

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

In Re: Internal Procedures in Cases)
Potentially Involving Retroactive Application)
of the Fair Sentencing Act of 2010 Pursuant to)
the First Step Act of 2018)

**INTERNAL PROCEDURES FOR PROCESSING CASES INVOLVING RETROACTIVE
APPLICATION OF THE FAIR SENTENCING ACT OF 2010
PURSUANT TO THE FIRST STEP ACT OF 2018**

This memorandum addresses the procedures in this District for implementing Section 404 of the First Step Act of 2018, which authorizes retroactive application of the Fair Sentencing Act of 2010. As a general matter, any motion challenging an already-final sentence will initially be processed as a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 and screened under the Court's ordinary procedures. However, if upon screening it appears that a defendant is requesting relief under Section 404 of the First Step Act and would be potentially eligible for such relief, the Motion will no longer be processed as a § 2255 Motion, and will instead be processed pursuant to the procedures set out below.

If a defendant is eligible for relief, the determination of whether to reduce a defendant's sentence is within the discretion of the District Judge. To aid in this determination, the Probation Office will provide a calculation of the Guideline Range under the U.S. Sentencing Guidelines that would have applied if sections 2 and 3 of the Fair Sentencing Act of 2010 and Parts A and C of Amendment 750 to the Sentencing Guidelines had been in effect at the time of the defendant's sentencing, with all other Guideline calculations and applications remaining the same. The Probation Office will also provide an additional calculation of the Sentencing Guideline range that would apply if the Court also applied any other retroactive amendments to the United States Sentencing Guidelines for which the defendant would be eligible on motion under 18 U.S.C. § 3582(c)(2). In addition, the Probation Office will provide information regarding post-sentencing conduct of the defendant for consideration by the Court.

Given the number of cases potentially impacted by Section 404 of the First Step Act in this District, and as a result of discussions with the Clerk's Office, the U.S. Attorney's Office, the Federal Public Defender's Office, and the U.S. Probation Office for this District, this memorandum provides an outline of an administrative process for prioritizing and handling these cases. When they are ready for a ruling, the cases will be submitted to the original Sentencing Judge, or to the assigned District Judge if the original Sentencing Judge is no longer active.

I. Initial Identification Process

- A. The U.S. Probation Office for this District has prepared and will continue to prepare a list of defendants who may be affected by Section 404 of the First Step Act, based on information obtained from the U.S. Sentencing Commission.
- B. The Federal Public Defender's Office has similarly identified defendants who may be affected by Section 404 of the First Step Act. The Federal Public Defender's Office

will provide general information to potentially-eligible defendants pursuant to the Court's Order Regarding Appointment of Counsel in Cases Potentially Involving Retroactive Application of the Fair Sentencing Act of 2010 Pursuant to the First Step Act of 2018.

- C. Consideration for relief will be limited initially to those defendants who have filed a Motion requesting relief pursuant to the First Step Act. As outlined below, the Motions will be prioritized for consideration based upon each defendant's projected release date, with initial priority given to those defendants identified by the U.S. Sentencing Commission as potentially eligible for relief that could result in immediate release.

II. Review of Motions

- A. Any motion challenging an already-final sentence will initially be processed as a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 and screened under the Court's ordinary procedures. However, if upon screening it appears that a defendant is requesting relief under the First Step Act and could be potentially eligible for relief under Section 404 of the Act, the Magistrate Judge will enter an Order directing that the Motion be processed by the Probation Office and referred for further review by the District Judge. Potential eligibility at this step requires that:

- (1) The defendant was convicted of an offense involving cocaine base ("crack") and sentenced under the statutory provisions in effect before August 3, 2010.
- (2) The applicable statutory penalty provision for that offense was 21 U.S.C. 841(b)(1)(A) or 841(b)(1)(B).
- (3) The quantity of cocaine base ("crack") alleged in the indictment or included in the plea agreement or jury verdict for that offense is a quantity for which the statutory penalties changed under the First Step Act of 2010:
 - (a) For § 841(b)(1)(B): the quantity was 5 grams of crack or more, but the indictment, plea agreement, or jury verdict does not specify at least 28 grams or more of crack.
 - (b) For § 841(b)(1)(A): the quantity was 50 grams of crack or more, but the indictment, plea agreement, or jury verdict does not specify at least 280 grams or more of crack.

If it does not appear that the defendant is eligible, the Magistrate Judge will enter a recommendation addressing that claim and any other request for relief. If further briefing is necessary on that issue prior to further processing, the Magistrate Judge will enter an Order requiring a Government response, with an opportunity for the defendant to file a reply.

- B. The Magistrate Judges and Probation Office will prioritize Motions as follows:
- (1) First Wave: Defendants who have been identified by the U.S. Sentencing Commission as potentially eligible for relief that could result in immediate release, and any other defendant who appears at screening to potentially be eligible for immediate release
 - (2) Second Wave: Defendants who have been identified by the U.S. Sentencing Commission as potentially eligible for relief that would not result in immediate release, and any other defendant who appears at screening to be eligible for relief that would not result in immediate release, including defendants on supervised release.
 - (3) Third Wave: Defendants with additional issues that may require further briefing and determination by the Court.
- C. Pursuant to the Court's Order Regarding Appointment of Counsel in Cases Potentially Involving Retroactive Application of the Fair Sentencing Act of 2010 Under the First Step Act of 2018, the Federal Public Defender's Office will be appointed to provide general information to potentially-eligible defendants and defendants who are requesting relief under the First Step Act. In addition, the Court will enter case-specific Orders for potentially-eligible defendants, appointing the Federal Public Defender's Office for the purpose of pursuing relief under Section 404 of the First Step Act. With respect to this process for appointment of counsel:
- (1) The Court will presume that any incarcerated defendant who previously qualified for appointment of counsel will continue to qualify for appointed counsel unless changed financial circumstances appear.
 - (2) For incarcerated defendants who have not previously qualified for appointment of counsel, if a case-specific appointment order is entered, the Clerk's Office will forward a new CJA 23 Financial Affidavit to be completed and returned to the Clerk's Office.
 - (3) For defendants on supervised release who are included on a list of the U.S. Probation Office for appointment of counsel, the U.S. Probation Office will forward a new CJA 23 Financial Affidavit to the defendant to be completed and returned to the Clerk's Office.
 - (4) The case-specific Orders will appoint the Federal Public Defender's Office, but the Public Defender's Office may file a Motion for Substitution of Counsel if necessary in a given case.
- D. For each case determined by the Magistrate Judge to be potentially eligible and referred for further processing, the Probation Office will retrieve Presentence Reports, Worksheets, and Judgments.

- E. The Probation Office will then undertake a review and recalculation that includes the following.
- (1) The Probation Office will first determine the statutory sentencing ranges that would have applied if the Fair Sentencing Act had been in effect at the original sentencing, including with respect to the term of imprisonment and the term of supervised release.
 - (2) The Probation Office will also calculate the Guideline Range that would have applied under the U.S. Sentencing Guidelines, taking into account the new statutory ranges and the effect of Amendment 750 (parts A and C), adopted pursuant to the Fair Sentencing Act.
 - (3) The Probation Office will also calculate the Guideline Range that would apply after application of any other Amendment to the U.S. Sentencing Guidelines listed as retroactive in Guideline 1B1.10, for which the defendant could request relief under 18 U.S.C. § 3582(c)(2).
- F. The Probation Office will prepare a First Step Act Memorandum. This Memorandum will be treated in the same manner as Presentence Reports, and will include:
- (1) Original Statutory Sentencing Ranges
 - (2) Original Offense Level, Criminal History Category, and Guideline Range
 - (3) Previous Sentence Imposed
 - (4) Any Departures, Variances, or Post-Judgment Proceedings
 - (5) Recalculated Statutory Provisions (imprisonment and supervised release)
 - (6) Recalculated Guideline Provisions (with new statutory provisions and Amendment 750 parts A and C).
 - (7) Recalculated Guideline with all applicable retroactive Guideline Amendments
 - (8) Information regarding post-conviction conduct, including infractions, educational and vocational training, substance abuse treatment, and any other public safety considerations
 - (9) Current projected release date, and whether the defendant would be subject to immediate release or a “time served” sentence under the recalculated Guideline range

III. Circulation of Probation Assessment and Objection Period

- A. The Probation Office will file the Memorandum under seal as a “First Step Act USPO Memorandum.” The original Presentence Report will be filed as a separate ECF docket entry if not already separately filed on the docket.
- B. Counsel for the Government will review the First Step Act USPO Memorandum and file a Response within 21 days either consenting or objecting. The Consent or

Objection should be filed under seal. It is the Court's expectation that the Government will raise in its Objections any assertions that the defendant is a public safety risk, or that the defendant is not eligible for the reduction, or any other issues that should be brought to the Court's attention in considering the defendant's Motion. The reasons for the Objection should be stated specifically. Counsel for the defendant may file a Reply under seal within 14 days thereafter, addressing any objections raised by the Government and raising any other objections to the USPO Memorandum. If it would be helpful in a particular case, the Court may direct a further Response from the Government to address the matters raised in the defendant's Reply.

IV. Submission to Court

- A. The Probation Office will prepare and forward to the assigned District Judge's ECF mailbox a completed "Order Regarding Motion for Reduction of Sentence Pursuant to § 404 of the First Step Act" for the Court's consideration, leaving blank the actual revised sentence to be imposed. The Order should reflect that any modified sentence would be "not less than time served," with the Order stayed for ten (10) days to allow the Bureau of Prisons time to process the defendant as necessary. In those cases without Objections, the first page should note that the Recalculation is made with the consent of the Government and the defendant.
- B. The Motion will be referred to the original Sentencing Judge, or to the assigned District Judge if the original Sentencing Judge is no longer active.
- C. Any further determination will be for the District Judge. Where no objection is raised, the District Judge may, in his or her discretion, impose a reduced sentence using the form provided by the Probation Office. If objections are raised, including any request for a full resentencing hearing, the District Judge may order further briefing if that would be helpful, and will then make any necessary determinations regarding eligibility, extent of relief, and nature of the proceeding.

This, the 20th day of February, 2019.

 /s/ Thomas D. Schroeder
Chief United States District Judge