

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



In Re: Petitions for Retroactive Controlled)
Substance Sentence Reductions Under)
U.S.S.G. Amendments 782 and 788,)
Effective November 1, 2014)

**INTERNAL PROCEDURES FOR PROCESSING CASES INVOLVING
RETROACTIVE APPLICATION OF AMENDMENTS 782 AND 788 TO THE
FEDERAL SENTENCING GUIDELINES EFFECTIVE NOVEMBER 1, 2014**

This memorandum addresses the procedures in this District for implementing the United States Sentencing Commission’s Amendments 782 and 788 to Federal Sentencing Guidelines, effective November 1, 2014 (the “2014 Retroactive Amendments”).

I. Initial Identification Process

- A. The U.S. Probation Office for this District has prepared a list of defendants who may be affected by the 2014 Retroactive Amendments, based on information they have obtained from the U.S. Sentencing Commission.
- B. Review of the cases on the list will be prioritized based on the estimated release date, regardless of whether the offender has filed a motion or not, as the Court may choose to reduce a sentence under 18 USC 3582(c)(2) on its own Motion.

II. Review of Cases on Probation Office List

- A. For every case on the 2014 Retroactive Amendment List, the Probation Office will perform a review to determine whether the case is eligible for a reduction.
- B. For cases the Probation Office determines to be eligible
 - 1. The Probation Office will prepare an Order Regarding Sentence Reduction (Form AO 247) that includes the prior Guideline Range and the New Guideline range, along with a brief memo indicating post-conviction conduct per the BOP. The memo will be filed via CM-ECF and the AO 247 sent to the Clerk’s office for review and submission to chambers. If the presentence report is not currently filed in CM-ECF, the final presentence report will be filed as an attachment to the memo.

2. Per agreement of the Federal Public Defender for the Middle District of North Carolina and the U.S. Attorney for the Middle District of North Carolina, no counsel will be initially appointed on any case included on the USSC list that U.S. Probation confirms is eligible.
 3. Within 30 days of the Probation Office's filing of the memo, Counsel for the Government will file a response either consenting or objecting.
 4. The Probation Office will monitor the case for response by the government. If the response is no objection, the Probation Office will notify the Clerk's Office that the matter is ready for Court ruling. If Counsel for the Government disagrees with the assessment of eligibility or mathematical computation of the revised guideline range, it will file a Statement of Position on Eligibility describing the objection. At that time, the Probation Office will notify the Federal Public Defender's Office and the Clerk's Office, and counsel will be appointed as outlined in Section IV. Appointed counsel shall then file a response to the position of the USAO within 60 days of the filing by the Counsel for the Government, or defense counsel's appointment, whichever is later. Upon completion of the filings described herein, the matter will be referred to the assigned district judge for a ruling.
- C. For cases where the Probation Office finds the defendant to be potentially eligible, but having a release date prior to the November 1, 2015 effective date, the Probation Office will draft a brief memorandum and an AO 247 indicating the motion is denied as being moot. The Probation Office will notify the Clerk, and counsel will be appointed, but shall not be required to file a response unless counsel disagrees with the conclusion that the motion is moot. Counsel's appointment shall be continuing to permit the filing of a motion for reconsideration should circumstances change following entry of an order. The Probation Office will send the memorandum and AO 247 to the Clerk's office for review and submission to chambers. The Court will subsequently issue a ruling, which may deny the motion as moot or grant other relief the Court deems appropriate.

III. Review of Cases Not on the Probation Office List Where a Motion is Filed

- A. The Probation Office will perform a review of each Motion for Resentencing to determine whether the case is eligible for a reduction.
- B. For cases the Probation Office determines to be eligible, the steps described in Section II above will be followed.

- C. For cases where the Probation Office finds the defendant to be ineligible due to a clear lack of connection to the amendment changes (i.e. bank robbery case where no drugs were involved), the Probation Office will draft an AO 247 indicating the motion is denied, including language justifying the reason for ineligibility. The Probation Office will send the AO 247 to the Clerk's office for review and submission to chambers.
- D. For cases where the Probation Office finds the defendant to be ineligible due the defendant being released and no longer serving a term of imprisonment, the Probation Office will draft an AO 247 indicating the motion is denied as being moot. The Probation Office will notify the Clerk, and counsel will be appointed, but shall not be required to file a response unless counsel disagrees with the conclusion that the motion is moot. Counsel's appointment shall be continuing to permit the filing of a motion for reconsideration should circumstances change following entry of an order. The Probation Office will send the AO 247 to the Clerk's office for review and submission to chambers. Unless the Court directs otherwise, counsel will not be appointed in these cases. The Court will subsequently issue a ruling, which may deny the motion as moot or grant other relief the Court deems appropriate.
- E. For cases in which the sentencing guideline calculations were based, in whole or in part, on the drug guidelines (e.g., base offense level, specific offense characteristic, cross reference or otherwise), the Probation Office will notify the Clerk's Office that counsel should be appointed. After appointment of counsel, the Probation Office will file a memo indicating the reason for ineligibility, including the prior presentence report if such report is not already filed on CM-ECF. Counsel will be directed to file a response within 60 days regarding the Probation Office's determination of ineligibility. Failure to file within the time frame will be considered no objection and the Court will proceed with processing of the case.

IV. Appointment of Counsel

- A. The Federal Public Defender's Office will coordinate appointment of counsel for defendants who were previously represented by court-appointed counsel, with a presumption that previous counsel (defined as the most recently-appointed prior counsel) should be reappointed if possible. An Order will be issued authorizing the Federal Public Defender to make initial reviews of potential eligibility and coordinate representation issues in this regard. However, the actual appointments will be made by separate orders issued by the Court in each case.

- B. 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. In order to confirm each defendant's present financial circumstances, the Clerk's Office will forward to each defendant identified a new CJA-23 Financial Affidavit to be completed and returned to the Clerk's Office.

- C. The Federal Public Defender's Office will identify previous counsel and will determine whether any conflicts or other issues would prevent reappointment of previous counsel. If the Federal Public Defender's Office was previously appointed as counsel and no conflict exists, the Federal Public Defender's Office will notify the Clerk's Office, and the Clerk's Office will submit a proposed Order Reappointing Counsel to the Court. Likewise, if a panel attorney was previously appointed and the attorney is still on the panel and no conflicts exist, a CJA-20 will be submitted reappointing counsel for purposes of the § 3582(c)(2) proceeding. If prior counsel cannot be reappointed, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate a new appointment, with a presumption in favor of appointing the Federal Public Defender's Office. If the Federal Public Defender's Office cannot be appointed, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate appointment of a panel attorney, for referral to the Court.

- D. For defendants who previously retained counsel, if the defendant files a Motion without the assistance of counsel, the Federal Public Defender's Office will coordinate with the Clerk's Office to facilitate obtaining a CJA-23 Financial Affidavit and appointment of counsel for that defendant.

- E. Defense attorneys who were previously appointed as counsel for a defendant and who wish to file a request for a sentence reduction on behalf of their former client must first contact the Federal Public Defender's Office and the Clerk's Office so that a CJA-20 can be submitted to the Court reappointing the attorney as counsel to handle the § 3582(c)(2) proceeding. Compensation for counsel will be based only on work performed after the attorney has been notified of the appointment by the Federal Public Defender's Office or the Clerk's Office.

This, the 8th day of September, 2015.

William L. Osteen, Jr.

Chief Judge William L. Osteen, Jr.