief Under Section 404 Of The First Step Act

Any motion filed by a defendant identified by the USSC as potentially eligible for a sentence modification shall be denied without prejudice as such sentences shall be reviewed on the Court's own initiative. If a *pro se* defendant submits a letter to the Court that requests relief under the First Step Act, the Clerk shall accept the letter and file it as a motion for relief under Section 404 of the First Step Act. The Clerk shall, likewise, accept and file any such letters forwarded to the Court by the USA or Federal Defender. The Court shall review such letters in accordance with the procedures set forth herein.

A. Appointment of Counsel

Pursuant to the provisions of the Criminal Justice Act, Title 18, U.S.C. § 3006A(a)(1) and (c), and the discretion of the Court, the Western Kentucky Federal Community Defender ("Federal Defender") is hereby appointed to screen the case of any defendant who was previously determined to have been entitled to appointment of counsel, or who is now indigent, to determine whether that defendant may qualify for relief under the First Step Act's retroactive application of the Fair Sentencing Act, which, among other things, increased the quantities of cocaine base necessary to trigger the enhanced penalty provisions set forth in 21 U.S.C. § 841(b)(1)(A) and (B).

The U.S. Probation Office for the Western District of Kentucky is ordered to disclose, upon request, Presentence Reports to the Federal Defender's Office, or to a defendant's previously appointed CJA lawyer, for the purpose of determining eligibility for relief.

The Court shall promptly notify the Federal Defender of all pending *pro se* motions seeking relief under Section 404 of the First Step Act so the Federal Public Defender can assume representation in a timely fashion. The Federal Defender is not obligated to assume representation for any individual who has filed a *pro se* motion.

If the Federal Defender, or a defendant's previously appointed CJA lawyer, determines that a defendant has a colorable claim for relief, it shall take the following steps.

- 1) In the case of a defendant who previously was found to be indigent and was represented by the Federal Defender, the Federal Defender is authorized to file a motion if it determines that a colorable claim exists;
- 2) In the case of a defendant who previously was found to be indigent and was represented by CJA counsel who is a member of the current CJA panel, the Federal Defender will contact the CJA lawyer and determine whether that lawyer wishes to provide further representation.
 - a. If the CJA lawyer expresses a willingness to represent the defendant, that lawyer shall file a request to be appointed for the purpose of preparing and filing a motion.
 - b. If the CJA lawyer is either unavailable or unwilling to undertake the representation, the FPD will file a request to be appointed as counsel.
- 3) If the Federal Defender identifies a defendant with a colorable claim for relief who was *not* previously found to be indigent, the Federal Defender shall obtain a financial affidavit (CJA Form 23) from the defendant, and submit the completed form, along with a request to be appointed as counsel, to the Court.

Upon receipt of a request to be appointed as counsel for a defendant who is not on the USSC's list and who has filed his or her own motion or who seeks to file one, the Clerk shall promptly appoint the Federal Defender or the CJA lawyer making the request. If the Federal Defender has a conflict of interest that makes it unable to accept the appointment, it shall so state in the request and the clerk shall appoint a lawyer from the Criminal Justice Act Panel, following the usual appointment procedures.

B. Review of Motions

When a defendant who is not on the USSC's list files, whether *pro se* or through counsel, a motion seeking a sentence modification, Probation shall be immediately notified and shall prepare an analysis of the First Step Act's impact, recommending a modified sentence, if appropriate. As part of its analysis, Probation shall include a conclusion whether the defendant was sentenced for a "covered offense" as provided in Section 404 of the First Step Act and whether the defendant is currently incarcerated.

If Probation concludes, and the Court agrees, that the defendant was sentenced for a "covered offense" and is currently incarcerated, the Court will enter an order that appoints the defendant counsel, directs Probation to electronically file its analysis and release it to both defense counsel and to the USA, directs the USA to file its response to Probation's recommendation and the defendant's motion with twenty (20) days from the date the recommendation is filed and directs defense counsel to file its reply to the USA's response within thirty (30) following service of the USA's response.

If Probation concludes, and the Court agrees, that the defendant was not sentenced for a "covered offense" or is not currently incarcerated, the Court will enter an order that directs the USA to file its response to the Defendant's motion as a sealed objection within twenty (20) days from the entry of the order, and directs defense counsel, or the defendant if *pro se*, to file a reply to the USA's response, using the sealed response event, within thirty (30) days following service of the USA's response.

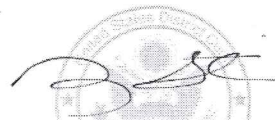
Nothing in the process outlined in this General Order, or in the addendum thereto, precludes the Court from holding a hearing on the merits of any motion, whether initiated by the Court or filed by a defendant.

IT IS SO ORDERED this: February 13, 2019

ENTERED

FEB 13 2019

VANESSA L. ARMSTRONG
BY 
DEPUTY CLERK


Greg N. Stivers, Chief Judge
United States District Court

ADDENDUM A

PROCEDURE FOR APPLICATION OF SECTION 404(B) OF THE FIRST STEP ACT

The Court has established procedures for both reviewing cases on its own motion and on motions filed by defendants who believe they are eligible for a modification of their sentence. Any motion filed by a defendant who is on the USSC's list that is construed as requesting a modification of their sentence pursuant to Section 404(B) of the First Step Act shall be denied without prejudice.

***Sua Sponte* Review of Cases Identified By The USSC As Potentially Eligible For A Modified Sentence**

1. The U.S. Probation Office will review the list of potentially eligible defendants provided to it by the United States Sentencing Commission (USSC).
2. Starting with those cases closest to release or eligibility for release, Probation shall prepare a memorandum that will attempt to address all issues relevant to a possible sentence modification and a recommendation to either grant or deny a modification.
3. Probation will provide the original sentencing judge or, if not available, the judge to whom the case has been reassigned with a copy of the above-referenced memorandum along with the original presentence report, the original judgment, the original statement of reasons, and, if applicable, any previously filed memorandum of recalculation and previously entered order modifying sentence.
4. The Court will review Probation's recommendation and shall enter an order that:
 - a. Appoints the defendant counsel to respond to the objection¹,
 - b. Directs Probation to electronically file its Memorandum of Recalculation and release it to counsel,
 - c. Directs the USA to file its response to the Probation's recommendation within twenty (20) days from the date the recommendation is filed, and
 - d. Directs defense counsel to file its reply to the USA's response, within thirty (30) days following service of the USA's response.

¹ If the defendant had previously been appointed counsel or represented by retained counsel, the Clerk's office shall contact said counsel to determine if they will remain counsel. If not, the Clerk's office will contact the Federal Defender to determine if it will accept representation. If so, it shall be appointed, if not, CJA counsel shall be appointed.

Review of Motions for Relief Under Section 404 Of The First Step Act

1. Any motion filed by a defendant who is not on the USSC's list that is construed as seeking a sentence modification pursuant to Section 404(B) of the First Step Act shall be docketed as a *Motion Seeking Relief Pursuant to 18 U.S.C. § 3582(c)(1)(B), First Step Act*. This shall apply to any letter sent by a defendant to the Court as well as to any letter sent by a defendant to the United States Attorney's Office or Federal Defender and forwarded by said entities to the Court.
2. The Court shall promptly notify the United States, the Federal Defender and Probation of all pending *pro se* motions seeking such relief.
3. Probation shall provide the original sentencing judge or, if not available, the judge to whom the case has been reassigned with a copy of a memorandum that will attempt to address all issues relevant to a possible sentence modification and that contains either the recommended recalculated sentence or a recommendation that the defendant is ineligible for a sentence modification. Probation shall additionally provide the judge with a copy of the original presentence report, the original judgment, the original statement of reasons, and, if applicable, any previously filed memorandum of recalculation and previously entered order modifying sentence.
4. The Court will review Probation's recommendation and
 - a. If Probation concludes, and the Court agrees, that the defendant was sentenced for a "covered offense" and is currently incarcerated, the Court shall enter a text-only order that:
 - i. Appoints the defendant counsel to respond to the recommendation²,
 - ii. Directs Probation to electronically file its Memorandum of Recalculation and release it to counsel and the defendant.
 - iii. Directs the United States to file a response to Probation's recommendation and to the defendant's motion within twenty (20) days from the date the recommendation is filed, and
 - iv. Directs the defendant to file a reply no later than thirty (30) days following service of the United States' response.

² If the defendant had previously been appointed counsel or represented by retained counsel, the Clerk's office shall contact said counsel to determine if they will remain counsel. If not, the Clerk's office will contact the Federal Defender to determine if it will accept representation. If so, it shall be appointed, if not, CJA counsel shall be appointed.

- b. If Probation concludes, and the Court agrees, that the defendant was not sentenced for a “covered offense” or is not currently incarcerated, the Court will enter a text-only order that:
 - i. Directs the United States to file a response to the motion within twenty (20) days of entry of the order, and
 - ii. Directs the defendant to file a reply no later than thirty (30) days following service of the United States’ response.